

EQUAL ACCESS IN CYBERSPACE:
ON BRIDGING THE DIGITAL DIVIDE IN
PUBLIC ACCOMMODATIONS COVERAGE
THROUGH AMENDMENT TO THE
AMERICANS WITH DISABILITIES ACT

*Laura Wolk**

INTRODUCTION

At its signing, George H.W. Bush described the Americans with Disabilities Act (“ADA” or “the Act”) as “the world’s first comprehensive declaration of equality for people with disabilities.”¹ Invoking “the sweep of congressional authority” under the Commerce Clause and Fourteenth Amendment,² the Act purported to provide a “clear and comprehensive national mandate”³ for the elimination of discrimination against the disabled in principal areas of American life including employment,⁴ state and local governmental services and programs,⁵ and “place[s] of public accommodation.”⁶

In the twenty-five years since its passage, public and private officials have engaged in vigorous discussion concerning what activities the ADA does and does not cover. This Note seeks to settle one such debate by ascertaining whether private, commercial websites with no brick-and-mortar presence in the physical world fall within Title III’s prohibition against disability-based discrimination in places of public accommodation.⁷

* J.D. Candidate, University of Notre Dame Law School, 2016; B.A., Psychology, Swarthmore College, 2009. I would like to express my deepest and most sincere gratitude to Dwight King and Beth Klein, without whose generosity and support I could not have undertaken the writing of this Note. My thanks also extend to Professor Randy Kozel for his instructive comments and suggestions, Professors A.J. Bellia and O. Carter Snead for their assistance, and Francesca Genova for her invaluable friendship and willingness to lend her ears and eyes to this project. All errors are mine.

1 President George H.W. Bush, Remarks on Signing of the Americans with Disabilities Act of 1990, 2 Pub. Papers 1068 (July 26, 1990).

2 42 U.S.C. § 12101(b)(4) (2012).

3 *Id.* § 12101(b)(1).

4 *Id.* § 12112(a).

5 *Id.* § 12132.

6 *Id.* § 12182(a).

7 *Id.*

Thus far, those seeking to answer this question have fallen into one of two camps. Proponents for inclusion invoke the broad remedial purpose of the statute, snippets from its legislative history, and public policy concerns to advance their position.⁸ Those opposed to the expansive interpretation cite canons of statutory construction,⁹ concerns over the use of legislative history, and wariness of judicial activism¹⁰ to advance their position. This Note argues that, framed in this manner, the debate myopically focuses on one purpose of the ADA—its “remedial” purpose—which “invoke[s] the sweep of congressional authority . . . to address the major areas of discrimination faced day-to-day by people with disabilities.”¹¹ This goal is unquestionably instrumental to the ADA; the Act accomplishes it by expressly identifying the numerous discriminatory actions rendered unlawful by the statute. However, the ADA does more than create a bare-bones outline of discriminatory actions, leaving the responsibility of fleshing out the details to the designated administrative agency. Rather, via its equally important “standards” purpose, the Act provides a corresponding set of clear, consistent, and enforceable standards for each form of proscribed discrimination.¹² Therefore, the Note will argue that a proper interpretation of public accommodations coverage requires consideration of the term in light of both statutory purposes. This approach will help to determine not only whether the term “public accommodation” is capacious enough to encapsulate websites, but also whether the ADA explicitly provides a corresponding set of standards governing website-based discrimination.

To this end, the Note will proceed in three Parts. Part I will trace the development of the case law on this issue, which has culminated in a circuit split. It will also discuss the influence of the Department of Justice (DOJ), which has not exercised its regulatory authority on the subject but which has

8 See, e.g., NAT'L COUNCIL ON DISABILITY, WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE: APPLICATION OF THE AMERICANS WITH DISABILITIES ACT TO THE INTERNET AND THE WORLDWIDE WEB 1 (2003) [hereinafter ADA GOES ONLINE], http://www.ncd.gov/rawmedia_repository/960de0db_0548_4c4c_b000_6f1eabb0f84a.pdf; Matthew A. Stowe, *Interpreting “Place of Public Accommodation” Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 323–25 (2000); Justin D. Petruzzelli, Note, *Adjust Your Font Size: Websites are Public Accommodations Under the Americans with Disabilities Act*, 53 RUTGERS L. REV. 1063, 1066, 1082–83 (2001).

