Racism in the Water: Access for All in Outdoor Recreation

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"I wanted to sit outside and listen to the roar of the ocean, but I was afraid. I wanted to walk through the redwoods, but I was afraid. I wanted to glide in a kayak and feel the cool water splash in my face, but I was afraid." – Evelyn White, *Black Women and the Wilderness*.[1]

Racism is rampant, especially in outdoor recreational spaces. Discrimination and exclusivity have kept predominantly Black and People of Color out of blue spaces, leaving only the privileged to enjoy them. This Article chronicles the long history of the exclusion of People of Color from blue spaces. With the realization that historical racism may have impacted Black communities and People of Color, social scientists conducted studies to determine just how deep the impacts ran. Studies demonstrated several barriers to accessing or enjoying blue spaces. Deep-rooted racism was shown to have created a socially exclusive environment where Black and People of Color are often berated and unwelcome in blue spaces. Racist land-use and housing policies force Black and People of Color into areas friendly to industrial uses, resulting in widespread environmental justice issues and being far away from blue spaces. Living far away from blue spaces makes it difficult for Black and People of Color to physically access blue spaces, as parking and transportation to these areas are often lacking. A combination of all these barriers results in a striking lack of racial diversity in blue spaces. Thankfully, a couple of existing tools could prove helpful in the fight to achieve more equitable access to blue space. This Article

DOI: https://doi.org/10.15779/Z38VM42Z54

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1. Evelyn C. White, *Black Women and the Wilderness*, *in* THE BLACK WOMEN'S HEALTH BOOK: SPEAKING FOR OURSELVES 1063 (Evelyn C. White ed., 1990).

reviews some of those tools, including the public trust doctrine, the First Amendment, Title II and Title VI of the Civil Rights Act of 1964, and the use of zoning reform. In the end, it seems some of the tools this Article reviews can prove helpful, while others have been gutted and have little helpful value. However, recent steps, like the introduction of the Environmental Justice for All Act and a greater awareness of the role of historical racism, give a glimmer of hope for the future of equitable access to blue space.

INTRODUCTION

Powerful groups have, and continue to, racialize outdoor space. U.S. government officials have used a variety of policy tools to exclude People of Color (POC) from outdoor public spaces. These tools include placing racially restrictive covenants in housing deeds, redlining municipal districts to exclude people of color from accessing housing loans, using vagrancy laws or tort claims like nuisance and trespass, or implementing Jim Crow laws to homogenize a space.[2]

The Environmental Protection Agency (EPA) defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies."[3] In response to research and grassroots mobilization, in 1994, President Bill Clinton issued Executive Order No. 12,898, establishing EJ as a national priority for the first time.[4] On paper, this executive order attempted to blend social justice with EJ. Clinton's move and subsequent efforts to build on the order should have legitimized the national EJ movement and validated the concerns of POC across the country.[5] Yet almost thirty years after EJ became federal policy, stories where POCs are prevented from enjoying or engaging with their natural environments to the same extent as white people are still tragically routine.[6] This Article identifies this inequity as a key EJ issue.

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2. *See generally* Kyle C. Velte, *Toward a Touchstone Theory of Anti-Racism Sex Discrimination Law Meets #LivingWhileBlack*, 33 YALE J.L. & FEMINISM 119, 130 (2021) (discussing the use of vagrancy laws to police Brown and Black bodies in "White" spaces).

3. *Learn About Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last updated Sept. 22, 2021).

4. Exec. Order No. 12,898, 3 C.F.R. § 651.17 (Feb. 11, 1994).

5. Albert Huang, *The 20th Anniversary of President Clinton's Executive Order 12,898 on Environmental Justice*, NAT. RES. DEF. COUNCIL (Feb. 10, 2014), https://www.nrdc.org/bio/albert-huang/20th-anniversary-president-clintons-executive-order-12898-environmental-justice (describing the wave of policies and regulatory guidance on EJ after the executive order, as well as the efforts under the Obama Administration to revive EJ efforts).

6. *See, e.g.*, Zoe Brown, *Man Pleads Guilty in Federal Court After Threatening Black Man with Knife in Paola, Kansas*, KCTV (Feb. 10, 2022, 4:23 PM), https://www.kctv5.com/2022/02/10/man-pleads-guilty-federal-court-after-threatening-black-man-with-knife-paola-kansas/ (In 2019, a White man

This Article uses a variety of terms to analyze the racialization of coastal and water-based recreation, including "blue space," "green space," and "POC." Blue space refers to visible surface water bodies or watercourses, including pools and water features within a park.[7] Green space is land partly or completely covered with grass, trees, shrubs, or other vegetation and includes parks, community gardens, and cemeteries.[8] POC refers to groups composed predominantly of low-income and racially diverse members. Ultimately, this Article finds that the exclusion of POC from healthy outdoor green and blue spaces constitutes environmental racism and stems from mechanisms like exclusionary land use and housing policies resulting in diminished proximity to blue spaces, inaccessible or inequitable availability of transportation to or parking at blue spaces, and ongoing discrimination resulting in perceived lack of safety for POC in and around blue spaces.

The boom of outdoor recreation was born out of the creation of the national park system and has become a hallmark of the U.S. environmental movement.[9] This Article explores whether there is inequitable access to spaces for outdoor recreation, particularly water-based recreation. This research is informed by a literature review of academic sources from multiple disciplines to examine whether and why there is demonstrable inequity. First, this Article reviews academic literature documenting the benefits of spending time in blue and green spaces to highlight the importance of equitable accessibility. Second, this Article reviews the social science and legal literature about the barriers to accessing blue space. Third, this Article establishes that historical legacies of slavery and later institutionalized racism constituted barriers to blue space, making it inequitably distributed and, often, more dangerous for POC, effectively deterring these communities from enjoying the benefits of water-based recreation. In other words, centuries of environmentally racist and elitist laws, policies, and practices have homogenized entire swaths of outdoor space to exclude POC.[10] Finally, this Article examines various legal and policy mechanisms available to address environmental justice and environmental racism concerns about accessing and

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threatened a Black man with a knife for walking on the sidewalk in a predominantly White city. He yelled racial slurs and told him the city was a "White town."); Vanessa Romo, *White Men Accused of Attack on Black Man Face Felony Charges in Indiana*, NAT'L PUB. RADIO (July 17, 2020, 9:26 PM), https://www.kpbs.org/news/2020/07/17/white-men-accused-of-alleged-lynching-of-black (In 2020, two White men attempted to lynch a Black man on a camping trip to an Indiana state park.).

7. Elle Hunt, *Blue Spaces Why Time Spent Near Water is the Secret of Happiness*, THE GUARDIAN (Nov. 3, 2019), https://www.theguardian.com/lifeandstyle/2019/nov/03/blue-space-living-near-water-good-secret-of-happiness.

8. *Green Streets and Community Open Space*, EPA (Jan. 5, 2023), https://www.epa.gov/G3/green-streets-and-community-open-space.

9. Richard W. Sellars, PRESERVING NATURE IN THE NATIONAL PARKS, Ch. 7 (1997), https://www.nps.gov/parkhistory/online_books/sellars/chap7c.htm.

10. Robert D. Bullard, *The Threat of Environmental Racism*, 7(3) NAT. RES. & ENV'T. 23, 23 (1993) (defining environmental racism as "any policy, practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups or communities based on race.").

enjoying blue space. It concludes with recommendations for reforms to address systemic barriers established by generations of institutional racism.

This Article seeks to answer the following questions: What does the academic literature say about POC access to and use of blue space? What role, if any, does systemic racism and inequality play in creating barriers to access?

Most historical accounts of any water-race nexus focused on the Black experience, and there is little academic research studying the connection to water, or lack thereof, among other POC.[11] Thus, this Article focuses on the Black experience of and connection to water, which includes the lack of access to blue spaces.[12] Additionally, this Article demonstrates the need for more studies to evaluate the experience of other non-Black POC regarding access to blue spaces.[13]

I. BENEFITS OF OUTDOOR ACCESS

A special solitude and calmness comes with a simple walk among the trees or along a lake shore—a natural anti-anxiety treatment resulting in a plethora of psychological, social, academic, and professional benefits. The benefits of enjoying and engaging with nature are well documented and have recently gained significant attention amid the COVID-19 pandemic.[14] This Part reviews literature demonstrating that engaging with the outdoors and accessing green and blue spaces can result in social, health, economic, and environmental benefits.

A. Social and Wellbeing Benefits

Numerous studies conducted throughout the early 2000s demonstrate the social and health benefits of outdoor recreation. These studies explain that access to outdoor recreation can significantly impact community health by fostering active lifestyles and reducing "the prevalence of obesity-related diseases" among

11. *See, e.g.*, Cirse Gonzalez, NUESTRO OCÉANO Y LA COSTA 4 (June 11, 2020), https://www.hispanicaccess.org/media/k2/items/cache/c230427c303c0684b5582388f5d0dfd7_XL.jpg (explaining that "there exist very few endeavors, studies, programs or otherwise, that focus on understanding the Latino-specific connection to the ocean and coast, and/or implement this understanding in their approaches").

12. Throughout this Article, I will capitalize "Black" but not "white." Like the editors at the *New York Times*, I believe that "this style best conveys elements of shared history and identity" of people with a shared African origin. Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES (July 5, 2020), https://nyti.ms/32MNCd4. So, "the capital B makes sense as it describes a race, a cultural group, and that is very different from a color in a box of crayons." *Id*. (internal citation omitted). Therefore, "for many people the capitalization of that one letter is the difference between a color and a culture." *Id*. (internal citation omitted). Lastly, "white doesn't represent a shared culture and history in the way Black does, and also has long been capitalized by hate groups." *Id*.

13. Bullard, *supra* note 10, at 23.

14. Jack Wang, *COVID-19 Outbreaks Show Why Cities Need to Invest in Green Spaces, Psychologist Says*, U. OF CHI. NEWS (Apr. 6, 2020), https://news.uchicago.edu/story/why-time-outdoors-crucial-your-health-even-during-coronavirus-pandemic.

adults and children.[15] Other studies demonstrate that nature-based health interventions, such as incorporating green and blue space into cities, can have profound health and well-being effects.[16] For example, multiple studies conducted in varying geographies and time periods suggest that nature-based health interventions can lower a population's prevalence of high blood pressure, anxiety, and depression.[17] Even enjoying scenic beauty has quantifiable positive impacts on wellbeing and has also been shown to mitigate anxiety and depression.[18] In the absence of access to outdoor recreation, one study estimates that increased obesity results in $117 billion in lost productivity due to a combination of inactivity and complications of obesity such as blindness or loss of limbs.[19]

In addition to their positive health impacts, blue and green spaces provide places for sports and physical activity that can result in positive character development, such as "pride, self-esteem, teamwork, and leadership."[20] To that point, a growing body of research is dedicated to understanding the idea of "natural play" and its impact on children.[21] In his best-selling book, *Last Child in the Woods*, Richard Louv hypothesized that the lack of nature, or a nature deficit, in a child's life directly correlated with higher incidences of anxiety, depression, and attention disorders among children.[22] His book discussed the growing body of research about this correlation to demonstrate that playing in nature can counteract these trends by reducing stress, sharpening concentration, and stimulating creative problem-solving.[23] Recreational activities also "foster an appreciation and love for the outdoors," which in turn creates stewards of community resources.[24]

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15. Jinwon Kim & Sarah Nicholls, *Access for All? Beach Access and Equity in the Detroit Metropolitan Area*, 61(7) J. OF ENV'T PLAN. AND MGMT. 1137, 1137 (2018).

16. Danielle F. Shanahan et al., *Nature-Based Interventions for Improving Health and Wellbeing The Purpose, the People, and the Outcomes*, 7(6) SPORTS (BASEL) 141, 142 (2019).

17. *See* Geoffrey H. Donovan et al., *Vegetation Diversity Protects Against Childhood Asthma Results from a Large New Zealand Birth Cohort*, 4 NAT. PLANTS 358–364 (2018); Shanahan et al., *Health Benefits from Nature Experiences Depend on Dose*, 6 SCI. REP. 28551 (2016); *see also* Cohen-Cline et al., *Access to Green Space, Physical Activity and Mental Health A Twin Study*, 69 J. EPIDEMIOL. COMMUNITY HEALTH 523–529 (2015); Cox et al., *Doses of Nearby Nature Simultaneously Associated with Multiple Health Benefits*, 14 INT. J. ENVIRON. RES. PUB. HEALTH 172 (2017).

18. Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J.C.R. & C.L. 143, 173 (2005) (internal citations omitted).

19. *Id.*

20. *Id.* at 174.

21. John H. Hartig, BRINGING CONSERVATION TO CITIES: LESSONS FROM BUILDING THE DETROIT RIVER INTERNATIONAL WILDLIFE REFUGE 215 (2014) [hereinafter *Hartig*].

22. Richard Louv, LAST CHILD IN THE WOODS 49 (2008) (explaining that "a 2003 survey, published in the journal *Psychiatric Services*, found the rate at which American children are prescribed antidepressants almost doubled in five years; the steepest increase—66 percent—was among preschool children").

23. *Hartig*, *supra* note 21, at 215.

24. *Id.* at 183.

B. Economic Benefits

In addition to public health and well-being benefits, access to outdoor recreation can drive tourism and generate revenue. For instance, John H. Hartig wrote his book, *Bringing Conservation to Cities*, chronicling lessons learned during the creation of the Detroit River International Wildlife Refuge near Detroit, Michigan.[25] He explained how a cleanup of legacy toxic contamination in the Buffalo River improved public access and, in six years, contributed over $428 million in waterfront development.[26] Likewise, after the famous Cuyahoga River fire and subsequent cleanup, the surrounding area—Cleveland Flats—saw economic development of more than $750 million, with $270 million in new developments.[27] The $80 million investment to create the Detroit River Walk returned over $1 billion in its first ten years and provided improved public access to enjoy the scenic Detroit River with a large paved path for walking, biking, running, and generally enjoying the river's beauty.[28]

Looking west, the accumulation of industries like tech and finance coupled with recreation and tourism in California coastal counties serve as one of the largest revenue streams in the country and provide much of the state's revenue. The National Ocean and Atmospheric Administration's (NOAA) data shows that in 2012 alone, California's coastal economy in ocean-adjacent counties "generated $662 billion in wages and $1.7 trillion in GDP [gross domestic product]."[29] To put this in perspective, the total GDP for California in 2012 was $2.13 trillion.[30] So, the coastal economy accounted for more than half the state's total GDP and 13 percent of the U.S. GDP at $16.1 trillion.[31] Thus, investment in blue spaces can result in lucrative returns for state economies from the Midwest to the ocean coasts.

C. Environmental Benefits of Sustainable Public Access

In addition to providing wellbeing, health, and economic benefits, engineering approaches that sustainably improve access to blue space also come with significant environmental benefits. Initially, a technique often used to protect shorelines from flooding and erosion was shoreline hardening—concrete

25. *See generally id.*

26. John H. Hartig et al., *Thirty-five Years of Restoring Great Lakes Areas of Concern Gradual Progress, Hopeful Future*, 46 J. GREAT LAKES RES. 429, 435 (2020).

27. *Id.*

28. *Id.*

29. E. R2sch. Grp., Inc., Nat'l Oceanic and Atmospheric Admin. Off. of Coastal Mgmt., THE NATIONAL SIGNIFICANCE OF CALIFORNIA'S OCEAN ECONOMY 1 (2015) https://coast.noaa.gov/data/digitalcoast/pdf/california-ocean-economy.pdf (explaining that the coastal economy "takes into account what share of the economic activity of those 19 shore-adjacent counties (plus four inland counties) is dependent on the ocean. Leading sectors of California's ocean economy include tourism and recreation, marine transportation, and offshore mineral extraction, together representing 95 percent of California's ocean economy GDP.").

30. *Id.* at 1, 4.

31. *Id.* at 4.

breakwater or sheet piling.[32] Unfortunately, shoreline hardening stripped natural habitats and stifled access to adjoining habitats.[33] For example, engineers hardened 49.9 of the 51.5 km of the U.S. shoreline along the Detroit River, resulting in a 97 percent wetland loss.[34]

As industrial activity dwindled along the Detroit River, soft shoreline engineering emerged. The new practice uses sustainable practices that promote the stabilization of shorelines, resulting in reduced erosion and improved riparian habitat health.[35] It can also provide habitat for spawning and fish nurseries, which is critically important for fish larvae to survive and thrive in the river system.[36] In his book *Resilience Justice and Community-Based Green and Blue Infrastructure*, Craig Arnold concluded that creating blue spaces using soft engineering principles can positively impact urban surroundings.[37] Wetlands and other riparian habitats restored by soft engineering filter air pollutants, moderate air temperature to reduce urban heat island effects, sequester greenhouse gases, and provide much-needed shade.[38] These green and blue spaces also provide ecosystem services, including filtering water pollutants, slowing stormwater runoff, recharging groundwater, moderating floodwater, and reducing the impact of storms, to name a few.[39]

Soft shoreline engineering has social benefits as well. This technique provides an opportunity for waterfront development which can help reconnect people with blue spaces through canoe and kayak trails, as well as providing opportunities for ecotourism and economic development.[40] Therefore, expanding public access has the added benefit of undoing years of shoreline hardening to improve the natural habitat and reimplement natural ecosystem services.[41] It follows that creating sustainable blue spaces and increasing outdoor recreation opportunities with all their associated benefits should be equitably

32. *Hartig*, *supra* note 21, at 98.

