Imagine, if you will, an extended American family preparing for one of its favorite traditions: a summer family reunion. Convened every few years, this is a time for fun and frolicking, particularly water frolicking — for this is a family that loves to swim. Viewed over time, the participants would include men and women, adults and children. Beyond that, American diversity is such that many imaginings are possible. Perhaps this family descends from the many indigenous peoples of the North American continent, or the Hawaiian Islands. But most likely, the progenitors were immigrants. They may have sailed with the Mayflower, exited Ireland during the great potato famine, or left China when Gold Mountain beaconed. They may have fled the Nazi Holocaust, or crossed the southern border to work in the Bracero program. Or they may be more recent immigrants, hailing from anywhere in the world, for any number of reasons. This family could be the descendants of slaves or slaveowners — or both. They might include biracial couples, biracial children, or adoptive children of differing national origins. They might include transgender people, or same-sex couples. They may now be far flung (or not) in geography, education, and wealth. They might practice any number of religions — or none at all. If they have been in the United States since the early 20th century, this family almost certainly includes veterans, particularly veterans of the World Wars. Whether they include veterans of the post-1973 all-volunteer era will be influenced by the geographic locations, socio-economic statuses and ethnicities you have summoned for them: disproportionately likely if they are rural, poor or people of color. And — whether they think of themselves this way or not — they likely include people with disabilities, including mobility disabilities. Perhaps the current matriarch, having worked long and hard all her life, recently had a stroke, and now uses a walker. Perhaps her grandson has returned from honorable service with traumatic brain injury or limb loss, two of the signature injuries of the recent wars in Iraq and Afghanistan. A great-granddaughter, perhaps, was born with cerebral palsy, and — along with her veteran uncle — uses a wheelchair. Imagine as you will, but ask yourself this: where exactly would this hydrophilic family swim, and how did those waters come to be? Can you conjure a time and place when they can all swim equally, together? If the answers elude you, perhaps it’s time to dive back into history …
To students of science, water is life. It covers our planet in great swaths of liquid salt and fresh, and flows through the veins of living things. But to students of American history, water is larger than life. It carries the cross-currents of our hopes and fears, our challenges and triumphs, and our imperfect progress towards realizing our highest and best ideals. In water we can see reflected the history of our public policy choices, particularly our efforts to achieve equality and civil rights for all. And in water we find the many confluences of immigration, socio-economic and veteran status, public health and health care, race, religion, gender, age, sexual orientation, and — as is only fitting to mention on this 22nd anniversary of the signing of the Americans with Disabilities Act (ADA) — disability.

In May 2012, responding to pressure from the swimming pool and "hospitality" industries, the U.S. Department of Justice announced that it was extending the compliance date for two specific provisions of the ADA Standards for Accessible Design. These provisions, which require either a pool lift or a sloped entry to accommodate mobility disabilities, currently apply to any pools that are newly built or altered as of March 2012. But as a result of DOJ’s recent pronouncement, pool operators now have a new January 2013 deadline for providing access to existing pools and spas — which are a significant percentage of the nation’s bathing facilities.¹

This seems a tediously dry fact to occupy us on a splashy summer day, even if it is an ADA anniversary. But it floats atop an enormously interesting sea of story. For as it happens, the tale of the American experiment in democratic capitalism, and the ongoing dramas of our diversity — up to and including this apparently arid 2012 accessible pool extension — can be told not just through water, but through our swimming pools.²

The swimming pool, like the United States, is for the most part a modern phenomenon. For much of human history, people bathed where nature dictated. Hunter-gatherers went with the flow, and relatively sparse and agrarian communities settled near the water sources vital to their sustenance. They drew on the same wild waterways for myriad different purposes (drinking, irrigation, cleansing and recreation), and the limitations of a given watershed tended to keep populations in check.

As increasingly complex human societies developed, some ancient civilizations — prominently including the Romans and the Japanese — pioneered new approaches to bathing, constructing

¹ Originally issued by the U.S. Access Board in 2004, and adopted by DOJ in 2010, Sections 242 and 1009 of the Standards require accessible, independent means of entry to and exit from swimming pools and spas for people with disabilities. See Amendment of Americans With Disabilities Act Title II and Title III Regulations To Extend Compliance Date for Certain Requirements Related to Existing Pools and Spas Provided by State and Local Governments and by Public Accommodations, 77 Fed. Reg. 30174 – 30180 (May 21, 2012). DOJ explicitly identified the “concerns and misunderstandings” of pool operators as the reason for its extension decision. Id. at 30175.

² See van Leeuwen, Thomas A.P., The Springboard in the Pond: An Intimate History of the Swimming Pool (1998)(hereafter Intimate History) at 52 (“The development and distribution of the private bath and pool house is an intricate part of the transition from public to private and from ancien régime to capitalist society.”)
artificial communal facilities. The influences of such historical developments remain to this day. But the Industrial Revolution dramatically changed humanity’s approach to water, as it changed so much else. This proved particularly true for the U.S., which came into being during that same late 18th century time frame. By the 19th century, America was increasingly urbanizing her population, while also enlarging her numbers through successive waves of European immigration. The huddled masses that washed up on Ellis Island may have been yearning to breathe free. But the power elites, particularly in the highly concentrated East Coast cities, quickly focused on whether and where these newcomers could bathe free.

Here we come to our first confluence: an intersection of immigration and socio-economic status. For the relatively homogenous and tight-knit inhabitants of rural and small town America, it remained comfortable to have everyone, rich or poor, plunge together into the “ol’ swimmin’ hole.” Elsewhere the urban wealthy and the middle class — with or without indoor plumbing — generally had sufficient resources and opportunity to satisfy their basic bathing needs in private. Not so the generally immigrant denizens of the squalid new urban tenements. While boisterous collections of poor and working class boys often braved a splash in increasingly polluted wild waterways if they could find them, most of these masses were indeed unwashed. To the elites, both the boisterous boys and the unwashed were a problem, the former because they threatened civil unrest, and the latter because they threatened — well, everyone.

In the years before the germ theory of disease was well understood, it was assumed that disease was correlated with dirt, and lurked disproportionately among the under-classes. The 1850s and 60s thus saw the creation of the first American natatoriums, enclosed spaces constructed specifically for bathing. Opened by cities and private charities, they were offered as highly utilitarian spaces, intended to cleanse the multitudes, curb pestilence, and civilize urban degenerates. Even as conceived, these early natatoriums were hardly models of equality. They were expressly for the lower classes, and either excluded women entirely, or permitted women-only swimming on a very limited schedule. And here is a confluence of race and gender. For gender segregation made racial integration possible during this era. Before the turn of the 20th century, a surprising number of American communities had no problem with black men and white men (particularly poor and working class men) swimming together in artificially created space.

But as is wont to happen, the theoretical goals of these projects were soon eroded by reality. For one thing, the boisterous boys had ideas of their own. While generally happy to be invited indoors, they failed to check their rowdy youth culture at the door, and their preference for rambunctious water play quickly swamped the plans for a dignified approach to public bathing. For

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3 See [http://www.britannica.com/EBchecked/topic/591317/thermae](http://www.britannica.com/EBchecked/topic/591317/thermae) (describing the ancient Roman thermae, a “complex of rooms designed for public bathing, relaxation and social activity that was developed to a high degree of sophistication by the ancient Romans.”) See also [http://www.japan-guide.com/e/e2074.html](http://www.japan-guide.com/e/e2074.html) (describing the traditional Japanese Sento, a neighborhood gathering place “where the locals could go to wash themselves, soak in a tub and socialize with neighbors.”)

4 See *Intimate History* at 53 (“hygienic exercises … began to settle within the intimacy of the private home. The bourgeoisie withdrew to its private quarters.”)

another thing, by the late 1890s, the germ theory of disease was becoming understood. Ironically, it revealed that the natatorium — far from being a sterilizing influence — was almost perfectly designed to propagate communicable illnesses, facilitating as it did the exchange of bodily fluids and infectious agents between large numbers of people.6

The cultural and biological hazards of these early natatoriums soon prompted a wave of flight from these “public” swimming pools. A parallel set of private establishments began to surface, emblems of opulence where wealthy men engaged in indoor laps, swimming meets and water polo contests.7 The decorous environment of these exclusive athletic clubs was fathoms away from the stormy waters of the natatoriums — but the clubs, too, excluded women.8 The Gilded Age also saw the creation of the first residential swimming pools — the very first, perhaps, a rather ascetic indoor water body commissioned by George Vanderbilt in 1895, and clearly designed for exercise, not amusement.9 By the end of the 19th century, the YMCA (emphasis again on the “M”) made some effort to throw a lifeline to the middle class, installing indoor tanks in some Y facilities. But these were hardly the lap pools of luxury, and a tiered fee structure ensured that only the best-off members were given access.10

By the time the Progressive Era hove into view, a distinct pattern had been established in most large American communities: the rich plunged separately from the hoi polloi, and the women — didn’t. Racial integration was still tolerated, and the leaders of the time continued to regard pools as a public

6 See Intimate History at 46 (“After being boxed in and separated from its original state, water loses its healthy composition, becoming stagnant. In order to restore its fitness for swimming it has to be submitted to various treatments of increasing alienation: artificial coloring, chlorination, and disinfectants.”)

7 See Contested Waters at 29.

8 See Contested Waters at 29.

9 See Contested Waters at 100-101. See also Intimate History at 78 (“The earliest American private pools were indoors, and the earliest of the indoor pools were built at the end of the nineteenth century on the East Coast, on the estates of the extremely rich. Indoor pools were, for a relatively short period, the status-bearing playthings of the Vanderbilts, the Astors, the Whitneys, and other Veblenian collectors of money and property.”)

10 See Contested Waters at 29-30. In addition to economic discrimination, some of these early YMCA’s practiced racial discrimination. See Contested Waters at 224 n.66 (noting existence of “many racially segregated Y facilities opened early in the twentieth century in cities throughout the country.”) For example, as of 1913 blacks on the South Side of Chicago swam at Y branch paid for by “the Pullman Railroad Car Company, the national YMCA, individual black Chicagoans, and local white philanthropists.” Id., citing “Race Gives Small Amount” in Chicago Defender at 1 (Jun. 28, 1913); “YMCA Building Dedicated with Imposing Ceremonies in Chicago Defender at 1 (Jun. 21, 1913); and “The Y.M.C.A.,” in Chicago Defender at 6 (Sept. 13, 1913).

Racial discrimination at YMCAs extended well into the 20th century, until it was ultimately deemed within the reach of federal statutory civil rights protections. See Nesmith v. Young Men’s Christian Assn. of Raleigh, N.C., 397 F.2d 96 (4th Cir. 1968); and Smith v. Young Men’s Christian Assn. of Montgomery, Inc., 462 F.2d 634 (5th Cir. 1972).
necessity. But the focus now was on socialization, rather than cleanliness. When the public health disadvantages of large pools had become clear, many municipalities interested in fostering better hygiene had abandoned the natatoriums in favor of public showers and smaller individualized bathing units. The advent of better pool sanitation techniques was making it safer to go back into communal waters. But by then, washing and recreation had become unmoored from each other. A subtle but momentous change was underway — a transition away from the bathing pool and towards the swimming pool. The latter, it was hoped, would help introduce us to each other, dissolve our differences, and launch new Americans successfully into the American way. While there were numerous exclusions and limitations still to be cast off (as well as new ones to come), social reformers such as Jane Addams expressly identified public recreational opportunities as a tool for strengthening American “respect for variety.”

Consistent with this theme, as the Progressive Era sailed over the horizon in 1920, a huge new era of water-related recreation followed in its wake. There was a great swell of municipal pool building during the prosperity of the 1920s. This was followed by a surge of federal construction as the economy tanked during the Great Depression. But this was a different sort of swimming, one first anticipated by the 1913 opening of the St. Louis Fairgrounds Pool, which had been unique in its

11 See Contested Waters at 35.

12 See Contested Waters at 97, 107

13 See Contested Waters at 61, citing Addams, Jane, “Recreation as a Public Function in Urban Communities,” American Journal of Sociology 17 (March 1912) at 617. Addams (1860-1935) was best known for her leadership role in the settlement movement of the 1880s-1920s, which created “settlement houses” in poor urban areas, staffed by middle-class volunteers, as part of the reformist effort to alleviate poverty and foster closer ties and increased understanding between those of differing socio-economic status. Co-recipient of the 1931 Nobel Peace Prize, Addams is the author of the classic Twenty Years at Hull-House (1910), which details her experience at the settlement house she founded in the West Side slums of Chicago in 1889. For summary of personal history and career see http://www.britannica.com/EBchecked/topic/5365/Jane-Addams.

14 See Contested Waters at 95 (2,000 municipal pools built between 1920 and 1940); and 91 (“Before 1920, few communities with a population less than 30,000 operated a swimming pool. During the 1920s, however, hundreds of small cities and towns built pools.”)

