

MAKING RECREATION ON PUBLIC LANDS MORE ACCESSIBLE

Karen Bradshaw & Caitlin Doak***

INTRODUCTION

This Article reflects upon Professor John Copeland Nagle's scholarship on public land with an emphasis on how his work might extend to the issue of accessibility. Professor John Copeland Nagle was a talented yet humble man of deep kindness and religious convictions. In addition to being a fabulous human being, John was a wonderful scholar. John's work will endure beyond his life to provide answers and guide future generations. In this Article, we trace how John's work provides a model with which others can engage to enact reform on public lands with direct effects on overburdened populations. How does the enduring relevance of national parks and recreation on public lands depend upon continuous, iterative updating of law and policy to support users who traditionally had limited access to the parks?

Part I discusses how John's work on national parks and recreation elevated a seldom studied area of law into a more robust field. Reading his work on national parks and recreation collectively provides a framework for understanding how disputes within public lands and the recreational resources are resolved. We show how John's careful doctrinal work developed a model of how law works in this realm, which can be applied to future and emerging issues.

Part II discusses the need for more accessible recreation. People of color, people with disabilities, women, and LGBTQ+ people use recreational resources at lower rates because of fear, discrimination, and historically exclusive practices. We outline types of accessibility within the recreation resource. We further analyze the recreation/conservation dichotomy,

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arguing that lack of accessibility is contrary to the rationale underlying public provision of the recreation resource.

Part III advances a modest proposal for creating more accessible recreation in the National Park Service and the National Trails System. By expanding John's work to trails, we find that the shape, purpose, and location of trails make trails particularly suitable for accessible recreation. Additionally, increased availability of information and technology continues to allow people to enjoy public lands.

Through this analysis we seek to show how John's foundational work in National Parks law and recreation can and should inform present and future questions.

I. JOHN COPELAND NAGLE'S LEGACY OF ELEVATING RECREATION

Public lands are core to the American identity. It is considered a birthright of Americans to enjoy time in beautiful natural spaces, so much so that our government gives free access to national parks to every fourth grader and discounted access to retirees.¹ This perk of citizenship is well loved by the American public. National parks maintain one of the highest approval ratings of any government service—above the president, Congress, Supreme Court, and even the military.² Recreation has far-reaching bipartisan support.³ Many love iconic national parks, and the idea that these spaces be preserved for future generations.

This Part explores the public enjoyment of public lands, with a specific focus on the legal structure underlying such places. It situates the recreation resource within the public lands literature. Part A briefly defines the recreation resource. Part B overviews National Park Law, noting John's significant contribution to public lands literature through years of sustained attention to this topic.

1 *Entrance Passes*, NAT'L PARK SERV., <https://www.nps.gov/planyourvisit/passes.htm> [<https://perma.cc/9QBE-4VSZ>].

2 *See, e.g., Public Expresses Favorable Views of a Number of Federal Agencies*, PEW RSCH. CTR. (Oct. 1, 2019), <https://www.pewresearch.org/politics/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies/> [<https://perma.cc/Y4VP-8Z9S>]; Jeffrey M. Jones & Steve Ander, *Americans Praise Gov't Work on Natural Disasters, Parks*, GALLUP (July 12, 2013), <https://news.gallup.com/poll/163487/americans-praise-gov-work-natural-disasters-parks.aspx> [<https://perma.cc/2A8A-9KR8>].

3 For example, in 2020, a divided Congress enacted the Great American Outdoors Act. Great American Outdoors Act, Pub. L. No. 116-152, 134 Stat. 682 (2020) (codified in scattered sections of 54 U.S.C.). This Act established the National Parks and Public Land Legacy Restoration Fund to support deferred maintenance projects on public lands. 54 U.S.C. § 200402(a), (e). The Act devoted up to \$1.9 billion annually—half of the national energy development revenue—to maintaining public lands. *Id.* § 200402(b)(2).

A. Understanding the Recreation Resource

We use the term “recreation” as a legal term of art throughout this Article to refer to use of natural resources or land for enjoyment. Rock climbing, hunting, boating, off-road vehicle use, hiking, and skiing are all examples of recreational activities. Although playing video games or golfing may be recreational in the conventional use of the term, they fall outside of the accepted meaning used by public lands scholars.⁴ Joseph Sax noted that recreation within national parks tends to focus on “activities that require the special resources parklands uniquely contain,” which is “why we have traditionally resisted building swimming pools, golf courses[,] and tennis courts in the parks.”⁵

Scholars primarily study recreation in reference to state and public lands, although commercialized recreational uses of private lands also exist.⁶ Public lands with recreational uses come in a variety of categories, such as lands managed by the Forest Service, Fish and Wildlife Service, and National Park Service.⁷ Additionally, national recreational designations can extend across state, private, and Indigenous-owned lands, as with the National Trails System.⁸

The federal government essentially subsidizes recreation through the maintenance of federal public lands accessible to members of the public.⁹

4 See Joseph L. Sax, *Fashioning a Recreation Policy for Our National Parklands: The Philosophy of Choice and the Choice of Philosophy*, 12 CREIGHTON L. REV. 973, 974 (1979).

5 *Id.* Put differently, the recreation resource operates at a larger scale of efficient management (state, federal) than do more localized forms of entertainment (local). See Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507, 2544–46 (2015).

6 See, e.g., HIPCAMP, <https://www.hipcamp.com/en-US> [<https://perma.cc/9YE3-NQ8S>] (last visited Aug. 16, 2021).

7 GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY, & ROBERT L. FISCHMAN, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 907 (6th ed. 2007). Among the thirteen federal agencies that manage public lands and resources, the National Park Service is that most closely aligned with the recreation resource for many.

8 See National Trails System Act, 16 U.S.C. §§ 1241–1249. Trails are a “long and skinny” resource—like powerlines, rivers, and railroad tracks—that must cross public and private land to be functional. See Bradshaw & Lueck, *supra* note 5, at 2518–19; Richard A. Epstein, *Property Rights: Long and Skinny*, 14 INT’L J. COMMONS 567, 570–72 (2020).

