THE "TRI-ETHNIC" DILEMMA: RACE, EQUALITY, AND THE FOURTEENTH AMENDMENT IN THE AMERICAN WEST

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INTRODUCTION

In 1973, the Supreme Court for the first time had before it a non-Southern school desegregation case, Keyes v. School District Number One.1 Petitioners, a group of Mexican American and African American parents, sought to integrate segregated schools located in downtown and northeast Denver, Colorado. One issue that particularly vexed the Justices was determining how the Equal Protection Clause of the Fourteenth Amendment operated in cities with more than just Black and White populations.2 As Justice Brennan’s majority opinion made patently clear, unlike cities in the American South, “Denver is a tri-ethnic, as distinguished from a bi-racial, community.”3 Accordingly, past constitutional jurisprudence left the Court little guidance in dealing with the complications of a “tri-ethnic” student body composed of “Anglos,” “Negroes,” and “Hispanos.” Hence, the Court asked whether “Negroes and Hispanics should not be placed in the same category to establish the segregated character of a school?”4

In answering this question, Justice Brennan ultimately concluded that “one of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination.”5 This conclusion was particularly surprising given past constitutional jurisprudence that had treated Mexican Americans as White.6 As a result, Keyes points to a fundamental reassessment

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2. Id. at 195.
3. Id.
4. Id. at 196.
5. Id. at 197-98.
6. See Hernandez v. Texas, 347 U.S. 475 (1954) (confronting whether Mexican Americans merited Fourteenth Amendment protection as a racially identifiable group). In Hernandez, Pete Hernández challenged his 1951 murder conviction due to the systematic exclusion of Mexican Americans from jury service in Texas. According to Hernández’s lawyers, the case merited Fourteenth Amendment Equal Protection scrutiny because “persons of Mexican descent are treated as a third class—a notch above the Negroes, perhaps, but several notches below the rest of the population. They are segregated in schools, they are denied service in public spaces, they are discouraged from using non-Negro restrooms.” See Brief for Petitioner at 28, Hernandez, 347 U.S. at 465 (No. 406). Although Hernández’s conviction violated the Fourteenth Amendment, the Supreme Court made it clear that he could not explain such
about the racial positioning of Mexican-Americans in Fourteenth Amendment jurisprudence. In this reformulation, the Court used the American West’s social situation to formulate “constitutional principles of national rather than merely regional application” in order to deal with the crises affecting increasingly heterogeneous non-Southern metropolitan areas.7 Especially in the region’s so-called “tri-ethnic” cities, the Fourteenth Amendment’s existing racial paradigm gave courts little guidance for dealing with segregation, economic stratification, and neighborhood tension affecting non-White and non-Black groups.

This essay is a brief historical account of the challenges that cases like *Keyes*—set in context of the multiracial and multiethnic American West—posed to the nationwide application of the Fourteenth Amendment. Beginning in the second half of the nineteenth century, many of the most controversial and contentious legal cases surrounding the substantive meaning and application of the Fourteenth Amendment have taken place in the region known as the American West. Although the region is not subject to easy definition, scholars agree that the American West has been and continues to be the United States’ most ecletic place of human variety, cultural complexity, and racial assortment.8 As those involved in the *Keyes* litigation quickly discovered, the American West’s demographic complexity created difficult questions about equality in a racially and ethnically diverse American society. Consequently, no region in the United States has had such a long, combustible, and dynamic history in the process of determining equality as the American West.

Another defining feature of the American West is the propensity of Westerners—despite myths to the contrary—to utilize the full power and resources of the legal system.9 Consequently, the region’s courts provide valuable insights

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8. See generally GEORGE J. SÁNCHEZ, BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE, AND IDENTITY IN CHICANO LOS ANGELES 1900-1945 13-14 (1993) (discussing the diversity of Los Angeles and the growth of Chicano community); QUINTARD TAYLOR, THE FORGING OF A BLACK COMMUNITY: SEATTLE’S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA 3-9 (1994) (describing the impact of civil rights on the growth of minority communities in the Seattle area); TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 1-7 (1994) (stating that the West is the most diverse region of the nation); Richard White, Race Relations in the American West, 38 AMERICAN QUARTERLY 386, 396-416 (1986) (discussing common themes found in the literature on racial minorities in the American West).

9. See generally JOHN PHILLIP REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL 360-64 (1980) (“The supposedly heartless mind of the law was more evident on the overland trail than in any eastern courtroom.”); GORDON MORRIS BAKKEN, ED., LAW IN THE WESTERN UNITED STATES 3-4 (2000) (describing the difference between perception and reality of western law); GORDON MORRIS BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912 passim (1987) (detailing the constitution-making process in the context of eight western states); DONALD J. PISANI, WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850-1920 xi (1996) (using natural resources as an illustration of diversity in the American West); MARÍA E.
into the ways that a multiracial and multiethnic cohort of Westerners used law to grapple with the profound and complex interaction of variant cultures, peoples, and backgrounds. Most important, Westerners struggled to answer how such concepts work in a dynamic, often transient, and racially fluid world.

This essay explores the regional variations in equality discourse by examining the ways that the American West’s diverse populations shaped the meaning and understanding of race in Fourteenth Amendment jurisprudence. Soon after the adoption of the Fourteenth Amendment in 1868, litigants, lawyers, and judges encountered unique difficulties in extending the guarantees of the Amendment to the region’s Asian - American, Pacific Islander, American Indian, Mexican - American, African - American, and White populations. As this list indicates, Justice Brennan’s “tri-ethnic” Denver understated the complexity of the region’s social structure and citizenry. Indeed, the American West—in its long-standing and recent past—included a diverse range of nationalities, from Swedes and Chinese to Russian Jews and Philippinos. The “tri-ethnic” distinction laid out by the Keyes court, however, suggested complex racial rather than ethnic fault lines that operated differently in the American West than any other region.10


10. "Racial" and "ethnic" categories are both socially -defined and -constructed concepts that distinguish among groups in a population. As socially-constructed concepts, both terms are dynamic, vary in context and meaning, and change over time. Yet, there are important differences in the ways that racial and ethnic concepts have historically worked in the United States. On the one hand, ethnicity is best understood as the consequence of a process of group formation based on culture. "Culture" in this formulation include[s] such diverse factors as religion, language, 'customs,' nationality, and political identification.” MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES, FROM THE 1960S TO THE 1990S 15 (1994) [hereinafter OMI & WINANT]. In such a formulation, ethnicity can be changed and transformed as one person or a group of persons from an “ethnic” group assimilate and acculturate into the cultural mores of the dominant “ethnic” group. Id. at 16-20. Race, on the other hand, is a social process that seeks to distinguish groups, usually by phenotype but through other characteristics as well, for the purposes of power, subordination, control, and exploitation. See EDWARD J. ESCOBAR, RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945 9 (1999) (discussing the ways in which the concept of race has been viewed and treated in society). Importantly, significant cultural and
Consequently, racial differences and racial formation heavily influenced the ability of Fourteenth Amendment jurisprudence to extend to the nation's non-White and non-Black ethnic groups.

The struggle over the meaning of "equality" began as soon as there was a "West" to which Americans and non-American-Americans moved and settled. Part I of this essay looks at the social condition of the American West as it developed in the nineteenth and early twentieth centuries. Compelled first by westward movement and the spoils of war, legislatures and courts grappled with the "fair" and "equal" incorporation of non--American-American and non-White peoples as full participating citizens in an American republic. Although many of these struggles predated the passage of the Fourteenth Amendment in 1868, they provided a context in which American courts and policy makers labored to extend and limit the Amendment's guarantees to groups not envisioned by the Framers. Starting with the westward movement of European squatters and culminating in anti-Chinese legislation in California during the second half of the nineteenth century, the American West's human diversity disrupted notions of inequality, hierarchy, and freedom in a rapidly growing region. By the early twentieth century, legislative, political, and legal bodies responded by racially limiting the Fourteenth Amendment's protections.

Part II then turns to important jurisprudential and social issues litigants of the American West encountered during and after World War II. During this time, no region of the country grew as fast or attracted such a massive mixture of people as the American West. As a result, Westerners were forced to reconcile rapidly contemporary notions of fairness and equality to the region's quickly changing citizenry. Part II specifically assesses such issues in the context of one Western city: Denver, Colorado. In two cases litigated during and after World War II, Honda v. People11 and Keyes v. School District Number One,12 courts in the West once again struggled over the correct application of the Fourteenth Amendment in a racially diverse society. The region's diverse metropolitan areas prompted American courts to become conscious of the multiracial color lines dividing their communities. The relationship between race, equality, and the Fourteenth Amendment—forced in the American West's legal history—in turn has become the American "dilemma" for the twenty-first century.13 This essay concludes by briefly

social differences within groups are collapsed, simplified, and not subject to the same processes or assumptions of assimilation and acculturation. For example, Americans of Filipino, Japanese, Korean, Chinese, Vietnamese, Laotian, and Thai descent (among others) are "aggregated" into the category "Asian American and Pacific Islander." Such aggregation in turn leads to important social realities with dynamic social and political consequences. As Omi and Winant point out, "the majority of Americans cannot tell the difference between members of these various groups. They are racially identified." OMI & WINANT, supra note 10, at 23 (emphasis added). For these reasons, "race" and "ethnicity" are two concepts that should not be used interchangeably. See also JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURRENCe OF IDENTITY AND CULTURE 23-27 (1997) (defining ethnicity and the role it plays in American Indian society); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 163 (1996) (discussing the meaning of race and its effects on society).

11. 141 P.3d 178 (Colo. 1943).
13. My argument assesses the ways that the American West's social order forced a complication of Gunnar Myrdal's mid-twentieth century understanding of an American nation divided along Black and
discussing the "tri-ethnic" implications of Keyes in relation to affirmative action jurisprudence.  

From the question of citizenship to the issue of racial identity, the American West's distinct populations forced courts to more fully consider the meaning of equality in a diverse, multicultural nation. As this essay argues, regional difference played a central role in the development of the jurisprudence of the Fourteenth Amendment. Yet, the "dilemmas" produced by the people, places, and institutions of the American West did not merely reflect the region's difference, but were an important catalyst behind making the law meaningful for all Americans.

I. EQUALITY ANTECEDENTS: INCORPORATING FREE AND EQUAL CITIZENS DURING THE NINETEENTH CENTURY

The American people have long struggled to incorporate a diverse set of peoples, beliefs, and value systems into the political and legal order long before the passage of the Fourteenth Amendment. From 1620 to 1860, the population in British North America, and later the United States, grew from approximately five thousand persons in 1620 to over thirty million by 1860. During this time, one population trend stood out: the "Westernness" of the nation's population. By 1830, more than twenty-five percent of the American people lived west of the Appalachian mountains and by 1850, that number had reached nearly fifty percent of the American population. Many of those migrating to the American West were born outside of the United States. Although "White native-born Americans dominated Western migration...a very large minority of western migrants tended to be Norwegians, Swedes, Germans, Irish, and Canadians" as well as Chinese and Japanese. Also significant were the "foreigners" who—for generations—called what became known as the American West their home. In addition to the over 98,000 Mexicans who became citizens after the United States acquired nearly one million acres of land in its war with Mexico, thousands of American Indians

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White lines, especially as the United States' racial balance dramatically shifted in the second half of the twentieth century. See Gunnar Myrdal, An American Dilemma: The Negro Problem and American Democracy passim (1944) (defining the "problem" as "[t]he very presence of the Negro in America; his fate in this country through slavery, Civil War and Reconstruction...his present status...in fact his entire biological, historical and social existence as a participant American").


16. Id. These numbers understate both the region’s population and its ethnic and racial diversity. As Elliot West notes, "between the Appalachians and the Mississippi was a wider range of cultures than east of the mountains—more than thirty widely varied Indian groups as well as French, English, and Spanish communities, all of them jointed by an influx of western emigrants of many different cultural traditions." Elliot West, American Frontier, in The Oxford History of the American West 115 (Clyde A. Miller II et al. eds., 1994).


survived disease, conquest, removal, and reservation by the end of the nineteenth century. Most important, these early “Westerners” were animated by a strong understanding of equality based on protean notions of the rule of law. Consequently, a diverse group of peoples, settling and living at the boundaries of an American political and legal order, insisted early in the nation’s history that they be treated as equal and full citizens in the American West.

A. Equality and Property Rights

Prior to the adoption of the Fourteenth Amendment, the major equality struggles of the American West revolved around land. In the ideology of the republic, land was believed to be the great equalizer of those considered White. According to historian Maria Montoya, “the essence of this ideology was that the American republic could remain a democracy of equal citizens only so long as citizens maintained their independence through ownership of productive resources such as land.” The federal government played a central role in the process of turning this ideology into a reality. From approximately 1784 to 1850, the United States acquired almost 900 million acres of public land through both conquest and purchase: The Louisiana Purchase (1803), 500 million acres; the Florida Purchase (1819), 43 million acres; the Gadsden Purchase (1853), 19 million acres; War with Mexico (1848), 334 million acres.