15 See Contested Waters at 93 (“Between 1933 and 1938, the federal government built nearly 750 swimming pools and remodeled hundreds more. The CWA [Civil Works Administration, a 1933-1934 New Deal program] was responsible for 351 new pools and improvements to 226 others. The WPA [Works Progress Administration, a 1935-1939 New Deal program] built 387 pools and remodeled 128 more. These figures do not include the 1,681 ‘wading pools’ built by the WPA and the Public Works Administration [a 1933-1939 New Deal program] during the same period.”) Wiltse notes that the New Deal swimming pools “had special meaning for many Americans” because they “stood as tangible reminders that the federal government was helping them and their communities cope with the economic and social hardships of the depression.” They were also particularly inviting “psychological and social oases” in the Midwest, which was simultaneously experiencing the severe drought and dirt storms of the 1930s Dust Bowl period. See Contested Waters at 94.
time, but was soon to become the norm. An enormous circular water body, Fairgrounds had an artificial sand beach and — disability skeptics take note — a zero depth entry. It was not located in a slum, but rather sited to attract a broad cross-section of society — including women. But as a consequence, Fairgrounds became not only gender-integrated, but officially racially segregated. In another confluence of race and gender, if white women were coming into the water, black men would need to come out.

Between 1920 and 1940, the sprinkling of “leisure resort” pools had become a flood, transforming the erstwhile narrowly cabined artificial water experience into a much more expansive social activity (at least for those permitted to partake). It also became a much more expansive commercial activity — giving rise to a flourishing pool industry, complete with its own trade associations, publications, and marketing gurus, which nine decades hence would coach the Department of Justice to take a backstroke on accessible pool mandates.

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16 A similar modern trend toward zero depth access was reflected in private pool design in the 1990s. See Intimate History at 68, citing a June 27, 1991 New York Times article on page C1 (“Among the newest fads is the ‘beach entry’ pool, a quasi-natural concrete hole in the ground with a lazy ramp on one side, covered with sand, gradually leading into a free-form pool. Recently the National Spa and Pool Institute rewarded such a ‘Beach Entry Pool,’ located in Phoenix, Arizona, with an award.”)

17 See Contested Waters at 228, n.24 (at the time of the 1913 Fairgrounds opening, “no other U.S. city permitted males and females to swim together in pools. Gender integration did not become common practice in the United States until the mid-1920s.”)

18 In addition to this gender-related trigger, Wiltse also notes that “[t]he onset of racial segregation at municipal swimming pools was part of a larger social and intellectual transformation that occurred in the urban North between the two world wars.” See Contested Waters at 125. A major contributing factor was the Great Black Migration, which brought millions of African Americans from the rural south into Northern cities. This heightened racial tensions, as blacks began to compete with working-class whites for jobs, housing and public services. At the same time, European immigration was declining, and white immigrant families were no longer regarded as quite the “foreigners” they had once been. The newly arrived, often poor, African Americans were now the predominant “other.” Thus a resorting was occurring in American public consciousness, leading to fears of disease and degeneracy becoming more strongly associated with race. Id. at 123-124.

19 See Contested Waters at 92-93 (“Pool building during the 1920s was so robust that it gave rise to a whole new sector of private enterprise. Entrepreneurs started an array of new businesses that specialized in pool construction and manufacture of pool equipment. … This nascent pool industry sponsored a monthly trade publication optimistically titled Swimming Pool Age. The magazine first appeared in 1927 and was marketed to municipal parks and recreation officials and managers of private clubs. Its articles touted the social and economic virtues of swimming pools and instructed readers on proper chlorinating procedures, pool management, and novel marketing strategies. The magazine was also filled with advertisements from the myriad small companies that manufactured and sold pool products.”) See also Intimate History at 104 (“From the mid-twenties onward, pools gradually became the domain of professional builders. The early mansion and playhouse pools were usually part of the overall architectural design of the house and were drawn by the architect and his team. But for the more moderate-sized open-air pools, a pool builder was contracted.”)
This was not bathing or sport, but more like a quasi-seaside experience created by private enterprise. Family groups arrived together to spend lazy hours in the company of neighbors from near and far. The public pool became a place to bask and lounge, to see and be seen. The heavy wet wool female “bathing” costume shrank into the much more revealing “swimming” suit, and poolside crowds became absorbed in bathing beauty contests. Pool operators reflected the whimsy and ambition of the times. St. Louis’s Fairgrounds ran a paddle device that made waves, Pittsburgh’s...
Highland Park channeled a waterfall, and Wilmington’s Price Run Park put a giant foot-shaped pool forward as a venue for residents to tread water and soothe their soles. San Francisco’s Fleishhacker Pool was so big it was patrolled by lifeguards in rowboats.

The interwar years thus offered new options for some Americans to interact with their neighbors across diversity boundaries, and to that extent represented a genuine democratization of pool culture. But of course this was not universally true. The turbulent waters of the modern civil rights era lay ahead, particularly after World War II dramatically exposed the hypocrisy of a society that sent racially segregated troops to fight for freedom. When it comes to identifying the watershed events of the 20th century movement for racial justice, most Americans quite correctly cite to the 1954 *Brown v. Board of Education* decision and the passage of the Civil Rights Act of 1964. But in the pool context, the biggest rapids had already been run well before the 1950s.

21 See *Contested Waters* at 98.

22 See *Contested Waters* at 98.

23 See *Contested Waters* at 98.

24 See *Contested Waters* at 108, 88 (“The resort pools of the interwar years democratized swimming in America and transformed the social composition of swimmers. Millions of new swimmers — including large numbers of females, adults, and middle-class Americans — flocked to them. Gone were the days when working-class boys dominated these public spaces. Most critically, the social divisions that characterized pool use during the Industrial Age largely evaporated during the 1920s and 1930s. Working class and middle class, men and women, and children and adults all swam together.”)

Wiltse attributes this enhanced social integration to factors including: (1) the redesign of pools to include decks and beaches, and their relocation to central community locations, which enhanced pool culture and made it inviting to a broader range of residents; (2) weakening of prejudice against European immigrants, as working-class whites began to appear less poor, dirty and foreign to their nativist neighbors; and (3) formal changes in public policy to permit and encourage gender integration as a way to promote family and community sociability. See *Contested Waters* at 88-89.

25 See *Brown v. Board of Education*, 347 U.S. 483 (1954). In a unanimous 9-0 ruling, the U.S. Supreme Court declared state-sponsored segregation of public schools to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Brown* thus overruled the high court’s previous *Plessy v. Ferguson* decision, which for half a century had given constitutional sanction to “separate but equal” public facilities. See 163 U.S. 537 (1896).

26 See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., Pub. L. 88-352, 78 Stat. 241 (July 2, 1964). Title II of the CRA prohibits discrimination on the basis of “race, color, religion, or national origin” in all places of “public accommodation,” which are defined to include privately owned or operated businesses that offer goods or services to the public. The CRA thus extended into the private sector, by statute, the federal constitutional prohibition against government entity discrimination afforded by the Fourteenth Amendment.

By the 1930s not only was there no racial integration in the water — there wasn’t even “separate but equal.”27 Despite the clear (albeit odious) dictates of the U.S. Supreme Court’s 1896 *Plessy v. Ferguson* decision, many municipalities failed to offer any swimming opportunities to blacks, or offered such grossly disparate facilities or practices that constitutional violations were clear.28 While there had been some organized public protest early in the leisure resort period,29 in many instances fear of violence and reprisals poured cold water on racial justice challenges during the 1930s and early 1940s.30 The NAACP Legal Defense Fund was prioritizing anti-lynching and 1968 (which extended racial fair housing guarantees into the private sector, with resulting impact on neighborhood demographics throughout the country).

27 As to “separate but equal,” it is also worth remembering the special presence of pools in that particular tributary of American history, a development that springs from the unique constitutional standing of the District of Columbia as the nation’s capital. The federal Constitution grants Congress, among other enumerated powers, exclusive jurisdiction over “the seat of government” of the United States. See U.S. Const, art. I, § 8 (1787). The federal legislature exercised this power directly until the passage of the District of Columbia Home Rule Act of 1973, Pub. L. 93-198, 87 Stat. 774 (Dec. 24, 1973), which delegated much of this congressional authority to a D.C. local government structure. Thus, up to and through the modern civil rights era, Congress was responsible for funding D.C. recreation programs as part of its administration of the District.

This power came under intense scrutiny in 1925 and 1926, during the debate and ultimate passage of what was referenced in contemporaneous news articles as the “Bathing Pool Bill.” See Pub. L. 69-174, 69 Cong. Ch. 234, 44 Stat. 394 (May 5, 1926). Specifying the construction of two facilities, “one pool for the white race and the other for the colored race,” this law added the formal imprimatur of the federal legislative and executive branches to the “separate but equal” doctrine espoused by the judicial branch in the *Plessy* decision. See also *Contested Waters* at 142-143.

28 Some *Plessy* violations took the form of outright exclusion. See *Contested Waters* at 146 (“Unlike large cities, smaller communities could rarely afford to build separate pools for black residents. They either had to permit them to swim with whites, set aside separate days, or exclude them entirely. Most one-pool towns, especially those in the southern tier of northern states, chose exclusion, even though doing so clearly violated state civil rights laws and the Supreme Court’s ‘separate but equal’ interpretation of the Fourteenth Amendment.”)

Other *Plessy* violations took the form of more stringent requirements. For example, on opening day in 1931 at Pittsburgh’s Highland Park, black swimmers were asked to produce a “health certificate” at the pool gate, an indignity that white swimmers were of course spared. See *Contested Waters* at 126.

29 There had been resistance to racial discrimination as of 1913, when it was first announced that the new Fairgrounds pool in St. Louis would exclude blacks. A planned effort by young swimmers of color to rush pool attendants and dive into the water on opening day was foiled when law enforcement learned of it in advance. The subsequent prospect of an alert police presence, combined with a hastily constructed perimeter fence, forced abandonment of the plan. The early emblem of leisure pool bathing, Fairgrounds was not racially integrated until the 1950s, just a few years before it was closed for financial reasons. See *Contested Waters* at 85, 180.

30 See *Contested Waters* at 146.
educational rights advocacy during this period, and for the most part the expense of private lawsuits deterred litigation.31

But not so in Newton, Kansas, where a legal fight to racially integrate the Athletic Park Pool began in the mid-1930s. In developments that find remarkable parallels in current day business and public reaction to ADA lawsuits, the subsequent litigation focused not on the discriminatory barriers — which were clearly illegal — but rather on the role and motives of the plaintiff. In the Kern v. City of Newton litigation that stretched from 1936 to 1940, the Kansas Supreme Court first determined that a private plaintiff could sue only for himself, and not for other swimmers.32 The state high court then ruled that the plaintiff had not actually presented himself at the pool to demand admission. Regardless of whether the policy was illegal, and regardless of whether he was desirous of or deterred from the waters, he was not a bona fide swimmer — and thus, no actionable discrimination had occurred.33

There were other equally slippery defense efforts to divert attention away from the discrimination itself. Cities began to cast upon their waters a shallow veneer of “privatization,” leasing municipal pools to private parties in an effort to circumnavigate integration obligations. But in general these efforts failed, as courts held cities responsible for ensuring constitutional compliance even when they delegated pool operations to private businesses. During the 1940s this particular bait-and-switch was judicially invalidated as to pools in Newton, Kansas (1940),34 Montgomery, West Virginia (1948)35 and Warren, Ohio (1948).36

31 See Contested Waters at 146.

32 Through the sale of municipal bonds authorized in 1934, the City of Newton had raised funds to construct a municipal pool. But only whites were permitted to swim, and no alternative facilities were offered to blacks. Newton resident D.E. Kern, a “negro taxpayer,” filed an original writ of mandamus in Kansas state court, alleging state and federal constitutional violations. Focusing on the threshold question of whether a private plaintiff could even bring such an action, the Kansas high court ruled that Mr. Kern had the right to pursue his case. However, the court also ruled that he was entitled to pursue the matter only “in his own behalf,” not on behalf of all Newton swimmers of color, as he had requested. See Kern v. City Commissioners of City of Newton, 141 Kan. 471, 77 P.2d 954, 959 (Apr. 9, 1938). The Kern case is discussed in Contested Waters at 146-152.

33 See Kern v. City Commissioners of City of Newton, 151 Kan. 565, 100 P.2d 709, 714 (Apr. 6, 1940), rehearing denied May 10, 1940 (“It can hardly be said that all conditions precedent to the issuance of the writ [of mandamus] in this case have been complied with when it is denied that plaintiff ever presented himself at the pool and demanded to be admitted to it.”). See also Contested Waters at 146-152. Wiltse further notes that — despite years of litigation — Athletic Park Pool was not actually racially integrated until 1951. See Contested Waters at 241, n.100.