9 John studied one rationale for subsidizing recreation: the opportunity for people who experience spirituality in nature to connect with a higher power through physically being in wild, unspoiled, natural settings. For a fascinating overview of the biblical basis for the Wilderness Act, see John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENV’T L. 955 (2005). See also John Copeland Nagle, *On the Hammock, Reading About Wilderness Wanderings*, BOOKS & CULTURE, March/April, 2016, at 9–10 (reviewing BELDEN C. LANE, *BACKPACKING WITH THE SAINTS* (2014)). For a discussion of the historic and enduring importance to Indigenous peoples of lands comprising modern national parks, see Trevor G. Reed, *Sonic Sovereignty: Performing Hopi Authority in Öngtupqa*, 13 J. SOC’Y FOR AM. MUSIC 508 (2019) (discussing Hopi asserting tribal sovereignty at Grand Canyon National Park through musical performance).

B. National Park Law

Professor Nagle was the preeminent scholar studying National Park Law. By specifically studying the National Park Service, John was writing at the intersection of public lands, natural resources, property, environmental, and administrative law. The National Park System contains 85 million acres comprised of 63 national parks and 423 areas.¹⁰ Administrative law systemically overlooks federal land and resource management agencies.

Through years of careful scholarship, John defined the field of National Park Law. His research included extensive field work, ongoing relationships with national park superintendents, and holding conferences on the subject. In 2015, John published the definitive work in the field, an article entitled *How National Park Law Really Works*.¹¹

John identified the central tension at the heart of the National Park Service (NPS) Organic Act as the conservation and enjoyment of national parks—two goals that can coexist but also sometimes lead to conflicting results.¹² As John explained, “enjoyment” includes activities like hiking and sightseeing, as well as more disruptive activities like snowmobiling and scenic flights.¹³ “Conservation” is the preservation of scenery and wildlife “by such means as will leave them unimpaired for the enjoyment of future generations.”¹⁴ Conservation and enjoyment are often in tension.

John noted that “[t]he Organic Act does not resolve such conflicts”¹⁵ but surveyed cases to note that courts afforded considerable discretion to NPS to favor one or the other. He noted, however, that overlaying federal laws governing particular resources within the parks provided conservation mandates within which the Park Service must operate.¹⁶ Courts do hold NPS accountable for adhering to these statutes and overturn decisions that violate them.¹⁷

John defined the legal framework of national park management as containing three parts: The Organic Act, federal environmental statutes, and statutes that govern a specific park. He suggested that this system balances the localized expertise of specific National Park Service divisions for on-the-ground disputes, while retaining for Congress the specialized, global

¹⁰ *About Us: Frequently Asked Questions*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/faqs.htm> [<https://perma.cc/QF8C-CNJ4>]; *About Us: National Park System*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/national-park-system.htm> [<https://perma.cc/K393-76PJ>].

¹¹ John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861 (2015).

¹² *Id.* at 863–64.

¹³ *Id.*

¹⁴ *Id.* at 863 (quoting 54 U.S.C. § 100101 (formerly cited as 16 U.S.C. § 1)).

¹⁵ *Id.* at 864.

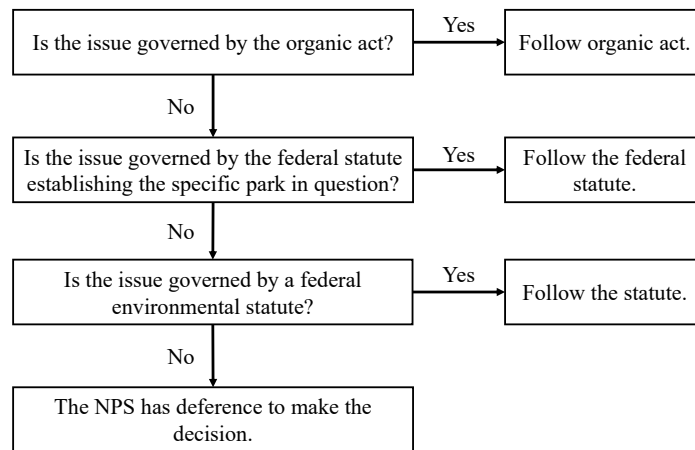
¹⁶ *Id.* at 865.

¹⁷ *See id.*

protection of certain park resources. Congress also reserved a constitutional ability to intervene in Park Service policy to dictate an outcome if competing values needed to be balanced.¹⁸ In this succinct summary of decades of research, John provided a framework for understanding National Park Law.

John did not express his framework visually. Had he, it might have looked like this:

FIGURE 1: NATIONAL PARK LAW ANALYSIS IN BALANCING ENJOYMENT WITH CONSERVATION



We believe this framework can provide a helpful guide for understanding not only existing conflicts between enjoyment and conservation, but also for understanding the legal pathways through which changes in National Park Law might exist. In this sense, John provided a roadmap for enacting changes within the park system, and so created guideposts through which one might navigate to advocate for reforming national parks.

II. MAKING NATIONAL PARKS MORE ACCESSIBLE

This Part explores the ways that legal reform can make public lands recreation resources accessible to diverse, historically excluded, and overburdened groups. We explore how the National Park Law framework

¹⁸ *Id.* at 866 (“[This structure is] normatively desirable from the perspective of ideal park management. This combination presumes that the NPS has the expertise to resolve the competing demands of enjoyment and conservation in most instances. It recognizes that certain environmental values are entitled to the special protection afforded them by federal environmental statutes. And it acknowledges that Congress may intervene to mandate a particular outcome based on its balancing of the competing values.”).

that John mapped addresses these challenges and the ways in which it might be improved to better address accessibility.

Accessibility is intrinsically tied to the “enjoyment” prong of the enjoyment/conservation dichotomy: the purpose of creating more accessible recreation is to give more people the opportunity to enjoy recreation.¹⁹ At a high level of abstraction, “enjoyment” of the recreational resource is a public trust doctrine concept, whereby the maintenance of public lands and resources are available for all Americans.²⁰ But, as we look more closely, it becomes clear that different Americans have different ideas of how to enjoy lands. When we speak of “enjoyment” of recreational resources, a natural question emerges: Whose enjoyment? Should public lands be for the enjoyment of 4-runners and snowmobilers, or hikers who prefer quiet? Are national parks refuges for wildlife populations that are hunted and killed on state lands, or for campers to sleep peacefully at night knowing they will not be attacked by predators? While such interesting questions have been addressed by the National Park Service, courts, and commentators for decades, they are not the focus of this Article.

