
THE APPLICATION OF TITLE III OF THE AMERICANS WITH DISABILITIES ACT OF 1990 TO THE INTERNET: PROPER E-PLANNING PREVENTS POOR E-PERFORMANCE

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I. INTRODUCTION

Suppose you would like to purchase an airline ticket. Realizing that electronic tickets are usually cheaper and more convenient, you decide to book your flight online. You boot up your computer to access the Internet, double-click on the "Internet Explorer" icon, and access your homepage. You type in your favorite airline travel agent's web address, and press enter. However, when the page is displayed, instead of providing intelligible information, the web page displays the following: "Blank, blank, blank;" "tab, tab, tab;" "graphic spacer, graphic spacer graphic 1234393.gif."¹

You think this is strange and attempt to access other sites, but you find the same results. You then decide to hop in your car and drive down to the local travel agency to purchase a ticket. However, when you get to the travel agent's office, there is no door. No door! This seems ludicrous of course, because anyone who would design a building would think it necessary to include a door. You think: "How could this travel agent possibly conduct business without a door to his building?"

Alfred Hitchcock would find these results normal. However, most people would be disheartened and even

angered at the inability to access the travel agency, either electronically or physically. The architect of a building would not think twice about the necessity of a door, but the door may only be accessible after ascending several steps. The steps could preclude a person with a mobility impairment from accessing the service.

The travel agency webpage display used above can be what happens when a blind person accesses a website without text labels² identifying items on the site.³ A person with a visual impairment or a physical disability may use a peripheral device known as a screen reader that will read the text on a website and either translates it into digital speech or Braille to allow the person to navigate the site.⁴ However, when a screen reader comes upon a picture or a hyperlink to another site, without labels describing the function or content of the item, the screen reader may only read "1234393.gif" or "blank." Similar to the inaccessibility of the travel agency with steps in front of it, a blind person may be precluded from navigating the travel agency website. Not only is the blind person unable to purchase an airline ticket, but the travel agency loses a customer that it never knew it had.⁵

The Internet is a popular, useful, and essential tool that is becoming increasingly necessary for

¹ See Neal Ewers, *Screen Readers and the Web*, 2, at <http://www.doit.wisc.edu/accessibility/video/transcript2.doc> (2002) [hereinafter *Screen Readers and the Web*] (providing examples of encrypted language in a website).

² A "text label" is a word designation for a hyperlink on a website providing the meaning and purpose of the hyperlink. See generally Curtis Chong, *Web Accessibility: Making Your Website Accessible to the Blind*, at <http://www.nfb.org/tech/webacc.htm> (last modified July 2, 2002) (offering tips on achieving accessibility on a website).

³ See *Screen Readers and the Web*, *supra* note 1 (providing a video and its transcript explaining the barriers encountered by people who use screen readers when navigating the Internet).

⁴ See, e.g., John Heim and Judy Heim, *People with Disabilities Reach for Web Access*, PCWORLD.COM, at <http://www.pcworld.com/news/article/0,aid,10362,00.asp> (Apr. 1, 1999) (describing how an individual with a vision impairment may

use a screen reader to operate a computer or to navigate the web); see also Judy Heim, *Locking out the Disabled*, PC WORLD, Sept. 2000, at 182 ("These shopping services are so important for people who are unable to drive, and for those of us who are unable to peruse the aisles.")

⁵ See Courtney Mecavinta, *W3C, Others Seek Accessible Web*, CNET NEWS.COM, at <http://news.com.com/2100-1023-225338.html> (May 4, 1999) (discussing the website navigation experiences of Doug Wakefield, a blind Internet user, as well as a technology specialist for the United States Access Board, an independent federal agency that issues accessibility standards). The author explains that "[i]f a site is built right, [Wakefield or other disabled individuals] can wade through articles, search for information, and make purchases. However, if a site doesn't consider that some visitors are hearing, visually, or physically impaired, it could be turning away scores of users like Wakefield." Wakefield, quoted in the article, states "[i]f a site is accessible, it gets my dollars." *Id.*

daily living.⁶ However, many potential Internet users are precluded from utilizing its wealth of information, products, and services because a number of websites are inaccessible.⁷ Disabled users and elderly users, especially those who may have vision impairments, find themselves unable to even enter the “door” of a website.⁸ Many electronic barriers exist on the Internet, not unlike architectural barriers that exist in the physical world.⁹

Although laws proscribe discrimination against persons with disabilities, there is much confusion regarding how these same laws apply in the non-physical world of the Internet.¹⁰ Title III of the Americans with Disabilities Act of 1990 (“Title III”) prohibits discrimination against persons with disabilities in “*places of public accommodation*.”¹¹ It is unclear, however, whether a *place of public accommodation*, such as a travel agent’s office, also includes a non-physical *place of public accommodation*, such as a travel agent’s website.

This Comment examines the application of Title III to the Internet. Part II examines the history of disability discrimination and the application of this problem to the Internet in light of statistical evidence. It also examines interpretations of the applicability of Title III to the Internet by federal circuit courts and the Department of Justice. Part II concludes that conflict exists among the federal appellate courts and that the Supreme Court needs to resolve this confusion. Part III provides

arguments for the application of Title III to the Internet. Part III.A provides that the Internet is subject to the non-discrimination mandates of Title III, and that any contrary interpretation would frustrate the plain language and defeat the purpose of the statute. This Comment also finds Title III to be constitutional as applied to the Internet. Part III.B finds that Title III is a permissible exercise of Congress’ commerce power as applied to the Internet. Finally, Part III.C finds that Title III as applied to the Internet does not violate the First Amendment to the Constitution.

II. THE SCOPE OF THE PROBLEM: DISCRIMINATION, LEGISLATION, AND THEIR MANIFESTATION

A. History of Discrimination on the Basis of Disability

History is replete with instances of overt discrimination against persons with disabilities.¹² However, discrimination can be more passive and less obvious, permeating many aspects of a disabled individual’s daily activities.¹³ Often the discriminator is not even aware that he or she is discriminating.¹⁴

Historically, social and legislative endeavors have sought to proscribe discriminatory activities against “discrete and insular minorit[ies]” such as persons with disabilities.¹⁵ In particular, the Dis-

⁶ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849-51 (1997) (providing a thorough explanation of the history, structure, and capabilities of the Internet). The Supreme Court also emphasizes the utilitarian breadth of the Internet in *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002).

⁷ See generally Cynthia D. Waddell, *The Growing Digital Divide In Access for People with Disabilities: Overcoming Barriers to Participation*, at http://www.icdri.org/CynthiaW/the_digital_divide.htm (May 25 & 26, 1999) [hereinafter *The Growing Digital Divide*] (finding that the use of graphics and tables without accessibility functions can create electronic barriers for persons who use screen-readers to navigate the Internet).

⁸ See *id.*

⁹ See *id.*

¹⁰ See generally *id.*

¹¹ Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§12181-12189 (2000) (emphasis added). Title III provides as a general rule, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. §12182(a).

¹² See 42 U.S.C. §12102(2) (providing the statutory definition in the ADA of disability as “a physical or mental im-

pairment that substantially limits one or more of the major life activities of such individual . . . a record of such an impairment . . . or being regarded as having such an impairment”). See generally THE DISABILITY SOCIAL HISTORY PROJECT, DISABILITY HISTORY TIMELINE, at http://www.disabilityhistory.org/timeline_new.html (last modified Sept. 23, 2003) (providing a brief history of the disability rights movement). Historically, disability discrimination has been pervasive in the United States and internationally. See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (Holmes, J.) (holding a Virginia statute authorizing the forced sterilization of persons with disabilities not a violation of due process or equal protection rights under the Fourteenth Amendment). Specifically, the Buck Court found “[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind Three generations of imbeciles are enough.” *Id.* at 207.

¹³ See, e.g., H.R. REP. NO. 101-485, pt. 2, at 29 (1990) (offering numerous examples of discrimination against persons with disabilities in various aspects of life).

¹⁴ See generally *The Growing Digital Divide*, *supra* note 7 (discussing passive discrimination on the Internet).

¹⁵ Congress has sought to protect select groups of individuals from discriminatory treatment based solely on status. Among these status positions are persons with disabilities. 42

bility Rights Movement, which has relied heavily on the Civil Rights Movement, developed in response to pervasive discrimination.¹⁶ The Civil Rights Act of 1964, which prohibits discrimination or segregation on the basis of "race, color, religion, or national origin,"¹⁷ provided the framework for disability rights legislation such as the Rehabilitation Act of 1973¹⁸ and the ADA.¹⁹

Among the landmark disability rights laws is Section 504 of the Rehabilitation Act of 1973 ("Section 504"), which prohibits discrimination on the basis of disability in programs that receive federal financial assistance.²⁰ The ADA's non-discrimination mandates are based on Section 504 and the Civil Rights Act of 1964.²¹ The ADA essentially extends Section 504's non-discrimination mandate beyond federal agencies and recipients of federal financial assistance to state and local governments, public transportation entities, and private entities holding themselves out to the public while engaged in commerce.²²

Federal government agencies are also bound by electronic access non-discrimination mandates. On July 21, 2001, the Rehabilitation Act of 1973 was amended, making federal agencies responsible for providing accessible websites. Section 508 of the Rehabilitation Act of 1973 ("Section 508") requires that all electronic and information technologies that federal agencies develop, procure, maintain, or use must be usable by persons with

disabilities in a manner that is comparable to non-disabled users, unless an undue burden would result.²³ This mandate proscribes discrimination against both federal government employees seeking to access information technologies and members of the public soliciting information from federal agencies.²⁴

The ADA prohibits both overt and passive discrimination against persons with disabilities.²⁵ In enacting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . persisting in such critical areas as . . . public accommodations, education . . . [and] communication."²⁶ The purposes of the ADA are:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.²⁷

Although existing statutes, such as the ADA, pro-

U.S.C. §12101(a)(7).

¹⁶ See generally THE SMITHSONIAN INSTITUTION, NATIONAL MUSEUM OF AMERICAN HISTORY VIRTUAL EXHIBITION, THE DISABILITY RIGHTS MOVEMENT, at <http://americanhistory.si.edu/disabilityrights/exhibit.html> (2000).

¹⁷ The Civil Rights Act of 1964, 42 U.S.C. §2000a(a) (2000).

¹⁸ Rehabilitation Act of 1973, 29 U.S.C. §§701, 794(a) (2000) (prohibiting discrimination against persons with disabilities by federal government agencies and recipients of federal financial assistance).

¹⁹ See 42 U.S.C. §§12101-12213. See, e.g., H.R. REP. NO. 101-485, pt. 2 (providing a history of disability rights legislation).