34 Anticipating the legal challenge that became the Kern case, Newton had quickly leased the Athletic Park Pool to “one Harold Hunt,” a private operator. During its second Kern consideration, the Kansas high court considered the argument that “if Hunt prevented the plaintiff from swimming in the pool he was not acting for the city, but in his own individual capacity as lessee of the pool.” Kern, supra, 100 P.2d at 713. The court rejected this argument, holding that “the lease here between the city and Hunt is nothing more than an arrangement whereby Hunt manages the pool for the city.” The court emphasized that “[i]t would not do to hold that the city officials could evade any of their official obligations or take away from this pool any of its characteristics by entering into a lease with Hunt.
By the early 1950s, even given the continued validity of the *Plessy* “separate but equal” doctrine, black swimmers were winning legal victories and real-world access to pools in communities that failed to offer them comparable facilities. In the *Draper v. St. Louis* case, a federal judge ordered the integration of Fairgrounds and other facilities as of mid-summer 1950. And across the country, public sentiment and citizen action were prompting racial desegregation even without the need for litigation. The U.S. Supreme Court’s 1954 *Brown v. Board* decision certainly affected pool litigation still in mid-stream at the time — for example in Maryland, where city pools were ordered integrated by

Furthermore, when the city leased the pool to Hunt, regardless of the terms written into the lease, it was presumed that the pool would be operated in accordance with all the provisions of the statute and the constitution. Among these provisions was one that the public generally would be admitted to the pool.” *Id.*

35 See *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W. Va. 1948). The City of Montgomery, West Virginia, having floated several bond issues in the early 1940s, used the resulting funds to construct what was in effect a “public” pool. But prior to its 1946 opening, the pool was leased to the Montgomery Park Association, a private operator. The city was sued after the Association refused to admit black swimmers. A federal district court ruled in 1948 that “the refusal by the Montgomery Park Association to admit plaintiff to the swimming pool was an exercise of governmental power by the City of Montgomery and as such was in violation of plaintiff’s rights under the Constitution of the United States.” *Id.* at 1010. See also *Contested Waters* at 160-166.

36 See *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E. 2d 82 (Ohio Ct. App., 7th Dist., Jul. 6, 1948). Using municipal and federal funds, the Warren, Ohio, pool opened in 1934. It was successfully racially integrated until 1940s, when some white citizens began to abandon Warren in favor of the segregated pools of neighboring communities. Black leaders declined subsequent proposals to restrict black use of Warren to one day a week so that white swimmers would return. Concluding that the only solution would be segregation, for the 1947 season the city leased the Warren pool to a private corporation called the Veterans Swim Club. As anticipated, the VSC excluded blacks. In the resulting lawsuit, an Ohio appellate court held that “The refusal of the Veterans Swim Club to admit plaintiffs and other colored persons to the swimming pool was an exercise of governmental power by the City of Warren and as such was in violation of plaintiffs’ rights under the Constitution of the United States.” *Id.* at 397. See also *Contested Waters* at 159-162.

37 See *Draper v. City of St. Louis*, 92 F. Supp. 546, 549-550 (E.D. Mo. 1950)(“The public policy of separation of the races in the use and enjoyment of open-air swimming pools in the City of St. Louis must rest, if a legal basis is to be found[,] solely on equality in fact of privileges.”) The vague hope of yet-to-come swimming opportunities at yet-to-be-built facilities was not sufficient for the *Draper* court: “The completion by defendants at some future date, and restriction to use of members of plaintiffs’ race, of an open-air swimming pool in some other part of the City, is no answer to plaintiff’s present claim of their constitutional rights.” *Id.* at 550. The solution was clear: “Plaintiffs are entitled to redress of denial of their constitutional rights now.” *Id.* at 550. See also *Contested Waters* at 176-179.

38 See, *Contested Waters* at 158 (“Between 1945 and 1955, progressive-minded Americans, both black and white, challenged racial discrimination at municipal pools throughout the northern United States. The protests were local in orientation, but national in scope. … By the mid-1950s — the period when most accounts say the civil rights movement began — local protesters and plaintiffs had successfully desegregated municipal pools throughout the northern United States.”)
the 1955 *Dawson v. Baltimore* federal appeals court decision, which expressly extended *Brown* out from the educational context into recreation.\(^{39}\)

But the course of American civil rights history has never run smooth. By the 1950s the law was on their side, but proponents of public pool integration were facing other challenges. Formal endorsement of racial discrimination was ending, but many white Americans simply did not wish to swim with blacks.\(^{40}\) This led to a surge of pool shut-downs — some the result of organized protests, but most an outgrowth of individual patron behavior (albeit heavily influenced by public policies).

In some communities, pools were officially closed to avoid integration — after all, equality could be achieved if blacks and whites were equally excluded from the water.\(^{41}\) This was also, of course, a strategy designed to encourage “blame the victim” sentiments — sentiments that find

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\(^{39}\) Demonstrating an increasing willingness and ability to devote advocacy resources to issues other than lynching and education, NAACP lawyers participated as plaintiff counsel in the Baltimore case, which was filed in 1952. The first major decision it generated was *Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954). The July 1954 *Lonesome* ruling was issued by a federal trial court three months after the May 1954 *Brown* decision. But while the trial judge acknowledged and discussed *Brown*, he also acknowledged Maryland and federal Fourth Circuit precedent that specifically sanctioned segregation in public recreation, and given that precedent declined to extend *Brown* beyond its education context. On appeal the Fourth Circuit had no such qualms, ruling that its own prior *Plessy*-based decision and the Maryland precedent in the recreational context were now invalid in light of the U.S. Supreme Court’s new decision. The federal high court itself quickly affirmed this appellate ruling. See *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 386 (4th Cir. 1955), *aff’d per curiam* at 350 U.S. 877 (1955). Thus — as hoped and feared, respectively, by its proponents and opponents — the effects of *Brown* quickly began to ripple out from the educational context into all other aspects of American life. See also Contested Waters at 155-158.

\(^{40}\) See Contested Waters at 205.

\(^{41}\) This strategy was used even prior to the 1954 *Brown* decision. For example, the District of Columbia responded with a permanent pool closure in 1940, to avoid expanding access to swimmers of color after demographic shifts brought black residents into previously white neighborhoods. See Contested Waters at 145-146. In response to its integration dramas, the Warren, Ohio, pool was closed to all swimmers in the summer of 1945. *Id.* at 159. After the *Lawrence* court ordered desegregation in 1948, city officials in Montgomery, Virginia, “closed the pool and kept it closed until 1961. For fourteen years, the unused pool stood as a conspicuous reminder of the city’s racial divide.” *Id.* at 165.

The legality of such pool closures themselves became the subject of litigation. In 1971, a divided U.S. Supreme Court held that pool closures, and more specifically the motivations behind them, were beyond the reach of the federal constitution. See *Palmer v. Thompson*, 403 U.S. 217 (1971). But while it is not yet explicitly overruled, more recent case law suggests that *Palmer* has lost much of its precedential force. See, e.g., *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989) “[The Supreme Court has never expressly overturned *Palmer*, but it has all but done so. Time and again over the past two decades, the Court has held that facially neutral laws may run afoul of the Equal Protection Clause if they are enacted or enforced with a discriminatory intent. *E.g.*, *Washington v. Davis* [426 U.S. 229, 244 n.11 (1976)] (“To the extent that Palmer suggests a generally applicable proposition that legislative purposes is irrelevant in constitutional adjudication, our prior cases ... are to the contrary.”)"

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parallels today, as patrons without disabilities bemoan the lost swim time necessitated by access modifications, and fret over the potential loss of swimming facilities that vow to go out of business rather than fully accommodate American diversity.

But in most communities, it was not outright pool closure that changed the waters, but rather millions of individual decisions. Though really, it was not that simple, because these decisions were channeled by powerful public policy choices at the confluence of race, socio-economic and veterans status — choices that laid the groundwork for a dramatic remaking of the American landscape, and that ripple through our communities and our pools to this day.

As is so often the case, this sea change began when America found itself at the intersection of opportunity and danger. Victory in World War II meant that troops previously devoted to the fight could now be redeployed to other pursuits. But welcome though it was, the task of successfully assimilating 16 million men (and a substantial number of often forgotten women) under arms back into civilian society was daunting. Where would they go? What would they do? And how could they afford to do it?

The answer — which is now almost universally recognized as one of America’s best ideas, notwithstanding its enormous economic cost — was the G.I. Bill, which offered two key benefits eventually reflected in the nation’s pools. The first was an educational entitlement, which improved the earning power and standard of living of a substantial stratum of society. The second was a housing benefit, which was integral to the creation of the modern American suburb. The changes wrought by the G.I. Bill would be further facilitated by increased attention to the home mortgage interest deduction, and the creation of the interstate highway system.

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The care and follow-through that the nation displayed in welcoming home her World War II veterans stands in contrast to promises broken to survivors of earlier conflicts. See Dickson, Paul and Allen, Thomas B., The Bonus Army: An American Epic (2006).

43 Though often believed to be of more modern vintage, the home mortgage interest deduction was created in 1913, when the Sixteenth Amendment to the U.S. Constitution granted Congress the power to levy an income tax. See U.S. Const, amend. XVI (1913). The federal legislature responded by creating an assessment that included this deduction, among others. See 26 U.S.C. § 163(h). As the American Dream became entwined with suburban life in the second half of the 20th century, the mortgage interest deduction gained importance and became increasingly associated with fostering homeownership. See Crabgrass Frontier at 190-218, and further discussion at “Who Needs the Mortgage Interest Deduction” by Roger Lowenstein, New York Times (March 5, 2006), available at http://www.nytimes.com/2006/03/05/magazine/305deduction.1.html?_r=1&pagewanted=print

44 The U.S. interstate highway system was an enormously ambitious public works project intended to establish and ensure a well-constructed and maintained network of American roadways. See, Federal-Aid Highway Act of 1956, Pub. L. 84-627, 84 Cong. Ch. 462, 70 Stat. 374 (June 29, 1956). Signed into law by President Dwight D. Eisenhower, it was billed as a means to redress
But while the G.I. Bill and changes to American financing and infrastructure gave millions of Americans the means to flee from urban centers on a rising tide of prosperity, the end of *de jure* racial segregation provided a primary incentive. The 1954 *Brown* decision prompted another wave of flight, dramatically transforming the diversity composition of the nation’s communities as Americans yet again resorted themselves. The inner cities were left to poor people of color. The wealthy and white would henceforth make their homes on the outskirts.

The effect on communal bathing was quick and clear: the grand age of the municipal pool was over. Vast shoals of white bathers retreated from ostensibly “integrated” pools, leading to patronage and revenue deficits. Public pools fell into disrepair, and closed in large numbers for financial reasons. Poor swimmers, who in a mid-century confluence of race and socio-economic status were often swimmers of color, were left high and dry.

Though not entirely, because some publically operated pools remained part of the American landscape. Municipal pools were also given reconsideration as an option for dampening the heightened racial temperature of the Great Society period. Indeed, availability (or lack) of public waters was in play not only in reaction to the race riots of the 1960s, but as a trigger for them. Urban populations sweltered during the weeks of long summer sunlight, high heat, and relentless humidity. In the absence of pools, inner city youth took to opening fire hydrants to cool off. As in other cities, this was illegal in Chicago, which experienced three days of intense violence after police were attracted to the scene of water gushing through the streets on a hot mid-July afternoon.

This 1966 Chicago “fire-hydrant” riot prompted President Lyndon B. Johnson to announce the availability of federal “anti-poverty” grants to build swimming pools for “disadvantaged youth.” Pool money was quickly channeled to forty metropolitan areas around the country. But unfortunately,

inadequacies in the nation’s homeland security defenses that had been exposed in 1919, when a U.S. Army Transcontinental Convoy (notably including then-Lt. Colonel Eisenhower) needed 62 days to travel from Washington, D.C. to San Francisco. See Swift, Earl, *The Big Roads: The Untold Story of the Engineers, Visionaries, and Trailblazers Who Created the American Superhighways* (2011). See also Crabgrass Frontier at 248-251.

45 As Wiltse notes, this was a class shuffle, as well as a racial resorting. See *Contested Waters* at 195 (with the advent of socially exclusive suburban “club pools,” swimmers were redivided along class lines, and “Americans from different social classes once again swim and socialized at different pools.”)

46 See, *Contested Waters* at 180 (“Beginning in the mid-1950s, northern cities generally stopped building large resort pools, and let the ones already constructed fall into disrepair. They became decrepit monuments of a bygone age when tens of millions of white Americans spent their summers swimming and suntanning at municipal pools.”); and at 184 (“Whereas cities opened thousands of pools during the interwar years, they built relatively few between 1945 and 1960. … In addition to not building new pools, many cities closed existing ones — especially those serving minority swimmers — and underfunded maintenance.”). Wiltse offers examples of pool closures in Philadelphia (post-1954); Kansas City (1957); and Washington, D.C. (post-1962). *Id.* at 184-185.