In this Article, we specifically address accessibility for diverse groups of people. Racism, sexism, and violence in outdoor recreation create barriers for overburdened and historically excluded groups accessing the recreation resource. Consider a few examples: In 1988, an anti-gay hate crime on the Appalachian Trail left one woman dead and her partner seriously injured.²¹ In 2015, a group of female academics visited Yosemite National Park; despite providing the same information as their white or Hispanic counterparts who were admitted to the Park without charge and without further questioning, the four Black scholars in the group were

19 However, accessibility can also conflict with enjoyment. For many if not most outdoor recreation users, part of the joy in exploring the outdoors is the solitude outdoor adventures often bring. Consider this analogy to wilderness areas: “If two hikers encounter each other deep within a wilderness area, where each is expecting solitude, each hiker’s rightful use damages the other hiker’s enjoyment of the resource. Second, if these two hikers are joined by hundreds, if not thousands, of additional hikers, then the resource itself becomes so degraded that the legally acceptable use itself has detracted from each user’s own ability to continue to benefit from the resource.” Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 HARV. ENV’T L. REV. 503, 517 (2008). More accessible recreation brings more people to the recreation resource, potentially diminishing the enjoyment of pre-existing recreation users. *See id.* The Wilderness Act, like the Organic Act, provides for both enjoyment and conservation. *See id.* at 554. However, the Wilderness Act is more restrictive because wilderness is preserved in large part for its environmental value. *See id.* at 510–11. Unlike the calls to make national parks more accessible, some wilderness advocates want to restrict access in ways antithetical to our accessibility framework.

20 *See Sax, supra* note 4, at 974–76. Mid-twentieth century conservation politics were ostensibly for the benefit of the public, but conservation politics largely ignored issues of equity. *See Sarah L. Thomas, When Equity Almost Mattered: Outdoor Recreation, Land Acquisition, and Mid-Twentieth-Century Conservation Politics*, 50 NAT. RES. J. 501, 501–3 (2010).

21 *See* CLAUDIA BRENNER, EIGHT BULLETS: ONE WOMAN’S STORY OF SURVIVING ANTI-GAY VIOLENCE (1995).

questioned extensively about their credentials and affiliations.²² In 2016, a Department of Interior investigative report revealed that several male employees of Grand Canyon National Park's River District withheld food from female river guides who had refused sexual advances.²³ To fulfill the purpose and ideal of recreation on public lands, we must do better.²⁴

This Part explores legal reform to expand accessibility on public lands. Part A outlines a framework of what accessibility means. Part B explains why the lack of accessibility is contrary to the ideas underscoring the recreation resource.

A. An Accessibility Framework

To situate accessibility within John's framework for National Park Law, we must have an understanding of what we mean by "accessibility." Accessibility occurs on at least three dimensions: others have suggested the need for theoretical access and practical access; we add to this list emotional access.²⁵

Theoretical access derives from the public trust doctrine, under which the government maintains land for the benefit of all citizens.²⁶ Vitally, theoretical access alone is insufficient to guarantee that potential recreation users will be able to participate in recreation. Facially neutral access can be discriminatory along practical and emotional dimensions, as we outline below.

Practical access relates to the extent to which various groups of people may expend reasonable amounts of resources to access other resources. Practical barriers to recreation access include the absence of what Professor Jan Laitos terms the "preconditions to recreation," including leisure time; discretionary income; good health; and affordable, reliable, and convenient transportation.²⁷ Access to these preconditions skews white and upper middle class. Other practical barriers include signage posted only in

22 Emily Mott, Note, *Mind the Gap: How to Promote Racial Diversity Among National Park Visitors*, 17 VT. J. ENV'T L. 443, 449 (2016); Tanya Golash-Boza et al., Opinion, *Why America's National Parks Are So White*, AL JAZEERA AM. (July 23, 2015), <http://america.aljazeera.com/opinions/2015/7/heres-why-americas-national-parks-are-so-white.html> [https://perma.cc/QQ2C-SJBV] ("The agents appeared incapable of imagining that a black woman could hold a Ph.D. and visit a research station for a scholarly event.").

23 Krista Langlois, *Hostile Environment*, OUTSIDE (Jan. 31, 2018); see Alexandra Lev, *Tips for Handling Harassment on the Trail*, ANDREW SKURKA (May 21, 2020), <https://andrewskurka.com/face-your-fears-harassment-on-the-trail/> [https://perma.cc/S934-GYJW].

24 See *infra* Section II.B.

25 Jennie Bricker, Comment, *Wheelchair Accessibility in Wilderness Areas: The Nexus Between the ADA and the Wilderness Act*, 25 ENV'T L. 1243, 1244 (1995).

26 See *id.*

27 Jan G. Laitos, *National Parks and the Recreation Resource*, 74 DENV. U. L. REV. 847, 848-49 (1997).

English²⁸ and conditions making resources inaccessible to people with disabilities.²⁹

Emotional access relates to whether access to the resource is safe and inclusive for all groups of people. Barriers to emotional access are less tangible than barriers to practical access: bias, fear, and historical exclusion built on systemic forces of racism and sexism provide additional hurdles to access for some groups.³⁰ Author James Mills describes this phenomenon:

As a person of color with 20 years' experience in the outdoor industry, I've long wrestled with vague notions about the racial tensions in this field. Despite a successful career, unfettered access to professional opportunities and no practical limitations on my enjoyment of the outdoors, I have always had a terrible feeling that I don't belong. And as I traveled around the national parks, I discovered I'm not alone in this perception.³¹

This feeling of not belonging is at the heart of emotional access to recreation.³²

To illustrate the theoretical, practical, and emotional aspects of accessibility, consider Grand Canyon National Park.³³ Professor Sarah

28 Stephanie Ebbs & Devin Dwyer, *America's National Parks Face Existential Crisis Over Race*, ABC NEWS (July 1, 2020), <https://abcnews.go.com/Politics/americas-national-parks-face-existential-crisis-race/story?id=71528972> [<https://perma.cc/8XFL-SESQ>].

29 Bricker, *supra* note 25, at 1244 (noting that theoretical access “may be meaningless if the only trail available to the wheelchair user is too narrow to navigate, or if fallen trees make trail passage impossible”).

30 See Mott, *supra* note 22, 443, 456; Emma Gosalvez, *Nature Gap: Why Outdoor Spaces Lack Diversity and Inclusion*, NC STATE U. COLL. NAT. RES. NEWS (Dec. 14, 2020), <https://cnr.ncsu.edu/news/2020/12/nature-gap-why-outdoor-spaces-lack-diversity-and-inclusion/> [<https://perma.cc/7XHW-5ENH>].