33. *Id*. at 4.

34. *Id.*

35. *Id.* at 99 (explaining the benefits of creating the first international wildlife refuge through soft shoreline engineering).

36. *Id.* at 119.

37. Craig A. Arnold, *Resilience Justice and Community-Based Green and Blue Infrastructure*, 45 WM. & MARY ENV'T L. & POL'Y REV. 665, 676 (2021) (citing Shawn M. Landry & Jayajit Chakraborty, *Street Trees and Equity Evaluating the Spatial Distribution of an Urban Amenity*, 41 ENV'T & PLAN. 2651, 2652 (2009) (describing the many benefits of urban trees and vegetation) and Zander S. Venter et al., *Green Apartheid Urban Green Infrastructure Remains Unequally Distributed Across Income and Race Geographies in South Africa*, 203 LANDSCAPE & URB. PLAN. 103,889, 103,889 (2020) (summarizing studies of benefits of green infrastructure)).

38. Arnold, *supra* note 37, at 676.

39. *Id.* at 675–76 (explaining that "wetlands prevent[ed] $625 million in property damage . . . from Superstorm Sandy").

40. *Hartig*, *supra* note 21, at 119–20 (describing outdoor recreation opportunities provided as well as the economic benefits including increases in employment of 7,076, $174 million increase in wages and salaries and $81 million increase in federal, provincial, and local tax revenues in 2004 between the United States and Canada).

41. *See id.* at 98.

accessible. Placing and maintaining these outdoor amenities in POC neighborhoods would support health, economic, and ecosystem services benefits. The Detroit River Walk example notwithstanding, despite the all-around benefits of providing recreation and access opportunities in and near water, POC were, and continue to be, excluded.[42]

II. HISTORICAL STRUGGLE FOR EQUITABLE ACCESS TO BLUE SPACES

Throughout human history, water has been a subject of racial exclusion and a place to demonstrate racial inferiority. For example, in India, high-caste Brahmins forbade low-caste individuals from using Brahmin water.[43] And during the Third Reich, Hitler prohibited Jewish people from using the same water as the so-called "Aryan race."[44] In the United States, this racialization manifested through slavery and its legacy, with the prevention of Black Americans from enjoying water the same way whites enjoyed it.

This Part chronicles some of the history surrounding the Black experience of water in the United States. First, this Part examines the legacy of early slavery, which featured water as a key element of the traumatic experience of Africans kidnapped and taken to the Americas. Then, this Part describes how segregation-era policies affected inequitable access, focusing on blue spaces like pools and coastal beaches. Finally, this Part concludes with the history of racist land use and housing policies, which forced Black families and other POC further away from blue spaces that white communities could enjoy.

A. From Slavery to Beach Discrimination on America's Coastlines

Beginning in early colonial America, the racialization of blue space emerged with the practice of slavery and the concept that inferior races were forbidden to enjoy blue spaces the same way. Historically, many African communities had a close connection with water. Before colonization and the transatlantic slave trade, many Africans grew up along rivers, lakes, or close to the ocean; they became "proficient swimmers, incorporating their skill into their work and recreation."[45] Because of their skill, Africans bought as slaves from coastal regions were often used as tradespeople and had privileges that only skilled bondmen might have had.[46] However, as the American slave trade grew, white landowners would have their slaves work the land or run the rivers for commercial purposes, changing African slaves' relationship with water.[47] For

42. *See id.* at 98. *Beach Access*, SURFRIDER FOUND., https://www.surfrider.org/initiatives/beach-access (last accessed Apr. 18, 2023) (describing battles to secure access to beaches nationwide).

43. Isabel Wilkerson, CASTE: THE ORIGINS OF OUR DISCONTENTS, 114–115 (2020).

44. *Id.* at 116–117.

45. Kevin Dawson, *Enslaved Swimmers and Divers in the Atlantic World*, 92 J. OF AM. HIST. 1327, 1327 (2006).

46. *Id.* at 1348, 1351.

47. *Id.* at 1355.

many African and Black Americans, water bodies gained a negative collective meaning because "they were the watery graveyards of many thousands and the conduit for the transportation of goods that greased the wheels of an institution that kept them in bondage."[48]

Right before the abolishment of slavery, as plantation owners fled the Union, Union General William Tecumseh Sherman signed Special Order Number 15.[49] Sherman's order confiscated 400,000 acres of coastal land with directions to redistribute the acreage to formerly enslaved people in forty-acre plots to restore the Black community and provide some reparations.[50] However, this plan never came to fruition as President Andrew Johnson later revoked Special Order Number 15 and returned the land to its former owners.[51] Many white landowners, realizing that the war left the coastlines battered and unsuitable for cultivating crops, sold the property to Black families seeking economic independence.[52] In time, formerly enslaved people predominantly populated the southeast Atlantic and Gulf of Mexico coastlines and labored intensely to revive the land and participate in coastal produce markets.[53]

The end of the Civil War meant the beginning of legal segregation. In addition to having to tend to difficult, sandy, and infertile coastlines, Black Americans also had to contend with intense racial violence.[54] The transition from slavery to segregation saw several states embody white supremacist principles through Jim Crow laws, particularly across the South.[55] During this time, both basic and recreational amenities were segregated between "whites" and "colored(s)," including water fountains, beaches, and pools.[56]

As global markets changed and the dawn of the industrial revolution left pollution in its wake, many Black Americans found southeastern coastal land untenable and looked northward for more opportunity.[57] For those who stayed, and with the help of twentieth-century infrastructure developments, like roads and bridges, the North reintegrated the South into the national economy.[58] With the influx of white people to the Gulf and Southeast Atlantic coasts came

48. Andrew Kahrl, *The History of African Americans on the Water and by the Shore Whitewashed and Recovered*, 35(2) J. OF AM. ETHNIC HIST. 63 (2016).

49. *Id.*

50. *Id.*

51. *Id.* at 64.

52. *Id.*

53. *Id.*

54. *From Slavery to Segregation*, EQUAL JUST. INITIATIVE, https://segregationinamerica.eji.org/report/from-slavery-to-segregation.html (last visited May 11, 2022).

55. *Id.* (explaining that Mississippi, South Carolina, and Louisiana adopted new state constitutions that denied Black people the vote, reflecting segregationists' conviction that "[w]e can trust white men to do right by their inferior race, but we cannot trust the inferior race with power over the white man." In 1901, Alabama followed suit and held a constitutional convention "to establish white supremacy in this state.").

56. *Jim Crow Laws*, HISTORY, https://www.history.com/topics/early-20th-century-us/jim-crow-laws (last updated Jan. 11, 2022).

57. Kahrl, *supra* note 48, at 64.

58. *Id.*

segregated vacation and leisure industries—making the coasts an asset once again, but primarily not for Black Americans.[59]

Some Black Americans capitalized on infrastructure improvements to open seaside resorts to serve Black customers excluded from white-owned establishments.[60] However, it was a tough market. Some Black businesses suffered from terrorism by those who feared that a Black presence would upset local real estate markets or were put out of business from the simple competition of white-owned resorts catering to Black clients in the wake of desegregation.[61] Developers knew that Black businesses were struggling, which made them easy targets.[62] Thus, rapid coastal development, with little opportunity for Black or minority engagement, effectively erased much of decades of the early history and connection of Black Americans to the nation's coasts.

B. The Struggle for Equitable Pool Access

Pools were a particularly violent blue space for Black Americans. Jim Crow and racist sentiments could be seen clearly. During the Progressive Era of the early 1900s to the 1920s, the country's Jim Crow laws segregated pools and water-based recreation.[63] According to historian Jeff Wiltse, "[m]iddle class Americans viewed the urban poor en masse as the 'great unwashed'" who, in their eyes, were "dirty and prone to carry communicable diseases."[64] So, pools became a segregation battleground when the Great Migration—the influx of Black Americans northward—transformed northern cities' social makeup.[65] For instance, when pools reached St. Louis in 1913, the city fenced the pool and placed guards at the entrance to ensure only whites could enter, forcing Black residents to wait for the city to erect a separate pool for Black use.[66] However, Black Americans in St. Louis did not see a pool of their own until thirty-eight years later.[67]

The white fear of swimming with Black people centered around the idea that Black people were less sanitary and unhealthier than whites, which led to the social exclusion and legal segregation of Black and other POC.[68] Not only did white Americans fear catching communicable diseases from Black

59. *Id.* at 65.
60. *Id.* at 66.
61. *Id.*
62. *Id.* at 66.
63. Jeff Wiltse, CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA 124 (2007).
64. *Id.*
65. *Id.* at 123; *see also* P. Caleb Smith, *Reflections in the Water Society and Recreational Facilities, a Case Study of Public Swimming Pools in Mississippi*, 52 SE. GEOGRAPHER 39, 40 (2012).
66. Smith, *supra* note 65, at 40.
67. *Id.; see also* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (upholding Louisiana state law requiring separate but equal railway carriages for whites and blacks), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding that the separate but equal doctrine is inherently unequal).
68. Wiltse, *supra* note 63, at 124.

Americans, but they also feared miscegenation.[69] Ideas around gender integration perpetuated racism in water and pool settings.[70] After it became culturally acceptable for men and women to swim together, a wave of racially discriminatory policies followed.[71] Wiltse explained that many officials worried that Black men would make advances on white women and that being exposed at the pool in front of white women would challenge the white man's superior manliness.[72]

Exemplifying these fears, some cities officially mandated segregation or encouraged a de facto kind of segregation by intentionally limiting access without any law or ordinance to support their action.[73] When Black people tried to enter white pools, white swimmers often harassed and assaulted them, a means of achieving segregation through violence.[74] For example, in 1931, Pittsburgh opened the Highland Park Pool, a massive outdoor swimming pool that attracted thousands of visitors.[75] Prior to entry, Black Americans were singled out and forced to produce a "health certificate" indicating they were disease-free or be turned away, a requirement that did not apply to white swimmers.[76] Black swimmers aired their grievances to the superintendent, who assured them that this practice was not policy and that they should have no issue entering going forward.[77] However, when fifty Black swimmers tried to enter the pool the next day, white male swimmers hurled threats at them.[78] As they entered the water, each Black swimmer was attacked by White swimmers until the Black swimmers eventually left.[79] Day after day, as Black men tried to enter the pool and swim, they were continually attacked and ultimately arrested for "inciting violence."[80] One day, a Black young man was hit so hard by a white swimmer that he shrieked, and a nearby church group overheard.[81] The group ran to the pool and attempted to rescue the boys being beaten, but the pool police stopped them and attacked the churchgoers.[82] Although a white man had instigated the incident, police arrested seven people—all of whom were Black.[83]

After Congress passed the Civil Rights Act, cities and municipalities found other ways to continue the legacy of segregation. Instead of providing much-needed upkeep to existing pool infrastructure, municipalities opted to allow

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 123.
74. *Id.*
75. *Id.* at 125–26.
76. *Id.* at 126.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 127.
81. *Id.*
82. *Id.*
83. *Id.*

pools to fall into disrepair to avoid integration and encouraged the use of private, fee-required pools, effectively pricing out many POC.[84] As a result, pools continue to be homogenous spaces resulting in lasting effects on Black Americans and the Black population.

C. Racism in Natural Blue Spaces

Even after the passage of the Civil Rights Act, the prevalence of violence and discrimination lingered, making many POC, especially Black Americans, feel unsafe visiting recreational sites—let alone recreational blue spaces.

During the early 1900s, acts of violence, like those at swimming pools, often occurred along the beaches in the Great Lakes and the nation's coasts. For example, white gangs would violently attack any person of color to discourage them from enjoying urban amenities.[85] In Chicago, in the summer of 1918, the Ku Klux Klan often patrolled the shores of Lake Michigan—ensuring that blue space was preserved exclusively for white people.[86]

A powerful example of exclusivity and racism in natural blue spaces during this era is the case of Eugene Williams. Williams, a Black twelve-year-old boy, unknowingly waded into the "white" water at a Lake Michigan beach outside Chicago.[87] White beachgoers viciously stoned Williams to death for his mistake.[88] When Black witnesses identified a white man as the person who cast the first stone, police refused to arrest him and instead arrested a Black man.[89] Williams' death marked the beginning of the famous 1919 Chicago Race Riot—an extremely violent week-long stint that resulted in the death of twenty-three Black Americans and fifteen white Americans, leaving 537 injured and one thousand homeless.[90] After the Riot, blue spaces were tainted—many Black Americans were hesitant to return to Lake Michigan and other public waters.[91]

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84. P. Caleb Smith, *Reflections in the Water Society and Recreational Facilities, a Case Study of Public Swimming Pools in Mississippi*, 52 SE. GEOGRAPHER 39, 41 (2012).

85. Colin Fisher, URBAN GREEN: NATURE, RECREATION, AND THE WORKING CLASS IN INDUSTRIAL CHICAGO 95 (2015) (explaining that in the spring and summer of 1918, white "ruffians" increased their assault efforts on Blacks in green and blue spaces with newspapers reporting "that 'young savage' had been attacking black people of all ages and that "no citizen of color, even when accompanied by women members of his family, is safe").

86. *Id.*

87. William Lee, *Black Teen Whose Death Sparked 1919 Race Riots Set to Receive Grave Marker 102 Years Later*, CHICAGO TRIB. (June 4, 2021, 5:00 AM), https://www.chicagotribune.com/news/breaking/ct-eugene-williams-grave-marker-1919-riots-tt-20210604-jisn3k5qabc45fx3xskxp6kvoy-story.html.

88. Melissa Ryan, *Dangerous Refuge Richard Wright and the Swimming Hole*, AFRICAN AM. REV. 27, 27–40 (2017) (reviewing Richard Wright, *Big Boy Leaves Home*, *in* UNCLE TOM'S CHILDREN 16 (1938)).

89. *Id.*

90. Lee, *supra* note 87; *see also* FISHER, *supra* note 85, at 99.

91. Fisher, *supra* note 85, at 99 (explaining that some blamed the Riot for never learning or being allowed to learn how to swim).

Into the 1960s, Black Americans continued to struggle to integrate recreational spaces. They hosted wade-ins at beaches across the country and litigated to desegregate urban spaces and pools.[92] Before the Civil Rights Act passed, Black Americans were constrained to using underfunded and dangerous parts of the shoreline. For instance, Virginia Key, Florida, was the area's first "Blacks only" beach.[93] Not only did it lack similar amenities as "white" beaches, but it was also "prone to 'treacherous' waters and unpredictable undertows," leading many Black swimmers to drown.[94]

Therefore, even after the passage of the Civil Rights Act, the prevalence of violence and discrimination lingered, making many POC, especially Black Americans, feel unsafe to visit any recreational site—let alone a water-based recreational site.[95]

D. Racist Land Use and Housing Policies

One of the most impactful and lasting legacies of the 1900s and the era of segregation was the practice of racially restrictive covenants. These were legally binding and enforceable contracts between owners and purchasers of real property.[96] Racially restrictive covenants often "ran with the land," meaning the land use was limited by the agreement in the covenant. [97] Racist land use and housing policies, like covenants, prevented the creation of diverse communities and forced people of color into areas with poorer access to natural amenities and blue spaces.

Starting in the 1900s, white landowners began attaching covenants to deeds that stated that buildings or property could not be rented, leased, sold, or occupied by any persons other than of the Caucasian race.[98] Racially restrictive covenants were customary all across the country.[99] In fact, there are still racist

92. *See* Victoria W. Wolcott, RACE, RIOTS, AND ROLLER COASTERS: THE STRUGGLE OVER SEGREGATED RECREATION IN AMERICA 168, 168–203 (2012).

93. Cassandra Phoenix et al., *Segregation and the Sea Toward a Critical Understanding of Race and Coastal Blue Space in Greater Miami*, 45(2) J. SPORT & SOC. ISSUES 115, 118 (2021).

94. *Id.*

95. *See* discussion *infra* Part III.B.

96. *See* George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience 1930- 1980*, 27 U.C. DAVIS L. REV. 555, 569 (1994) ("Another important method the white majority has used to force minorities into a subordinate position in society has been through racially restrictive covenants. These legal devices in deeds of land typically prohibited the sale or lease of property to persons of a particular race, religion, or national origin. These covenants were developed to exclude minorities from white residential areas." [internal citations omitted]).

97. *Glossary Run with the Land*, THOMSON REUTERS: PRACTICAL LAW, https://1.next.westlaw.com/Glossary/PracticalLaw/I39cfcc7aa31b11e38578f7ccc38dcbee?contextData=(sc.Default)&transitionType=Default (last accessed Apr. 23, 2023) (A covenant that runs with the land is "[a] right or restriction that affects all current and future owners of real property and transfers with title to the property.").

98. Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J.C.R. & C.L. 143, 154 (2005).