²⁰ 29 U.S.C. §794 (prohibiting discrimination by federal agencies).

²¹ See H.R. REP. NO. 101-485, pt. 2.

²² See 42 U.S.C. §§12101-12213.

²³ See §508 of the Rehabilitation Act of 1973, 29 U.S.C. §794d (2000).

²⁴ See Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500 (Dec. 21, 2000). The Access Board, an independent federal agency, provides the standards for electronic and information technology accessibility pursuant to Section 508. See The Architectural Barriers Act of 1968, 42 U.S.C. §4151 (2000). The Access Board was

established under Section 502 of the Rehabilitation Act of 1973, 29 U.S.C. §792 (2000). See generally The Access Board, at <http://www.access-board.gov> (last visited Mar. 25, 2003); see also Steve Mendelsohn and Ron Hager, *Access to Information and Electronic Technology Offered by the U.S. Government, Section 508 of the Federal Rehabilitation Act*, 6 ADVOCATE 1 (National Assistive Technology Advocacy Project, Buffalo, N.Y.), Jan./Mar. 2001 (providing a detailed examination of the entities covered by Section 508 as well as exemptions from the law); just as Section 504 set the stage for the passage of the ADA, some argue that Section 508 sets the stage for enforcement of the ADA or a future statutory amendment to the ADA to make the non-discrimination mandate unmistakably clear that it applies to the Internet. See Latresa McLawhorn, Comment, *Recent Development: Leveling of the Accessibility Playing Field: Section 508 of the Rehabilitation Act*, 3 N.C. J. LAW & TECH. 63, 75 (2001). This Comment finds that Title III already applies to the Internet and thus, the argument for amending the statute is not applicable here.

²⁵ 42 U.S.C. §§12101-12213 (2000); see also H.R. REP. NO. 101-485, pt. 2, at 29 (providing numerous examples of overt and passive discrimination by employers, state and local governments, and places of public accommodation).

²⁶ 42 U.S.C. §§12101(a)(2)-(3).

²⁷ *Id.* §12101(b).

vide mechanisms for enforcing the civil rights of persons with disabilities, discrimination is still pervasive.²⁸ One such area where discrimination is still pervasive is the Internet.²⁹

B. E-Barriers to Internet Accessibility

The Internet is an invaluable resource and an ever-growing medium. The Internet provides a forum for efficient information transfer, business transactions, and communications.³⁰ Recently, the Supreme Court, in emphasizing the broad utility of the Internet, stated that “[o]ne can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theater, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis.”³¹ It is fair to say that the utility of the Internet is so expansive that it is hard to imagine its potential future uses; “[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought.”³²

Unfortunately, many individuals are precluded from utilizing the wealth of the Internet because of virtual architectural and electronic barriers (“e-

barriers”).³³ E-barriers are pervasive in the current structure of the Internet.³⁴ The National Center for the Research and Dissemination of Disability Research, in examining the accessibility of the Internet for persons with disabilities, concludes that the Internet in its current form does not communicate well to users who may have different needs.³⁵ The report states that “the use of graphics, animation, tables, and frames have the potential unintended consequence of limiting, rather than expanding, information access on the Web for some people, such as persons using screenreaders.”³⁶ The United States Department of Commerce has reported that “[t]he transformation of the Internet from a text-based medium to a robust multi-media environment has created a crisis—a growing digital divide in access for people with disabilities.”³⁷

Opponents of enforcing the application of Title III to the Internet argue that it would be overly burdensome on private Internet websites.³⁸ Experts argue that it is possible, and that there are ample resources providing services, often free, to make private websites accessible.³⁹ Among these are the City of San Jose, California, web accessibil-

²⁸ See, e.g., U.S. DEP’T OF JUSTICE, ENFORCING THE ADA: A STATUS REPORT FROM THE DEP’T OF JUSTICE, at <http://www.ada.gov/janmar03.htm> (last modified Mar. 12, 2004) (providing the most recent enforcement activities of the ADA by the Department of Justice).

²⁹ Compare H. STEPHEN KAYE, U.S. DEP’T OF EDUCATION, DISABILITY AND THE DIGITAL DIVIDE, (2000) [hereinafter DISABILITY AND THE DIGITAL DIVIDE] (finding that only 9.9% of persons with disabilities, as compared to 38.1% of non-disabled persons, connected to the Internet in the year 2000), with *The Growing Digital Divide*, supra note 7 (discussing the difficulty in determining the number of persons with disabilities that are precluded from using the Internet, essentially because they are precluded from using the Internet and cannot be counted).

³⁰ See, e.g., U.S. CENSUS BUREAU, U. S. DEP’T OF COMMERCE, E-STATS, E-COMMERCE 2001 HIGHLIGHTS 1 (2003). The Census Bureau brief states that “e-commerce outperformed total economic activity in three of four major economic sectors measured between 2000 and 2001.” *Id.*

³¹ *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002).

³² *Reno v. ACLU*, 521 U.S. 844, 852 (1997) (internal quotations omitted).

³³ See generally, Cynthia D. Waddell, *Applying the ADA to the Internet: A Web Accessibility Standard*, at http://www.icdri.org/CynthiaW/applying_the_ada_to_the_internet.htm (last visited Mar. 25, 2004); see also Leo Valdes, *Accessibility on the Internet*, at <http://www.un.org/esa/socdev/enable/disacc00.htm> (last modified Dec. 24, 2003) (discussing the problem of website accessibility); see also Amy M. Kautzman, *Virtuous, Virtual Access: Making Web Pages Accessible to People with Disabilities*, SEARCHER, at <http://www.infotoday.com/searcher/jun98/story3.htm> (June 1998) (presenting an overview of the prob-

lem of website accessibility).

³⁴ See generally, Lawrence Lessig, *The Laws of Cyberspace*, STATE BAR OF ARIZONA, at http://www.lessig.org/content/articles/works/laws_cyberspace.pdf (last visited Mar. 25, 2004) (discussing the non-physical architectural barriers to participation on the Internet).

³⁵ See THE NATIONAL CENTER FOR THE RESEARCH AND DISSEMINATION OF DISABILITY RESEARCH, WHO NEEDS WEBSITE ACCESSIBILITY?, THE RESEARCH EXCHANGE, 2 (1998) [hereinafter WHO NEEDS WEBSITE ACCESSIBILITY?]. The National Center for the Research and Dissemination of Disability Research is funded by the National Institute on Disability and Rehabilitation Research (NIDRR), a component of the United States Department of Education. See NIDRR, DEP’T OF EDUCATION, at <http://www.ed.gov/about/offices/list/oders/nidrr/index.html> (last visited Mar. 25, 2004).

³⁶ See WHO NEEDS WEBSITE ACCESSIBILITY?, supra note 35.

³⁷ See *The Growing Digital Divide*, supra note 7, at 5.

³⁸ See *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 12 (Feb. 9, 2000) (statement of Dennis C. Hayes, Chairman of the United States Internet Industry Association) [hereinafter Hayes Statement] (arguing that “the Internet is an evolving media, not a physical structure . . . if we apply regulations based on the technologies and possibilities of today, we may in fact limit the development of better access tools simply because we couldn’t conceive of them when the regulation was drafted”); see also Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U.J. SCI. & TECH. L. 26 (2001) (providing arguments against the application of Title III to the Internet) [hereinafter Taylor].

³⁹ *Id.*

ity project and the World Wide Web Consortium Web Accessibility Initiative.⁴⁰ Other resources providing services for websites seeking accessibility, such as Bobby, “test web pages and help expose and repair barriers to accessibility and encourage compliance with existing accessibility guidelines.”⁴¹ The Bobby service, which is sponsored by IBM, will either test a website under Section 508 guidelines or under W3C “Web Content Accessibility Guidelines 1.0” based on user preference.⁴² The Bobby site also provides an icon that can be placed on a website to advertise its accessibility.⁴³ The Alliance for Technology Access also provides helpful information on accessibility.⁴⁴ The Trace Center, at the College of Engineering at the University of Wisconsin-Madison, provides useful and free technical assistance on universal design and accessibility.⁴⁵ Nevertheless, experts on the issue report that the use of graphical websites without textual labels preclude persons who use screen readers from accessing the site.⁴⁶ This concern is amplified in light of the number of individuals who are precluded from utilizing the In-

ternet’s wealth of information and resources.⁴⁷

C. Statistical Evidence

Excluding persons with disabilities from using the Internet is cause for concern.⁴⁸ Nearly one-in-five Americans has one or more mental or physical disability.⁴⁹ Other sources indicate that there are approximately 750 million people with one or more disabilities in the world.⁵⁰ In 2000, the Census Bureau reported that nearly 42% of United States citizens, sixty-five years and older, had some type of disability.⁵¹ At that time, 34.7 million people were elderly; this number is expected to increase to 69.4 million by the year 2030 as the baby-boom generation ages.⁵²

Certainly website inaccessibility does not affect every person with a disability, but statistics show that it affects a large number of people, particularly those who are blind.⁵³ Although blind persons are most directly affected, website inaccessibility can affect other persons with disabilities.⁵⁴ For example, an individual with a mobility impair-

⁴⁰ See *The Growing Digital Divide*, *supra* note 7.

⁴¹ See Bobby, at <http://bobby.watchfire.com/bobby/html/en/index.jsp> (last visited Mar. 25, 2004).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See generally The Alliance for Technology Access, at <http://www.ataccess.org/> (last visited Mar. 25, 2004).

⁴⁵ See The Trace Center, at <http://tracecenter.org/> (last visited Mar. 25, 2004); see also Jennifer Jones, *Users with Disabilities Push High-Tech Limits*, INFO WORLD, Sept. 4, 2000, at 37.

⁴⁶ See *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Dr. Steven Lucas, Senior Vice President, Privaseek, Inc.).

⁴⁷ See *The Growing Digital Divide*, *supra* note 7.

⁴⁸ See generally, H.R. REP. NO. 101-485 (offering numerous examples of individuals with disabilities excluded from mainstream activities and the adverse effects of such discrimination on those persons and society in general); see also, 42 U.S.C. §12101(a)(9) (2002) (providing that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity”); see Sally McGrane, *Is the Web Truly Accessible to the Disabled?*, CNET.COM (Jan. 26, 2000) (on file with the author) (providing that 50% of Americans were online in 2000, that 76% of Americans with disabilities were online in 2000, and that approximately 98% of websites were inaccessible to disabled persons in 2000); see also Humphrey Taylor, *How the Internet is Improving the Lives of Americans with Disabilities*, at http://www.harrisinteractive.com/harris_poll/index.asp?PID=93 (June 7, 2000) (providing a survey of 535 adults with disabilities and

614 adults without disabilities taken between March 22, 2000 and April 5, 2000). The survey finds that on average, adults with disabilities spend twice as much time on the Internet than adults without disabilities. *Id.*

⁴⁹ JUDITH WALDROP & SHARON M. STERN, U.S. DEP’T OF COMMERCE, *DISABILITY STATUS: 2000*, 2 (2003) [hereinafter CENSUS 2000 BRIEF]. The census report excludes people in the military and people who are in institutions. *Id.*

⁵⁰ NAT’L INST. OF STANDARDS AND TECH., DEP’T OF COMMERCE, *THE INFORMATION INFRASTRUCTURE: REACHING SOCIETY’S GOALS*, 11 (1994).

⁵¹ CENSUS 2000 BRIEF, *supra* note 49. The percentage is equivalent to almost 14 million Americans. The census report excludes people in the military and people who are in institutions. *Id.*

⁵² DEP’T OF COMMERCE, *AGING IN THE UNITED STATES—PAST, PRESENT AND FUTURE*, at <http://www.census.gov/ipc/prod/97agewc.pdf> (last visited Mar. 25, 2004). Because disability often comes with age, and because the Baby-boom generation is increasingly dependent on the Internet, website accessibility is an investment in our future. *Id.*

⁵³ NAT’L FED’N FOR THE BLIND, *BLINDNESS STATISTICS*, at <http://www.nfb.org/stats.htm> (last modified Oct. 30, 2002) [hereinafter BLINDNESS STATISTICS]. The World Health Organization, in 1994, estimated that 38 million people around the world were blind and that there were an estimated 110 million additional cases of low vision. See WORLD HEALTH ORG. INFO., *FACT SHEET N 142, BLINDNESS AND VISUAL DISABILITY*, at <http://www.who.int/inf/fs/en/fact142.html> (Feb. 1997). The Fact Sheet provides that “[t]he estimated worldwide prevalence of blindness is 0.7%, ranging from 0.3% in the Established Market Economies and Former Socialist Economies of Europe to 0.6% in China to 1% in India to 1.4% in Sub-Saharan Africa.” *Id.*

⁵⁴ See *Screen Readers and the Web*, *supra* note 1.

ment may use a screen-reader, equipped with voice activated devices, to navigate the Internet.⁵⁵

Website accessibility also extends beyond affecting persons with disabilities and can affect illiterate populations.⁵⁶ Accessible features on websites can open Internet use up to illiterate populations who may use screen readers.⁵⁷ Experts argue that this may in effect reduce illiteracy in the United States.⁵⁸ Moreover, website accessibility extends even further beyond assisting persons with disabilities and illiterate populations.⁵⁹ Using "Alt" tags and other text labels benefits other technologies, such as personal digital assistants ("PDAs") and cellular telephones with web access.⁶⁰ Text-based language opens the Internet up to low technology users in other countries through various interfaces.⁶¹ Further, using text-based language and text labels helps facilitate data search engines.⁶² Additionally, these accessibility features may serve as an effective technique for people who are learning English as a second language.⁶³ Finally, the use of accessible features can help reduce work-related injuries.⁶⁴

It is impossible to determine the exact number of people precluded from accessing parts of the Internet and calculating the number would lead to an understatement of the problem.⁶⁵ In the end, what is important is that many individuals are precluded from using the Internet because of e-barriers to access. Much of the problem springs from confusion in the law as to whether Title III

applies to the Internet.⁶⁶

D. The Status of Title III as Applied to Non-Physical Places of Public Accommodation

Title III prohibits discrimination against persons with disabilities in the provision of goods and services by commercially operating entities.⁶⁷ Entities covered under Title III are public accommodations, commercial facilities, and certain educational facilities offering examinations and courses.⁶⁸ The confusion stems from the language "places of public accommodation" within Title III and whether that relates to non-physical places.⁶⁹

Despite the broad language of Title III, its legislative history,⁷⁰ and its regulations,⁷¹ some argue that the non-discrimination mandate only applies to *physical* places of public accommodation.⁷² The issue of whether Title III applies to non-physical places of public accommodation has been examined most often in the context of insurance in federal circuit court adjudications, which focus on the broad issue of whether Title III is limited to physical places and there is a conflict among the circuits.⁷³ The federal courts that hold Title III is limited to physical places base their rationale on Congress' enumeration of solely physical places or its failure to otherwise mention any non-physical place in the statute.⁷⁴ The other federal courts hold that Title III is not limited to mere physical places.⁷⁵ Despite the conflict, only one district

⁵⁵ See *Screen Readers and the Web*, *supra* note 1.

⁵⁶ See *The Growing Digital Divide*, *supra* note 7, at 4.

⁵⁷ *Id.*

⁵⁸ See SUSAN BRUMMEL TURNBULL, NAT'L INFO. INFRASTRUCTURE, PEOPLE WITH DISABILITIES AND THE NII: BREAKING DOWN BARRIERS, BUILDING CHOICE (1994).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *The Growing Digital Divide*, *supra* note 7.

⁶⁶ See discussion *infra* Part II. D.

⁶⁷ See 42 U.S.C. §§12181-12189 (2000).

⁶⁸ See *id.*

⁶⁹ 42 U.S.C. §12182(a) (emphasis added).

⁷⁰ H.R. REP. NO. 101-485 (1990).

⁷¹ 28 C.F.R. §§36.101-608 (2003).

⁷² Hayes Statement, *supra* note 38 ("the Internet is an evolving media, not a physical structure . . . if we apply regulations based on the technologies and possibilities of today, we may in fact limit the development of better access tools simply because we couldn't conceive of them when the regulation was drafted."); see also Taylor, *supra* note 38 (providing

arguments against the application of Title III to the Internet).

⁷³ See Kelly E. Konkright, Comment, *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713 (2001) [hereinafter Konkright]; see also NOT LIMITED TO ACTUAL PHYSICAL STRUCTURES, 4 AMS. WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL §31 (Aug. 2003) (discussing federal court interpretations of Title III as applied to the Internet).

⁷⁴ See Konkright, *supra* note 73, for a discussion of federal court interpretations of whether a public accommodation is limited to a physical place in the insurance context. See e.g., *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (holding that public accommodations are limited to physical places); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997) (holding that public accommodations are limited to physical structures).

⁷⁵ See, e.g., *Carparts Distrib. Cir., Inc. v. Auto. Wholesaler's Ass'n. of New England, Inc.*, 37 F.3d 12, 26 (1st Cir. 1994) (holding that places of public accommodation are not limited to physical structures); cf. *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 425-26 (D.N.H. 1996) (holding that a public accommodation cannot deny a person with a disability the services or goods it would provide non-disabled patrons).

court case, decided in 2000, specifically discusses whether Title III applies to the Internet, and it held in the negative.⁷⁶ The most promising case on the issue was filed by the National Federation for the Blind against America Online,⁷⁷ alleging that the Internet service was inaccessible for blind users; however, the case settled out of court in 2000.⁷⁸

Courts holding that Title III does not apply to the Internet conflict with the position of the Department of Justice. In 1996, after United States Senator Harkin of Iowa received a constituent letter concerning whether the ADA applied to the Internet, he sought guidance from the Department of Justice.⁷⁹ In response, the Department of Justice issued an advisory letter stating that entities covered by the ADA "are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media, such as the Internet."⁸⁰ The Department of Justice has also submitted an amicus brief opinion in the Court of

Appeals for the Fifth Circuit in favor of Title III applicability to the Internet.⁸¹ Nonetheless, the conflict among circuits concerning whether Title III is limited to physical places still exists,⁸² and questions remain as to whether Title III applies to the Internet.⁸³ These issues have created unfortunate economic and social restrictions on the digital market which beg their resolution before the Supreme Court.⁸⁴

III. ARGUMENTS FOR APPLYING TITLE III TO THE INTERNET

This Part discusses the arguments for and against making the Internet accessible for persons with disabilities. Part III examines whether the plain language of Title III applies to non-physical places such as the Internet. It contends that Title III has applied to non-physical places since its passage in 1990 and that Congress has the authority to regulate Internet commerce because discrimination against persons with disabilities on the In-

But cf., *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999) (holding that Title III prohibits public accommodations from denying access to goods and services but does not regulate the content or substance of the goods or services.).

⁷⁶ See *Access Now v. Southwest Airlines, Co.*, 227 F. Supp. 1312, 1321 (S.D. Fla. 2002) (holding that an airline Internet website is not a place of public accommodation within the meaning of Title III).

⁷⁷ See Carl S. Kaplan, *Is Cyberspace a 'Public Accommodation'?*, N.Y. TIMES CYBER L.R. at <http://www.nytimes.com/library/tech/99/11/cyber/cyberlaw/12law.html> (Nov. 12, 1999) (discussing the filing of suit by the National Federation of the Blind against America Online and the implications of website inaccessibility); see also Pamela Mendels, *U.S. Law Aims at Helping Disabled*, NY TIMES, at <http://www.nytimes.com/library/tech/99/11/cyber/articles/12access.html> (Nov. 12, 1999) (discussing the suit filed by the National Federation of the Blind's against America Online and the problem of website accessibility).

⁷⁸ See Complaint of National Federation of the Blind, Nat'l Fed'n of the Blind et. al. v. Am. Online, Inc., 99CV12303EFH (D. Mass 1999) at <http://www.education-rights.org/homenfbvaol.html> (last visited Mar. 25, 2004); see also, National Federation of the Blind/America Online Accessibility Agreement, Nat'l Fed'n of the Blind et. al. v. Am. Online, Inc., 99CV12303EFH (D. Mass 1999), at <http://www.nfb.org/Tech/accessibility.htm> (Jul. 26, 2000); see also, Barbara Pierce, *NFB Sues AOL*, THE BRAILLE MONITOR, at <http://www.nfb.org/bm/bm99/bm991201.htm> (Dec. 1999).

⁷⁹ See Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to the Honorable Tom Harkin, United States Senate, at <http://www.usdoj.gov/crt/foia/tal712.txt> (Sept. 9, 1996) [hereinafter DOJ LETTER] (containing the text of Senator Harkin's constituent's letter as well as the text of Senator Harkin's letter to the Department of Justice).

⁸⁰ See *id.* The letter states that "[t]he Internet is an excellent source of information and . . . people with disabilities should have access to it as effectively as people without disabilities." *Id.* It also states that "covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means." *Id.*

⁸¹ See Brief of the United States as Amicus Curiae in Support of Appellant, *Hooks v. OKBridge, Inc.*, 252 F.3d 208 (5th Cir. 2000) (mem.) (arguing that a company that offers services solely on the Internet is subject to the public accommodations provision of Title III).