47 See *Contested Waters* at 185-187.

48 See *Contested Waters* at 187-188.
this second tide of municipal pool construction was not nearly as powerful as the interwar public commitment to community recreation had been.49

Meanwhile, in the newly created suburbs, the “swim club” was making its resurgence as a 20th century institution. Certainly there were multiple motives behind this movement. Clubs were a means of binding the new suburban communities together, and they provided an opportunity for organized water activities that required large numbers of people.50 But mostly, clubs were a means to accomplish what the Brown decision and the Civil Rights Act now decreed to be illegal — keeping blacks out.51 In many cities, increasing de facto segregation was all that was needed to keep club waters restricted. Residency requirements and membership fees effectively replaced formal “whites only” policies.52

But in places where eligible black suburbanites sought entry, a modern examination of the concept of “private” — one with enormous relevance to today’s pool inequities — ensued. Ultimately, in rulings reminiscent of the earlier cases involving municipal ownership “transfers,” the courts — most prominently the U.S. Supreme Court in Sullivan v. Little Hunting Park (1969)53 and Tillman v.

49 See Contested Waters at 189-193.

50 See Contested Waters at 194 (“Swimming pools served a vital social function in the nation’s burgeoning suburbs. These new communities lacked the social bonds that knit older communities together. Neighbors did not know one another, nor did they necessarily share the same ethnic or religious heritage. Furthermore, single family homes in sprawling suburbs best navigated in a car tended to isolate families from their neighbors. This spatial arrangement afforded residents desired privacy, but that privacy could turn into isolation. Swimming pools brought suburban families together. They were one of the few civil spaces where suburbanites could socialize and integrate themselves into the community.”)

51 See Contested Waters at 195 (“The primary appeal of club pools … was the assurance of not having to swim with black Americans.”)

52 See Contested Waters at 195 (“Suburbanites organized private club pools rather than fund public pools because club pools enabled them to control the class and racial composition of swimmers. … Class exclusion was achieved through residency requirements and membership fees. Many pool associations mandated that most or all members had to live within a certain distance of the club or within a particular subdivision. This limited the social makeup of the membership to the social makeup of the community. The typical $200 membership fee and $30 annual dues reinforced the residency requirement by restricting membership to families earning a middle-class income.”)

53 The Sullivan lawsuit was brought against a private Virginia corporation that operated a swim club for Fairfax County residents within a specified geographic area. Mr. Sullivan, a white resident, rented his home to the Freeman family, who were the first African American residents in the relevant neighborhood. Pursuant to general Park policies, homeowners were entitled to assign their club membership to tenants — with the approval of the board of directors. The board disapproved the assignment to the Freemans on the basis of race, and revoked Sullivan’s own membership when he protested the discrimination. He then initiated a lawsuit that quickly became focused on whether Little Hunting was a “private social club” exempt from the reach of civil rights mandates. In 1969, the U.S. Supreme Court held that the Park had illegally interfered with Sullivan’s right to “lease” his membership. See Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). The ruling was grounded in a
Wheaton-Haven Recreation Association (1973)\textsuperscript{54} — recognized that the sheen of “private” enterprise cannot be used to subvert access to institutions that are, for all intents and purposes, “public.”\textsuperscript{55} For democratic capitalism to flourish, a private concern that invites people through its doors must truly open those doors to everyone.

\textsuperscript{54} The Tillman case similarly involved a “private” swimming pool association that was limited to residents of a given area in Silver Springs, Maryland. The case involved both white (the Tillmans) and black (the Presses) homeowners, who protested the denial of membership or guest benefits on the basis of race. Again, the litigation probed the boundary between truly intimate associations (where government cannot interfere), and establishments which — while “private”— have expansive or commercial characteristics that trigger nondiscrimination mandates. In its 1973 decision, the high court ruled that an organization serving a specified neighborhood is not a “private club,” and thus must comply with the Civil Rights Act of 1964. See Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973).

In an interesting illustration of the swelling backyard recreation phenomenon, while the Presses ultimately won the right to join the club, they never did so. By 1973 they had built their own pool. However, to honor the principles of their fight, and the strong bond they had formed with their co-plaintiffs, the Presses “made a special event of ‘integrating’ the residential pool by throwing the Tillmans’ daughter into it fully clothed.” See Contested Waters at 196-198, 250 nn.68-78 and especially 198 (quoting “After Five Years, Humiliation Still Recalled,” Washington Post at A-12 (Feb. 28, 1973).

\textsuperscript{55} There has also been successful litigation against privately operated clubs that ban Jews, with rulings that such anti-Semitism violates the Civil Rights Act of 1964. See, e.g. People v. Ocean Club, Inc., 602 F. Supp. 489, 496 n.8 (D.C.N.Y. 1984)(applying mandate for nondiscrimination on the basis of religion to club that offered “Ocean Bathing, Large Pool, Kiddie Pool,” among other amenities.)

In contrast, the U.S. Supreme Court has ruled that Boy Scouts of America has the constitutional right to discriminate on the basis of sexual orientation (which currently has no federal “public accommodation” statutory protection). See Boy Scouts of America v. Dale, 530 U.S. 640 (2000). But legal questions nevertheless remain as to scouting operations of pools. Two months after the Dale decision, lesbian and agnostic parents asserted both federal and California state constitutional claims against the City of San Diego. The City had a lease agreement with a non-profit charted by the BSA, which permitted the non-profit to offer amenities including a swimming pool in Balboa Park. Given the Dale decision, a critical issue was whether this governmental involvement triggered constitutional protections. The federal trial court hearing the Balboa Park case found constitutional violations. See Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). On appeal, the Ninth Circuit determined that the plaintiffs had legal standing to pursue their case, but requested the assistance of the California Supreme Court as to state constitutional issues. See Barnes-Wallace v. City of San Diego, 607 F.3d 1167 (9th Cir. 2010). The California high court declined involvement in the Barnes-Wallace case. See Barnes-Wallace v. City of San Diego, S185299 (certification denied Oct. 10, 2010). It is likely that similar constitutional claims will be raised again other cases.
But even as the suburban swim clubs were being forced to acknowledge their quasi-public character, there was another major bend in the American swimming saga. Because the option of having a truly private pool — erstwhile the province of the super-rich — was now trickling down into the middle class. Back in the 1910s the mega-wealthy, in their continued quest for status symbols, had first opened the door to outside bathing, using pools to enhance their spacious grounds and enrich their garden parties.\(^6\) In the early 20th century the chance to own such amusements had gradually seeped west. Hollywood in particular got into the act as lavish outdoor pools became mainstream in entertainment circles, sparkling in the sun next to Southern California mansions.\(^7\)

But prohibitive costs still kept residential pools limited to the most rarified strata of society. This would change after World War II, when the prosperity that led to suburbanization laid the foundation for a flood of pool building. The middle class now had the space and the income to dabble in backyard pools.\(^8\) Pools were also made more affordable by new building techniques,\(^9\) as well as changes to banking practices that reclassified pools as “home improvements,” thus enabling loan financing for their construction.\(^10\) In 1950, there were only 2,500 residential pools in the United

\(^56\) See Contested Waters at 102; and Intimate History at 100.

\(^57\) See Contested Waters at 102. See also Intimate History at 98 (“Outdoor pools were not terribly practical in the hostile New England climate. As water heating systems became more and more sophisticated, the outdoor pool gained favor, but it never achieved the same popularity as in California or Florida.”)

In another notable diversity twist, as it happened “the foremost swimming pool architect of the West Coast” was a woman: Julia Morgan (1972-1957). See Intimate History at 117, and 115 (identifying Morgan as “the nation’s (if not the world’s) first major woman architect”). Morgan’s pool projects were made possible in large part through the backing of another woman: Phoebe Apperson Hearst. Now perhaps best remembered as the mother of William Randolph Hearst, she introduced her son to the young female architect who would go on to build, for his private use, the Hearst Castle at San Simeon, California. But the elder Hearst herself was deeply committed to more public construction projects, many of which involved collaboration with Morgan. See Intimate History at 115 (“Early in her career as a promoter of women’s position in American life, especially academic life, Mrs. Hearst had compiled an enviable record as a patron of architecture, particularly with regard to gymnasia and swimming pools for the Young Women’s Christian Association.”). A substantial benefactor of the University of California, Berkeley, Hearst was also memorialized by her son in U.C. Berkeley’s Phoebe Apperson Hearst Memorial Gymnasium for Women at the University of California at Berkeley, a Morgan-designed facility completed in 1925-1926. Id. at 117.

\(^58\) See Intimate History at 179 (“The privilege once reserved for the millionaire and the movie star was to become the right of the middle class: the private pool became the family pool”); and Intimate History at 180 (family pools were “absorbed, together with the station wagon and the barbecue, into the family-values complex of the virtuous bourgeois.”)

\(^59\) See Contested Waters at 200 (“The ‘Gunite method’ enabled builders to spray a concrete mixture of dry sand, cement, and water through an air-pressurized hose into a steel-meshed cage formed in the shape of the pool. At $3,000, to $4,000, many middle-class Americans could afford a Gunite pool.”)

\(^60\) See Contested Waters at 200 (“Prior to the 1950s, banks generally refused to loan money for at-home pools. The lack of financing meant that only those people who could pay the full cost of the pool upfront could afford to buy one. During the 1950s, however, banks reclassified pools as
States. By 1955 there were more than 25,000. The numbers would swell into the millions by the end of the century.\footnote{See Contested Waters at 199 (offering statistics in support of the observation that “[o]ne of the definitive symbols of the leisure class had suddenly become accessible to the middle class.”) Wiltse further notes that “[a]fter the 1960s, residential pool building fluctuated with the ups and downs of the American economy” — ebbing during the “stagflation” of the 1970s, then swelling with the boom times of the 1980s and 1990s. But as is wont to happen in a capitalist society, even as economic challenges slowed construction, they also prompted the pool industry to respond with less expensive alternatives — a feat made easier by continued advances in pool design and technology. See Contested Waters at 202-203.}

Natural water swimming continues, of course. And while our commitment to the large public recreation spaces of the interwar period has ebbed, public pools are still being run by municipalities, public universities, and other civic institutions. Nevertheless, there has been a growing American penchant for “private” bathing, as private enterprise has increasingly absorbed responsibility for providing swimming opportunities.\footnote{In addition to tracing the history of how this came about, Wiltse also offers an editorial comment on its effect on American society — one that perhaps helps to explain why so many Americans, as well as their Department of Justice, seem undisturbed by the enormous delay in welcoming people with disabilities into the modern American pool. See Contested Waters at 205, 6 (“The proliferation of private swimming pools after the mid-1950s, however, represented a retreat from public life. Millions of Americans abandoned public pools precisely because they preferred to pursue their recreational activities within smaller and more socially selective communities. Instead of swimming, socializing, and fighting with a diverse group of people at municipal pools, private-pool owners fenced themselves into their own backyards. The consequences have been, to a certain extent, atomized recreation and diminished public discourse.”). Wiltse finds much the same opinion in a 1991 New Yorker article, which he cites for the proposition that “closing of municipal pools significantly degraded the quality of community life” in New York City. See Contested Waters at 193, citing “The Talk of the Town” in New Yorker (August 5, 1991) at 23-23.}

Many Americans now swim mostly in residential pools, neighborhood swim clubs, gyms or hotels. As a direct result of our historical choices, these “private” waters are now our “public” swimming venues. And if they are not accessible to all — including those with mobility disabilities — we have failed to achieve the full integration and diversity that is our collective goal.

And here, perhaps, is the place to find the confluence with disability — though of course it has been there all along throughout this history. There are many ways to acquire a mobility disability: through combat injuries, industrial or car accidents, genetic or birth conditions, infectious agents, age-associated medical events, the list goes on. But since we are under a summer sun, and reflecting on water, for simplicity let’s focus on just one cause: poliomyelitis.
An ancient disease, polio is still abroad in the world, though no longer wild in the Western Hemisphere. But while ancient, its most dramatic history is an American one — and one particularly intertwined with our swimming pools.