99. *Id.*

covenants in deeds across the Midwest.[100] Racist covenants pushed POC into urban areas with substandard housing and lackluster access to blue space, away from the freshwater coasts of the Great Lakes.[101] Similarly, racially restrictive covenants forced POC either wholly away from the coasts or into urban areas with poor access to blue spaces in coastal communities across California.[102] Despite case law legally abolishing racially restrictive housing covenants, significant damage was done.[103] POC were concentrated away from the water access points, blue space amenities, and other urban amenities.[104] During the same period, even the Federal Housing Administration discouraged public ownership of recreational facilities to avoid the obligation to integrate these spaces, opting instead for encouraging private ownership to perpetuate segregation further.[105]

In addition to covenants, federally subsidized mortgage policies (also referred to as redlining), payoffs by neighbors, death threats, vandalism, and policies restricting real estate agents from introducing Black and other POC into white neighborhoods prevented POC from accessing and enjoying the same blue-space amenities as their white counterparts.[106] Redlining, in particular, is probably the most well-known federal housing policy that effectuated segregation and pushed disadvantaged communities away from green and blue spaces. Redlining was the practice of denying a credit-worthy applicant a loan for a home in a certain neighborhood based on race.[107] Even though the practice is now unlawful under the Fair Housing Act, the legacy of redlining can be seen today in places like Detroit's Brewster-Douglass towers.[108] Even when Black Americans made enough money to move closer to the coasts, real estate agents

100. *About Mapping Prejudice*, UNIV. OF MINN., https://mappingprejudice.umn.edu/about-us/project (last visited Apr. 23, 2023) (project through the University of Minnesota cataloging racist deed restrictions in greater Minneapolis); *see also* Laura Otto, *Mapping the Echoes of Racially Restrictive Property Deed Covenants in Milwaukee*, UNIV. OF WIS.-MILWAUKEE REP. (Feb. 17, 2022), https://uwm.edu/news/mapping-the-echoes-of-racially-restrictive-property-deed-covenants-in-milwaukee/ (reporting on a similar project beginning in Milwaukee).

101. *About Mapping Prejudice*, *supra* note 100; *see also* Otto, *supra* note 100.

102. Cheryl Thompson et al., *Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country*, NAT'L PUB. RADIO (Nov. 17, 2021), https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination.

103. García & Baltodano, *supra* note 98, at 154 (citing *Shelley v. Kramer*, 334 U.S. 1 (1948) and *Barrows v. Jackson*, 346 U.S. 249 (1953)).

104. *Id.*

105. *Id.* (citing the Federal Housing Administration Manual of 1938, which states: "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values.").

106. *Id*. at 154–55.

107. *Federal Fair Lending Regulations and Statutes Fair Housing Act*, CONSUMER COMPLIANCE HANDBOOK, https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf (last visited May 12, 2022).

108. *A Forgotten History' of How the U.S. Government Segregated America*, NAT'L PUB. RADIO (May 3, 2017, 12:47 PM), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america.

often refused to show them homes in homogenous white areas.[109] For instance, even the famous Brooklyn Dodgers baseball star Jackie Robinson and his wife could not break into the coastal Connecticut housing market.[110]

Andrew Kahrl chronicled the struggle between privatization, gentrification, racism, and the right to share shorelines in Connecticut.[111] The infrastructure boom, including the installation of bridges and paving of roads during the early twentieth century, turned the once undesirable coast into a developer's playground.[112] Kahrl explained that developers purchased massive amounts of waterfront property for private beach associations, complete with exclusive access and security in the 1920s.[113] Forty years later, only 2 percent of Connecticut's beaches were public.[114] Throughout the 1930s and 1940s, cities and municipalities in coastal Connecticut implemented ordinances to limit the number of Black people visiting public beaches.[115] In addition to the lack of truly public beaches in Connecticut, between 1962 and 1970, most federal funding to develop recreational land targeted predominantly white, affluent areas, leaving only 6 percent of federal funds devoted to low-income neighborhoods.[116] In effect, the influx of federal funding for the public to engage in outdoor recreation and enjoy open space disregarded the needs of Black communities.[117]

Private home and beach associations also maintained racial exclusivity by pleading color-blind innocence. For instance, in 1955 Connecticut, a Black American minister in New Haven, William Philpot, purchased a home on Andover Lake.[118] However, he and his family could not access the lake because the Andover Lake Property Owners' Association purported to own it, although it had rejected Philpot's application to join four times.[119] After the fourth rejection, the association adopted a bylaw forcing people to wait five years to reapply for membership after being denied.[120] The Philpot family could finally enjoy the lake that abutted their home after a state trial court ruled that Philpot acquired an implied easement when he purchased the property, so he and his

109. Andrew W. Kahrl, FREE THE BEACHES: THE STORY OF NED COLL AND THE BATTLE FOR AMERICA'S MOST EXCLUSIVE SHORELINE 29 (2018).

110. *Id.*; *see also* Mark Lungariello, *Here's What Happened When Jackie Robinson Tried to Move to Westchester County*, LOHUD, https://www.lohud.com/story/news/local/westchester/2019/04/16/jackie-robinson-westchester/3482983002/ (April 17, 2019 at 7:11 am ET).

111. Kahrl, *supra* note 109, at 1–13.

112. Andrew Kahrl, *The History of African Americans on the Water and by the Shore Whitewashed and Recovered*, 35(2) J. OF AM. ETHNIC HIST. 63, 65 (2016); *see also* Kahrl, *supra* note 109, at 9 (explaining that the Federal Housing Administration through the Federal Highway Act created both the funding and workforce to begin the gateway to the coasts).

113. Kahrl, *supra* note 109, at 9.

114. *Id.* at 10.

115. *Id.* at 19–22 (explaining that some Connecticut cities enacted ordinances which restricted beach parking access to resident-only, crafted definitions of "public" to mean only residents or local taxpayers).

116. *Id.* at 28 (citation omitted).

117. *Id.*

118. *Id.* at 33.

119. *Id.*

120. *Id.*

family were legally allowed to access the lake.[121] Even more sobering is the fact that towns that acquired and developed their beaches did so with potential future litigation in mind.[122] Some towns intentionally did not accept federal funds for their beaches because doing so would have opened the door to potential litigation from taxpayers or under Title VI of the Civil Rights Act.[123]

When the U.S. Supreme Court outlawed racially restrictive covenants in 1948, exclusionary zoning became the preferred method for white majorities to exclude POC from blue spaces across the nation.[124] In places like Connecticut, a state without income tax, municipalities relied more heavily on property taxes to produce revenue.[125] To hike property taxes, Connecticut created zoning ordinances that required residential home lots to be at least four acres.[126] In other places, exclusionary zoning practices made some POC more susceptible to industrial and commercial zoning, creating industrial landscapes where there was little incentive to invest in green and blue spaces in those neighborhoods.[127]

Exclusionary zoning ordinances intended to prevent POC and low-income families from living in certain areas, effectively creating communities blind to poverty.[128] Throughout the Northeast, municipalities amended local ordinances to increase minimum lot sizes.[129] These ordinances effectively priced out POC from living in certain areas.[130] In some places, average lot sizes doubled.[131] To use another example, in 1955, an all-Black church congregation used a "straw buyer" to purchase an estate in Darien, Connecticut, to use as a summer camp for inner-city children.[132] When the town council learned of the purchase, they amended the local ordinance to say that land uses must be harmonious with the

121. *Id.*

122. *Id.* at 35 (explaining Sarah Cogen, Ruth Holle, and Barbara Louis's efforts to challenge exclusionary practices along Connecticut's coastlines).

123. *Id.* at 35–36.

124. *Id.* at 29–30 (explaining that after the 1948 ruling in *Shelley , 334 U.S. 1 (1948)* outlawing racially restrictive covenants, wealthier towns began using exclusionary zoning practices. This move followed the decision in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) which had authorized municipal zoning twenty years earlier).

125. *Id.* at 31.

126. *Id.* at 31–32.

127. *See* Richard Rothstein, *The Making of Ferguson Public Policies at the Root of its Troubles*, ECON. POL'Y INST. 7, 7–9 (Oct. 14, 2015) (providing a helpful overview of discriminatory housing); *see* also Cecilia Rouse et al., *Exclusionary Zoning Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE BLOG (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/ (explaining research on Seattle's 1923 zoning laws showing that areas in which Black or Chinese-American families lived were disproportionately likely to receive commercial zoning).

128. *See* Kimberly Winter, *A Tale of Two Suburbs How Zoning Contributed to Demographic Patterns*, 30(3) J. AFFORDABLE HOUS. 437, 442–443 (2022).

129. *Id.* at 443 (discussing how increasing minimum lot sizes reduces the amount of available land and increases real estate prices, making purchase prices and corresponding property taxes more expensive).

130. Kahrl, *supra* note 109, at 30.

131. *Id.*

132. *Id.* at 33.

"orderly development of the district where the land is located."[133] Ultimately, the town council deemed the church's purchase of the estate for use as a summer camp for inner-city children to be inharmonious, citing that the amendment had nothing to do with race and everything to do with the protection of homeowners.[134] So, despite legal efforts aimed at reducing racial disparities in better housing and better access to natural amenities like blue spaces, community leaders perpetuated racist land use and housing policies.

Literature from the last five years indicates a growing understanding of how the fight for equitable access and open space leads to revitalization and, ultimately, gentrification—green displacement.[135] Newly revitalized areas attract urban developers and new residents to historically distressed neighborhoods, resulting in both a lack of access to green and blue spaces for residents of low-income neighborhoods and displacement from their neighborhoods.[136] This positive feedback loop was exemplified in Chicago's Little Village neighborhood, composed mostly of Mexican-American residents.[137] A 2018 study held that anti-displacement is implicit in EJ—there is a "right" to remain and enjoy the benefits of long-fought-for revitalization.[138] The study chronicles the struggle of Mexican communities to find a sense of place.[139] Mexican communities immigrated forcefully or voluntarily to fill labor shortages, but regardless of citizenship status, Mexican communities often feel collective insecurity.[140] As Mexican communities found refuge in cities, there were still no parks; even as cities "improved," green spaces in disadvantaged areas are still rare and public transportation still lags, even though Little Village is a Chicago business and cultural hub.[141]

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133. *Id.*

134. *Id.* (citation omitted).

135. *See, e.g.*, Isabelle Anguelovski, *From Toxic Sites to Parks as (Green) LULUs? New Challenges of Inequity, Privilege, Gentrification, and Exclusion for Urban Environmental Justice*, 31(1) J. PLAN. LITERATURE 23 (2016).

136. *Id.* at 23.

137. *Quality of Life Plan*, ENLACE CHI., https://www.enlacechicago.org/littlevillagequalityoflifeplan (last visited Apr. 27, 2023).

138. Leslie Kern & Caroline Kovesi, *Environmental Justice Meets the Right to Stay Put Mobilising Against Environmental Racism, Gentrification, and Xenophobia in Chicago's Little Village*, 23(9) LOCAL ENV'T 952, 953 (2018).

139. *Id.* at 956.

140. *Id.*

141. *Id.* at 954, explaining that:

> "[I]n the twentieth century, the rate of Mexican immigration to Chicago was increasing as nation-wide labour shortages spurred demand for agricultural and blue-collar workers, particularly during the Second World War. Widespread deprivation and poverty in Mexico pushed many across the border, either under temporary foreign worker programmes, or via other legal and illegal channels (Fernández 2012). In Chicago, the Near West Side (NWS) was the primary venue for Mexican settlement, as it had been for previous waves of primarily European immigrants over at least a century. The racially diverse, deteriorating, poor neighbourhood was labeled as "blighted" by city planners and targeted for slum clearance and

Through historical research, surveys, and other qualitative research methods, social scientists Kern and Kovesi demonstrated that environmental gentrification is well underway in places like Pilsen, a predominantly Mexican neighborhood just outside the Chicago "Loop."[142] Real estate prices and property taxes continue to rise out of reach of working-class and minority families' range.[143] Local experts say that gentrification is not as likely in the Little Village because crime, gangs, and incarceration rates are high—essentially, stigma would prevent gentrification, although stigma should not be the only reason gentrification fails and the right to remain prevails.[144]

Overall, exclusionary housing and land use practices have displaced swaths of POC, often sealing them in urban areas with little access to blue spaces. Even for those able to secure more spacious and enjoyable land, like the Philpots, white majorities have ensured that POC are often unable to enjoy these spaces the same way as white people. The next Part investigates the lasting impacts of exclusionary practices.

III. BARRIERS TO BLUE SPACE ACCESS

Jim Crow-esque policies and laws began in the late 1800s and continued until roughly the 1970s.[145] However, the echoes of the past still impact equitable access and enjoyment of blue space today. In 2018, a South Carolina woman accosted a young Black boy trying to enter a pool.[146] She called him a "punk" and told him he did not belong there.[147] The following Part assesses the academic literature documenting contemporary barriers to accessing blue space and follows the themes of safety and discrimination, racist land use and housing policies, proximity, and cost or lack of transportation and parking.

Ultimately, this Part demonstrates that POC do not have unfettered, safe, and equitable access to green and blue spaces. Across the literature, there are surprisingly few studies that investigate *why* there is a lack of access among POC despite well-documented disparities in access. This Part first reviews data supporting the inequitable access to the outdoors generally. Then, it focuses on blue spaces and reviews literature discussing the lasting impacts of racist land use and housing policies. Following these policies, this Part reviews how racist land use and policies pushed POC further away from blue spaces, making them

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urban renewal in the 1950s."

142. *Id.* at 959 (explaining environmental gentrification as the post-revitalization driving up of rent prices, property taxes, and real estate prices, "leading to the displacement of working-class and minority residents").

143. *Id.*

144. *Id.*

145. *Jim Crow Laws*, HIST., https://www.history.com/topics/early-20th-century-us/jim-crow-laws#when-did-jim-crow-laws-end (last updated Jan. 11, 2022).

146. Sarah Mervosh, *Woman Assaulted Black Boy After Telling Him He Did Not Belong' at Pool, Officials Say*, N.Y. TIMES (July 1, 2018), https://www.nytimes.com/2018/07/01/us/pool-patrol-paula.html.

147. *Id.*

harder to access due to a lack of public transportation, parking, or both. Finally, this Part documents academic literature reviewing how perceived lack of safety, the history of racism, and ongoing discrimination affect POC engagement with blue spaces.

A. A Decade of Data: Documenting Inequitable Access to the Outdoors

Social science researchers are only beginning to quantify their understanding of inequity in outdoor spaces and how historic decisions impact today's culture. Rigolon and Németh's study explored this by measuring inequity in park access.[148] This study examined park planning in Denver, Colorado from 1902 through 2015.[149] Using geospatial data and interviews with local experts and historians, researchers attempted to examine social and institutional mechanisms to determine why there are massive inequities in positive infrastructure, like green and blue spaces.[150] From this, they found that, historically, through racist housing policies and other factors, POC were often limited to areas with little green or blue space.[151] Racist housing and land policies had lasting effects on parks as urban amenities, such as less park acreage for communities of color and more privately planned communities creating their own exclusive parks, to name a few.[152] In effect, environmental amenities like blue spaces are a function of where POC have historically been forced or able to live through the decades.[153]

This lack of access to green and blue space is not limited to urban settings. Several organizations and federal agencies have documented unequal usage of green and blue spaces.[154] The National Park Service launched a project called "Linking the 2010 Census to National Park Visitors" to understand the needs of their visitors better.[155] In the report, the National Park Service overlaid surveys collected between 2001 and 2011 with 2010 census data.[156] One of the main

148. Alessandro Rigolon & Jeremy Németh, *What Shapes Uneven Access to Urban Amenities? Thick Injustice and the Legacy of Racial Discrimination in Denver's Parks*, 41(3) J. PLAN. EDUC. & RSCH. 312, 317 (2018).

149. *Id.* at 312.

150. *Id.*

151. *Id.* at 313.

152. *See id.* at 316–32 (outlining amenity distribution going back to the New Deal era and demonstrating the disparity between green and blue spaces in Black, Hispanic, and non-Hispanic white communities in Denver).

153. *Id.* at 313.

154. *See, e.g.*, David Flores & José J. Sanchez, *The Changing Dynamic of Latinx Outdoor Recreation on National and State Public Lands*, U.S. DEP'T OF AGRIC. & U.S. FOREST SERV., 38(4) J. PARK & RECREATION ADMIN. 58, 59 (2020); William Elmendorf et al., *Urban Park and Forest Participation and Landscape Preference A Comparison Between Blacks and Whites in Philadelphia and Atlanta*, 31(6) U.S. J. ARBORICULTURE & URB. FORESTRY 318, 320–21 (2005); Kimberly J. Shinew et al., *Understanding the Relationship between Race and Leisure Activities and Constraints Exploring an Alternative Framework*, 26(2) LEISURE SCIS. 181, 194–96 (2004).

155. Jerry J. Vaske & Katie M. Lyon, *Linking the 2010 Census to National Park Visitors*, NAT'L PARK SERV. (2014), https://irma.nps.gov/DataStore/DownloadFile/495294.