In order to settle the land in an orderly fashion, Congress passed two pieces of legislation in the late eighteenth century to control and govern westward growth. The first legislation, the Ordinance of 1785, ordered the Northwest Territory of the United States surveyed into square-mile sections to be grouped together in six square-mile townships. Once surveyed, the government would sell the sections at public auctions. The second piece of legislation, the Ordinance of 1787, set up a plan for executive control, legislative decision-making, judicial review, and the eventual ascension of the Northwest Territory to statehood.

(1999).


21. The meaning of “Whiteness” has a long and unsettled history. Although Congress in 1790 restricted naturalization to “White persons,” Congress and American courts have struggled to define the exact parameters of the term. See Act of March 26, 1790, ch. 3, 1 Stat. 103. In context of the late eighteenth and early nineteenth century, however, the term “White person” was meant to distinguish those European immigrants to the United States from the nation’s African and American Indian populations. See HANEY LÓPEZ, supra note 10, at 25 (noting historical court cases whereby “Whites” were defined as White Europeans).

22. MONTOYA, supra note 9, at 166.


25. Id.

declared that American Indians living in the territory "did not own the land they inhabited and extinguished all their property rights."27 The primary goals of the Ordinances, eventually applied to most of the growing American Republic, were to extend the English common law into unsettled territories and to guarantee constitutional freedoms for White Americans. As historian Elliot West notes, the Ordinances "provided that the expanding nation would be one of sovereign states with equal rights."28

Although the Northwest Ordinance provided a seemingly elegant structure for extending political and social equality in a rapidly growing American nation, it could not easily bring about this goal. One problem had to do with Congress' continual tinkering with the laws. "Between 1789 and 1834, Congress passed 375 different land laws. It changed the minimum purchase, offered credit, and then decided against credit sales."29 In other cases, the drafters of the Ordinances assumed that poor settlers would buy land from wealthy investors who in turn would sell the tracts off in smaller parcels, extend credit, or make favorable leases of the land.30 Even these speculative options, however, were often "beyond the means of the [White] pioneer."31

Not surprisingly, the Ordinances and the resulting American land system never realized its initial ideals. Land agents quickly discovered the White European and American migrants to the American West "moved faster than surveyors, and so when surveyors arrived in a region, they often found settlers already in place."32 Instead of providing equality, the federal government created inequity for the nation's early White "Westerners." Congressmen quickly worked to dislodge squatters by often forceful and violent means. In 1785, Congress passed a resolution expressly prohibiting squatting to prevent trespassers from entering the public domain. The most punitive aspect of the resolution gave the Secretary of War authority to remove unlawful settlers from federal lands in the Northwest Territory. This policy was put into effect in the spring of 1785, when the U.S. Army, at the juncture of the Muskingum and Ohio Rivers, disposessed ten

29. WHITE, supra note 17, at 139.
30. Id.
32. WHITE, supra note 17, at 139. Although Congress was dominated by those strongly opposed to squatting in the early decades after the American Revolution, Congress passed legislation that paradoxically increased the numbers of squatters on the public lands. For instance, the Land Act of 1796 continued the requirement established in the 1785 Land Ordinance that rectangular surveys be conducted before land could be offered for sale. The process of surveying land, however, was bogged down by ineptness and confusion. Indeed, there were delays in the appointment of a surveyor-general and his staff; Congress was slow to appropriate the necessary money; every tract had to be described fully as to nature of soil and rivers. This process took considerably longer than had been expected. The delays only fueled squatter discontent and invited them to invade public lands so as to avoid lengthy and costly bureaucratic procedures. Id. See also Act of May 18, 1796, Public and General Statutes Passed by the Congress of the United States of America: 1789 to 1827 Inclusive (Joseph Story, ed., 1828) (providing statute that caused squatter discontent).
families by destroying their homes while constructing a fort "to prevent settlers from returning." Then in 1789, President George Washington ordered the destruction of cabins and the removal of families who settled on Pennsylvania frontier land owned by Indians.

Despite outright hostility displayed by the American government to settlers, European and American migrants continued to move westward in sizable numbers. And as their numbers continued to grow, politicians, "particularly westerners and most Democrats, saw western squatters differently. To them, squatters were not criminals or barbarians; they were noble pioneers. They were securing the rapid growth and development of the country. If they broke the letter of the law, they fulfilled its intent." from Congressman Stephen Cobb of Kansas emphasized that "all over the State [ ] . . . settlers have gone on the lands, paid for them, taken receipts, put up valuable and lasting improvements, and then there has come a decision of the Secretary of Interior that they have no rights to their homesteads.", Congressman Henry Clay, long an opponent of liberally extending the property rights claims of Westerners, conceded:

They build houses, plant orchards, enclose fields, cultivate the earth, and rear up families around them. Meantime, the tide of emigration flows upon them, their improved farms rise in value, a demand for them takes place, they sell to the new comers at a great advance, and proceed further west . . . In this way, thousands and tens of thousands are daily improving their circumstances and bettering their conditions.

In order to protect these squatters' equality rights, Congress extended to White European and American squatters on public lands the opportunity to buy the land, usually at a modest price, before it was offered to the general public for sale. Known as the principle of preemption, Congress enacted the first such law in 1801. Between 1799 and 1830, Congress passed thirty-three special preemption acts

34. Id.
36. WHITE, supra note 17, at 139.
37. 43 SESSION CONG. REC. n. 16034 (February 18, 1874).
39. Id.
40. This first preemption act was actually passed in response to inequities perpetuated by one of Congress' own members. In the late 1780s, Congressman John Cleves Symmes and associates purchased large sections of land and subsequently sold undefined tracts to bona fide purchasers. Symmes, however, soon failed to make his payments for the large grant of land and his title reverted back to the federal government. Beginning in 1792, settlers petitioned Congress to quiet title "to [lands] which they supposed themselves entitled, under the purchase made by John Cleves Symmes and associates." Clearly not sympathetic to the duped squatter, Congress waited until 1801 before it passed a specific preemption act for those who possessed written contracts from Congressman Symmes. In the Act, Congress "offered the same credit as before without the necessity of interest payments." Id. at 112.
acts. 41

The 1830s witnessed the articulation of bitter sectional differences in Congress. In this debate, the West and the multi-ethnic squatters who dominated its lands started to flex their growing political muscle. By 1830, seven of the eleven new states that joined the union were Western states that had congressmen and senators fully committed to policies that favored the White migrants. 42 To gain the support of this increasingly influential bloc, the “Northeast and Southeast vied with one another to prove that each had supported the West.” 43 During the Jacksonian period,

sympathy for squatter rights increased as the last property qualifications for voting and holding office disappeared, as common schools proliferated, as the states ended imprisonment for debt and humanized penal codes, and as hostility to judge[s] and lawyers—whom many Americans perceived as all-too-willing agents of the new forces of industry—became widespread. 44

At the center of these changes, the West’s multi-ethnic European and American population forced lawmakers to question the substantive if not precise meaning of equality for regionally divided peoples. Southern legislators favored slavery and opposed a protective tariff. Northern ones wanted the tariff and abhorred slavery. Western politicians argued that public lands belonged to the states where they were located, while Easterners asserted that the lands were for the nation as a whole. 45 Fueled by these differences over slavery, land and tariffs, arguments over states’ rights and the right to secede from the union, the federal government paved the way for White European and American Western migrants to find equality in the law.

In 1830, a coalition of Western and Southern congressmen enacted a general preemption act that applied “to every settler or occupant of the public lands... who is now in possession, and cultivated any part thereof in the year one thousand eight hundred and twenty-nine.” 46 A squatter could claim 160 acres of land, including lands that he had improved, for $1.25 per acre. 47 Payment was required before the land was set for public auction, and transfers or sales of preemptive rights were strictly forbidden. By 1841, the preemption principle had become so firmly established that Congress enacted a general prospective preemption bill. 48 Importantly, the 1841 act not only reached existing squatters, but also covered

41. Id. at 124.
42. Id.
43. Id. at 154.
44. PISANI, supra note 9, at 63.
45. See WHITE, supra note 17, at 157-60 (discussing arguments over Western lands during the Civil War).
47. Id.
“every person . . . who shall hereafter make a settlement on the public lands.”

In 1862, the United States Congress passed the Homestead Act. This act represented the final triumph of those who believed that equality in the United States was dependent upon a person’s ability to hold and utilize private property. The Act entitled a settler to 160 acres of land for free simply for agreeing to live on and develop it. The impact of the Act, however, was limited. Between 1862 and 1890, “the American population grew by 32 million people, but only approximately 2 million people settled on the 372,649 farms claimed through the Homestead Act.” Although “nearly 400,000 farms and the distribution of millions of acres of land to farming families represented by any standard a formidable success . . . it was nonetheless only a limited success in term of the promises made for the act.” In spite of its inability to distribute property more fully, the Homestead Act was nonetheless symbolic. Importantly, “when Congress drafted the Homestead Act of 1862, it only envisioned Whites as its beneficiaries.” Indeed, Congress required that a petitioner be either a citizen of the United States or an immigrant eligible for naturalization.

At the time that Congress passed the Act into law, the United States was locked in a bitter and violent struggle to redefine the meaning of racial equality in a fractured United States. Concomitantly, the nation as a whole was undergoing a demographic and economic transformation that threatened a White and Protestant legacy of industrious settlers. Property as a means to ensure equality no longer seemed such a viable model in an industrial nation of wage laborers and large corporate holdings. In the aftermath of the Civil War, the West—and its racially distinct and ambiguously defined non-White and non-African populations—played a prominent role in formulating a redefinition of equality.

B. From Treaty Rights to Constitutional Rights

The Civil War and the passage of the Fourteenth Amendment soon after the war’s end represented a fundamental change in the understanding of equality in the United States. Instead of rights to land, the Amendment’s structure suggested fundamentally different values that would ensure “equality before the law.” The

49. Id.

50. Homestead Act, ch. 75, 12 Stat. 392 (1862). The Act was limited to heads of families or persons over twenty-one and to citizens or those promising to become one. In exchange for a grant of land, the potential homesteader had to pay a fee associated with processing and registering a claim and swear that he would actually live on and cultivate the land. After five years of continuous residence, title would be issued to the homesteader.

51. Id.

52. WHITE, supra note 17, at 143.

53. Id.

54. MENCHACA, supra note 27, at 235.

55. Homestead Act, supra note 50. In 1790, Congress limited naturalization to “any alien, being a free white person.” Act of March 26, 1790 ch. 3, 1 Stat. 103. Until 1870, this excluded Africans, indigenous persons from North and South America, and Japanese and Chinese immigrants from the opportunity to become citizens. After the Civil War, “Congress opted to maintain the ‘white person’ prerequisite, but to extend the right to naturalize to ‘persons of African nativity, or African descent.’ . . . Blacks as well as Whites could naturalize, but not others.” HANEY LÓPEZ, supra note 10, at 43-44.
Amendment—for the first time in the nation’s history—“enshrined in the Constitution the ideas of birthright citizenship and equal rights for all Americans” regardless of race or ethnicity. Although the language of the Amendment was sweeping and majestic, it was unclear what it meant for a diverse ethnic and racial population. As in the years before the passage of the Amendment, the American West’s rapidly changing demography provided substantive answers to such a question.

The momentous discovery of gold in California and subsequent mineral discoveries in Colorado, Nevada, and Arizona as well as land acquisitions during and after the Mexican American War racially transformed what was to become the American West. Although White, native-born Americans represented the highest number of “Westerners” in the second half of the nineteenth century, significant numbers of Mexicans, Chinese, and Japanese settled in the West. In the years leading up to the ratification of the Fourteenth Amendment in 1868, the United States had a much different relationship with these groups than American and European migrants. Rather than grudgingly extending property rights in preemption legislation, the American government relied on “solemmn and idealistic treaties” to incorporate the region’s Mexican, American Indian, and Asian populations. In the Treaty of Guadalupe-Hidalgo, for instance, the United States allowed Mexicans living in the recently expanded United States to remain on their land, become American citizens, and have their civil rights in respect to language, religion, and culture protected.