Before 1900, polio was at the margins of public concern in the United States. While the germ theory of disease was gaining prominence in public health policy — with resulting impact on public bathing — polio was simply not a major problem, relative to the other epidemic diseases that visited American communities during the Industrial Revolution and the Gilded Age. Indeed, until the end of the Gilded Age, polio was not an epidemic disease. This changed profoundly in 1916, when the U.S. experienced its first major outbreak of the disease. From there, the 20th century witnessed a

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63 The last U.S. case of wild polio was recorded in 1979. The last wild case in the Americas as a whole dates from 1991, when a 3-year-old Peruvian boy named Luis Fermin Tenorio contracted the disease. The Americas (including the U.S.) still report perhaps 6-10 polio cases annually, but they are either imported or vaccine-related. See Wilson, Daniel J., Biographies of Disease: Polio (2009)(hereafter Bio) at 154; Black, Kathryn, In the Shadow of Polio: A Personal and Social History (1996)(hereafter Shadow of Polio) at 256.

64 These included bacterial illnesses whose virulent effects can be correctly linked to poor sanitation and population pressures, such as cholera and typhus. They also include viral illnesses such as influenza, measles and yellow fever. See Bio at 4.

65 In contrast to many other epidemic illnesses, polio is now understood to have a correlative (rather than inverse) relationship with good sanitation. It was not epidemic throughout most of human history precisely because poor sanitation made it so ubiquitous. While polio led to some instances of disability and death in past centuries, routine worldwide exposure in infancy and early childhood resulted mostly in no or mild symptoms, creating a widespread, lasting immunity to more virulent effects in human populations. Polio became epidemic only in modern times, when sanitation improved to the point where endemic polio was reduced or eliminated. See, e.g., Oshinsky, David M., Polio: An American Story: The Crusade that Mobilized the Nation Against the 20th Century’s Most Feared Disease (2005)(hereafter Polio) at 31 (“What Americans could not foresee was that their antiseptic revolution brought risks as well as rewards. As the nation cleaned up, new problems arose. There was now a smaller chance that people would come into contact with dangerous microbes early in life, when the infection was milder and maternal antibodies offered temporary protection. In the case of polio, the result would be more frequent outbreaks and a wider range of victims.”) See also Finger, Anne, Elegy for a Disease: A Personal and Cultural History of Polio (2006)(hereafter Elegy) at 46.

66 Technically, the first recorded U.S. polio epidemic occurred in 1894 near Rutland, Vermont. This outbreak met the scientific definition, which focuses on significant deviation from past experience as a hallmark of epidemic disease. However, the overall number of cases and the public awareness of the Rutland outbreak were modest. See Polio at 11; Shadow of Polio at 24; and Elegy at 42-44. The 1916 epidemic, in contrast, was much more dramatic, including almost 30,000 reported cases nationwide, with 6,000 fatalities. See Elegy at 40-42; Polio at 16-22; Shadow of Polio at 24; and Gould, Tony, A Summer Plague: Polio and its Survivors (1995)(hereafter Summer Plague) at 2-28. But while undoubtedly significant, the 1916 polio epidemic was also soon eclipsed in public consciousness by the vast carnage of World War I, and the contemporaneous and even more deadly influenza pandemic of 1918-1919. For further discussion of the flue pandemic, see http://www.britannica.com/EBchecked/topic/287805/influenza-pandemic-of-1918-19.
pattern of summer epidemics that would ebb and flow throughout the next 40 years, generating reactions that still have implications in the 21st century.  

As an avatar for disability generally, polio serves well in many regards. The American polio experience reflected an often uninformed and unreasoning dread of disability that stays with us to this day. The medical equipment and devices used to address polio and its affects took on a life of their own, replete with complex associations and connotations that overshadowed the people who used them. This was particularly true of the “iron lung,” which became an icon of the times.  

67 A third of the 1916 polio cases were in New York City, which addressed the outbreak through a series of practices that would influence not only disease-consciousness, but disability-consciousness. These included practices of quarantine, house-to-house inspection, and obligations to produce “health certificates” when crossing jurisdictional borders. See Polio at 16-22; and Summer Plague at 2-28.

While to some extent and in some instances the responses were merited as a method of addressing acute contagious illness, these practices also reflected and introduced dark undercurrents of prejudice and discrimination into American public health policy. Because outbreaks were perceived to be most significant in urban areas, with their racially diverse, poor and immigrant populations, disease and disability came to be associated in the public mind with poverty, squalor, and justified second-class citizenship. The errors of fact were later corrected. It was ultimately understood that while urban outbreaks did have the largest impact as far as overall numbers (as large numbers of people lived in cities), the relative impact was much more evenly distributed, affecting rural and sparsely populated areas, and wealthy and white communities, with as much, and sometimes more, force. The errors of association, unfortunately, often still endure. Id.

68 See Shadow of Polio at 74. More technically known as a tank respirator, the iron lung was used to address bulbar polio, which affects the motor neurons that control breathing. Operating as a negative pressure ventilator, it adjusted air pressure within the tank to create air flow in and out of the lungs. It was regarded as “both a lifesaver and a death trap, combining ‘durability and awesome power’ with ‘dread and revulsion.’” See Polio at 296 n.3 (quoting Rothman, David, “The Iron Lung and Democratic Medicine” in Beginnings Count: The technological Imperative in American Health Care at 42-66 (1997)). See also Summer Plague at 90-91.

Such was the celebrity of the device that crowds lined up to see it in the Hall of Science at the 1933-34 Chicago World’s Fair; the eponymous hero of the “Dick Tracy” comic raced a child to its embrace in one of the strips; and newspaper cartoonists “showed it resuscitating defeated politicians, as well as the deflated currency of 1933.” See Shadow of Polio at 74.

Some people contracting bulbar polio needed tank respirator breathing assistance only during the acute phase of the disease. Others, however, used iron lungs and other respirator assistance thereafter. And while inconceivable to many Americans, they could and did live full and productive lives — though it took imagination and determination to confront the many attitudinal and architectural barriers that society put in their path. A prominent example is Ed Roberts (1939-1995), who contracted polio at age 14, and nevertheless went on to acquire university degrees, marry and parent a child, work at challenging jobs (including a 1975 political appointment as the director of the California Department of Vocational Rehabilitation), and become an early disability rights leader. See Pelka, Fred, The ABC-CLIO Companion to the Disability Rights Movement (1997)(hereafter ABC-CLIO) at 266-268; Shapiro, Joseph P., No Pity: People with Disabilities Forging a New Civil Rights Movement (1993)(hereafter No Pity) at 41-55; and New York Times obituary available at http://www.nytimes.com/1995/03/16/obituaries/edward-v-roberts-56-champion-of-the-disabled.html.
fostered new approaches to public health policy and health care, including health insurance. And it was strongly associated in the public mind with children — hence its erstwhile designation as “infantile paralysis” — and thus helped to endorse and perpetuate enduringly paternalistic responses to disability.

And it left its mark on summer, and affected our public swimming culture. Polio was the interloper in the season of sunlight, anticipated with the language of fear, and greeted with panic. People fled from each other, and from public spaces, and avoidance of water became a key polio

His legacy is evident at the Ed Roberts Campus, an accessibly designed building which opened in Berkeley, California in 2010, and which houses the offices of seven partner agencies that share a common history in the Independent Living Movement of People with Disabilities, including the offices of the Disability Rights Education & Defense Fund (DREDF). See further discussion available http://edrobertscampus.org/index.php.

The National Foundation for Infantile Paralysis (NFIP), founded in 1930s, quickly became one of the most innovative, successful and visible organizations of the 20th century, pioneering approaches to medical research, health care treatment and nonprofit fundraising that broadly inform all those activities to this day. NFIP sponsored and funded systematic efforts to unravel the mysteries of the disease, influencing the nation’s scientific priorities. See Polio at 64-65.

NFIP also created an interlaced national and local presence, developing and supporting a systematic approach to polio treatment across the country, and collaborating with the U.S. Military Transport Service to move medical personnel and equipment to epidemic sites, and to transport patients to specialized treatment facilities. NFIP’s famous “March of Dimes” and “Presidential Birthday Ball” campaigns gave the disease enormous prominence in the public mind (disproportionate, in truth, given the reality of its incidence) and ushered work-a-day people into the erstwhile elite world of philanthropy and cause participation. See Shadow of Polio at 77, 100-110.

By the 1930s, in a time when fee-for-service medical care was the norm and less than 10% of American households had any type of health insurance, “polio insurance” was on offer, either direct to individuals, or as an employment benefit. The standard contract available throughout the mid-20th century epidemics provided up to $5,000 to cover the cost of medical treatment. See Polio at 65; and Shadow of Polio at 9.

This early name was a misnomer on both counts: the poliomyelitis virus affected people of all ages, and as is clearly demonstrated by its endemic history, it often did not have lasting effects. Nevertheless, children were disproportionately represented in reported polio cases, and because polio entered the central nervous system during its acute phase, it could cause death or disability, including effects on mobility, after the virus was gone. See Shadow of Polio at 28; and Summer Plague at 9-10.

Such is the strength of the seasonal association that Gould adopted A Summer Plague as the title for his book. See also Elegy at 25 (“Summer was polio season.”); and Polio at 9 (describing polio as “among the most seasonal of afflictions”). Black notes that “[w]hat everyone who grew up in the polio years or who was rearing a child then remembers was the fear that hung like heat in the summer air.” See Shadow of Polio at 30. It was both predictable, and mystifying. “The polio season, like the ripening of crops, began in the South in the early spring and spread northward through the summer.” Notwithstanding all that science came to know about polio, its association with summer remains “an oddity still unexplained [that] contributed to its mystic.” Id. at 39.
strategy. When polio arrived in a city or region, life drained away from the pools, the carefree bustle of splashing children replaced by an aura of calamity that hovered like mist over the abandoned waters.

The linkage with water was further enhanced by the knowledge that America’s most famous polio survivor, President Franklin Delano Roosevelt, had contracted the disease in 1921 after time spent in the water. For many reasons, FDR seemed an unlikely candidate for the virus. He was 39 years old at the time, scion of a powerful and wealthy family, and thus defied the myth that polio targeted only the young, poor or squalid. But in other regards, FDR’s experience was in line with the desired American polio narrative — or more accurately, he made sure that his experience was understood to be consistent with that narrative. Though it was widely known that Roosevelt had survived polio, the true extent of his disability was not made public until years after his death in 1945. With the carefully choreographed collusion of many around him, including the press and the Secret Service, he successfully disguised his significant mobility impairment.

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73 See Shadow of Polio at 45 (“And everyone, it seems had his or her own theory about water and swimming. Mothers cautioned their children to stay away from oil-skimmed dirty water in the streets and to avoid swimming in ‘stirred up’ cloudy water. … [C]ity parents made their children resist the icy flowing water of ‘fireplug’ showers on hot summer days. Other parents decided that public swimming pools were off limits, but that swimming holes in woodland creaks were safe.”)

74 See Polio at 2, 70 (referencing typical response to announcement of polio: “Panic swept the region. Public events were canceled. Swimming pools, movie theaters, and libraries were closed.”); and Shadow of Polio at 45 (“in communities around the country, popular swimming sites were closed down.”) More generally, Black notes that “[t]he implicit threat of disease curtailed summer pleasures for the children of the polio years” as “reading, playing card games and following other solitary pursuits” replaced “neighborhood evening games of kick-the-can [and] long afternoons spent at the baseball field, matinee movies, or swimming pools[.]” See Shadow of Polio at 40.

75 See Shadow of Polio at 45 (“Cold water was especially feared, probably because it was common knowledge that on the day FDR had fallen ill, he had taken a swim in the icy bay near his summer home.”) Roosevelt contracted polio in August 1921, on Campobello Island, a Canadian property located in the Bay of Fundy in the Gulf of Maine. See Polio at 24-28. A rising star in Democratic party politics at the time, FDR would go on to become governor of New York in 1928. He was elected to the first of his four terms as U.S. President in 1932. See Bio at 23, 151.

76 This is a story brilliantly told by Hugh Gregory Gallagher in a book subtitled “the moving story of Roosevelt’s massive disability — and the intense efforts to conceal it from the public.” See FDR’s Splendid Deception (1985)(hereafter Splendid Deception). Gallagher (1932-2004) was himself a survivor of paralytic polio, and a disability rights advocate. See ABC-CLIO at 131-132.

77 See Splendid Deception at 93-94, 101 and 105 (referencing FDR’s “unspoken understanding” with the press that they would not report on his disability); and Id. at 91, 93-94 and 97 (referencing Secret Service physical assistance, confiscation of potentially revealing film footage, and extensive accessibility monitoring and modifications.) In preparing travel itineraries, Roosevelt’s security agents tracked “a checklist of details, ensuring complete accessibility for the President’s wheelchair — measuring the width of doors, the angle of ramps, the height of toilets.” Id. at 97. As Gallagher notes, “The President moved quite literally in a ramped world. Wherever he went, the Secret Service went first. They built ramps for his
would have been shocked to learn that one of their leader’s biggest concerns, in a time of world war and economic devastation, was to avoid falling while speaking in public.78

But while he didn’t wish to be known as someone who required extensive mobility assistance, FDR was happy to claim the fight against polio as his cause. That fight was consistent with the idea of “can-do” America79 on a mission to eradicate the disease, and to rehabilitate her polio survivors back to full function. And here again, water comes into play.