156. *Id.* at 10.

considerations was determining the makeup of visitors.[157] In that regard, the survey showed that visitors to national parks are overwhelmingly white at 95 percent.[158] Only 7 percent of visitors identified as Hispanic.[159] In fact, Hispanic visitors "were underrepresented in all [National Park regions] except the Southeast," and in terms of blue space, none of the surveys at National Seashores reported respondents from Hispanic origins.[160] Black, African American, and Native Hawaiian and other Pacific Islander respondents comprised 1 percent or less of visitors.[161] Vaske and Lyon concluded that national parks are "more homogenous than U.S. citizens in general."[162]

Further, a study by Montgomery and colleagues focusing on the Miami area attempted to understand inequity in access to blue-space amenities.[163] They established that beaches are more accessible to neighborhoods with a higher proportion of non-Hispanic white residents, whereas neighborhoods with higher percentages of Hispanic and socioeconomically disadvantaged residents had limited beach access.[164] To better understand why these equity gaps exist, the next Part contextualizes the problem by depicting POC struggles to access blue spaces, including lack of safety, distance from natural amenities and blue spaces, and the cost of transportation to blue spaces or lack thereof.

B. Safety, Discrimination, and Social Exclusivity

In 2009, a group of Black and African American children paid for entry to the Valley Swim Club as part of a day camp in Philadelphia, Pennsylvania.[165] During their first day, campers reported that club members made racial comments towards them.[166] The next day, the Valley Swim Club refunded their money, and they were asked not to return.[167] After months of investigation, the U.S. Department of Justice determined the ban on these Black children was racially motivated, and three years later, the Valley Swim Club agreed to a $1.1 million settlement.[168]

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157. *Id.*
158. *Id.* at 31.
159. *Id.*
160. *Id.* at 19.
161. *Id.* at 20.
162. *Id.* at 31.
163. *See generally* Marilyn Christina Montgomery et al., *An Environmental Justice Assessment of Public Beach Access in Miami, Florida*, 62 APPLIED GEOGRAPHY 147 (2015).
164. *Id.*; *see also* Howard R. Ernst, *Parking Access, Beach Usage, and Race A Study of the Relationship Between Parking Access and Racial Inequality at Public Beaches in Palm Beach County, Florida*, 14(1) ENV'T JUST. 1, 71–72 (2021).
165. Lauren Disanto, *Settlement in Swim Club Discrimination Case*, NBC PHILA. (Aug. 17, 2012) https://www.nbcphiladelphia.com/news/national-international/settlement-in-swim-club-discrimination-case/1938088/.
166. *Id.*
167. *Id.*
168. *Id.*

Echoing the centuries of history chronicling racial violence and discrimination against POC who attempted to utilize blue spaces, many sources across the literature at least partially describe a perceived lack of safety and discrimination as a barrier to accessing the outdoors and blue space for some marginalized groups including Black, Latin, and Hispanic groups.[169] For instance, in 2021, one study found barriers to beach access in Miami, Florida, ranging from intergenerational transmission of fear of blue spaces, limited opportunities for learning how to swim, and limited knowledge of sea life and tidal patterns to microaggressions and over-policing, resulting in strong feelings of otherness and lack of belonging.[170]

Qualitative studies reinforce the idea of pools as a longtime racialized space. They demonstrate how the pool "as a cultural field, maintains socially segregated boundaries offering members a significant, yet hidden vehicle through which [pool members] can facilitate their class and race-based privilege."[171] For example, during the summer of 2009, DeLuca collected thirty-five interviews of women and children at a homogenous white pool facility in a mid-Atlantic city in the United States.[172] Of those interviews, the author found that the interviewees demonstrated varying levels of discomfort at the homogeneous facility.[173] Another study found that social exclusivity and homogeneity of pool facilities correlated with nonparticipation in swimming by disadvantaged groups like Black Americans.[174] The literature documents today what began decades ago. Since their creation, white majorities have made pools a site of racial exclusion.

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169. *See, e.g.*, Leslie Kern & Caroline Kovesi, *Environmental Justice Meets the Right to Stay Put Mobilising Against Environmental Racism, Gentrification, and Xenophobia in Chicago's Little Village*, 23(9) LOCAL ENV'T 952, 953 (2018) (describing the "violence of structural racism" as a reason for social and economic disinvestment in the Little Village neighborhood of Chicago); *see also* Isabelle Anguelovski, *From Toxic Sites to Parks as (Green) LULUs? New Challenges of Inequity, Privilege, Gentrification, and Exclusion for Urban Environmental Justice*, 31(1) J. PLAN. LITERATURE 23, 27 (2016) (explaining that urban historians often credit racial discrimination as a reason for ongoing environmental inequity); P. Caleb Smith, *Reflections in the Water Society and Recreational Facilities, a Case Study of Public Swimming Pools in Mississippi*, 52 (1) SE. GEOGRAPHER 39, 40 (2012) (explaining that discrimination in pool access during the Jim Crow era in the South effectively racialized pools as "white" spaces); Iryna Sharaievska et al., *Perceived Discrimination in Leisure Settings in Latino Urban Communities*, 38(3) LEISURE 295, 295–326 (2010) (describing discrimination experiences by Hispanic people attempting to enjoy parks).

170. Cassandra Phoenix et al., *Segregation and the Sea Toward a Critical Understanding of Race and Coastal Blue Space in Greater Miami*, 45(2) J. SPORT & SOC. ISSUES 115, 126 (2021); *see also* J.-F. Staszak, *Other/Otherness*, INTERNATIONAL ENCYCLOPEDIA OF HUMAN GEOGRAPHY 43–47 (2008) (defining otherness as social context stigmatizing one group from another based on some real or imagined difference and providing motive for discrimination).

171. Jamie R. DeLuca, *Submersed in Social Segregation The (Re)Production of Social Capital Through Swim Club Membership*, 37(4) J. SPORT & SOC. ISSUES 340, 340 (2013).

172. *Id.* at 346.

173. *See id.* at 348–54.

174. Donald W. Hastings et al., *Drowning in Inequalities Swimming and Social Justice*, 36(6) J. BLACK STUD. 894, 908 (2006).

C. Lasting Impact of Racist Land Use and Housing Policy

The blatant perpetuation of discriminatory land use and housing policies is a barrier for blue and green space access. Suburban neighborhoods commonly implemented racially restrictive covenants to prevent Black Americans from moving to cities' outskirts—where the air was fresh and there was wide-open space to enjoy.[175] So, the lasting impact of racist and discriminatory housing left many Black and POC unable to experience and interact with the natural world to the same degree as white people.

Often concentrated in dilapidated urban housing and underfunded neighborhoods, POC had to grapple with the disproportionate placement of industrial land uses as well. Arnold's 1998 study on EJ and land use investigated thirty-one census tracts from seven cities nationwide.[176] Arnold found that "low-income, minority communities have a greater share not only of locally unwanted land uses (LULUs), but also of industrial and commercial zoning, than do high-income white communities."[177] In effect, practices like rezoning racially diverse neighborhoods for industry or commercial activity forced Black Americans, Indigenous, Hispanic, Latin, Asian, and other POC into unhealthy spaces with little connection to the natural world.[178]

Social scientists are only beginning to quantify and document the lasting effect of discriminatory housing policies as EJ concerns. One commonly documented effect of diminished green and blue space is increased temperatures.[179] Extreme heat caused more fatalities in the last few decades than any other hazardous weather in the United States.[180] A 2020 study on urban heat issues sought to understand whether historical housing practices, particularly redlining, explained current patterns of excess heat effects in low-income communities and communities of color.[181] Researchers overlayed Home Owners' Loan Corporations' redlining maps from 108 cities across the country with satellite temperature data.[182] Their results corroborated other findings linking a lack of green and blue space plus a higher prevalence of roadways and

175. *Id.*; Alana Semuels, *White Flight Never Ended*, THE ATLANTIC (July 30, 2015), https://www.theatlantic.com/business/archive/2015/07/white-flight-alive-and-well/399980/.

176. Craig A. Arnold, *Planning Milagros Environmental Justice and Land Use Regulation*, 76 DEN. U. L. REV. 1, 77 (1998) (investigating census tracts in California, Pennsylvania, Texas, and Kansas).

177. *Id.*

178. Craig A. Arnold, *Resilience Justice and Community-Based Green and Blue Infrastructure*, 45 WM. & MARY ENV'T L. & POL'Y REV. 665, 728 (2021) (citing Katia Perini et al., *Green and Blue Infrastructure in Cities*, in URBAN SUSTAINABILITY AND RIVER RESTORATION: GREEN AND BLUE INFRASTRUCTURE 3, 4 (2017)) (describing several cities in the United States including Milwaukee as a city with limited or less quality green space).

179. Farshid Aram et al., *Urban Green Space Cooling Effect in Cities*, 5(4) HELIYON 1, 2, 9 (2019); *see* Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat A Study of 108 US Urban Areas*, 8(1) CLIMATE 1, 2, 9 (2021).

180. *See* Kaufui V. Wong et al., *A Review of World Urban Heat Islands Many Linked to Increased Mortality*, 135 ENERGY RES. TECH. 22101, 22101-2, 22101-9 (2013).

181. Hoffman et al., *supra* note 179, at 12.

182. *Id.* at 3–4.

urban buildings to the presence of low-income communities and communities of color.[183] Most profoundly, they concluded that in "nearly all cases, those neighborhoods located in formerly redlined areas . . . are at present hotter than their non-redlined counterparts."[184]

Overall, the lasting impact of intentional exclusionary housing and land use practices leaves POC with little recourse to rectify the side effects of prolonged exposure to industry and limited outdoor recreational outlets to escape.[185]

D. Proximity

As a result of exclusionary and racist housing and land use practices, POC now suffer a proximity barrier to accessing blue spaces. Reineman and colleagues' 2016 study, conducted in California, demonstrated that POC usually live furthest away from blue space access due to large disparities in income.[186] The study concluded that annual household income steadily increases with proximity to coastal access, "with households living [one kilometer] or less from coastal access making on average roughly 20% more than the state average."[187] Additionally, the study revealed that of 38.2 percent of Californians identifying as Hispanic or Latinx, only 1.7 percent live within one kilometer of a coastal access point.[188] Similarly, only 1.5 percent of Black or African American Californians live within one kilometer of coastal access.[189] So, generally, those who live close to public coastal access points are more likely to be white.[190]

Similarly, Kim and Nicholls' 2018 study used statistical methods to demonstrate proximity as a barrier and explored potential sub-issues contributing to the problem.[191] For instance, this study noted four different approaches to measuring shoreline access: presence of beaches in a given geographical unit, minimum distance to a beach, travel cost of getting to a beach, and spatial

183. *Id.* at 10. *See generally* David J. Nowak & Eric J. Greenfield, *Declining Urban and Community Tree Cover in the United States*, 32 URB. GREEN 32 (2018).

184. Hoffman et al., *supra* note 179, at 11 (noting that the extent of temperature difference varies).

185. *Groundbreaking Nationwide Study finds People of Color Live in Neighborhoods with More Air Pollution*, UNIV. OF MINN. COLL. OF SCI. & ENG'G (June 30, 2020), https://cse.umn.edu/college/news/groundbreaking-nationwide-study-finds-people-color-live-neighborhoods-more-air (describing that combustion and burning of fossil fuels contributes to poor air pollution resulting in respiratory ailments like asthma and heart disease, and these industries are often unfairly and inequitably placed in minority neighborhoods); Jacob Carter & Casey Kalman, *A Toxic Relationship Extreme Coastal Flooding and Superfund Sites*, UNION OF CONCERNED SCIENTISTS (July 28, 2020), https://www.ucsusa.org/resources/toxic-relationship (describing the placement of Superfund sites also in minority neighborhoods in geographic regions prone to flooding causing water pollution issues in these communities).

186. Dan R. Reineman et al., *Coastal Access Equity and the Implementation of the California Coastal Act*, 36 STAN. ENV'T L. J. 89, 93 (2016).

187. *Id.* at 97.

188. *Id*.

189. *Id.*

190. *Id*. at 99.

191. Jinwon Kim & Sarah Nicholls, *Access for All? Beach Access and Equity in the Detroit Metropolitan Area*, 61(7) J. OF ENV'T PLAN. & MGMT. 1137, 1137 (2018).

interaction.[192] The study employed a "minimum distance" approach, where researchers measured the shortest road network distance to public beaches.[193] It focused on three counties in southeast Michigan with diverse populations and a high density of public beaches: Oakland, Wayne, and Macomb. The study then measured road distance networks against various demographic data, including race, household income, vehicle ownership, and other information.[194] They found that those living in "densely populated areas, the elderly, and those with lower levels of education [were] significantly less likely to be able to access a public beach."[195] Part of the study also used the level of access as the dependent variable, indicating the shortest road network available.[196] When measured against race, the shortest distance to beach-related recreational opportunities decreases.[197] So, in effect, there is also inequity in access to blue spaces by race.

Finally, further proximity from human-made blue spaces, like pools, can negatively affect excluded swimmers. Studies quantitatively establish that access to and the availability of swim instruction and competitive swimming programs may influence mortality rates among POC, especially Black communities.[198] One study found that the rate of nonparticipation in swimming was highest among Black Americans and that this difference may relate to drowning mortality.[199]

So, due to exclusionary housing and land use policies, POC find their communities often lack blue space amenities or are located far from blue space amenities, like pools, lakes, and oceans, making it all the more difficult to access and enjoy recreational opportunities.[200]

E. Cost or Lack of Transportation and Parking

The further one lives from blue or green space, the more transportation and parking take on greater importance.[201] This Part reviews the academic literature

192. *Id.* at 1144.
193. *Id.*
194. *Id.* at 1147.
195. *Id*. at 1154.
196. *Id.* at 1144–45.
197. *Id.* at 1144 (displaying a "decrease" in the shortest road networks for Black, Asian, and Hispanic levels of access to recreational opportunities such as swimming, sailing, kayaking, canoeing, diving and fishing take place at water-based sites such as lakes, rivers, oceans and beaches).
198. Donald W. Hastings et al., *Drowning in Inequalities Swimming and Social Justice*, 36(6) J. BLACK STUD. 894, 908–910 (2006). *See generally* Julie Gilchrist, & Erin M. Parker, *Racial/Ethnic Disparities in Fatal Unintentional Drowning Among Persons Aged ≤ 29 Years—United States, 1999–2010*, 63 MORBIDITY & MORTALITY WKLY. 421–426 (2014); *Cassandra Phoenix et al., Segregation and the Sea Toward a Critical Understanding of Race and Coastal Blue Space in Greater Miami*, 45 J. SPORT & SOC. ISSUES 126 (2021).
199. Hastings, *supra* note 198, at 908–10.
200. *See* discussion *infra* Part II.D.
201. Linda Poon, *Why Can't I Take Public Transit to the Beach?*, BLOOMBERG NEWS (Aug.16, 2019, 2:56 PM), https://www.bloomberg.com/news/articles/2019-08-16/america-needs-more-transit-friendly-beaches; Ramesh Ghimire et al., *Who Recreates Where Implications from a National Recreation*

on barriers to blue space based on the cost and availability of transportation. It then investigates parking and the impact that parking availability has on POC.

1. Transportation

Generally, public transportation offers lackluster options for coastal visits.[202] For example, while New York offers access to beaches via the subway system, other cities are far behind the curve, with many blue spaces only accessible by car.[203]

Supporting this assertion, in 2019, Kim and colleagues conducted a study using Geographic Information System (GIS) spatial analytical techniques to assess the level of access to and the degree of equity inherent in the distribution of public beaches in the Detroit Metropolitan Area.[204] Results showed inequalities associated with public beach access based on several factors, including lack of vehicle ownership.[205] The study explains that lack of vehicle ownership becomes important in the context of "deprivation amplification."[206] This is "a pattern of diminished opportunities related to the features of the local environment."[207] The study further explained that where communities have limited access to their own private transportation, there is a clear decrease in safe open spaces for people to enjoy the outdoors.[208] So, this study exemplifies the importance of providing public transportation that links POC to blue spaces.

Further supporting this notion, in 2007, Shores and colleagues conducted a qualitative survey of three thousand respondents, ranging from eighteen to sixty-four years old, from ten regions throughout Texas to determine constraints in deciding to leave home for outdoor recreation of any kind.[209] The study focused on several variables, including distance, cost, lack of knowledge of the location of recreational amenities, lack of time, no one to go with, fear of getting hurt or attacked, poor health of self or family, disinterest, and disapproval.[210] The authors then ran these against five independent variables (race, gender, age, income, and education).[211] The study found that race played a role in five of the nine constraints: transportation, economy, fear of crime, poor health, or

Household Survey, 114(4) J. FORESTRY 458, 459 (2016) (considering the cost of fees in accessing both private and public land as a deterrent).

202. Robert Thompson, *Local Government and the Closing of the Coast Parking Bans and the Beach as a Traditional Public Forum*, 25 FORDHAM ENV'T L. REV. 458, 463 (2014).

203. Poon, *supra* note 201.

204. *See generally* Jinwon Kim et al., *Environmental Justice and Public Beach Access*, 18(1) CITY & CMTY. 49 (2019).

205. *Id.* at 62 (explaining that "public beaches are inequitably accessible to [census tracts] with . . . higher levels of non-vehicle ownership").

206. *Id.*

207. *Id.*

208. *Id.*

209. *See generally* Kindall Shores et al., *Constraints to Outdoor Recreation A Multiple Hierarchy Stratification Perspective*, 29(3) LEISURE SCI. 227 (2007).

210. *Id.* at 234.