31 James Mills, *In Search of Diversity in Our National Parks*, HIGH COUNTRY NEWS (July 22, 2011), <https://www.hcn.org/articles/in-search-of-diversity-in-our-national-parks> [<https://perma.cc/8AE8-NYCM>]. James Mills is also the author of *THE ADVENTURE GAP: CHANGING THE FACE OF THE OUTDOORS*, which explores diversity in outdoor recreation while chronicling the story of the first all-African-American summit attempt on Denali, the highest point in North America. JAMES MILLS, *THE ADVENTURE GAP: CHANGING THE FACE OF THE OUTDOORS* (2014); *The Adventure Gap: Changing the Face of the Outdoors*, THE JOY TRIP PROJECT, <https://joytripproject.com/the-adventure-gap/> [<https://perma.cc/KFF5-KPSJ>].

32 Many activists are breaking barriers and addressing emotional access to recreation in other media. See, e.g., Faith E. Briggs, *This Land*, VIMEO (Feb. 26, 2020), <https://vimeo.com/394088858> [<https://perma.cc/6GTA-PD3N>]. Legal commentators including Andrea Wayne and John Schelhas are doing important theoretical work to identify the varied reasons for the continued lack of representation of disadvantaged groups in national parks. See Andrea Wayne, *An Environmental Justice Perspective on African-American Visitation to Grand Canyon and Yosemite National Parks*, 11 HASTINGS W.-N.W. J. ENV'T L. & POL'Y 125, 135–39 (2005) (summarizing three main theses: the marginality thesis, the ethnicity thesis, and the ethnic boundary maintenance thesis); John Schelhas, *Race, Ethnicity, and Natural Resources in the United States: A Review*, 42 NAT. RES. J. 723 (2002).

33 John Nagle studied the conflict and litigation over scenic flights in Grand Canyon National Park (GCNP) as one example of the tension between conservation and enjoyment in public lands. See John Copeland Nagle, *What If the Grand Canyon Had Become the Second National Park?*, 51

Krakoff explains that national parks were created through a false narrative of “empty” land.³⁴ But the land was not empty before, and it is not empty now. After the land for the Park was declared “empty,” white people created a park managed by white people for white people.³⁵ Although eleven federally recognized Indigenous tribes live in and around the Grand Canyon today,³⁶ none have any direct authority within GCNP.³⁷

Accessibility can help identify who is missing from the recreation resource and why. In 2016, decades of sexism and sexual harassment within the National Park Service came to light.³⁸ Female employees working on the Colorado River were harassed and assaulted by coworkers, and even withheld food if they refused sex with a boatman.³⁹ Professor Krakoff situates these dark issues of the GCNP’s past and present during the two-week rafting trip with law students.⁴⁰ In this setting, Sarah Krakoff finds hope: the students in Sarah Krakoff’s story represent the future, a future that can “redefine the ‘public’ in our public lands so that it includes [I]ndigenous peoples, all classes, races, and genders, and even other species, and future

ARIZ. ST. L.J. 675, 718–19 (2019). A similar analysis might apply to every issue of accessibility in the Grand Canyon—the decision to pave the Rim Trail, offer guided mule rides, charge entrance fees, or develop more lodging accommodations.

34 Sarah Krakoff, *Not Yet America’s Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 562 (2020) (“[L]aw facilitated the violent displacement of [I]ndigenous peoples to construct ‘empty’ public lands, which then became sites that perpetuated broader structures of economic and social inequality.”).

35 See *id.* at 615. The National Park Service is reckoning with the racist history of “America’s Best Idea.” The founding fathers of the recreation resource—white men like John Muir, President Theodore Roosevelt, and Gifford Pinchot—also embraced eugenics. Jedediah Purdy, *Environmentalism’s Racist History*, NEW YORKER (Aug. 13, 2015), <https://www.newyorker.com/news/news-desk/environmentalisms-racist-history> [<https://perma.cc/H8AE-WHGY>]. Several national parks, including Shenandoah National Park, were racially segregated. See Kurt Repanshek, *How the National Park Service Grappled with Segregation During the 20th Century*, NAT’L PARKS TRAVELER (Aug. 18, 2019), <https://www.nationalparkstraveler.org/2019/08/how-national-park-service-grappled-segregation-during-20th-century> [<https://perma.cc/YQ47-D3YF>]. The “separate but equal” rule of the time meant that parks for African-American visitors often lacked amenities. *Id.* For a brief overview of environmental racism and the recreation resource, see Kimberly L. Bick, *Environmental Parity and Outdoor Equity*, 63 ORANGE CNTY. LAW., Apr. 2021, at 36.

36 Krakoff, *supra* note 34, at 564–613.

37 *Id.* at 564.

38 See *id.* at 638–39; Lyndsey Gilpin, *The National Park Service Has a Big Sexual Harassment Problem*, ATLANTIC (Dec. 15, 2016), <https://www.theatlantic.com/science/archive/2016/12/park-service-harassment/510680/> [<https://perma.cc/KG8A-2Z4J>].

39 Sarah Kaplan, *Female Park Service Employees Say They Were Propositioned, Groped and Bullied on Grand Canyon River Trips*, WASH. POST (Jan. 13, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/13/female-park-service-employees-say-they-were-propositioned-groped-and-bullied-on-grand-canyon-river-trips/> [<https://perma.cc/YGW5-YEHH>].

40 See Krakoff, *supra* note 34, at 560.

generations.”⁴¹ Below, we consider how John’s work might help achieve this aim.

B. Why Lack of Accessibility is Contrary to the Basis of the Recreation Resource

Accessibility in recreation is at a strange juncture. Recreation has become so popular that some believe we are “loving nature to death.”⁴² But the lack of diversity in recreation is just as threatening.⁴³ We advocate for accessibility for accessibility’s sake—in line with John’s commitment to uplifting and including others. Beyond the need for accessibility to live in a just society, however, a lack of accessibility is contrary to the basis of the recreation resource.