Like many people before and since, Roosevelt was intrigued by the idea of finding healing in water.80 In 1924, he was introduced to the perfect location for his experimentation with hydrotherapy: the natural waters of Warm Springs, Georgia. A few years later he spent about two-thirds of his personal fortune to purchase the property, and then quickly opened it to the public as the nation’s leading site for polio rehabilitation and physical therapy.81 Or at least, opened it to some of the public.

use at every point.” Even more dramatically, “upon occasion [they] would actually raise the entire level of a street to the level of the building entrance by means of temporary but extensive wooden trestles and scaffolding.” Id. at 97.

78 For the most part, Roosevelt succeeded in this exercise, again with the help of those close to him. As Gallagher explains: “If steps to a speaker’s platform were unavoidable and if they were in public view, the President would be lifted up the steps in a standing position. FDR would bend his arms at the elbows, holding his forearms rigid and parallel with the ground. A strong man on each side would grab the President at the elbow and lift. So far as the audience in an auditorium could tell, the President, his agents, and the officials of the welcoming committee had simply crowded together momentarily as they moved up the steps. This relatively simple maneuver required of Roosevelt the strength of a gymnast working out on the rings, for without powerful muscle control he risked dislocating his shoulders, or worse. In all, it was an uncomfortable and risky business.” See Splendid Deception at 98.

FDR then remained upright with the help of the podium, which “took much concentration and hard work. [His] braces caused him pain, and the effort and the concentration made him sweat profusely during the ordeal of standing and walking.” Id. at 101. Despite all precautions, FDR fell in public at least three times. These included incidents when an unsecured podium failed to bear his weight during his 1932 presidential campaign, and when his knee brace unlocked during his renomination acceptance speech at the 1936 Democratic Convention. Id. at 93, 101-105.

79 While often a target for easy caricature, it’s useful to remember that the idea of “can-do” America has precedence not only in our culture and history, but in our law. We have never contented ourselves with what has gone before, particularly when time and experience make it clear that the status quo fails to match our principles. Our founding documents proclaim us to be a country of active verbs. Our Constitution exhorts us to “form a more perfect union” — committing us to strive for the better, even in the face of inevitable imperfection. And it exhorts us to “establish justice” — clearly recognizing that justice is not intrinsic to a given landscape, but rather will come from our choices.

80 See Polio at 35 (“Like other polio patients … Roosevelt was fascinated by hydrotherapy, the use of water to treat disability and disease.”)

81 Soon after his purchase, Roosevelt worked to establish the Georgia Warm Springs Foundation, to which he transferred oversight and fundraising responsibilities. But “[h]e made dozens of visits, and built a home on the grounds, later known as “the little White House,” where he was
Because while always integrated by gender, Warm Springs originally excluded people of color. This segregation posed a delicate political challenge: it was integral to the Deep South in the 1920s and 30s, yet anathema to FDR's own professed principles, and to the blacks and progressives whose votes FDR needed.

Ultimately, in an attempt to unravel this Gordian knot, a second facility was established by the NFIP at the historically black Tuskegee Institute in rural Alabama. The same Tuskegee, Alabama, that is also associated in civil rights history with the heroism of the black airmen of World War II, and the infamous Tuskegee syphilis study.

staying at the time of his death in office on April 12, 1945. See Bio at 29-32, 151; Polio at 35-40; and Shadow of Polio at 24, 91-93.

82 See Polio at 65-66 (“In the era of Jim Crow [the Warm Springs Foundation] did not dare challenge the prevailing color line of the South. When Eleanor Roosevelt suggested that a cabin be built for ‘Negro polio victims’ on the grounds at Warm Springs, she was told that ‘such a thing would not be desirable in Georgia.’ Socially, it would cause racial unrest. Medically, it would do no good. Blacks were widely [though erroneously] believed to be ‘less susceptible’ than whites to polio, and therefore less in need of care. Something had to be done, however. Ignoring the Negro South could be a public relations nightmare for the foundation as well as for FDR, who had begun to bring black voters, traditionally Republican, into the Democratic fold.” See also Summer Plague at 77-81. By the 1950s, there were polio survivors of color at Warm Springs.

83 Funded by an NFIP grant in 1939 and opened two years later with FDR in attendance to deliver the keynote address, the Tuskegee facility was a state-of-the-art Infantile Paralysis Center “for the colored race.” See Polio at 66; and Summer Plague at 81-84. Tuskegee also “trained dozens of health care professionals to work with polio patients — white and black — in segregated facilities across the South.” See Polio at 66. The NFIP subsequently “pumped more than a million dollars into Tuskegee in the 1940s, portraying these grants as proof of its concern for all polio victims, regardless of race.” Id. “At the same time, however,” Oshinsky notes, “foundation officials seemed to accept the notion that polio was a lesser problem for blacks.” Id.

Tuskegee also played a critical role in subsequent polio research, garnering NFIP funding in the 1950s to evaluate the Salk vaccine — using, notably, cells cultured from the cancerous tumor of an African American woman, which had been harvested without her permission, and which have changed the course of medical research. See Skloot, Rebecca, The Immortal Life of Henrietta Lacks (2010)(hereafter Immortal Life) at 93-97. Thus, “Black scientists and technicians, many of them women, used cells from a black woman to help save the lives of millions of Americans, most of them white.” Id. at 97.

84 The “Tuskegee Airmen” were the first black flying unit in the still-segregated U.S. military, and they served with distinction in World War II. See information available at http://www.britannica.com/EBchecked/topic/610603/Tuskegee-Airmen (“In January 1941, the War Department formed the all-black 99th Pursuit Squadron of the U.S. Army Air Corps (later the U.S. Army Air Forces) to be trained using single-engine planes at the segregated Tuskegee Army Air Field at Tuskegee, Alabama.”)

85 Officially known as the “Tuskegee Study of Untreated Syphilis in the Negro Male,” the project is now one of the most notorious U.S. examples of unethical human experimentation. See http://www.britannica.com/EBchecked/topic/610607/Tuskegee-syphilis-study (the Tuskegee syphilis
While Roosevelt did not live to see it, many of the goals of his cause were accomplished. One of the great public health triumphs of the 20th century was the creation and wide release of vaccines capable of eradicating polio.\(^8\) These were, of course, the work of Jonas Salk and Albert Sabin, respectively — both Americans and children of immigrants, the former a U.S. citizen by birth who grew up in a New York tenement, the latter naturalized in adulthood.\(^7\) The campaign against polio as a disease is in large part correctly remembered as one that united the nation\(^8\) — though for humility’s sake, we must remember that mid-century vaccination activities were affected by racial segregation,\(^8\) and (as with the Tuskegee syphilis study) they included dark undercurrents of medical research project “was conducted by the U.S. Public Health Service (PHS) from 1932 to 1972 to examine the natural course of untreated syphilis in African American men” living in the rural south).

As Skloot notes, there is tremendous irony in the fact that the Tuskegee polio advances occurred “on the same campus — and at the very same time — that state officials were conducting the infamous Tuskegee syphilis studies.” See *Immortal Life* at 97. See also *Summer Plague* at 84.

\(^8\) The first inoculation was Jonas Salk’s injectable “killed” vaccine, which was announced to be “safe and effective” on April 12, 1955, the tenth anniversary of FDR’s death. The second was Albert Sabin’s oral “live” vaccine, which was licensed for use in 1961, and widely available as of 1962. See *Bio* at 153-154; *Shadow of Polio* at 223-224, 233; and *Summer Plague* at 150, 183.


\(^8\) In this age of acrimonious partisanship, it’s worth recalling that this unity crossed the aisle in profound and enduring ways. In 1940, in one of its efforts to focus a spotlight on polio, the NFIP publicity department produced a short film entitled “The Crippler.” This motion picture starred a young actress named Nancy Davis, who later became the wife of the 40th President of the United States. The experience apparently stuck with her, because when it was proposed in 2003 that American currency be modified to feature “the great communicator” on the U.S. dime, his widow offered a strenuous defense of the status quo. As of 1946, the FDR’s visage had graced the coin so closely associated with crusade against polio. And antithetical though his liberal policies might have been to the woman who ultimately became Nancy Reagan, in 2003 she was determined to help Roosevelt stay on the dime. As to the prospect of replacing Roosevelt’s image with that of her late husband Ronald Reagan, Nancy went on record saying: “I do not support this proposal, and I’m certain Ronnie would not.” See *Polio* at 68 & 295-296 n.36, citing Reiter, Ed “Franklin D. Roosevelt: The Man on the Marching Dime (June 28, 1999), available at [http://www.pcgs.com/Articles/Detail/984](http://www.pcgs.com/Articles/Detail/984); and citing Scheer, Robert, “Stealing FDR’s Dime,” published in Los Angeles Times (Dec. 13, 2003) and USA Today (Dec. 5, 2003), available at [http://www.salon.com/2003/12/10/dime/](http://www.salon.com/2003/12/10/dime/).

\(^8\) The “Polio Pioneers” were millions of elementary school children who participated in the nationwide 1954 field trials of the Salk vaccine. Notwithstanding the almost contemporaneous *Brown* decision, racial segregation was still the norm in many of the places where American children gathered, and hence was present in the places where they were inoculated. “In Montgomery, Alabama, black children received their Salk shots on the front lawns of white public schools,
experimentation on powerless populations.\textsuperscript{90} The eradication efforts also crossed international boundaries in interesting ways,\textsuperscript{91} and the economic history of the vaccines is a tantalizing tale unto itself.\textsuperscript{92}

But in a more heartening development, volunteer interpreters were used in New York City to explain the inoculation procedure to non-English speaking immigrant participants. \textit{See Polio} at 198.

\textsuperscript{90} Institutions have often been regarded as a good (or at least palatable) source of human guinea pigs, and polio research indulged in such exploitation. Early tests of the Salk vaccine involved residents at Pennsylvania’s Polk Street School for the “feeble-minded,” as well as the Keystone state’s D.T. Watson Home for Crippled Children, which was established to house “destitute poor white female children between the ages of three and sixteen years, especially including and preferring children crippled or deformed.” \textit{See Elegy} at 105. Finger also notes that “Salk wasn’t the first to test a polio vaccine on institutionalized people,” referencing a prior oral vaccine experiment at Letchworth Village, a home for the “feeble minded and epileptic” in Rockland County, New York. \textit{Id.} at 105.

Sabin, too, throughout his career working with various viruses, turned to disadvantaged populations, anticipating the prospect of testing on “volunteers in some mental institution,” and conducting actual testing on prisoners. \textit{See Bio} at 122-123, 153; and \textit{Polio} at 308 n.59. The stakes were particularly high for his “live” polio vaccine, which offered the potential for a stronger lasting immunity, but also created an increased risk of causing paralytic polio. Notably, in 1954, the NFIP, which was funding his research, refused to authorize a Sabin trial involving institutionalized children with mental illness. It did, however, give permission for vaccination of 30 Ohio inmates whose “voluntary” participation was inspired by “the promise of $25 and a slight reduction in their sentence.” \textit{See Bio} at 122.

While ethical problems were noted by observers in the 1950s and 60s, and somewhat reflected in NFIP decision-making, such objections were not particularly emphatic. \textit{See Elegy} at 106-107, 284 \textit{(citing} a 1952 article in the prestigious British medical journal \textit{The Lancet}, and a 1963 book by John Wilson entitled \textit{Margin of Safety: The Story of the Poliomyelitis Vaccine}). This lack of mid-century outrage perhaps helps to explain how Rockland County could later become the setting for the notorious abuse and neglect of people with disabilities that occurred at Willowbrook State School, which was exposed in graphic film footage shot for ABC-TV by reporter Geraldo Rivera in 1972. \textit{See ABC-CLIO} at 326-329.

\textsuperscript{91} During the cold war period from the late 1940s to the early 1990s, dramatic tensions characterized the relationship between U.S. and the U.S.S.R. particularly in scientific matters such as space exploration and weapons development. The 1950s and early 1960s in particular were marked by enormous distrust between the two superpowers, and fear of biological, as well as nuclear, warfare was in the air. Nevertheless, in 1956 a delegation of Soviet physicians was invited to visit the United States to study the American approach to polio. Their stop-off at Dr. Sabin’s lab went so well that he subsequently traveled to Russia, which pursued field trials of the Sabin vaccine in 1959 — though this international cooperation was prompted in part by the fact that Sabin’s “live” oral vaccine approach was originally met with significant skepticism in the U.S. medical community. \textit{See Bio} at 122-123; and \textit{Summer Plague} at 172-173.
But while both FDR and the disease were gone, many people who had experienced it remained. Those who survived paralytic polio were as eager as their neighbors to return to the fun and fellowship of the public pool. But for the most part, they couldn’t. Not because there were public health consequences; that danger had passed. Not because they were uninterested in or incapable of recreation or athleticism; quite the opposite, as the buoyancy of water is extremely inviting to people with mobility impairments. No, the post-polio challenge came not from disease, but from design: most American pools had stairs. We have vanquished the disease, but not the design. For a “can-do” society, the half-finished job should rankle.