211. *Id.*

disapproval of others.[212] Additionally, Black participants were more likely than white participants to report that each constraint was important in their decision to leave home for recreation.[213] Hispanic respondents also "reported higher levels of transportation, economic, knowledge, fear of crime, and health constraints than did whites."[214] Thus, the intersection of decades of economic inequality and the lasting impact of exclusionary housing and land use have left POC with longer travel distances to reach blue spaces and fewer transportation options to get there.

2. Parking

Generally, the easiest way to visit a beach is to drive and hopefully find parking within walking distance.[215] However, cities began restricting parking after highway infrastructure improvements and massive federal investment in highway systems increased the popularity of beaches.[216] Parking restrictions came in the forms of restricting parking to residents or providing little public parking.[217] The latter is reflected in a variety of academic studies.

For example, in 2021, Ernst conducted a study examining the relationship between parking availability, beach usage, and race in Palm Beach County, Florida.[218] Ernst used parking availability data and a demographic beach survey to examine the relationship between race and beach access along a twenty-kilometer stretch of beach.[219] After dividing this twenty-kilometer beach segment into smaller parts, Ernst monitored each part on five different occasions.[220] Ernst noted the racial composition of beachgoers over a total of 335 total beach segment observations.[221] In areas where public parking was unavailable, Ernst observed less than one person of color (.28 people) per beach segment (2 percent of total beachgoers) and concluded that this result was tied to the absence of parking.[222] For comparison, in the same absence of public parking, there were almost eight Caucasian people observed in each segment.[223] Ernst's study suggests a strong correlation between public parking availability and the presence of POC at beaches. If parking were readily available or public transportation more easily accessible, POC may be more likely to enjoy blue

212. *Id.* at 235.
213. *Id*.
214. *Id.* at 237.
215. Thompson, *supra* note 202, at 463.
216. *Id*. at 459.
217. *Id.*
218. Howard R. Ernst, *Parking Access, Beach Usage, and Race A Study of the Relationship Between Parking Access and Racial Inequality at Public Beaches in Palm Beach County, Florida*, 14(1) ENV'T JUST. 1, 70 (2021).
219. *Id.* at 72.
220. *Id.*
221. *Id.* at 73.
222. *Id.* at 74.
223. *Id.*

spaces and coastal areas more equitably. Thankfully, it appears that public transportation to blue spaces is set to improve. Some states are launching pilot programs to improve equitable access to blue space, and beaches in particular.[224] For instance, in April 2022, after a successful test run, Rhode Island Public Transit Authority will begin a new bus route from Newport's North End to Easton's Beach in an attempt to ensure increased equal access to beaches and blue space.[225]

Over centuries, racist and discriminatory policies and practices effectuated a lawful form of segregation. These acts resulted in POC displacement or intentional placement away from the social, economic, and health benefits derived from blue spaces, the effects of which continue even today. Moreover, the first half of this Article establishes that national, state, and local institutions have not fairly considered environmental effects on low-income Americans or POC, leaving these communities sicker, poorer, and less able to enjoy the benefits of blue spaces to the same extent as their white counterparts. Thus, blue space access is an EJ issue. Several tools already exist that may, at least partially, alleviate some of the barriers to blue space access, including the public trust doctrine and Title VI of the Civil Rights Act. However, as the next Part demonstrates, many of these tools do not pack as strong a punch as intended, leaving POC to fall through legal loopholes.

IV. TOOLS FOR THE PRESERVATION OR EXPANSION OF BLUE SPACE ACCESS

Addressing the intersectionality of environmental law and civil rights is not easy, but some existing legal mechanisms may be helpful. This Part provides an overview of some, but not all, of the legal avenues marginalized communities might take to redress the harm historically and currently done by the barriers to accessing blue spaces. In doing so, this Part presents funding opportunities and possible federal or state causes of action. In concluding, this Part demonstrates that most legal actions, as they stand today, are relatively ineffective at addressing environmental injustice and environmental racism in the beach access

224. *See State Officials Award More than $1.7 Million to Improve Public Beach and Coastal Waterfront Access*, N.C. DEP'T OF ENV'T QUALITY (Nov. 17, 2022), https://deq.nc.gov/news/press-releases/2022/11/17/state-officials-award-more-17-million-improve-public-beach-and-coastal-waterfront-access (explaining that North Carolina gave $1.7 million to several towns and cities throughout the state to improve beach access); Bethany Reeves, *Pismo Beach Breaks Ground for Ocean Blvd. Improvement Project*, KSBY (Apr. 26, 2022, 1:56 PM), https://www.ksby.com/news/local-news/pismo-beach-breaks-ground-for-ocean-blvd-improvement-project (describing the groundbreaking on a new access program in Pismo Beach, California aimed at creating more sidewalk and lookout points for visitors).

225. Laura Damon, *Proposed RIPTA Bus Route in Newport to Provide Equal Access to Beaches' and Beyond*, NEWPORT DAILY NEWS (Apr. 5, 2022, 5:04 AM), https://www.newportri.com/story/news/local/2022/04/05/newport-ri-new-ripta-bus-route-provide-transportation-eastons-beach/7221316001/.

context, so it is time to consider refreshing old tools and creating new, intersectional legal tools that more effectively address environmental injustices.

A. The Public Trust Doctrine: Blue Space's Best Friend

The public trust doctrine is perhaps the most widely used and most successful legal tool to preserve and expand public access to beaches. This Part provides a brief overview of the doctrine and reviews several successful legal challenges to access under this doctrine.

1. Overview of the Doctrine

The public trust doctrine "is the body of law that directs the state to hold navigable waters in trust for shared use by the public."[226] Though it has roots in Roman law, the public trust doctrine is a federal common law doctrine articulated by the Supreme Court's decision in *Illinois Central Railroad Co. v. State of Illinois.*[227] The Supreme Court held in *Illinois Central* that the public trust doctrine protects navigation, commerce, and fishing in navigable water.[228] The public trust doctrine also appears in state constitutions, statutes, regulations, and cases.[229]

While different states protect different rights under the public trust doctrine, protecting beach access as a form of recreation is widely accepted.[230] Since public use rights are left to the states to protect as trustees, states charge the enforcement of the public trust doctrine to various agencies, and some states that recognize a private right of action under the public trust doctrine.[231] Regardless of the enforcement framework, there have been challenges under the doctrine to enforce, or sometimes create, rights of access to blue spaces, particularly in coastal areas. The next Part reviews several defining cases around access to blue space under the public trust doctrine.

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226. Melissa K. Scanlan, *Implementing the Public Trust Doctrine A Lakeside View into the Trustees' World*, 39 ECOLOGY L. Q. 123, 128 (2012).

227. *See generally* Ill. Cent. R.R. Co. v. State of Ill., 146 U.S. 387 (1892).

228. *Id.* at 435.

229. Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENV'T L. REV. 1, 5 (2007); *see also* Martin v. Waddell's Lessee, 41 U.S. 367 (1842) (establishing right to bathe in navigable water).

230. *See, e.g.*, Meunch v. Pub. Serv. Comm'n, 53 N.W.2d 514, 521 (Wis. 1952) (recognizing the right to enjoyment of scenic beauty); *see also* Leydon v. Town of Greenwich, 777 A.2d 552, 557 n.17 (Conn. 2001) (recognizing recreation as protected under the trust in Connecticut); Larman v. State, 552 N.W.2d 158, 161 (Iowa 1996) (recognizing recreation as a protected right in Iowa).

231. *See, e.g.*, Hilton *ex rel.* Pages Homeowners Ass'n v. Dep't of Nat. Res., 717 N.W.2d 166, 174 (Wis. 2006) (explaining that the Wisconsin Department of Natural Resources regulates and enforces the public trust doctrine); *See* Scanlan, *supra* note 226, at 132 (explaining this in *Gillen v. City of Neenah*, 580 N.W.2d 628, 636 (Wis. 1998)); State v. Deetz, 224 N.W.2d 407, 413 (Wis. 1974) (demonstrating that Wisconsin allowed private rights of action under the trust doctrine); *see also* ILL. CONST. art XI, § 2 (granting the right to a healthiful environment); Friends of the Parks v. Chicago Park Dist., No. 14-CV-09096, 2015 WL 1188615 (N.D. Ill. 2015) (providing new authority for citizen plaintiffs to establish standing on the basis of the public trust doctrine).

2. Legal Challenges to Access Under the Public Trust Doctrine

Since the 1800s, nearly every state has expanded public trust protection to encapsulate various rights—like the right to bathe in navigable water, recreation, and fishing—and some states expanded the doctrine to include public recreation on state-trusted lands.[232] In states where there is a right to recreate in trust-protected water bodies, there is an arguable de facto violation of the public trust where there is a significant lack of public access. In fact, several states have used the public trust doctrine to protect public access to state lands so that all community members can adequately exercise their rights to recreate, enjoy scenic beauty, and derive other benefits from natural space.[233] Such acts show that the public trust doctrine is malleable enough to be considered a worthy tool for expanding access to blue spaces.[234]

Several court cases across the United States pave the way for increasing access through several mechanisms, whether state-sanctioned easements, easements by prescription, the doctrine of custom, or rights protected as ancillary to the public trust doctrine. The next Subpart reviews these mechanisms in turn.

a. Right of Reasonable Access as Ancillary to Public Trust

New Jersey stands out as a state that actively preserves the public's right to access under the doctrine. It expanded the state public trust doctrine to encompass recreation in the early 1970s.[235] In *Matthews v. Bay Head Improvement Ass'n*, the New Jersey Supreme Court made explicit that reasonable access is essential to the public trust doctrine and that without access, the doctrine lacks meaning.[236] One of the parties to the case, the Bay Head Improvement Association, was a quasi-public entity that owned segments of the beach in Bay Head and opened membership only to nearby residents.[237] Residents from a different town, Point Pleasant, sued the Association, asserting that it prevented nonresidents from accessing the beachfront under the public trust doctrine by not allowing membership for nonresidents.[238] The lower court determined that the association was a private entity and had no public trust

232. *See, e.g.*, *Muench*, 53 N.W.2d at 522.

233. CAL. PUB. RES. CODE. §§ 30220–24 (protecting rights to recreation in California); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (explaining that there is a legitimate interest in requiring an easement for beach access which state may make as a condition on development permits).

234. *But see* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 631–33 (1986) (questioning the relevance of the public trust doctrine).

235. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972).

236. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363–64 (N.J. 1984) (noting that such access can be divided into two types: (1) the public's right to cross dry sand areas to reach the foreshore (vertical access), and (2) the public's right to remain upon dry sand areas for sunbathing and recreational activities (horizontal access)).

237. *Id.* at 359; *see also* Melissa K. Scanlan, *Shifting Sands A Meta-theory for Public Access and Private Property Along the Coast*, 65 S.C. L. REV. 295, 358 (2013).

238. *Matthews*, 471 A.2d at 358.

obligations.[239] However, the New Jersey Supreme Court reversed this decision in part.[240] It instead explained that the Association violated the doctrine by allowing only two residents to become members because the Association was actually a quasi-public organization.[241] In its opinion, the New Jersey Supreme Court articulated four factors to use when determining what parts of a privately owned area must be available to satisfy rights under the doctrine: "location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner. . . ."[242] The court ordered the Association to open membership to the general public for reasonable fees.[243] The decision further explained that reasonable access to blue spaces—in this case, beaches—is implicit and integral to the public trust doctrine.[244]

The New Jersey Supreme Court put *Matthews* into practice in *Raleigh Ave. Beach Ass'n v. Atlantic Beach Club Inc*.[245] In *Raleigh Ave.*, a private beach club attempted to exclude the public from the dry sand beach areas, and the court held that the public trust doctrine required that a reasonable portion of the upland dry sand area be made available to the public.[246] The court employed the factors from *Matthews* and "highlighted the longstanding public use of the beach . . . the documented public demand, the lack of publicly-owned beaches in Lower Township, and the type of use by the current owner as a business enterprise."[247]

Other states also implicitly recognize access rights as ancillary to the public trust doctrine. For instance, in *State of Wisconsin v. Town of Linn*, the Village of Williams Bay and Town of Linn, adjacent to Lake Geneva in Wisconsin, enacted parking ordinances that restricted parking at a public boat launch to residents and enforced a launch fee.[248] The plaintiffs explained that the Wisconsin Department of Natural Resources (WDNR) received numerous complaints about the exclusion of the general public and a lack of access to Lake Geneva and other prohibited acts.[249] The Wisconsin Court of Appeals affirmed the trial court's ruling enjoining the village from restricting parking.[250] The court explained that the WDNR was within the bounds of the doctrine to regulate the adequacy of public access to state-trusted waters because access is important to the enjoyment

239. *Id.* at 360.
240. *Id*. at 370.
241. *Id.* at 368.
242. *Id.* at 365.
243. *Id.* at 368–69.
244. *Id.* at 363 (explaining that "in order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches.").
245. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2004).
246. *Id.*
247. *Id.*
248. State v. Town of Linn, 556 N.W.2d 394, 397 (Wis. Ct. App. 1996).
249. *Id.* at 399.
250. *Id.* at 405.

of the water bodies.[251] Thus, the WDNR's authority impliedly extends to the shores and public access facilities.

New Jersey and Wisconsin should serve as examples of states that have developed a successful framework for balancing the public and private interest in blue spaces and prioritizing the public's right to access and enjoy blue spaces. States like New Jersey can serve as a guide for how to frame the concept of access to blue space under the public trust doctrine.

3. Variation in the Doctrine

The public trust doctrine varies significantly from state to state. This variation makes it difficult to predict any likelihood of expanding public access to blue spaces on a national scale. The quintessential lawyer response, "it depends," perfectly embodies whether the doctrine can be used to expand access to blue spaces.

Other states codified or constitutionalized their public trust doctrines, which may make expanding its application to access more favorable. For instance, in 1967, Oregon's state legislature enacted the Beach Bill, which codified the "state policy of preserving beaches, including the dry sand area, for recreational use by the public."[252] The Beach Bill gave the public the power to enforce their public rights up to the vegetation line.[253]

In her article on using the public trust doctrine to promote public access to Oregon's beaches, Erin Pitts articulated the doctrine's flexibility by asserting that because the state is the trustee of public resources, assertions of nonuse or abandonment against public resources are unlikely to prevail.[254] Interestingly, the article then launched into a discussion about the possibilities of codifying rights under the public trust.[255] However, Pitts postulated that "once people, through the legislature, have spoken by codifying the public trust doctrine, [it is] subsumed by the legislation and the trust is then limited to that statute."[256] Whether the public trust becomes diluted by codifying it in statute varies state-by-state and largely rests on whether a particular state's public trust doctrine is in their constitution.[257] California's state constitution contains public trust language and even instructs the legislature to "give the most liberal construction

251. *Id.* at 402.

252. Erin Pitts, Comment, *The Public Trust Doctrine, A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 ENV'T L. 731, 736 (1992) (citing OR. REV. STAT. § 390.610 (1989)).

253. OR. REV. STAT. § 390.605(2) (defining the ocean shore as the land between the "extreme low tide line" and the "line of vegetation" as established by OR. REV. STAT. § 390.770); *see also* OR. REV. STAT. § 390.610(2) (explaining that "where such use [by the public] has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise . . . it is in the public interest to protect and preserve such public rights").

254. Pitts, *supra* note 252, at 747.

255. *Id.* at 750.

256. *Id.*

257. *Id.* at 751–53.

to this provision."[258] As demonstrated in Alaska, which has also constitutionalized the public trust doctrine, "constitutional provisions may not be determinative in cases involving a trust issue, [but] they do add the balancing equation and weigh against the right to develop a public trust resource."[259]

So, to put it simply, the answer to whether the public trust doctrine can be used to protect or expand access to blue space is, "it depends." It depends on the state, the current rights protected under the doctrine, whether the doctrine is codified or constitutionalized, and how precedent has shaped the application of the public trust doctrine in the state.

B. Constitutional Remedies to Parking Barriers and Exclusive Beach Access

As noted in Part E above, one way of policing blue spaces to ensure racial homogeneity is to restrict nonresident parking. However, some scholars argue that these restrictions are a blatant violation of the constitutional right to assemble, making them subject to strict scrutiny.[260] This Part lays out one constitutional provision that may help achieve greater access to blue spaces: the First Amendment.

1. First Amendment

The First Amendment of the U.S. Constitution reads in pertinent part, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." [261] Spaces that serve as traditional public forums are protected from government action attempting to intrude on the public's rights to speech and assembly.[262] Should a government entity like a municipal parking authority overstep, the burden rests on the government to prove that its action to exclude the public narrowly serves a compelling state interest.[263] In the beach access context, state action against overreach often manifests as overly strict or overbroad parking regulations preventing non-residents from gathering and exercising their First Amendment rights to speech and assembly.[264] The First Amendment is an effective tool because the burden of proof is on the offender and the burden is a high bar.[265] The biggest hurdle may be whether a beach qualifies as a traditional public forum.[266]

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258. *Id.* at 751 (citing CAL. CONST. art. X, §§ 3–4).
259. *Id.* at 752–53.
260. Robert Thompson, *Local Government and the Closing of the Coast Parking Bans and the Beach as a Traditional Public Forum*, 25 FORDHAM ENV'T L. REV. 458, 469 (2014).
261. U.S. CONST. amend. I.
262. Thompson, *supra* note 260, at 469.
263. *See id.* at 467–68.
264. *Id.* at 499–505.
265. *See id.* at 468–70.
266. *See id.* at 460.

Whether a beach constitutes a traditional public forum remains up for debate.[267] According to Robert Thompson's law review article on local governments and parking bans, parking restrictions distinguishing residents from nonresidents violate nonresidents' First Amendment rights to assemble "because beaches are traditional public forums. . . ."[268] In his article, Thompson looked at parking restrictions as constitutional violations. He noted that "through the doctrine of incorporation, the Supreme Court has used the Fourteenth Amendment to extend the First Amendment protections of speech and assembly to the states and hence to municipal governments which exercise delegated state power."[269] Thompson asserted that parking restrictions chill beach access for nonresidents.[270]

Several states have come to the same conclusion. In Connecticut, a state notorious for its highly exclusive beaches, courts confronted the question of beaches as public forums.[271] In *Leydon v. Town of Greenwich*, the town of Greenwich enacted several city ordinances preventing non-residents from visiting and enjoying town beaches.[272] The Connecticut Supreme Court found that the ordinance violated both the First Amendment and the Connecticut constitution.[273] As the court held, under the First Amendment, the government may regulate the time, place, and manner of content-neutral expression where the regulation is narrowly tailored to a significant interest while leaving ample other channels of communication open.[274] The court explained that the beach had characteristics of a park, which are traditionally considered public forums, so the beaches were also a public forum and required strict scrutiny for any exclusive ordinance preventing people from assembling.[275] When applied, the court determined that the government failed to give any compelling interest for the restriction and determined that the restriction was not narrowly tailored enough to be permissible even if the interest had been compelling.[276]

In addition to parking restrictions and restrictions against nonresidents, federal district and circuit courts have considered whether beaches constituted public forums to determine the extent to which the government could regulate them in the early 1990s.

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267. *See generally* Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001); Thompson, *supra* note 202, at 470–81 (discussing case law determining beaches as a non-public forum).

268. Thompson, *supra* note 260, at 460.

269. *Id*. at 468.

270. *Id.* at 459–60.

271. *See* Andrew W. Kahrl, FREE THE BEACHES: THE STORY OF NED COLL AND THE BATTLE FOR AMERICA'S MOST EXCLUSIVE SHORELINE 15–19 (2018) (chronicling the development of the Connecticut coastline and its effect on people of color).

272. Leydon, 777 A.2d at 558.

273. *Id.* at 565.

274. *Id.* at 571.

275. *Id.* at 568.

276. *Id.* at 572.

For example, in *Naturist Society, Inc. v. Fillyaw* (*Fillyaw I*), the Eleventh Circuit held that John D. MacArthur Beach State Park in Florida constituted a public forum.[277] Here, the plaintiffs wanted to distribute educational material and petitions advocating for a "clothing optional" lifestyle.[278] While the state park granted a permit, it was significantly limited.[279] The plaintiff challenged the permit and, a major point of contention was whether beaches constituted public forums.[280] The court rejected defendant's argument that beaches were not like parks because, for one thing, people half-dressed might make engagement uncomfortable.[281] Instead, the court reasoned that "as at the beach, people sunbathe in city parks, sometimes in less than the usual amount of clothing, and they often arrange their possessions around themselves, making it difficult to move when someone approaches them."[282] As at John D. MacArthur Beach State Park, many city parks suffer a shortage of law enforcement personnel. In short, none of the facts the district court found adequately distinguish John D. MacArthur Beach State Park from a typical city park for First Amendment purposes.[283]

The finding in *Fillyaw I* resonated, and in *Paulsen v. Lehman*, the Eastern District of New York held that Jones Beach State Park was a traditional public forum.[284] Here, the plaintiff sought a permit to distribute religious pamphlets in the "mosaic area" of the state park on a few holiday weekends.[285] The defendants, the State Park commissioner and the New York State Office of Parks, denied the plaintiff a permit based on a strict policy regarding the issuance of permits for pamphlet distribution.[286] The court ultimately found the policy overbroad because it effectively targeted the expression of belief.[287] In finding that the

277. Naturist Society, Inc. v. Fillyaw, 958 F.2d 1515, 1522 (11th Cir. 1992) (*Fillyaw I*) (finding that: "[t]he district court believed it was 'stating the obvious' when it remarked that the park is a 'beach.' But, as the diagram appended to the court's opinion reveals, the park is more than a beach . . . In particular, it contains parking lots, a nature center, and walkways. Speech and expressive conduct in these areas may not pose the same evils as on the beach. In declaring the park a non-public forum based solely upon its beach characteristics, the district court ignored other areas of the park that are not beach. Moreover, the facts the district court recites do not render the park a non-public forum. City parks are quintessential public forums. […] In these parks, as at the beach, the public may swim, play games, rest, and enjoy the surroundings. Although the district court remarked on the small size of John D. MacArthur Beach State Park, most city parks are even smaller, presenting the same space problems the district court contemplated.").

278. *Id.* at 1517.

279. *Id.* ("*Fillyaw* limited the distribution to three hours on July 9, 1988, and confined it to a small table 100 yards north of the beach entrance. The permit admonished Society members not to obstruct or impede park visitors and stated that "no banners or signs shall be permitted.").

280. *Id.* at 1517–18.

281. Naturist Society, Inc. v. Fillyaw, 736 F. Supp. 1103, 1117–18 (S.D. Fla. 1990).

282. *Fillyaw I*, at 1522–23.

283. *Id.* (remanding the decision and clouding whether beaches were public forums, so we won't delve into that case).

284. Paulsen v. Lehman, 839 F. Supp. 147, 161 (E.D.N.Y. 1993) (relying on *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45–46 (1983), where the U.S. Supreme Court found that parks are public forums for purposes of First Amendment analysis).

285. *Id.* at 150.

286. *Id.* at 152.

287. *Id*. at 170.

beach was a protected public forum, the court relied heavily on the reasoning in *Fillyaw I*.[288]

Thus, some state and federal courts found that beaches with characteristics of parks, including picnic areas, parking areas, and biking areas, are considered public forums. Should POC and low-income communities reside in jurisdictions persuaded by this reasoning, the First Amendment could prove a handy tool in preserving not only the right to free speech, but also, even if tangentially, in preserving beach access.

C. Funding Opportunities & Permitting: The Coastal Zone Management Act

Federal funding opportunities offer another possible avenue to redressing environmental injustice. This Part focuses on the Coastal Zone Management Act of 1972 (CZMA) and the funding possibilities it holds for preserving and expanding public beach access. The CZMA is a promising tool because expanding beach access for recreational purposes is explicitly noted as a purpose of the CZMA.[289]

The CZMA was a response to commercial development growth in coastal zones.[290] The CZMA recognized the nation's salt and freshwater coasts as valuable resources that require a balance between the "wise use of land and water resources" and development or commerce.[291] To help achieve this balance, the CZMA, through NOAA, offers various funding opportunities to participating coastal states, and opportunities for public engagement and input.[292] States participate voluntarily by creating and submitting a coastal management plan to the Secretary of Commerce for approval.[293] "Coastal states" are those bordering "the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes."[294]

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288. *Id.* at 160.

289. 16 U.S.C. § 1451; *see also* 16 U.S.C. § 1452(2)(I) (listing public access for recreation as part of the congressional intent for this Act).

290. *Coastal Zone Management Act*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/environment/environmental-assessment/coastal-zone-management-act#:~:text=Congress%20enacted%20the%20Coastal%20Zone,offshore%20oil%20and%20gas%20development (last visited Apr. 27, 2023) ("Congress enacted the Coastal Zone Management Act (CZMA) (16 U.S.C. 1451 et seq.) to protect the coastal environment from growing demands associated with residential, recreational, commercial, and industrial uses (e.g., State and Federal offshore oil and gas development). The CZMA provisions help States develop coastal management programs (Programs) to manage and balance competing uses of the coastal zone. Federal Agencies must follow the Federal Consistency provisions as delineated in 15 CFR part 930.").

291. 16 U.S.C. §§ 1451, 1452(2); *see also* 118 Cong. Rec. 14, 170–71 (1972) (statement of Sen. Hollings explaining that "[t]he aim is to allow the wise and orderly development and growth within this critical area so as to protect the vital waters of our coastlines and Great Lakes").

292. 15 C.F.R. §§ 930.2, 930.42, 930.61, 930.77, 930.83, 930.113, 930.128 (2022).

293. 16 U.S.C. § 1454 (submittal of state program for approval).

294. 16 U.S.C. § 1453(4) (The term also includes "Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa.").

In the past decade or so, NOAA created roughly 1,000 public access beach sites and enhanced another 2,800 beach sites through the CZMA.[295] In 2020 alone, $6.2 million in CZMA funding, plus another $11.4 million matched by partners, was put towards public access projects.[296]

NOAA provides annual allotments of CZMA funding to participating states and territories.[297] In 2021, NOAA invested $78 million to implement the management plans of thirty-four participating states and territories.[298] Additionally, of the $78 million federal dollars, 9 percent, or $7.1 million federal and $5.7 million in matching funds, was invested in projects enhancing public access.[299] For instance, California used CZMA funding to expand access profoundly. Through its three coastal agencies, California used CZMA funds to support one thousand miles of shoreline trails, install bilingual signage, and create a program that aims to provide coastal experiences for disabled communities, low-income communities, and those that reside further inland.[300]

Under the CZMA, three types of funding can be used to expand public access: federal consistency, resource management improvement grants, coastal zone enhancement grants, and technical assistance grants.

1. Federal Consistency

One major benefit of participating in the CZMA is the federal consistency provisions and safeguards outlined in section 307.[301] A federal agency that affects land, water use, or natural resources of the coastal zone must ensure federal consistency with the provisions of a state's coastal management program (CMP) in permitting and approving projects to the maximum extent practicable.[302] If not, the state may either halt or modify a federal project to bring them into compliance.[303]

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295. *Programs Improve Access for All*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT., https://coast.noaa.gov/states/stories/access-inclusiveness.html (last updated Apr. 19, 2022).

296. *Id.*

297. Coastal Zone Management Act of 1972, as amended through Pub. L. No. 109-58, the Energy Policy Act of 2005 (noting that allotments are made annually based on the fiscal year).

298. *NOAA's National Coastal Zone Management Program*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT., https://coast.noaa.gov/data/czm/media/funding-summary.pdf (last visited May 18, 2022).

299. *Id.*

300. *California Opens Up Public Access in a Big Way*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT., https://coast.noaa.gov/states/stories/access-inclusiveness.html (last updated Apr. 19, 2022).

301. 16 U.S.C. § 1456.

302. 16 U.S.C. § 1456(c)(1)(A); *see also* 15 C.F.R. § 930.32 (elaborating on the maximum extent practicable standard).

303. 16 U.S.C. § 1455(e) (explaining that "a coastal state may amend or modify a management program which it has submitted, and which has been approved by the Secretary under this section, subject to [Secretary approval]").

If a federal agency is out of compliance with a state's CMP, the state may object. A state's objection to the project usually results in some kind of mediation or appeal process.[304] For example, if a state objects to a non-federal applicant for a federal permit or license, the non-federal applicant may appeal to the Secretary of Commerce.[305] The Secretary of Commerce must then determine whether the project can proceed on one of two grounds: whether the activity is consistent with the purposes of the CZMA or is in the interest of national security.[306] Furthermore, an exemption added in the 1990 amendments to the CZMA allows the president to exempt those activities from compliance if it is in the paramount interest of the United States.[307] Thus, a state receiving CZMA funding can utilize federal consistency provisions and halt an federal project impacting water use or natural resources in costal zones.

In the beach access and recreation context, this might mean that if a coastal state includes public access and recreation in its federally approved management plan and a federal project threatens access or recreation, the state may have a rare opportunity to advocate for such access by altogether halting that federal project. Not only that, but advocacy opportunities may extend beyond the state with this type of provision.

2. Resource Management Improvement Grants

Another source of funding through the CZMA that could help improve public access and alleviate environmental injustices in coastal areas are resource management grants under section 306A.[308] If a coastal state is making satisfactory progress toward achieving its management plan goals, the Secretary of the Department of Commerce may make a grant to help the state meet its objectives.[309] A grant made under section 306A is limited to one of four objectives: the preservation or restoration of specific areas, redevelopment of waterfronts, development of process among state agencies, and improvement of public access to coastal areas and waters.[310] So, again, organizations like the Surfrider Foundation can support a state's CMPs public access provisions by openly advocating in support, writing letters of support, and bringing the public's attention to local issues of equitable public access to secure more funding.

304. 16 U.S.C. § 1456; *see also* 15 C.F.R. § 930 (2022).

305. 15 C.F.R. § 930.3 (2022); *see also* 15 C.F.R. §§ 930.120–930.131 (2022).

306. 15 C.F.R. § 930.120 (2022).

307. 16 U.S.C. § 1456(c)(1)(B); *see also CZMA Federal Consistency Overview*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT. (Feb. 24, 2020), https://coast.noaa.gov/data/czm/consistency/media/federal-consistency-overview.pdf (exemplifying a 2007 presidential exemption for sonar testing off the California coast despite a federal court finding testing was not consistent with the state's CMP).

308. 16 U.S.C. § 1455a.

309. 16 U.S.C. § 1455a(b).

310. 16 U.S.C. §§ 1455b(b)(1)–(4).

3. Coastal Zone Enhancement Grants

Under section 309 of the CZMA, eligible states can also apply for grants toward their coastal zone enhancement objectives.[311] Section 309 enumerates several objectives worthy of funding, one of which is "providing increased current and future public access."[312] Parallel to providing greater current and future public access to coastal areas, section 309 also provides for objectives "preventing or reducing threat to life and destruction of property by eliminating or managing development in hazardous areas" and "developing and adopting procedures to consider and manage cumulative and secondary impacts of coastal growth and development."[313] In any given year, between 10 and 20 percent of the total allocation given to the CZMA is set aside for grants under this section.[314]

In addition to these regular grants, NOAA facilitates an annual competition for Projects of Special Merit.[315] In 2020, NOAA declared public access for "underserved communities with disabilities and non-English speakers" the focus of their special merits grants round.[316] However, despite that declaration, Maryland was the only state approved for special merit funding to support a public-access-facing project.[317] In addition, NOAA awarded the state's project to promote equity and access in Maryland State Parks $167,200, which was the second lowest allotment for that fiscal year.[318] Generally, awards from 2012 through 2020 fell somewhere around $200,000.[319] The last time NOAA awarded a special merit grant to promote blue space access was in 2012—eight years prior.[320]

So, the funding available under the Projects of Special Merits program may be an underutilized source of money to support EJ-focused public access and help remedy several of the barriers discussed above. For instance, additional grants under this section could be used to construct additional beach parking or fund subsidized bus routes to blue spaces from regions largely populated with POC.

In conclusion, the funding provided to coastal states through the CZMA should be leveraged, especially while the Biden Administration is in office since

311. 16 U.S.C. § 1456b.

312. 16 U.S.C. § 1456b(a)(3).

313. 16 U.S.C. §§ 1456b(a)(2), (5).

314. Allocation of Section 309 Funds, 15 C.F.R. § 923.124(b) (2022).

315. *The Coastal Zone Enhancement Program*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT., https://coast.noaa.gov/czm/enhancement/ (last updated May 18, 2022).

316. *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT., PROJECTS OF SPECIAL MERIT SELECTED FOR FUNDING: FISCAL YEARS 2012 TO 2020 1 (last accessed Apr. 27, 2023), https://coast.noaa.gov/data/czm/enhancement/media/special-merit-funding.pdf.

317. *Id.*

318. *Id.*

319. *See id.*

320. *Id.* at 4 (granting California $180,644 to "Improve Valuation of Impacts to Recreation, Public Access, and Beach Ecology from Shoreline Armoring and Beach Nourishment Projects").

the Administration has pledged to focus on the environmental justice agenda through policy initiatives and a massive influx of funding to the states.[321] Through the Infrastructure Investment and Jobs Act, NOAA received a $2.96 billion investment.[322] The CZMA received $207 million for habitat restoration, but there is no mention of public access.[323] Despite an influx of funding, it remains to be seen whether the money is exclusively earmarked for habitat restoration projects or if some money might support the broader grant programs and projects improving beach access.

D. The Civil Rights Act of 1964: Failed Promises & Renewed Optimism

In response to racial violence, racist policy, and segregation, President Lyndon Johnson signed the Civil Rights Act of 1964 (the Act).[324] The Act "created new legal mechanisms for challenging and addressing discrimination," inspiring high hopes for past proponents of racial justice and now, EJ.[325]

This Part explores two provisions of the Act that are the most known options for achieving EJ redressability, Title VI (federally assisted programs) and its cousin, Title II (public accommodations).[326] This Part lays out the legal framework of both and discusses their effectiveness in dismantling some of the environmentally racist barriers described in the first part of this Article.

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321. *Environmental Justice*, THE WHITE HOUSE, https://www.whitehouse.gov/environmentaljustice/ (last accessed June 20, 2023) (explaining the Biden Administration's commitment to environmental justice through signing Executive Order 14008, creation of the White House Environmental Justice Interagency Council (IAC), the Justice40 Initiative, and the White House Environmental Justice Advisory Council (WHEJAC)). *See, e.g.*, *Biden-Harris Administration Announces $550 Million to Advance Environmental Justice*, U.S. ENVTL, PROT. AGENCY (Feb. 23, 2023), https://www.epa.gov/newsreleases/biden-harris-administration-announces-550-million-advance-environmental-justice (announcing a $550 million investment in environmental justice grants to reduce pollution through the E.P.A.).