⁸² See Konkright, *supra* note 73; see also *supra* notes 74-76.

⁸³ Compare Taylor, *supra* note 38 (arguing that Title III does not apply to the Internet, and that a proactive application could have the effect of chilling economic incentive and requiring websites to produce forced speech in violation of the First Amendment), and Hayes Statement, *supra* note 38 (arguing that Title III is not the correct piece of legislation to effectuate website accessibility), with Konkright, *supra* note 73, and *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., at http://www.ncd.gov/newsroom/testimony/bristo_2-17-00.html (Feb. 17, 2003) (statement of Marca Bristo, Chair, National Council on Disability).

⁸⁴ See U.S. SUP. CT. R. 10(a) (providing that the Supreme Court will grant certiorari on a matter when courts of appeals conflict); see also *Braxton v. United States*, 500 U.S. 344, 347 (1991) (providing that "[a] principal purpose for which [the Supreme Court uses] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law"). Resolution and uniformity of the law by the Supreme Court is particularly compelling in this case because under the current state of affairs, private Internet websites are subject to liability in some federal circuits while exempt in others. *Id.*

ternet places artificial restraints on the market. Furthermore, Title III does not offend the First Amendment, but strengthens its essential functions.

A. Whether Title III Applies to the Internet:
Facial Examination of the Statute and
Congressional Intent

1. *Statutory Interpretation of Title III*

Many legal disputes hinge on the interpretation of one word. Similarly, the issue of whether Title III applies to non-physical structures amounts to the interpretation of the word "place."⁸⁵ Title III's non-discrimination mandate can be interpreted in several ways. It is clear that Congress intended to prohibit *public accommodations* from discriminating against the disabled. However, Congress uses the language "any *place* of public accommodation."⁸⁶ Thus, the issue becomes whether Congress intended for "*place*" to mean solely a physical place or whether it is inclusive of non-physical public accommodations.⁸⁷

A fundamental principle of statutory interpretation is that a statute should be given its plain and literal meaning unless some ambiguity in the terms should arise.⁸⁸ The word "*place*" may connote several meanings. For example, a literal meaning dictionary search of the word "*place*" uncovers, at the minimum, seventeen definitions, from "[a]n area with definite or indefinite boundaries; a portion of space" to "[a] dwelling; a house" to "[a] locality, such as a town or city."⁸⁹ The definitions continue, to include "job, post, or position," a "[h]igh rank or status," or "particular situation or circumstance."⁹⁰ Looking at the word

"place" in the context of "place of public accommodation," it seems that two reasonable interpretations of the word may coexist. A "place of public accommodation" could be an "area with definite . . . boundaries" such as a house or a pharmacy.⁹¹ A "place of public accommodation" could simultaneously be "an area with . . . indefinite boundaries; a portion of space" such as the mind or outer space (although this "*place*" is arguably not accommodating to the public).⁹² Similarly, it seems that an interpretation of the phrase "place of public accommodation" that includes cyberspace does not offend the definition of "[a]n area with definite or indefinite boundaries; a portion of *space*."⁹³ For example, a pharmaceutical drug distributor on the Internet would be a *place* where one could purchase prescription drugs, although one need not actually enter a physical structure to get there. Similarly, one may purchase airline tickets at a travel agent's office or online, where entrance into the physical travel office is not necessary or possible.

There is clearly an ambiguity as to whether a *place* as used in Title III is limited to physical places. This is further evidenced by the difficulty that federal courts have had in determining whether Congress' definition of a "*place*" is exclusive of non-physical places.⁹⁴ Therefore, it is necessary to examine the remainder of the statutory language to determine congressional intent.

Title III provides examples of public accommodations.⁹⁵ While all of the places listed are physical places, several have language indicating that there could be other entities not specifically enumerated in the category, but within the scope of the list.⁹⁶ For example, public accommodations

⁸⁵ 42 U.S.C. §12182(a) (2000).

⁸⁶ *Id.* (emphasis added).

⁸⁷ *Id.* (emphasis added). This is the issue or principle of law in conflict among the federal appellate courts with regard to the application of Title III to the Internet. See cases and accompanying text *supra* notes 74-76.

⁸⁸ See, e.g., *Smith v. United States*, 508 U.S. 223, 228 (1993) (providing "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning").

⁸⁹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1339 (Houghton Mifflin Co. 4th ed., 2000) [hereinafter DEFINITION OF PLACE].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (emphasis added).

⁹⁴ See cases cited *supra* notes 74-76.

⁹⁵ 42 U.S.C. §12181(7) (2000).

⁹⁶ The legislative history to the ADA provides that the "12 listed *categories* are exhaustive." H.R. REP. NO. 101-485, pt. 3 at 54 (1990) (emphasis added). However, the legislative history provides that, within each category, the examples listed are "only a representative sample of the types of entities covered under this category" and that "[o]ther retail or wholesale establishments selling or renting items, such as a book store, videotape rental store, or pet store, would be a public accommodation under this category." It is important to note that the legislative history provides the following:

[A] person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient that the jewelry store sells items to the public. (emphasis

include “a motion picture house, theater, concert hall, stadium, or other place of exhibition;” as well as “an auditorium, convention center, lecture hall, or other place of public gathering.”⁹⁷ Furthermore, public accommodations include “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;” as well as “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.”⁹⁸ Continuing, public accommodations include “a museum, library, gallery, or other place of public display or collection;” as well as “a park, zoo, amusement park, or other place of recreation” and “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.”⁹⁹ Finally, included within the statutory definition of a public accommodation is “a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment” and “a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.”¹⁰⁰

Clearly, private Internet websites could encompass several of these areas. The Internet can be a “place of exhibition,” a “place of public gathering,” a “sales or rental establishment,” a “service establishment,” a “place of public display or collection,” a “place of recreation,” and a “place of education.”¹⁰¹ One may access the Internet to watch the daily news, to chat with friends, to rent a DVD, or to attend class. Certainly, these activities can be construed as types of recreation, service or exhibition and whether the accessing of

these materials is for education, recreation, or some other reason, the Internet is one *place* in which to do it.¹⁰²

The matter is of hierarchy here. The enumeration of the twelve categories of places of public accommodation at first glance seemingly excludes all things not enumerated. However, it is clear from the language of the statute, as well as the legislative history and regulations, that each category is not in itself exhaustive.¹⁰³ It is clear that the enumerations within each category are only examples of things within the categorical class. Thus, the language used in Title III’s specific enumerations, pointing to “other places,” necessarily negates the application of the maxim “*expressio unius est exclusio alterius*” within each category, although it may be applied to the twelve enumerated categories, where there is no possibility of a thirteenth category.

Another fundamental principle of statutory interpretation is that ambiguous statutes, specifically remedial statutes, should be given liberal construction consistent with the statute’s purpose.¹⁰⁴ Section 302(b)(2)(A) of the ADA explains the meaning of the term “discrimination” as used in Section 302(a). Specifically, Section 302(b)(2)(A)(iv) provides that discrimination includes among other things, “a failure to remove architectural barriers, and communication barriers that are structural in nature . . . where such removal is readily achievable.”¹⁰⁵ Clearly, Congress was concerned that persons with disabilities were being discriminated against due to the existence of architectural barriers and communications barriers.¹⁰⁶ Since communication barriers extend beyond the physical world, it is logical to

added).

Id.

⁹⁷ 42 U.S.C. §§12181(7)(C), (D) (emphasis added).

⁹⁸ *Id.* §§12181(7)(E), (F) (emphasis added).

⁹⁹ *Id.* §§12181(7)(H)-(J) (emphasis added).

¹⁰⁰ *Id.* §§12181(7)(K), (L) (emphasis added).

¹⁰¹ *Id.* §§12181(7)(A)-(L).

¹⁰² See *Ford v. United States*, 273 U.S. 593, 612 (1927) (discussing the maxim “*expressio unius est exclusio alterius*,” in that a statute with enumerations impliedly excludes things not enumerated in the statute); see also Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioners Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451 (2000) (discussing avenues of statutory interpretation).

¹⁰³ See H.R. REP. NO. 101-485, pt. 2 (1990); see also *Non-discrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35,544, 35,551 (July 26, 1990) (codified at 28 C.F.R. pt. 36).

¹⁰⁴ See, e.g., *United States v. Article of Drug . . . Bacto-*

Unidisk . . ., 394 U.S. 784, 799 (1969) (providing that remedial statutes should be afforded liberal interpretations to effectuate their ends).

¹⁰⁵ 42 U.S.C. §12182(b)(2)(A)(iv).

¹⁰⁶ Title IV of the ADA (“Title IV”) amended Title II of the Communications Act of 1924, 47 U.S.C. §§201-231, 225 (2000), to require the implementation of telecommunications services for hearing-impaired and speech-impaired individuals by common carriers engaged in interstate and intrastate commerce by wire or radio. Title IV requires that telecommunications services engaged in wire or radio communication provide telecommunications relay services that provide persons using TDD machines the ability to engage in communication. See 47 U.S.C. §225 (2000). A TDD, as defined by Title IV, is a “Telecommunication Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.” 47 U.S.C. §225(a)(2).

conclude that Congress was concerned with discrimination in non-physical places.¹⁰⁷

2. Congressional Intent

To determine the congressional intent of a statute, principles of statutory interpretation provide that “[t]he purpose, subject matter, the context, the legislative history, and the executive interpretation of that statute are aids to construction.”¹⁰⁸ When examining the history of the ADA and the circumstances surrounding its enactment, it seems unlikely that Congress would have intended to “invoke the *sweep* of congressional authority, including the power to . . . regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities” in physical places, but then completely disregard non-physical places.¹⁰⁹ Such an interpretation would prohibit a travel agent with an office in Cleveland, Ohio from discriminating on

the basis of disability, but would allow an online travel website to discriminate at will.¹¹⁰ This absurd result would allow online public accommodations to escape liability, which conflicts with the numerous provisions of Title III which prohibit contracting services out to escape liability.¹¹¹

Congress was also concerned with the economic effects of discrimination on persons with disabilities.¹¹² It found that discrimination “costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”¹¹³ In light of its concern with the dependency and nonproductivity that results from discrimination against persons with disabilities, it is illogical to assume that Congress would prohibit physical places from discriminating while simultaneously exempting non-physical places.¹¹⁴ If Congress intended on exempting non-physical places of public accommodation, it would have enumerated such an intention.¹¹⁵

When the ADA was passed in 1990, the Internet

¹⁰⁷ See *Johnson v. United States*, 529 U.S. 694, 710 n.10 (2000) (providing that the obligation of the Supreme Court is “to give effect to congressional purpose so long as congressional language does not itself bar that result”); see also *Nardone v. United States*, 308 U.S. 338, 339 (1939) (providing that statutes should be interpreted “so as to effectuate the policy which Congress has formulated”). Here, Congress is concerned with discrimination against persons with disabilities and its effects thereof. Furthermore, it is clear that Congress is concerned with architectural and communication barriers. Because an interpretation of Title III exclusive of the Internet alters or defeats the purpose of the statute, the Internet must be included within the scope of Title III. Such an interpretation is consistent with the requirement of providing effective communication so as to eliminate communication barriers.