John’s research on the legislative history of the National Park Service Organic Act reveals that accessibility was a driving factor in the passing of the Organic Act. According to John, “Congress was most concerned about the enjoyment of the national parks, which required efforts to encourage people to visit them, and increased visitation in turn necessitated efforts to make the parks more accessible.”⁴⁴ Accessibility is a prerequisite for fulfilling the enjoyment prong of the dual mandate.⁴⁵ As the popularity of recreation on public lands grew exponentially over the past decades,⁴⁶ the two dual mandates—enjoyment and conservation—have increasingly come into conflict.⁴⁷

Yet John’s scholarship illustrates that the dual mandate represents a false dichotomy. Though the publicized and litigated conflicts between enjoyment and conservation dominate the debate over the dual mandate, there are “easy cases under the Organic Act” in which enjoyment and conservation coincide; for example, in a conflict between preserving forests for hiking trails or exploiting them for logging, enjoyment and conservation are both served by preserving forests for hiking trails.⁴⁸ Philosophically, the dichotomy breaks down because enjoyment necessitates conservation and

41 *Id.* at 647–48.

42 See Charlotte Simmonds et al., *Crisis in Our National Parks: How Tourists Are Loving Nature to Death*, *GUARDIAN* (Nov. 20, 2018), <https://www.theguardian.com/environment/2018/nov/20/national-parks-america-overcrowding-crisis-tourism-visitation-solutions> [<https://perma.cc/CVF3-2Q4V>].

43 See Ebbs & Dwyer, *supra* note 28.

44 Nagle, *supra* note 11, at 874.

45 *Id.* (“These three steps—accessibility → visitation → enjoyment—animated much of the congressional and popular debate that resulted in the Organic Act.”).

46 See Robert B. Keiter, *The Emerging Law of Outdoor Recreation on the Public Lands*, 51 *ENV’T L.* 89, 104 (2021).

47 See *supra* Sections I.A, I.B; Laitos & Gamble, *supra* note 19, at 508–31 (examining overuse of the recreation resource through economic theory).

48 Nagle, *supra* note 11, at 863–64.

conservation necessitates enjoyment. As John wrote, “[i]t would be impossible to enjoy national parks if we did not conserve them,” but “[t]he purpose of conserving the parks [is] so that they [can] be enjoyed.”⁴⁹

Two truths are in tension: (1) the recreation resource, especially in national parks, is being overburdened by increased visitation,⁵⁰ and (2) more accessible recreation is necessary to ensure continued conservation of the recreation resource. Demographic changes coupled with the lack of diversity in recreation poses an “existential crisis” to the recreation resource.⁵¹ Historically and presently, recreation users are predominantly white, middle-class families with children. The U.S. population is getting older, racial minorities are becoming the majority, and the family structure of a married couple with children is no longer the norm.⁵² People protect what they love—and as the demographics change, the recreation resource will need the support of an increasingly diverse citizenry.

National parks are a quintessential part of the American experience, yet what dominant culture perceives of as the American identity has shifted significantly since they were formed. As our society grapples with historical exclusion and violence, public lands scholars should consider what it means to create more inclusive recreational resources.

III. CREATING MORE ACCESSIBLE RECREATION

Creating more accessible recreation is necessary for the continued protection of the recreation resource. This Part explores how leveraging John Nagle’s framework of National Park Law can expand accessibility to public lands and resources. We show how John’s framework for understanding National Park Law serves as a blueprint for making changes within the National Park System.

Part A overviews the laws affecting accessibility of recreational resources. Part B outlines current and potential future steps for increasing accessibility in national parks. Part C shows how considering issues of accessibility in the National Trails System is an easy, necessary extension of the work towards creating more inclusive resources.

⁴⁹ *Id.* at 879–80.

⁵⁰ Not all scholars advocate for increasing accessibility. For a perspective that focuses on solutions to the overburdened recreation resource and limiting accessibility, see Laitos & Gamble, *supra* note 19, at 545–48 (noting prohibition of high-tech equipment and reversing the presumption of access as unpopular and unlikely solutions).

⁵¹ Ebbs & Dwyer, *supra* note 28.

⁵² Dudley L. Poston, Jr., *3 Ways That the U.S. Population Will Change Over the Next Decade*, PBS NEWS HOUR (Jan. 2, 2020), <https://www.pbs.org/newshour/nation/3-ways-that-the-u-s-population-will-change-over-the-next-decade> [<https://perma.cc/4TTZ-SZT3>]; Alicia VanOrman & Linda A. Jacobsen, *U.S. Household Composition Shifts as the Population Grows Older; More Young Adults Live with Parents*, POPULATION REFERENCE BUREAU (Feb. 12, 2020), <https://www.prb.org/resources/u-s-household-composition-shifts-as-the-population-grows-older-more-young-adults-live-with-parents/> [<https://perma.cc/G5HC-DGZS>].

A. Legal Structure of Accessible Recreation

John's framework outlined in Section I.B can be expanded to evolving legal issues around accessibility. We add a fourth layer to John's legal framework of national park management: in addition to the Organic Act, federal environmental statutes, and statutes that govern a specific park,⁵³ law and policy specific to accessibility and anti-discrimination should inform park management decisions.

The Americans with Disabilities Act (ADA), which prohibits discrimination based on disability, is one such law that implicates accessibility of the recreation resource.⁵⁴ John's framework can easily be overlaid onto resource conflicts involving accessibility, for example, wheelchair usage in wilderness areas.⁵⁵

Similarly, the Civil Rights Act provides an additional layer to John's framework. Notably for our purposes, the Civil Rights Act ended segregation of the recreation resource and "granted permission for Black communities to enter public spaces like national and state parks—spaces they had been banned from prior."⁵⁶

Congress passed the Civil Rights Act and the Wilderness Act the same year, but the two Acts were rarely considered in conjunction with one another.⁵⁷ The silos separating civil rights laws and environmental and natural resources laws, however, are beginning to crack. After white supremacist messages were posted on local trails, a New Hampshire State Senator introduced a bill titled "The Inclusive Outdoors Act."⁵⁸ This bill seeks to expand civil rights enforcement in New Hampshire's outdoor recreation areas by, among other things, requiring ethics, diversity, and deescalation training for park officials.⁵⁹

⁵³ See *supra* Section I.B.

⁵⁴ See Bricker, *supra* note 25, at 1244; Ellen Aubrey Fred, Note, *Outdoor Accessibility Requirements of the Americans with Disabilities Act: Must Holders of Conservation Easements Provide ADA Access?*, 54 HASTINGS L.J. 243 (2002). For a step-by-step guide to more inclusive outdoor recreation, see *Five Ways to Make the Outdoors More Inclusive*, ATLANTIC RE:THINK, <https://www.theatlantic.com/sponsored/rei-2018/five-ways-to-make-the-outdoors-more-inclusive/3019/> [<https://perma.cc/EQ43-ND67>].