And yet, somehow, we aren’t rankled enough. As was the case for the other forms of exclusion that have shadowed America’s pools, we have turned excuses that shouldn’t hold water into reasons for excluding people with disabilities. There are those who would say: That is your lot. Nature has done this, not humanity. It is not humanity’s job to fix it. But if humanity creates a pool, humanity, not nature, is responsible for its features. Nature does not dictate stairs in the built environment. Stairs are a choice that some people make to the exclusion of others. Precisely the kind of choice that violates our civil rights traditions and commitments.

There are those who would say: your pool mates would be happy to carry you into the water. But that is not reliably true, and even when true, carries with it a risk of injury. Muscles and tissues can be wrenched and torn, and gravity is indifferent to the goodwill of well-meaning folks who drop you. Even more true is this: people past childhood do not want to be carried. The concept of “infantile paralysis” has been aptly discarded not only by the medical and scientific communities, but by the disability rights movement. Mobility impairment, in itself, is not infantilizing. What

92 Because he had developed his vaccine pursuant to an NFIP grant, which forbade patents associated with its research grants, Dr. Salk himself never made so much as a “marching dime” from his life-changing product. In a similarly communal and magnanimous approach to public health, President Dwight D. Eisenhower quickly announced that the medical and scientific knowledge related to production of the Salk vaccine would be shared gratis with the world. See Bredeson, Carmen, *Jonas Salk: Discoverer of the Polio Vaccine* (1993) at 79-81.

In some countries vaccine development and distribution quickly became the province of government. See, e.g., *Polio* at 219 & n.318 n.19 (“In Canada, polio was viewed as a national crisis requiring an appropriate national response,” citing Crichton, Robert, “How Canada Handled the Salk Vaccine,” in *The Reporter* at 28-32 (July 14, 1955). But in America the reverse was true, as big pharma quickly sought to capitalize on Salk’s victory. See *Polio* at 219-220 & 318 n.20 citing Klaw, Spencer “Salk Vaccine—the Business Gamble,” Fortune at 172 (September 1955)(“The drug companies not only lobbied furiously in favor of free enterprise, they also sank millions into plant construction and worker training as a way of keeping vaccine production in their own hands. Profits aside, they feared the long-term consequences of allowing the state to take responsibility and credit for a medical milestone like this one. As the head of Eli Lilly put it: ‘If the vaccine wasn’t available commercially, we knew people would demand it from some source, and we didn’t want it produced by the government.’”)

93 Indeed, carrying is so antithetical to the principles of the independent living and disability rights movements that it was expressly disfavored 34 years ago, in one of the earliest policy interpretations construing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, which prohibits disability discrimination in programs and activities receiving federal financial assistance and federally conducted programs. See U.S. Dept. of Health, Education & Welfare Policy Interpretation No. 4, 43 Fed. Reg. 36035 (August 14, 1978). HEW identified carrying
infantilizes is a forced dependency on others that stems solely from barriers in the built environment. The paralysis may be permanent, but if you replace or supplement the stairs with a lift or a ramp, the dependency evaporates.

Back in 1990, on a hot July day highly suitable for swimming, there was good reason to believe that the evaporation of unnecessary dependency was truly underway. That was the day when 3,000 disability rights advocates gathered on the South Lawn of the White House to witness the signing of the Americans with Disabilities Act. Despite misunderstanding and hyperbole to the contrary, we were celebrating an extraordinarily thoughtful and nuanced piece of legislation. The ADA’s clear promise was that the attitudinal and architectural barriers of the past would dissolve — perhaps not that day or the next, but soon. That was 22 years ago. A new generation of swimmers has been born and reached adulthood since that time. But some of them still can’t get into the water.

As we reflect on the May 2012 DOJ “swimming pool delay,” and its implication for all swimmers, it is important to understand how it fits into the previously existing landscape of disability rights law protections. Of most relevance here are the ADA provisions that mandate nondiscrimination by states and local governments,\(^94\) as well as those that apply to privately operated businesses that invite public participation.\(^95\) In articulating the nondiscrimination requirements, the law recognizes that there are costs to modifying the existing built environment — and so the ADA obligation to make physical alterations is not unlimited. But the ADA’s intention — and its legal requirements — nevertheless mandate steady progress towards the goal of full accessibility.

Recognizing the ease with which new facilities can be designed for universal access, and the relative ease of incorporating access features into renovations undertaken for other purposes, the ADA requires that “new” and “altered” facilities meet specified design standards.\(^96\) All of the “new” and

as “undependable [because it requires volunteers] and often hazardous (e.g., when carriers are untrained or when the carrying is to occur on poorly illuminated or narrow stairs),” and further acknowledged that “[i]t may humiliate the handicapped person by dramatizing his or her dependency and creating a spectacle. Its use is therefore inconsistent with section 504’s critical objective of encouraging” the full participation of people with disabilities.

The U.S. Department of Justice expressly recognized the validity of this HEW Policy Interpretation in its own original 1991 ADA regulations, clearly specifying that “[c]arrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.” See Section-by-Section Analysis to 28 C.F.R. § 35.150(b)(1), 56 Fed. Reg. 35709 (July 26, 1991).

\(^{94}\) This “state and local government” mandate is found in Title II of the ADA, as amended, 42 U.S.C. §§ 12131-12134, as implemented by regulations issued by the U.S. Department of Justice at 28 C.F.R. Part 35, as amended. ADA Title II incorporates and builds on the prior 1970s-era disability nondiscrimination mandate of Section 504.

\(^{95}\) This “public accommodations” mandate is found in Title III of the ADA, as amended, 42 U.S.C. §§ 12181-12189, as implemented by regulations issued by the U.S. Department of Justice at 28 C.F.R. Part 36, as amended. ADA Title III is modeled on the prior racial nondiscrimination mandate in the Civil Rights Act of 1964, which similarly applies to “public accommodations”— notably including hotels and other establishments within the “hospitality” industry.

\(^{96}\) These are defined in law to include construction endeavors undertaken after the passage of the ADA. As to ADA Title II coverage of state and local governments, this mandate is found at 28 C.F.R. §§ 35.151-35.152. As to ADA Title III coverage of public accommodations, this mandate is
“altered” facility requirements continue to remain in effect for pools. Notwithstanding DOJ’s May 2012 extension, any newly designed or altered pool must be accessible to people with mobility disabilities.

As to facilities that predate the ADA’s 1990 enactment (known as “existing facilities”) the requirement is for state and local governments to provide “program access” to their pools, and for private operators to remove barriers where it is “readily achievable.” Again, neither of these requirements is unlimited. Both build in defenses of cost and feasibility, which ensure that entities subject to the law will not incur undue costs, or become responsible for unattainable goals. It is only these “existing facilities” requirements that are subject to the May 2012 pool extension.

The rationales being used to support the current “swimming pool delay” merit close examination. Those rationales include ideas floating around in general public consciousness and in the media, as well as the more targeted and deliberate arguments that have been proffered during the DOJ process leading up to the recent regulatory extension.

The less focused objections often spring from outside the pool context, and fundamentally misunderstand the law. Some people mistakenly believe that the ADA threatens delicate natural waterscapes. But while nature may on occasion influence some outlying architectural parameters of pool design, it rarely if ever dictates the qualities of the built environment that affect access for people with disabilities. Whatever exceptions may exist should not drive the current conversation about standard swimming pools. Those aghast at the prospect of “lifts on cliffs!” raise misplaced concerns that the ADA carefully anticipated and explicitly dealt with two decades ago. The very limited number found at 28 C.F.R. §§ 36.401-36.406. These mandates became effective for construction undertaken as of the early 1990s — two decades ago.

97 The “program access” requirement has been in use since the 1970s, when it was developed as part of the Section 504 nondiscrimination mandate. This requirement dictates that a program, service or activity of a federally-funded or governmentally operated program, when “viewed in its entirety,” must be “readily accessible to and useable by individuals with disabilities.” See 28 C.F.R. § 35.150(a). However, in meeting the requirement entities are not necessarily required to make physical alterations, unless there is no other way to ensure “program access.” See 28 C.F.R. § 35.150(a)(1). The requirement also includes defenses of “fundamental alteration” and “undue financial and administrative burdens;” actions that result in such circumstances are not required. See 28 C.F.R. § 35.150(a)(3). Also precluded are actions that would “threaten or destroy the historic significance of an historic property.” See 28 C.F.R. § 35.150(a)(2). Finally, the “program access” requirement acknowledges that time may be required to accomplish any needed physical modifications. The appropriate time period was identified as “within three years,” but “in any event as expeditiously as possible.” See 28 C.F.R. § 35.150(c). For many entities, this clock began running in the 1970s. It began running at least by January 1992 for all state and local governments in the United States — which was over twenty years ago.

98 As part of Title III of the ADA, the “readily achievable” defense was introduced in 1990. It requires private businesses that are open to the public to remove barriers that are structural in nature, where such removal “easily accomplishable and able to be carried out without much difficulty or expense.” See 28 C.F.R. § 36.304. The defenses are articulated in the rule: actions are not required if they involve “much difficulty or expense.” However, the requirement expressly anticipates that entities will work over time to improve “existing facility access.” This obligation has now been part of disability rights law for more than two decades.
of truly eccentric settings, and the wild qualities of wilderness, are not at risk under the law. But ironically, basic disability access entitlements to prosaic places are now threatened by DOJ’s action — not merely due to this pool delay itself, but because of the precedent that it sets for possible extension of other access requirements.

Then there are the more focused “concerns and misunderstandings” referenced in DOJ’s extension announcement. These include confusion about the exact nature of what is required, and fear that misunderstandings regarding requirements will force the wholesale closure of pools as the only alternative to operating ostensibly illegal facilities. While raised here in this particular disability context, these arguments should seem hauntingly familiar now that we have surfed through the American history above. They’ve been used in an attempt to preserve other types of pool segregations — segregations that mainstream America now finds wholly unjustifiable. Moreover, these arguments dissolve when they come into contact with the actual ADA legal requirements that have addressed the legitimate concerns of pool operators since 1990. They also dissolve in the

99 As enacted in 1990, the ADA included a specific provision to ensure that its access mandates would be consistent with National Wilderness Preservation System. See 42 U.S.C. § 12207. The nuanced legal defenses available to state and local governments and private businesses under ADA Titles II and III — most prominently including the “fundamental alteration” defense — further ensure that provisions for physical access are in harmony with public policy goals of wildland preservation.

100 In particular, there is an assertion of surprise at the idea that entities might be required to permanently affix lifts to their pool decks, “given that many pool owners and operators had previously believed that portable lifts were permissible even when it was readily achievable to provide a fixed lift.” See 77 Fed. Reg. at 30716. But as DOJ proceeds to explain, since the original ADA Title III regulation was issued in 1991, the enforcing agency has been clear that “public accommodations must provide a fixed or built in lift in existing pools as long as it is readily achievable.” Id. at 30177.

101 See 77 Fed. Reg. at 30178 (“if pool owners and operators close pools because they incorrectly believe that the 2012 Standards require that a fully compliant pool lift must be installed in all cases, those closures will reduce access to pools for everyone, including people with disabilities.”)

In assessing the validity of this argument, Americans — and their Department of Justice — should remember that in the racial justice context courts have clearly recognized that such arguments cannot justify discrimination. See, e.g., City of St. Petersburg v. Alsup, 238 F.2d 830, 832 (5th Cir. 1956)(“It is no answer to say that the beach and pool cannot be operated at a profit on a nonsegregated basis, and that the City will be forced to close the pool. Of course, financial loss cannot justify illegal operation; and, unfortunate as closing the pool may be, that furnishes no ground for abridging the rights of the appellees to its use without discrimination on the ground of race so long as it is operated.”)

102 Of particular note is the industry claim that a “significant backlog in availability of current lifts” justifies the extension. The identified concern is that “pool owners and operators who could not acquire a lift because of a manufacturing backlog would be in violation of the ADA.” See 77 Fed. Reg. at 30177. However, as DOJ explains, the law already makes allowance for such a circumstance. “[T]he lack of availability of a compliant lift because of limitations in manufacturing capacity would demonstrate that it is not readily achievable to comply with the requirements, until such time as a lift becomes available.” Id.
light of the reality that effective pool access has already been achieved in many “existing facilities” over the past 40 years without causing the human bathing enterprise to go down the drain. Which leaves, perhaps, just the questions of cost and culture still to be examined.