In contrast to the Treaty of Guadalupe-Hidalgo, treaties with the region’s American Indian populations did not “contemplate the incorporation of Indians as citizens into the United States.” Rather, such treaties were “agreements between separate sovereigns, each of which agreed to assume the primary responsibility for its own citizens.” Even after Congress ratified the Fourteenth Amendment, the United States continued to use treaties with other treatise to guarantee the equal rights of the American West’s non-White and non-European population. Under the Burlingame Treaty of 1868, for example, the United States promised to extend Chinese residents working in the nation the “same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoined by the citizens or subjects of the most favored nation.”

57. WHITE, supra note 17, at 191. It is important to note that anti-Black legislation prior to the Civil War, and anti-Black sentiment after, truncated the growth of the region’s African American community. See ALMAGUER, supra note 8, at 38-41 (stating that the West was a melting pot of many different cultures and ethnicities).
60. Id. at 929-30, Art. VIII-IX.
62. Id.
Despite rights to equal treatment found in the treaties, however, Mexicans, American Indians, Asians and Pacific Islanders in the American West found "equality" to be an elusive goal. Nothing symbolized this fact more than the rapid dispossession of Mexican and Indians from their property rights to the American West's land during the nineteenth century. For instance, the original Treaty of Guadalupe-Hidalgo contained Article X, which granted land rights to Mexicans. However, Article X was deleted by the United States Congress.\(^{64}\) The Article read in part:

\[\text{[a]ll grants of land made by the Mexican government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico.}\(^{65}\)

In failing to ratify Article X, Congress did not provide clear language protecting the property rights of a large portion of Mexican landowners. Consequently, many Mexican Americans found their claim to land mired in costly litigation.\(^{66}\)

Instead of rights enjoying preemptive legislative acts validating their rights, Mexicans and Indians encountered hostility to their settlement in the American West. Because neither Mexican law nor American Indian land use practices provided for exclusive possession, capital improvement, and in the case of Indians, permanent occupation, "many judges and lawyers believed that such a regime could not be squared with American notions of impartial government by laws or with republican equality."\(^{67}\) Indeed, in a series of Mexican land grant cases and legislative acts during the mid and late-nineteenth century, Mexicans and American Indians in the United States found themselves stripped of their rights provided by Mexican and American law.\(^{68}\) In comparison to the land laws passed to benefit

\(^{64}\) Treaty of Peace, \textit{supra} note 59, at 930, Art. X.


\(^{66}\) Montoya, \textit{supra} note 9, at 48. A similar impact was felt when Congress re-wrote Article IX of the Treaty. The original text provided that Mexican citizens choosing to reside in the United States would become citizens rapidly. The revised text, however, stated that Mexican citizens "shall be incorporated into the Union of the United States... at the proper time." According to Professor Montoya, "by rewriting Article IX, the Senate made the promise of U.S. Citizenship for these former Mexican citizens... [dependent] on the whim and desires of Congress... Without this constitutional protection, former Mexican citizens suffered prejudice from the very beginning in 1848." \textit{Id.} at 170.

\(^{67}\) \textit{Id.} at 162.

\(^{68}\) Throughout the nineteenth century, Congress passed various pieces of legislation that gave the President authority to extinguish American Indian rights and forcibly remove them to reservations, and that gave judicial courts the right to punish Indians for transgression of laws, including capital punishment; and thee [s]implified ofe American Indian groups. \textit{See generally} Indian Intercourse Act of 1802, 2 Stat. 139 (\textit{Two United States Statutes at Large}, 1789-1845, Chap. 13, at 139-46) (ceding large plots of land previously occupied by Native Americans to the United States government as a buffer zone for White westward migration); Indian Intercourse Act of 1834, 4 Stat 729 (\textit{Four United States Statutes at Large}, 1789-1845, Chap. 161, at 729-35) (limiting "Indian title" to portions of land west of the Mississippi River where it had not yet been extinguished, excluding Arkansas, Louisiana and Missouri); Indian Allotment Act, 10 CONG. REC. 2039, 2066 (1880) (demonstrating methods used by the United
White European and American settlers, Mexican and American Indian law and jurisprudence seemingly confirmed that "only republican property [and by extension equality] was worthy of legal protection."69

The dispossession of Mexican and American Indian land and property rights was endemic of a widespread tendency of the American West’s legal regime to racialize Mexican, Asian, and American Indians as “foreign” to all Anglo-Saxon, Protestant “American” values and beliefs. Unlike the “industrious” European and American squatters in the American West who were pursuing the highest of “American” traditions, non-White groups were viewed in opposite and dangerous terms. As American Diplomat Waddy Thompson warned about United States acquisition of Mexican land in 1848,

we shall get no land, but will add a large population alien to us in feeling, education, race, and religion—a people unaccustomed to work, and accustomed to insubordination and resistance to law, and an expense of government who will be ten times as great as the revenue derived from them.70

In contrast, but having the same conclusion, an 1878 report by the California State Senate Committee on Chinese Immigration declared that Americans:

cannot compete with Chinese labor, and are now suffering because of this inability. This inability does not arise out of any deficiency of skill or will, but out of a mode of life heretofore considered essential to our American civilization. Our laborers have families, a condition considered of vast importance to our civilization, while the Chinese have not, or if they have families they need but little to support them in their native land.71

As demonstrated in various American speeches and documents, virtually every aspect of the Chinese, Mexican, and the American Indian way of life was used by Westerners to demonstrate the incompatibility of these non-White

69. Montoya, supra note 9, at 174.
communities to White American culture, values, and institutions.72

These racist attitudes were expressed in Western courtrooms as Mexican Americans faced “cultural barriers” revolving around language, misunderstandings of Mexican and Spanish property law, and preference by judges for “American” litigants, values, and institutions. As early as 1868, the Territorial Supreme Court of Colorado overruled a probate case because of its reliance on a foreign language at the trial court level.73 According to the Court, “[I]t is enough to say, that the declaration in the case was in the Spanish language. It is not to be tolerated in this country, that judicial proceedings should be in any other than the adopted language of the nation.”74 While foreigners and migrants could litigate—as long as one spoke English—many Asians, American Indians, and African Americans in the American West found themselves completely silenced by Western courts and legislatures by testimonial and other limitations and exclusions.

In 1850, the California legislature passed a statute that declared “no black or mulatto person, or Indian shall be permitted to give evidence in favor of, or against, any white person.”75 In 1854, the statute was challenged after three Chinese witnesses testified against three “free” White men in the murder of a Chinese man named Ling Sing.76 In the case, People v. Hall, the California Supreme Court indicated that Chinese were covered in the prohibition.77 According to the Court, “Black, Mulatto, Indian and White” racial categories are “generic terms... intended to limit their application to specific types of the human species.”78 The intention of the Act, according to the Court, “was to throw around the [White] citizen a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes... who have nothing in common with us, in language, country or laws.”79 Relying on the “ethnology of the day,”80 the Court found the Chinese “unambiguously nonwhite and therefore not entitled to testify against white citizens in the state.”81 Importantly, the California court based its argument upon the threat that the racially diverse American West posed to the equal rights of the region’s White citizens.82 According to the court,

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72. See, e.g., Stuart Creighton Miller, Unwelcome Immigrant: The American Image of the Chinese, 1785-1882 149 (Berkeley: UC Press 1969) (showing how “Americans” used propaganda to advocate that their minority citizens were inferior and a threat to their White way of life); Almaguer, supra note 8 (demonstrating how Whites stereotyped and badgered Chinese Americans); Menchaca, supra note 27, at 38-41 (showing the tactics of separating Whites and Mexicans in the nineteenth and twentieth centuries).
73. Dunton v. Montoyo, 1 Colo. 99, 100 (1868).
74. Id. But see Town of Trinidad v. Simpson, 5 Colo. 65, 69 (1879) (limiting the holding of the Dunton case to only require English in the pleadings, and allowing interpreters to be assigned to the Mexican American litigants).
76. People v. Hall, 4 Cal. 399, 399 (1854).
77. Id.
78. Id. at 399.
79. Id. at 403.
80. Id. at 400-05.
81. Almaguer, supra note 8, at 162.
82. Hall, supra note 8, at 399.
[t]he same rule which would admit them [Chinese] to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. This is not a speculation which exists in the excited and overheated imagination of the patriot and statesman, but it is an actual and present danger. 83

In People v. Brady 84 in 1870, the California Supreme Court considered the constitutionality of this same act in light of the Fourteenth Amendment. Significantly, the Act was amended in 1863 to declare: “No Indian or person having one half or more Indian blood, or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man.” 85 The original 1850 Act was directed against “black or mulatto person[s], or Indian[s],” but was amended by the California legislature in response to the Civil War, the passage of the Thirteenth Amendment, and the rapid influx of Chinese laborers during the 1850s and 1860s into California. 86 Consequently, People v. Brady was not merely a re-evaluation of the constitutionality of the amended Act. Rather, it represented the Fourteenth Amendment’s first tentative attempt to deal with a racially diverse and internationally mobile population. The case and the multiracial crucible of the American West thus tested the ability of Western courts to think of “equality” and “citizenship” outside of “Black” and “White” terms.

Importantly, racial thinking infused the California court’s analysis of the Fourteenth Amendment. According to the Court, the Fourteenth Amendment’s “chief purpose” was primarily “those States where slavery recently existed.” 87 In specifically singling out the nation’s Black community, the Court implicitly declared that no such inequalities existed in California. The Court’s reasoning suggested that the social condition and racial treatment of African Americans was unique because of past servitude, despite the ruling in Hall that seemed to suggest otherwise. The California Court was primarily concerned with the equality rights of its White population instead of the unequal treatment afforded the state’s Chinese residents. As the Court reasoned:

Now, in passing these laws, the Legislature does not act arbitrarily. It does not exclude a person because of his unbelief in popular theological

83. Id. (emphasis added).
84. 40 Cal. 198, 198 (1870).
87. Brady, 40 Cal. at 214. The Court further elaborated:
[un]der . . . laws [in those states] it sometimes happened that the law pronounced a different judgment upon a negro from that it pronounced upon a white man upon the same state of facts. The law provided a different punishment to the negro when convicted of crime from that which was provided for a white man when convicted of the same crime, and in other respects the law discriminated against the negro. The Amendment was evidently intended to prevent these inequalities.
Id. at 214.
dogmas, nor the Mongolian for being a Mongolian merely. The theory of
the law and the idea upon which these laws are based is, that every
person shall be permitted to testify who can aid the Court in coming to a
correct conclusion as to the facts upon which it is to adjudicate. The
reason why the testimony of such persons would be valueless in judicial
investigations may be that they are incapable of testifying intelligently;
that they are too unreliable to be of any service; that their admission
would probably defeat justice by producing false testimony, or that they
have particular prejudices against certain classes which would cause their
evidence likely to do harm where the rights of such persons are
concerned; such evidence, it is presumed, would impede rather than
advance the cause of justice. It would not tend to protect any, but might
cause the conviction of the innocent, or the acquittal of the guilty. 88

As the court made clear in its Fourteenth Amendment analysis, the seemingly
"unequal" testimonial prohibition was necessary to create "fairness" for Whites in
the multiracial West. 89 The Fourteenth Amendment, in the view of the Court, was
not intended to question the motives of a seemingly "tolerant" and "reasonable"
Western legislative body responding to a much different social situation than those
encountered in the American South. 90

The Brady decision symbolized the extent that courts were unwilling to extend
the protections and guarantees of the freshly ratified Fourteenth Amendment to the
American West’s non-White and non-Black communities. What complicated
matters was the ability of Western courts to shift constantly the racial boundaries of
Chinese, Mexicans, and American Indians. In People v. Pablo De La Guerra, 91 for
example, the California Supreme Court assessed the State of California’s attempt to
disqualify De La Guerra from his election in 1869 as Judge of the state’s First
Judicial District because he was not a White American citizen. 92 Though the Court
upheld De La Guerra’s White citizenship, the decision nevertheless suggested that
guarantees of the U.S. Constitution—including the Fourteenth Amendment—were
not applicable to Mexican Indians who enjoyed equal citizenship under Mexican
law. 93 Because neither Chinese, Mexicans, nor American Indians were officially
identified as either White or Black, 94 early Fourteenth Amendment jurisprudence

88. Id. at 211.
89. Id.
90. Id.
91. 40 Cal. 311 (1870).
92. Id. at 339. In addition to his election to the judicial post, De La Guerra was also a delegate to
the California Constitutional Convention in 1850.
93. Id. at 343. Fourteen years later, the United States Supreme Court declared that Indians,
regardless of tribal affiliation, treaty, and embrace of “American” values, were nonetheless denied
citizenship under Section 1 of the Fourteenth Amendment. Importantly, the factual evidence of the case
94. See, e.g., ALMAGUER, supra note 8 at 40 (stating that Mexicans were not protected by the early
Fourteenth Amendment holdings); HANEY LÓPEZ, supra note 10, at 120 (stating that non-Whites were
not protected by the early Fourteenth Amendment holdings); MENCHACA, supra note 27, at 221-22
(stating that American Indians were not protected by the early Fourteenth Amendment holdings); Natsu
Taylor Saito, Allen and Non-Alien Alike: Citizenship, ‘Foreignness,’ and Racial Hierarchy in American
Law, 76 OR. L. REV. 261, 287 (1997) (stating that the government could not racially classify all
by Western courts reinforced, rather than challenged, the unequal distribution of
dights, benefits, and privileges to the region’s multiracialized groups. 95

In spite of such rulings, the economic position of Whites in the American
West remained precarious. Although the gold, mineral, and land rushes of the
nineteenth century evoked images of the propitious prospector and the prosperous
homesteader, the socio-economic condition of the American West belied such
individual ideas. Major portions of the region were heavily industrialized,
consisting of a myriad of ethnic and racial groups working for daily wages, set in
the backdrop of a national and international labor and capital market that only
exacerbated economic and racial tensions. 96 Thus, changing conceptions of
property, economic turbulence, demographic transformation, and multiracial
hostility forced Western and, increasingly, national courts to re-evaluate the
applicability of the Fourteenth Amendment in the context of these changed
conditions.