¹⁰⁸ See *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

¹⁰⁹ 42 U.S.C. §12101(b)(4) (emphasis added).

¹¹⁰ Such an interpretation not only defeats the purpose of Title III, but should be avoided. See *Holy Trinity Church v. United States*, 143 U.S. 457, 460-61 (1892) (providing that “[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity” and “[t]he reason of the law . . . should prevail over its letter”).

¹¹¹ See generally 42 U.S.C. §12182. See also H.R. REP. NO. 101-485, pt. 2, at 101 (1990) (providing “[t]he intent of the contractual prohibitions of section 302(b)(1)(A)(ii)-(iii) [codified as 42 U.S.C. §12182(b)(1)(A)(ii)-(iii)] is to prohibit a public accommodation from doing indirectly through a contractual relationship, what it may not do directly”).

¹¹² See also 42 U.S.C. §12101(a)(6) (providing that “census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally”) (emphasis added). See also 42 U.S.C. §12101(a)(8) (providing that the “Nation’s proper goals regarding individuals with disabilities

are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals”) (emphasis added). See also 42 U.S.C. §12101(a)(9) (providing that the “continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity”) (emphasis added).

¹¹³ 42 U.S.C. §12101(a)(9).

¹¹⁴ See *id.* §12101(a)(9).

¹¹⁵ See *Smith*, 508 U.S. at 229 (providing that an expansive statutory term must be given the expansive interpretation unless Congress similarly provides a limitation). The *Smith* Court provides that “[h]ad Congress intended [a] narrow construction . . . it could have so indicated. It did not, and we decline to introduce that additional requirement on our own.” *Id.* Congress was also concerned with the economics of barrier removal on businesses. It is illogical to assume that Congress, concerned with the effect of Title III on businesses, would apply the statute to physical places while simultaneously exempting non-physical places without specifically enumerating this intention to do so. See generally H.R. REP. NO. 101-485 (providing numerous concerns about the economic impact of requiring businesses to make changes so as to accommodate persons with disabilities). Particularly, Congress was concerned with the economic impact that required alterations could have on businesses, both large and small. Therefore, Congress provided for tax credits and tax deductions for all of the modifications that a business would be required to make. See 26 U.S.C. §44 (2000) (providing a maximum tax credit of up to \$5,000 per year to help small businesses recover the costs related to accessibility modifications); see also 26 U.S.C. §190(c) (2000) (providing a maximum tax deduction of \$15,000 per year for both large and small businesses to cover the costs of accessibility modifications.). Whether or not the tax incentives arising from the

was a very young industry.¹¹⁶ However, the youth of an industry hardly negates the clear legislative purpose of the ADA.¹¹⁷ As noted, Congress was concerned that “discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, education, . . . [and] communication,” all three of which are available via the Internet.¹¹⁸ It is illogical to assume that Congress would pass legislation with the intention of eliminating discrimination, only in physical places. The plain language of Title III reveals no such intent.¹¹⁹

The Supreme Court has applied similar reasoning in a unanimous decision holding that the ADA, “can be applied in situations not expressly anticipated by Congress.”¹²⁰ The following Section examines this analogous case, *Pennsylvania Department of Corrections v. Yeskey*, and how it applies to the current problem of Title III and the Internet.

3. The Yeskey Decision

Title II of the ADA prohibits discrimination against persons with disabilities by state and local governments in the provision of “services, programs, and activities.”¹²¹ In 1998, the Supreme Court, presented with a novel question of statutory interpretation, determined that Title II’s non-discrimination mandate applied to places op-

erated by state and local governments that were not specifically mentioned in the statute. Justice Antonin Scalia, writing for the unanimous Court in *Pennsylvania Department of Corrections v. Yeskey*, held that “the plain text of Title II of the ADA unambiguously extends to state prison inmates,” despite there being no reference to inmates in the statute or legislative history.¹²² Although the findings of the ADA enumerate that Congress found that “discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization,” Title II does not specifically enumerate state prison inmates.¹²³ Nonetheless, the *Yeskey* Court determined that “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”¹²⁴

In determining that Title II of the ADA “demonstrates breadth,” the Court held that “the plain text of Title II of the ADA unambiguously extends to state prison inmates.”¹²⁵ This case is analogous to Title III’s application to the Internet. Although Congress has not specifically enumerated that discrimination on the Internet is pervasive, it has recognized the barriers faced by persons with disabilities “in such critical areas as . . . public accommodations, education, . . . [and] communication.”¹²⁶ The Internet’s explosive growth and increasing social utility could not have been “expressly anticipated by Congress,”¹²⁷ since it was

removal of barriers apply solely to physical places is not enumerated. If Congress intended on exempting businesses engaged in commerce in the non-physical world, it seems that it would have done so in relation to the tax incentives. In the end, history reveals the economic benefits of applying Title III. Some businesses, such as Greyhound Bus Lines, argued that requiring their buses to have wheelchair lifts pursuant to the ADA would force them into bankruptcy. However, federally mandated bus accessibility actually increased business for Greyhound. See Cassandra Burke Robertson, *Providing Access to the Future: How the Americans with Disabilities Act Can Remove Barriers in Cyberspace*, 79 DENV. U. L. REV. 199, 225-26 (2001) (discussing the Greyhound Bus Lines account).

¹¹⁶ See Robert H. Zakon, *Hobbes’ Internet Timeline v. 6.1*, at <http://www.zakon.org/robert/internet/timeline/> (last visited Mar. 25, 2004) [hereinafter INTERNET TIMELINE] (providing a timeline of important events in the history of the Internet). For example, the World Wide Web was not even developed until 1991. The number of Internet users did not reach one million until 1992. The United States House and Senate did not provide information servers on the Internet until 1994. Traditional online dial-up services such as CompuServe, America Online, and Prodigy did not begin to provide Internet access until 1995.

¹¹⁷ 42 U.S.C. §12101(b) (2000).

¹¹⁸ *Id.* §12101(a)(3). It is clear that the failure to en-

force Title III as applied to the Internet has great consequences. Whether Congress specifically foresaw these consequences on the Internet is unclear at best. However, Congress clearly foresaw the effects of discrimination against persons with disabilities generally.

¹¹⁹ See generally 42 U.S.C. §§12181-12189 (2000). Nowhere in the language of Title III is there a congressional intent to exclude non-physical places of public accommodation engaged in commerce from the reach of the statute.

¹²⁰ *Pa. Dep’t of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotations omitted) (quoting *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985)).

¹²¹ 42 U.S.C. §12132 (2000). Title II provides that “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” *Id.*

¹²² *Yeskey*, 524 U.S. at 213.

¹²³ 42 U.S.C. §12101(a)(3).

¹²⁴ *Yeskey*, 524 U.S. at 212 (internal quotations omitted) (quoting *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985)).

¹²⁵ *Yeskey*, 524 U.S. at 212-13 (citations omitted).

¹²⁶ 42 U.S.C. §12101(a)(3).

¹²⁷ *Id.*

such a new medium when the ADA was enacted.¹²⁸ Nor could Congress envision the numerous e-barriers.¹²⁹ However, Congress' stated purpose of the ADA, to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," is unmistakable and unambiguous.¹³⁰

Since the ADA manifests a congressional intent to extend Title III to non-physical places such as the Internet, it becomes necessary to determine whether such an extension is constitutional—does Congress possess the power to regulate discrimination on the Internet?¹³¹

B. The Commerce Clause: E-Barriers to the Free Flow of Commerce and the Regulation of Ones and Zeros on the Net¹³²

The constitutional principle of "enumerated powers" commands that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."¹³³ The principle that "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten" is as old as the Constitution itself.¹³⁴ Title III of the ADA relies on the Commerce Clause as authority for Congress' prohibition of discrimination by places of public accommodation against persons with disabilities.¹³⁵ Specifically, the Constitution provides

Congress the authority, *inter alia*, "[t]o regulate Commerce . . . among the several States"¹³⁶ and the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," namely the power to regulate commerce.¹³⁷ The Supreme Court has consistently upheld Congress's authority, pursuant to the Commerce Clause, to enact remedial legislation to prohibit discrimination by private entities that affect commerce.¹³⁸ These cases also determine the extent of congressional authority to prohibit discrimination by such public accommodations, even though they may be local in their affectation.¹³⁹

It is clear that Congress has the authority to prohibit disability-based discrimination in physical places of public accommodation.¹⁴⁰ However, novel questions arise when examining Congress' power to prohibit discrimination in non-physical places of public accommodation, such as the Internet.

The central issue is whether Congress' regulation in Title III is the regulation of *commerce*. The word *commerce*, as used in the Commerce Clause, includes the traffic, movement, and intercourse of things, but not the manufacturing or producing of things.¹⁴¹ It may also include non-commercial activities, such as the transportation of liquor across state lines for personal use,¹⁴² kidnapp-

¹²⁸ See generally, INTERNET TIMELINE, *supra* note 116 (providing examples of the youth of the Internet in 1990).

¹²⁹ *Id.*

¹³⁰ 42 U.S.C. §12101(b)(1).

¹³¹ See *id.* §12101(b)(4). Although Congress provides the Fourteenth Amendment as an authority to regulate and prohibit discrimination in addition to the Commerce Clause, the Fourteenth Amendment only applies to the states, and thus is not applicable in the discussion here. However, Title II of the ADA, which prohibits discrimination by state and local governments against persons with disabilities, is authorized by the Fourteenth Amendment. An examination of Title II as applied to the Internet would prove equally useful. See generally *United States v. Morrison*, 529 U.S. 598 (2000) (discussing authorities by which Congress may legislate).

¹³² See, e.g., *Computer Assocs. Int'l Inc. v. Altai, Inc.*, 982 F.2d 693, 698 (2d Cir. 1992) (affording a discussion of binary code, the language of ones and zeros that a computer uses to process information).

¹³³ *Morrison*, 529 U.S. at 607.

¹³⁴ *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (Marshall, C. J.)).

¹³⁵ See 42 U.S.C. §12101(b)(4) (providing that Congress intends to "invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major area of discrimination faced day-to-day by people with disabili-

ties"). In addressing discrimination against persons with disabilities by private entities, Congress may only do so pursuant to the Article I Commerce Clause. The Fourteenth Amendment only applies to the states. See generally *Morrison*, 529 U.S. at 607, for a discussion of congressional authority to legislate.

¹³⁶ U.S. CONST. art. I, §8, cl. 3.

¹³⁷ U.S. CONST. art. I, §8, cl. 18. See also *McCulloch v. Maryland*, 17 U.S. 316, 352 (1819) (providing the rule of law that Congress may regulate activities falling outside the enumerated powers to effectuate the enumerated power).

¹³⁸ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964) (providing that Congress may prohibit discrimination on the basis of race, color, religion, or national origin by public accommodations, whose operations affect commerce); see also *Heart of Atlanta Motel v. U. S.*, 379 U.S. 241, 250 (1964) (providing same). See also H.R. REP. NO. 101-485, pt. 3, at 53 (1990) (providing that "[c]ommerce is defined in the same manner as in Title II of the Civil Rights Act of 1964, regarding public accommodations").

¹³⁹ See *Katzenbach*, 379 U.S. at 301; see also *Heart of Atlanta*, 379 U.S. at 258.

¹⁴⁰ See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001) (providing that golf courses may not discriminate on the basis of disability pursuant to Title III).

¹⁴¹ See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁴² See generally *United States v. Hill*, 248 U.S. 420 (1919) (holding the prohibition of the transport of liquor for one's

ping,¹⁴³ and fleeing a state to avoid prosecution.¹⁴⁴ Although the manufacture of goods is not in itself interstate commerce, if the shipment of those goods is destined for interstate commerce, Congress may regulate it pursuant to the Commerce Clause.¹⁴⁵

Congress' intent in eliminating discrimination pursuant to Title III is to afford persons with disabilities meaningful access to the "goods, services, facilities, privileges, advantages, or accommodations" that a place of public accommodation affecting commerce may provide.¹⁴⁶ More specifically, the *commerce* could be the ones and zeros that makes up the information being transferred via the Internet,¹⁴⁷ or the electrons that flow through cable Internet wires,¹⁴⁸ or the telephone lines used to access a website. The *commerce* could also simply be the information transfer, which, pursuant to Title III, must be in a manner that is accessible by all. In any event, little case law exists concerning whether Congress may regulate Internet communications pursuant to the Commerce Clause. Only one court has addressed the issue, which seems to accept the Internet as within the ambit of the Commerce Clause.¹⁴⁹

The next question is whether Congress' regulation of commerce on the Internet is "among the several states."¹⁵⁰ The Supreme Court has interpreted this phrase to mean *interstate* commerce, such as the prohibition by Congress of the transportation of lottery tickets across state lines.¹⁵¹ Because the Internet is accessible in any state, websites are engaged in *interstate* commerce.¹⁵² It is commonly understood that when a website is developed, it will be accessible by people anywhere in the world.¹⁵³ From the moment an electron or a one or a zero is accessible on the web, the site becomes national and international in scope. Thus, Congress is regulating Internet communications in interstate commerce to promote accessibility and eliminate discrimination against persons with disabilities.

Congress may regulate civil rights based upon the principles of interstate commerce because discrimination against particular groups can have an artificial restriction on the market and interfere with the free flow of commerce.¹⁵⁴ With the expansive growth of the Internet, and with the number of persons with disabilities who seemingly are

own use across state lines within Congress' commerce authority).

¹⁴³ See generally *Gooch v. United States*, 297 U.S. 124 (1936) (holding the prohibition on the kidnapping of a child by a parent without custody within Congress' commerce authority).

¹⁴⁴ See *Hemans v. United States*, 163 F.2d 228, 238-39 (6th Cir. 1947) (holding the prohibition of the fleeing from a state to avoid prosecution within Congress' commerce authority).

¹⁴⁵ See, e.g., *United States v. Darby*, 312 U.S. 100, 124-25 (1941) (holding that Congress may regulate things that it deems injurious to the public welfare, such as wages, hours and working conditions to protect interstate commerce).

¹⁴⁶ 42 U.S.C. §12182(a) (2000).

¹⁴⁷ See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 (1984) (recognizing radio and television broadcasting as commerce).

¹⁴⁸ See *FERC v. Miss.*, 456 U.S. 742 (1982) (holding the Congressional regulation of interstate power transmission valid pursuant to the Commerce Clause).

¹⁴⁹ *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (holding that Internet communications were "commerce" within the meaning of the Commerce Clause. Nonetheless, more concern seems to surround the operation of the dormant commerce power in relation to states ability to regulate commerce over the Internet). See, e.g., Daniel A. Farber, *Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 GA. ST. U. L. REV. 789, 818-19 (2000) (arguing for a more restrained application of the dormant Commerce Clause in striking down state Internet regulations).

¹⁵⁰ U.S. CONST. art. I, §8, cl. 3.

¹⁵¹ *Champion v. Ames*, 188 U.S. 321, 363-64 (1903). This case is also commonly referred to as "The Lottery Case."

¹⁵² Moreover, Congress can reach those activities of a place of public accommodation on the Internet that are intrastate if Congress has a rational basis to conclude that such intrastate activity has a substantial effect on interstate commerce. See, e.g., *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 280-81 (1981) (holding that Congress could have a rational basis that surface coal mining, a local activity, has substantial effects on interstate commerce). Thus, if there are websites that are not interstate in nature, Congress could have a rational basis for regulating those websites, because they could have substantial effects on interstate commerce. Nonetheless, intrastate activity on the Web is probably an irrelevant distinction since any website is generally accessible by people in almost any part of the country and even the world. See *Reno*, 521 U.S. at 850 (internal quotations omitted) (finding the Internet to be a "unique and wholly new medium of worldwide communication" that "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world").

¹⁵³ See *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (internal quotations omitted) (finding that the Internet "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world").

¹⁵⁴ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (providing that Congress may prohibit discrimination on the basis of race, color, religion, or national origin by public accommodations, whose operations affect commerce); see also *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964) (providing same).

precluded from accessing websites,¹⁵⁵ Congress has a legitimate concern in making websites accessible. Unburdening the free flow of commerce justifies mandating that places of public accommodation on the Internet provide websites that are accessible by all persons.

Some Internet websites, although engaged in commerce, may be local, such as a cable operator providing services to one area within one state. Such a place of public accommodation provides goods or services that are somewhat trivial in comparison to the vast world of *interstate* commerce. The issue then becomes whether Congress may still regulate these trivial activities. The Supreme Court has long held that in such instances, Congress may still have the right to regulate local activities if, collectively or in the aggregate, they have (or could have) a real and substantial burden on the free flow of commerce.¹⁵⁶ The aggregate effect of allowing all local places of public accommodation on the Internet to discriminate could have a substantial effect on Congress' authority to regulate commerce because public accommodations could escape liability by providing purely local activities.¹⁵⁷

Congress has the constitutional authority to regulate commerce on the Internet.¹⁵⁸ The means of prohibiting discrimination against persons with disabilities justify the ends of unburdening the free flow of commerce on the Internet.¹⁵⁹ While it is clear that Congress has the power to prohibit discrimination on the Internet, it is necessary to determine whether the application of Title III to the Internet violates the First Amendment.

¹⁵⁵ See *BLINDNESS STATISTICS*, *supra* note 53 (providing statistical evidence of the e-barrier problem).

¹⁵⁶ See *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942).

¹⁵⁷ The Supreme Court recently has limited the scope of congressional commerce powers, when federal legislation regulates intrastate activity that is non-economic in nature. Because the regulation of places of public accommodation on the Internet is purely economic in nature, these recent limitations do not apply. See *United States v. Morrison*, 529 U.S. 598, 617 (2000); see also *United States v. Lopez*, 514 U.S. 549, 566-68 (1995).

¹⁵⁸ See, e.g., *The Telecommunications Act of 1996*, 47 U.S.C. §151 (2000).

¹⁵⁹ *C.f. Katzenbach*, 379 U.S. at 298 (holding that Congress may prohibit discrimination on the basis of race, color, religion, or national origin by public accommodations, whose operations affect commerce, as a means to effect the end of unburdening the free flow of commerce), and *Heart of Atlanta Motel*, 379 U.S. at 250 (holding same).

¹⁶⁰ See *Taylor*, *supra* note 38, at 45 (arguing that the application of Title III to private Internet Websites would

C. Whether the Application of Title III to the Internet Would Offend First Amendment Jurisprudence: E-Barrier Manner Restrictions

Opponents of the application of Title III to the Internet argue that it violates the First Amendment to the Constitution,¹⁶⁰ namely that "Congress shall make no law . . . abridging the freedom of speech."¹⁶¹ Novel questions of First Amendment jurisprudence arise when one considers whether Congress has the authority to require private websites to ensure accessibility for all users. Since the courts have not addressed this issue, it can best be addressed by understanding the Internet regulations that have confronted First Amendment challenges.¹⁶²

The initial question is whether the non-discrimination mandate of Title III, requiring websites to be accessible, is a regulation of verbal speech, non-verbal speech, or non-speech conduct. Here, classifying Internet speech as either verbal or non-verbal speech-related conduct depends on the content of the website. Some websites provide text only, while others depict activities and conduct through pictures. A website could depict cardboard shacks in a park¹⁶³ or a person burning a draft card on courthouse steps.¹⁶⁴ In either case, requiring these pictures to include text labels for accessibility purposes is the congressional regulation of non-verbal speech. Thus, the Internet contains both forms of verbal and non-verbal speech.¹⁶⁵ This Comment primarily focuses on non-verbal Internet speech. However, it ultimately shows that non-verbal Internet speech is

amount to "forced speech" and would violate the First Amendment); see also *Hayes Statement*, *supra* note 38 (testifying that "there are serious constitutional implications" arising from the application of Title III to the Internet). *Contra*, Peter David Blanck and Leonard A. Sandler, *Feature Article ADA Title III and the Internet: Technologies and Civil Rights*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 855 (2000) (providing an analysis of Title III as applied to the Internet subject to principles of First Amendment jurisprudence).

¹⁶¹ U.S. CONST. amend I.

¹⁶² See generally *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003); see also *Ashcroft v. ACLU*, 535 U.S. 564 (2002); see also *Reno v. ACLU*, 521 U.S. 844 (1997).

¹⁶³ See, e.g., *Clark*, 468 U.S. at 289 (holding a regulation prohibiting sleeping in Lafayette Park, expressive or otherwise, not a violation of the First Amendment).