In contemplating cost, we can again return to the clear ADA mandates, which expressly include financial defenses. But from a broader perspective, it’s also worth bearing in mind that our civil rights choices have always had economic consequences — though they are not always the consequences we most expect or fear. The long enduring and often virulent discrimination faced by Native American communities, combined with their historically-based tribal sovereignty, has concentrated legal gambling on Indian lands within the United States. The progress towards marriage equality has been a commercial boon to the wedding industry, even as same-sex couples are still denied the valuable financial benefits that usually flow from marriage, and incur legal costs for

103 Many state and locally run pools have retrofitted their “existing facilities” to provide independent pool entry and exit consistent with their Section 504 or ADA Title II “program access” obligations. While in some instances this has been accomplished only through litigation, what is most remarkable about this case law is how old it is now (illustrating that the relevant technology has been available for decades), and how rarely, if ever, pool access orders have been appealed (illustrating both the clarity of the legal mandate, and the feasibility of pool barrier removal).


104 It should also be noted that there was a specific assessment of pool accessibility costs in connection with DOJ’s 2010 endorsement and adoption of the 2010 Standards, which include the pool access requirements provisions now at issue. As DOJ explained in issuing the recent pool extension, the Regulatory Impact Analysis (RIA) undertaken in connection with that 2010 endorsement “looked at costs with respect to fixed and built-in elements when analyzing the provisions of the 2010 Standards. With respect to pools, the RIA included both the cost of purchasing a lift as well as the cost of installing the lift for barrier removal in existing pools.” See 77 Fed. Reg. 30176 (citing to prior regulatory documents).

105 See Indian Gaming Regulatory Act (IGRA) of 1988, Pub. L. 100-497, codified at 25 U.S.C. §§ 2701 et seq., 102 Stat. 2467 (Oct. 17, 1088). Congressional articulation of IGRA public policy purposes include findings that “numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue,” 42 U.S.C. § 2701(1), and “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” 42 U.S.C. § 2701(5).
customized family and estate planning documents that are unnecessary for traditional families.\textsuperscript{106}

The enormous federal investment in G.I. Bill lifted millions of American World War II veterans into the middle class, and facilitated our dramatic increase in suburban living — with the resulting ongoing effect on American swimming pools.

But since we’re on the topic of recreation, let’s take a particularly close look at the originally dreaded economic effects of racial integration on America’s favorite pastime. Or we should say, the second integration of baseball, because (as with public swimming), in the late 1900s black athletes had participated with whites in organized professional play.\textsuperscript{107} But unquestionably, the 20\textsuperscript{th} century integration of major league baseball was an enormous economic transformation. It was, of course, an integration first achieved in 1947 by Jackie Robinson, who (not incidentally, as one motive for his willingness to endure the gauntlet of hatred that he faced in adulthood) grew up swimming on Tuesdays, because that was the only day of the week when blacks were permitted at the city pool in his hometown of Pasadena, California.\textsuperscript{108} Though the country’s tolerance for racial discrimination was waning, particularly in light of the heroic efforts of African Americans during World War II,\textsuperscript{109} there was a widespread assumption that the integration of the majors would lead to massive ticket sale losses, as white patrons abandoned the stadiums in protest.\textsuperscript{110} But New York Dodgers owner Branch Rickey — the sole dissenter from an internal 1946 report of club presidents that concluded that

\textsuperscript{106} See Marcus, Miriam “The $9.5 Billion Gay Marriage Windfall: If same-sex marriage were legalized nationwide, the lackluster wedding industry would perk up fast” in Forbes (June 16, 2009) (“Talk about a stimulus package… If half of the same-sex couples got hitched, Forbes estimates that the industry would reap nearly $10 billion in additional revenue.”), available at http://www.forbes.com/2009/06/15/same-sex-marriage-entrepreneurs-finance-windfall.html.

\textsuperscript{107} See Hogan, Lawrence, \textit{Shades of Glory: The Negro Leagues and the Story of African-American Baseball} (2006) at 2. Hogan dates the advent of professional baseball to the 1870s, and notes that “[i]nto the 1880s, some black athletes had participated in ‘organized’ white ball. By the turn of the century, as segregation hardened, Negro players would be barred from the white professional version of America’s game. Black ballplayers would not be seen in the majors again until the 1950s.”

\textsuperscript{108} This is one of the “forgotten facts” memorialized by the African American tennis great Arthur R. Ashe, Jr., who himself grew up in a segregated Richmond, Virginia. See Ashe, Jr., Arthur, \textit{A Hard Road to Glory: A History of the African American Athlete: Baseball} (1988) at 38 (“Robinson had plenty of experience in delicate racial situations, though not so public [as his Major League Baseball debut]. In Pasadena, he fumed at the rule that allowed blacks to swim in the municipal pool only on Tuesdays.”).

\textsuperscript{109} Albert B. “Happy” Chandler (1898-1991), an erstwhile U.S. Senator from Kentucky who began serving as commissioner of the majors in 1945, exemplified this sentiment. See \textit{Hard Road to Glory} at 41; and \textit{Shades of Glory} at 334 (“If they can fight and die on Okinawa, Guadalcanal, in the South Pacific, they can play baseball in America. And when I give you my word, you can count on it.”). See also http://www.britannica.com/EBchecked/topic/105414/Happy-Chandler.

\textsuperscript{110} See \textit{Shades of Glory} at 332 (“But some [major league ball team] owners feared losing white fans if they accepted black players, largely because they thought that large black crowds at their games would scare away white patrons.”)
segregation was essential for business — had a different perspective. He figured that tapping into a huge black fan base would put his team into the black at the gate. Rickey was right. National League President Ford Frick’s principled 1947 vow to “wreck the league” to achieve integration, proved quite unnecessary. As the great sportswriter Wendell Smith quipped, “Jackie’s nimble, Jackie’s quick, Jackie makes the turnstiles click.” Integration, it turned out, was good business for the majors.

111 See Hard Road to Glory at 41 (“A secret report on the prospects for integrated baseball was supposedly written by a steering committee in 1946. The committee members included Ford Frick, the National League president; Sam Breadon of the St. Louis Cardinals; Phil Wrigley of the Chicago Cubs; William Harridge, the American League president; Larry McPhail of the New York Yankees; and Tom Yawkey of the Boston Red Sox, who urged the other committee members not to admit blacks. The vote was fifteen to one opposing blacks in the major leagues. Branch Rickey, the Brooklyn Dodgers’ president and Jackie Robinson’s mentor, was the lone dissenter.”)

As summarized by Ashe, the report identified five ostensible “facts” of relevance to the question of breaching the color line: (1) integrationists are just trying to stir up trouble; (2) Negro fans will hurt attendance; (3) Negro players are not good enough yet; (4) integration will hurt the Negro Leagues; and (5) Segregation is good business. See Hard Road to Glory at 42.

While all copies of the report other than Chandler’s had been destroyed, Rickey effectively made it public in a February 23, 1948, speech at historically black Wilberforce University, when he leaked and emphasized the committee’s guiding conclusion that the economic effects of integration would be intolerable: “however well-intentioned, the use of Negro players would hazard all of the physical properties of baseball.” See Hard Road to Glory at 42-43 (citing Weaver, Bill L., “The Black Press and the Assault on Professional Baseball’s ‘Color Line,’ October, 1945-April, 1947” Phylon (Winter 1979) at 305).

112 See, Shades of Glory, at 333 (“Branch Rickey looked at integration differently. Instead of focusing on the downside, he saw the potential for black ballplayers to turn the Dodgers around and for his team to profit at the gate. Rickey had seen the St. Louis Stars play during his years with the Cardinals when the club had rented out Sportsman’s Park for games between all-star teams of Negro and major leaguers. As World War II progressed, Rickey saw the wealth of Negro league and Latin talent and the potential for the black fan base that had grown apace with the migration of African Americans northward.”)

113 See Ritter, Lawrence S., Leagues Apart: The Men and Times of the Negro Baseball Leagues (1995) at 27 (“I do not care if half the league strikes. Those who do will be suspended and I don’t care if it wrecks the league for five years. This is the United States of America, and one citizen has as much right to play as another.”)

114 See Shades of Glory at 345.

115 Adding financial insult to racial injury, predictions of economic loss did in fact prove true for the Negro Leagues, which began leaking revenue as the color line dissolved. At their heyday, the Negro Leagues had annual receipts of $2 million dollars, and employed hundreds of African-Americans. See, Shades of Glory, at 343. But they “faded almost as soon as Robinson made his mark on the majors. The black teams began to lose some of both their most established and their most promising players. Their departure hurt at the gate, but even if the black teams had retained their stars, the fans wanted to see black players in the majors.” See Shades of Glory at 345.
As to culture, that too is inevitably transformed by our civil rights choices — clearly including recreational culture. But again, it’s hard to predict exactly how. The racial integration of major league baseball brought a new faster sensibility to America’s pastime, as fans came to expect the dramatic sliding, squeeze plays and base stealing that characterizes today’s game. The boisterous boys of the early natatoriums introduced a powerful current of play and pleasure into American swimming pools, which has endured through all the ebbs and flows of discrimination and inclusion that followed. So it’s logical to expect that truly full integration on the basis of disability will create new ripples in our pool culture. But until we actually wade in, we can’t know exactly what will happen.

All of which is to say: yes, of course — there will be costs, as well as gains, that will come with the more widespread physical accessibility of American pools. But if history is any guide, it is hubris to assume that we know exactly what those consequences will be. We do know, however, what we’ve known all along, about all of our civil rights integration dilemmas: it’s the right thing to do. For now, though, people with disabilities are being told — by their Department of Justice, no less — what so many American diversity communities have so often, to our collective shame, been told over the years: Wait, just wait, a little longer …

During this wait, since we can’t all engage in the time-honored American tradition of summer swimming, disability rights leaders have decided to engage in another time-honored American tradition: protest. A national coalition of disability rights groups has now launched a two-part boycott campaign. The campaign asks supporters to avoid all U.S. hotels with pools that lack independent access for people with mobility disabilities. It also asks supporters to steer conventions, meetings and leisure travel away from specific hotels whose leaders have been active in advocating for the “swimming pool delay.”

While Negro League teams continued to barnstorm in the years immediately after Jackie took the field at Ebbets, they met with dwindling success in attracting an audience. Banking on novelty, the Indianapolis Clowns proved the most resilient, billing themselves as “the Globetrotters of baseball,” and promising “fun” and “laughs” along with thrills. In a confluence of race and disability, Clowns stars included Ralph “Spec” Bebop, an African American player of short stature, one of the far-too-long list of Americans forced to deploy his skills and talents in an artificially limited role — the “other” admitted as court jester, rather than full participant. See Shades of Glory at 365, 367.

**116 See Hard Road to Glory** at 77 (“All in all, baseball has been the fortunate recipient of the extraordinary efforts of blacks who excel at the game. In a short period of time, blacks have transformed a tradition-bound, patterned style of play into a more kinetic and energized festival of spectacular home runs, unsurpassed base running, and breath-taking catches in the outfield.”)

**117** The coalition of organizers include ADAPT (a national grass-roots community that organizes disability rights activists to engage in nonviolent direct action, including civil disobedience); the American Association of People with Disabilities (the nation’s largest disability rights organization); the National Council on Independent Living (the longest-running national cross-disability, grassroots organization run by and for people with disabilities); and the National Disability Rights Network (the nonprofit membership organization for the federally mandated Protection & Advocacy Systems and Client Assistance Programs, collectively the largest provider of legal based advocacy services to people with disabilities in the United States).

**118** More information on this campaign is available at [http://www.adapt.org/main/adaattack](http://www.adapt.org/main/adaattack).
And finally, while we’re waiting — on this ADA anniversary date in the middle of the summer recreation season, floating atop the many remarkable confluences of the American story — it also seems a good time to engage in one last reflection involving America’s most famous polio survivor. Larger than life in many respects, the 32nd President of the United States had an outsized joy in water. Love him or hate him, it is indisputable that this avid swimmer, sailor and one-time Secretary of the Navy did much to shape the tides of history in his own time. It was fortunate, also, that he had the outsized wealth to purchase his own private bathing facilities at Warm Springs. Because if he joined us again today, Franklin Delano Roosevelt — along with millions of his fellow Americans with disabilities — would still be banned from the currents that flow through many of our “public” swimming pools.
FOR FURTHER READING

On Baseball:

On Disability Rights Movement:

On Hotels:

On Polio:
Black, Kathryn, *In the Shadow of Polio: A Personal and Social History* (1996)
Gallagher, Hugh Gregory, *FDR’s Splendid Deception* (1985)

On Public Health Policy, Health Care & Medical Research:

On Suburbanization:

On Swimming Pools:

On Veterans: