

THE COLOR(BLIND) CONUNDRUM IN COLORADO PROPERTY LAW

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* JD, PhD, Associate Professor of Law, University of Denver Sturm College of Law. Affiliate Faculty, University of Denver, Department of History. Faculty Director, University of Denver's Interdisciplinary Research Institute for the Study of (in)Equality. I want to acknowledge generally all the institutions and people who have contributed to the framework of reconsidering what "Colorful Colorado" means in our historical and contemporary understanding of the state. I especially want to thank all of the public history institutions in the state who have graciously invited me to give public lectures on versions of this work at Colorado History, El Pueblo History Museum, Telluride Historical Museum, and the Littleton History Museum. Countless government, religious, and non-profit organizations and institutions of higher education, from the city and county of Denver to the Denver Chamber of Commerce Foundation to my own home institution, the University of Denver, have asked me to share the ideas, images, and historical record of race and racism in the history of the state. I especially want to thank the organizers of the 2022 Rothgerber Conference at the University of Colorado Law School, and in particular, Professor Suzette Malveaux, for inviting me to participate and finally put many of the ideas, talks, and lectures I have given over the years about Colorado's color line into article form. This work is reliant on the archival record, and in addition to numerous students who have worked with me to collect the archival materials presented and relied upon in this Article, I cannot thank enough all the archivists and their institutions who have faithfully protected, preserved, and grown the record of race relations in the state. From the Western History Collection at the Denver Public Library, to the Stephen H. Hart Library at Colorado History, Katherine Crowe and Stephen Daniels at the University of Denver archives, and those at the Library of Congress, your collections are essential to unraveling the color(blind) conundrum I describe. Finally, I want to say a simple thank you to all of the editors at the *University of Colorado Law Review* who have worked so thoughtfully to make this Article a compelling and important read. Your insights, edits, and knowledge and your future leadership in the bar, academia, and policy will be essential towards helping us unravel the conundrums that I detail.

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I. COLORBLINDNESS

“The Color Line Doesn’t Exist” in Colorado.

– Isaac Jones, *Baltimore Afro-American* (1952)¹

I recently wrote an article detailing the long-time struggle of the Rocky Mountain West’s legal institutions to reconcile the region as both a utopia of racial promise and progress and one replete with countless examples of state-sanctioned racial violence and Jim-Crow-type racial discrimination.² The result, I argue, has been a nearly ubiquitous blindness to acknowledge and deal forthrightly with deep-rooted racial inequities that continue to resonate to this very day.

Many observers of Colorado, like the journalist Isaac Jones when he visited Denver in 1952, believe that a “color line” does not exist in the state. The superficial and surface layer perception that race and racial inequity seemingly were absent and never an issue in the state has therefore allowed many of those living and leading in the state to either conveniently ignore or explain away the ongoing harm of racism and racial disparity.

This Article explicitly centers Colorado and its property law regime at the center of this conundrum. Property has long served as the nation’s most important determinant of the color line by marking boundaries, enforcing access, and defining spaces, places, and things.³ In the process, the creation, promotion, and

1. *Paper Lauds Denver’s Fair Play to Negroes*, DENV. POST, Feb. 7, 1952, at 18.

2. See Tom I. Romero, II, *A Brown Buffalo’s Observations on Color(Blindness), Legal History, and Racial Justice in the Rocky Mountain West*, 2022 UTAH L. REV. 721 (forthcoming 2022) [hereinafter *Observations on Color(Blindness)*].

3. I use the terms “color” and “color lines” throughout this Article to describe legally enforced boundaries between Whiteness and non-Whiteness. Race and color are used in contemporary nomenclature to distinguish between White people, Latinx, Asian Americans and Pacific Islanders, Indigenous Peoples, and Black people in the post-World War II United States. The “color line” between Whiteness and non-Whiteness describes the determinative role of law in rewarding or punishing those vis-à-vis their position in the divide. I explore the interchangeability of race and color in the post-World War II United States as well as the importance of being precise about the meaning of color and law’s important role as opposed to race in 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, 249–55 (2007).

protection of property rights gives substantive meaning and power to racial ideas, ideologies, and values in the United States.⁴

Despite this, when it comes to thinking about property in Colorado, most Coloradans have chosen to simply ignore any racial connections.⁵ Two examples, drawn from my own experiences at the University of Denver (DU), serve to illustrate the point. The first experience occurred a few years after I joined the law faculty in 2010. A student who had an interest in racially restrictive covenants wrote a research paper about their widespread use in the Denver area. Affixed to his final paper were several racially restrictive covenants he located in deeds and plat maps recorded in the offices of the city and county of Denver. Among them were the covenants for the Burns Brentwood development,⁶ a post-World War II housing project in what would become the larger Harvey Park neighborhood southwest of downtown Denver.

What made this covenant stand out for me was that the first name on the document was Franklin L. Burns, the namesake of DU's Real Estate and Construction Management School. According to DU's own website:

[The] school is named for Denver native Franklin Lane Burns (1914–1983), a visionary home builder. He was one of the first builders to bring affordable housing to lower-income families and returning WWII veterans. He was acclaimed as Denver's premier home builder in the 1940s and 1950s. Franklin and his wife Joy Burns made a \$5 million endowment in 1997, which effectively changed the real estate department into a "school."

4. See generally Tom I. Romero, II, *Kelo, Parents and the Spatialization of Color (Blindness) in the Berman-Brown Metropolitan Heterotopia*, 2008 UTAH L. REV. 947 (2008).

5. It should be noted that colorblindness is not unique necessarily to Colorado and, indeed, is endemic to the larger understanding of property law in the United States. See K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 1995–98 (2020); K-Sue Park, *The History Wars and Property Law*, 131 YALE L.J. 1062, 1071–91 (2022).

6. Declaration of Protective Covenants, Burns Brentwood Subdivision 1 (June 28, 1949), https://collective.coloradotrust.org/wp-content/uploads/sites/2/2018/05/burns_brentwood_racially_restrictive_covenant.pdf [https://perma.cc/M4Z4-VHKY].

The Burns School will forever be grateful for the generosity and faith of Franklin and Joy Burns, and will always work hard to be an expression of their pioneering spirits.⁷

A local and former DU student who came to take over the family-owned Burns Realty and Trust business in the early 1940s, Burns had long been valorized as one of the most important engines driving Denver's real estate growth.⁸ According to one account, Burns had built more than 13,500 residential and commercial buildings in many of the city's well-known neighborhoods, especially those housing former servicemen and their families.⁹ His wife, Joy Burns, would eventually serve as a member of the university's board of trustees until her death in 2020.¹⁰ In all the public celebrations and documentation of Frank Burns's life and contributions to the city's real estate market,¹¹ however, not one single mention is made of Burns's role in contributing to the racial segregation of the city.

For universities, names that are affixed to their buildings, chaired positions, academic units, stadiums, and endowments (to name but a few) are centrally important to the value universities have created around their brands. As names are

7. *Franklin L. Burns School of Real Estate and Construction Management: Burns School Overview*, DANIELS COLL. OF BUS.: UNIV. OF DENV., <https://daniels.du.edu/burns-school> [<https://perma.cc/4RS6-TMAH>].

8. NANCY MUENKER, FRANK BURNS: MASTER BUILDER OF DENVER (Kay Volkema ed., 1997); Thomas H. Simmons & R. Laurie Simmons, *National Register of Historic Places Multiple Property Documentation Form: Historic Residential Subdivisions of Metropolitan Denver, 1940–1965*, NAT'L PARK SERV. 116–17 (Oct. 22, 2020), <https://www.historycolorado.org/sites/default/files/media/document/2017/654.pdf> [<https://perma.cc/3NRZ-PV5G>].

9. Paul Malkoski, *Builders of Colorado: Biographic Sketch of Franklin L. Burns*, COLO. HIST. SOC'Y OFF. ARCH. & HIST. PRES., https://www.historycolorado.org/sites/default/files/media/document/2017/Builders_Franklin_Burns.pdf [<https://perma.cc/RPK8-AH77>].

10. Kieran Nicholson, *Joy Burns, First Woman to Lead DU's Board of Trustees, Dies at 92*, DENV. POST (July 18, 2020), <https://www.denverpost.com/2020/07/18/joy-burns-du-board-of-trustees-dies> [<https://perma.cc/9TER-2MGQ>]; see also *Honoring Joy Burns*, STERLING RANCH BLOG (July 29, 2020), <https://sterlingranchcolorado.com/happenings/blog/honoring-joy-burns> [<https://perma.cc/7BHS-HGUR>]; Paul Aven, *Creating Her Own Legacy*, DENVER BUS. J. (Mar. 22, 1998), <https://www.bizjournals.com/denver/stories/1998/03/23/story3.html> [<https://perma.cc/GP72-7AWK>].

11. In addition to the sources in *supra* notes 7–10, see *Franklin and Joy Burns*, COLO. BUS. HALL OF FAME, <http://www.coloradobusinesshalloffame.org/franklin-and-joy-burns.html> [<https://perma.cc/V8Y7-ENZW>].

substantial property interests,¹² countless universities have had moments of public reckoning¹³ when those names have been associated with members of the Klu Klux Klan (KKK or the Klan),¹⁴ anti-Chinese hatred,¹⁵ former slaveholders,¹⁶ and those involved in the genocide of the nation's Indigenous Peoples.¹⁷ The names—at one time valuable assets precisely for conveying exclusion and racial superiority at historically White colleges and universities—have not sat comfortably in the context of spaces and places that are increasingly diverse and non-White.¹⁸

12. See Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U. CAL. DAVIS L. REV. 919, 929–934 (2007); Christian M. Voigt, “What’s Really in the Package of a Naming Rights Deal?” *Service Mark Rights and the Naming Rights of Professional Sports Stadiums*, 11 U. GA. J. INTELL. PROP. L. 327, 329–331 (2004); Reuben Rose-Redwood et al., *Naming Rights, Place Branding, and the Tumultuous Cultural Landscapes of Neoliberal Urbanism*, 40 URB. GEOG. 747 (2019).

13. Greta Anderson, *Campuses Reckon with Racist Past*, INSIDE HIGHER EDUC. (July 6, 2020), <https://www.insidehighered.com/news/2020/07/06/campuses-remove-monuments-and-building-names-legacies-racism> [<https://perma.cc/2MFC-K2VZ>].

14. CNN Wire Staff, *Board Votes to Change Name of UT Dorm Named for Klan Member*, CNN (July 15, 2010, 12:00 PM), <http://www.cnn.com/2010/US/07/15/texas.klan.dorm/index.html> [<https://perma.cc/48W4-D6AL>]; see also Thomas D. Russell, “Keep Negroes Out of Most Classes Where There Are a Large Number of Girls”: *The Unseen Power of the Ku Klux Klan and Standardized Testing at the University of Texas, 1899–1999*, 52 S. TEX. L. REV. 1, 35 (2010).

15. Gretchen Kell, *UC Berkely Removes Racist John Boalt’s Name From Law School*, BERKELEY NEWS (Jan. 30, 2020), <https://news.berkeley.edu/2020/01/30/boalt-hall-denamed> [<https://perma.cc/2CR9-L2EN>].

16. *Queens Renames Building After Discovery of Ties to Slavery*, QUEENS U. CHARLOTTE (July 2, 2020), <https://www.queens.edu/news/2020/queens-renames-building.html> [<https://perma.cc/TG5X-M5UG>].

17. Melissa Gomez, *UC Hastings College of the Law to Rename School After Reviewing Founder’s Role in Mass Killings of Yuki Indians*, L.A. TIMES (Nov. 6, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-11-06/uc-hastings-college-of-the-law-name-change> [<https://perma.cc/43JE-Y288>].

18. See Russell, *supra* note 14, at 35. Institutions of higher education are regularly identified by their racial composition, which generally reflects a distinction between predominantly white institutions (PWIs), and minority-serving institutions (MSIs). As a way to ostensibly and qualitatively compare predominant numbers of White or non-White students at different institutions, the term PWi “is used without thought being given to its significance; that race and racism are the cornerstones upon which these institutions were built and currently operate.” Brian Bourke, *Meaning and Implications of Being Labelled a Predominately White Institution*, 91 COLL. & UNIV. 12, 13 (2016). For this reason, I prefer to use the nomenclature articulated by Dr. Eduardo Bonilla of many PWIs as Historically White Colleges or Universities (HWCUs) where “systemic racism” has long been part of an institution’s history and still ongoing reality. Eduardo Bonilla Silva, *The White Racial Innocence Game*, RACISM REV. (NOV. 15, 2015),

Despite this tension, many universities, including DU, have chosen to either ignore or justify these names as being something altogether more than the sum of their parts. The second example from DU comes from the “Pioneer” moniker adopted by the university in the 1920s to replace its “Fighting Ministers/Parsons” nickname.¹⁹ The process to find a new moniker started with the students who, along with university leadership, eventually settled on the idea of the Pioneer. Unsurprisingly, and certainly in the context of the time, all the imagery associated with White, westward expansion and settlement—including dressing in Native American regalia²⁰ and the prominent displays of male settlers and cowboys²¹—reinforced popular concepts of White settlers as civilizers and Indigenous Peoples as savages.²² DU’s Pioneer, accordingly, came into corporeal form when Disney studios in 1968 created the first of only two mascots the studio ever designed for higher education: Boone.²³ According to one account, the name of the mascot “was a play on the name Daniel Boone.”²⁴ Not far from the university, in Denver’s city center, a memorial to Kit Carson, the grandson of the real Daniel Boone, stood prominently as a

<http://www.racismreview.com/blog/2015/11/12/white-racial-innocence-game> [<https://perma.cc/K5AE-R3M3>]. On a visit to the DU Campus in 2015, Dr. Bonilla-Silva made the observation with me and many others that DU was just like his DU (Duke University, where he is the James B. Duke Distinguished Professor of Sociology), in that both institutions were HWCUs.

19. *Denver “Battling Ministers” Seek Fitting Name: War Cry to Replace Outworn Slogans Is Big Contest Aim*, DENV. CLARION (Oct. 23, 1924), <https://exhibits.library.du.edu/librariespresents/items/show/7491> [<https://perma.cc/6QEF-DZAD>]; see also *No More Pios: The Legacy of Settler Colonialism and the University of Denver*, U. DENV., <https://exhibits.library.du.edu/librariespresents/exhibits/show/no-more-pios-du-exhibit/timeline-1864-2000> [<https://perma.cc/D8CQ-L3NR>]; STEVE FISHER, *A BRIEF HISTORY OF SOUTH DENVER & UNIVERSITY PARK 79* (2012) (noting that the university had grown beyond its Methodist roots represented by the “Fighting Parsons” or “Fighting Ministers” moniker).

20. *Y.M./Y.W. Pioneer Rally* (photograph), in KYNEWISBOK 116 (1925–26), <https://exhibits.library.du.edu/librariespresents/items/show/7508> [<https://perma.cc/SLX3-XSTP>].

21. *Pioneer Pete* (photograph), in KYNEWISBOK 133 (1956–57), <https://exhibits.library.du.edu/librariespresents/items/show/7466> [<https://perma.cc/J796-Q45Z>].

22. CYNTHIA CULVER PRESCOTT, *PIONEER MOTHER MONUMENTS: CONSTRUCTING CULTURAL MEMORY*, 19–48 (2019); see also PHILLIP J. DELORIA, *PLAYING INDIAN* (1998); SHARI M. HUHNDORF, *GOING NATIVE: INDIANS IN THE AMERICAN CULTURAL IMAGINATION* (2001).

23. FISHER, *supra* note 19, at 128.

24. *Id.*

“proud and unchallenged” monument to White settlers’ “conquest of western lands and peoples.”²⁵ Ironically, Boone nearly vanished in the early 1980s “when the student body rejected him as too wimpy and wanted a more masculine prototype.”²⁶

In spite of this challenge, Boone remained the university’s literal representation of the Pioneer until 1998 and remains both a beloved and problematic, if unofficial, mascot for the university to this very day. Nevertheless, the Pioneer moniker and its Boone corporeal form have continued to divide the university and large groups of students and faculty have repeatedly asked for its elimination.²⁷ Such calls magnified after the publication of the university’s John Evans Report in 2014—part of the larger efforts of remembrance and reconciliation tied to the university’s sequential celebration.²⁸

Of particular importance was the report’s own conclusion that DU’s founder—John Evans—who was also Governor of the territory of Colorado, was culpable for the incitement that led to the slaughter of Arapaho and Cheyenne elders, women, and children wintering on the banks of the Sand Creek in 1864.²⁹ In

25. PRESCOTT, *supra* note 22, at 32.

26. FISHER, *supra* note 19, at 128.

27. In February of 2013, for example, the “character of Boone was featured in a student-sponsored rendition of the Harlem Shake video. Tensions were raised as protestors in connection to DU’s Native American Student Alliance were escorted by campus safety from the campus green where the filming was taking place, drawing into question their rights to free speech through protest. Over the next months, campus constituency groups engaged in dialogue as to Boone’s continued presence on campus, resulting in the student government organizations reaffirming of Boone’s 1998 removal as mascot and support of the university’s push to find a new mascot. After a year and a half long process, the search for a new mascot failed, leaving the Boone question and controversy unresolved, and allowing for his continued presence on campus.”

Ryan Evely Gildersleeve et al., *What’s in a Mascot: Discourse, Culture, and Organizational Change in the Case of Denver Boone 11* (2017) (unpublished manuscript on file with author).

28. RICHARD CLEMMER-SMITH ET AL., UNIV. OF DENVER, REPORT OF THE JOHN EVANS STUDY COMMITTEE (2014), <https://portfolio.du.edu/downloadItem/286858> [<https://perma.cc/YN4T-CFA4>] [hereinafter EVANS REPORT]. For some of the efforts around reconciliation and remembrance, see UNIV. DENV., STRATEGIC RECOMMENDATIONS OF THE TASK FORCE ON NATIVE AMERICAN INCLUSIVITY (2016), <https://www.du.edu/sites/default/files/2018-04/native-american-task-force-report.pdf> [<https://perma.cc/MFD7-LCKJ>]; Grace Carson, *Cheyenne and Arapahoe Flags Now Hang in Driscoll Bridge*, DU CLARION (Apr. 2, 2018), <https://duclarion.com/2018/04/cheyenne-and-arapaho-flags-now-hang-in-driscoll-bridge> [<https://perma.cc/7EX4-P43J>].

29. EVANS REPORT, *supra* note 28, at 14.

a bloody campaign led by founding DU Board of Trustee member, Col. John Chivington, between 400–500 Indigenous people died that day. Chivington’s troops returned to Denver displaying scalps, body parts, and other “trophies” from their massacre.³⁰ The War Department established a military commission to investigate the events at Sand Creek.³¹ Congress condemned Chivington’s actions and called for the removal of Evans as governor of the Colorado Territory.³²

In the wake of the 2020 national and worldwide movement for racial justice, students, faculty, staff, alumni, and many others again asked for the retirement of the Pioneer moniker as directly connected to the university as well as Colorado’s own violent founding. While organizations and institutions all over the country were reassessing, examining, and in many cases eliminating either Native American mascots or those that could be associated with the forced removal and in some cases genocide of Indigenous Peoples, many thought the time was ripe for eliminating the Pioneer from the DU brand.

The university, particularly its leadership, believed otherwise. In a statement by Chancellor Jeremy Haefner, released on October 21, 2020, the university acknowledged the controversy surrounding the Pioneer moniker but said DU would continue to use it: “What we unconditionally denounce is the tragic violence and injustice against Native people denoted by the term pioneer . . . What we avow is the pioneering spirit—the courage and resilience to think and act boldly; to break through barriers as explorers, innovators, and frontrunners into the future.”³³ In response, the student activists asking for the change simply said that Chancellor Haefner’s decision “represents the University of Denver’s violent commitment to colonialism and [W]hite supremacy.”³⁴

30. *Id.* at 8; *1864 Leadup & Massacre*, SAND CREEK MASSACRE FOUND., <https://www.sandcreekmassacrefoundation.org/massacre> [<https://perma.cc/4PNP-39WD>].

31. EVANS REPORT, *supra* note 28, at 78.

32. *Id.* at 84–85.

33. Jeremy Haefner, *Response to Students; Commitments to Native and Indigenous Communities*, UNIV. DENV. (Oct. 21, 2020), <https://www.du.edu/news/response-students-commitments-native-and-indigenous-communities> [<https://perma.cc/2H7R-RDBQ>].

34. Juli Cardi, *Student-Led Group Decries DU’s Response in Asking to Change Nickname, Other Demands*, DENV. GAZETTE (Oct. 31, 2020), https://denvergazette.com/news/local/student-led-group-decries-dus-response-in-asking-to-change-nickname-other-demands/article_50b59bcc-1a1c-11eb-976f-

While institutions throughout the nation rightly questioned whether their brands could be neutral and inclusive for all, DU explicitly believed its Pioneer brand, connected directly as it was to the anti-Indigenous beliefs and violent acts of its founders in the nineteenth century, could somehow, somehow be stripped of its violent, racist past. Although the university embraced diversity, equity, and inclusion as a core value, its embrace of the Pioneer moniker was emblematic as a form of “racial capitalism” as way to “extract value” for the university as a modern, forward-thinking institution while refusing to consider the ongoing violence and harm of its intellectual property.³⁵ As the historian Cynthia Culver Prescott writes about pioneer imagery used throughout the American West, “we embrace the myths, *but choose to erase the inconvenient truths*, of our settler colonial heritage.”³⁶ In short, DU’s embrace of both Franklin Burns and Boone perfectly embodies the color(blind) conundrum at the center of Colorado’s property regime.

This Article uses these two examples at DU as entry points to interrogate more deeply the ongoing denial and erasure of the legacy of settler-colonialism and White supremacy in the color lines created by Colorado property law.³⁷ While Colorado has long been venerated as forward and future thinking, especially

e3dae3e44fd1.html [https://perma.cc/A94R-PGDP]. For further examination of the student and other responses, see Aubrey Cox, *The Pioneer Moniker: DU Needs to Catch Up*, DU CLARION (Nov. 9, 2020), https://duclarion.com/2020/11/the-pioneer-moniker-du-needs-to-catch-up [https://perma.cc/Z3TA-L88H].

35. “Racial capitalism is a territorial project manifested through property rights regimes as well as racial-cultural norms. Racial capitalism in the US has a long history of targeting specific non-white people to extract value, while preventing their ability to access value-producing sites.” Jennifer L. Fluri et al., *Accessing Racial Privilege Through Property: Geographies of Racial Capitalism*, 132 GEOFORUM 238, 239 (2022); see also Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2198–219 (2013).

36. PRESCOTT, *supra* note 22, at 7 (emphasis added).

37. Settler Colonialism is a legal, political, and social structure, “an on-going project in which colonizers invade an Indigenous territory and dispossess and eliminate the people and cultures in order to access and settle territory in perpetuity.” Bonnie M. McGill et al., *Words Are Monuments: Patterns in US National Park Place Names Perpetuate Settler Colonial Mythologies Including White Supremacy*, 4 PEOPLE & NATURE 683, 685 (2022). In the United States, it works with White supremacy which is legal as well as “political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.” Frances Lee Ansley, *Stirring the Ashes: Race Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

when it comes to matters of race relations, property has structured deeply embedded institutional and systematic racial inequities. In short, property has created a conundrum about how we collectively think of, talk about, and deal with race, its origins, and legacies arising out of settler-colonialism and White supremacy.

Colorado's color(blind) property conundrum is explored in the next two Parts of this Article. In Part II, I situate the emergence of Colorado's property regime in the context of the racialized wars of aggression that would literally shape the boundaries of the state. First, in the Mexican-American War, and soon thereafter in the forced and often violent removal of the Tsitsistas (Cheyenne), Inun-ina (Arapaho), Nuche (Ute), and other Indigenous Peoples from the land, Colorado's property was and continues to be defined by the legal logic of colorblind notions of conquest, progress, policing, and exclusivity. From the reordering of notions of property and related concepts of personhood in land and people to the naming of mountains, landmarks, and neighborhoods throughout the state, settler-colonialism and White supremacy lurk behind and inform so many pieces of property throughout the state.