¹⁶⁴ See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (holding a regulation prohibiting the expressive burning of a draft card is not a violation of the First Amendment).

¹⁶⁵ See *Reno*, 521 U.S. at 849-55 (giving a thorough explanation of the history, structure, and capabilities of the Internet,

subject to the same test as verbal Internet speech. Therefore, it is irrelevant whether Title III is regulating verbal or non-verbal speech.¹⁶⁶

1. *The Regulation of Speech Related Conduct: The Elimination of E-Barriers is Unrelated to the Suppression of Free Expression*

The Supreme Court in *United States v. O'Brien* provides the test for determining whether a congressional regulation that has the potential of limiting non-verbal speech is "sufficiently justified" to pass First Amendment scrutiny.¹⁶⁷ The *O'Brien* Court states:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁶⁸

First, the Court in *O'Brien* examines the statute under the third element, namely whether "the governmental interest is unrelated to the suppres-

and providing examples of verbal and non-verbal speech conduct).

¹⁶⁶ See *O'Brien*, 391 U.S. at 376-77 (examining the burning of a draft card as non-verbal speech related conduct, but ultimately deciding the case as though it were verbal speech).

¹⁶⁷ *Id.* at 376-77.

¹⁶⁸ *Id.*

¹⁶⁹ *O'Brien*, 391 U.S. at 377; see also *Texas v. Johnson*, 491 U.S. 397, 407 (1989) ("[i]n order to decide whether *O'Brien's* test applies . . . we must decide whether [the regulation] . . . is unrelated to the suppression of expression."). The *O'Brien* Court has recited a number of adjectives "[t]o characterize the quality of the governmental interest which must appear;" among these are "compelling; substantial; subordinating; paramount; cogent; strong." See *O'Brien*, 391 U.S. at 376-77 (1968).

¹⁷⁰ We assume here that Title III applies to the Internet. See discussion *supra*, Part III.A.

¹⁷¹ See 42 U.S.C. §§12101(a)(1)-(9) (2000) (providing the findings and purposes of the ADA. Specifically, Congress found that the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity").

¹⁷² See *id.* §§12101(a)(1)-(2).

¹⁷³ *O'Brien*, 391 U.S. at 377.

¹⁷⁴ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J.) (dissenting and borrowing from John Milton's "Areopagitica" (1644) and John Stuart Mill's "On Liberty" (1859)). Justice Holmes states in his *Abrams* dissent:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than

sion of free expression."¹⁶⁹ The governmental interest in Title III is the elimination of discrimination against persons with disabilities on the Internet,¹⁷⁰ and specifically, by places of public accommodation.¹⁷¹ Congress is concerned that persons with disabilities will be precluded from accessing public accommodations in a manner similar to non-disabled persons, whether or not they are on the Internet.¹⁷² This interest is "unrelated to the suppression of free expression"¹⁷³ because it expands the "Marketplace of Ideas" by allowing equal access for all individuals.¹⁷⁴ This is clear from the plain language of the ADA,¹⁷⁵ as well as its legislative history.¹⁷⁶ Thus, Congress' interest in codifying Title III is unrelated to the suppression of free expression, but is related to eliminating discrimination against persons with disabilities. In *Clark v. Community for Creative Non-Violence*, the Supreme Court explains that *O'Brien's* other three elements are "little, if any, different from the standard applied to time, place, or manner restrictions."¹⁷⁷

they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Id.

¹⁷⁵ See 42 U.S.C. §12101.

¹⁷⁶ See H.R. REP. NO. 101-485, pt. 2, at 22-3 (1990). The Legislative History provides:

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

Id.

¹⁷⁷ *Clark*, 468 U.S. at 298. It is clear that Title III is not concerned with the regulation of the content of e-speech, such as obscenity or defamation on the Internet. See *Reno v. ACLU*, 521 U.S. 844 (1997); *N.Y. Times Co. v. Sullivan* 376 U.S. 254 (1964). Nor is Title III concerned with regulating sexually explicit material that might be accessible to minors on the Internet. See *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Title III is concerned with eliminating discrimination against persons with disabilities in the accessing of public accommodations operating in commerce on the Internet. See 42 U.S.C. §§12181-12189. Therefore, Title III is a regulation of the manner in which speech is transmitted, not a restraint on the content.

2. *Title III As Applied to the Internet: Content Restrictions or Time, Place or Manner Restrictions on E-Speech*

To determine the level of scrutiny Internet speech regulations get pursuant to time, place, and manner principles, we must determine first in which categorical forum the Internet falls. Different levels of scrutiny are applied to time, place, and manner restrictions depending on the forum where it takes place, and several forums exist.¹⁷⁸ The most restrictive are the traditional and designated public fora, which receive strict scrutiny analysis.¹⁷⁹ Conversely, Congress has the authority to regulate in non-public and private fora so long as the regulation has a rational basis.¹⁸⁰

The Supreme Court has not yet decided the forum in which the Internet falls for purposes of time, place, and manner restrictions. However, the Court recently has shed light on the placement of the Internet.¹⁸¹ In *United States v. American Library Association*, the Court refused to apply traditional public forum and designated public forum principles to a public library that provides Internet access.¹⁸² The Court avoided the issue of whether the Internet in itself is a traditional public forum, a designated public forum, a non-public forum, or a private forum.¹⁸³ The Court stated, "we would hesitate to import the public forum doctrine . . . wholesale into the context of the Internet . . . [w]e are wary of the notion that a par-

tial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area."¹⁸⁴ Although the Internet-forum issue for purposes of First Amendment jurisprudence has not yet been resolved, it seems that the Court has ruled out a public forum application. We will assume, in light of *American Library Association*, that the Internet is either a non-public forum or a private forum.¹⁸⁵ Nevertheless, this Comment will also analyze Title III under the public forum doctrine, which will show that ultimately, the statute passes both rational basis and strict scrutiny review under the First Amendment.

3. *Non-Public and Private Fora: Rational Basis Review*

First Amendment jurisprudence holds that Congress may regulate the manner of speech in non-public and private fora if the regulations are viewpoint neutral and are reasonably related to a legitimate governmental purpose.¹⁸⁶ Here, Congress' stated intent of eliminating discrimination against persons with disabilities is viewpoint neutral because it does not regulate in favor of one viewpoint over another.¹⁸⁷ It promotes all viewpoints, only requiring that persons with disabilities have access to the website if it is provided on the Internet and the website is engaged in commerce.¹⁸⁸

¹⁷⁸ Compare *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (holding streets, sidewalks, and parks as being traditional public fora), and *Lamb's Chapel v. Ctr. Moriches Union Free School Dist.*, 508 U.S. 384, 394-96 (1993) (holding school rooms opened for after-school meetings by social, civic, and recreation groups to be a designated public forum), with *Int'l Soc'y of Krishna Consciousness v. Lee*, 505 U.S. 672, 679-81 (1992) (holding an airport to be a nonpublic forum), and *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 131-35 (1981) (holding a mailbox to be a private forum).

¹⁷⁹ See *Hague*, 307 U.S. at 515-16 and *Lamb's Chapel*, 508 U.S. at 394-96. Government regulations of public fora demand that the regulation be content neutral, which means they must be viewpoint neutral, subject matter neutral, and speaker neutral. Furthermore, regulations of public fora must be narrowly tailored to serve a significant government interest and must leave open ample alternative means of expressing the speech. *Id.*

¹⁸⁰ See *Int'l Soc'y of Krishna Consciousness*, 505 U.S. at 679-81 and *Council of Greenburgh Civic Ass'n*, 453 U.S. at 131-35. Government regulations of nonpublic and private fora demand that the regulation be viewpoint neutral and reasonably related to a legitimate government interest.

¹⁸¹ See *United States v. Am. Library Ass'n, Inc.*, 539 U.S.

194, 231-233 (2003).

¹⁸² *Id.*

¹⁸³ *Id.* at 231-234. The Court did, however, reject the notion that Internet access in a public library could neither be a traditional or designated public forum. *Id.* The Court has not yet made a per se classification of Internet forum placement.

¹⁸⁴ *Id.* at 233 n.3 (internal quotations omitted) (citation omitted) (citing *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 749 (1996)). The *American Library Association* Court's rejection of Internet access in a public library as not being a public forum seems to suggest that the Internet in and of itself does not fall within the public forum doctrine.

¹⁸⁵ See *Am. Library Ass'n, Inc.*, 538 U.S. at 232-233.

¹⁸⁶ See, e.g., *U.S. Postal Service v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 132 (1981) (discussing the application of First Amendment principles to nonpublic fora, specifically applying the rational basis test).

¹⁸⁷ Title III does not provide that only persons with disabilities may express opinions while simultaneously proscribing the viewpoint of non-disabled individuals. Title III is not interested in proscribing any particular message, but in allowing all messages to be communicated.

¹⁸⁸ See generally 42 U.S.C. §§12181-12189 (2000). Title III does not favor one viewpoint over another. Title III requires

Furthermore, Title III is reasonably related to a legitimate governmental purpose because Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."¹⁸⁹ Affirmative legislation such as the ADA brings persons with disabilities into mainstream activities and reduces dependency and nonproductivity, a reasonable Congressional endeavor.¹⁹⁰ Congress has a legitimate governmental interest in preventing discrimination in places of public accommodation,¹⁹¹ and requiring websites to eliminate e-barriers is a reasonable way to effectuate that purpose.¹⁹²

4. Public Fora: Strict Scrutiny

Even if Title III, as a regulation of the manner of speech, was analyzed as a traditional public forum or designated public forum, the result would be the same. Congress may only regulate a public forum if the regulation is content neutral, mean-

ing the regulation must be viewpoint neutral, subject matter neutral, and speaker neutral.¹⁹³ As stated previously, Title III is viewpoint neutral because it does not regulate in favor of one viewpoint over another.¹⁹⁴ Title III is subject matter neutral because it does not regulate in favor of one subject over another; it simply requires a website to discuss a subject in a manner that is accessible to persons with disabilities. Finally, Title III is speaker neutral because it does not regulate in favor of one speaker over another.