9 See *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (applying the *noscitur a sociis* canon); *Access Now, Inc. v. Sw. Airlines Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (applying the *ejusdem generis* canon); Patrick Maroney, Note, *The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the Americans with Disabilities Act of 1990?*, 2 VAND. J. ENT. L. & PRAC. 191, 192 (2000).

10 See, e.g., *Access Now*, 227 F. Supp. 2d at 1318 (arguing that giving the provision a broad sweep would be intruding into Congress's territory).

11 42 U.S.C. § 12101(b)(4).

12 *Id.* § 12101(b)(2). The ADA's third purpose of heavily involving the federal government, *id.* § 12101(b)(3), is not applicable here. Its fourth purpose, to provide a “clear and comprehensive national mandate” for the eradication of disability-based discrimination, *id.* § 12101(b)(1), applies equally to the broad remedial and standards purposes discussed in this Note.

initiated enforcement actions consistent with an interpretation that includes freestanding websites. Part II will argue, based on the text, congressional silence, and the statute's dual principal purposes, that private commercial websites do not fall within the purview of Title III. Part III will propose that disability rights advocates should direct their energy not toward enforcing the statute as currently interpreted by the DOJ, but instead toward Congress to ensconce this important public policy through clear statutory amendments. Such amendments should govern websites and establish a framework for assessing and evaluating any technologies which might arise in the future.

I. SETTING THE STAGE: THE PUSH TOWARD INCLUDING WEBSITES AS PUBLIC ACCOMMODATIONS

In theory, the proliferation of commercial websites has the potential to markedly improve the disabled community's ability to participate in commercial activity. Such individuals might otherwise find themselves barred by insurmountable physical accessibility barriers which simply do not exist online. In practice, however, websites, like physical structures, often require modifications to become accessible to disabled users, particularly those with visual, hearing, intellectual, and mobility disabilities.¹³ Many people with disabilities interact with the Internet using assistive technologies including modified mice, speech-recognition software, and screen readers that read aloud the visual content displayed on a webpage.¹⁴ A website that does not conform to certain practices minimizes the functionality of these assistive technologies, rendering the site partially or completely unusable to individuals relying on such adaptive equipment. Common practices such as embedded flash content, videos with no audio or closed-caption descriptions, and visual CAPTCHA registration requirements constitute just a few of the many examples of accessibility barriers that continue to plague the Internet.

As a result of these accessibility issues, the threshold question whether commercial websites fall within the purview of the ADA's public accommodations provision has wide-ranging implications for both the disability and business communities. Currently, no set of regulations mandates that owners of such websites make them accessible. The World Wide Web Consortium (W3C), through its Web Accessibility Initiative (WAI), has promulgated recommendations aimed at addressing many accessibility concerns.¹⁵ Though they do not carry the force of law, the DOJ has called these suggestions the

13 See Shawn Lawton Henry et al., *Introduction to Web Accessibility*, W3C WEB ACCESSIBILITY INITIATIVE (Sept. 2005), <http://www.w3.org/WAI/intro/accessibility.php>.

14 See Shawn Lawton Henry & Liam McGee, *Accessibility*, W3C (Mar. 20, 2014), <http://www.w3.org/standards/webdesign/accessibility>.

15 See Ben Caldwell et al., *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C RECOMMENDATION (Dec. 11, 2008), <http://www.w3.org/TR/WCAG20/> (outlining the need for accessibility as well as recommended standards to achieve accessibility). Regulations passed under the Rehabilitation Act cover similar accessibility issues for websites attached to federal agencies. See 36 C.F.R. § 1194.1 (2014).

“recognized international industry standards”¹⁶ and has used them as the litmus test against which the Department measures compliance in consent decrees with commercial websites.¹⁷ Determining that private, commercial websites are places of public accommodation would permit the DOJ to use its statutory authority to globally impose these or similar requirements upon all such websites.¹⁸

A. *Developments in the Case Law*

The ADA defines a place of public accommodation as a private entity that has operations that affect interstate commerce and falls into at least one of twelve categories of businesses.¹⁹ The list of covered entities is broad, encompassing hotels, parks, the offices of certain professionals, educational institutions, health clubs, and others.²⁰ As discussed below, courts first interpreted these provisions as covering only physical, brick-and-mortar establishments. Over time, some courts developed a “nexus” approach, holding that the statute covered certain entities such as a website or a telephone-based contest so long as a sufficient nexus existed between such entity and a physical structure. Beginning in 2012, the Massachusetts District Court and DOJ consent decrees have interpreted the statute to cover private, commercial websites existing only in cyberspace.

The question whether the Act covers non-physical entities as well as physical structures primarily arose in the context of insurance policies. The ADA explicitly covers insurance offices in its defined list of places of public accommodation.²¹ The question became whether a discriminatory insurance policy presented to a disabled employee through his employer constituted discrimination of the goods and services offered by a place of public accommodation under the statute, or if the scope only reached instances in which the disabled individual had purchased the policy directly from the insurance office.

In *Carparts Distribution Center, Inc. v. Automotive Wholesalers Ass’n of New England Inc.*,²² the plaintiff, who was the sole shareholder and president of

16 Press Release, Dep’t of Justice, Office of Pub. Affairs, Justice Department Enters Consent Decree with National Tax Preparer H&R Block Requiring Accessibility of Websites and Mobile Apps Under Americans with Disabilities Act (Mar. 6, 2014), <http://www.justice.gov/opa/pr/justice-department-enters-consent-decree-national-tax-preparer-hr-block-requiring>.

17 See Consent Decree, Nat’l Fed’n of the Blind v. HRB Dig. LLC, No. 1:13-cv-10799-GAO (D. Mass. Mar. 25, 2014), [hereinafter H&R Block Consent Decree]; Settlement Agreement Between the United States of America and Ahold U.S.A., Inc., and Peapod, LLC Under the Americans with Disabilities Act §§ 12(a)–(c), DJ 202-63-169 (Nov. 17, 2014) [hereinafter Peapod Settlement Agreement].

18 See 42 U.S.C. § 12186(b) (2012).

19 *Id.* § 12181(7).

20 *Id.*

21 *Id.* § 12181(7)(F).

22 37 F.3d 12 (1st Cir. 1994).

Carparts,²³ brought a discrimination claim against the defendant insurance company after the defendant capped lifetime expenses related to the Human Immunodeficiency Virus to \$25,000 compared with the \$1 million caps it extended to other diagnoses.²⁴

To answer whether the policy constituted discrimination by a place of public accommodation, the Court of Appeals for the First Circuit looked first to the plain language of the statute. After citing the statutory definition of public accommodations and the list of twelve categories—which it characterized as “illustrative”²⁵—the court stated, without elaboration, that “[t]he plain meaning of the terms do not require ‘public accommodations’ to have physical structures for persons to enter.”²⁶ Even if the term was not plain on its face, the court stated that it was “at worst[] ambiguous. This ambiguity, considered *together with agency regulations and public policy concerns*, persuade[d] [the court] that the phrase is not limited to actual physical structures.”²⁷

The court also noted that neither the text of the statute nor its accompanying regulations makes any mention of physical boundaries or structures.²⁸ Further, the public accommodations provisions included “travel service” as one of its categories, which the court took to mean that the statute contemplated the inclusion of other types of accommodations that did not require physical entry by customers.²⁹

Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business [only] by mail and phone It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.³⁰

The court then combined its broad textual reading with public policy concerns to find that construing public accommodations strictly so as to apply only to physical structures would “run afoul of the purposes of the ADA

23 *Id.* at 14.

24 *Id.* at 14–15.

25 *Id.* at 19.

26 *Id.*

27 *Id.* (emphasis added).

28 *Id.* at 20. *But see* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,550 (July 26, 1991) (defining a public accommodation as a “facility” for the purposes of a place of public accommodation as “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located”).

29 *Carparts*, 37 F.3d at 19.

30 *Id.*

and would severely frustrate” Congress’s intent.³¹ It cited the ADA’s purpose of creating a national mandate to eliminate discrimination and statements from the House Report concerning Congress’s intent to give the disabled equal access to “the economic and social mainstream of American life.”³² This line of analysis heavily emphasized the statute’s broad remedial purpose. It did not discuss how the statute’s “standards” purpose should influence its interpretation.

The Sixth Circuit reached the opposite conclusion in *Parker v. Metropolitan Life Insurance Co.*³³ There, the plaintiff, who had been denied insurance benefits related to her depression, brought suit against her insurance company for extending more comprehensive benefits to those with physical disabilities under its long-term disability policy than to those with mental health disabilities.³⁴ Looking to the plain language of the statute, the *Parker* court stated that *Carparts* had given the statutory terms “unintended breadth” because it had failed to apply the *noscitur a sociis* canon, which directs judges to determine the meaning of a term by contextualizing it within the surrounding statutory language.³⁵ Applying this canon, the *Parker* court found that places of public accommodation referred only to the list of enumerated physical structures and the goods and services which those structures offer to the public.³⁶ Contextualized within the list of other physical structures, the *Parker* court stated that the word “service” used in the travel service provision did not indicate that the statute contemplated including entities conducting their business solely by phone or mail as public accommodations. Rather, “service” was the only word available to aptly describe the physical place from which travel agents offered goods and services to the public.³⁷ Since the plaintiff, as a member of the public, could not enter the insurance office to purchase her policy, nor could a member of the public enter plaintiff’s employer’s office to purchase the same, the court found that the insurance policy did not constitute a good or benefit offered by a place of public accommodation.³⁸

The Third Circuit applied this same approach in *Ford v. Schering-Plough Corp.*,³⁹ which also involved a plaintiff raising discrimination claims based on disparities between insurance benefits offered to those with physical as opposed to mental health disabilities.⁴⁰ The Third Circuit found that “places of public accommodation” referred to physical places, including the insurance office in question.⁴¹ However, the policy offered by Schering-Plough to

31 *Id.* at 20.

32 *Id.* at 19 (quoting H.R. REP. NO. 485, pt. 2, at 99 (1990)).

33 121 F.3d 1006 (6th Cir. 1997).

34 *Id.* at 1008.

35 *Id.* at 1014.

36 *Id.*

37 *Id.*

38 *Id.* at 1011.

39 145 F.3d 601 (3d Cir. 1998).

40 *Id.* at 603.

41 *Id.* at 612.

Ford's employer constituted one of the "terms and conditions" of Ford's employment,⁴² not a good or service offered to the public. Therefore, the defendant's actions did not qualify as discrimination by a place of public accommodation.⁴³ The court also held that, since the public accommodation provision only referred to physical structures, a "nexus" must exist between a public accommodation and any good or service it offers in order for a plaintiff to raise a cognizable claim of discrimination of goods or services. The court stated that "the 'goods, services, facilities, privileges, advantages, or accommodations' concerning which a disabled person cannot suffer discrimination are not free-standing concepts but rather all refer to the statutory term 'public accommodation' and thus to what these places of public accommodation provide."⁴⁴ To support its interpretation, the court looked to the Civil Rights Act of 1964's prohibition on racial discrimination in places of public accommodation, citing cases that held that the statute did not cover discriminatory membership practices and other "operations unconnected to any physical facility."⁴⁵

The Ninth Circuit joined the Third and Sixth Circuits in *Weyer v. Twentieth Century Fox Film Corp.*⁴⁶ The court applied the same line of reasoning to find that no nexus existed between the plaintiff and the services offered to the public by the insurance office at issue.⁴⁷

Courts have followed this "nexus" approach in other contexts. In *Rendon v. Valleycrest Productions, Ltd.*,⁴⁸ a group of mobility- and hearing-impaired individuals sued the game show *Who Wants to Be a Millionaire?* Plaintiffs claimed that the screening process for contestants, which involved communicating via telephone and using the phone's keypad to rapidly answer questions, constituted a discriminatory screening or eligibility requirement of a place of public accommodation.⁴⁹ The defendants filed a motion to dismiss, claiming that Title III did not cover the contestant hotline since the hotline itself was not a physical place.⁵⁰ The Court of Appeals for the Eleventh Circuit rejected this argument, in part by distinguishing the case at hand from the insurance cases discussed above.⁵¹ The court stated that those cases "do not stand for the broad proposition"⁵² that "discrimination must occur on site to offend title III."⁵³ Rather, "[a]t most, they can be

42 *Id.*

43 *Id.* at 612–13 ("Since Ford received her disability benefits via her employment at Schering, she had no nexus to MetLife's 'insurance office' and thus was not discriminated against in connection with a public accommodation.")

44 *Id.* at 613.

45 *Id.*

46 198 F.3d 1104 (9th Cir. 2000).