Part III turns to a familiar form of White supremacy found in real property all throughout the United States: racially restrictive covenants. Represented in the standard practices of Frank Burns and his real estate company, Colorado courts repeatedly and consistently upheld the constitutionality of racially restrictive covenants as one of the main mechanisms in which to maintain the color line. Segregation and the consequence of the color line were also reinforced by public actors in the state. From the open segregation of public beaches, swimming pools, and other pieces of public property by local authorities to the use of martial law to terrorize and keep Mexicans and Mexican Americans out of the state, private and public actors conspired to make real and permanent Colorado's color divide in its homes, schools, and other public places.

Part IV concludes by briefly exploring the ongoing maintenance of colorblindness in Colorado's property regime. From gentrification to property foreclosures by homeowner associations, settler-colonialism and White supremacy continues to reinforce patterns and practices of racial inequity. Nevertheless, activists, policymakers, and property owners are identifying new ways that those living in Colorado can move

beyond the color(blind) conundrum found in properties all throughout the state. In so doing, they are taking some of the first tentative steps required to unwind the dilemmas posed by a property regime forged in settler-colonialism and maintained through White supremacy—despite all assertions that claim otherwise.

II. COLOR BY CONQUEST

“Conquest gives a title which the Courts of the conqueror cannot deny.”

– *Justice John Marshall*³⁸

In 1846, the United States Army entered the territory of Mexico, occupying by force of arms the area that today comprises the American states of New Mexico, California, Arizona, Nevada, Utah, and parts of Colorado.³⁹ For many Americans, Mexico and its “mongrelized” populations of mestizos and Indigenous Peoples posed a threat to American democracy and were a blight to America’s manifest territorial ambitions.⁴⁰ Acquiring the land by force of arms therefore was not only necessary, but a vital component of American concepts of the rule of law. As one editorial in the *Boston Times* explained: “The ‘conquest’ which carries peace into a land where the sword has always been the sole arbiter . . . which institutes the reign of law where license has existed for a generation . . . must necessarily be a great blessing to the conquered.”⁴¹ Within two years of the U.S. occupation, the Treaty of Guadalupe Hidalgo formally ended hostilities between the United States and Mexico.⁴²

38. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).

39. See generally ROBERT W. JOHANNSEN, *TO THE HALLS OF THE MONTEZUMAS: THE MEXICAN WAR IN THE AMERICAN IMAGINATION* (1986); REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981).

40. Tom I. Romero, II, *Bound Between & Beyond the Borderlands: Region, Race, Scale and a Subnational Legal History*, 9 *OR. REV. INT’L L.* 301, 310–311 (2007).

41. FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY* 122 (1966) (quoting unidentified editorial, *BOSTON TIMES*, Oct. 27, 1847).

42. Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the United Mexican States, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.

The idea of “conquest” as a foundational and organizing principle of American law, particularly American property law, was enshrined by the Supreme Court in *Johnson v. M’Intosh*.⁴³ Professor Joseph William Singer argues that the case has been used “to justify conquest, it provides a legal basis for colonialism, it denounces Indians as ‘fierce savages,’ and it undermines the property rights of Indian nations by subjecting them to overriding federal power while presenting false depictions of the way Indian nations lived on the land.”⁴⁴ Professor Jedediah Purdy further explains that the decision

spun a narrative tapestry of dicta, describing an agentless ethnic cleansing in which Native Americans “necessarily receded,” along with the deer and the unbroken forests, before the axe and plough of the American frontier. By the end of the opinion, the Euro-American expropriation of North America has emerged as (1) lawful and (2) inevitable, even though the basis of its legality was “opposed to natural right” and [Justice John] Marshall stressed that the inevitability of the displacement gave “excuse” but not “justification” to expulsion.⁴⁵

As a foundational pillar in American property law, the opinion was “both startlingly racist and startlingly critical of conquest.”⁴⁶ It connected White supremacy as an essential component of Americans’ fierce love of private property rights⁴⁷ and tied together the law of property and the law of imperialism as self-evident components in the project of settler-colonialism and White supremacy.⁴⁸ Yet, the opinion hinted at the slightest promise of American law to protect its most vulnerable, racially-

43. *Johnson*, 21 U.S. at 588.

44. Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV. L. REV. 1, 3 (2017).

45. Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M’Intosh*, 75 GEO. WASH. L. REV. 329, 331 (2007).

46. Singer, *supra* note 44, at 5.

47. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1723–24 (1993). Alexis de Tocqueville has long been cited for his observation that in “no other country in the world is the love of property keener or more alert than in the United States.” See Lee Harris, “Reparations” as a Dirty Word: *The Norm Against Slavery Reparations*, U. MEM. L. REV. 409, 418 (2003).

48. Purdy, *supra* note 45, at 331.

minoritized peoples.⁴⁹ The American law of the “conqueror” thus reflected and amplified the color(blind) conundrums that Coloradans confronted in subsequently giving order (often by force of arms) to lands that had been possessed by non-White people for millennia.

This Part revisits some of my earlier work on the role of conquest in bringing order to Colorado’s multiracial and multicultural contested lands.⁵⁰ I first explore how and in what ways treaties with non-White peoples and other legislative acts established the initial color lines of what became the state of Colorado in the latter half of the nineteenth century. During this time and into the present day, White settlers, federal officials, Indigenous Peoples, and Mexican Americans struggled to maintain historic rights to land and related resources. I then turn to examining how the logic of conquest entered one’s home through the state’s unique anti-miscegenation provision. For Chinese Americans, Black Americans, and their White or Mexican American partners, the law violently intruded into the most intimate of personal relations as people struggled to survive and thrive in color lines that were being established throughout the mountain, plain, and desert regions of the state.⁵¹ At the center of this struggle was “power in its rawest, most common meanings — physical domination, the command of formal authority, the strength to say who could live where and how people had to behave.”⁵²

This Part concludes by highlighting some prominent examples by which the state reinforced these color lines in its naming of landmarks, monuments, other property, and related entitlements open to the public. The act and subsequent legal enforcement of naming, itself a distinct form of intellectual property, “reproduces particular racial orders.”⁵³ Names, especially those given to public property, therefore “replicate ideologies of dominance and dramatically influence public

49. Singer, *supra* note 44, at 5–7.

50. Tom I. Romero, II, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado’s Legal Past*, 73 U. COLO. L. REV. 521 (2002) [hereinafter *Uncertain Waters*]; Romero, *supra* note 40.

51. See generally *Uncertain Waters*, *supra* note 50.

52. ELLIOTT WEST, *THE CONTESTED PLAINS: INDIANS, GOLDSEEKERS, & THE RUSH TO COLORADO*, 331–32 (1998).

53. ANJALI VATS, *THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS 2* (2020).

memory.”⁵⁴ Through the “force” of law, Colorado’s ordering, christening, and access to public and private property accordingly sent powerful and explicit messages about settler-colonialism and White supremacy in the state.

A. *Conquest over Land*

As this Part opened, the human boundaries of what we now know as the state of Colorado were first drawn in the United States’ war of conquest with Mexico and the subsequent signing of the Treaty of Guadalupe Hidalgo. Shortly thereafter, the need for additional treaties and legislative acts, especially those with Indigenous communities living in what became Colorado, “arose from the US government’s desire to protect [W]hites traveling west and secure a peaceful environment for them in newly acquired territories.”⁵⁵ Indeed, the imperial ambitions and the White supremacist underpinnings guiding American law at the time were reflected in the words of Lt. Gen. William T. Sherman, “a grizzled Civil War Veteran and a relentless advocate of total warfare.”⁵⁶ Commenting on settlement along the Arkansas and Platte Rivers (whose headwaters are found in Colorado’s mountains), Sherman passionately declared, “[I]t makes little difference whether [Indians] be coaxed out by Indian Commissioners or killed,” as long as White settlers and Indigenous Peoples were kept physically apart.⁵⁷

The United States obscured the violence of conquest, its dominion over land, and the segregation of White and non-White peoples “by solemn and idealistic treaties.”⁵⁸ In addition to the Treaty of Guadalupe Hidalgo, the Treaties of Abiquiú (1849), Fort Laramie (1851), Fort Atkinson (1853), Fort Wise (1861), Conejos (1863), Little Arkansas (1865), Medicine Lodge (1867), and Ute (1868) were designed to either curb contact between Utes, Cheyennes, Arapahos, Lakotas, Comanches, Kiowas,

54. Richard A. Grounds, *Tallahassee, Osceola, and the Hermeneutics of American Place-Names*, 69 J. AM. ACAD. RELIGION 287, 287 (2001).

55. *Indigenous Treaties in Colorado*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/indigenous-treaties-colorado> [<https://perma.cc/Q7T9-YX8W>]; see also WEST, *supra* note 52.

56. Kerry R. Oman, *The Beginning of the End: The Indian Peace Commission of 1867–1868*, 22 GREAT PLAINS Q. 35, 36 (2002).

57. *Id.*

58. Christine A. Klein, *Treaties of Conquest: Property Rights, Indians Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 202 (1996).

Plains Apaches, and American travelers on roads and hunting grounds along the Arkansas and Platte Rivers,⁵⁹ or prevent any contact between Indigenous Peoples and White settlers by altogether “removing” Indigenous Peoples to isolated and tightly contained reservations.⁶⁰

Symbols of American law’s colonial and imperial ambitions and its impact on sovereignty and property are seen in the treaty experiences of the Southern Utes, the Uncompahgre Utes, and the White River Utes, who collectively formed the confederated band of Utes in the 1860s.⁶¹ Most prominently affected by the treaty process were Colorado’s Southern Utes. In the Treaty of Abiquiú in 1849, the United States promised to give the Utes food and supplies in exchange for peace between Mexican American settlements and Utes in southern Colorado and the assurance that the Utes would devote themselves to farming.⁶² However, skirmishes between Americans and Utes continued, as well as conflicts over the meaning and validity of the treaty, into the 1850s. As a result, the United States waged “a vigorous campaign . . . against the Utes” that resulted in the tribe giving up all claims to the San Luis Valley in the Treaty of Conejos in 1863.⁶³

In 1868, the tribes exchanged their historic claim to lands in large swaths of Utah, New Mexico, and Colorado for approximately 15.7 million acres in southern Colorado.⁶⁴ In the early 1870s, the Tribe ceded 3.7 million acres of the reservation after minerals were discovered in the middle of Ute land.⁶⁵ Accordingly, the effect “was almost to sever the reservation, leaving the Southern Utes wedged between the southern boundary line of the [original] . . . [c]ession and the New Mexico border.”⁶⁶

A Ute uprising in 1879 that killed an Indian agent led to an 1880 Act by Congress that further eroded the Utes’ property rights and land holdings.⁶⁷ Most importantly,

59. See WEST, *supra* note 52.

60. VIRGINIA MCCONNELL SIMMONS, THE UTE INDIANS OF UTAH, COLORADO, AND NEW MEXICO (2000).

61. See *United States v. Southern Ute Tribe*, 402 U.S. 159, 161–62 (1971).

62. JAMES A. ATKINS, HUMAN RELATIONS IN COLORADO: A HISTORICAL RECORD 42 (1968).

63. *Id.* at 43.

64. *Southern Ute Tribe*, 402 U.S. at 162.

65. *Id.*

66. *Id.*

67. *Id.*

[t]he central feature of the Act of 1880 was the termination of tribal ownership in the reservation lands, and the limitation of Indian ownership to such lands as might be allotted in severalty to individual Indians. The purposes of that provision were to destroy the tribal structure and to change the nomadic ways of the Utes by forcibly converting them from a pastoral to an agricultural people.⁶⁸

In what came to be known as the “allotment period,” the United States in subsequent years opened much of the Ute land to White homesteading and mineral exploration.⁶⁹ By the turn of the twentieth century, the southern band of Utes remained the only Indigenous group living in Colorado.⁷⁰ Yet, as a result of relocation and allotment, Colorado’s Utes became not only segregated from other Coloradans, but they retained few rights to the vast lands that they once called their home.

The Treaty of Guadalupe Hidalgo, in contrast to the Indigenous treaties, allowed Mexicans living in southern Colorado to remain on their land and offered them the option of becoming American citizens.⁷¹ Importantly, “[a]s a part of their citizenship, the Mexicans had been guaranteed property and political rights as well as those of language, religion, and culture.”⁷² Despite such assurances, however, Mexican Americans living in southern Colorado found their claim to land and related protection of language, religious, and cultural rights threatened.

The precise sovereignty of American law over Mexican Americans and its connection to the larger project of and struggle over White supremacy came to be refined in 1854 when Congress passed the Kansas-Nebraska Act, bringing many of the lands that would become Colorado under the jurisdiction of

68. *Id.* at 163; *see also* 10 CONG. REC. 2059, 2066 (1880).

69. *See* Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392 (repealed 1976); Coal Lands Act of 1873, ch. 279, 17 Stat. 607 (1873); General Mining Law of 1872, 30 U.S.C. §§ 21–42 (1994). Such laws served several purposes. The homesteading law, for instance, allowed Americans to receive virtually free title to 160 acres of land in fee simple in exchange for five years of continued settlement and improvements to the land. Homestead Act § 1. The mineral laws, on the other hand, encouraged mineral developers to explore for mineral deposits and develop those mineral deposits without having to buy land. 30 U.S.C. § 22.

70. *See* ATKINS, *supra* note 62, at 47–50.

71. *See* Treaty of Peace, Friendship, Limits, & Settlement Between the United States of America and the United Mexican States, *supra* note 42, at arts. VIII-IX.

72. ATKINS, *supra* note 62, at 97.

Kansas.⁷³ The Act, according to one historian, “enjoys the dubious honor of being the only piece of legislation that caused a civil war” because it failed to resolve slavery’s expansion in the growing American nation.⁷⁴

To be sure, in the years leading up to and after the Civil War, Colorado became the 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.⁷⁵ 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.”⁷⁶

Thus, creation of the territory of Colorado by Congress on February 28, 1861,⁷⁷ and the signing of the Homestead Act in 1862⁷⁸ cemented an established racialized vision of American concepts of property and property rights that provided for the survey and platting of town sites, the recognition of city charters, and the need to make written claims to the land to achieve fee simple title.⁷⁹ As part of a logic of conquest conducted by “surveyor chains” going back to the Northwest Ordinance, the maps of the land created arbitrary and fictitious lines over land that “not only conquered natural topography but also made possible the liberation of parcels of land from their previous occupants and their efficient allocation to newcomers.”⁸⁰

73. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).

74. Allen C. Guelzo, Book Review, 114 AM. HIST. REV. 1084, 1084 (2009) (reviewing U. NEB. PRESS, NEBRASKA-KANSAS ACT OF 1854 (John R. Wunder & Joann M. Ross eds., 2008)).

75. See 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 *Wringing Rights out of the Mountains*].

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

77. Act of Feb. 28, 1861, ch. 59, 12 Stat. 172 (1861).

78. Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392 (repealed 1976).

79. See Richard Lawrence Hogan, “Law and Order” in Colorado: 1858–1888, at 30 (1982) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

80. Donald Harman Akenson, *The Great European Migration and Indigenous Populations*, in IRISH AND SCOTTISH ENCOUNTERS WITH INDIGENOUS PEOPLES 22, 27 (Graeme Morton & David Wilson eds., 2013); see also Michael Witgen, *A Nation of Settlers: The Early American Republic and the Colonization of the Northwest Territory*, 76 WM. & MARY Q. 391, 391 (2019) (explaining that the creation of maps

Under Mexican law, most people had usufructuary rights to land and its resources under communal and private grants not subject to such arbitrary and fictitious lines.⁸¹ Influenced in its application by prevailing Indigenous land tenure systems, the property rights of Mexicans living in what would become Colorado were uniquely adapted and legally defined to the geography and aridity of the region.⁸² In contrast, American property valorized the fee simple absolute, or complete individual ownership, to the exclusion of all others over land.⁸³ While article 10 of the Treaty of Guadalupe Hidalgo recognized unambiguously the property rights that Mexican citizens enjoyed under Mexican law, the failure of the U.S. Congress to ratify this provision and the unenforceability of the Protocol of Queretaro that was drafted in its place made fully insecure any possessory or community claims that native Mexicans made to the most abundant resource: land.⁸⁴ In short, the Treaty of

aided in erasing the presence of Indigenous Peoples and helped to establish the new public domain of the United States).

81. MARÍA MONTOYA, TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840–1900, at 20, 157–90 (2002); Guadalupe T. Luna, *Chicana/Chicana Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife”*, 4 MICH. J. RACE & L. 39, 43–44 (1998); Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre de Cristo/Rael Case*, 16 CHICANO-LATINO L. REV. 39, 40 (1995).

82. Garcia & Howland, *supra* note 81, at 40; *see also* Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RES. J. 1039 (1985).

83. Garcia & Howland, *supra* note 81, at 54.

84. For a general analysis of the land and property rights problems the treaty created in the American Southwest, *see generally* Luna, *supra* note 81, and MONTOYA, *supra* note 81, particularly chapter 5. Montoya also explores the context of Colorado in Maria E. Montoya, *Dividing the Land: The Taylor Ranch and the Limited Access Commons*, in LAND IN THE AMERICAN WEST: PRIVATE CLAIMS AND THE COMMON GOOD (William Robbins & James C. Foster eds., 2000), as does Stoller in Marianne L. Stoller, *Grants of Desperation, Lands of Speculation: Mexican Period Land Grants in Colorado*, in SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO 22 (John R. & Christine M. Van Ness eds., 1980). Garcia and Howland detail especially well the contemporary problems created by the treaty in Colorado. Garcia & Howland, *supra* note 81. The ongoing deliberations they analyzed surrounding the interpretation of the Sangre de Cristo Land Grant, first litigated in *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967), were resolved by the Colorado Supreme Court in 2002 and 2003 when it recognized the historic usufructuary rights of Mexican Americans in American property terms as a prescriptive easement. *Lobato v. Taylor (Lobato I)*, 71 P.3d 938 (Colo. 2002); *Lobato v. Taylor (Lobato II)*, 70 P.3d 1152 (Colo. 2003). The impact of those decisions are detailed in Placido G. Gomez, *Bringing Reason and History onto the Same Page: Lobato v. Taylor and the Struggle Over the Common Lands of Spanish and Mexican Land Grants*, 17 ST. THOMAS L. REV. 83 (2004).

Guadalupe Hidalgo created deep uncertainty over the property “owned” by Mexican Americans who believed they enjoyed the protection of their property claims and related language and cultural rights.

Indeed, in litigation that continues to this very day,⁸⁵ the Mexican American descendants of those Mexicans living on the one-million-acre Sangre de Cristo Land Grant—the first and only land grant in Colorado to be fully confirmed by the U.S. Congress in 1860—have long struggled to receive the “benefits of pastures, water, firewood, and timber” promised by the grant’s original owner to the mountain known as La Sierra (Culebra Peak) on the grant.⁸⁶ Colorado’s first territorial governor William Gilpin took ownership and attempted to subdivide the land for land speculation. After acknowledging the rights of Mexican Americans to access the mountain upon purchase, Gilpin then tried to renegotiate the rights in 1863; but the settlement “fell apart because the parties could not agree on whether the parcientes would be allowed to graze livestock and cut timber on unoccupied lands.”⁸⁷

The property rights of Mexican Americans and their descendants to the grant under their understanding about Mexican property law went unabated for 100 years until the Sangre de Christo Land Grant was sold in 1960 to Jack Taylor. As any fee simple title owner in the United States as well as any settler-colonist might do, Taylor placed a fence around the property and immediately began a logging operation near the headwaters of the Río Culebra watershed.⁸⁸ Beginning in 1961, lawsuits were filed on both sides for land rights infractions, setting up technical battles over Colorado’s ability to “translate” substantive differences in the usufructuary as well as cultural

85. See Kate Perdoni, *Judge Will Appoint a Special Master in Costilla County Land Rights Case*, ROCKY MOUNTAIN PBS (May 27, 2002), <https://www.rmpbs.org/blogs/news/judge-will-appoint-a-mediator-in-costilla-county-land-rights-case> [<https://perma.cc/JJB3-JGWM>] [hereinafter *Special Master in Costilla County*]; Kate Perdoni, *Attorneys Anticipate Judge’s Historic Ruling in 41-year-old Land Rights Case*, ROCKY MOUNTAIN PBS (Mar. 25, 2022), <https://www.rmpbs.org/blogs/news/attorneys-anticipate-judges-historic-ruling-in-41yearold-land-rights-case> [<https://perma.cc/PBY2-RDKZ>].

86. Will Davidson & Julia Guarina, *The Hallett Decrees and Acequia Water Rights Administration on Rio Culebra in Colorado*, 26 COLO. NAT. RES., ENERGY & ENV’T L. REV. 219, 227 (2015) (“[B]enefits of pastures, water, firewood and timber” were noted in Beaubien’s document, along with a simple, overarching rule: “always taking care that one does not injure another.”).

87. *Id.* at 232.

88. *Lobato I*, 71 P.3d at 942.

rights of Mexican citizens and their descendants to the large piece of land.

In 2002, the Colorado Supreme Court seemingly settled the case for good when it found a “prescriptive use” to graze livestock and collect timber and firewood.⁸⁹ Rather than affirm the rights of Mexican Americans and their descendants as they may have existed under Mexican law, the Colorado Supreme Court applied the settler Anglo-American concept of “profits à prendre” or “easement appurtenant” to identify more than 350 landowners who could link their deed back to 1863.⁹⁰

Simply, the Colorado Supreme Court used a legal fiction of American law to confirm historic property and culturally informed property rights. The problem in using this legal fiction is that it tacitly “rewards a trespasser with an uncompensated right to use another person’s land.”⁹¹ Though the usufructuary rights of the original Mexican American property-rights holders and their descendants were ultimately confirmed, they nevertheless were conceptualized as trespassers, rather than as legitimate original and secure rights holders to a Mexican land grant that carried none of the presumptions of absolute possession and wholesale exclusion of the fee simple absolute.⁹²

Not surprisingly, the current landowners’ attempts to proscribe the scope of the Mexican American descendants’ property rights—from the types of firewood they could cut and at what elevations, the amount of firewood that could be taken and whether rights holders could scout for firewood in the first place, to how many animals could be grazed and whether they could camp to steward livestock on the property—make the property rights insecure and reliant on the deed title owner.⁹³ In the latest statement on the matter, the current judge overseeing the case stated the fee simple title holder is not allowed to “unilaterally make up rules and regulations on the property” impacting the rights of the largely Mexican American descendants.⁹⁴

89. *Id.* at 953–55.

90. *Id.* at 945 (highlighting that easements to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another is a property right long recognized by Colorado law).

91. John A. Lovett, *Restating the Law of Prescriptive Easements*, 104 MARQ. L. REV. 939, 944 (2021).

92. *See Lobato I*, 71 P.3d at 953–55; MONTROYA, *supra* note 81.

93. *Special Master in Costilla County*, *supra* note 85.

94. *Id.*

B. Conquest over the Family Home

In other ways, conquest provided opportunities to inscribe and reinforce color lines in the land and legal scape of Colorado. In 1864, mere months before the end of the Civil War, the Territorial Legislature passed a law preventing intermarriage among White and non-White residents. 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: “[n]othing 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.”⁹⁵ Recall that as this law was first passed, Territorial Governor William Gilpin had, in his purchase of the Sangre de Cristo Land Grant, seemingly recognized the usufructuary (and related cultural) rights of its Mexican-origin population, who were concentrated as a result of conquest and the Treaty of Guadalupe Hidalgo in the southern mountain valleys of the state.⁹⁶ Due to the mixed European, Indian, and African genealogy of this group, Colorado’s territorial legislature abdicated responsibility for the policing of racial boundaries in this area of the state to local customs, control, and even common sense.⁹⁷

Unique among the anti-miscegenation statutes in the United States for its carve out of those lands and peoples that were once part of Mexico,⁹⁸ Colorado’s anti-miscegenation statute accordingly raised troubling questions about the nature of the color line and by extension, government and private intrusions into the intimate relations of men and women in their own homes as well as their bodies and racial identities. In 1881, for instance, a “Chinaman named Lee Chin and a white woman named Mrs. Eva H. Lee” married in Denver in order to escape Wyoming’s prohibition against marriage between “Mongolians”

95. COLO. REV. STAT. § 90-1-2 (1935) (repealed 1957).

96. *Wringing Rights out of the Mountains*, *supra* note 75, at 570.