This tension came to a head in 1880 when San Francisco authorities arrested
Tiburcio Parrot, the White president and director of the Sulfur Springs Quicksilver
Mining Company. 97 The authorities alleged that Parrot violated Article Nineteen of
the California Constitution, 98 as well as the Penal Code of California, 99 when his

minorities as “Black” or “White,” so different grades of minority status began to appear for any person
who had immutable non-European characteristics).

95. See, also e.g., Wilkins, 112 U.S. at 109 (holding that Native Americans did not acquire
citizenship upon birth).

96. See, e.g., WILLIAM G. ROBBINS, COLONY AND EMPIRE: THE CAPITALIST TRANSFORMATION OF
THE AMERICAN WEST 61-102 (Univ. Pr. of Kansas 1994) (showing the many kinds of socioeconomic
tensions that existed in the American West after the arrival of many non-White immigrants). Tomás
Almaguer points out that “the arrival of Black slaves during the Gold Rush heightened anxiety among
European Americans that slavery might compromise [the American West’s] prospect of becoming a
haven for free white labor. When Chinese immigrants followed blacks into the mining region, whites
drew close analogies between black slaves and Chinese ‘coolies.’” ALMAUGER, supra note 8, at 153-54.
Such fears were exacerbated by American companies, who preferred to hire non-European and non-
American American labor, largely Chinese, whenever possible. Id. White workers, however, believed
that such laborers “were mere pawns of capitalist interests and other monopolistic forces that relied upon
unfree labor. Consequently, white male laborers believed that Chinese workers threatened both the
precious class position and the underlying racial entitlements that white supremacy held out to them
and to the white immigrants who followed them into the new class structure.” Id. The Panic of 1873 and
the Depression of 1877 further fostered anti-alien “fervor” in the American West that resulted in racially
restrictive laws and a restrictive system of immigration. Jan C. Ting, “Other Than a Chinaman,” How
U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian

97. PAUL KENS, Civil Liberties, Chinese Laborers, and Corporations, in LAW IN THE WESTERN
UNITED STATES 499 (Gordon Morris Bakken ed., 2000).

98. Article XIX of the California Constitution of 1879 declared:

CHINESE.

Section 1. The legislature shall prescribe all necessary regulations for the protection of the
state, and the counties, cities and towns thereof from the burdens and evils arising from the
presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or
invalids, afflicted with contagious or infectious diseases, and from aliens otherwise
dangerous or detrimental to the well-being or peace of the state, and to impose conditions
upon which such persons may reside in the state, and to provide the means and mode of their
removal from the state upon failure or refusal to comply with such conditions; provided, that
nothing contained in this section shall be construed to impair or limit the power of the
company hired Chinese workers to labor in his mines. Parrot’s lawyers quickly petitioned for a writ of habeas corpus to the United States Circuit Court for the District of California. In the writ, Parrot’s lawyers argued that the California constitutional provision and legislative enactments and his subsequent incarceration violated the Fourteenth Amendment.

In re Tiburcio Parrot received intense scrutiny by the region’s White citizenry. According to Paul Kens,

legislature to pass such police laws or other regulations as it may deem necessary.
Section 2. No corporation now existing, or hereafter formed under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as may be necessary to enforce this provision.
Section 3. No Chinese shall be employed on any state, county, municipal, or other public work, except in punishment for crime.
Section 4. The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of this state, and the legislature shall discourage their immigration by all the means within its power.

CAL. CONST. art. XIX (1879).

99. In February 1880, the California legislature responded by inserting into the state’s criminal code two provisions that subjected corporate officers to criminal penalties and imprisonment for violations of the Constitutional provision:

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Sec. 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee, or contractor of any corporation now existing or hereafter formed under the laws of this state, who shall employ, in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail of not less than 50 nor more than 300 days, or by both such fine and imprisonment; provided, that no director of a corporation shall be deemed guilty under this section who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors.

1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:
2. For each subsequent conviction such person shall be fined not less than $500 nor more than $5,000, or by imprisonment not less than 200 days nor more than two years, or by both such fine and imprisonment.

Sec. 2. A new section is hereby added to the penal code, to be known as section 179, to read as follows:

Sec. 179. Any corporation now existing, or hereafter to be formed under the laws of this state, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, for the first offence, be fined not less than $500 nor more than $5,000; and, upon the second conviction, shall, in addition to said penalty, forfeit its charter and franchise, and all its corporate rights and privileges, and it shall be the duty of the attorney general to take the necessary steps to enforce such forfeiture.

This act shall take effect immediately.


100. KENS, supra note 97, at 499.

101. Id.

102. 1 F. 481 (C.C.D. Cal. 1880).
[w]hen hearings in the Parrot case began . . . anti-Chinese leader Denis Kearney incited a rally of unemployed workers, saying 'I will accept no decision but that of the people . . .' . . . As a precaution, National Guard troops moved into the city . . . the federal courtroom was packed when hearings before Judge Odgen Hoffman and Lorenzo Sawyer began. Every San Francisco newspaper kept a daily tab on the developments.103

The case was so significant, however, not because of the degree of anti-Chinese sentiment exhibited in the Constitution and enabling legislation, but because it posed the first of many Fourteenth Amendment dilemmas for the region’s White citizenry in relation to a non-African American population. At issue was the extent that Whites should be held accountable for discrimination against the region’s Chinese workers. Although Article Nineteen of the California Constitution, and subsequent enabling legislation, was clearly passed to allow legal discrimination against the Chinese,104 the law jailed a White citizen. As a result, the case squarely confronted the question of how to contain “equal protection of the law” in regions experiencing dramatic economic transformations and concomitant racial division.

In their disposition of the case, Judges Sawyer and Hoffman found the case raised a series of questions that connected the Fourteenth Amendment to the recent historical development of the American West. Thus, the court asked: Did the California Constitution and subsequent actions by the legislature violate the Fourteenth Amendment to the United States Constitution?105 Did each contradict Article Five of the Burlingame Treaty between the United States and China?106 Or, did the state’s ability to create, repeal, alter, or amend corporate charters also give it authority to pass penal legislation against corporations hiring Chinese laborers?107 Importantly, Judges Sawyer and Hoffman’s analysis of the case suggested that they did not see these questions as mutually exclusive. Rather, the federal judges connected the legal issues by framing their analysis in relation to the “privileges and immunities” of companies and individuals doing business, making contracts, and providing labor in California.108

Only a few years earlier, a divided United States Supreme Court in The Slaughter-House Cases109 limited the application and meaning of “privileges and immunities” of national citizenship and more important, noted that the recent amendments were directed exclusively to alleviate the condition of the nation’s African American citizenry.110 Nevertheless, Judges Sawyer and Hoffman’s analysis of the issues in Parrot showed the inapplicability of the Supreme Court’s decision to California and the entire American West’s social and economic

103. Kens, supra note 97, at 499.
104. Id. at 499.
105. Tiburcio Parrot, 1 F. at 484-85.
106. Id. at 485.
107. Id. at 486.
108. Id. at 488.
109. 83 U.S. 36 (1873).
110. Id. at 77-80 (1873); see also supra notes 95-97 and accompanying text.
situation. According to the Court, the American West was a region where “Chinese subjects visiting or residing in the United States” theoretically enjoyed “the same privileges [and] immunities . . . as may there by enjoyed by the citizens or subjects of the most favored nation.”

In so far as the California law violated the provisions of the Burlingame Treaty, both Sawyer and Hoffman agreed that the domestic law was void. Yet, the question remained, what did the “privileges and immunities” of citizens and most-favored nation mean in the multiracial West?

In order to answer such a question, Judge Sawyer, in particular, turned to Justice Stephen Field’s, Justice Joseph Bradley’s, and Justice Noah Swayne’s dissents in the Slaughter-House cases. Most prominent in Judge Sawyer’s dissent was the reasoning of Justice Field, himself a Westerner and one-time judge in Judge Hoffman and Sawyer’s courts. According to Justice Field, if the Fourteenth Amendment was to have any meaning, it needed to ensure that the “distinguishing privilege of citizens of the United States” was not eviscerated by laws that denied “to them, everywhere, all pursuits, all professions, all avocations.”

Justice Field further elaborated: “[T]he fundamental idea upon which our institutions rest” is the “right of free labor, one of the most sacred and imprescriptible rights of man.” Although the Slaughter-House majority had rejected such a broad reading of the Fourteenth Amendment, Judge Sawyer’s reliance on the dissent suggested that he believed that the Fourteenth Amendment would be incongruous if it did not afford the same or greater protection to those races who were not “Negro.”

Accordingly, he hinged his analysis upon the property rights that everyone seemingly had regardless of race. According to Sawyer,

There is no difference of opinion as to the significance of the terms ‘privileges and immunities.’ Indeed, it seems quite impossible that any definition of these terms could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence. As to by far the greater portion of the Chinese, as well as other foreigners who land upon our shores, their labor is the only exchangeable commodity they possess. To deprive them of the right to labor is to consign them to starvation. The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, wherever he may be permitted to be, of which he cannot be deprived, either under the guise of law or otherwise, except by usurpation and force.

112. Tiburcio Parrot, 1 F. at 498-99, 504.
113. KENS, supra note 9.
114. Slaughter-House Cases, 83 U.S. at 110.
115. Id. at 109-10.
116. In an 1886 oral history, Judge Sawyer concluded that the “Chinese are vastly superior to the Negro.” CHRISTIAN G. FRITZ, FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851-1892, 247 (quoting Sawyer Dictations (Sept. 22, 1886) (available in Folder C-D 321:1, Bancroft Library, University of California, Berkeley)).
117. Slaughter-House in re Tiburcio Parrot, 1 F. at 507.
Most importantly, Sawyer grounded his analysis in the Fourteenth Amendment:

The [F]ourteenth [A]mendment . . . prevents any state from depriving ‘any person’ of life, liberty or property without due process of law, or from denying to ‘any person within its jurisdiction the equal protection of the law.’ In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution . . . it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the [F]ourteenth [A]mendment and the act of congress.118

Although Judge Sawyer “never made clear exactly which clause of the Fourteenth Amendment California’s constitutional prohibition violated,”119 the underlying principle of his analysis was that there is a “fundamental, inalienable” right to free labor, both to an individual and a corporate entity.

It was clear that both Judges Sawyer and Hoffman feared the consequences of Chinese labor on the racial makeup of the region and the nation.120 However, they questioned legislation that threatened the multiethnic and multiracial composition of the American West’s workforce. To Judge Hoffman, it was not necessarily the rights of the Chinese laborer that needed protection. Rather, it was the threat that such laws posed to current and future White citizens. As Judge Hoffman observed, if allowed to stand, the California law would not only forbid the employment of a Chinese laborer, “it might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest.”121 Irrespective of the rights of the Chinese or any other groups, the California constitutional prohibition and the jailing of Tiburcio Parrot, in Judge Hoffman’s estimation, threatened the ability of California’s and the American West’s White

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118. Id. at 508-10 (emphasis added).
119. Kens, supra note 97, at 500.
120. Judge Hoffman noted:
[...]that the unrestricted immigration of the Chinese to this country is a great and growing evil, that it presses with much severity on the laboring classes, and that, if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese Empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons.
In re Tiburcio Parrot, 1 F. at 498. Similarly, Judge Sawyer noted:
[...]bidding as we do, that the constitutional and statutory provisions in question are void, for reasons already stated, we deem it proper again to call public attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the state, but with the general government.
Id. at 518.
121. Id. at 491.
population to profit handsomely off the labor of the region’s non-White, non-Black groups.122

The free labor principle articulated by the Western federal court was seemingly extended nationally with Yick Wo v. Hopkins in 1886.123 124 In a short and concise opinion declaring finding that an ordinance that disproportionately affected the Chinese was unconstitutional, the Court declared that the California law was administered

with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.125

The United States Supreme Court—for the first time in its Fourteenth Amendment jurisprudence—applied the Amendment to persons other than former slaves.126

The Court did so, however, not out of a desire to promote or achieve racial equality. Indeed, in the years after the decision, anti-Chinese as well as anti-Japanese and anti-Mexican state and federal laws consistently passed Fourteenth Amendment scrutiny.127 Rather, the racially diverse late-nineteenth and early-twentieth century laboring populations of the American West provided the means by which Western jurists developed a substantive theory of economic, and not multi-racial, rights in early Fourteenth Amendment jurisprudence.128 As scholars have suggested, the American West’s multi-racial population provided the “missing link”129 between the Slaughter-House cases and Lochner v. New York.130 According

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122. As Judge Hoffman pointed out, if the California constitutional prohibition is enforced, [A] bank or a railroad company will lose the right to employ a Chinese interpreter to enable it to communicate with Chinese whom it does business. A hospital association would be unable to employ a Chinese servant to make known or minister to the wants of a Chinese patient; and even a society for the conversion of the heathen would not be allowed to employ a Chinese convert to interpret the gospel to Chinese neophytes.  

123. 118 U.S. 356 (1886).
124. Id.
125. Id. at 373.
127. See, e.g., In re Rodriguez, 81 F. 337 (W.D. Texas 1897) (holding that a Mexican immigrant’s application for U.S. citizenship should not be denied “if he is shown by the testimony to be a man attached to the principles of the Constitution, and well disposed to the good order and happiness of the same”); United States v. Sandoval, 231 U.S. 28 (1913) (holding that Congress had sufficient authority to prohibit the introduction of intoxicating liquor in Pueblo Indian communities of New Mexico owned collectively in fee simple).
128. For examples of cases heard by the Supreme Court involving African Americans in other regions of the country that tended to involve the denial of political rights and equal access to rights, rather than the inability to contract, see. Neal v. Delaware, 103 U.S. 370 (1880); Ex Parte Virginia, 100 U.S. 339 (1879); Plessy v. Ferguson, 163 U.S. 537 (1896); The Civil Rights Cases, 109 U.S. 3 (1883).
129. Joo, supra note 126, at 356.
130. 198 U.S. 45 (1905).
to Thomas Wuil Joo, "by dealing with economic rights in the context of racial
discrimination, [Fourteenth Amendment cases involving the American West’s
multiracial populations] formed a bridge between the exclusively race-based
approach of Slaughter-House and the exclusively economic rights-based-approach
of Lochner.”  

As in the years before the passage of the Amendment, “property”
proved to be the great equalizer of a diverse American society. In the post-
Fourteenth Amendment West and larger American nation, however, the individual
“property” that was valued was not fee simple ownership of a tract of land, but
one’s ability to contract labor. In this regard, the Fourteenth Amendment, like the
Homestead and Preemption Acts of the early nineteenth century, was more likely
to protect men (and in some cases women like Tiburcio Parrot) than Yick Wo.

Although early Fourteenth Amendment jurisprudence in the American West
disrupted settled understandings of equality concerning the region’s non-White and
non-African populations, it neither challenged their continued subordination in
state and federal law, nor their social and political exclusion in the American West
and the larger United States in the late-nineteenth and early-twentieth centuries.

II. WORLD WAR II AND BEYOND: REDEFINING EQUALITY IN THE METROPOLITAN
WEST

Not unlike the gold and silver rushes of the nineteenth century, World War II
and the Cold War represented a time of rapid economic and demographic change
for the American West. As historian Richard White notes, “it was as if someone
had tilted the country: people, money, and soldiers all spilled west.”

Accordingly, the impact of this change was felt most in the urban West, as Mexican
Americans, Mexican immigrants, Japanese Americans, African Americans,
American Indians, and White ethnics moved to the West’s cities in search of jobs
and opportunity.  

In the decades during and after World War II, the region’s

131. Joo, supra note 126, at 356. See also Howard J. Graham, Justice Field and the Fourteenth
Amendment, 52 YALE L.J. 851, 883-87 (1943) arguing that developing doctrines from the Ninth Circuit
regarding Chinese cases “suffered implicit . . . rejection by the Supreme Court in the Slaughterhouse and
Granger cases”.

132. Interestingly, in the decades after Yick Wo, class and gender divisions in the American West, not
its racial ones, animated state and federal court’s assessments of the applicability of the Fourteenth
Amendment. See e.g. Holden v. Hardy, 169 U.S. 366, 398 (1898) (upholding in accordance with the
Fourteenth Amendment a Utah eight-hour workday statute for underground miners and smelters as a
result of the extraordinary conditions these Western laborers faced); Muller v. State of Oregon, 208 U.S.
412, 423 (1908) (Finding no Fourteenth Amendment violation in an Oregon legislative act mandating
that women in any mechanical establishment, factory, or laundry work no more than ten hours a day).

133. WHITE, supra note 17, at 496.

134. Kevin Allen Leonard, Migrants, Immigrants, and Refugees: The Cold War and Population
Growth in the American West, in THE COLD WAR AMERICAN WEST, 1945-1989 29-49 (Kevin J.
Fernlund, ed. 1998); Ric Dias, The Great Cantonment: Cold War Cities in the American West, in THE
COLD WAR AMERICAN WEST, 1945-1989 71-85 (Kevin J. Fernlund, ed. 1998); CARL ABBOTT, THE
METROPOLITAN FRONTIER: CITIES IN THE MODERN AMERICAN WEST (1993); and Gerald D. Nash,
Planning for the Postwar City: The Urban West in World War II, in 27 ARIZONA AND THE WEST 99
(1985).
urban metropolises led the country in rates of urban population growth. 135 Despite the promise of jobs and opportunity, however, patterns of racial and ethnic segregation and discrimination that had been established in the late nineteenth and early twentieth centuries continued to divide the region’s multiracial populations. Not surprisingly, law generally and the Fourteenth Amendment specifically more often than not reinforced existing inequalities and deeply held beliefs concerning alleged racial differences of the region’s diverse communities. 136

Yet, widespread and rapid economic and demographic change forced Western courts and their participants to again confront the issues of equality in a fluid and racially diverse society. Such questions were heightened further as the United States’ World War II and Cold War rhetoric of democratic equality for all peoples compelled many Americans to re-assess the guarantees of the Constitution—including the Fourteenth Amendment. 137 Indeed, during World War II, Judge Thurmond Clark of Los Angeles articulated—for African-Americans—the imperative faced by the region and the nation: “[i]t is time that members of the Negro race are accorded, without reservations or evasions, the full rights guaranteed them under the Fourteenth Amendment of the Constitution. Judges

135. WHITE, supra note 17, at 507.
136. For example, in 1907 President Theodore Roosevelt signed an executive order that prohibited the migration of Japanese and Korean’s to the United States mainland. In 1917, Congress created an “ Asiatic barred zone ” in the 1917 Immigration Act. In conjunction with jurisprudence that made Asian Americans and Pacific Islanders ineligible for citizenship, the 1924 Immigration Act prohibited the immigration of all “aliens ineligible for citizenship” and the Tydings–McDuffie Act in 1934 reclassified Filipinos as aliens. See Gabriel J. Chin, The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965, 75 N.C. L. REV. 273, 278-282 (1996) (arguing that the 1965 Immigration Act intended to “take race out of America’s immigration policy” by creating more equalized opportunities for all, including whites); and TAKAKI, supra note 86 at 331-32. The 1917 and 1924 Acts also inserted literacy and moral turpitude tests, mandated delousing procedures, and instituted a head tax. Mexican immigrants, in particular, suffered extreme humiliation and discrimination as a result of these new procedures. See SÁNCHEZ, supra note 86, at 55-59 (discussing the effects of the 1917 Immigration Act on Mexicans entering the U.S.) For those Mexicans and Japanese already living in the American West, racially restrictive covenants, alien land and employment laws, de jure policies of segregation, and racial profiling perpetuated inequality and discrimination in the first half of the twentieth century. See id. at 77-78, 211 (discussing post-World War I racial segregation in Los Angeles); TAKAKI, supra note 8672, at 197-212 (analyzing legal restrictions erected against Japanese immigrants in California); EDWARD J. ESCOBAR, supra note 10, at 104-31 (discussing theories and statistics of Mexican criminality in Los Angeles); Kristi L. Bowman, The New Face of School Desegregation, 50 DUKE L.J. 1751, 1768-1772 (2001) (discussing de jure school segregation and the “Latino Experience”). African-Americans also encountered such difficulties. See TAYLOR, supra note 8, at 21, 89-90, 97-98, 178-82. Importantly, Western courts more often than not upheld such prohibitions. In Colorado and Texas, for example, state courts upheld provisions that legally excluded Mexicans and Mexican Americans from public facilities reserved for Whites. See Lueras v. Town of Lafayette, 65 P.2d 1431, 1432 (Colo. 1937) (upholding trial court’s decision that town was not responsible in for sign outside pool that read “white trade only” and further questioned its applicability to “Spanish-American Americans”); Terrell Wells Swimming Pool v. Rodriguez 182 S.W. 2d. 824, 827 (Tex. Civ. App. 1944) (per curiam) (holding that nothing prevented private swimming pool from excluding “Mexican” and “Hispanic” patrons). And in Korematsu v. United States, 323 U.S. 214, 219 (1944), the Supreme Court approved the internment of Japanese and Japanese Americans on the West Coast and their removal to the Intermountain West as a war necessity.
have been avoiding the real issue too long." 138 Such language held particular resonance in the American West as the region’s inhabitants and commentators steadfastly held onto an image of tolerance, opportunity, and inclusion139 in spite of nationwide cases of racial tension140 and the forced removal of Japanese and Japanese Americans from their West Coast homes.141

The metropolitan Denver area during and after World War II provides an especially compelling environment to assess the ways that urban Westerners struggled to redefine the meaning of racial equality in the Fourteenth Amendment. By 1970, more than a quarter of Denver’s population consisted of racial minorities.142 Migrating to the city, in search of economic opportunity, Mexican Americans, African Americans, Japanese Americans, and Whites transformed the city in the years after World War II. Importantly, many individuals moved to the city because discrimination did not seem to exist in the city. In 1952, Isaac Jones, a reporter for the Baltimore Afro American praised Denver for its citizens’ racial tolerance. In finding Blacks employed in a wide array of positions and a few racially mixed schools, Jones concluded that “fair play reigns” and “the color line does not exist.”143 Yet, less than twenty years later cleavages along racial lines threatened to tear Denver apart. Indeed, during the 1970s, efforts to integrate Denver’s public schools “triggered the February 1970 dynamiting of forty-six school vehicles.”144 Likewise, tensions between people of color and the police culminated in the March 1973 shooting death of Luis Martinez by the Denver Police in the alley behind the headquarters for the Crusade for Justice, an organization dedicated to Chicano political and social mobilization.145 As

138. Denver Unity Council, Racially Restrictive Covenants” 3 (undated, 1940s) in Keyes (Wilfred) v. Denver School Board Collection, University of Colorado at Boulder, Norlin Library Archives, Box 1, FD 9.

139. See, e.g., Tolerance in Colorado, ROCKY MTN NEWS (Denver, Colo.), Nov. 10, 1944, at 14 (stating that “Colorado voters are to be congratulated for their wisdom and tolerance in rejecting Amendment No. 3 . . . which would forbid alien Japanese from owning land in Colorado . . . [and] could readily have been a precedent for other, more vicious prejudice legislation”).

140. The so-called “Zoot Suit Riots” and “Sleepy Lagoon Case” in Los Angeles demonstrated widespread racial tension among Mexican Americans and Whites. In the former instance, White servicemen on leave attacked young Mexican American men and women for their “un-American-Americanness” between June 3 and June 10, 1943. In the latter case, eight Mexican American young men were convicted for the murder of another Mexican American youth. Evidence presented in the case highlighted the “blood-thirsty” Aztec lineage of the youth as being an aggravating factor. See ESCOBAR, supra note 11410, at 197-253.


143. STEPHEN J. LEONARD & THOMAS J. NOEL, DENVER MINING CAMP TO METROPOLIS 373 (1990).

144. Id. at 380.

145. Harry Gessing & John Ashton, 1 Killed, 19 Hurt, 36 Held in Denver Gunfight, Blast, DENV. POST, Mar. 17, 1973, at 1; Man Slain, Officers Wounded in Denver Shooting, Bombing, ROCKY MTN.
historians Stephen Leonard and Thomas Noel point out, "Denver was prepared for violence. By 1973 bombings were nothing new; clashes between police and minorities had become routine."  

Like many Western cities during and after World War II, "Denver was a boom town," as the city was "one of the dozen or so 'exploding metropolises' about which the editors of Fortune and Harper's have become concerned." It was during these years that Denver and the greater metropolitan area's population grew by thirty-eight percent from approximately 400,000 people on the eve of World War II to 560,000 by 1950; the third largest increase of all cities West of the Mississippi. As local news columnist Robert Perkin pointed out, the "war industry" catalyzed such an explosion. From bomber modification hangers at Stapleton Airfield to the establishment of the Rocky Mountain arsenal, the federal government laid the foundation for the subsidized national defense economy that would emerge. As wartime activities in the early 1940s rejuvenated the economy and as the Cold War defense industries sustained it, thousands of Mexican-Americans, African-Americans, Japanese-Americans, and Whites permanently found their way to Denver. Working not only in the beet-fields that lay in the outskirts of the city, many of Denver's new arrivals also found jobs in newly erected and converted factories, meat-packing plants, iron foundries, construction projects, federal government jobs, and railroads.

Mexican Americans, African Americans, and Japanese Americans, however,
did not move into the racially tolerant metropolis that Isaac Jones described to his Baltimore readers. Along with its long history of racial antagonism and tension, Denver had a long history of racial prejudice\(^{154}\) and legal discrimination. Indeed, Denver and Colorado courts consistently upheld such measures as racially restrictive covenants\(^{155}\) and anti-miscegenation laws.\(^{156}\) The outbreak of war in late 1941 threatened to expose bias and discrimination in Denver’s legal regime. As a result, legal authorities worked to ensure at least the promise of fairness in the disposition of cases. For example, shortly after the United States entry in the war, United States District Judge J. Foster Symes warned a recently convened grand jury “to avoid war hysteria.”\(^{157}\) In cases concerning aliens of nations with whom America was at war or if other matters relating to the war effort should arise, Judge Symes emphasized that “such cases should be treated the same as any others.”\(^{158}\) It was not long before Denver courts had the opportunity to test Judge Syme’s proposition.

A. "Oriental" Minds and Equal Citizenship During War

On May 4, 1942, a startling headline dominated the front page of the Rocky Mountain News: “Denver Jap Butchers Wife in Hotel Lobby.”\(^{159}\) In vivid detail, Denverites discovered how George Honda, “a 37 year old Japanese American restaurant operator, slashed his wife to death . . . then attempted to commit hara-kiri with the blood drenched weapon.”\(^{160}\) George Honda operated the United States Café, a restaurant located in the heart of downtown Denver.\(^{161}\) Born in Hawaii, but raised in Japan by his mother until he was sixteen before returning to the United States, Honda had married Mary Iyama, a born and bred Japanese American native of Colorado.\(^{162}\) Married for seven years, the Hondas worked together at the café while living since 1940 at the Columbia Hotel—located across the street.

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154. For example, in 1932, Blacks and Whites clashed over attempts to integrate a “White-only” beach at the popular Washington Park. As Blacks went swimming, “Whites quickly left the water, armed themselves with sticks and stones, and advanced on the newcomers who fled towards the trucks that had brought them. When the two trucks would not start, the Blacks were pursued and beaten as nearly a thousand onlookers watched. The police arrested 17 people—10 African-Americans and 7 Whites who had encouraged the Blacks to assert their rights.” LEONARD & NOEL, supra note 144, at 366.

155. See, e.g., Chandler v. Ziegler, 291 P. 822, 823 (Colo. 1930) (holding that a person owning a body of land and dividing it into smaller tracts for the purpose of selling one or more may insert a provision into the deeds restricting the ownership and occupancy according to race).

156. See, e.g., Jackson v. City and County of Denver, 124 P.2d 240, 241 (Colo. 1942) (upholding the constitutionality of a Colorado statute declaring all marriages between Black and White persons absolutely void).


158. Id.


160. Id.


162. Denver Jap Butchers Wife, supra note 159, at 1 in Hotel Lobby, ROCKY MTN. NEWS (Denver), May 4, 1942, at 1.
On the morning of May 3, 1941, Honda left the hotel apartment at sunrise to get breakfast underway at the restaurant. He found out the cafe's dishwasher had overslept, and as a result, demanded that his wife come over and help out. An argument ensued. After returning to the apartment sometime around 11 a.m., Honda and his wife again quarreled in the hotel lobby. Mary Honda then asked the hotel clerk "to telephone her father . . . and ask him to come to Denver [for] her."

When Honda demanded that she accompany him back upstairs, "she refused and sat in a lobby chair." Honda went upstairs and reappeared a short time later. Honda then "walked up to [Mary] and grabbed her by the wrist, saying something fierce-like . . . He jammed his right hand inside his shirt and drew the knife. Then he began yelling wildly and stabbing." Mary Honda died almost immediately. As the hotel clerk and guests grabbed and held Honda until police arrived, "he continued screaming, apparently in Japanese . . . after a final frenzied burst of unintelligible shouting, he relapsed into an icy calm" soon after the police shackled him. He maintained his demeanor "while writing and signing a confession" and told the police "in broken English," his desire "to kill himself." From his "fierce" Japanese screams to his "fail[ure] to follow the tradition of his race to commit hara kiri," Honda brought the perceived brutality and viciousness of the United States' Pacific enemy close to home.

Taking place less than a year after the Japanese attack on Pearl Harbor, Honda's trial tested the ability of Denver's legal regime to give fair, impersonal, and individual justice to a person of Japanese descent. Honda's lawyer questioned whether such an outcome was even possible and asked Denver District Court Judge, Stanley H. Johnson, for an unusual motion: a continuance of the trial until after World War II had ended. According to Honda's attorney, the defendant

[could] not obtain and secure before the present jury panel a fair and impartial trial, not because of any particular prejudice in the mind of any particular juror in said panel, but on account . . . of being subconsciously influenced by a great many articles, whether propaganda or truth, appearing in the newspapers or magazines."

163. Honda, 141 P.2d at 181.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Honda, 141 P.2d at 183.
171. Aff. of Robert McDougal, (June 14, 1942) at 1-2, Honda v. People, 141 P.2d 178 (Colo. 1943) (No. 15227). In order to support such a claim, Honda's lawyer submitted several articles from the Denver newspapers demonstrating clear and explicit anti-Japanese bias. One representative article was Emily C. Davis, Here's How to Distinguish Chinese From Japanese, ROCKY MTN. NEWS (Denver, Colo.), Dec. 13, 1941, at 3. Historical hindsight helps us validate Honda's theory. Of Denver's two dailies, the Denver Post adopted an explicitly anti-Japanese American policy. As one former bureau chief of Time magazine in Denver noted:

The Denver Post campaign against the incoming Nisei got wilder and wilder with each passing day. Sober-minded citizens of Denver, watching the editorials become more and
In order to support his theory, McDougal related the following conversations that he had with people in Denver:

I see you represent Honda; gas will be too good for him. That’s what ought to happen to all the Japanese in this country . . . Well, I haven’t any sympathy for him. They ought to kill him just like they ought to kill a lot of other Japs . . . . The only thing you can say for him is that he killed another Jap [ ]. 172

Outlining a general feeling of hatred and prejudice against persons of Japanese descent, Honda and his attorney questioned the ability of Denver jurors to be balanced in their judgment of the case. 173 Judge Johnson denied Honda’s motion. 174 He nevertheless attempted to mitigate the impact that the war had on the jury. In his remarks to the all-White jury before the beginning of the trial, Judge Johnson noted:

This case on trial today is that of the People against George Honda, and is a trial for murder. The defendant, though I am informed he is an American citizen, is of Japanese extraction. Of course we are at war with Japan at this time, and all of us well understand that it is possible for some individuals to have prejudice against anyone of Japanese extraction . . . I think I do not need to say to you gentlemen that that is one of the things that we are in this war for, to protect, and if any individual is drawn into the error of allowing racial prejudice to enter in his service as a juror, he is simply doing that much to destroy the institutions that protect our own liberty as well as that of any person who comes to this country and happens to be charged with a crime. 175

Although the judge attempted to make racial difference a non-issue, it played a key role in the litigation. During the trial, for example, Honda’s lawyer called Dr. Leo Teply to testify as to Honda’s sanity. 176 Although Teply described Honda and his relationship with his wife as a normal “American” family, 177 Dr. Teply

more intemperate, feared that some of the citizenry might be incited to attack the Nisei and blood might be shed . . . When the War Manpower Commission asked the Post to tone down such articles, [the immediate result couldn’t have been more explosive. . . . “Japanese Americans? [Editor, Publisher, and President] Shepard yelled. Contributions to the war? Why those yellow devils . . . .”

173 Honda, 141 P.2d at 183.
174 Id.
175 Trial Tr. at 5, Honda v. People, 141 P.2d 178 (Colo. 1943) (No. 15227).
176 Honda, 141 P.2d at 183.
177 Trial Tr. at 374-77, Honda v. People, 141 P.2d 178 (Colo. 1943) (No. 15227).
made one important qualification. In describing Honda’s “state of mind,” Dr. Tepley noted:

Then, in this particular case, there is another thing, the mind is Oriental, he thinks and feels and acts very much like an Oriental; he was very little affected by his twenty years of American life. I never examined an Oriental before, and it is hard for me to try to understand him as fully as I would an American or, to use the loose term, we will say, an Aryan, because all those people haven’t the same idea, how their emotions run . . . he is an Oriental, that in his soul he thinks of a woman, a wife, as something different from the American, or, as I said, an Aryan, has hastened that impulse which resulted in the tragedy.  

Such differences, even for Honda’s own expert witness, could not easily be separated from the war. As Dr. Tepley himself struggled to explain:

I would rather not discuss national matters, so I will just limit myself to the one Japanese: When a Japanese ship goes down, I am very happy about it. But this is George Honda we are talking about, and I like to differentiate George Honda as a human being . . . and I don’t want to associate him with the horrors that have taken place.

Although Dr. Tepley attempted to focus attention on George Honda the person, and not George Honda the “Jap,” he could not easily separate Honda’s pathology from his own understanding of racial and national characteristics. Not surprisingly, the prosecutor jumped upon such racial differences. In his closing remarks to the jury, the prosecutor noted:

[B]ut I say to you, gentlemen of the jury, that it is nothing more nor less than typical Oriental treachery . . . . And, gentlemen, here is what happened: Here is a man that his alienist has said is Oriental, and in the Oriental home the man is the master and the woman nothing more than a chattel, and when he orders her to do something, she must do it, and when she told him she would not go up there, she would not obey the word of her master, that made him very mad; and finally, when he thought about this other man, the white man there, who said, “You don’t have to go,” and she was listening to him and not the master Honda, then he jerked that knife out, gentlemen, and thrust it into her breast in the way indicated . . . killing her right there, killing her right down, dropping her into her own blood, without giving her a chance.

Despite the warning by Judge Johnson, racial difference and possibly racial antagonism permeated the case. Deliberating less than half-an-hour, the jury returned with a verdict that condemned Honda to death in the gas chamber at the

178. Id. at 375-76.
179. Id. at 385-86.
180. Id. at 442.
State Penitentiary. 181

Notably, Honda’s lawyers failed to raise the issue of individual bias among the jury members until after the jury had rendered a verdict. Honda’s lawyers submitted a vigorous post-verdict complaint including an affidavit from the Deputy Jury Commissioner that no person of Japanese extraction had been placed on a jury list in his five plus years of work. 182 However, the trial court dismissed the argument.183 In appealing Honda’s case to the Colorado Supreme Court, Honda’s attorney argued that racial differences in the case—from the all-White jury to the use and definition of “Oriental”—denied Honda the “equal protection” of the law. Importantly, Honda’s brief to the Colorado Supreme Court cited Fourteenth Amendment cases from the South to make his point.184 Yet, he added a distinctly Western understanding to his Fourteenth Amendment analysis. As Honda’s lawyers argued:

And is a Japanese, or a person of the yellow race, any different from a negro . . . ? The same principle is involved . . . . This court will take notice of the fact that in its entire experience neither Chinese, Spanish people, Spanish Americans or negroes are called as jurors in most of the counties of this state. 185

In linking Honda’s trial experience to the historical alienation of “Chinese,” “Spanish,” and “Negroes” to Colorado’s legal regime, Honda’s counsel indicated both the complexity of the West’s social situation and the simplicity of discrimination against the region’s non-White races.