⁵⁵ See generally Bricker, *supra* note 25.

⁵⁶ Naomi Humphrey, *Breaking Down the Lack of Diversity in Outdoor Spaces*, NAT'L HEALTH FOUND. (July 20, 2020), <https://nationalhealthfoundation.org/breaking-down-lack-diversity-outdoor-spaces/> [<https://perma.cc/R79S-ULJ9>].

⁵⁷ *Our Wild and Civil Rights*, OUTDOOR AFRO, <https://outdoorafro.com/2014/06/our-wild-and-civil-rights-2/> [<https://perma.cc/7YWY-5ZWW>] (last visited Aug. 16, 2021).

⁵⁸ Annie Ropeik, *Bill Would Expand Civil Rights Enforcement in N.H.'s Outdoor Recreation Areas*, N.H. PUB. RADIO (Feb. 10, 2021), <https://www.nhpr.org/nh-news/2021-02-10/bill-would-expand-civil-rights-enforcement-in-n-h-s-outdoor-recreation-areas> [<https://perma.cc/LPN2-CCDS>].

⁵⁹ S.B. 114-FN, 2021 Reg. Sess. (N.H. 2021).

Various accessibility-specific laws can be mapped on to resource conflicts in the same manner John applied federal environmental statutes. John's framework is also flexible enough to adapt to cultural and political shifts. Black Lives Matter, the Me Too movement, and other activist-led and community-based movements can inform the legal structure of accessible recreation. To this end, it is time to begin collaboratively remaking public lands as more inclusive spaces. We acknowledge this is not a quick or neat "fix" and do not suggest it can or should be, but believe the effort of engaging the issues is necessary work.

B. Accessible National Parks

Scholars and advocates have outlined steps for creating more accessible recreation in national parks.⁶⁰ These steps include internal changes to hiring practices and eradicating harassment and discrimination in the NPS workforce,⁶¹ marketing towards a more diverse audience, including informational and educational material that engages diverse visitors, improving transportation to parks, listening to and collaborating with tribes, and designing amenities with people with disabilities in mind.⁶²

The NPS is working directly to engage more diverse visitors.⁶³ The "Find Your Park" campaign leverages the diversity of national parks: "America's national parks are as unique and varied as the people who love them," the campaign's website declares.⁶⁴ One way the NPS seeks to attract a diverse audience is by highlighting the diversity in the history of the national parks.⁶⁵ For example, Yosemite National Park highlights the role of Black soldiers that protected the Park in the early 1900s, combatting the narrative that only white men like John Muir are responsible for creating and protecting national parks.⁶⁶

60 See Waye, *supra* note 32, at 139–42; Krakoff, *supra* note 34, at 645–46.

61 See NPS's Office of Relevancy, Diversity, and Inclusion works to address discrimination, sexual harassment, and the lack of diversity in the workforce. *Office of Relevancy, Diversity and Inclusion*, NAT'L PARK SERV., <https://www.nps.gov/orgs/1244/index.htm> [<https://perma.cc/LD2E-9N7K>] (last visited Aug. 16, 2021).

62 See Waye, *supra* note 32, at 139–42; Krakoff, *supra* note 34, at 645–46; Alexandra Charitan, *Outdoors for All: How National Parks Are Addressing Accessibility Challenges*, ROADTRIPPERS (Apr. 26, 2019), <https://roadtrippers.com/magazine/national-parks-accessibility/> [<https://perma.cc/S6Z8-JL2U>].

63 See NAT'L PARK SERV., CONSERVATION STUDY INST., BEYOND OUTREACH HANDBOOK (2011).

64 FIND YOUR PARK, <https://findyourpark.com/> [<https://perma.cc/J5J3-8JY4>] (last visited Aug. 16, 2021).

65 See Waye, *supra* note 32, at 140.

66 *Id.* at 140–41; see also Tori Peglar, *The Living History of Yosemite's Buffalo Soldiers*, OUTSIDE: YOSEMITE NAT'L PARK TRIPS (June 25, 2021), <https://www.myosemitepark.com/park/history/buffalo-soldiers/> [<https://perma.cc/7BH9-SN25>].

The NPS is also listening to the tribes that live near national parks.⁶⁷ In Grand Canyon National Park, members of the eleven tribes in the Grand Canyon set forth “three immediate goals for reversing their histories of exclusion and erasure:” (1) adding Indigenous names to park signs and maps; (2) increasing the employment of native guides, artists and entrepreneurs in the NPS; and (3) increasing the involvement of tribes in park management and decisionmaking.⁶⁸ Moving forward, the NPS must continue consulting with tribes in a way that provides tribes with meaningful input.⁶⁹

The next frontier in creating more accessible national parks is bringing national parks to urban populations.⁷⁰ The early national parks focused on preserving awe-inspiring scenic views in the West—places like Yellowstone, Sequoia, and Yosemite National Parks. However, “the idea that ‘only scenically spectacular locations’ merit national park status has been replaced with an acknowledgement that areas of ‘ecological and wilderness value’ should also be protected.”⁷¹ And with this shift in what national parks look like came a shift in who national parks are for.

Urban parks are not a new idea. The earliest urban units of the National Park System include Federal Hall National Memorial in Manhattan, incorporated into the Park System in 1939, and Independence National Historical Park in Philadelphia, established in 1948. These sites, however, “were not in the National Park System because they were in urban areas but, if anything, in spite of it.”⁷²

In the 1960s and ‘70s, the Parks to the People movement focused on fulfilling the need for parks in urban areas.⁷³ Accessibility and equity drove park expansion in this era of NPS management.⁷⁴ Spearheaded by NPS director George B. Hartzog, the Parks to the People movement ushered in several new urban NPS units including Golden Gate National Recreation

67 See *Working with Native Americans*, NAT’L PARK SERV., https://www.nps.gov/history/tribes/tribal_historic_preservation_officers_program.htm [<https://perma.cc/7Q9Q-J2BY>] (last visited Aug. 16, 2021).