97. See MARTHA MENCHACA, *RECOVERING HISTORY, CONSTRUCTING RACE: THE INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS* 215–94 (2002).

98. 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* 215–30 (Valerie Matsumoto & Blake Allmendinger eds., 1999); James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 *DUKE BAR J.* 26 (1951).

and White residents.⁹⁹ While the clergyman who married the couple and signed their marriage license was opposed morally to interracial marriage, he justified his decision on the belief that the woman was “Mexican.”¹⁰⁰ According to the pastor, Mexicans “are even lower and viler than the Chinese and consequently, he did not think that the woman was degrading herself any by marrying a Chinaman.”¹⁰¹

Perhaps even more troubling were the measures that legal actors in the state took to enforce the law. In 1913, for example, the officials in Denver’s marriage license office questioned whether Nora Harrington Frazier, who looked White, could marry a Black man, Frank Frazier.¹⁰² Frazier, claiming that she was an “octoroon,” had her lawyer do the following to convince the government officials:

He had her bare her neck and he showed dark blotches at the root of her hair on the back of her neck. Then he had Frazier press her fingers at the root of her nails. They turned black. He offered to have the marriage license clerk rub the spinal column of Mrs. Frazer, which he asserted would turn black.¹⁰³

Seemingly satisfied with this display, the officials issued the Fraziers a marriage license and Nora and Frank were soon thereafter married.¹⁰⁴

The Fraziers, however, were subsequently arrested ten days later for violating the state’s anti-miscegenation law and found themselves in the police court of Judge Benjamin Stapleton.¹⁰⁵ Stapleton, who would later become Mayor of Denver due in part to his embrace of the KKK, had a reputation as a “strong, law-

99. *Mingling of Races—Indictment for Miscegenation*, SACRAMENTO DAILY REC., June 7, 1881, at 1. For Wyoming’s anti-miscegenation provision, see Browning, *supra* note 98, at 30.

100. *Miscegenation, A Chinaman Marries A White Woman in Denver*, DENV. REPUBLICAN, June 10, 1881, at 1.

101. *Id.*

102. “*Consistency, Thou Art a Jewel.*”, DENV. STAR, Aug. 23, 1913, at 4; *Blood Will Be Drawn in Court to Prove that Woman Is a Negress*, DENV. POST, Aug. 18, 1913, at 1 [hereinafter *Blood Will Be Drawn*].

103. *Blood Will Be Drawn*, *supra* note 102.

104. *Id.*

105. “*Consistency, Thou Art a Jewel.*”, *supra* note 102.

and-order morals man.”¹⁰⁶ In order to dismiss the charges against them, Judge Stapleton required that Nora provide substantial proof to confirm that she was non-White.¹⁰⁷ Arrangements were then subsequently made to draw Nora’s blood “in open court and an analysis made in [Judge] Stapleton’s presence” to, in Judge Stapleton’s own words, determine if she would “suffer the ignominy” that she is a “negro woman.”¹⁰⁸

Another telling example happened in 1941 when Denver police officers patrolling Denver’s segregated Five Points neighborhood encountered a White teenager, Caroline Brethauer, and her boyfriend, Clifford James Springs, a black teenager, in the back seat of an automobile parked in front of the girl’s home.¹⁰⁹ The police pulled the teenagers out of the car and proceeded to arrest and charge the young couple with violating the city and county’s ordinance against vagrancy.¹¹⁰

The police inquiry did not stop there. Rather, they marched over to the girl’s house where they found James W. Jackson who was living with and “married” to Caroline’s mom, Lydia. The police officers forced their way inside and detained Mr. Jackson in the front room of his house.¹¹¹ Mr. Jackson, having encountered these officers before, asked them, “What’s the matter now?” The police answered: “You will find out. We have got a new judge down there We are going to break this up. We are going to take matters in our own hands.”¹¹²

One officer then barged into the Jacksons’ bedroom where Lydia Jackson was lying down. The officer demanded that she get her clothes on, and when Mrs. Jackson went into the kitchen to dress in private, the officer followed her, shining a flashlight on her while she attempted to get dressed.¹¹³ She objected, saying “[W]hat do you want to do that for?” The officer chided in response, “Well, there isn’t anything I have never seen before.”¹¹⁴ The officers then arrested James and Lydia and

106. PHYLLIS PERRY, *SPEAKING ILL OF THE DEAD: JERKS IN COLORADO HISTORY* 169 (2011).

107. “*Consistency, Thou Art a Jewel.*,” *supra* note 102.

108. *Id.*

109. Transcript of Record at 3, *City & County of Denver v. Lydia Jackson*, No. 74058 (Denver Mun. Ct. 1941) [hereinafter *Trial Trans.*].

110. *Id.* at 4.

111. *Id.* at 27 (testimony of James W. Jackson); *compare with id.* at 8 (testimony of Officer Farrar).

112. *Id.* at 27.

113. *Id.* at 30 (testimony of Lydia Jackson).

114. *Id.*

hauled them away to the police station, holding them in jail without a bond hearing for three days. According to police, the Jacksons' marriage was illegal under Colorado's anti-miscegenation law, and so their cohabitation violated Denver's ordinance prohibiting one from leading an "idle, immoral or profligate course of life."¹¹⁵

This was not the first time the police arrested the Jacksons over their marriage. While booking the couple, one officer refused to call Lydia Jackson by her married name, insisting that she was Lydia Brethauer—invoking the name of her ex-husband George Brethauer.¹¹⁶ That same officer first arrested the couple for vagrancy on February 22, 1939, citing their cohabitation as justification,¹¹⁷ and pursued the couple even after they moved, arresting them for a second time early in 1940, despite the couple's insistence that they had been common-law spouses since November 1939.¹¹⁸

The couple attempted to defend against this third charge by presenting evidence that they were common-law spouses.¹¹⁹ However, the City Attorney premised his case on the notion that Lydia, who was White, and James, who was Black, could not legally marry.¹²⁰ The judge ultimately found the couple guilty and imposed a fine of \$150 on each defendant, or alternatively to serve time in the county jail not to exceed 151 days.¹²¹ The couple appealed their conviction in a case that ultimately reached the Colorado Supreme Court in 1942.¹²²

For the Jacksons' lawyers, the case posed a troubling dilemma about the nature of the color line in the state. As they argued, could the legal system tolerate an "imaginary boundary line" where already questionable racial categories in one part of the state were fundamentally different than in another?¹²³ For a majority of the Colorado Supreme Court, the question was answered as a matter of legal procedure. Although Colorado law never defined Mexican marriage customs nor described precisely

115. DENVER, COLO., MUN. CODE § 1345(6) (1927).

116. Trial Trans., *supra* note 109, at 8 (testimony of Officer Farror).

117. *Id.* at 14.

118. *Id.* at 17.

119. *Id.* at 27 (testimony of James Jackson); *id.* at 32 (testimony of Lydia Jackson).

120. *Id.* at 29 (testimony of James Jackson); COLO. REV. STAT. § 90-1-2 (1935) (repealed 1957).

121. Trial Trans., *supra* note 109, at 33.

122. *Jackson v. City & Cnty. of Denver*, 124 P.2d 240 (Colo. 1942).

123. Brief on Specification of Points at 8, *Jackson*, 124 P.2d 240.

what portion of the state had actually been acquired from Mexico, the interracial couple never offered evidence that the geographic area encompassed by the city and county of Denver was subject to the miscegenation law's imposition of a color/colorblind line. As a result, the Colorado Supreme Court took "judicial knowledge of the fact" that Denver was not once part of Mexico.¹²⁴

In ruling against the Jacksons, the Colorado Supreme Court's determination made salient an international boundary that had not existed for nearly a hundred years. The practical effect, Justice Otto Bock argued in dissent, was to "have a *geographical* immorality within the state, applicable to Denver but not to some other portions of Colorado."¹²⁵ For Justice Bock, such an imprecise border was particularly troubling in relation to Colorado's own imprecise color lines. According to Justice Bock, violation of the city's vagrancy law in Denver "would seem to be a discrimination against both the negro and white persons in favor of the Mongolian race, members of which may enter into marriage relationships without any limitation whatsoever."¹²⁶ In Justice Bock's estimation, and perhaps in implicitly referencing the 1881 Chin case, the judicial border recognized by the Court extended a "Mongolian" greater rights and freedoms than those accorded "American" White, Black, and even Mexican "citizens."

Critically, property was implicitly at the center of these battles over whom one could and could not marry. Along with thirty other states, Colorado's ban on interracial marriage denied particularly Black Coloradans "a legal basis to inherit the estate of a [W]hite relative."¹²⁷ The consequence is that in many cases, the law denied the spouses and children of interracial

124. *Jackson*, 124 P.2d at 242; *see also* Answer Brief of Defendant in Error at 8, *Jackson*, 124 P.2d 240 (arguing on behalf of the city that "it is common historical knowledge that Denver, where these parties claim to have been married by common law, is not within the portion of the state acquired from Mexico, but is within the boundaries of the Louisiana Purchase. As is well known, the southern boundary of the Louisiana Purchase within Colorado is the Arkansas River, and the boundary turns northward at the Continental Divide, and follows the Divide north and out of the state. This area plainly includes Denver.").

125. *Jackson*, 124 P.2d at 243 (emphasis added).

126. *Id.* at 242.

127. Dorothy E. Roberts, *Race, Care Work, and the Private Law of Inheritance*, 40 L. & SOC. INQUIRY 511, 514 (2015).

unions any claims to valuable property interests.¹²⁸ And as seen in the case of the Jacksons, it gave cover to ongoing police surveillance as well as sanction to the judicial violence to enter homes, objectify bodies, and fiercely maintain segregation in the state's neighborhoods. Colorado's anti-miscegenation statute and the resulting insecurities to one's home and control over intimate familial relations as well as property protections would remain law into the 1950s, when it was finally repealed by the state legislature in 1957.¹²⁹

C. Conquest over Landmarks

There is no doubt that settler-colonialism and White supremacy in Colorado law both restructured and reinforced racialized rights and understandings to land, natural resources, homes, and related protections to familial autonomy and generational wealth. It was powerfully buttressed by a decades-long (and still ongoing) effort to valorize the state's "pioneers" and its symbols of "progress," "ingenuity," and "innovation" symbolized in the names and sometimes iconography given to the natural as well as built landscape. The process, as the anthropologist Paul Shackel reminds us, is often to "mask or naturalize" inequalities to further entrench stereotypes and support outright bigotry.¹³⁰

Monuments and related corporeal forms like statues or names and monikers are largely protected as both public and private property by a broad range of federal, state, and even local law.¹³¹ Though the creation, meaning, and preservation of these monuments and monikers have always been fraught with conflict and tension, Professor Zachary Bay argued that the "frequency, intensity, and visibility" of current conflicts is altogether new because they have "become a shorthand for one's

128. *Id.* For further examples in American law, see Peggy Pascoe, *Race, Gender, and Intercultural Relations: The Case of Interracial Marriage*, 1 FRONTIERS: J. WOMEN'S STUDIES 1 (1991); Angela Onwauchi-Willig, *A Beautiful Life: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393 (2007); PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* (2002).

129. H.B. 57-1039, 41st Gen. Assemb., 1st Reg. Sess. (Colo. 1957)

130. Paul A. Shackel, *Public Memory and the Search for Power in American History Archaeology*, 103 AM. ANTHRO. 655, 655, 660–664 (2001).

131. Zachary Bray, *We Are All Growing Old Together: Making Sense of America's Monument Protection Laws*, 61 WM. & MARY L. REV. 1259, 1288 (2020).

stance on a host of cultural and political issues.”¹³² Confederate statues as well as pioneer monuments highlight the “ongoing fight for racial justice” as they are not “innocuous symbols[;] . . . they are weapons in the larger arsenal of white supremacy [and settler-colonialism], artifacts of Jim Crow not unlike the ‘whites only’ sign that declared black southerners to be second-class citizens.”¹³³

The monuments and monikers used to celebrate and valorize certain people and sets of values in the state, affixed to public or private property, are reflective of the color(blind) conundrums of a state forged both in conquest and the promise of racial equity. To be sure, the naming of land and landmarks and the erection of statues and monuments to celebrate the state’s most revered people, values, and beliefs demonstrated the state and its citizenry’s commitments to excluding all those who were not ostensibly White. Names, and their corporeal forms in the guise of statues and monuments “can explicitly or unintentionally normalize and perpetuate hegemonic myths, naturalize racist structures and erase or displace Indigenous [as well as other non-majority] knowledges.”¹³⁴

There are nearly eleven-thousand place names in Colorado¹³⁵ as well as countless other memorials and monuments. In some cases, the names and memorials are derogatory and have been used to highlight the sexualized nature of Indigenous women and their bodies.¹³⁶ In other cases,

132. *Id.* at 1266.

133. KAREN L. COX, *NO COMMON GROUND: CONFEDERATE MONUMENTS AND THE ONGOING FIGHT FOR RACIAL JUSTICE* 3 (2021). For the connection of confederate monuments to pioneer monuments, see PRESCOTT, *supra* note 22, at 13–15.

134. McGill, *supra* note 37, at 684. Richard Grounds argues that names and related monuments, especially those that seemingly celebrate Indigenous Peoples, help resolved an inherent tension in conceptions of American exceptionalism: “They provide an extraordinarily effective means for ameliorating the conflict between notions of America as land of justice and liberty and the long-practiced unjust treatment of the Indigenous Peoples of the land whose liberty was being taken away.” Richard A. Ground, *Tallahassee, Osceola, and the Hermeneutic of America Place-Names*, 69 *J. AM. ACAD. RELIGION* 287, 289 (2001).

135. DONALD R. ELLIOT, *PLACE NAMES OF COLORADO: A GENEALOGICAL & HISTORICAL GUIDE TO COLORADO SITES*, at iv (Doris L. (Salmen) Elliot ed., 1999).

136. Vincent Schilling, *The S-word: Offensive or Not?*, *INDIAN COUNTRY TODAY* (Sept. 13, 2018), <https://indiancountrytoday.com/archive/the-word-squaw-offensive-or-not> [<https://perma.cc/U5YF-A833>]; Dep’t of the Interior, Secretarial Order No. 3404, *Declaring “Squaw” a Derogatory Term and Implementing Procedures to Remove the Term from Federal Usage* (2021) (declaring, on November 19, 2021, that “Squaw” is a “Derogatory Term” and implementing

like the Confederate monuments in the American South, the names and memorials valorized Indigenous genocide and related notions of White supremacy, either specifically or more generically as promoting “pioneers.”

Perhaps the most prominent example is seen in the number of landmarks, memorials, and awards commemorating John Evans, the second territorial governor of Colorado as well as the founder of Northwestern University and DU. No one name or figure so embodied Colorado’s color(blind) conundrum as did John Evans. A “physician by training, over the course of his lifetime he was also a professor of medicine, a founder of hospitals and medical societies, an innovative businessman, a tireless institution builder, and a passionate advocate of general public education and higher learning.”¹³⁷

An ardent abolitionist, Evans was appointed in 1862 by President Abraham Lincoln to be territorial governor of Colorado, a post that also included his assignment as ex officio superintendent of Indian affairs.¹³⁸ In spite of the scope of his work and efforts, Evans was valorized in Colorado as a “warrior” or the “War Governor of Colorado” who “sent squadrons in the field which fought both Indians and [Confederate] rebels during his administration.”¹³⁹ To be sure, his term as territorial governor was bookended by the overwhelming defeat of Confederate forces in the Battle of Glorietta Pass in March 1862 and his forced resignation in October of 1865 for the role that he played in the Sand Creek Massacre.

In the early morning of November 29, 1864, and two weeks after what would become DU opened its doors, U.S. forces under the command of Col. John Chivington (a founding member of the Board of Trustees at DU), attacked hundreds of Cheyenne and Arapaho people camped under a flag of peace on the banks of

procedures to remove the term from landmarks and sites). In Colorado, the Colorado Geographic Naming and Advisory Board was established in 2020 by Governor Jared Polis. Colo. Exec. Order No. B 2020 004. Twenty-eight geographic features in the Colorado utilized the term “Squaw” until September 2022. *Colorado Geographic Naming Advisory Board*, COLO. DEPT. NAT. RES., <https://dnr.colorado.gov/colorado-geographic-naming-advisory-board> [<https://perma.cc/KE7G-9FHP>].

137. EVANS REPORT, *supra* note 28, at v.

138. *Id.* at iii.

139. Henry Dudley Teetor, *Hon. John Evans, War Governor of Colorado*, 9 MAG. W. HIST. 722 (1888).

Sand Creek in southeastern Colorado Territory.¹⁴⁰ More than two hundred Indigenous Peoples were slaughtered, the vast majority of them women, children, and the elderly, and their body parts were taken to Denver and proudly displayed in the city's streets.¹⁴¹

In December of 1864, Chivington and his troops returned to a hero's welcome in Denver. Unbeknownst at the time, two company commanders, Capt. Silas Soule and Lt. Joseph Cramer, had written letters to the U.S. Congress detailing the horrors and atrocities perpetuated by the soldiers under the military command of Chivington. The Joint Committee on the Conduct of the [Civil] War, the Joint Committee on the Conduct of the Tribes, and an army commission all initiated investigations and hearings that "all came to the same conclusion: Sand Creek was a massacre of Indians who were under the protection of the U.S. government."¹⁴² The slaughter of Arapaho and Cheyenne on the banks of Sand Creek makes it, according to one account, "one of the most infamous cases of state-sponsored violence in U.S. history."¹⁴³

Although he was never prosecuted or even in the state at the time of the Sand Creek Massacre, Evans did not come off well in the investigations and was forced to resign due, in large part, to the benign neglect he showed as the Indian superintendent toward protecting the rights of Indigenous Peoples living in the Colorado Territory. Instead, Evans increasingly became enamored with the prospect of war with tribes that he believed "have gone to war with the white people. They steal stock and run it off, hoping to escape detection and punishment. In some instances, they have attacked and killed soldiers and murdered peaceable citizens."¹⁴⁴ Ironically, many of the settler-colonist pioneers that Evans wanted to protect had illegally entered federal or Indigenous land and did not hold

140. EVANS REPORT, *supra* note 28; Gary L. Roberts, *Sand Creek: Tragedy and Symbol* (1984) (Ph.D. dissertation, University of Oklahoma).

141. Tony Horwitz, *The Horrific Sand Creek Massacre Will Be Forgotten No More*, SMITHSONIAN MAG. (Dec. 14, 2014), <https://www.smithsonianmag.com/history/horrific-sand-creek-massacre-will-be-forgotten-no-more-180953403> [<https://perma.cc/R4JP-YK9W>]; *1864 Leadup & Massacre*, *supra* note 30.

142. EVANS REPORT, *supra* note 28 at 9.

143. See Roberts, *supra* note 140, at 457.

144. John Evans, *To the Friendly Indians of the Plains* (June 27, 1864), in EVANS REPORT, *supra* note 28, at 60.

legal title to the burgeoning “farms and ranches they so tenaciously regarded as their own private property.”¹⁴⁵

Evans’s connection to, and indeed his shame (if not his culpability) for, the Sand Creek Massacre was sealed on August 11, 1864, when he declared martial law in the state:

Now, therefore, I, John Evans, governor of Colorado Territory, do issue this my proclamation, authorizing all citizens of Colorado, either individually or in such parties as they may organize, to go in pursuit of all hostile Indians on the plains, scrupulously avoiding those who have responded to my said call to rendezvous at the points indicated also, to kill and destroy, as enemies of the country, wherever they may be found, all such hostile Indians. And further, as the only reward I am authorized to offer for such services, I hereby empower such citizens, or parties of citizens, to take captive, and hold to their own private use and benefit, all the property of said hostile Indians that they may capture, and to receive for all stolen property recovered from said Indians such reward as may be deemed proper and just therefor.

. . . .

The conflict is upon us, and all good citizens are called upon to do their duty for the defence of their homes and families.¹⁴⁶

In the subsequent hearings on the Sand Creek Massacre by the U.S. Congress in March 1865, Evans testified that he had no knowledge of the massacre plans but suggested it might have been justified by prior attacks.¹⁴⁷ The Joint Committee on the Conduct of the [Civil] War rebuked Evans for the “prevarication and shuffling” that had characterized his testimony, condemning his role for inciting an atmosphere of fear among the White settlers, as well as his failure to acknowledge the massacre’s horrors, and calling for his removal from office.¹⁴⁸ Evans was subsequently forced to resign on August 1, 1865.

145. EVANS REPORT, *supra* note 28, at 29.

146. John Evans, *Proclamation* (Aug. 11, 1864), in EVANS REPORT, *supra* note 28, at 64.

147. EVANS REPORT, *supra* note 28, at 80–82.

148. *Id.* at 83.

Like Chivington, Evans was celebrated by Colorado's settler-colonial pioneers for the role he played on their behalf. In an 1884 interview, Evans showed no remorse for Sand Creek and stated, unequivocally, in an 1884 interview that "the benefit to Colorado, of that massacre, as *they call it*, was very great for it ridded the plains of the Indians."¹⁴⁹ Evans's role as "pioneer" came to be celebrated and memorialized in the number of towns, streets, landmarks, and awards named in his honor. To be sure, no other person or name in the state symbolized the conquest of land as did John Evans. Thus, it was not a surprise that on March 5, 1895, the "majestic lofty peak dominating the western skyline of the Colorado plains," which can be seen as far away as one hundred miles to the east, was renamed by the Colorado legislature as Mount Evans.¹⁵⁰

The mountain had been known to Colorado's settler-colonists as Mount Rosalie, named after the wife of renowned landscape painter Albert Bierstadt, whose sketches and paintings of the mountain vastly influenced the geographic representation of Colorado.¹⁵¹ Though Colorado legislators as early as 1872 had suggested renaming the mountain after John Evans, serious effort to officially do so did not happen until late December 1894 and early January 1895 to honor Evans "as our Territorial . . . Governor."¹⁵² The Colorado General Assembly passed the proclamation "in view of the long and eminent services to the State of Ex-Governor" on January 2, 1895, and it was signed into law and presented as gift to Governor Evans on his eighty-first birthday in March of that same year.¹⁵³

Another example of the celebration of settler-colonialism and the erasure of Indigenous history in the state's public spaces is seen in what became the Kit Carson Pioneer Fountain, dedicated in 1911 in Denver's city civic center. Carson, the grandson of Daniel Boone, was a renowned frontiersman and guide to John C. Frémont's California expedition.¹⁵⁴ Beginning

149. *Id.* at 86 (emphasis added).

150. JERI L. NORRGREN, COLORADO'S HIGHEST: THE HISTORY OF NAMING THE 14,000 PEAKS 21–23 (2020).

151. *Id.* at 21–22.

152. *Id.* at 23.

153. *Id.*

154. Christian J. Zier, *Kit Carson*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/kit-carson> [<https://perma.cc/TJT4-WP27>]; Stephen C. Schell, *John C. Frémont*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/john-c-fr%C3%A9mont> [<https://perma.cc/WTY9-YXRJ>].

in 1904, Denver's Real Estate Exchange initiated efforts to construct a monument dedicated to the "pioneers of the state."¹⁵⁵

The hope was that the memorial would sit prominently "within the shadow of the Capitol building, and standing at the divisional point between the state's temple of law, the city's business district, and Denver's residences."¹⁵⁶ Such a monument, according to the Exchange, was proper to honor "our pioneers, who cleared the way nearly half a century ago and made it possible for Denver and Colorado Springs and Pueblo and our beautiful smaller towns and rich farm lands to astound the world with their greatness."¹⁵⁷

In 1906, after a successful launch to a fundraising campaign and a grant from the Colorado legislature, the Denver City Council "set aside the desired tract of land for siting the monument, a triangular tract bounded by Broadway, West Colfax Avenue, and Cheyenne Place."¹⁵⁸ That same year, the Exchange commissioned one of the leading sculptors of his time, Frederick MacMonnies, to design the project and bring it to completion.¹⁵⁹

To his surprise, MacMonnies's initial design sparked public outrage when it was published in the local newspapers a year later.¹⁶⁰ The design displayed prominently atop the sculpture an Indigenous man sitting "upon a rearing horse delicately balanced upon an outcropping of rock" while "[t]he hexagonal-shaped base of the monument would bear three life-sized, reclining figures representing a miner, a pioneer settler, and a hunter, trapper or cowboy."¹⁶¹ In an effort led by the Colorado Society of Pioneers and the Sons of Colorado, and given voice as well as substance by the *Rocky Mountain News*,¹⁶² critics of the design "found it unacceptable for an indigenous warrior to be

155. One of the primary leaders of the Denver Exchange was Denver's then mayor, Robert Speer, a proponent of the City Beautiful Movement and a power broker among the city's propertied elite. Paul Scolari, *Indian Warriors and Pioneer Mothers: American Identity and the Closing of the Frontier in Public Monuments, 1890-1930*, at 107-109 (June 6, 2005) (Ph.D. Dissertation, University of Pittsburgh) (on file with the University of Pittsburgh University Library System).

156. *Id.* at 110 (quoting R. W. SPEER ET AL., DENVER REAL EST. EXCH. COMM. ON PUB. IMPROVEMENTS, A GREETING (1905)).

157. *Id.*

158. *Id.* at 111.

159. *Id.*

160. *Id.* at 113-14; PRESCOTT, *supra* note 22, at 30.

161. Scolari, *supra* note 155, at 113-17.

162. *Id.* at 113.

glorified over the sacrifices of white hunters, prospectors, and pioneer mothers.”¹⁶³ According to Society of Pioneer member, J. D. Howland, MacMonnies

show[ed] a lack of knowledge as to what is demanded by our local conditions. His miners, settlers, hunters and cowboys are around the base; and towering above all is the triumphant Indian. It does not represent truth. It does not represent Colorado. It does not represent pioneer days. The place for the Indian in such a monument is dead upon the ground, or subjugated or fighting at the base. The pioneer himself should be triumphant over all and holding the place of honor.¹⁶⁴

Another critic of the MacMonnies design was T. M. Patterson, former U.S. Senator from Colorado and the owner and publisher of the *Rocky Mountain News*. Connecting themes that Justice Marshall himself explored in the *Johnson v. McIntosh* case, Patterson made clear that any celebration of Indigenous Peoples over the state’s pioneer settlers was “moved by a sentiment of misguided and misplaced justice” as it would have left Indigenous Peoples in “undisturbed possession of the continent.”¹⁶⁵ In response, the Society of Pioneers and their proponents demanded that unless a change to the design occurred, that use of the word “pioneer” be stricken from any association with the monument, and if that did not happen, they might file a court injunction to bar further use of the word.¹⁶⁶

Ultimately, MacMonnie capitulated to the Colorado Society of Pioneers and replaced the heroic Indigenous figure with Kit Carson. His second design represented an unapologetic symbol of conquest, one specifically designed to the peculiar conditions of Colorado and the vision for some of fully eradicating Indigenous Peoples from its past, present, and future. As the author of the most in-depth account of the Kit Carson Pioneer

163. PRESCOTT, *supra* note 22, at 30. MacMonnies himself was not trying to valorize or celebrate Indigenous Peoples but was rather artistically recreating a “bottom up” vision of the march of White civilization, one in which he repeatedly referred to Indigenous Peoples as “barbarians” and “savages.” Scolari, *supra* note 155, at 115–23.

164. Scolari, *supra* note 155, at 115 (quoting *Triumphant Indian Arouses Ire of Pioneers*, ROCKY MOUNTAIN NEWS, Apr. 18, 1907, at 1).

165. *Id.* at 116 (quoting ROCKY MOUNTAIN NEWS, Apr. 25, 1907, at 16).

166. *Id.* at 119–20.

Fountain detailed, “MacMonnies’ original design had unleashed a flood of Indian hating sentiment” unique to the context of pioneer in Colorado.¹⁶⁷ Informed by the “exaggerated and sensationalized” press accounts of White and Indigenous conflicts in what would become the territory of Colorado after the Gold Rush of 1858 and galvanized by the “glee” with which White Coloradans reacted to the Sand Creek Massacre, anti-Indigenous sentiment was central to the meaning of pioneer in the state.¹⁶⁸

In an event hosted by the Society of Pioneers in 1883, the notorious and seemingly disgraced Col. John Chivington was greeted as a conquering hero as “men threw up their hats, women waved their handkerchiefs, and all huzzaed at the top of their voices.” In response, Chivington proudly declared, “I stand by Sand Creek.”¹⁶⁹ Thus, as “placement of Kit Carson at the top of the monument was greeted with enthusiasm, so too was the removal of the Indian from the top of the monument a cause for celebration” among those “pioneers” who fundamentally shaped the final design.¹⁷⁰

In a final twist of irony—and one that directly linked John Evans and the Sand Creek Massacre to the pioneer memorial—a Union soldier statue was installed on the grounds of the Colorado State Capital in 1909 to commemorate Colorado’s important role in the Civil War.¹⁷¹ The statue was funded by the same Society of Pioneers who were behind the efforts of the Kit Carson statue and designed by Jack Howland, a member of the U.S. Army First Colorado Calvary who was also part of the forces that Chivington used to attack the Arapaho and Cheyenne on the banks of the Sand Creek in 1864.¹⁷² Accompanying the

167. *Id.* at 133.

168. *Id.* at 118–19.

169. GUNTHER BARTH, *INSTANT CITIES: URBANIZATION AND THE RISE OF SAN FRANCISCO AND DENVER* 124 (Univ. of N.M. Press 1988). Barth further details the conflicts between White and Indigenous peoples in the region. *Id.* at 122–27; see also ROBERT UTLEY, *THE INDIAN FRONTIER OF THE AMERICAN WEST, 1846–1890*, at 86–90 (Ray Allen Billington et al. eds., 1984).

170. Scolari, *supra* note 155, at 134.

171. *The Civil War Monument “On Guard”*, HIST. COLO., <https://www.historycolorado.org/exhibit/civil-war-monument-guard> [https://perma.cc/D2K3-TJ9L].

172. Norman Dasinger, *Civil War Monument (Denver)*, BLUE & GRAY DISPATCH (Dec. 28, 2020); Carol McKinley, *Controversial Colorado Union Soldier Statue Will Stay Where It Is – For Now*, COLO. POL., https://www.coloradopolitics.com/legislature/controversial-colorado-union-soldier-statue-will-stay-where-it-is-for-now/article_2bd154d9-cea8-5052-bff5-

plaque was mention of the day as a battle.¹⁷³ With absolutely no mention of the massacre that took place that day, the placement of Sand Creek and the inclusion of other “battles” with Colorado’s Indigenous tribes made evident the links between settler-colonialism and White supremacy. As Professor Ari Kelman points out, “We remember the Civil War as a war of liberation that freed four million slaves But it also became a war of conquest to destroy and dispossess Native Americans.”¹⁷⁴ The Sand Creek Massacre, he points out, “is a bloody and mostly forgotten link” between the Civil War and the Indigenous subjugation that followed.¹⁷⁵ Perhaps unsurprisingly, at least six Confederate monuments were erected in Colorado, with at least two on public property.¹⁷⁶

To be sure, the intellectual property of “pioneer” and all its accordant iconography, heroes, and symbols unambiguously represented the violence of conquest, the inevitability of settler-colonialism, and the righteousness of White supremacy. These landscapes powerfully reinforced the color lines of conquest shaped each and every day by the force of law. From the loss of historic lands, to insecurity in traditional and cultural understanding of property ownership, to the policing of intimate relations in one’s one home, to the Colorado-specific valorization of the anti-Indigenous “pioneer” property—whether private or public, real or personal, corporeal or intellectual—became the primary basis to perpetuate racial violence and, in the process, re-ordered Colorado’s color lines in familiar but no less problematic ways.

199a337da457.html [https://perma.cc/QXU3-BKHG] (Oct. 25, 2022); *Denver Civil War Monument*, PUB. ART AROUND THE WORLD, <https://publicartaroundtheworld.com/public-art-in-the-usa/public-art-in-denver/denver-civil-war-monument> [https://perma.cc/W8C4-UV9B].

173. Kevin Simpson, *When the Union Soldier Fell at the Colorado Capital, It May Have Started a Chain Reaction*, COLO. SUN (Sept. 3, 2020, 4:00 AM), <https://coloradosun.com/2020/09/03/union-soldier-statue-history-colorado> [https://perma.cc/8N2J-2SQF].

174. Tony Horwitz, *The Horrific Sand Creek Massacre Will Be Forgotten No More*, SMITHSONIAN MAG. (Dec. 2014), <https://www.smithsonianmag.com/history/horrific-sand-creek-massacre-will-be-forgotten-no-more-180953403> [https://perma.cc/7TKX-S2Q9].

175. *Id.*

176. Jennifer Lee Kovaleski, *Colorado Has Six Confederate Monuments, One in Denver*, DENVER7 (Aug. 16, 2017, 7:36 PM), <https://www.thedenverchannel.com/news/politics/colorado-has-six-confederate-monuments-one-in-denver> [https://perma.cc/YH8J-PFSG].

III. COLOR BY LAW

“Only persons of the Caucasian race shall own, use or occupy any dwelling or residence upon said lots or tracts.”

– Franklin L. Burns, *et al.*¹⁷⁷

In 1910, Oliver Toussaint Jackson established Dearfield, Colorado’s only all-Black agriculture colony. At its height, the small town had 300 to 700 residents, forty farms, “a filling station, a dance hall, two churches, . . . [and] a school.”¹⁷⁸ As a “cultural bridge” to the White and Latinx residents living in near proximity,¹⁷⁹ it was common for White, Latinx, and Black Dearfield residents to fill Dearfield’s dance halls on weekend nights.¹⁸⁰ As one scholar has observed, “Integration happened in Dearfield long before it came to Denver.”¹⁸¹

Seemingly at the heart of Dearfield’s success was the idea that Colorado was ideally situated for people of color. Indeed, one promotional letter for Dearfield boldly declared, “There is no

177. Declaration of Protective Covenants, *supra* note 6, at 1.

178. 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 black community of Chapelton” and “[t]he population of the town of Dearfield itself likely never exceeded more than 50 to 75 residents”).

179. Marianne Goodland, *Lawmakers Get a Firsthand Look at Dearfield, Colorado’s Historic Black Farm Colony*, DENV. 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://perma.cc/P9ND-H22K].

180. *Id.*

181. *Id.* Much of what we are learning about Dearfield is emerging out of the University of Northern Colorado’s Dearfield Dream Project—a research program led by Drs. George Junne and Robert Brunswig. Anne Delaney, *University of Northern Colorado Receives National Park Service Grant for Dearfield Dream Project*, GREELEY TRIB. (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]; 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]. 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 et al., *Dearfield Dream Project: Developing an Interdisciplinary Historical/Cultural Research Network*, 2 SOC. SCI. 168, 169 (2013).

better location in the U.S. than Colorado to try on a garment of self-government.”¹⁸² 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 formerly enslaved peoples and their children,¹⁸³ those like Jackson and his wife Minerva saw unbridled opportunity to thrive in Colorado.¹⁸⁴

Part of the promise of settling in Colorado was attributable to what seemed like divine providence for many Black Americans suffering under the White supremacy of the Reconstruction and post-Reconstruction South.¹⁸⁵ On the same day that Abraham Lincoln signed the Emancipation Proclamation, January 1, 1863, the Homestead Act went into effect.¹⁸⁶ Ironically, while the complicated property rights of grantees and settlers to Mexican land grants in the territory were in a state of confusion, and while the sovereignty of Indigenous Peoples to their land was being proscribed,¹⁸⁷ the

182. *Dearfield*, GREELEY HIST. (Feb. 2, 2013, 9:54 AM), <http://www.greeleyhistory.org/pages/dearfield.htm> [<https://perma.cc/TMR7-37RF>].

183. See BRUCE J. REYNOLDS, USDA, BLACK FARMERS IN AMERICA, 1865–2000: THE PURSUIT OF INDEPENDENT FARMING AND THE ROLE OF COOPERATIVES 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 Black people 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 Black people to move out west).

184. See generally *African American Homesteaders in the Great Plains*, NPS, <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm> [<https://perma.cc/3T44-FU7K>].

185. 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 (Henry Steele Commager & Richard B. Morris eds., 1st ed. 1988).

186. Homestead Act, Pub. L. No. 37–64, 12 Stat. 392 (1862) (repealed 1976); Emancipation Proclamation, Pres. Proc. No. 17, 12 Stat. 1268 (1863); Barbara Bamberger-Scott, *The Exodusters: The Roots of African American Homesteading*, HOMESTEAD.ORG, <https://www.homestead.org/homesteading-history/exodusters-the-roots-of-african-american-homesteading> [hereinafter *The Roots of African American Homesteading*] [<https://perma.cc/5C69-BS3A>].

187. See *supra* notes 58–71 and accompanying text.

opportunity of fee simple ownership through the Homestead Act offered recently emancipated slaves “the strongest and most complete set of property rights imagined by law.”¹⁸⁸

The creation of the territory of Colorado on February 28, 1861, which prohibited slavery,¹⁸⁹ and the subsequent successful push for statehood in 1876¹⁹⁰ seemed to represent a promising colorblind future in its constitutional protections for all Coloradans. Such protections included the right of everyone to vote,¹⁹¹ have access to courts, commitment to courts,¹⁹² and due process.¹⁹³ The 1876 Colorado Constitution also prohibited slavery,¹⁹⁴ provided for bilingual access to public acts,¹⁹⁵ and

188. Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695, 1697 (2021).

189. Act of Feb. 28, 1861, ch. 59, 12 Stat. 172. Congress also created the Nevada Territory and the Dakota Territory days later on March 2, 1861. Act of Mar. 2, 1861, ch. 83, 12 Stat. 209 (Nevada); Act of Mar. 2, 1861, ch. 86, 12 Stat. 239 (Dakota).

190. ROBERT G. ATHEARN, *THE COLORADANS* 102 (Univ. of N.M. Press ed. 1976); see also Colin B. Goodykoontz, *Some Controversial Questions Before the Colorado Constitutional Convention of 1876*, 17 COLO. MAG. 1, at 2, 4 (1940) (discussing the role of party politics at the Colorado Constitutional Convention of 1876); Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* 81–83 (1957) (unpublished Ph.D. thesis, University of Colorado) (on file with author) (describing the circumstances under which congressional Republicans passed the bill granting Colorado statehood); Rebecca Jones, *From State of Flux to Statehood Colorado Overcame Obstacles of Territorial Days*, ROCKY MOUNTAIN NEWS, July 27, 1999, at 14A.

191. COLO. CONST. art. II, § 5. The section states, “[A]ll elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” *Id.*

192. *Id.* § 6. The section states, “[C]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and . . . right and justice should be administered without sale, denial, or delay.” *Id.*

193. *Id.* § 25. The section states, “[N]o person shall be deprived of life, liberty, or property without due process of law.” *Id.*

194. *Id.* § 26. The section states, “[T]here 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.” *Id.* The fact that slavery was still theoretically possible as punishment compelled Colorado voters, over 140 years later, to eliminate that provision from the constitution. H.C.R. 18-1002, 71st Gen. Assemb., Reg. Sess. (Colo. 2018) (adopted).

195. *Id.* art. XVIII, § 8 (amended 1991). Prior to amendment, the section stated, “[T]he general assembly shall provide for the publication of the laws passed at each session thereof; and, until the year 1900, they shall cause to be published in Spanish and German a sufficient number of copies of said laws to supply that portion of the inhabitants of the State who speak those languages, and who may be unable to read and understand the English language.”

guaranteed the property rights of noncitizens.¹⁹⁶ Along with the Homestead Act, the 1866 Civil Rights Act, and the ratification of the Fourteenth and Fifteenth Amendments to the federal Constitution, state and federal law accordingly provided unprecedented opportunities for Black communities moving to and settling in Colorado.¹⁹⁷

Despite these aspirations, and as noted above in Part II, Colorado's law was very rarely colorblind. In addition to the prohibition on interracial marriage by its territorial legislature,¹⁹⁸ Colorado territorial legislators gave school districts the ability to prevent Black students from attending publicly-financed schools.¹⁹⁹ In 1864, Black parents in Central City "objected to paying the school tax since they were not legal voters, and their children were not at the time admitted to the public schools."²⁰⁰ Two years later, the presence of Black students in Denver School District No. 1 (East Denver) prompted White parents to open a private school in Denver. William Byers, the editor and publisher of the territory's most influential paper, editorialized: "We do not propose to eat, drink, or sleep with one, and neither do we believe it is right that our children should receive their education in Negro classes."²⁰¹ His solution that each group contribute proportionally to its own

196. *Id.* art. II, § 27 ("Aliens, who are or who may hereafter become *bona-fide* residents of this State, may acquire, inherit, possess, enjoy, and dispose of property, real and personal, as native born citizens.")

197. 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). For a more comprehensive understanding of Black migration to the Rocky Mountain West, see generally NELL IRVIN PAINTER, *EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* (1976); UNIV. PRESS OF COLO., *AFRICAN AMERICANS ON THE WESTERN FRONTIER* (Monroe Lee Billington & Roger D. Hardaway eds., 1998).

198. *See supra* notes 96–131 and accompanying text.

199. *See* GENERAL LAWS, MEMORIALS AND PRIVATE ACTS PASSED AT THE FIFTH SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO 83 (1866) ("The secretary shall keep a separate list of all colored persons in the district, between the ages of five (5) and twenty-one (21) years, . . . and shall report the same to the president, who shall issue warrants on the treasurer in favor of such colored persons . . . for educational purposes.").

200. Lynn I. Perrigo, *The First Decade of Public Schools at Central City*, 12 COLO. MAG. 81, 86 (1935), https://www.historycolorado.org/sites/default/files/media/document/2018/Colorado_Magazine_v12n3_May1935.pdf [<https://perma.cc/5H7T-7HJU>].

201. ATHEARN, *supra* note 190, at 54 (quoting William Byers, ROCKY MOUNTAIN NEWS, Sept. 18, 1867).

educational needs would ensure that Black schools would receive no funding given the Black community's small size.

In partial response to some of these concerns, the Territorial Assembly amended the official school code in 1868, giving school districts the discretion to open separate schools for Black students.²⁰² Black parents in Central City defied these policy provisions by securing admission of their children to the city's schools in 1869 after their attorneys "demanded admission on the basis of the Civil Rights Act of Congress and the equality of treatment granted by the local coach line since 1865."²⁰³ While these segregated school laws did not survive statehood, they nevertheless symbolized Colorado's connection to Jim Crow and the use of the legal and political system to perpetuate racial inequity.

This Part describes some of the ways that private and government actors in the state used access and related rights to real property and public space to create enduring color lines that exist to this very day in the state's neighborhoods, cities, and counties. The first Section of this Part examines Colorado's robust use and unapologetic judicial enforcement of racially restrictive covenants that was in widespread practice in the early decades of the twentieth century. Used by Frank Burns, his family, and other real estate developers in the region into the 1950s, racially restrictive covenants reinforced "redlining" by real estate agents and confirmed the legal right of the state's White communities to keep their neighborhoods free of non-White residents.

The second Section details ways that the private property preferences of White Coloradans were further reinforced and, in some cases, codified in the actions, behavior, and policy of Colorado's public officials. From the government takeover by the KKK during the 1920s and long-standing official segregation in public places to the openly anti-Mexican policies of Colorado's governor in the 1930s, politicians used terror, the police, and even the military to enforce the state's color boundaries.

The final Section concludes by synthesizing some my previous scholarship and the scholarship of others on the battle to desegregate the Denver Public Schools. The manipulation of

202. THE REVISED STATUTES OF COLORADO: AS PASSED AT THE SEVENTH SESSION OF THE LEGISLATIVE ASSEMBLY, CONVENEED ON THE SECOND DAY OF DECEMBER, A.D. 1867, at 580 (1868).

203. Perrigo, *supra* note 200, at 87.

attendance boundaries to maximize school segregation by the Denver School Board and the subsequent backlash to the school board's efforts to address the segregation it created shattered the state's colorblind aspirational promise.

A. *The Color of Neighborhoods*

Racially restrictive covenants began to appear in large concentrations in Colorado, primarily the Denver metropolitan area, in the early decades of the twentieth century.²⁰⁴ As early as the 1910s, real estate agents in Denver hoped that the city would use its regulatory authority over property to create non-White sections of a city.²⁰⁵ According to one account of their plan, the realtors wanted the city to pass an ordinance that would require “the consent of a majority of the lot owners in block before a piece of property could be sold to a negro.”²⁰⁶ The effort seemed to gain little traction and became moot when the U.S. Supreme Court, in *Buchanan v. Warley*, declared such racial segregation ordinances to be unconstitutional.²⁰⁷

Real property owners and property developers nonetheless used their real property regime to keep their neighborhoods White. Frank Burns's uncle, Daniel, who founded the D.C. Burns & Trust Company in 1899, for instance, had the following provision in the company's standard weekly home purchase plan: “It is understood and agreed that this certificate, or the property purchased therewith, will not be assigned, sold, or leased to a negro.”²⁰⁸ Other developers, such as George Olinger,

204. Simmons & Simmons, *supra* note 8, at 86–88, 178–84. For one of the best public collections of these covenants in Colorado, especially in Jefferson County, see *Mapping Prejudice in Jefferson County, Colorado: Racism in Real Estate*, COLO. SCH. MINES, <https://libguides.mines.edu/jeffco/jeffco> [<https://perma.cc/3KLP-SXRJ>] (Feb. 8, 2022, 9:22 AM).

205. *Special District for Negroes Plan of Realty Agents*, DENV. POST, Aug. 22, 1916, at 5.

206. *Id.*

207. 245 U.S. 60 (1917).

208. MUENKER, *supra* note 8, at 7. The D.C. Burns Company had a “long history and dedication to housing for low-and-moderate income families.” They created “a savings plan held by the company's trust department in which the home buyer would agree to make regular weekly or monthly payments into a ‘home purchase plan savings account’ dedicated to the purchase of the home. When the prospective home buyer had accumulated an amount equal to 10 percent of the purchase price for the down payment, Burns would finance the balance of the purchase.” E. MICHAEL ROSSER & DIANE M. SANDERS, *A HISTORY OF MORTGAGE BANKING IN THE WEST: FINANCING AMERICA'S DREAMS* 67 (2017).

used deed restrictions in Jefferson County (Indian Hills Evergreen, Jefferson County, 1923) and Denver (Bonnie Brae, city and county of Denver, 1925).²⁰⁹ To be sure, Olinger was no stranger to using his private real estate interests to segregate, even after people died. Inheriting the family's mortuary business, Olinger built the Crown Hill Cemetery in 1907 whose property restrictions prevented non-White Coloradans from being buried on its grounds.²¹⁰ Even if such property restrictions did not exist, it was common practice for there to be segregated cemeteries—either White and well-maintained or non-White and poorly maintained.²¹¹

Two Colorado Supreme Court cases made it clear that the color line could be at the very center of real property ownership. The first case was *Chandler v. Ziegler*, which was decided by the court in 1930.²¹² In that case, White property owners Mable and Edward Ziegler sued the developer of their subdivision, Lemuel Chandler, for fraudulently representing that all deeds in the subdivision contained a restriction that it “could be owned, leased, or occupied by White persons only, and that all of said lots were restricted against colored people”²¹³ After the Zieglers purchased their lot, the neighboring lot, which did not have a racially restrictive covenant, was purchased by a Japanese family who subsequently shot off fireworks, erected a

209. Caitlin Hendee & 9News, *Colorado Closeup: This Neighborhood is One of Denver's Most Beloved (and Expensive)*, DENV. BUS. J. (Feb. 9, 2018, 2:46 PM), <https://www.bizjournals.com/denver/news/2017/11/10/this-neighborhood-is-one-of-denver-s-most-beloved.html> [<https://perma.cc/CC93-MX69>]; *Our History*, BONNIE BRAE NEIGHBORHOOD ASS'N, <https://bonniebrae.org/history> [<https://perma.cc/QF9V-5A38>]; *Mapping Prejudice in Jefferson County, Colorado: Plat Map Examples*, COLO. SCH. MINES, <https://libguides.mines.edu/jeffco/platmaps> [<https://perma.cc/6ZR8-Z3BC>].

210. Jim Moshinskie, *Olinger Mortuary Operated in this Highland Neighborhood Building in Denver, Colorado, from 1908–1999*, FLICKR (Dec. 21, 2007), <https://www.flickr.com/photos/drmo/4330906463> [<https://perma.cc/R62D-N2V2>]; Sheba R. Wheeler, *Denver Cemetery's Data "Very Valuable" to State*, DENV. POST (July 26, 2017, 4:09 PM), <https://www.denverpost.com/2005/12/22/denver-cemeterys-data-very-valuable-to-state> [<https://perma.cc/ZX25-WVM5>]; *Jefferson County Hall of Fame: George Washington Olinger*, 34 HIST. JEFFCO 1, 19 (2013), <https://www.jeffco.us/DocumentCenter/View/9480/Historically-Jeffco-2013-PDF> [<https://perma.cc/52C8-YH7B>].

211. See Judith F. Baca, *La Memoria de Nuestra Tierra*, in CHICANO & CHICANA ART: A CRITICAL ANTHOLOGY 310 (Jennifer A. González et al. eds., 2019) (noting a Colorado cemetery that had been historically segregated; while the “White” section of the cemetery was “green and well maintained,” the “Mexican” section was in a state of disrepair).

212. See 291 P. 822 (Colo. 1930).

213. *Id.* at 823.

building that obstructed his view, invited guests onto their property, and piled trash on the lot.²¹⁴ And even if the Japanese neighbors had not done so, the Zieglers also argued that “the fact the Japanese family lived next door annoyed them.”²¹⁵

The Zieglers subsequently alleged and the trial court agreed that they, as White homeowners, suffered a loss of value in their property due to the “annoyance and inconvenience” of having a Japanese family next door.²¹⁶ In assessing the case as a whole, 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 white, or Caucasian, race”²¹⁷ Although the court left open the question of damages, it made clear the constitutionality and enforceability of such a provision.²¹⁸

Ten years later, the Colorado Supreme Court heard a second racially restrictive covenants case, *Steward v. Cronan*.²¹⁹ In contrast to the White plaintiff in *Zielger*, 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.²²⁰ 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.”²²¹ Hoping to have the restriction legally declared void, the Black plaintiff brought suit against all the White defendants who were originally parties to the agreement.²²²

214. *Id.* at 824.

215. *Id.*

216. *See id.*

217. *See id.* at 823.

218. *Id.* at 824. (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).

219. 98 P.2d 999 (Colo. 1940).

220. The restrictive covenant agreement was executed by a small group of White people 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).

221. *Steward*, 98 P.2d at 999.

222. *Id.*

In spite of the fact that 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.²²³ According to the court, the racial restriction in this case was “not substantially different” than those found in *Ziegler*.²²⁴ Whether a Black plaintiff tried to void the restriction or a White homeowner attempted to enforce it, there was never any doubt, at least in the court’s opinion, whether such covenants were unlawful or unconstitutional. Legal restrictions against property ownership by people of color in fee simple were the valid prerogatives of White property owners.²²⁵

With the constitutionality of racially restrictive covenants clear, the restrictions were extensively used in many of Colorado’s post-World War II developments. From small towns like Estes Park to burgeoning suburban communities like Lakewood, race restrictions in the deed were a common feature found in many of Colorado’s residential housing developments in the 1940s.²²⁶ Even after the Supreme Court’s decision in *Shelley v. Kramer* in 1948 ostensibly made the enforcement of racially restrictive covenants unconstitutional,²²⁷ developers did not stop the practice of using racially restrictive covenants to solidify segregation in the state.

To be sure, the state’s largest residential developer, Frank Burns, and the company he inherited from his uncle, D.C. Burns Realty and Trust, was fully onboard in erecting unambiguous color lines in Denver’s neighborhoods. Taking over as president of the company two years shy of his thirtieth birthday in 1942,²²⁸ the company had long had the reputation for making fee simple homeownership attainable for “low-and-moderate income [White] families.”²²⁹ Recognizing the need to provide housing to World War II veterans and their new families, and seizing on the opportunity that would be provided by the GI Bill and

223. *Id.* at 395.

224. *Id.* at 394.

225. *Id.* at 395 (reaffirming the holding of *Ziegler*).

226. Simmons & Simmons, *supra* note 8, at 178–79, 184; *Man on Crusade to Expose Colorado’s Racist Property Records: ‘This Is so Appalling!’*, DENVER7 (Oct. 13, 2017, 10:51 PM), <https://www.denver7.com/news/investigations/this-is-so-appalling-says-man-on-crusade-to-expose-colorados-racist-property-records> [<https://perma.cc/5HTB-XK8P>].

227. 334 U.S. 1 (1948).

228. ROSSER & SANDERS, *supra* note 208, at 67.

229. *Id.*

favorable Federal Home Authority financing rates, Burns conceptualized what came to be known as the “Burns Better Built Bungalow.”²³⁰ With a down payment of \$299, prospective homeowners could purchase a modest single-family home that included a two-car garage, kitchen range, refrigerator, washing machine, and a construction warranty.²³¹ Most importantly, each Burns Better Built Bungalow would include a “protective covenant in deeds” to “protect property values.”²³²

Frank Burns’s first major development, where he and his company would realize their initial vision of “low-cost homes to fit the working man’s needs,”²³³ was recorded in six filings for the Burns Brentwood Subdivision between 1946–1951.²³⁴ Accordingly, each deed in the subdivision included protective covenants that provided for typical use, height, and activity restrictions on the property in order to “maintain said real property as a *high class* residential district.”²³⁵ Importantly, the first listed covenant to accomplish this goal was not those land use restrictions listed above, but instead, the racial restriction:

Only persons of the Caucasian race shall own, use or occupy any dwelling or residence erected upon said lot or tracts; provided, however, that occupancy by persons of another race who are employed as domestic servants by the occupying owner or occupying tenant shall not constitute a violation of the protect covenant.²³⁶

In Burns’s initial vision, high-class was coterminous with White residents as homeowners, fee simple title holders using live-in, non-White employees in a state of domestic servitude.

230. *Id.* at 68; *see also* MUEKNER, *supra* note 8, at 10–13.

231. MUEKNER, *supra* note 8, at 10–13.

232. D.C. BURNS REALTY & TRUST CO., BUILD IN SOUTHRIDGE: DENVER’S NEWEST AND LARGEST SUBDIVISION (on file with author).

233. Simmons & Simmons, *supra* note 8, at 116.

234. MUEKNER, *supra* note 8, at 9–10; *see also* Declaration of Protective Covenants, *supra* note 6.

235. Declaration of Protective Covenants, *supra* note 6 (emphasis added). Those restrictions included limitations to only residential use (#2), ground area and height restrictions (#3), construction uniformity (#4), set-backs (#5), a fence and building design committee (#6), prohibitions of livestock (#7), nuisances (#8), and single-family use (#9).

236. Declaration and Agreement Establishing Building Restrictions, Crestmoor Park (May 23, 1947) (on file with author); Declaration of Protective Covenants, *supra* note 6.

The racially restrictive covenants that formed the basis of the Burns Brentwood Subdivision were drafted at the same time that the U.S. Supreme Court declared in 1948 that racially restrictive covenants could not be enforced.²³⁷ Yet, as the Burns Brentwood Subdivision showed, property developers continued to use racially restrictive covenants after 1948. This created a conundrum for “[t]itle examiners [who] are in constant apprehension as to whether a title may be passed where these restrictive covenants prevail.”²³⁸ To be sure, Frank Burns’s next major development in the 1950s, Cherry Hills Vista, removed the racial prohibitions but continued to use covenants to keep the subdivision a “high class residential district.”

While the Colorado Supreme Court finally affirmed that racially restrictive covenants were unconstitutional in 1957,²³⁹ the fixation of property developers to maintain “high-class” neighborhoods highlighted ways that builders and the larger real estate industry could maintain the color line in more nefarious, colorblind ways.

A massive 1954 study by Denver’s Commission on Human Relations surveyed over 250 of the metropolitan area’s real estate brokers, developers, and lenders about the state of real estate access available to the city’s “minority” groups, which included Black, Latinx, Asian Pacific, and Jewish residents.²⁴⁰ Their survey found a system where real estate agents refused to show certain listings to people of color because of the wishes of the White sellers or their neighbors,²⁴¹ where lenders refused to make loans in neighborhoods of color or to people of color who purchased in White communities,²⁴² and where subcontractors would walk out when they learned they were building a home

237. *Shelly v. Kraemer*, 331 U.S. 1 (1948) (holding that enforcement of racially restrictive covenants would be a violation of the Fourteenth Amendment’s Equal Protection Clause). The language of the Supreme Court’s decision suggested that private racially restrictive covenants were not invalid per se and that an action for damages might still be available to property owners. In *Barrows v. Jackson*, 346 U.S. 249, 258–59 (1953), the Court held that property owners with racially restrictive covenants could not recover damages for violation of the covenant.

238. *Capital Fed. Sav. & Loan Assoc. v. Smith*, 316 P.2d 252, 255 (Colo. 1957). The racially restrictive covenant at issue in this case was created in 1942 east of Denver’s racially integrated Five Points neighborhood and was designed to be enforceable until 1990. *Id.* at 254.

239. *Id.* at 255.

240. INVENTORY OF HUMAN RELATIONS, DENVER COMM’N ON HUM. RELS. 121–55 (Sept.–Oct. 1954).

241. *Id.* at 122–24.

242. *Id.* at 127–29, 133.

for a person or family of color.²⁴³ The end result was that people of color were confined to some of the oldest and “substandard” areas of the state’s cities.²⁴⁴ For the real estate industry, this system was maintained with precision as redlining maps were a primary tool of real estate developers and the real estate industry to make the color line durable.²⁴⁵

In response to and reflecting again on the color(blind) conundrums of the state, the Colorado Fair Housing Act was passed into law in 1959.²⁴⁶ That same year, James and Elizabeth Rhone, a Black couple, entered into a purchase agreement with J.L. Case and Company to purchase a home in the eastern part of Colorado Springs.²⁴⁷ The Rhones put a \$500 down payment to “bind the contract of purchase and sale,” and the J.L. Case and Company cashed the check two days later.²⁴⁸ At nearly the same time, the Company then asked the Rhones to withdraw their offer. When the Rhones refused, the Company sold the property to an agent of the Company for less than the Rhones offered.²⁴⁹

The Rhones filed a complaint with the Colorado Anti-Discrimination Commission whose investigation ultimately concluded that J.L. Case and Company had refused to sell the home once they discovered that the Rhones were Black.²⁵⁰ In May 1960, the Anti-Discrimination Commission ordered the

243. *Id.* at 134 (noting that excavators, plasterers, and painters stopped working on a house when they learned it was being built for a Black family. The primary contractor on the house was reportedly threatened for being one of the few contractors willing to take the job).

244. *Id.* at 137.

245. See 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]. These practices occurred throughout the state. See *Learning from Colorado Springs’s Past and Mapping a More Equitable Future*, COLLECTIVE COLO. (Nov. 19, 2018), <https://collective.coloradotrust.org/stories/learning-from-colorado-springs-past-and-mapping-a-more-equitable-future> [https://perma.cc/WHB9-4MN9]; DAWN DI PRINCE, *Seeing Red: The Unethical Practice of Redlining in Pueblo*, HIST. COLO. (Jan. 29, 2019), <https://www.historycolorado.org/story/colorado-voices/2019/01/29/seeing-red-unethical-practice-redlining-pueblo> [https://perma.cc/Z9HU-WXQT].

246. Fair Housing Act of 1959, 1959 Colo. Sess. Laws. 489.

247. Colorado Anti-Discrimination Comm’n v. J.L. Case, 380 P.2d 34, 36 (Colo. 1962).

248. *Id.*

249. *Id.*

250. *Id.* at 37.

Company to sell the Rhones a “comparable home” in the same neighborhood and under the same terms and conditions.²⁵¹ J.L. Case and Company filed suit to challenge the constitutionality of Colorado’s Fair Housing Act,²⁵² and in 1962, the court upheld the broad enforcement authority of the Commission and the overall legality of the Colorado Fair Housing Act.²⁵³

The majority and dissenting opinions of the court highlight exactly the color(blind) conundrums in Colorado property law. As Justice Otto Moore’s majority opinion explicitly pointed out, all those opposed to Colorado’s Fair Housing Act relied heavily

on expressions such as ‘inalienable rights’, ‘fundamental rights’, ‘human right to own property’, ‘essential attribute of property’, ‘freedom of choice’ . . . the ‘right to dispose of one’s property’, to ‘freely alienate’ the same, the ‘freedom of choice in the sale of one’s property’ and ‘the exercise of choice that is inherent in property rights’ are absolute rights and freedoms.²⁵⁴

Or as Justice Moore more simply noted, supporters of the Company broadly “asserted that the ‘exercise of choice that is inherent in property rights must be left to the moral order for control rather than in the police power.’”²⁵⁵

At the center of these claims was the Colorado Constitution’s property guarantees, including the “essential and inalienable” right of “acquiring, possessing, and protecting property.”²⁵⁶ The conundrum, as Justice Moore described, could be succinctly described as this:

[T]he argument is that the unenumerated ‘natural right of property’ for which [J.L. Case and Company] contend, can be so exercised by them as to destroy the unenumerated natural right of the Negroes to seek and obtain safety and happiness

251. *Id.* at 38.

252. *Fair Housing Act Legality Challenged*, DENV. POST, July 12, 1960, at 15.

253. *Colorado Anti-Discrimination Comm’n*, 380 P.2d 34.

254. *Id.* at 39.

255. *Id.*

256. COLO. CONST. art. II, § 3. Article II, section 14 provides, “Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.” Article II, section 25 provides, “No person shall be deprived of life, liberty or property, without due process of law.”

and to acquire property unfettered by discriminations based on race and color.²⁵⁷

In resolving the “inalienable” rights of White property holders to discriminate and the “inalienable rights” of people of color to own real property, Justice Frantz’s concurrence highlighted Colorado’s special duty—as a territory forged in the crucible of the Civil War and as the first state to “seek and achieve statehood” after the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments—to use its broad powers to achieve racial equality.²⁵⁸ For Justice Frantz, it was clear that the Fair Housing Act’s prohibitions against racial discrimination in housing markets “is the latest chapter in the history of Colorado, dealing with race and color, commencing with the Civil War.”²⁵⁹

In dissent, Justice Hall argued that Colorado’s Fair Housing law effectuated a simple, unconstitutional transfer of private property from two contracting parties.²⁶⁰ Ignoring completely the discrimination that took place, the larger history of Colorado’s formation out of the Civil War, the court’s own repeated endorsements of racial restrictive covenants, and the more recent examples of race discrimination in housing markets, Justice Hall provided a more simple, colorblind understanding of the past:

For nearly two hundred years in these United States of America, one seeking to acquire property sought an owner wanting to sell, and *on complete agreement* between the parties a sale was consummated. The parties enjoyed complete freedom of contract. The buyer could refuse to buy for any reason; *the seller could refuse to sell for any reason, whimsical or otherwise.*²⁶¹

257. *Colorado Anti-Discrimination Comm’n*, 380 P.2d at 40.

258. *Id.* at 252–55 (Frantz, J., concurring). In recounting Colorado’s formation as a state in context of the larger civil war and its aftermath, it was obvious to Justice Frantz that “Colorado satisfied the requirements of the Enabling Act. It should be noted that some of these constitutional provisions are affirmative, others negative or prohibitory. But all state a policy against discrimination on account of race or color.” *Id.* at 255.

259. *Id.*

260. *Id.* at 257–62 (Hall, J., dissenting).

261. *Id.* at 257–58 (emphasis added).

Fearing that the majority's opinion upholding Colorado's Fair Housing Act and the broad authority given to the Anti-Discrimination Commission to enforce it, Justice Hall painted a dystopian picture. One that, according to him, "would compel Case to transfer his residential property to the Rhones, not voluntarily, but under compulsion, with sanctions that might lead to his imprisonment for failure to comply."²⁶² Ironically, Justice Hall seemed to be suggesting that the White, discriminating property holder was the true victim in this case. Indeed, making an argument that echoed the anti-civil rights movement libertarianism of the emerging conservative right,²⁶³ Justice Hall indicated that Fair Housing Act's attempt to undermine Colorado's color line might, in Justice Hall's own rendering, "be forerunners of a police state."²⁶⁴

In 1965, the Colorado legislature strengthened Colorado's Fair Housing Act. The law now included an antidiscrimination provision for all homes publicly offered for sale, lease, or rent, excluding rooms in single-family housing.²⁶⁵ The bill also provided job protection to real estate agents working in compliance with the law and made it a violation to refuse to show housing that was publicly offered.²⁶⁶ Nevertheless, as the J.L. and Company case subtly revealed, Colorado's colorblind lines had been over 200 years in the making. While important judicial and legislative gains had been made to challenge Colorado's color order, it would be very hard to redraw and thereby reimagine a more equitable geography of property in a state committed to keeping the color line fully intact.

B. *The Color of Politics*

To be sure, the color lines driving Colorado's real property regime were reinforced and made durable by a variety of activities, actions, and behavior on the part of state bureaucrats,

262. *Id.* at 258.

263. Kim Phillips-Fein, *Conservatism: A State of the Field*, 98 J. AM. HIST. (2011); Kathleen Blee & Kimberly A. Creasap, *Conservative and Rightwing Movements*, 36 ANN. REV. SOCIO. 269–86 (2010).

264. *Colorado Anti-Discrimination Comm'n*, 380 P.2d at 48 (Hall, J., dissenting).

265. COLO. REV. STAT. § 69-7-3(d) (1963) (amended 1965).

266. *Id.* See generally Morton Gitelman, *Fair Housing in Colorado*, 42 DENV. L. REV. 1 (1965) (detailing Colorado's Fair Housing Act and its changes from 1959–1965).

politicians, and other public officials. These “public” acts connected through the color line one’s own homeownership or real property tenure (like renting) to access to resources like parks and schools in one’s own neighborhood. One prominent example is seen in the access to public accommodations like restaurants, inns, and even parks and public pools. Though the Colorado legislature passed one of the nation’s first equal access to public accommodations laws in 1895,²⁶⁷ the law was largely symbolic as the State lacked a state agency to enforce violations.²⁶⁸

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.²⁶⁹ The city’s manager of improvements and parks enforced the policy that “provided for certain days for ‘white and other days for ‘colored’ people.”²⁷⁰ In 1932, Black and White residents clashed over attempts to desegregate the swimming pools.²⁷¹ As Black residents 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 blacks were pursued and beaten as nearly a thousand onlookers watched. The police arrested 17 people—

267. H.B. 175, 1895 Gen. Assemb., 10th Sess. (Colo. 1895). 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 . . .” 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.

268. JAMES A. ATKINS, HUMAN RELATIONS IN COLORADO: A HISTORICAL RECORD 113–14 (1968); see COLO. C.R. COMM’N, A TIME FOR CHANGE AND CHALLENGE 17 (1969).

269. See *State ex rel. McKinney v. Lowry*, 66 P.2d 334, 335 (Colo. 1937).

270. *Id.*

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

10 African Americans and 7 whites who had encouraged the blacks to assert their rights.²⁷²

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 be segregated, albeit in a form that recognized the complexity of the color line in the region.²⁷³ Indeed, by the end of World War II, Denver's public swimming pool included separate days for "Spanish" and "Japanese" as well as Black and White residents.²⁷⁴

White supremacy was embraced by many politicians in the state 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 KKK became, for a short period of time, the most powerful political force in Colorado in the 1920s. Building its power around anti-immigrant, anti-Semitic, and anti-Black sentiment, Colorado's governor, one of its federal senators, a majority of its state legislators, and many of its local officials were members of the Klan.²⁷⁵

One of the most open in his political alliance with the Klan was the mayor of Denver, Benjamin Stapleton. Stapleton was first elected as mayor in 1923 with the secret support of the Klan.²⁷⁶ A close friend of the Klan's leader, John Galen Locke, and holding Klan membership himself (No. 1,128), Stapleton named fellow Klansmen to posts as manager of safety, manager of revenue, manager of improvements and parks, city attorney, and justices of the peace.²⁷⁷ Stapleton was forced to openly avow his allegiance to the Klan in 1924 when he became embroiled in a fierce recall campaign.²⁷⁸ In a public speech only minutes away from the Jefferson County neighborhoods where many of the

272. LEONARD & NOEL, *supra* note 271, at 366.

273. See also Tom I. Romero, II, *The "Tri-Ethnic" Dilemma: Race, Equality, and the Fourteenth Amendment in the American West*, 13 *TEMPLE POL. & C.R. L. REV.* 817, 843 (2004).

274. MAYOR'S INTERIM SURV. COMM. ON HUM. RELS., *A REPORT OF MINORITIES IN DENVER* 67 (1947).

275. See KENNETH T. JACKSON, *THE KU KLUX KLAN IN THE CITY 1915-1930*, at 215-31 (1967); ROBERT ALAN GOLDBERG, *HOODED EMPIRE: THE KU KLUX KLAN IN COLORADO* 163-64 (1981); James H. Davis, *Colorado Under the Klan*, *COLO. MAG.*, Spring 1965, at 93.

276. GOLDBERG, *supra* note 275, at 29.

277. *Id.* at 30.

278. *Id.* at 29-30.

state's first racially restrictive covenants were drafted and enforced, Mayor Stapleton declared: "I have little to say, except that I will work with the Klan and for the Klan in the coming election, heart and soul. And if I am reelected, I shall give the Klan the kind of administration it wants."²⁷⁹ To reinforce his support of the Klan, Stapleton also named William Candlish as Denver's new chief of police even though Candlish had no qualification other than Klan membership.²⁸⁰ When it was clear that Stapleton would win the recall in a landslide, Denver's Klansman "signaled their victory with fiery crosses visible in Denver."²⁸¹ Klan power was not isolated to Denver or any particular regions of the state and support and membership for the KKK were widespread.²⁸²

Though the Klan takeover of Colorado government was short, White supremacist ideals continued to animate the behavior of the state's most powerful leaders. Another example occurred in the 1930s when Colorado's governor, Edwin "Big Ed" Johnson, exercised his power as "commander-in-chief" of the National Guard to declare martial law against all "Mexicans" coming to the state for work.²⁸³ Beginning in 1935, Governor Johnson launched a campaign to scapegoat Mexican immigrants for the impact of the Great Depression.²⁸⁴ Johnson called for the federal government to deport all undocumented labor, and to speed up the process, he proposed using his powers as "commander-in-chief" of the National Guard to deport undocumented labor if the federal authorities did not take action.²⁸⁵

279. *Id.* at 34. The speech took place at South Table Mountain park in Jefferson County. Not surprisingly, this county had some of the most prevalent real estate developments containing racially restrictive covenants and was the epicenter of the 1930s case confirming the preferences of White people to keep their neighborhoods racially segregated. *See supra* notes 218 and 221–227.

280. GOLDBERG, *supra* note 275, at 32–33.

281. *Id.* at 35.

282. 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*, HIST. COLO., <https://www.historycolorado.org/kkkledgers> [https://perma.cc/E7HW-NBX2].

283. 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 State Anti-Immigration Initiatives*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 63, 63 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

284. *Id.*

285. Frances Wayne, *Colorado Aliens Will Be Deported*, DENV. POST, Mar. 25, 1935, at 1.

Governor Johnson subsequently approved a plan to establish "concentration camps" for "all aliens in Colorado."²⁸⁶ Arguing that the plan was the only way to "meet the problems raised by the increasing horde of Mexicans coming into Colorado,"²⁸⁷ 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."²⁸⁸

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."²⁸⁹ 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."²⁹⁰

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.²⁹¹ 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.²⁹² The man assigned to "halt the influx of alien labor" to the state, Adj. Gen. Neil Kimball, was celebrated by one local paper for being from a "pioneer Colorado family."²⁹³

286. See *Urges Deporting of Aliens*, N.Y. TIMES, Mar. 27, 1935, at 7.

287. Frances Wayne, *Aliens on Relief to Be Put in Camp*, DENV. POST, Mar. 26, 1935, at 3; see also *That's That*, DENV. 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.").

288. *Party of Aliens from Texas Is Being Held in Trinidad After Governor Wires Sheriff*, CHRON.-NEWS (Trinidad, Colo.), May 7, 1935, at 1.

289. Letter from C.W. Thuringer to Edwin C. Johnson, Colo. Governor (Mar. 14, 1936) (on file with author).

290. Letter from C.W. Varnum to Edwin C. Johnson, Colo. Governor (Mar. 17, 1936) (on file with author).

291. *Proclamation Asks Citizens to Support Ban on Cheap Labor*, DENV. POST, Apr. 19, 1936, at 1.

292. See Fred S. Warren, *Martial Law Saves Jobs for Citizens*, DENV. POST, Apr. 19, 1936, at 1; Barron B. Beshoar, *Governor Declares Martial Law and Mobilizes National Guard on Southern Border to Check Aliens*, DENV. ROCKY MOUNTAIN NEWS, Apr. 19, 1936, at 1.

293. *Adj. General Neil Kimball is of Pioneer Colorado Family*, CHRON.-NEWS (Trinidad, Colo.), Apr. 21, 1936, at 1.

Many Coloradans 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.”²⁹⁴ Another Coloradan, writing in support of the military action, advocated that Johnson support legislation “to sterilize every Mexican on relief who has more than two children.”²⁹⁵ Even more inflammatory were the bright orange placards publicly posted throughout the state, “WARNING ALL MEXICAN AND ALL OTHER ALIENS TO LEAVE THE STATE OF COLORADO AT ONCE, By Order of: Colorado State VIGILANTIES [sic].”²⁹⁶

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.²⁹⁷ The Guard established Camp Johnson as its base of operations seventeen miles outside of Trinidad, as well as other support camps near Alamosa, Durango, and Cortez.²⁹⁸ 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.²⁹⁹ It organized daily sorties of the Guard’s 120th Air Squadron to patrol the southern half of the state.³⁰⁰ The Guard also exercised its authority far removed from the border by inspecting automobiles of suspected “invaders” hundreds of miles into the state.³⁰¹ Hundreds of “Mexicans,” many of whom were American citizens but without what the state deemed proper “credentials,” were turned back

294. Letter from Mr. and Mrs. Williams to Edwin C. Johnson, Colo. Governor (Apr. 20, 1936) (on file with author).

295. Letter from H.L. Robertson to Edwin C. Johnson (Colo. Governor) (Apr. 29, 1936) (on file with author).

296. COLORADO STATE VIGILANTIES, FLYER (on file with author).

297. David A. Sandoval, *Recruitment, Rejection, and Reaction: Colorado Chicanos in the Twentieth Century*, in ENDURING LEGACIES: ETHNIC HISTORIES AND CULTURES OF COLORADO 239, 245 (Arturo Aldama ed., 2011).

298. See *Colorado’s Southern Front Against Alien Entry*, DENV. POST, Apr. 19, 1936, at 3.

299. Sandoval, *supra* note 297, at 245–47; Jack Carberry, *Plane Watches for Alien Groups South of the Border*, DENV. POST, Apr. 21, 1936, at 1, 6 (noting close inspection of license plates and registration records).

300. *Loopholes in Alien Patrol*, ROCKY MOUNTAIN NEWS, Apr. 22, 1936, at 1; Fred S. Warren, *Gov. Johnson Calls Out Troops to Halt Influx of Alien Labor into Colorado*, DENV. POST, Apr. 19, 1936, at 3.

301. Sandoval, *supra* note 297, at 246.

and in some cases escorted by the Guard to the New Mexican border.³⁰²

C. *The Color of Public School*

One final example is seen in the efforts of public school administrators, school boards, and politicians to keep the state's public schools segregated. I and others have documented extensively the history of segregation in the Denver Public Schools (DPS) and the subsequent legal and political battles to integrate the schools beginning in the 1960s.³⁰³ Parts of that story as it relates specifically to real property ownership, neighborhood change, and the jurisdictional limits of transgressing the state's color boundaries bear repeating here.

Beginning in 1956, Black parents began to raise pointed questions about overcrowding, an aging physical plant, and persistent segregation occurring in DPS.³⁰⁴ Particularly as Denver's historically segregated Black community began to push beyond the color line into the city's northeast neighborhoods, they questioned how and why attendance boundaries were being drawn and utilized by the school district.³⁰⁵ In response, Peter

302. *Rigid Boundary Patrol Is Maintained by Troops*, CHRON.-NEWS (Trinidad, Colo.), Apr. 21, 1936, at 1; Glenn T. Neville, *Troops Plug Loopholes in Alien Patrol*, ROCKY MOUNTAIN NEWS, Apr. 22, 1936, at 1; See Glenn T. Neville, *Colorado Troops on Border Turn Back 70 Persons Who Have Neither Jobs nor Cash*, ROCKY MOUNTAIN NEWS, Apr. 21, 1936, at 1; Jack Carberry, *Governor Orders Troops Kept on Colorado Side of Border*, DENV. POST, Apr. 23, 1936, at 4 (noting the governor of New Mexico decried the impact of the ban on New Mexican American citizens); Charles T. O'Brien, *Colorado Rejects Touring Indigents*, N.Y. TIMES, Apr. 26, 1936, at E7.

303. See Tom I. Romero II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 73–74, 98 (2004) [hereinafter *Our Selma Is Here*]; 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 *How I Rode the Bus*].

304. *Our Selma is Here*, supra note 303; *How I Rode the Bus*, supra note 303; see also Frederick D. Watson, *Removing the Barricades From the Northern Schoolhouse Door: School Desegregation in Denver 26* (1993) (Ph.D. Dissertation, University of Colorado Boulder) (on file with Auraria Library, University of Colorado Denver).

305. The DPS Board in 1953 decided to fix the eastern boundary of the school's attendance area at York Street; a street separating the largely African American Five Points neighborhood from the increasingly integrated Clayton Park neighborhood. In turn, the DPS Board gave parents in Clayton Park the option of sending their children to the overcrowded, but predominately White East High

Holme, assistant superintendent of DPS, in January of 1956, made a proposal to change the “optional” and “mandatory” attendance zones for the high school and its respective feeder junior high school.³⁰⁶ At its core was a commitment to let students attend schools that were close to or in the same neighborhood where their families had real property interests. Though Holme and other DPS officials noted that attendance zone changes were necessary to address demographic changes happening in the district, Black parents and activists believed that the policy was designed to contain the movement of the Black community and keep its children in substandard and inferior schools.³⁰⁷

Inspired by the language and spirit of *Brown v. Board of Education* and a recent visit to the city by Dr. Martin Luther King, Jr., Denver parents threatened to sue the DPS Board and its administration for unconstitutionally maintaining two separate and unequal schools.³⁰⁸ There was a sense, still not fully articulated, that the school district’s commitment to neighborhood schools and its redrawing of attendance boundaries merely obscured the fact that the neighborhoods, and thereby their schools, had been deliberately segregated for decades. Though that historic color line was beginning to break down, the new attendance boundary policy being applied by the district was achieving segregation by a potentially more insidious and colorblind means. In contrast to cases like *Brown*, discriminatory animus on the part of the DPS Board and its administration was hard to define. As NAACP lawyer Sam Menin noted, “This is a subtle type of discrimination that is difficult to put your finger on, but we know it exists.”³⁰⁹ For this reason, no lawsuit was filed at the time.

The DPS policies through the first half of the 1960s confirmed the worst fears of parents of color that school district policies were maximizing both residential and educational segregation. In 1959, for example, DPS proposed constructing a new elementary school to relieve overcrowding at Columbine

School of Clayton Park or to the under capacity, but predominantly minority Manual. At this time, “East High School was over capacity by about five hundred students, while Manual was under capacity by about six hundred students.” Watson, *supra* note 304, at 14.

306. *Id.* at 15.

307. *Id.*

308. *Id.* at 1.

309. *ACLU Holds Off on Race Suit*, DENV. POST, Oct. 30, 1956, at 15.

Elementary School. The DPS Board decided to build the proposed school, Barrett Elementary, on the west side of Colorado Boulevard, a busy four-lane highway that also served as the residential dividing line between Black and White neighborhoods.³¹⁰ Although there were predominantly White schools whose attendance crossed busy streets, the Board—in the name of safety—set the attendance boundary at Colorado Boulevard. Black parents and community activists believed that such actions were done to deliberately segregate Black students in inferior schools.³¹¹

A few years later, the DPS Board proposed relieving overcrowding at the predominantly Black Cole Junior High School by building a new junior high on the western corner of Thirty-Second Avenue and Colorado Boulevard.³¹² Despite a DPS report that indicated that Gove and Smiley Junior High Schools in predominately White Park Hill were operating under capacity, the Board—against the pleas of many Black parents—proposed to again set the attendance boundaries for the new school at Colorado Boulevard. Vocal protest on the part of several Black and White parents and activists, however, led the Board to shelve the proposal until it could “study” the situation.³¹³

In addition, the DPS Board proposed to relieve additional overcrowding at Cole by shifting Black students from Cole to Morey Junior High. Morey, a predominately White school, was “76 percent under capacity.”³¹⁴ Objections by the Morey parents, however, led the Board to extend its “optional” area to Morey students so they could attend the all-White Byers Junior High. As a result, White student “enrollment at Morey Junior High declined by 49%.” In one letter, one Park Hill resident expressed his fear that with the “busing of approximately 500 or more pupils in from the underprivileged sections of Five Points . . . we will eventually become a completely segregated district.”³¹⁵

The DPS Board, however, repeatedly asserted that the racial identity of Denver students played no part in its

310. GEORGE E. BARDWELL, PARK HILL AREAS OF DENVER 1950–1966, at 6 (1966).

311. Watson, *supra* note 304, at 30–32.

312. *Id.* at 41–43.

313. *Id.*

314. *Id.* at 49–51.

315. Letter from Mrs. Lester Friedman to Jackson Fuller, Denver Bd. of Educ. Member (Nov. 19, 1963) (on file with Penrose Library, University of Denver).

decisions.³¹⁶ Instead, DPS administrators and officials argued that a school's student body should be strictly anchored to the neighborhoods of which they were a part, ignoring altogether systemic and institutional practices that kept its neighborhoods segregated. According to one Board member: "We don't keep track by race. We put schools where the children are If we have ghetto schools it's because we have ghettos."³¹⁷ In a remarkable expression of colorblindness, the member went on to conclude: "The basic answer to this problem is the dispersion of the Negro population [T]he School Board is not responsible for neighborhood housing patterns, you are."³¹⁸ Continued pressure created some attempts in the early 1960s to integrate the schools after a Special Study Committee on Equality of Education Opportunity in 1962³¹⁹ found that the Board's actions exacerbated and possibly contributed to segregation.³²⁰ In response to the Committee's report, DPS adopted some changes, such as open enrollment, but not a repudiation of the neighborhood school concept.³²¹

In spite of such actions, however, the DPS Board and its administration continued practices that kept the district's Black and Mexican American students concentrated in certain schools. While DPS bused White students in the city and the school district's newly annexed areas in southeast and southwest Denver to alleviate school overcrowding, the administration utilized mobile and temporary classroom units to respond to overcrowding in predominately Black and Mexican American

316. Watson, *supra* note 304, at 42–43.

317. *Id.*

318. *Id.*

319. *Id.* at 51.

320. *Id.* at 51–52.

321. Shortly after the Committee submitted its findings, the DPS Board and Administration drafted Policy 5100, offered open enrollment for the 1964–1965 academic year at twenty-nine (out of 117) schools, eliminated optional areas, instituted compensatory education programs, and began to keep statistics on the number of "Anglo," "Negro," "Spanish American," "Oriental," and "Indian" students in their schools. *See id.* at 52–53.

schools.³²² In such schools, parents and activists derogatorily referred to these units as “Oberholtzer Wagons.”³²³

To many, it was becoming clear that DPS needed to respond more actively to the concentration of Black and Mexican American students.³²⁴ The choices, however, were not popular. As one news article declared, DPS could educate students in “segregated classrooms” or it could achieve “racial balance” by busing.³²⁵ The article emphasized that busing was “repugnant” to many Denver parents, especially the city’s White parents.³²⁶ Failure to achieve racial balance in the city’s schools, however, led parents of color to demonstrate at school board meetings and to again threaten a lawsuit against the school district.³²⁷ The DPS Board, “caught between two strong arguments . . . favored study rather than action. They wanted to put the whole question into the hands of a committee to be composed in large part of minority groups persons.”³²⁸

In order to appease both sides, DPS in 1966 ordered limited busing for a few select schools and commissioned another committee to study the feasibility of maintaining neighborhood schools in the face of widespread residential segregation.³²⁹ The new committee, the Advisory Council on Equality of Educational Opportunity, comprised of over thirty citizens selected from all facets of the Denver community³³⁰ and made several

322. DENVER PUB. SCHS., REPORT AND RECOMMENDATIONS TO THE BOARD app.9 (1964); DENVER PUB. SCHS., FINAL REPORT AND RECOMMENDATIONS TO THE BOARD 10 (1967) [hereinafter DPS 1967]; Watson, *supra* note 304, at 55. DPS officials argued that busing was used only in schools and areas where overcrowding was seen as temporary. In areas where overcrowding was seen as permanent, however, DPS officials sought to use temporary mobile units, build additions to schools, or build a new school. Jack Gaske, *School Concept Faces Acid Test*, ROCKY MOUNTAIN NEWS (Denver), Dec. 21, 1965, at 86. Such actions, however, only exacerbated the racial divide when DPS officials found that of the twenty-nine mobile units in use in the entire DPS system, twenty-eight were at schools with substantial “Negro” and “Spanish-surnamed” populations. DPS 1967, *supra* note 322, at 10.

323. Watson, *supra* note 304, at 55.

324. *Id.* at 70–76; Jack Gaske, *Who’s in School: Minority, Majority Ratio Growing Stronger*, ROCKY MOUNTAIN NEWS (Denver), Mar. 14, 1966, at 6–7.

325. Greg Phinney, *Park Hill’s Racial Schools Problem Stymies Officials*, DENV. POST, Jan. 19, 1966, at 88.

326. *Id.*

327. Watson, *supra* note 304, at 69–75.

328. Gaske, *supra* note 322, at 86.

329. Greg Pinney, *Study of Segregation Bus Plan Improved*, DENV. POST, Jan. 21, 1966, at 1, 26; Watson, *supra* note 304, at 72–75.

330. Watson, *supra* note 304, at 76.

recommendations “to evolve feasible methods of achieving integration and quality education without violating fundamental legal and constitutional doctrines.”³³¹ Consequently, the Council recommended voluntary busing, intensive compensatory education in Black and Mexican American schools, the creation of an “educational park” in a neighborhood straddling one Black and one White community, and the establishment of a Cultural Arts Center where all students (one half-day a week) would learn “the cultural contributions by various ethnic components of our region, including European, Negro, Hispanic, American Indian of the Southwest and Plains regions, [and] other ethnic groups.”³³²

Council member Stephen Knight in a “Minority Report” to the larger council’s recommendations made a scathing critique of the Council’s recommendations.³³³ In so doing, Knight made evident the prerogative of White real-property holders to live in segregated communities. The Minority Report unashamedly declared that by implementing the recommendations, Denver’s public schools would be used as an “instrument of forced integration.”³³⁴ In promoting policies designed to meet the needs of students of color, Knight argued that the School Board paid insufficient attention to the White families who, at “*a personal sacrifice*,” moved into areas on the basis of neighborhood schools.³³⁵ The Minority Report accordingly warned that if the neighborhood school concept was undermined through the adoption of the Council’s recommendations, “mainly white, middle-income” Denverites would leave the city and be replaced by the “in-migration of low-skill, low-income, multi-problem families.”³³⁶

In November 1967, Denver citizens voted on a bond issue to implement the Council’s recommendations.³³⁷ For the first time since 1938, Denverites by a margin of three to one failed to endorse a school bond issue.³³⁸ Despite the setback in the bond

331. *Id.* at 35.

332. *Id.* at 39.

333. DPS 1967, *supra* note 322, at 181. Though the report called for incremental and mostly voluntary change, it was nevertheless harshly criticized by many. *Id.* at 78–82.

334. *Id.* at 181.

335. *Id.* at 184 (emphasis added).

336. *Id.*

337. Watson, *supra* note 304, at 82.

338. *Id.* at 82.

vote, on April 25, 1968, nearly three weeks after Dr. Martin Luther King, Jr. had been assassinated, two DPS Board members, Rachel Noel and A. Edgar Benton, introduced Resolution 1490 to the Board to respond to the reality that the “continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups.”³³⁹ The resolution required the DPS superintendent to prepare a comprehensive integration plan for the DPS system by September 1968.³⁴⁰

After a month of acrimonious debate, the DPS Board, by a margin of five to two, voted to adopt the resolution. The Board then asked DPS’s new superintendent, Dr. Robert Gilberts, to devise a plan to implement the Board’s integration policy.³⁴¹ Stephen Knight again voiced his opposition to integration.³⁴² According to Knight, the DPS Board had been overly influenced by the “pressures of a small group of misdirected people” and its actions were “contrary to the wishes” of Denver’s White majority.³⁴³ Despite vocal and strident opposition, Superintendent Gilberts’s desegregation plan was enacted as series of resolutions between January and April of 1969.³⁴⁴

The backlash to this effort was immediate. In the spring of 1969, lawyer James Perrill and former state senator and realtor Frank Southworth campaigned for two open seats on the DPS Board.³⁴⁵ Promising to repeal the integration resolutions if they were elected, Perrill and Southworth exclusively campaigned on the premise that Denver’s schools should not attempt to correct “all of the social ills of the society.”³⁴⁶ One national observer commented on the “creative redundancy” of Perrill and Southworth’s message: “In their public appearances, Perrill and Southworth . . . mentioned crosstown busing, massive busing,

339. *Id.* at 94.

340. *Id.*

341. Charles Carter, *Integration Ordered: School Board Avoids Bus Issue*, DENV. POST, May 17, 1968, at 1,4; *see also Negro Teacher Group Plans School Boycott*, DENV. POST, May 13, 1968; *Busing Should Be Voluntary*, UNIV. PARK NEWS-CHERRY CREEK NEWS (Denver), May 9, 1968.

342. Watson, *supra* note 304, at 100.

343. *Id.*

344. The School Board Actions, known as Resolution 1520, 1524, and 1531, and enacted by the Board respectively on January 30, 1969, March 20, 1969, and April 24, 1969, targeted specifically those schools in east and northeast Denver with large “African American” communities. *See id.* at 107–08.

345. Calvin Trillin, *Doing the Right Thing Isn’t Always Easy*, NEW YORKER, May 23, 1969, at 85.

346. *Id.*

and massive crosstown busing. By the end of the campaign, Southworth was talking about ‘forced mandatory crosstown busing on a massive scale.’”³⁴⁷

The strategy worked. In May of 1969, Perrill and Southworth “won in a landslide” victory.³⁴⁸ Reflecting the city’s, as well as the state’s, decades-long efforts to segregate private as well as public property, Perrill and Southworth’s opponents “lost soundly in the [White] sections of the city. They even lost the white areas that would not have been touched by the busing plan.”³⁴⁹ Consequently, Perrill and Southworth spearheaded the rescission of the integration resolutions at the meeting of the new Board on June 9, 1969.³⁵⁰ Ten days later, on June 19, 1969, a group of Black, Latinx, and White parents and their children filed suit against the DPS Board and its Administration in the United States District Court, District of Colorado for maintaining a policy of intentional segregation.³⁵¹

Four years later, the DPS District became the first non-southern school district ordered to desegregate by the U.S. Supreme Court.³⁵² As with the Noel bussing resolutions in 1969, the backlash to the Supreme Court decision was swift. In 1974, Colorado voters amended the state constitution. One amendment actually prohibited busing as a means of achieving the goal of racial integration.³⁵³ That amendment, however, did not apply to DPS because it was under a court order. Accordingly, Colorado voters also changed its state constitution

347. *Id.*

348. Watson, *supra* note 304, at 111.

349. *Id.*

350. *Id.*

351. *Keyes v. Sch. Dist. No. 1*, 313 F. Supp. 61, 63 (D. Colo. 1970). *See generally* DANIELLE OLDEN, *RACIAL UNCERTAINTIES: MEXICAN AMERICANS, SCHOOL DESEGREGATION, AND THE MAKING OF RACE IN POST-CIVIL RIGHTS AMERICA* (2022) (exploring contests over color lines and the ways that tropes employed by some Mexican Americans in opposing school integration reinforced the strength of “colorblindness” in the 1970s battles against civil rights).

352. *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.”).

353. COLO. CONST. art. IX, § 8 (1974) (adding that “nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance”).

to greatly limit the ability of the city and county of Denver and, by implication, DPS to grow through annexation.³⁵⁴

As legal efforts to compel school districts were successful into the early 1970s, the ability of school districts to maximize their integration efforts through land use policies like annexation were being explored all throughout the United States.³⁵⁵ The policy was simple—if neighborhoods and cities were residentially segregated as non-White, integration could only be effectively achieved by annexing White areas beyond the current jurisdictional boundaries.

Colorado's version of this effort was codified in the Colorado Constitution in 1974 in what came to be known as the Poundstone Amendment.³⁵⁶ Because most of those lands subject to annexation were largely White, 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.³⁵⁷ One editorial written shortly after the changes to the Colorado constitution lamented, on a yearly basis, rigid distinctions between White, Chicano, and Black students:

It is, I think, right to suppose that the primary reason for the easy passage of the Poundstone Amendment was the suburbs' fear of busing. If, in other words, there is to be a ghetto, and busing is to relieve the pressures and injustice of the ghetto, let it all be within the City and County—and school district—of Denver.³⁵⁸

354. 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).

355. *How I Rode the Bus*, *supra* note 303, at 1045–46; Tom I. Romero, II, Kelo, Parents and the Spatialization of Color (blindness) in the Berman-Brown Metropolitan Heterotopia, 2008 UTAH L. REV. 947, 974–79.

356. 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 (1974).

357. James & Gerboth, *supra* note 354, at 163 (providing a comprehensive analysis of the impact on these state constitutional changes).

358. *Id.* at 173 n.87 (quoting John Bromley, Editorial, DENV. POST, 1974). James and Gerboth's study noted that Freda Poundstone, the author of the

According to one later study, the Amendment allowed

Colorado voters permanently [to] split Denver from its suburbs in the 1974 election. Suburbanites decided that remaining separate from the city would permit them to maintain *racially* and economically segregated communities and schools, and to thereby evade the social and economic problems of the central city.³⁵⁹

Ultimately, the prerogatives of real property owners to create and maintain racially homogenous neighborhoods and the very public acts of politicians, jurists, and citizens to openly advocate and be rewarded for anti-Black, anti-immigrant, and anti-integration positions became an enduring feature of both the physical and political landscape of Colorado. Yet, Coloradans continued to remain adamantly committed to colorblindness that perpetuated policies and practices and celebrated those who openly committed to practicing White supremacy.

Symbolic of this connection is a series of seemingly unconnected events that occurred in the state at the same time that efforts to integrate the state's public schools effectively locked in the color lines of Denver's neighborhoods that had been decades in the making. On March 8, 1973, the westbound bore of what eventually came to be known as the Eisenhower Memorial Tunnel was completed.³⁶⁰ The tunnel was an unprecedented feat of modern engineering and former Colorado governor and then U.S. senator Edwin Johnson was pivotal in getting the funding for the tunnel's completion and for extending the I-70 interstate system west from Denver, across the continental divide, to I-15 near Cove Fort, Utah.³⁶¹ For this reason, the eastbound bore of the tunnel, completed on December 21, 1979, was named to memorialize Senator Johnson.³⁶²

amendment, "intentionally stoked suburban fears by raising the specter of court-ordered busing on a metropolitan scale." *Id.* at 158.