The Colorado Supreme Court, however, held an opposite view. Instead of recognizing the complexity of Colorado’s racial past and Denver’s racial present, the Court ruled that Honda received a fair and impartial trial and that accusations of racial improprieties, were completely “without merit.”186 In rejecting Honda’s Fourteenth Amendment challenge as being untimely, the Court nevertheless noted

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182. Aff. of Huse Taylor, Deputy Jury Commissioner, City and County of Denv., (Aug. 29, 1942) at 1, Honda v. People, 141 P.2d 178 (Colo. 1943) (No. 15227). See also Aff. of Robert McDougal, (Aug., 15, 1942) at 1, Honda v. People, 141 P.2d 178 (Colo. 1943) (No. 15227) (arguing that Honda “was tried before a jury of white Americans.”). After making an investigation; he Honda learned that jury commissioners had for 10 to 15 years prior, “excluded from service in this county such eligible jurors of Japanese extraction . . . solely because of their race and color.” Aff. of George Honda, (Aug. 17, 1942) at 1, Honda v. People, 141 P.2d 178 (Colo. 1943) (No. 15227) (stating that he knew of “not one instance to his knowledge where any of such friends or acquaintances of Japanese extraction . . . have been called or requested by the Jury Commission to serve as jurors.”).
183. Honda, 141 P.2d at 184.
184. Such cases included Carter v. Texas, 177 U.S. 442, 447 (1900) (holding that the exclusion of all persons of African descent from a grand jury violated the Fourteenth Amendment); Neal v. Delaware, 103 U.S. 370, 397 (1880) (finding a Fourteenth Amendment violation due to the fact that no “colored” person had ever been summoned as a juror).
185. Brief and Argument of for Pl. in Error at 33 . Honda v. People, 141 P.2d 178 (Colo. 1943) (No. 15227).
186. Honda, 141 P.2d at 182.
the inapplicability of the “negro” cases to Honda’s litigation. According to the Court, such cases “go no further than to say that when timely objection is raised a defendant shall not be required to submit to trial by a jury even of individually qualified members if he is denied the possibility or probability of having a member of his own race called upon the jury selected to hear his case.” 187 In spite of the centrality of racial difference in the case, the Colorado Supreme Court strongly believed in the ability of the Denverites to “honestly and fairly and to the best of their respective abilities” adjudge the issues before them. 188 Having several eyewitnesses, the murder weapon, and most important a signed confession from Honda himself, it was hard for the Colorado Supreme Court to imagine any other result. 189 

Within three months of the Colorado Supreme Court’s decision, the state of Colorado executed George Honda on October, 1943. 190 The only Japanese American executed during World War II in the United States, 191 George Honda’s experience with both the Denver and the Colorado legal system revealed tensions at the heart of post-World War II Fourteenth Amendment jurisprudence. Although the trial court made every effort to diffuse racial discrimination, racial thinking and categorization was imbedded in the case. From Honda’s physical appearance to his “Oriental” state of mind, Honda’s offense could not be separated from the question of racial difference that percolated through his trial. Yet, the Colorado Supreme Court could not easily identify a Fourteenth Amendment violation against the Japanese American Honda in light of authority that focused exclusively on cases in the American South. Indeed, the Colorado Supreme Court could not imagine Denver’s “racial” tensions, even in light of war and pre-existing stereotypes against the Japanese, approximating those experienced in other parts of the nation. Although Honda’s “Oriental” difference played a key role in the trial, he was

187. *Id.* at 185.

188. *Id.* The Colorado Supreme Court conceded that: “it would be futile to deny that such conditions [war with Japan] have tended to inspire in a large part of our citizenship a dislike of the Japanese as a race because of their supposed or assumed racial characteristics.” *Id.* Yet, the Court argued that to believe that such beliefs:

had become so general as to constitute a mob psychology at the time of the trial we think does not appear from the record. In this connection, it may be noted that the victim, his wife, also was a member of the Japanese race. Defendant . . . had operated a restaurant on one of the main streets of Denver, and, as disclosed by the record, was not without customers other than those of his own race. He and his family continued to occupy a hotel apartment on the same street, operated and patronized by members of the white race . . . We do not believe that the jury in this case reacted to the situation disclosed by the evidence in any other or different manner than would juries confronted with evidence of homicides attended by similar circumstances of wantonness and brutality perpetuated by defendants of Anglo-Saxon lineage.

*Id.* at 182-83, 185.

189. *Id.* at 182.


treated, for the court’s analysis, as any criminal—Japanese or White—who had committed such a heinous crime. Though the Colorado Supreme Court believed racial prejudice was a non-existent issue, its persistence in post-War Denver and the larger American West continued.

B. The “Tri-Ethnic” Realization

The tolerant and reasonable city envisioned by the Colorado Supreme Court in *Honda* proved more of an illusion than reality. Indeed, severe employment discrimination, de facto residential and educational segregation, police brutality, and pervasive tensions between Whites, Mexican Americans, African Americans, and Japanese Americans forced the mayor of Denver to appoint a task force to study racism in the city in 1947.192 The task force decried “the native White people in Denver” for “ignorance,” “self-deception” and “inner conflicts” for creating “a barbed wire of prejudice” in the city.193

In the years after World War II, such attitudes fell directly upon the shoulders of Mexican Americans and African Americans.194 For example, a 1949 study found that the average Mexican American family made only $1,830 a year.195 In comparison, African American families earned $1,930 and Whites earned over $3,000.196 Even worse, the study determined that 60 percent of Mexican Americans lived in substandard housing, 90 percent did not complete high school, 50 percent sought help from social welfare agencies, that they occupied 30 percent of all public housing and constituted over a third of the city’s jail inmates; [and] that their infant mortality rate was six times greater than that for residents of more affluent areas.197

By 1970, Mexican Americans and African Americans, in particular, remained concentrated in distinct neighborhoods located mainly in the northwest, north central, and northeast sections of the city.198 While the percentage of Denver’s African Americans living in distinct “poverty” areas actually decreased by 1970, over three-fourths of the city’s Mexican American community lived below the “poverty” line.199

192. DENVER COMMITTEE ON HUMAN RELATIONS, A REPORT OF MINORITIES IN DENVER WITH RECOMMENDATIONS BY THE MAYOR’S INTERIM SURVEY COMMITTEE ON HUMAN RELATIONS (1947).
193. Id. at 16.
194. LEONARD & NOEL, supra note 144, at 392.
195. Id.
197. LEONARD & NOEL, supra note 144, at 392.
199. Id. The study points out that such a difference “does not necessarily imply that Denver has become an integrated city; rather the reduction of the Negroes [from the poverty areas] is primarily due to an eastward migration of the Denver Negro into neighborhoods immediately adjacent to the poverty area.” Id. at 5. These neighborhoods became the focus of the school integration battle culminating in *Keyes*. 
The impact of residential segregation and economic inequality was felt directly on the city's schools. Indeed, predominantly African American and Mexican American schools received "the ragged, worn-out, hand-me-down textbooks and were poorly equipped. There were no multicultural or bilingual courses. [Teachers of color] were only placed in minority schools . . . as a result of these and other deficiencies, the academic level in minority schools was allowed to lag a year or two below that of the white schools." Further, the policies of the Denver Public School Board and Administration suggested a conscious practice of segregating students. The experience of Barrett Elementary School is revealing. Opened in 1960, surrounding schools "suddenly became lily white."

To accommodate whites in areas that were becoming black, the schools permitted parents in those neighborhoods either to enroll their children in the local school or to send them elsewhere. That escape hatch was closed after a school became largely black so that there was not much chance that blacks would attend white schools. When white schools became crowded, students were bused to other schools. If a black school exceeded capacity, temporary classrooms were built.

Although the efforts of "neighborhood schools" and "optional attendance zones" was to prevent White-flight from the City and County of Denver, Mexican American and African American students in Denver became educationally as well as physically segregated from their White peers. In 1969, a group of African American, Mexican American, and White parents—on behalf of their children—filed suit against the Denver Public School District to integrate the city's schools.

From the outset, Keyes raised a series of novel and troubling Fourteenth Amendment questions. Importantly, region played a central role in the analysis and subsequent remedy. As Harvard Professor Christopher Jenks remarked at the time, "If Southern precedents are followed, it will not now suffice to redraw attendance zones on a color-blind basis. Instead, Denver will have to redraw its zones in such a way as to offset the effects of neighborhood segregation and produce racially mixed schools." Yet, what did "racially mixed" legally entail in a city not split along Black and White lines? Reiterating a question posed by the trial court, Justice Brennan summarized the Fourteenth Amendment "dilemma": "Denver is a tri-ethnic, as distinguished from a bi-racial, community . . . [Thus,] should Negroes and Hispanics . . . be placed in the same category to establish the segregated character of a school?"

201. LEONARD & NOEL, supra note 144, at 376.
202. Id. at LEONARD & NOEL, supra note 144, at 376-77.
203. Watson, supra note 200, at 7-34.
205. Christopher Jencks, Busing-The Supreme Court Goes North, NEW YORK TIMES MAGAZINE, Nov. 19, 1972, at SM40.
Long time Denver resident, Judge William Doyle, confronted this issue as soon as the trial began. Not surprisingly, he understood that the placement of “Hispanos as well as Negroes . . . all in one category . . . is often an oversimplification . . . and [to] lump them into a single minority category . . . remains a problem and question.” 207 Indeed, Judge Doyle noted that “Hispanos have a wholly different origin, and the problems applicable to them are often different.” 208 As a long-time and publicly active resident, Judge Doyle knew well that Denver’s Black and Mexican American communities held different ideas about the meaning of integration. Only a few years earlier, in 1968, Mexican American activist Rodolfo “Corky” Gonzales had interrupted a School Board meeting regarding an integration plan proposed by the School District’s Superintendent. 209 According to Gonzales, the integration plan failed to address the unique needs of Mexican American students. 210 As he finished his statement, Gonzales declared that integration, in particular the solution of busing, is “obviously not a panacea . . . [i]t won’t solve the problems of Mexican American youth.” 211 If allowed to proceed, Gonzales warned that “the future may hold burning of racist books, boycotts of schools and vacant lots where schools now stand.” 212

Judge Doyle’s reservations regarding the different educational needs of Blacks and Mexican Americans compelled him to apply a different Fourteenth Amendment analysis to different parts of the city. Indeed, in Denver’s so-called “core city” schools, the question revolved not on the de jure actions of the School Board, but on the alleged inferiority of “minority schools” in comparison to those having a White majority. 213 In such schools, the plaintiffs contended that racial concentration tended to have: “(1) low average scholastic achievement; (2) less experienced teachers; (3) higher rates of teacher turnover; (4) higher dropout rates; and (5) older buildings and smaller sites.” 214 Yet, Judge Doyle and the plaintiffs recognized that a “minority” and hence “unequal” school in Denver would not look so segregated if “Hispanos” or “Negroes” were counted separately. Indeed, in many of the city’s “core city” schools, a “tri-ethnic” look at population ratios suggested an integrated school system. 215

The experience of Denver’s Mexican American population and their concentration in many of the city’s schools, however, indicated that the

208. Id.
210. Id. Gonzales demanded, among other things, that an integration plan needed include bilingual education, community control of schools, and a Chicano-based curriculum. Id.
211. Id.
212. Id.
214. Id.
215. See id. at 78 (displaying chart of racial composition of select Denver-area schools). In many of the schools that the court looked at, “Anglos,” “Negroes” and “Hispanos” individually constituted sizable populations, but by no means overwhelming majorities or minorities. The only exceptions were: Bryant-Webster Elementary (75.5% Hispanic); Columbine Elementary (97.2% Negro) Elmwood Elementary (91.6% Hispanic); Fairmont (79.9% Hispanic); Fairview (83.2% Hispanic); Greenlee (73% Hispanic); Harrington (76.3% Negro); Mitchell (70.9% Negro); Smith (91.7% Negro); Stedman (92.7% Negro); and Whittier (94% Negro). Id. at 78.
“educational” opportunity afforded them was more akin to that experienced by the city’s Black, rather than White populations. Indeed, Denver’s Civil Rights activists had long acknowledged that the city’s Mexican Americans were its most impoverished and disadvantaged group.216 Accordingly, Judge Doyle argued that the “Hispano” and the “Negro” shared “economic and cultural deprivation”217—a view ultimately confirmed by the U.S. Supreme Court.218 After the United States Supreme Court determined that de jure segregation in one part of the school system created a system-wide presumption of unconstitutionality,219 Judge Doyle attempted to fashion a remedy that addressed the unique needs of Denver’s “tri-ethnic” student population.220 The District Court not only ordered a traditional busing remedy, but on the recommendation of the Mexican American Legal Defense and Education Fund, adopted bilingual and multicultural programs as an integral part of equal protection.221 Though the specifics of the plan were ultimately rejected by the 10th Circuit Court of Appeals,222 the trial court’s order for limited bilingual


217. Keyes, 313 F. Supp. at 69. As a result Doyle believed that the Fourteenth Amendment required a numerical threshold to determine which Denver schools were segregated and which were not. According to Judge Doyle, “a concentration of either Negro or Hispano students . . . of 70 to 75 percent is . . . likely to produce the kind of inferiority which we are here concerned with.” Id. at 77. Of Denver’s public schools, Judge Doyle found fifteen that—by numerical definition—were constitutionally inferior. Id. at 78.