Strict scrutiny also requires that congressional regulations of public fora be narrowly tailored¹⁹⁵ to serve significant government interests,¹⁹⁶ leaving open ample alternative means to communicate speech.¹⁹⁷ Clearly, the elimination of discrimination against persons with disabilities to unburden commerce and to allow persons with disabilities to live independent lives constitutes such significant government interests.¹⁹⁸ Furthermore, Title III is narrowly tailored to meet this end because it does not burden substantially more speech than is necessary to effectuate the end of

private Internet websites to provide text labels, "Alt" tags, and other identifying information that allow peripheral devices, such as screen readers, to successfully navigate the site. The website publisher reserves complete discretion in the content or substance of the text label or "Alt" tag. Title III's mandate does not require a private Internet website to provide a viewpoint-biased text label or "Alt" tag. Therefore, Title III does not favor a particular viewpoint over another. Analogically, requiring a website to include certain language to make it navigable by persons with disabilities is similar to requiring that a website incorporate a particular type of code so that a particular web browser may access the site. It is not the content or substance of the code that is being regulated but the form or manner. *Id.*

¹⁸⁹ 42 U.S.C. §12101(a)(2); *see also id.* §12101(b)(4) (Congress has made it clear in the purposes section of the ADA that it intends to "invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities").

¹⁹⁰ *See id.* §12101(a)(9).

¹⁹¹ *See* discussion *supra* Part III.B, finding discrimination against persons with disabilities as placing artificial restraints on the market that interfere with the free flow of commerce.

¹⁹² *See* 42 U.S.C. §12101(a). The elimination of e-barriers is, at the very least, reasonable because it helps defray the costs of dependency and nonproductivity borne by the United States.

¹⁹³ *See* *Boos v. Barry*, 485 U.S. 312, 318-20 (1988). Title III, in requiring private Internet websites to add text labels to pictures, graphics, and hyperlinks, does not require the website to implement any particular content or substance. Title III only requires the addition of information in a manner

that makes it usable to all. It does not ask the website provider to take a stance on a particular subject or viewpoint. It also does not favor one speaker's Internet speech in favor of another. Private Internet websites reserve the right to encode graphics, tables, and hyperlinks with whatever Internet speech deemed to be fitting. Title III simply requires a website generating Internet speech must do so in a manner accessible by persons with disabilities. Of course, Title III's content neutral regulations only apply to those private Internet websites fitting within the statutory definition of a place of public accommodation. *See* 42 U.S.C. §12182. *See also* discussion *infra*, Part III.A.

¹⁹⁴ *See supra* Part III.C.3. Viewpoint neutral for rational basis is the same test applied to determine whether a regulation is viewpoint neutral for purposes of strict scrutiny.

¹⁹⁵ *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (holding that a law requiring persons performing at a city's theater to use the city's sound equipment as being narrowly tailored to the city's interest in preventing excessive noise).

¹⁹⁶ *See* *Hill v. Colorado*, 530 U.S. 703, 729 (2000) (holding constitutional a state law prohibiting persons within 100 feet of a health care facility from approaching those seeking access to the facility, because access to health care facilities was a significant government interest).

¹⁹⁷ *See* *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (holding that picketing in the street in front of a single household left open ample alternative means for the picketers to walk through the neighborhood). *Cf. supra* Section III.C.3 (assuming the Internet is a non-public or private forum, applying rational basis review, and concluding that Title III is a viewpoint neutral regulation of Internet speech that is reasonably related to a legitimate governmental interest).

¹⁹⁸ *See generally* 42 U.S.C. §12101.

website accessibility.¹⁹⁹ Finally, a website has ample alternative means of expressing speech if it were unable to make accessible modifications for some reason.²⁰⁰ In the end, Title III in no way requires a website provider to implement any particular content on a website, but does require a website, operating in commerce, to provide speech in a manner that is equally accessible to persons with disabilities.

Some opponents argue that requiring websites to provide the language, such as "Alt" tags, or links to text-only sites, to make websites accessible, amounts to "forced speech."²⁰¹ They argue that this mandate indirectly affects the content of speech, because websites must use valuable resources to make the accommodations, instead of using the money to make potential speech.²⁰² However, First Amendment jurisprudence clearly holds that Congress may regulate speech so long as it survives the applicable level of scrutiny. As is shown here, Title III is a valid regulation of the Internet subject to rational basis review, and in the alternative, strict scrutiny. Therefore, even if private Internet websites are subjected to "forced speech," Congress may do so without offending the First Amendment. Nevertheless, questions remain as to whether the application of Title III to the Internet would prove to be overbroad or vague.

5. *Precision of Title III As Applied to the Internet: Overbreadth and Vagueness*

The First Amendment does not guarantee unbridled protection in the delivery of speech, and Congress may regulate speech so long as the regu-

lation is reasonable.²⁰³ According to the Supreme Court, imprecise laws can be attacked on their face on two grounds: overbreadth and vagueness.²⁰⁴ Thus, a complete facial analysis of a manner statute, such as Title III, requires an examination of overbreadth and vagueness.

The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep."²⁰⁵ This constitutional doctrine is judicially created and its purpose is to prevent the chilling of protected speech.²⁰⁶ The overbreadth doctrine is applied to time, place, and manner restrictions to ensure that the regulations do not sweep more broadly than necessary.²⁰⁷ In the context of a non-public forum, overbreadth of a viewpoint neutral regulation reasonably related to achieving important governmental interests turns on whether Title III has alternative means of communication. Here, Title III leaves open ample alternatives for websites to provide commercial information, products, or services because websites are not prohibited from selling goods over the Internet; they merely are required to fashion the distribution in a manner that is accessible to all. Although websites might be required to add extra information, such as text labels, this information is the extent of Title III's restriction (if this is even a restriction on speech). Although the additions of text-labels may have some trivial or de minimus burden on the amount of web speech, it is not unduly burdensome and clearly not substantial since the economic benefits outweigh the economic burdens.²⁰⁸ Furthermore, Title III does not prohibit

¹⁹⁹ See generally *Rock Against Racism*, 491 U.S. 781 (providing a discussion of strict scrutiny for time, place, or manner restrictions).

²⁰⁰ This is similar to the picketing regulation in *Frisby*, 487 U.S. at 483, where picketers could not focus their speech in front of a particular residence, but they had the alternative to picket throughout the neighborhood streets.

²⁰¹ See Taylor, *supra* note 38, at 45 (arguing that requiring Websites to make accommodations amounts to "forced speech" in that it would limit Web space and server capacity for the delivery of information").

²⁰² See *id.* at 42. The potential speech would be the speech that the Internet public accommodation would expend resources on if disability related speech were not required. Arguably, this potential speech is de minimus.

²⁰³ See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).

²⁰⁴ *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (holding a Chicago loitering ordinance impermissibly

vague).

²⁰⁵ *Id.* at 52 (internal quotations omitted).

²⁰⁶ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 n.8 (1980) (providing that "[t]he overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review"); see also *Broadrick v. Oklahoma*, 413 U.S. 60, 612-131 (1973).

²⁰⁷ See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

²⁰⁸ Nor is the requiring of private Internet websites to be accessible a restriction on the creativity of a website. Although website accessibility requires the use of text labels and "Alt" tags, this does not mean that websites must abandon visual and aesthetic creativity. Changes to websites, so as to facilitate their accessibility, are hidden within the code of the website. See Judy Heim, *Locking out the Disabled*, PC WORLD, Sept. 2000, at 181 (providing that misunderstandings of the implementations that accessible websites require leads

speech, it amplifies it. Since Title III does not burden more speech than is necessary to accomplish the ends of Internet accessibility, Title III is not overbroad in application.

The vagueness doctrine prohibits legislation that lacks sufficient clarity to provide adequate guidance on the application of the law.²⁰⁹ According to the Supreme Court, "the principal inquiry is whether the law affords fair warning of what is proscribed."²¹⁰ Clearly, discrimination against persons with disabilities by places of public accommodation engaged in commerce is proscribed by Title III.²¹¹ Such activity has been proscribed by Title III since 1990. Furthermore, there is no evidence that Title III's application to the Internet has resulted in a chilling effect on Internet speech, whereby private Internet websites are afraid to generate web speech subject to unclear notice.²¹²

The application of Title III in its current form does not offend First Amendment jurisprudence. Title III is a regulation of the manner of speech where Congress has a legitimate, if not substantial concern, in eliminating discrimination and Title III is a reasonable method of effectuating this concern. Furthermore, Title III is not overbroad because it does not include a substantial number of impermissible applications. Title III is also valid under the vagueness doctrine because it puts places of public accommodation on notice that discrimination against persons with disabilities is unlawful.

III. CONCLUSION

It is clear from the plain meaning of the statute and the intent of Title III that the Internet is within the scope of its regulation. A contrary reading of the statute would foster the illogical result that Congress intended to prevent discrimination in all places of physical locale while simulta-

neously exempting businesses with non-physical locales. This interpretation has no basis in the statute.

Additionally, Congress has the power to prohibit discrimination by private Internet websites pursuant to its commerce power. Congress has long had the power to prohibit discrimination pursuant to the Commerce Clause so as to prevent artificial restrictions on the free flow of goods or services. Congress, in prohibiting discrimination against persons with disabilities, found that such activity isolates and segregates such individuals and forces them into dependency. Congress, concerned with the effects of such isolation and dependency, found it necessary to legislate. Not only did Congress have a rational basis for Title III, it had the power to enact such legislation.

Title III is also well within the bounds of the First Amendment. Because Title III does not regulate the content of Internet speech, it is a time, place, or manner regulation. Whether Title III is found to be a public or non-public forum is inconsequential because Title III meets both standards of review. Title III is also specific enough to avoid invalidation on the basis of vagueness or overbreadth.

This Comment has shown that Title III applies to the Internet. Nonetheless, there is a conflict among the circuits which requires adjudication by the Supreme Court. Although the most efficacious method of making Title III's application unmistakably clear would be the amending of the statute, such activity would raise serious questions in light of the separation of powers doctrine. Congress was looking to clarify Title III's application in 2000; however, the current posture of the issue in the judiciary makes congressional activity improper.²¹³ Thus, certiorari is the *modus operandi* for the resolution of the issue of Title III Internet applicability.

to misconceptions that website creativity will be compromised. The article provides, borrowing from the HTML Writers Guild's AWARE Center, which offers essays concerning creating accessible websites, that "Myth no. 1: An accessible Web page is dull, boring, plain text."

²⁰⁹ See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

²¹⁰ See *id.*

²¹¹ See 42 U.S.C. §§12181(1), (7) (2000).

²¹² In this debate, there is no evidence that private Internet websites would rather not emerge in Internet Web-speaking for commercial purposes than be subject to liability

under Title III. Although there is confusion in the law as to whether Title III applies to the Internet, the addition of disability friendly features is as burdensome as using the proper computer language so anyone can access the website. *But cf. Gentile v. State Bar*, 501 U.S. 1030, 1048-51 (1991) (holding a statute prohibiting attorneys representing clients in a pending case from making statements that would have a substantial likelihood of prejudicing a trial as void for vagueness because it does not provide sufficient standards by which to judge whether statements are illegal).

²¹³ See generally *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992).