359. *Id.* at 163 (emphasis added).

360. *About the Eisenhower Tunnel*, COLO. DEP'T TRANSP., <https://www.codot.gov/travel/eisenhower-tunnel/description.html> [<https://perma.cc/UU3G-FC32>].

361. WILLIAM PHILPOTT, *VACATIONLAND: TOURISM AND ENVIRONMENT IN THE COLORADO HIGH COUNTRY* (William Cronan ed., 2013).

362. *Edwin C. Johnson Memorial Bore*, COLO. DEP'T TRANSP., <https://www.codot.gov/travel/eisenhower-tunnel/edwin-c-johnson-memorial-bore.html> [<https://perma.cc/P64M-43VK>].

Due to the role that the interstate highway system played in destabilizing non-White homeownership, and in the process redrawing and reconstituting non-White neighborhoods throughout the United States,³⁶³ this tunnel, sitting approximately sixty miles from Denver and cutting at over 11,000 feet through the continental divide, symbolizes the state's color(blind) conundrum.

Before he fought for the I-70 tunnel, Governor Johnson, as we recall, had a war against "Mexicans" that has largely become forgotten. A "homesteader" himself,³⁶⁴ Johnson's story and actions as a lawmaker fully encapsulate the promise of colorblindness seemingly embedded in the formation and settlement of the state and the repeated reality of color consciousness based on White supremacy. From racially restrictive covenants to state constitutional amendments, property owners and real estate developers to the police, jurists, 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 colorblind and its legacies resonate deeply to the present day.

IV. CONUNDRUMS AND CONSCIOUSNESS

"Why does Denver still honor a former KKK leader with a neighborhood?"

– *Tay Anderson*³⁶⁵

In 1995, Denver embarked upon one of the largest infill projects in the history of the United States when it began to redevelop the 4,700 acres of the vacant Stapleton International Airport. The airport, which had officially been named for

363. The literature in this area is vast. For representative work on Colorado, see OWEN D. GUTFREUND, *TWENTIETH-CENTURY SPRAWL: HIGHWAYS AND THE RESHAPING OF THE AMERICAN LANDSCAPE passim* (2004).

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

365. Conor McCormick-Cavanagh, *A Hundred Years of History Behind Stapleton Name Change Vote*, WESTWORD, <https://www.westword.com/news/stapleton-neighborhood-will-vote-on-new-name-11725869> [<https://perma.cc/2XYJ-FGW9>] (June 17, 2020, 1:45 PM).

Denver's former mayor, Benjamin Stapleton, closed in 1995 when the city and county opened Denver International Airport in the northeast part of the Denver metropolitan area. Early in his tenure as mayor in the 1920s, Stapleton came to the conclusion that Denver needed to build a municipal airport that would enhance the city's economic growth both regionally and nationally.³⁶⁶ In what ultimately would come to be called the "Union Station of the Air," the city built the Denver Municipal Airport six miles to the northeast of downtown Denver on property that supported small dairy farming, cattle grazing, and was bifurcated by the "meandering Sand Creek."³⁶⁷

In 1944, the airport was renamed Stapleton Airfield to honor the mayor's early support and vision around aviation, and, in 1964, it was renamed Stapleton International Airport as a result of its spectacular growth as an international aviation hub.³⁶⁸ The continued use of the Stapleton name in its "rebranding" according to the historian William Wei was no doubt "a reaction to the civil-rights movement that was occurring at that time, during the mid-1960s They came up with this way of honoring him and were implicitly opposing the efforts of civil rights."³⁶⁹ Indeed, it was not lost on many that the epicenter of the state's efforts to integrate its schools and neighborhoods (as we saw in the brief overview of the issues of the Keyes litigation) was taking place in the Park Hill neighborhood that was adjacent to the airport's western boundaries.³⁷⁰ The airport, as well, sat at the center of major military and industrial sites, the Rocky Mountain Arsenal and the Suncor gas refineries to its north and the Lowry Air Force Base to its south, that only served to exacerbate long-standing

366. Christopher Yake, *Principles, Partners, and Process: The Redevelopment of Stapleton International Airport 2–4* (2003) (Master's thesis, University of North Carolina at Chapel Hill) (on file with author).

367. *Id.* at 4.

368. Jack Seward, *History*, CENT. PARK UNITED NEIGHBORS, <https://www.centralparkunitedneighbors.com/history> [<https://perma.cc/2ENG-TKEC>].

369. McCormick-Cavanagh, *supra* note 365.

370. See Sam Tabachnik, *The Future of Stapleton: How a Neighborhood Changes Its Name*, DENV. POST, <https://www.denverpost.com/2020/06/20/stapleton-neighborhood-name-change> [<https://perma.cc/3JYN-FVLR>] (June 23, 2020, 3:17 PM); *Park Hill Neighborhood History*, DENV. PUB. LIBR., <https://history.denverlibrary.org/park-hill-neighborhood-history> [<https://perma.cc/P4YX-HR36>].

inequities posed by air and water contamination caused by these heavy polluters.³⁷¹

The redevelopment of the airport and the property and larger land-use decisions to be made, accordingly, represented an unprecedented opportunity to “respond to the significant social and demographic changes” and to “create diverse, successful urban communities.”³⁷² According to the vision, “a strong commitment to honor diversity and to ensure broad-based participation of minorities and women . . . is fundamental to the redevelopment program.”³⁷³ In so doing, the vision indicated that the redevelopment would be a “pioneer” in meeting, among other goals, community and social needs.³⁷⁴

While the redevelopment plan was no doubt visionary and a model of many of the best practices of new urbanism emerging in the land use and planning field,³⁷⁵ its continued use of the Stapleton name tacitly endorsed the long-standing practices of settler-colonialism and White supremacy in the state’s property regime. Of note, many of those involved in the envisioning for the new redevelopment did not, at least publicly, even consider renaming the site.³⁷⁶ Accordingly, “from the first sale of land” from the city to the property developer, the property was legally named Stapleton.³⁷⁷ “From that point on, the name Stapleton

371. Tom I. Romero II, *The Color of Local Government: Observations of a Brown Buffalo on Racial Impact Statements in the Movement for Water Justice*, 25 CUNY. L. REV. 241, 273, 278 (2022) [hereinafter *Observations on Racial Impact Statements*].

372. STAPLETON REDEVELOPMENT FOUNDATION, STAPLETON DEVELOPMENT PLAN 1–3 (Forest City Development 1999) (1995).

373. *Id.* at 2–5.

374. *Id.*

375. See Brian Shea, *The Stapleton Redevelopment Plan and Three Master Plans*, CONG. NEW URBANISM VI, at 1 (1998), <https://www.cnu.org/sites/default/files/Shea.pdf> [https://perma.cc/W4DX-FJCL]; Harriet Baskas, *Defunct Airports Take Flight with Creative New Uses*, USA TODAY, <https://www.usatoday.com/story/travel/flights/2017/11/30/defunct-airports-take-flight-creative-new-uses/906433001> [https://perma.cc/8U3M-5GGH] (Dec. 4, 2017, 3:58 PM) (Aerotropolis author John Karsada calls it “the most successful repurposing of a former major commercial airport I have observed anywhere in the world”); Yake, *supra* note 366, at 1.

376. McCormick-Cavanagh, *supra* note 365 (“Wellington Webb, Denver’s mayor at the time and the city’s first black mayor, says that transitioning the name of the airport to the name of the neighborhood was ‘the road of least resistance, the road that made sense, historically, at the time.’ He recalls ‘no conversation’ about whether the Stapleton name was appropriate. ‘It never came up,’ says Webb.”).

377. Carol Roberts, *Discussion About Stapleton Name Continues*, FRONT PORCH (Oct. 1, 2017), <https://frontporchne.com/article/discussion-stapleton-name-continues> [https://perma.cc/NN5Q-7NKT].

has been tied to all zoning documents with the city. All the deeds, title documents and mortgages contain the word Stapleton in the legal property descriptions.”³⁷⁸

Perhaps it should not be a surprise that the community that would emerge is “very white, very young and very wealthy” despite its original vision to be a model of diversity and inclusion.³⁷⁹ Nevertheless, when longtime residents, many who had been deeply involved and committed to the redevelopment, began to openly call for a renaming of the neighborhood because of Stapleton’s affiliation with the KKK,³⁸⁰ many residents fiercely clung to the Stapleton brand.³⁸¹ One referendum to change the name was led by the neighborhood’s Master Community Association (MCA) in 2019.³⁸² Empowered by covenants in the title deeds of all property owners living in the redevelopment, the MCA initiated a vote which required two-thirds of those same property owners to change the name in all property and other public documents.³⁸³

In the public forums leading to the vote, Stapleton as a “brand” and a larger piece of intellectual property was something that many people wanted to retain.³⁸⁴ The MCA itself took the position that should the referendum pass, property owners collectively through the MCA would be liable for \$300,000 to legally change the name.³⁸⁵ In the 2019 vote of property holders—the vast majority of whom were White—65

378. *Id.*

379. John Fernandez, *Stapleton Demographics Are “Not Average”*, FRONT PORCH (July 1, 2016), <https://frontporchne.com/article/stapleton-demographics-not-average> [<https://perma.cc/G86X-5NJV>].

380. *Who We Are*, RENAME ST*PLETON FOR ALL, <http://renameforall.com> [<https://perma.cc/NCW8-7T84>].

381. McCormick-Cavanagh, *supra* note 365. Not all residents wanted to keep the name and some businesses even changed their name once they learned of Stapleton’s connections to the KKK. Grace Carson, *Rename Stapleton? Backers Say It’s Time to Dump ‘Symbol of Hate’*, COLO. INDEP. (Aug. 19, 2019), <https://www.coloradoindependent.com/2019/08/19/rename-stapleton-racism-ben-stapleton> [<https://perma.cc/AKA5-JQBH>]; Carol Roberts, *The Stapleton Name: What’s Next? And What Are People Saying?*, FRONT PORCH (Jan. 1, 2018), <https://frontporchne.com/article/stapleton-name-whats-next-people-saying> [<https://perma.cc/TKN7-52T2>].

382. Michael Roberts, *Stapleton Residents Vote to Keep Name Despite KKK Ties*, WESTWORD (Aug. 20, 2019, 7:04 AM), <https://www.westword.com/news/stapleton-name-change-results-and-kkk-ties-11453542> [<https://perma.cc/2R7L-32PZ>].

383. *Id.*

384. Roberts, *supra* note 377.

385. Carson, *supra* note 381.

percent were in favor of retaining Stapleton as the name for the neighborhood.³⁸⁶

Yet less than a year later and in direct response to the larger racial justice movements roiling Denver and the rest of the world in the summer of 2020, the Stapleton brand had become toxic and irreconcilable.³⁸⁷ MCA “delegates voted to get rid of the Stapleton name, removing it from all ‘branding, marketing and community outreach materials, including signage’ and also removing any references to Stapleton as the community’s name in governing documents.”³⁸⁸ Subsequently, and perhaps a perfect illustration of the state’s still on-going color(blind) conundrums, residents overwhelmingly voted to rename the redevelopment the generic “Central Park,” even though names that would have honored and recognized local Black and Latinx “pioneers” and leaders were available but subsequently not endorsed by the majority of the White property holders.³⁸⁹

The battle over the naming of the redevelopment of the former international airport in Colorado highlights both the legacy and ongoing efforts to deal forthrightly with settler-colonialism and White supremacy in the state. The story directly connects real property ownership, the economic and personal investments Coloradans make in corporeal and incorporeal representations of its neighborhoods, parks, schools, and the continued salience of the color line, despite the “myths” of colorblindness that racism plays little to no part in ongoing patterns and practices of racial segregation.³⁹⁰

386. Roberts, *supra* note 382.

387. McCormick-Cavanagh, *supra* note 365.

388. *Id.*; see also Sean Keeler, *Denver’s Stapleton Neighborhood Moves to Change Name: “We’re Doing the Right Thing”*, DENV. POST (June 14, 2020, 9:24 PM), <https://www.denverpost.com/2020/06/14/denver-stapleton-neighborhood-name-change-move> [https://perma.cc/EV52-XQ3D]; Esteban L. Hernandez, *Stapleton’s New Neighborhood Comes Down to Two Choices: Central Park or Skyview*, DENVERITE (July 27, 2020, 1:36 PM), <https://denverite.com/2020/07/27/stapletons-new-neighborhood-name-comes-down-to-two-choices-central-park-or-skyview> [https://perma.cc/U38D-FMDV]; Esteban L. Hernandez, *Stapleton Group Will Start to Narrow Down New Neighborhood Name Suggestions After Getting More than 300 Suggestions*, DENVERITE (July 6, 2020, 5:15 PM), <https://denverite.com/2020/07/06/stapleton-group-will-start-to-narrow-down-new-neighborhood-name-suggestions-after-getting-more-than-300-suggestions> [https://perma.cc/KB5U-FLLG].

389. Conrad Swanson, *So Long Stapleton, Hello Central Park: Denver City Council Cements Neighborhood Name Change*, DENV. POST (May 18, 2021, 9:02 AM), <https://www.denverpost.com/2021/05/17/denver-rename-stapleton-central-park-neighborhood> [https://perma.cc/ES7P-C2N9].

390. See *How I Rode the Bus*, *supra* note 303, at 1045–46.

What follows in this final concluding Part are brief snapshots into the ongoing challenge of the color line and the consequence of segregation in Colorado's property regime. As the first Section of this Part 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.³⁹¹ The result is a Colorado that continues to be racially segregated with devastating consequences. Next, this Part addresses the persisting challenges posed by racial segregation, related gentrification, and some legal and legislative efforts to be color conscious moving forward.

A. *The Legacy of Conquest and Color*

In 2021, researchers at the University of California, Berkeley released a powerful analysis examining the persistence of racial residential segregation in the United States.³⁹² Focusing on cities or metropolitan regions with over 200,000 people, it found most of the country, including Colorado and its major metropolitan regions, are segregated, even more so than they had been in 1990.³⁹³ Of surprise to many in Colorado were the report's findings that Colorado Springs, along with St. Lucia, Florida were the only cities or metropolitan regions that could be categorized as integrated.³⁹⁴ The researchers surmised, however, that the reason for this result was the presence of large scale military facilities in the region which serves as a

391. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 177–93 (2019).

392. See Stephen Menendian et al., *The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*, OTHERING & BELONGING INST. (June 30, 2021), <https://belonging.berkeley.edu/roots-structural-racism> [https://perma.cc/SKM3-NF7A].

393. *Most to Least Segregated Metro Regions in 2020*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/most-least-segregated-metro-regions-2020> [https://perma.cc/GU4X-3A4L]; *Most to Least Segregated Cities in 2020*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/most-least-segregated-cities-in-2020> [https://perma.cc/P3GR-DR38].

394. Jenny McCoy, *Study on Racial Residential Segregation Finds Contrasts Between Denver and Colorado Springs*, COLO. NEWSLINE (Aug. 16, 2021, 5:00 AM), <https://coloradonewsline.com/2021/08/16/study-on-racial-residential-segregation-finds-contrasts-between-denver-and-colorado-springs> [https://perma.cc/K3UP-P3W6].

“deliberate force” to create integration.³⁹⁵ Yet, as those in Colorado Springs were quick to point out, its ranking did not “necessarily reflect the lived experiences of people on the ground” as a variety of real property policies and practices “the city [and private actors] has employed throughout its history, including single-family zoning laws, redlining and industrial zoning in low-income areas,” made the history of racial segregation a still ongoing reality.³⁹⁶

The 1962 words of the Colorado State Advisory Committee about Colorado Springs to the United States Commission on Civil Rights echoes just as forcefully today:

[Colorado Springs'] situation requires special comment and attention, for in Colorado Springs more than in any other area of Colorado, discrimination runs throughout the broad spectrum of everyday living. It is not legally protected segregation, which one can anticipate and avoid, but sporadic and spasmodic discrimination which infects daily living with uncertainty and anxiety for [Black] Americans who are sent there while serving our country.³⁹⁷

To be sure, a recently filed voting rights case alleging racial discrimination in the city's municipal electoral process suggests some of the consequences of the color line, where over 80 percent of the city's elected representatives or those appointed to local government boards and commissions are White.³⁹⁸

395. Adam Harris, *The Only Thing Integrating America*, ATLANTIC (July 2, 2021), <https://www.theatlantic.com/politics/archive/2021/07/federal-intervention-still-only-thing-integrating-america/619329> [https://perma.cc/AVG4-BJAP].

396. McCoy, *supra* note 394.

397. COLO. ADVISORY COMM., REPORT TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS 3–5 (1963). The Committee also noted the distinct housing and other discrimination that Black servicemen stationed in Colorado Springs experienced. Telling is one of the Black airmen stationed at Fort Carson: “[A]ll his Caucasian friends had found adequate places to live within a reasonably short time, while he looked for a month but could find nothing. Frequently, rental and real estate agents told him of available housing when he telephoned them. When he subsequently appeared, however, and the landlord saw that he was colored, he was invariably told that the house had suddenly been rented.” Because he and his pregnant wife had spent a month in hotels while finding a place to live, the airman used his GI Bill right to purchase a house. “After the airman became a land owner, he was subjected to further embarrassment when his immediate neighbor erected a 16-foot fence, made out of discolored boards along the line dividing the two properties.” *Id.* at 5.

398. Abigail Beckman, *Lawsuit Calls on Colorado Springs to Move April Elections to November to Address Racial Disparities*, KRCC (June 6, 2022, 3:54 PM),

Accordingly, the property color line is central to understanding the legacy of structural racism in the state and beyond. One recent study noted:

It is residential segregation, by sorting people into particular neighborhoods or communities on the basis of race, that connects (or fails to connect) residents to good schools, nutritious foods, healthy environments, good paying jobs, and access to health care, clinics, critical amenities and services. Aggressive . . . policing practices target racially and economically isolated black and brown neighborhoods, while jobs and the tax dollars flow to white communities, leaving crumbling infrastructure, poisonous water, predatory financial institutions, and food deserts behind.³⁹⁹

In Colorado, the consequence of the color line constantly resonates throughout the state. Commerce City provides an instructive example, where a predominately Latinx neighborhood is tucked between polluting refineries and heavily industrial activities.⁴⁰⁰ That neighborhood, at one time, also suffered the health risks associated with 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)⁴⁰¹ and a chemical warfare munitions plant that would become one of the largest Superfund cleanup sites in the country.⁴⁰² Indeed, decades after the facility closed

<https://www.cpr.org/2022/06/06/colorado-springs-april-elections-lawsuit>
[<https://perma.cc/EBT5-C64U>].

399. Menendian et al., *supra* note 392; *see also* Bruce Mitchell & Juan Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT’L CMTY. REINV. COAL. (Mar. 20, 2018), <https://ncrc.org/holc> [<https://perma.cc/W9CW-48RT>].

400. Silvia Foster-Frau, *A Colorado County Offers a Glimpse of America’s Future*, WASH. POST (Aug. 13, 2021, 6:00 AM), <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*, GAZETTE, 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>] (Nov. 15, 2021).

401. *See generally* Mathias Basner et al., *Aviation Noise Impacts: State of the Science*, 19 NOISE & HEALTH 87 (2017) (collection of articles on various health effects related to airport noise).

402. *See* Rachael E. Salcido, *The Rocky Mountain Arsenal National Wildlife Refuge: On a Rocky Road to Creating a Community Asset*, 47 J. MARSHALL L. REV.

and years after the cleanup, “[o]rganochlorine pesticides, heavy metals, agent degradation products and manufacturing by-products, and chlorinated and aromatic solvents” continue to pollute the groundwater.⁴⁰³

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.⁴⁰⁴ In 2002, “the Agency for Toxic Substances and Disease Registry sent letters to 650 homes” in the neighborhood stating that residents could get cancer from living there because the soil was so contaminated.⁴⁰⁵ The agency concluded that 9 percent of children living there “showed dangerous levels of lead in their blood.”⁴⁰⁶ This led to 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. Children from predominantly “Black or Hispanic and Latinx” zip codes all over the state were disproportionately affected by high levels of lead in their blood compared with those in predominantly White zip codes.⁴⁰⁷

In terms of education, DPS has become “minority-majority,” with the biggest surge being that of Latinx enrollment.⁴⁰⁸ Though the DPS desegregation order ended in 1995, a 2019 study found that the schools were just as “segregated as they

1401, 1401–02 (2014); Jeffrey P. Cohn, *A Makeover for Rocky Mountain Arsenal*, 49 *BIOSCIENCE* 273, 273–77 (1999).

403. Kirk Mitchell, *Rocky Mountain Arsenal Continues to Leak Contaminants into Groundwater, Colorado Health Department Lawsuit Says*, *DENV. 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].

404. See *Globeville Neighborhood History*, *DENV. PUB. LIBR.*, <https://history.denverlibrary.org/neighborhood-history-guide/globeville-neighborhood-history> [https://perma.cc/956Y-P6JY].

405. *Id.*

406. *Id.*

407. Marissa Hauptman et al., *Individual- and Community-Level Factors Associated with Detectable and Elevated Blood Lead Levels in U.S. Children*, 175 *JAMA PEDIATRICS*, 1252, 1255 (2021); Alayna Alvarez, *Majority of Colorado Children Under Age 6 Have Lead in Their Blood*, *AXIOS* (Nov. 18, 2021), <https://www.axios.com/local/522enver/2021/11/18/522enver522o-children-lead-blood-water-pipes> [https://perma.cc/SYH8-87JT].

408. Chungmei Lee, *Denver Public Schools: Resegregation, Latino Style*, *HARV. U. CIV. RTS. PROJECT* 1, 3 (2006) (“In 1980, DPS was already majority minority with 41 percent White, 23 percent Black, 32 percent Latino, and 3 percent Asian student enrollment. A little over two decades later, DPS became majority Latino, with White students comprising only one-fifth of the entire student body by 2003.”).

were in the late 1960s.”⁴⁰⁹ The impacts in Denver and other segregated schools throughout Colorado are similar. Racially segregated schools are associated with teacher turnover, lower teacher quality, larger class sizes, fewer extracurricular offerings, substandard facilities, lower test scores, and lower graduation rates.⁴¹⁰ The result is a massive achievement gap between White and non-White schools.⁴¹¹

Another consequence of racial segregation is what has become known as the school-to-prison pipeline.⁴¹² Emerging at nearly the same time as federally mandated school integration began to wane nationwide and locally,⁴¹³ Black and Latinx students in the region found themselves subject to increasing surveillance and punishment in public schools.⁴¹⁴

409. See 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/2019/09/08/523enver-school-segregation> [<https://perma.cc/DJ7K-VX37>].

410. See Sean F. Reardon et al., *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) (finding racially segregated schools create test score gaps and non-White majority schools offer less extracurricular activities); Brief of the NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae in Support of Respondents at 46 n.12, *Parents Involved in Cmty. Schs. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908 & 05-915) (stating that minority schools have larger class sizes, higher teacher turnover, lower teacher quality, lower facility quality, and lower graduation rates).

411. See Reardon et al., *supra* note 410, at 33.

412. See *Dismantling the School-to-Prison Pipeline*, NAACP LEGAL DEF. & EDUC. FUND, https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline__Criminal_Justice_.pdf [<https://perma.cc/Y55T-SW6N>].

413. In 1995, the Supreme Court all but indicated the end of federally supervised court-ordered desegregation. See *Missouri 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 Fourteenth Amendment. See *id.* at 91–101. 1995 was also the same year that the federal courts ended their oversight of the DPS system. See *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1307 (D. Colo. 1995).

414. 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_RacialJustic_MovementBuilding.2014-copy.pdf [<https://perma.cc/L9X6-VFL8>]. I go into further detail into the school-to-prison pipeline and larger concerns about racial profiling and policing of youth of color in Colorado in *Observations on Color(Blindness)*, *supra* note 2, at 776–80.