218. According to Justice Brennan, “the District Court itself recognized that ‘[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination.’ This is agreement that, though of different origins, Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students.” Keyes, 413 U.S. at 197-98 (quoting Keyes., 313 F. Supp. at 69).

219. Id. at 198-201.


221. Id. The plan submitted by the Mexican American Legal and Defense Fund—known as the “Cardenas Plan”—argued that School District No. 1 needed to adhere to the following principles:
1. That the culture, heritage, and language of minorities are worthy of study and recognition by the educational system, its students, and its personnel;
2. That the development of pride, coupled with resilience, will motivate minority youngsters toward higher academic goals and aspirations;
3. That learning another language at a very early age is instrumental for developing a student’s appreciation of all languages;
4. That it is essential for students to participate in a strong oral English language program before beginning other English language skills.
5. That it is essential for students initially to receive instructing instruction in the dominant language.
6. That it is essential for the schools to evidence concretely the recognition of other cultures, especially those of the Southwest and Mexico.
7. That it is essential for the schools to make available materials which accurately and objectively reflect the culture, history, and language of minorities.


222. Keyes, 521 F.2d 465, at 480-83 (10th Cir. 1975).
and bicultural programs suggested they ways that the American West’s urban populations forced courts to consider different strategies and alternative solutions to traditional, Southern-based Fourteenth Amendment school integration strategies.223

Despite the efforts of Colorado’s federal court to overcome the “tri-ethnic” racial lines of the city of Denver, however, many Denver parents still worked to preserve Denver’s racial boundaries.224 Accordingly, “some grumbled and talked of organizing an alternate school system. Some moved to the suburbs; others put their children in private institutions.”225 Still others turned to often violent and extra-legal means to maintain the heterogeneity homogeneity of their neighborhoods and schools.226 By 1974, anti-integrationists appealed to both recent fears about the impact of racial mixing227 in order to encourage Colorado citizens to pass the “Poundstone Amendment” to the State Constitution.228 Touted by its supporters as a measure to deprive the City and County of Denver of power over the metropolitan area, the amendment greatly limited the ability of the city to acquire land through annexation and thus end metropolitan educational segregation.229

Ultimately, the inability of courts, policy makers, and citizens to offer a truly multifaceted remedy suggested a dramatic transformation in racial understandings in Fourteenth Amendment jurisprudence that took place in context of the written decision. The most important transformation in this regard was Justice Brennan’s linguistic shift from “bi-racial” to “tri-ethnic.”230 The articulation of a “tri-ethnic” as opposed to a “tri-racial” or “multiracial” understanding of American society would have consequences in how future judges interpreting the Fourteenth Amendment understood race and discrimination in contemporary society.

223. See, e.g., Lau v. Nichols, 414 U.S. 563, 567-69 (1974) (upholding bilingual education program aimed at children of Chinese ancestry); Serna v. Portales Municipal Schools, 499 F.2d 1147, 1152-54 (10th Cir. 1974) (holding that lack of effective bilingual and bicultural education program created unequal educational opportunity for Mexican Americans). Yet, the Tenth Circuit’s rejection of the Cardenas Plan in Keyes made clear that bilingual and bicultural education “is not a substitute for desegregation.” Keyes, 521 F.2d at 480. Because both Lau and Serna were upheld on the basis of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1964), the Tenth Circuit ultimately concluded that bilingual and bicultural programs were not an appropriate Fourteenth Amendment remedy. Keyes, 521 F.2d at 481-82. Four years later, however, five justices of the Supreme Court declared in Regents of the Univ. of California v. Bakke that Title VI’s prohibitions were co-extensive with the Fourteenth Amendment. 438 U.S. 265, 287 (1978) (per curiam); Id. at 328 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part) (suggesting that its proscriptions—including bilingual and multicultural education—were co-extensive as well).

224. LEONARD & NOEL, supra note 144, at 378-80.

225. Id. at 378.

226. Id. at 380.

227. Id. at 378-79.

228. COLO. CONST., art. XX, § 1 (amended 1974); COLO. CONST., art. XIV, § 3 (amended 1974); see LEONARD & NOEL, supra note 144, at 379.

229. LEONARD & NOEL, supra note 144, at 379.

C. "Tri-Ethnic" America: The End of History and the Beginning of . . . ?

The change from a "bi-racial" to a "tri-ethnic" understanding of race in Keyes suggests an end of history—not necessarily in the terms proposed by Francis Fukuyama—but more pragmatically in the inability of constitutional jurisprudence to speak effectively about the divergent and competing histories of race and ethnicity in the history of the United States. By conflating the processes of racial and ethnic formation, Keyes provided a means by which subsequent courts made history irrelevant in their analyses.

In the aftermath of Keyes, fact patterns in the American West again compelled state and federal courts to consider the applicability of the Fourteenth Amendment in a racially and ethnically fluid United States. In Regents of the University of California v. Bakke, the Court had the opportunity to test Keyes' "tri-ethnic" assumption: namely that other "minority" groups shared analogous discriminatory experiences to Blacks to merit Fourteenth Amendment consideration. In a sharply divided court, Justice Lewis Powell noted the impact of Western based Fourteenth Amendment jurisprudence:

It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between 'white' and 'Negro.'

For Justice Powell, however, this meant not the validity of a program to remedy a long history of societal discrimination against California Blacks, Chicanos, or Asians, but rather an arbitrary line where various "minority" groups, including most Whites, could "lay claim to a history of prior discrimination at the hands of the State and private individuals." Ironically, in introducing a "tri-ethnic" conception of America into Fourteenth Amendment jurisprudence, Keyes allowed the Bakke Court to unhinge the analysis from the specific and regional historical and contemporary discriminatory experiences of Mexican Americans, Asian Americans and Pacific Islanders, Blacks, and American Indians. Not

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231. See Francis Fukuyama, The End of History and the Last Man (Free Press 1992) passim (discussing democracy in historical contexts). In one important respect, Fukuyama and I see an important transformation and complication in social and political identities at the end of the twentieth century. Whereas Fukuyama sees this transformation in the triumph of liberal democracy and market capitalism, I do not make such a sweeping observation. The "tri-ethnic" articulation of difference in Fourteenth Amendment jurisprudence suggests the "end" of Black-White racial dichotomies and tensions in the United States as being one of the most dominant features of social, political, and legal difference.


233. Id. 438 U.S. at 294 (citing Hernandez v. Texas, 347 U.S. 475, 478 (1954)).

234. Id. at 295.

235. Justice Thurgood Marshall's opinion is especially revealing in this regard. In his analysis, Justice Marshall focuses exclusively on the experience of African Americans in the American South. He
surprisingly, all “tri-ethnic” and multiracial classifications became highly “suspect” in subsequent Fourteenth Amendment litigation. This loose articulation of race transformed the racial, and by extension the historical, dimensions of the Fourteenth Amendment, into an ahistorical ethnic understanding of racial tensions and difference. The consequences of this shift will be the American dilemma for the 21st twenty-first century.

When the United States Supreme Court recently issued its opinion concerning the affirmative action programs of the University of Michigan’s Law School and its undergraduate Literature, Arts, and Science and Arts program, it represented only the most recent example of the institutions and people of the American West shaping the substantive meaning of the Fourteenth Amendment for a new century. Similar to the American’s West’s long history of legal struggle, the University of Michigan’s attempt to provide equality has provided an imperfect model towards achieving the guarantees and promises of the Fourteenth Amendment in a diverse and multiracial world. As Justice O’Connor’s opinion in Grutter made clear, “race unfortunately still matters” in the United States. Yet, makes no mention of the American West’s racially diverse and discriminatory past. Id., at 3877-402.

236. In City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), for example, Justice O’Connor’s majority opinion questioned how narrowly tailored the Richmond City Council’s minority set-aside government contract program was in view of those “minority” groups designated as eligible for such a program. As Justice O’Connor made clear: “There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry.” Croson, 488 U.S. at 506. In Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), Justice O’Connor applied the standard set in Croson to a federal government set aside. Interestingly, the fact patterns took place in Colorado, where minority set-asides for a range of non-White groups similar to the ones used by the Richmond City Council, were implemented. As the history of Colorado and other Western states demonstrated, a specific history of past discriminatory treatment against such groups is plausible. These analyses pose an interesting dilemma regarding region and social change. Surely, in the American South, the greatest racial divide has been the one between White and Black. However, cities and regions are not racially static and the American South is undergoing some of the same demographic transformation as that experienced in the past and present experiences of the American West. Although such change is not sufficient evidence of discriminatory treatment, the “tri-ethnic” experiences of city cities like Denver suggest a complicated process of racial differentiation and, at times, racial discrimination that should occupy a court’s Fourteenth Amendment analysis.

239. The territory and later state of Michigan formed the Northwestern boundary of the United States. At one time the quintessential “frontier” of American culture and life, Michiganders saw themselves as the true and only “Champions of the West.” Early attendees to the University recognized this fact when they inserted the following verse to the school’s fight song:

Hail! to the victors valiant
Hail! to the conqu’ring heroes
Hail! Hail! to Michigan
the leaders and best
Hail! to the victors valiant
Hail! to the conqu’ring heroes
Hail! Hail! to Michigan, the champions of the West!


240. Grutter, 123 S.Ct. at 2341.
the "tri-ethnic" understanding of difference that emerged has prevented many Americans from comprehending the reality of the multiracial formation and the subsequent need for "affirmative" programs directed at historically racialized groups.  

Sociologist Edward Chang has noted that the Kerner Commission Report of 1968, that concluded concluding that America was headed toward two societies—one Black and the other White—separate but unequal was "only partially correct in its projections." For Chang, the 1992 Los Angeles uprisings that included "Latino immigrants, Korean merchants, African American residents, and Whites "as both victims and assailants" only served to underscore the fact that the United States is starting to look, at least socially, like much of the American West. Accordingly, it has been the equality experiences of Asian Mexican Americans, Asian Americans and Pacific Islanders, African Americans, American Indians, and Whites that has have substantively shaped the Fourteenth Amendment for the vast array of people settling and living in the United States. While Fourteenth Amendment jurisprudence regarding the region's multiracial populations have has not always been consistent, the continued arguments of the American West's non-White and non-Black groups have forced courts and policy makers to consider and re-consider the meaning of equality in a racially and ethnically fluid nation.

Consequently, the American West's diverse citizenry has posed special challenges for the Fourteenth Amendment jurisprudence ever since its passage in 1868. From the claims of Chinese immigrants for social and economic equality to the demands made by Black, Chicano, and White parents and students for educational equity, the region has forced courts and legislators to consider more fully the meaning of "equality." Most important, the region's multiracialized citizenry posed a dilemma for courts asked to consider the Amendment's application to non-White and non-African Black groups. The "American Dilemma" for the twenty-first century remains the same: "[T]he fundamental equality of all men [and women], and of certain inalienable rights to freedom, justice, and a fair opportunity." However, the "problem" can no longer be contemplated in "Black and White" terms. Accordingly, the American West has been and will continue to be the testing ground for a Fourteenth Amendment that can meaningfully be applied to all people in the United States.

241. Editorials in news periodical's regarding the University of Michigan case consistently interchanged and collapsed racial and ethnic categories. See, e.g., Editorial, Another Round for Adarand the Issue: Landmark Colorado Case Goes Back to the Supreme Court; Our View: While It Drags On, Its Effects Are Felt Elsewhere, ROCKY MTN. NEWS (Denv., Colo.), Mar. 30, 2001, at 53A (arguing that University of Michigan failed to explain why Puerto Rican, but not Salvadorans, Somoans, or Palestinians Palestinians would "make it easier for an Aluet to speak in class"); Editorial, Protecting Promise of Equal Access, ROCKY MTN. NEWS (Denv., Colo.), Dec. 4, 2002, at 48A (arguing that the University of Michigan irresponsibly utilized ethnic categories in admissions while dismissing President Mary Sue Coleman's understanding of discrimination in terms of "skin color").


243. id. at 1-3.

244. MYRDAL, supra note 130, at 4.