322. *Statement from NOAA Administrator Rick Spinrad on the Signing of the Bipartisan Infrastructure Investment and Jobs Act*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Nov. 15, 2021), https://www.noaa.gov/news-release/statement-from-noaa-administrator-rick-spinrad-on-signing-of-bipartisan-infrastructure-investment ("Over the next five years the $2.96 billion dollar investments for NOAA laid out in this legislation will improve and significantly expand equitable access to our weather and climate prediction capabilities and services; enhance coastal resilience and habitat restoration efforts, including Pacific salmon recovery; and improve our modeling capacity through investments in supercomputing infrastructure.").

323. *Id.*

324. *The 1964 Civil Rights Act Turns 50*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/explore/stories/1964-civil-rights-act-turns-50 (last accessed Apr. 27, 2023).

325. Claire Glenn, *Upholding Civil Rights in Environmental Law The Case for Ex Ante Title VI Regulation and Enforcement*, 41 N.Y.U. REV. L. & SOC. CHANGE 45, 47 (2017).

326. *See* 42 U.S.C. § 2000d; 42 U.S.C. § 2000a.

1. Title VI: Federally Assisted Programs

Congress included Title VI in the Act to address institutional racism and discrimination on a national scale.[327] It provides in pertinent part:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[328]

In effect, this means that a plaintiff seeking relief under Title VI needs to establish that a discriminating entity received federal financial assistance before launching a complaint.[329] Federal financial assistance comes in many forms. It can include not only loans and grants, but also the use or rental of federal land or property below market value, federal training, a loan of federal personnel, subsidies, and other federal assistance arrangements.[330] Should a recipient of federal financial assistance distribute federal funds to third-party entities, the recipient is responsible for ensuring Title VI compliance.[331]

Moreover, the "program or activity" language does not further narrow the scope of Title VI. Congress intended these anti-discrimination measures to apply "as broadly as necessary to eradicate discriminatory practices in programs that federal funds supported."[332] This includes state and local government operations that receive federal financial assistance.[333]

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327. *See* H.R. Misc. Doc. No. 124, 88th Cong. 1st Sess. at 3, 12 (1963) (in calling for its enactment, President John F. Kennedy stated: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.").

328. 42 U.S.C. § 2000d.

329. *Title VI Legal Manual Section I*, U.S DEP'T OF JUST., CIV. RTS. DIV. (Apr. 22, 2021), https://www.justice.gov/crt/fcs/T6manual1; *see also* 28 C.F.R. § 42.102(c) (Department of Justice regulations similarly defining what constitutes federal financial assistance).

330. *See* U.S. Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 607 n.11 (1986) ("Although the word 'financial' usually indicates 'money,' federal financial assistance may take nonmoney form," citing *Grove City Col. v. Bell*, 465 U.S. 555, 564–65 (1984)).

331. *See, e.g.*, 28 C.F.R. §§ 42.106(b), (c) (Department of Justice regulations).

332. *Title VI Legal Manual Section V*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6manual5 (last updated Feb. 3, 2021); *see also* 110 Cong. Rec. 6544 (statement of Sen. Humphrey); S. Rep. No. 64, 100th Cong., 2d Sess. 5–7 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 7–9 (confirming the broad application of "program or activity" to state and local governments).

333. 42 U.S.C. § 2000d-4a(1) (explaining that some instrumentalities might be considered a "program or activity" under Title VI when "all of the operations of (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government[,] … any part of which is extended Federal financial assistance"); *see also* S. Rep. No. 100-64, at 16 (1988), reprinted in 1988 U.S.C.C.A.N. 18 (confirming the broad application of "program or activity" to state and local governments).

There are two standards of review under Title VI: disparate impact and intentional discrimination.

a. Disparate Impact

Under Title VI, federal agencies enact regulations to monitor incidents of disparate impact. Simply put, disparate impact is a claim that government action disproportionately harms a suspect class and is a "cause of action independent of any intent."[334] Thus, a Title VI investigation would focus "on the consequences of the recipient's practices, rather than [their] intent."[335] As of 2021, twenty-six federal funding agencies have Title VI disparate impact regulations, including the Department of Commerce.[336] NOAA is a bureau within the Department of Commerce, so their disparate impact regulations apply to NOAA and the CZMA provisions it implements.[337] Proving disparate impact requires showing actual disparate impact and the existence of a less discriminatory alternative.[338]

However, in 2001, the U.S. Supreme Court's decision in *Alexander v. Sandoval* precluded the possibility of using this tool to its full potential.[339] In *Sandoval*, the Court held that private parties cannot invoke Title VI to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination.[340] Because of this, the disparate impact is no longer used in courts to determine if there was a Title VI violation. Instead, private parties wishing to rely on disparate impact theory of discrimination must file an administrative complaint to the federal agencies which provide federal assistance to recipients allegedly discriminating against the complainant.[341]

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334. *Title VI Legal Manual Section V*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6manual5 (last updated Feb. 3, 2021).

335. *Id.* (citing *Lau v. Nichols*, 414 U.S. 563, 568 (1974)).

336. *See* 7 C.F.R. §§ 15.3(b)(2)–(3) (USDA); 22 C.F.R. §§ 209.4(b)(2)–(3) (Agency for Int'l Dev.); 15 C.F.R. §§ 8.4(b)(2)–(3) (Dep't of Com.); 45 C.F.R. § 1203.4(b)(2) (Corp. for Nat'l & Cmty. Serv.); 32 C.F.R. § 195.4(b)(2) (Dep't of Def.); 34 C.F.R. § 100.3(b)(2)–(3) (Dep't of Educ.); 10 C.F.R. § 1040.13(c)–(d) (Dep't of Energy); 40 C.F.R. §§ 7.35(b)–(c) (EPA); 41 C.F.R. §§ 101-6.204-2(a)(2)–(3) (Gen. Serv. Admin.); 45 C.F.R. §§ 80.3(b)(2)–(3) (Health & Human Serv.); 6 C.F.R. § 21.5(b)(2)–(3) (Dep't of Homeland Sec.); 24 C.F.R. §§ 1.4(b)(2)(i), (b)(3) (Dep't of Hous. & Urb. Dev.); 43 C.F.R. §§ 17.3(b)(2)–(3) (Dep't of the Interior); 28 C.F.R. §§ 42.104(b)(2)–(3) (Dep't of Just.); 29 C.F.R. §§ 31.3(b)(2)–(3) (Dep't of Labor); 14 C.F.R. § 1250.103-2(b) (Nat'l Aeronautics & Space Admin.); 45 C.F.R. §§ 1110.3(b)(2)–(3) (Nat'l Found. on the Arts & Humanities); 45 C.F.R. §§ 611.3(b)(2)–(3) (Nat'l Sci. Found.); 10 C.F.R. §§ 4.12(b)–(c) (Nuclear Regul. Comm'n); 5 C.F.R. § 900.404(b)(2) (Off. Pers. Mgmt.); 22 C.F.R. § 141.3(b)(2) (Dep't of State); 18 C.F.R.§§ 1302.4(b)(2)–(3) (Tenn. Valley Auth.); 49 C.F.R. §§ 21.5(b)(2)–(3) (Dep't of Transp.); 31 C.F.R. §§ 22.4(b)(2)–(3) (Dep't of Treasury); 38 C.F.R. §§ 18.3(b)(2)–(3) (Dep't of Veterans Affs.); 18 C.F.R. § 705.4(b)(2) (Water Res. Council).

337. 15 C.F.R. §§ 8.4(b)(2)–(3).

338. *Title VI Legal Manual Section VII*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6manual5 (last updated Feb. 3, 2021).

339. *See* Alexander v. Sandoval, 523 U.S. 275 (2001).

340. *Id.* at 285.

341. *Memorandum from the Assistant Attorney General to the Heads of Departmental Agencies, General Counsels, and Civil Rights Directors*, U.S. DEP'T OF JUST. (Oct. 26, 2001), http://www.justice.gov/crt/about/cor/lep/Oct26Memorandum.php; *see also Title VI Legal Manual Section VII*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6Manual9 (last updated

b. Intentional Discrimination

The *Sandoval* decision restricted complainants from bringing a private suit unless they could prove intentional discrimination—a much higher bar.[342] Those up to the task may bring their complaint directly to the courts or through an administrative complaint with the funding agency.[343] An intentional discrimination claim under Title VI alleges that a recipient of federal funding intentionally treated persons differently or otherwise knowingly caused them harm because of their race, color, or national origin.[344]

Courts consider direct and circumstantial evidence when evaluating whether a federally funded entity intentionally discriminated against a complainant.[345] Circumstantial evidence is usually evaluated according to the frameworks established in *Village of Arlington Heights v. Metropolitan Housing Development Corp*. and *McDonnell Douglas Corp. v. Green*.[346]

The *Arlington Heights* framework is usually used in situations "where the complaint is about the treatment of a group, not individuals, and the investigation reveals many different kinds of evidence."[347] In organizing the evidence, this framework utilizes the following factors: "clear pattern unexplainable on grounds other than" discriminatory ones; "the historical background of the decision"; "the specific sequence of events leading up to the challenged decision"; the defendant's departures from its normal procedures or substantive conclusions; and the relevant "legislative or administrative history."[348]

Courts usually use the latter framework "where the complaint is about one or a few individuals, and involves easily identifiable similarly situated

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Feb. 3, 2021) (explaining that following *Sandoval*, the Civil Rights Division issued a memorandum on October 26, 2001, for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors" that clarified and reaffirmed federal government enforcement of the disparate impact regulations. The memorandum explained that although Sandoval foreclosed private judicial enforcement of Title VI the regulations remained valid and funding agencies retained.).

342. *See Sandoval*, 523 U.S. at 285.

343. *Title VI Legal Manual Section IX*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6Manual9 (last updated Feb. 3, 2021).

344. *Title VI Legal Manual Section VI*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6Manual6 (last updated Feb. 3, 2021) ("A Title VI discriminatory intent claim alleges that a recipient intentionally treated persons differently or otherwise knowingly caused them harm because of their race, color, or national origin.").

345. *Id*.

346. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13, 804–05 (1973).

347. *Title VI Legal Manual Section VI*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6Manual6 (last updated Feb. 3, 2021).

348. Faith Action for Cmty. Equity v. HawaiI'i, No. CIV. 13-00450 SOM, 2015 WL 751134, at *7 (D. Haw. Feb. 23, 2015) (Title VI case citing *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158–59 (9th Cir. 2013)); *see also* Sylvia Dev. Corp. v. Calvert Cty., 48 F.3d 810, 819, 823 (4th Cir. 1995) (adding to the *Arlington Heights* factors evidence of a "consistent pattern" of actions of decision-makers that have a much greater harm on minority populations than on non-minority populations).

individuals not in the protected class."[349] In the litigation context, a victim must "first prove a prima facie case of discrimination by a preponderance of the evidence."[350] Therefore, to prevail, a plaintiff must show "that he or she is a member of a particular protected group, was eligible for the recipient's program, activity or service, and was not accepted into that program or otherwise treated in an adverse manner, and that an individual who was similarly situated with respect to qualifications, but was not in the plaintiff's protected group was given better treatment."[351] Note that with the *McDonnell Douglas* framework, "whether conduct rises to the level of 'adverse action' is a fact-specific inquiry," and that the inquiry was intended to encompass a "broad range of 'adverse actions.'"[352]

Following *Sandoval*, many plaintiffs can only use administrative complaints to try to resolve Title VI disparate impact claims because the burden of proof required to win an intentional discrimination suit is incredibly high.[353] However, the outcome of administrative claims is highly dependent on the agency leadership present at the time.[354] Additionally, hundreds of claims are waiting for resolution, and they are extremely difficult to collect and analyze in any attempts to hold the Office of Civil Rights (OCR) more accountable in handling these complaints.[355]

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349. *Title VI Legal Manual Section IX*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/book/file/1364106/download (last updated Feb. 3, 2021).

350. *Id.*

351. *Id.*; *see also, e.g.*, Brewer v. Bd. of Trs. Of Univ. of Ill., 479 F.3d 908, 921 (7th Cir. 2007).

352. *Title VI Legal Manual Section VI*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/book/file/1364106/download (last updated Feb. 3, 2021) (internal quotations omitted); *see also* 28 C.F.R. § 42.104(b)(1)(iv) (providing a Department of Justice regulation reading that recipients may not "restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program").

353. *Title VI Legal Manual Section I(A)*, U.S DEP'T OF JUST., CIV. RTS. DIV., https://www.justice.gov/crt/fcs/T6manual5 (last updated Feb. 3, 2021) (stating that "[p]rivate parties may also file administrative complaints with federal agencies alleging that a recipient of the agency's federal financial assistance has engaged in intentional discrimination; the federal agency providing the assistance may investigate these complaints").

354. *Id.* ("Rather, an agency has discretion to gather and evaluate all relevant evidence as part of its initial investigation or may choose to make a preliminary prima facie finding then require recipients to articulate defenses.").

355. Jennifer Hijazi & Stephen Lee, *Biden's Environmental Civil Rights Effort Wrestles With Caseload*, BLOOMBERG LAW (May 3, 2022, 2:30 AM), https://news.bloomberglaw.com/environment-and-energy/bidens-environmental-civil-rights-effort-wrestles-with-caseload (noting that "[t]he EPA is still 'wrestling' with a backlog of cases at the office, according to University of New Mexico law professor Clifford Villa. But things are improving, he says."); *see also EPA Violated the Law by Failing to Investigate Civil Rights Complaints, Court Rules*, THE INTERCEPT (Apr. 3, 2018), https://theintercept.com/2018/04/03/epa-complaints-civil-rights-discrimination-court-ruling/ (although previous law review articles cited this webpage as a place to visit to see every complaint on the OCR's docket, it is no longer available).

Overall, Title VI litigation is an inefficient tool for communities seeking EJ because it takes too long and is completely agency-dependent—changes in administrations can alter the chances of remedy, making it unpredictable.[356]

Some academics argue that Title VI's reactive enforcement model, which redresses harm that has already manifested, leads to its ultimate inefficacy because of the challenges in defining what constitutes disparate impact and the difficulty in proving causation.[357] And while standards of review vary within the Act, the overall goal was always to tackle *intentional* discrimination like that which was occurring at the time.[358] It is important to discuss Title VI because it is usually thrown around in spaces when EJ issues arise, or when there is other discrimination in environmental spaces.

c. Beach Access and Title VI

In the beach access context, Title VI is unlikely to be as helpful as anticipated for the protection or expansion of access to blue spaces. First, although it is highly dependent on what state is under analysis, the public trust doctrine states that, at a minimum, the wet sand areas between a navigable water body and the mean high-tide mark are held in trust for public purposes by the state.[359] So, if the state receives federal funds and, as broadly as Title VI is meant to apply, the state may not discriminate based on race regarding the beach itself.[360]

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356. Albert Huang, *Environmental Justice and Title VI of the Civil Rights Act A Critical Crossroads*, AM. BAR ASS'N (Mar. 1, 2012), https://www.americanbar.org/groups/environment_energy_resources /publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/ ("A March 2011 report commissioned by EPA that evaluated OCR's handling of Title VI complaints deemed OCR's Title VI track record as inadequate, unresponsive to EJ communities, and in some cases, damaging to EPA's reputation. *See Evaluation of the EPA Office of Civil Rights*, Deloitte Consulting LLP, Environmental Protection Agency, Order # EP10H002058 (Mar. 21, 2011).").

357. *See* Claire Glenn, *Upholding Civil Rights in Environmental Law The Case for Ex Ante Title VI Regulation and Enforcement*, 41 N.Y.U. REV. L. & SOC. CHANGE 45, 48 (2017).

358. *Id*. at 47.

359. Joseph J. Kalo, *The Changing Face of the Shoreline Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869, 1870 n.4 (2000) (citing David C. Slade et al., NATIONAL PUBLIC TRUST STUDY, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 26, 59 (1990)); *see also* State v. Trudeau, 408 N.W.2d 337, 342 (Wis. 1987).

360. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363 (N.J. 1984) (internal citation omitted) (explaining that New Jersey not only protected beach access up to the mean high-tide mark under the public trust doctrine but also the dry sand above it). The waters get murky when we talk about accessing beaches held in public trust because access points often cross dry sand areas, which is frequently private property. This distinction creates an issue: ensuring public access versus perhaps inadvertently taking private property. However, this Article will not delve into that issue. *See*, e.g., Bell v. Town of Wells, 557 A.2d 168, 176 (Me. 1989) (holding that a statute defining public rights to include use of intertidal land for recreational purposes constituted an unconstitutional taking of private property); In re Opinion of the Justices, 313 N.E.2d 561, 569–70 (Mass. 1974) (holding that proposed legislation granting public the right to walk on that portion of the beach above the mean low-water mark would constitute an unconstitutional taking of private property rights).