68 Krakoff, *supra* note 34, at 645.

69 See generally Reed, *supra* note 9.

70 For an overview of the need for parks, trails, and other “green and blue infrastructure” particularly in low-income communities of color, see Craig Anthony Arnold et al., *Resilience Justice and Community-Based Green and Blue Infrastructure*, 45 WM. & MARY ENV’T L. & POL’Y REV. 665 (2021).

71 Sarah J. Morath, *A Park for Everyone: The National Park Service in Urban America*, 56 NAT. RES. J. 1, 5 (2016) (quoting Robert S. Keiter, *The National Park System: Visions for Tomorrow*, 50 NAT. RES. J. 71, 77, 80 (2010)).

72 *Id.* at 6 n.37 (quoting RONALD A. FORESTA, AMERICA’S NATIONAL PARKS AND THEIR KEEPERS 169–70 (1984)).

73 *Id.* at 6–7. As Morath notes, the word “recreation” in their titles illustrates that the purpose of these additions to the NPS was to “provide access to nature and recreational opportunities in populated areas.” *Id.* Urban parks and recreation areas are analogous to national recreation trails. See *infra* Section III.C.

74 See Morath, *supra* note 71, at 6–7.

Area in San Francisco and Gateway National Recreation Area in New York and New Jersey.⁷⁵ Even over half a century ago, accessibility was understood as a vital part of the recreation resource within national parks.⁷⁶

C. *Beyond National Parks: Accessible National Trails System*

The National Trails System is well situated to become a beacon of accessibility in the recreation resource. Trails can be both land based and water based and can provide access to recreation in mountains, deserts, forests, marshes, beaches, arctic tundra, and anything in between. The National Trails System Act of 1968 (“Trails Act”) itself, as amended, identifies accessibility as a prominent consideration for establishing national trails.⁷⁷

Congress recognized both the importance of accessible recreation and the inherent inaccessibility of the recreation resource predominantly found in remote national parks. In order to promote public access to the recreation resource, the Trails Act notes that trails “should be established . . . primarily . . . near the urban areas of the Nation” to bring the recreation resource to diverse population hubs.⁷⁸

The Trails Act provides the means for establishing a national trails system composed of national scenic trails, national historic trails, and national recreation trails, as well as connecting or side trails.⁷⁹ According to the NPS, the Trails Act “calls for establishing trails in both urban and rural settings for people of all ages, interests, skills, and physical abilities.”⁸⁰ The three different types of trails create a diverse trails system that increases trail accessibility by providing a trail for a multitude of activities.⁸¹

National scenic trails, national historic trails, and national recreation trails each have different attributes, and these different attributes increase accessibility of the recreation resource. National scenic trails are long, continuous trails located to “provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass.”⁸² The eleven national scenic trails range from 694 miles on

75 *Id.* at 7.

76 *See Office of Relevancy, Diversity and Inclusion, supra* note 61.

77 *See* 16 U.S.C. § 1241(a).

78 *Id.*

79 *Id.* § 1241(b).

80 *America’s National Trails System*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationaltrailssystem/index.htm> [<https://perma.cc/8J85-PN2L>] (last visited Aug. 16, 2021).

81 *See National Scenic and Historic Trails—FAQs*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationaltrailssystem/faqs.htm#:~:text=One%20of%20the%20best%2C%20used,%2Dcountry%20skis%2C%20off%2Droad> [<https://perma.cc/T6KC-EVY7>] (last visited Aug. 16, 2021).

82 16 U.S.C. § 1242(a)(2) (2018).

the Natchez Trace Trail to 3200 miles on the North Country Trail.⁸³ Seven national scenic trails extend for over 1000 miles, including the iconic Appalachian and Pacific Crest Trails.⁸⁴

Because of their vast lengths, national scenic trails are more “long and skinny” than historic and recreation trails.⁸⁵ The physical shape of these long trails means there are numerous access points passing through many different communities. And, because of the distance these trails cover, the trails by necessity cross over highways and through towns.⁸⁶ The length of the national scenic trails also supports a greater number of recreation users; many recreation users can use a trail simultaneously without causing the severe congestion and overuse problems that have become endemic to “short and squat” national parks.

In contrast to national scenic trails, national historic trails are established to follow “as closely as possible and practicable the original trails or routes of travel of national historical significance.”⁸⁷ All nineteen national historic trails are linked to urban areas, again bringing the recreation resource closer to population hubs.⁸⁸ But the attribute of national historic trails with the most potential to increase accessibility of the recreation resource is the history itself.

Understanding the origins of the recreation resource is necessary for creating more accessible recreation.⁸⁹ Hiking in the twenty-first century is merely a popular recreational activity, but long-distance treks are woven into the history of the United States. And much of that history provides insight into the inequity that exists today within the recreation resource. For instance, several of the national historic trails follow the path of colonizers, from the conquistadors in the Southwest, English settlers in the East, and the constant western expansion of the United States.⁹⁰ In a moment of national reflection surrounding race, it seems that creating truly accessible trails may require a deep investigation into how and why certain stories are told through trails.⁹¹

83 See 16 U.S.C. § 1244 (2018).

84 See *id.*

85 See Epstein, *supra* note 8, at 570–72.

86 On the Appalachian Trail, the average number of miles between road crossings is only four miles. Zach Davis, *21 Appalachian Trail Statistics That Will Surprise, Entertain, and Inform You*, REI CO-OP (July 28, 2015), <https://www.rei.com/blog/hike/21-appalachian-trail-statistics-that-will-surprise-entertain-and-inform-you> [<https://perma.cc/9KGG-JHMX>].

87 16 U.S.C. § 1242(a)(3) (2018).

88 See Ryan Rowberry, *When Past Is Prologue: The Values of Historic Resources for Cities*, 4 J. COMPAR. URB. L. & POL'Y 563, 582 (2020).

89 See Krakoff, *supra* note 34.

90 See *National Historic Trails*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nationaltrailssystem/national-historic-trails.htm> [<https://perma.cc/AEV9-Q2M8>] (last visited Aug. 16, 2021).

91 Do the educational materials along these trails reflect an accurate account of history? Are there aspects of the histories that have been white-washed?