Importantly, those same neighborhoods and developments that had effectively excluded communities of color through racially restrictive covenants, redlining, zoning and other land-use practices have increasingly become home to Colorado's communities of color.⁴¹⁵ The result is a reordering of the property color line, where White Coloradans are either moving into newer housing developments in a metropolitan area's ex-urban periphery or settling in historic neighborhoods of color.⁴¹⁶ In the latter case, in a process known as gentrification,⁴¹⁷ Colorado's cities and its racially segregated neighborhoods are experiencing some of the highest rates of displacement and subsequent racial tension in the country.⁴¹⁸

Emblematic of this change and tension are neighborhoods on the northside and the eastside of Denver. The "historic" Latinx Northside of the city and the "historic" Black Five Points have rapidly moved from largely communities of color to largely White communities.⁴¹⁹ As a result, families of color that have lived in these neighborhoods for generations have seen their property taxes rise, their neighbors leave, and many of their community institutions dismantled, all without any sense from the White newcomers of the change and loss happening in their communities.⁴²⁰ In one prominent example, a White-owned business (a coffee shop) moved into Denver's Five Points

415. See WILLIAM H. FREY, BROOKINGS INST., MELTING POT CITIES AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000S, at 10–11 (2011). See generally Myron Orfield & Thomas Luce, *America's Racially Diverse Suburbs: Opportunities and Challenges*, 23 HOUS. POL'Y DEBATE 395 (2013).

416. URB. DISPLACEMENT PROJECT, *Denver Gentrification and Displacement*, <https://www.urbandisplacement.org/maps/denver-gentrification-and-displacement> [<https://perma.cc/NK83-3RED>].

417. "Gentrification is the process whereby the character of a poor urban area is changed by wealthier people moving in, improving housing, and attracting new businesses, typically displacing current inhabitants in the process." Angelique Courtney, *Housing Crisis: Denver Is the Second Most Gentrified City in the Country*, BOLD, (Aug. 15, 2021, 5:11 PM), <https://theboldcu.com/2021/06/housing-crisis-denver-is-the-second-largest-city-to-be-gentrified-in-the-nation> [<https://perma.cc/93LJ-HKBD>].

418. *Id.*

419. Caroline Tracey, *White Privilege and Gentrification in 'America's Favourite City'*, GUARDIAN (July 14, 2016, 2:30 PM), <https://www.theguardian.com/cities/2016/jul/14/white-privilege-gentrification-denver-america-favourite-city> [<https://perma.cc/HTF9-TBX5>].

420. See *id.*

neighborhood and proudly declared themselves as leading the push for gentrification.⁴²¹

A backlash ensued, where protesters spray painted “White coffee” on the building⁴²² and noted gentrification’s uncomfortable connections to White-settler colonization.⁴²³ To be sure, just as in the nineteenth century, the act of naming and subsequent rebranding is playing a powerful colonizing force in Colorado. Denver’s historic Northside and Five Points (and adjacent neighborhoods) are the most prominent examples. Gentrification has created conditions for those areas to be marketed by affluent and socially mobile White people with names and “brands” such as “Highlands” or “LoHi” and the “Rino District.”⁴²⁴ Gentrification, as modern form of settler-colonialism⁴²⁵ and racial capitalism,⁴²⁶ in Denver and all throughout the state is causing a housing crisis that is displacing communities of color and reinforcing through names, businesses, and schools new and enduring colorblind lines in the state’s property regime.⁴²⁷

421. Josiah Hesse, ‘*Happily Gentrifying Since 2014: Denver Coffee Shop Sign Sparks Fury*, GUARDIAN (Nov. 23, 2017, 8:00 AM), <https://www.theguardian.com/us-news/2017/nov/23/denver-coffee-shop-sign-gentrification-ink-five-points> [<https://perma.cc/3ZWW-Y5MW>].

422. Joe Rubino, *Ink! Coffee in Five Points Tagged ‘White Coffee’ by Vandal Following Gentrification Controversy*, DENV. POST (Apr. 9, 2021, 12:33 PM), <https://www.denverpost.com/2017/11/23/ink-coffee-five-points-gentrification-controversy> [<https://perma.cc/D2TS-T6V6>].

423. One protester was captured holding a sign stating “Gentrification = Urban Colonialism.” Mimi Madrid, *Denver is Not ‘Happily Gentrifying’ for Me*, BLOOMBERG (Dec. 1, 2017) <https://www.bloomberg.com/news/articles/2017-12-01/denver-s-ink-coffee-is-not-happily-gentrifying-for-me> [<https://perma.cc/B9GJ-BULT>].

424. See Tracey, *supra* note 419.

425. See John Kamaal Sunjata, *Gentrification as Settler-Colonialism: Urban Resistance Against Urban Colonization*, HAMPTON (Nov. 9, 2021) <https://www.hamptonthink.org/read/gentrification-as-settler-colonialism-urban-resistance-against-urban-colonization> [<https://perma.cc/GCQ8-9T4A>]; Seth W. Mehl, *Appropriation, Gentrification, Colonization: Newly Synonymous?*, 16 LEXIS J. ENG. LEXICOLOGY 1, 1–33 (2022), <https://journals.openedition.org/lexis/4603> [<https://perma.cc/A7NX-63RW>]; M. Moosa Khan, *Examining Gentrification: A New Internal Colonialism*, INVERSE J. (Mar. 27, 2022), <https://www.inversejournal.com/2022/03/27/examining-gentrification-a-new-internal-colonialism-an-academic-essay-by-m-moosa-khan> [<https://perma.cc/W9KB-Z89U>].

426. Zawadi Rucks-Ahidiana, *Theorizing Gentrification as a Process of Racial Capitalism*, 21 CITY & CMTY. 173 (2022).

427. “We argue that whiteness operates as an essential framework for understanding Boulder’s self-representation as a healthy, socially inclusive, and liberal environment as well as a site of wealth and wealth generation (particularly

All of this has resulted in a reality where over 70 percent of those who are White own real property as fee simple title holders in Colorado and a much smaller percentage of people of color do not.⁴²⁸ And even where property rights are held by people of color in Colorado, particularly in fee simple residential ownership, predatory practices have destabilized and, in many cases, alienated many of those from their ownership. Most prominent is the case of a Denver suburban homeowners association (HOA) that filed a rash of foreclosures in 2021.⁴²⁹ Using broad authority under the provisions governing the association,⁴³⁰ the HOA cited, fined, and eventually foreclosed on residents, the vast majority being people of color and

in the housing market). Drawing on Melamed (2006) we illustrate the ways in which white privilege is performed to meet the neoliberal expectations of ‘proper’ economic behavior.” Jennifer L. Fluri, et al., *Accessing Racial Privilege Through Property: Geographies of Racial Capitalism*, 132 *GEOFORUM* 238, 238 (2022); see also Abby Hickcox, *Green Belt, White City: Race and the Natural Landscape in Boulder, Colorado*, 29 *DISCOURSE* 235, 236–59 (2007). As of 2017, 45 percent of Denver’s moderate-to-high-income neighborhoods demonstrated risk of or ongoing exclusion of lower-income households. Twenty-one percent of Denver’s low-income households, or over 100,000 low-income households, live in these potentially or currently exclusive neighborhoods. Patricia Calhoun, *Is This Five Points, RiNo. . . or Gentrification Station?*, *WESTWORD* (Aug. 15, 2021, 5:17 PM), <https://www.westword.com/news/gentrification-denver-five-points-rino-black-neighborhood-11739444> [https://perma.cc/UG22-FBMW]; Kevin Beaty, *Denver Maps Show Neighborhood Changes, New (and Sometimes Empty) Homes, and More from Census Data*, *DENVERITE* (Aug. 13, 2021), <https://denverite.com/2021/08/13/denver-population-demographics-shifting> [https://perma.cc/LBX2-VA9W].

428. “About 48% of white residents can afford to buy the typical home in Colorado, compared with 30% of Black residents and 32% of Latino people. In the last decade, the gaps between Black and white homeownership have widened. In 1970, the homeownership gap between Black and white households was 19 percentage points and it has grown every decade since to 32 percentage points in 2020. In 2020, 73% of white Coloradans owned their own home, compared with 41% of Black Coloradans.” The gap is not so stark and is slightly improving for Latinx. Tatiana Flowers, *After 50 years, Homeownership Gap Between White and Latino Coloradans Narrows*, *COLO. SUN* (June 8, 2022), <https://coloradosun.com/2022/06/08/colorado-homeownership-racial-gap> [https://perma.cc/DJQ6-VUNX].

429. Kieran Nicholson, *Green Valley Ranch Homeowners Facing Slew of HOA Foreclosure Notices*, *DENV. POST*, <https://www.denverpost.com/2022/03/11/green-valley-ranch-hoa-foreclosure-notices> [https://perma.cc/LD99-RMQ6] (Mar. 11, 2022, 3:27 PM); Noelle Phillips, *“Tip of the Iceberg”: Green Valley Ranch Foreclosures Spotlight Colorado’s Lack of HOA Regulation*, *DENV. POST*, <https://www.denverpost.com/2022/04/03/green-valley-ranch-foreclosures-hoa-homeowners-association> [https://perma.cc/P7JS-XNLN] (Apr. 4, 2022, 12:02 PM).

430. Phillips, *supra* note 429.

elderly,⁴³¹ for failure to paint and or repair parts of their property, including trim, windows, and fences.⁴³²

According to the HOA, it was merely doing what Colorado property law compelled them to do in order to “*create curb appeal and increase property values.*”⁴³³ Echoing the same arguments used for the robust use of racially restrictive covenants, redlining, and other forms of racial discrimination in real estate markets in Colorado and the nation’s past, the HOA’s exercise of legal powers contained in the title deeds symbolizes the centrality of property law as a form of bondage.⁴³⁴ As residential homeownership is, in particular, the primary means of accumulating wealth for most families, the historical and still ongoing patterns of outright discrimination and implicit bias in housing and home financing markets has only served to reinforce and make seemingly inevitable Colorado’s color(blind) conundrum.

B. *Seeing Color*

I recently have written how Colorado, as with the rest of the nation, was profoundly impacted by the racial justice protests of 2020, spurring new and unprecedented opportunities to reject colorblindness in understanding and evaluating the state and

431. “All of the home owners are black or hispanic, low income, and owe less than \$100,000 on their homes.” Kevin Beaty, *Emails Show the City Considers Green Valley Ranch HOA ‘Predatory’ in Its Ongoing Lawsuits Against Residents*, DENVERITE (Mar. 30, 2022), <https://denverite.com/2022/03/30/we-have-a-predatory-hoa-group-in-the-green-valley-ranch-community> [<https://perma.cc/JS8V-NFC9>].

432. *Id.*

433. Official Statement from the Master Homeowners Association for Green Valley Ranch to the Denverite (Mar. 30, 2022), <https://wp-denverite.s3.amazonaws.com/wp-content/uploads/sites/4/2022/03/Media-Response.pdf> [<https://perma.cc/J6Z9-ECQA>] (emphasis added).

434. In direct response to these large-scale foreclosures, Colorado legislators in 2022 made it much harder for HOAs to assess fines and fees leading to foreclosure. H.B. 22-1137, 73d Gen. Assemb., Reg. Sess. (Colo. 2022); Saja Hindi, *New Law Aims to Protect Colorado Homeowners Living in HOA*, DENV. POST (June 7, 2022, 4:30 PM), <https://www.denverpost.com/2022/06/07/green-valley-ranch-hoa-homeowner-protections-colorado-law-legislature> [<https://perma.cc/P39N-VQ23>]. The Colorado Common Interest Ownership Act creates a comprehensive framework for the creation and operation of common interest communities, including recognition of HOAs, to enforce its property rules. *Rancho Escondido Prop. Owners Ass’n v. Redstone Mgmt. Co.*, 169 P.3d 270, 273 (Colo. App. 2007). The HOA has broad powers and serves “quasi-governmental functions” when enforcing covenants and must abide by the due process requirements of the United States and Colorado Constitutions. *Colorado Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718, 722 (Colo. App. 2001).

the larger region's body of law.⁴³⁵ In areas from criminal justice reform to environmental justice policy, Colorado's legislators, lawyers, and policymakers have created new tools and new practices to acknowledge and begin to break down the state's inequitable color lines.⁴³⁶ A breakthrough, of sorts, in the rejection of colorblind thinking occurred in 2018 when Colorado voters abolished the possibility for slavery from its state constitution. A relic from the nineteenth century, Colorado along with twenty-six other states, most located in the American South,⁴³⁷ had a "slavery" provision in the state constitution that allowed slavery "*as a punishment for crime.*"⁴³⁸ Slavery and property ownership of people in Colorado was thus theoretically possible until 2018, when state voters successfully amended the constitution.⁴³⁹

More recently, the city council of the Denver suburb of Wheat Ridge passed a resolution declaring racially restrictive covenants "illegal and unenforceable."⁴⁴⁰ In an action spearheaded by the municipality's mayor, who herself discovered that her home contained a racially restrictive covenant, the ordinance was designed, in her own words, to bring the seemingly "invisible" legacy of White Supremacy "out of the shadows."⁴⁴¹ While largely symbolic, the action highlighted some of the necessary steps to untie the "nasty, nasty knots" of settler-colonialism and White supremacy perpetuated as a matter of property law.

435. *Observations on Color(blindness)*, *supra* note 2; *Observations on Racial Impact Statements*, *supra* note 371.

436. *Observations on Racial Impact Statements*, *supra* note 371, at 287–90, 304–05.

437. Article II section 26 of the Constitution of Colorado previously stated, "[t]hat 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." H.R. Con. Res. 18-1002, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018); 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>].

438. U.S. CONST. amend. XIII, § 1 (emphasis added).

439. Colo. H.R. Con. Res. 18-1002; Chappell, *supra* note 437.

440. John Aguilar, *Wheat Ridge Revisits Racist History in Housing Policy, "Untying These Nasty, Nasty Knots,"* DENV. POST (July 27, 2022), <https://www.denverpost.com/2022/07/27/wheat-ridge-racist-covenants-house-illegal> [<https://perma.cc/GME5-KS78>].

441. *Id.*

Another initiative, launched by the city and county of Denver in Spring 2022, offers \$15,000 to \$25,000 to relatives of family members who lived in Denver neighborhoods that were redlined between 1938 and 2000.⁴⁴² The purpose of the program is to increase fee simple homeownership for people of color.⁴⁴³ To breach those historic, as well as re-emerging color lines, the funds can be used to purchase a home anywhere in the Front Range of Colorado.⁴⁴⁴

A final example to consider began formally in July of 2020, when Governor Jared Polis established the Colorado Geographic Naming Advisory Board (GNAB).⁴⁴⁵ While part of the GNAB's stated mission is to "evaluate proposals and applications concerning name changes, new names, and name *controversies* of geographic features and certain public places in the State,"⁴⁴⁶ it was a direct response to the "renewed attention on fraught or racist symbols like statues, monuments, landmark names and state flags."⁴⁴⁷

One such proposal that came before the GNAB was an application to rename Mount Evans—named for the territorial governor and DU founder linked directly to the Sand Creek Massacre.⁴⁴⁸ While the Evans name had become ubiquitous throughout the state, adorning not only mountains and landmarks, but towns, streets, and even honorifics, the 150-year anniversary of the Sand Creek Massacre led to a major reassessment of John Evans's role in the slaughter of the elders,

442. Kyle Harris, *Redlined in Denver Between 1938 and 2000? The City Might Help You Put a Down Payment on a New Home*, DENVERITE (Apr. 21, 2022) <https://denverite.com/2022/04/21/redlined-in-denver-between-1938-and-2000-the-city-might-help-you-put-a-down-payment-on-a-new-home> [https://perma.cc/XQ7Q-RGSA].

443. *Id.*

444. *metroDPA*, DENVERGOV.ORG, <https://denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Department-of-Housing-Stability/Resident-Resources/Affordable-Home-Ownership/metroDPA> [https://perma.cc/V7BW-T6MF].

445. Colo. Exec. Order No. B 2020 004.

446. *Id.*

447. May Ortega, *These Are the People Who Will Advise on Renaming Some Colorado Mountains*, CPR (July 31, 2020), <https://www.cpr.org/2020/07/31/these-are-the-people-who-will-advise-on-renaming-some-colorado-mountains> [https://perma.cc/A5GX-7QW6]; Sam Tabachnik, *Here's the List of People Who Will Consider Name Changes to Colorado Landmarks*, DENV. POST (July 31, 2020) <https://www.denverpost.com/07/31/colorado-geographic-naming-advisory-board-polis> [https://perma.cc/G522-BPG7].

448. Ortega, *supra* note 447.

women, and children that day.⁴⁴⁹ Two reports commissioned by DU and Northwestern University even evaluated Evans's legal culpability as territorial governor.⁴⁵⁰ As the DU report noted, this reevaluation of the state's first governor and its own founder presented

an opportunity to reflect on our institutional origins, history, and legacy. We have an opportunity to provide a model of transparency, accountability, and transformation for institutions that have directly profited or indirectly benefited from the displacement of the indigenous communities whose lands and histories they occupy.⁴⁵¹

It is instructive to consider the challenges of removing and thereby "rebranding" the names and symbols of public and related intellectual property, especially in light of the past and recent history of renaming in Colorado's neighborhoods. After Northwestern's report on John Evans was released, Indigenous students at the university demanded that the Evans name be removed from all campus buildings.⁴⁵² The University's Board of Trustees decided to keep the Evans name and in March of

449. See generally EVANS REPORT, *supra* note 28.

450. The DU study was not officially commissioned by the university but was an independent inquiry by eleven faculty and community members. Their review found "John Evans's pattern of neglect of his treaty-negotiating duties, his leadership failures, and his reckless decision-making in 1864 combine to clearly demonstrate a significant level of culpability for the Sand Creek Massacre." EVANS REPORT, *supra* note 28, at iii. The Northwestern report, in contrast, cleared Evans of culpability for the massacre, but found that "for a long stretch the University participated in and perpetuated a collective amnesia that not just disconnected John Evans from the massacre but erased it entirely." The report also declared that "John Evans deserves institutional recognition for his central and indispensable contributions to the establishment of Northwestern and its development through its early decades." NED BLACKHAWK ET AL., NW. UNIV., REPORT OF THE JOHN EVANS STUDY COMMITTEE 94 (May 2014), <https://www.northwestern.edu/provost/about/committees/john-evans-study.html> [<https://perma.cc/3J5C-FSVT>].

451. EVANS REPORT, *supra* note 28, at 23.

452. David Gleisner, "FUCK JOHN EVANS" – *The Background Behind the Rock's Weekend Paint Job*, NORTH BY NORTHWESTERN (Oct. 31, 2019) <https://www.northbynorthwestern.com/john-evans-explained> [<https://perma.cc/HC5N-DAQ5>]. It should be noted that other Northwestern University constituents asked for the John Evans name to be removed from campus buildings. Bill Smith, *NU Panel: Remove Founder's Name from Alumni Center*, EVANSTON NOW (Nov. 18, 2014) <https://evanstonnow.com/nu-panel-remove-founders-name-from-alumni-center> [<https://perma.cc/HT9B-96CB>].

2020, cited his “exemplary” character among its reasons.⁴⁵³ Months later, after the racial justice protests in the summer of 2020, the chair of the Board saw “no reason to ask the board to reconsider its vote.”⁴⁵⁴

DU did not have any buildings named officially for John Evans and unceremoniously removed the Evans name from all of its highest university honors. As the introduction of this Article detailed however, the Pioneer imagery, symbols, and brands could not be so easily disentangled or forgotten from Evans acts as territorial governor. Nevertheless, the university chose, by fiat, to deny the ongoing violence of the past.⁴⁵⁵ In addition, DU’s campus continues to be bifurcated by Evans Avenue and names on campus property like Evans and Stapleton cause consternation, even if those names do not honor specifically John Evans or Ben Stapleton, but their familial relations.⁴⁵⁶

In terms of its public property and larger understanding of the state’s branded heroes, in August of 2021, Governor Polis officially rescinded the 1864 John Evans proclamations creating the conditions for the Sand Creek Massacre to occur.⁴⁵⁷ According to Governor Polis, the Evans Proclamations are “a symbol of a gross abuse of executive power” and part of a “shameful” chapter in the state’s history.⁴⁵⁸ In March 2022, the Clear Creek County Board of Commissioners, sitting where Mount Evans officially rises, recommended that the iconic and

453. Austin Benavides, *Board of Trustees Chairman: John Evans’ Name Removal Will Not be Reconsidered, Evans’ Conduct Was “Exemplary”*, DAILY NW. (Mar. 3, 2020) <https://dailynorthwestern.com/2020/03/03/campus/board-of-trustees-chairman-john-evans-name-removal-will-not-be-reconsidered-evans-conduct-was-exemplary> [https://perma.cc/W7VN-NMLX].

454. Loren Ghiglione, *Commentary: Northwestern’s Connection to the Sand Creek Massacre and a Call for a National Week of Mourning*, CHI. TRIB. (Nov. 27, 2020) <https://www.chicagotribune.com/opinion/commentary/ct-opinion-john-evans-sand-creek-massacre-20201127-dbu4y3hsezaxhk4uodlpjgdere-story.html> [https://perma.cc/W7X9-FRLT].

455. See Haefner, *supra* note 33.

456. Evans Chapel on campus is named in honor of John Evans’s daughter. The son and grandson of Ben Stapleton have a tennis court and a classroom named after them. Julia Mertes, *Exploring DU: The History of Evans Chapel*, DU CLARION (Apr. 5, 2022), <https://duclarion.com/2022/04/exploring-du-the-history-of-evans-chapel> [https://perma.cc/H2YV-5SBR]; Benjamin F. Stapleton Jr. Tennis Pavilion, DU ATHLETICS, https://denverpioneers.com/news/2007/6/28/Benjamin_F_Stapleton_Jr_Tennis_Pavilion [https://perma.cc/K4J3-NZ2E].

457. Colo. Exec. Order No. B 2021 002.

458. *Id.*

well-known fourteener be renamed “Mount Blue Sky.”⁴⁵⁹ A name jointly created and recommended by the Arapaho and Cheyenne descendants of Sand Creek, it became supported by conversation organizations, government officials, and various tribal leaders.⁴⁶⁰ As of this writing, that recommendation is awaiting approval and recommendation by the GNAB.

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Ultimately, Colorado’s color(blind) conundrums continue to wage just as fiercely today as they did when the U.S. Civil War Congress decided to carve the territory out of Kansas. A state founded in competing and often contradictory tensions of racial and civic nationalism,⁴⁶¹ Colorado has and continues to struggle with the ways that its myths and stories around pioneers, freedom, individualism, civilization, innovation, community, and racial equity have obscured a true reckoning and avoided an honest accounting of racism and massive and enduring inequalities and inequities. Property law—in both its corporeal and incorporeal forms—and related use, jurisprudence, legislation, and proclamation has played a profoundly determinative role in perpetuating the myth while subtly reinforcing the logic of settler-colonialism and White supremacy and the subsequent indignities of displacement and dispossession.⁴⁶² Whether current efforts to make the state—from its neighborhoods to its most venerated public institutions like DU and the University of Colorado—or its most cherished landmarks more color conscious in its property and other legal regimes represents an end to the myths and the larger conundrums these myths create, is the challenge we living in Colorful Colorado must confront.

459. Clarissa Guy, *Clear Creek County Officials Clear Way for Mount Evans Name Change to Mount Blue Sky*, ROCKY MOUNTAIN PBS (Mar. 16, 2022) <https://www.rmpbs.org/blogs/news/mount-evans-renaming-mount-blue-sky> [https://perma.cc/3FLN-WU4S].

460. *Id.*

461. GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* 75 (Princeton Univ. Press 2001).

462. A recent collection of essays centering “racial regimes of ownership” around the world are providing important thinking to move beyond the “category of ownership” and “render imaginative futures beyond property.” Malini Ranganathan & Anne Bonds, *Racial Regimes of Property*, 40 *SOC. & SPACE* 197, 199 (2022).