Most recently, the Texas legislature introduced the Texas Open Beaches Act which would restrict public beach access along the shore. The bill would reverse a standard set in 1959 to now require

While in some instances, intentional discrimination and exclusion of POC from coastal areas based on race is evident and well-documented, the larger issues like blatant state-sponsored segregation were done away with half a century ago.[361] What remains are the embedded, systemic practices and policies that maintain the same level of exclusion against POC—something not easily proven as intentional in a federal court challenge under the Title VI framework.

As discussed, many of the connections establishing any sort of intentionality behind racially disparate impacts are now forgotten or hidden behind centuries of policies and practices that have left POC without any recourse to effectively right the wrongs of the past. And so many critics have argued that Title VI needs a makeover.[362] However, without overturning *Sandoval* and reinstating disparate impact analysis or the development of new tools to address the intersectionality of the harms caused, POC can only make limited use of Title VI to make strides in equitable access.

2. Title II: Public Accommodations

Title II may provide a framework to protect and expand access to blue spaces. Title II was critical in the Act's early days, specifically concerning desegregation and full equal accommodations.[363] It was also critical in the women's and gender rights movements, and remains so to this day.[364] Its effectiveness in securing major progress in both the civil and women's rights movements begs the question—what can Title II public accommodations law do to improve beach access for POC?

Title II reads in pertinent part,

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.[365]

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the public or the state to establish whether a public access ingress exists across private property. The 1959 standard required a private property owner to establish the opposite: that the public access point created a burden for them. Texas Open Beaches Act, S.B. 434 (2023); Sana Ammer, Hearst, *New Bill Could Restrict Public Access to Texas Beaches*, BEAUMONT ENTERPRISE (March 17, 2023), https://www.beaumontenterprise.com/news/article/new-bill-restrict-public-access-texas-beaches-17846136.php.

361. *See* discussion *infra* Part D.

362. *See, e.g.*, Tony LoPresti, *Realizing the Promise of Environmental Civil Rights The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757 (2013) (discussing new enforcement measures and federal intervention measures to revive Title VI); *see also* Glenn, *supra* note 357 (discussing implementing preventive measures in Title VI to improve its effectiveness).

363. Kyle C. Velte, *Toward a Touchstone Theory of Anti-Racism Sex Discrimination Law Meets #LivingWhileBlack*, 33 YALE J.L. & FEMINISM 119, 121 (2021).

364. *Id.* (citing Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 81, 111 (2019) (describing the history of the feminist movement's campaign for the inclusion of sex in public accommodation laws)).

365. 42 U.S.C. §§ 2000a et seq.

Kyle Velte applied Title II to the recreation context by asking the following question: "What work can sex discrimination law do for the project of dismantling anti-Black racism and white supremacy, specifically in public and recreational spaces?"[366] Velte focused on incidents of racism through the #LivingWhileBlack movement and called attention to how "swimming while black" involves the daily exclusion of Black bodies from white spaces.[367] Moreover, relying on other theorists, Velte explained how nuisance, trespass, and vagrancy laws helped create a culture that "applied to police the boundary of 'white' spaces and maintain a white racial hierarchy."[368]

Places of entertainment are places of accommodation in the Title II context.[369] The U.S. Supreme Court clarified what constituted a place of entertainment in 1969. In *Daniel v. Paul*, plaintiffs filed a class action under Title II to stop the owners of the recreational area that included swimming, among a slew of other recreational opportunities, from denying admission to Black Americans solely on racial grounds.[370] At issue was whether this recreational area constituted a place of entertainment.[371] The Supreme Court found that it did.[372] The Court reasoned that under any definition of "entertainment" this recreational area qualified.[373] The Court relied on President John F. Kennedy's statement in enacting the public accommodations provisions of the Civil Rights Act, where he explained that "no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, recreational areas and other public accommodations and facilities."[374]

Thus, although a relatively narrow tool, Title II may provide POC discriminated against in parks and beaches (i.e., places of accommodation) an avenue to justice, potentially limiting discrimination and enhancing safety for POC in recreational blue spaces.

To run with Velte's theory and apply public accommodations law in a coastal context—as thoroughly demonstrated in the first half of this Article, POC were intentionally pushed away from the enjoyment of blue spaces.[375] It is also established in the first half of this Article that the effect of intentional racial discrimination against POC has had lasting impacts, resulting in these

366. Velte, *supra* note 363, at 121.
367. *Id*.
368. *Id.* at 130.
369. 42 U.S.C. §§ 2000b.
370. Daniel v. Paul, 395 U.S. 298, 300 (1969).
371. *Id.* at 301.
372. *Id.* at 308.
373. *Id.* at 325.
374. *Id.* at 326 (citing *Special Message to the Congress on Civil Rights and Job* Opportunities, June 19, 1963, in PUBLIC PAPERS OF THE PRESIDENTS, JOHN F. KENNEDY, 1963, at 485).
375. *See* discussion *infra* Parts II and III.

communities' displacement or the intentional placement away from blue spaces.[376]

So, as Velte demonstrated in applying it to the #LivingWhileBlack movement, Title II may be useful in remedying issues of EJ in the beach access context as a place of public accommodation.

E. Zoning and Land Use: Need for Collective Planning and Regulation

As demonstrated in Subpart I.A.1., the unequal distribution of and access to blue spaces is at least partially a result of racist land use and housing policies. Beginning in the early 1900s, the Supreme Court began validating the experience of racially diverse Americans by outlawing discriminatory housing practices one by one. The next few paragraphs describe some of the defining cases in this area.

In *Buchanan v. Warley*, a white man contracted to sell his real property to a Black family, but could not due to a city ordinance that prevented a seller of real property from selling to a Black person where the block of property had more white people than Black.[377] First, the Kentucky Court of Appeals found the ordinance constitutional, so the seller appealed.[378] The U.S. Supreme Court overturned the court of appeals and instead found that the ordinance violated the Fourteenth Amendment's prevention of state interference with property rights and was not a legitimate use of the state's police power.[379] In effect, the holding in *Buchanan* prohibited explicit race-based zoning.

After the decision in *Buchanan*, racially restrictive covenants became the exclusionary method of choice for white landowners. As described earlier in the Article, racially restrictive covenants limited where and what properties people of color, particularly Black Americans, could buy homes. In 1948, the U.S. Supreme Court unanimously prohibited state enforcement of racially restrictive covenants.[380] In *Shelley v. Kraemer*, thirty property owners signed agreements stating that no other race outside Caucasians were allowed to live in the neighborhood for fifty years.[381] When the Shelleys, a Black family, bought a home on a restricted property, their neighbors, the Kraemers, sued to stop the Shelleys from taking possession of the property.[382] However, the Court held for the Shelleys and explained some of these restrictions have already been judicially enforced and that judicial enforcement of such a covenant would violate Equal

376. *See* discussion *infra* Parts I–III.
377. Buchanan v. Warley, 245 U.S. 60, 70–71 (1917).
378. *Id.* at 70.
379. *Id.* at 82.
380. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).
381. *Id.* at 4.
382. *Id.* at 5–6.

Protection as applied to the states under the Fourteenth Amendment because their decision would constitute state action.[383]

So, after racially restrictive covenants were outlawed, cities turned back to zoning. In *Village of Euclid v. Ambler Realty Co.*, the U.S. Supreme Court held that, while states cannot zone based on race, state and local governments' zoning will generally be upheld if it is reasonably related to public welfare.[384] In this case, the City of Euclid passed a zoning ordinance that divided the city into districts and defined the use and size of building in each district.[385] Ambler Realty owned sixty-eight acres of land spanning multiple districts, which severely limited what they could construct on, reducing the value of the land.[386] So, the owner of Ambler Realty Co. sued under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[387] The Court explained that the ordinance did not exceed the state's police powers, was not arbitrary or capricious and served the public welfare by generally keeping residential and industrial uses separate.[388] So began the era of Euclidean zoning.[389]

Note that land use regulation, like zoning, is also a function of social and cultural values.[390] The dominant social value at the time was in white Americans' superiority over other races, so it is unsurprising that zoning became a constitutional way to continue excluding POC from dominant white communities.[391]

Even today, cities reinforce discriminatory housing and land use policies by refusing to invest in affordable housing and allowing unchecked private market discrimination.[392] Eventually, this leads to pricing out POC and gentrification of areas long held by POC, disallowing these communities from enjoying the new

383. *See also* Barrows v. Jackson, 346 U.S. 249 (1951) (building on *Shelley* and holding racially restrictive covenants unenforceable as they would constitute state action in violation of the Fourteenth Amendment).

384. Euclid v. Ambler Realty Co., 272 U.S. 387, 387 (1926) ("The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.").

385. *Id.* at 380.

386. *Id.* at 366.

387. *See id.* at 384.

388. *Id.* at 389–90.

389. *The Problems with Euclidean Zoning*, BOS. UNIV. SCH. OF L. DOME BLOG (July 19, 2018), https://sites.bu.edu/dome/2018/07/19/the-problems-with-euclidean-zoning/; *see, e.g.*, MASS. GEN. LAWS ch. 40A §4 (stating "[a]ny zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted"); *see also* Maureen Brady, *Turning Neighbor into Nuisance*, 134 HARV. L. REV. 1609, 1612–13 (2021).

390. Craig A. Arnold, *Planning Milagros Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 9 (1998) (investigating census tracts in California, Pennsylvania, Texas, and Kansas).

391. *See* Angela Ruggiero, *Berkeley to end single-family residential zoning, citing racist ties*, MERCURY NEWS (Feb. 25, 2021 at 3:58 AM), https://www.mercurynews.com/2021/02/24/berkeley-to-end-single-family-residential-zoning-citing-racist-ties/.

392. Report, *Biased appraisals and the devaluation of housing in Black neighborhoods*, BROOKINGS INST. (Nov. 17, 2021), https://www.brookings.edu/research/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/.

investments in the neighborhoods they often fought hard for, and forcing POCs to less regulated, more unhealthy spaces.[393]

Rectifying the wrongs of racist land use and policy is difficult. However, in addition to the very first step of understanding the intersectionality between EJ efforts and gentrification, one author asserted a new framework through which to view the issue: resilience justice.[394] Craig Arnold explained that resilience justice requires contemplating equity and co-governance.[395] To ensure that communities fighting for EJ are not displaced in the aftermath, Arnold suggested several courses of action, including maximizing grassroots design and resisting government-driven design, creating processes of inclusion and power-sharing, vesting these structures within policymaking, providing adequate public resources, not shying away from conflict but not running towards it first, and utilizing litigation to address injustice and improve resilience, among other strategies.[396]

The Biden Administration has recognized the importance of land use and housing as an environmental issue and has pledged to take action.[397] Specifically, to reform and alleviate the problems associated with exclusionary zoning, affordable housing, and EJ, the Biden administration took big steps forward by making $5 billion in grants available for jurisdictions to reform exclusionary zoning and eliminate barriers to erecting affordable housing.[398]

F. Environmental Justice for All Act

In 2021, Rep. Raúl Grijalva of Arizona introduced EJAA.[399] The EJAA focuses on providing a seat at the table for POC suffering environmental injustice. For example, if passed, the EJAA would create several national advisory bodies to guide EJ initiatives, provide funding for new projects, incorporate trainings for federal employees, and create several new initiatives to alleviate environmental injustices.[400] First, the bill as it stands now states that

393. *See* Leslie Kern & Caroline Kovesi, *Environmental Justice Meets the Right to Stay Put Mobilising Against Environmental Racism, Gentrification, and Xenophobia in Chicago's Little Village*, 23(9) LOC. ENV'T 952, 953 (2018).

394. Craig A. Arnold, *Resilience Justice and Community-Based Green and Blue Infrastructure*, 45 WM. & MARY ENV'T L. & POL'Y REV. 665, 669, 670 (2021).

395. *Id.*

396. *Id.* at 729.

397. *Id.* at 724 (chronicling co-governance case studies in the U.S.).

398. *Exclusionary Zoning Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/.

399. Environmental Justice for All Act, H.R. 2021, 117th Cong. (2021).

400. Yukyan Lam & Sara Imperiale, *The Promise of the Environmental Justice for All Act*, NAT. RES. DEF. COUNCIL (Apr. 8, 2022), https://www.nrdc.org/experts/sara-imperiale/promise-environmental-justice-all-act (summarizing meaningful amendments to existing law, including improvements to NEPA "requiring federal agencies to provide early and meaningful community involvement opportunities for proposed projects that may affect an environmental justice community," requiring through Section 7 "that federal agencies consider cumulative impacts in Clean Air Act (CAA) and Clean Water Act (CWA)

"environmental justice disparities are also exhibited through a lack of equitable access to green spaces, public recreation opportunities, and information and data on potential exposure to environmental hazards" and that "all people have the right to breathe clean air, drink clean water, live free of dangerous levels of toxic pollution, and share the benefits of a prosperous and vibrant pollution-free economy."[401]

In support of these goals, there are two specific sections of the EJAA that might create modes of transportation to green and blue spaces or create new spaces for POC to enjoy. Section eleven of the Act specifically provides for the Secretary of the Interior to create a grant program for qualifying urban areas "to acquire land and water for parks and other recreation purposes, to develop new or renovate existing outdoor recreation facilities; and develop projects that provide opportunities for outdoor education and public land volunteerism."[402] Additionally, section twelve of EJAA would create a "transit to trails."[403] To qualify, a community would have to demonstrate that they have "inadequate, insufficient, or no park space" by demonstrating quality concerns, that facilities do not serve community need, or the inequitable distribution of park space.[404] Under this program, the Secretary of Transportation would be charged with creating a new grant program to develop transportation routes and improvements for POC, which would help alleviate transportation issues in reaching green and blue spaces.[405]

Additionally, in an ambitious and game-changing move, EJAA would amend Title VI of the Civil Rights Act.[406] If passed, the EJAA would reinstate the disparate impact cause of action under Title VI, once again allowing aggrieved parties to sue using a disparate impact theory, overturning the Supreme Court's *Sandoval* decision.[407] Not only would it reinstate the disparate impact cause of action, but it also would extend intentional discrimination to include actions that disproportionally harm communities of color.[408] So, there is reason to hope that if passed the EJAA would create new tools for EJ advocates and update other tools like Title VI to better serve its intended purpose in line with the Biden Administration's policy goals. Although, as of publication of this article, the EJAA died without a vote in December 2022.[409] Current followers of

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permitting decisions," and restoring the private right to sue under the disparate impact analysis of Title VI).

401. Environmental Justice for All Act, *supra* note 399, §§ 2(a)(2), 2(a)(9).

402. *Id.* at § 11(b)(1–3).

403. *Id.* at § 12.

404. *Id.* at §§ 12(a)(1)(A)(i–iii).

405. *Id.* at §§ 12(b)(1)(A–B).

406. *Id.* at §§ 4, 5, 6.

407. *Id.* at § 5(b).

408. *Id.* at § 4(2).

409. Emma Dumain, *How Democratic Dissension Sunk Landmark EJ Bill*, E&E NEWS (Dec. 19, 2022, 6:16 AM), https://www.eenews.net/articles/how-democratic-dissension-sunk-landmark-ej-bill/.

the legislation believe it will be another two years before the legislation is revived.[410]

CONCLUSION: HOPE FOR THE FUTURE

It is impossible to separate racism from the many dimensions of social justice issues. In other words: racism is social justice is housing justice is environmental justice is environmental racism. Because of this intersectionality, no single tool as it stands now can alleviate the burden caused by systemic barriers to blue spaces.

POC do not have the same benefits conferred on white Americans who can more easily access blue spaces. As this Article explained, POC do not receive the health and wellness benefits derived from blue spaces because of barriers related to parking, transportation, and inequitable housing practices. POC do not receive the same sense of safety from discrimination that white Americans enjoy because of pervasive racism. And as a result, POC do not have equal opportunities to experience the same wondrous joy that comes from exploring natural, healing, blue space that many white Americans enjoy—and there are few possibilities for recourse.

However, in light of the established history of exclusion, discrimination, and racism, this Article provides an overview of some potential avenues of recourse for POC seeking to enjoy blue spaces. Although some of the common mechanisms are not as helpful as intended, others may be successful for some POC, including the public trust doctrine, the First Amendment, Title VI administrative complaints, public accommodations under Title II, and zoning reform. Additionally, the renewed promise of Title VI under the Biden Administration and the possibility of amendment under the Environmental Justice for All Act of 2022 (EJAA) hold promise by potentially reestablishing the disparate impact private right of action.

At a time in the country when there are stark lines drawn in the sand by race and prejudice, there is a growing understanding of the intersection between historical decisions, lasting impacts, and the need to remedy those impacts.[411] The growing understanding of this intersectionality gives reason to hope that decisions around access to blue space can become more equitable using existing

410. *Id.*

411. Paul Singer, *State Commission Pushes for Expanding Access to State Beaches in Boston Area*, GBH NEWS, (May 12, 2023) https://www.wgbh.org/news/local-news/2023/05/12/state-commission-pushes-for-expanding-access-to-state beaches-in-boston-area (calling attention to the need for inclusivity in the nation's blue spaces, the Massachusetts State Commission urged the Massachusetts Department of Conservation and Recreation to invest in changes that would make the shoreline more accessible); *see also Barriers at the Beach- Series*, https://www.wgbh.org/news/barriers-at-the-beach, GBH NEWS (last accessed June 20, 2023).

tools, as well as implore the creation of new more inclusive tools that honor these intersectionalities.