National historic trails also tell stories of pain, inequality, progress, and hope. The Trail of Tears and the Nez Perce Trail memorialize the forced removal of Indigenous people.⁹² The Selma to Montgomery Trail commemorates the fifty-four-mile march led by Dr. Martin Luther King Jr. in 1965 in support of the Voting Rights Act.⁹³ Centering diversity within trails and teaching the full history of the land in the United States are important means of creating more accessible recreation for diverse groups.⁹⁴

Of the three types of trails, national recreation trails are, by design, the most accessible. Over 1300 national recreation trails provide access to the recreation resource in every state⁹⁵ and predominantly serve urban areas.⁹⁶ A database of national recreation trails facilitates access to these abundant trails.⁹⁷ By providing “close to home outdoor access for strolling, pedaling, or paddling,” national recreation trails make the recreation resource accessible to a more diverse demographic.⁹⁸

The three different types of trails show that a framework for a more accessible recreation resource can already be found in the National Trails System. Accessible recreation provides a multitude of ways for many people to enjoy the recreation resource. It brings the recreation resource closer to urban areas, engages with more diverse populations, and provides easy access points. It furthermore acknowledges and learns from the history of recreation in the United States. As demand for the recreation resource grows, the long and skinny nature of trails can alleviate overuse problems.⁹⁹ And, while the recreation resource is finite, more trails continue to be added to the National Trails System.¹⁰⁰

Much work has already been done on identifying and implementing trail accessibility standards, especially regarding accessibility for people

92 See Brian Kevin, *The Other Trail of Tears*, HIGH COUNTRY NEWS (June 15, 2009), <https://www.hcn.org/issues/41.11/the-other-trail-of-tears> [<https://perma.cc/VSG3-ETWU>].

93 *Alabama: Selma to Montgomery National Historic Trail*, NAT'L PARK SERV., <https://www.nps.gov/places/selma-to-montgomery-national-historic-trail.htm> [<https://perma.cc/7Z6E-GVE3>] (last visited Aug. 16, 2021).

94 See Waye, *supra* note 32, at 139–42; *Five Ways to Make the Outdoors More Inclusive*, *supra* note 54.

95 *Secretary Haaland Promotes Outdoor Recreation, Designates Ten New National Recreation Trails*, U.S. DEP'T OF THE INTERIOR (June 4, 2021), <https://www.doi.gov/pressreleases/secretary-haaland-promotes-outdoor-recreation-designates-ten-new-national-recreation> [<https://perma.cc/V76H-G8E3>] [hereinafter *Secretary Haaland*].

96 See MARK K. DESANTIS & SANDRA L. JOHNSON, CONG. RSCH. SERV., R43868, *THE NATIONAL TRAILS SYSTEM: A BRIEF OVERVIEW 5* (2020), <https://fas.org/spp/crs/misc/R43868.pdf>.

97 See *NRT Database*, NAT'L RECREATION TRAILS, <https://www.nrtdatabase.org/> [<https://perma.cc/YVC6-UTH6>] (last visited July 3, 2021).

98 See *Secretary Haaland*, *supra* note 95.

99 Karen Bradshaw & Dean Lueck, *Contracting for Control of Landscapes*, 100 IOWA L. REV. 2507 (2015) (defining “long and skinny” resources); Richard A. Epstein, *Property Rights, Long and Skinny*, 14 INT'L J. COMMONS 567 (2020).

100 *Secretary Haaland*, *supra* note 95.

with physical disabilities.¹⁰¹ Information and technology are some of the most powerful ways to increase accessibility of trails. Information about trails can increase accessibility for all users, especially under-represented groups.¹⁰² Most trails today have a rating of easy, moderate, or hard,¹⁰³ but these are subjective terms. Objective information about trail width, grade, surface, cross slope, water availability, and amenities can help all users prepare for a visit to a trail.¹⁰⁴

Technology is first and foremost a means of transmitting information. Additionally, technological advancements provide safety, security, and comfort for new and experienced recreation users.¹⁰⁵ For example, the advancement of GPS and apps that allow users to find their location on a map without cellular service create a sense of security that may bring more people safely to the recreation resource.¹⁰⁶ Technology and information, combined with affordable and convenient transportation¹⁰⁷ and gear, can greatly increase accessibility of trails.

CONCLUSION

John bettered the lives of others in many ways. The ripple effect of his life and work will influence legal scholarship and the lives of the people around John for decades to come—contributing to an intergenerational tapestry of human kindness and potential, an enduring reminder of what it is to live a life well lived.

With respect to John’s scholarship, we hope this Article shows that he established a framework for understanding National Park Law, which can be extended to new issues and questions. This Article provides a decision framework for national parks, which we hope future scholars will compare

101 See FOREST SERV., U.S. DEP’T OF AGRIC., ACCESSIBILITY GUIDEBOOK FOR OUTDOOR RECREATION AND TRAILS (2012), <https://www.fs.usda.gov/sites/default/files/Accessibility-Guide-Book.pdf>.

102 “Information is a form of accessibility in itself.” Bricker, *supra* note 25, at 1269.

103 See, e.g., ALLTRAILS, <https://www.alltrails.com/> [<https://perma.cc/YX9U-X342>] (last visited Aug. 16, 2021).

104 Peter Axelson & Jeremy Vican, *Tools and Technology for Accessible Trails*, BENEFICIAL DESIGNS, INC., <http://web.stanford.edu/class/engr110/2011/Trails.pdf> (last visited Aug. 16, 2021).

105 For a contrary perspective on technology in wilderness areas, see Laitos & Gamble, *supra* note 19.

106 AllTrails offers a paid version of the app that allows users to find their location on previously downloaded maps even without service. See ALLTRAILS, *supra* note 103. FarOut offers similar features for users of long-distance trails. See *Explore Our Guides*, FAROUT, <https://faroutguides.com/guides/> [<https://perma.cc/X3AM-YR6E>]. These apps also allow users to comment on trails and way points regarding water availability, camp sites, and other useful information.

107 In 2019, the Transit to Trails Act was introduced in the House to “establish a program to award grants to entities that provide transportation connectors from critically underserved urban communities and rural communities to green spaces.” Transit to Trails Act of 2019, H.R. 4273, 116th Cong. (2019).

and contrast to other understudied federal land management agencies, such as the Bureau of Land Management or National Forest Service. How are the legal models of these agencies similar and different? Might John's model and findings of doctrinal development hold true in other public lands contexts? These questions remain to be answered but show how engaging carefully with John's work provides the opportunity to develop the undertheorized field of public lands and natural resources in ways that are responsive to the issues of our time, richly informed through his decades of research fueled by love of recreation, public lands, and national parks.