47 *Id.* at 1115.

48 294 F.3d 1279 (11th Cir. 2002).

49 *Id.* at 1281.

50 *Id.*

51 *Id.* at 1284 n.8.

52 *Id.* at 1285 n.8.

53 *Id.* at 1286 n.10.

read to require a nexus between the challenged service and the premises of the public accommodation.”⁵⁴ Here, the court found that a nexus existed between the discriminatory barrier and the physical place of public accommodation—in this case, the theater where the game show took place. Therefore, unlike the insurance contexts, the plaintiff had established a nexus to a physical place.⁵⁵

In contrast, in *Stoutenborough v. National Football League, Inc.*,⁵⁶ the Sixth Circuit held that the National Football League (NFL), its member teams, and various media outlets that broadcast football games were not places of public accommodation under the statute.⁵⁷ As such, a television broadcast of a football game did not qualify as a service provided by a place of public accommodation.⁵⁸ There, a group of hearing-impaired individuals challenged the NFL’s blackout provision that prohibited broadcasting local games that had not sold out seventy-two hours prior to the beginning of the game.⁵⁹ The hearing impaired individuals alleged that this practice constituted discrimination of goods and services by a place of public accommodation.⁶⁰

First, the court looked to the plain language of the statute, reiterating that places of public accommodation referred to physical structures, thus excluding the NFL, its member teams, and the media.⁶¹ Though not explicitly adopting the “nexus” language, the court stated that “the ‘service’ that [the plaintiffs] seek to obtain . . . does not involve a ‘place of public accommodation.’ Although a game is played in a ‘place of public accommodation’ and may be viewed on television in another ‘place of public accommodation,’ that does not suffice.”⁶² Since the plaintiffs did not connect the challenged service with an entity covered under the statute, the court affirmed the district court’s grant of the defendant’s motion to dismiss.⁶³

B. Application to the Internet

The courts first seriously addressed the question whether the ADA covers commercial websites in *Access Now, Inc. v. Southwest Airlines Co.*⁶⁴ There,

54 *Id.* at 1285 n.8.

55 *Id.* For a discussion of cases which upheld discrimination claims in other civil rights contexts which took place “at a distance,” see *id.* at 1285.

56 59 F.3d 580 (6th Cir. 1995).

57 *Id.* at 583.

58 *Id.*

59 *Id.* at 582.

60 *Id.* at 581–82.

61 *Id.* at 583.

62 *Id.*

63 *Id.* at 582.

64 227 F. Supp. 2d 1312 (S.D. Fla. 2002). Two previous lawsuits addressed this question. One, brought by the National Federation of the Blind against America Online, settled before trial, with America Online agreeing to make its software more accessible to the blind. See Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 32 (2001). The other involved a plaintiff claiming that OKbridge, which operated an online Bridge tournament, unlawfully excluded him due to his disability and thus

visually impaired plaintiffs claimed that southwest.com was a place of public accommodation and challenged the accessibility of the goods and services provided through its “virtual ticket counters.”⁶⁵ The ticket counters used graphics rather than text, which had the effect of vastly limiting the functionality of the plaintiffs’ screenreading technology.⁶⁶ The plaintiffs alleged that the website itself fell within three out of the twelve categories outlined in the statute, claiming that it was a place of “exhibition, display and a sales establishment.”⁶⁷ Relying on *Carparts*, they argued that the statutory definition of public accommodations was not confined solely to physical structures.⁶⁸

The district court opted instead to follow the Eleventh Circuit’s decision in *Rendon*, holding that the plain and unambiguous language of the statute covered only physical structures.⁶⁹ It reached this conclusion by relying on two modes of analysis. First, the court focused on the statute’s “standards” purpose by stating that the court must follow the “comprehensive” definitions set out by Congress.⁷⁰ It expounded upon this idea by noting that “[w]here Congress has created specifically enumerated rights and expressed the intent of setting forth ‘clear, strong, consistent, enforceable standards,’ ‘courts must follow the law as written Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure.’”⁷¹ The court further observed that “[t]o expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards;”⁷² as such, the court must “wait for Congress to adopt or revise legislatively-defined standards that apply to [these] rights.”⁷³ Second, the court utilized the *ejusdem generis* canon, which states that judges should limit the scope of general words which follow specifically enumerated lists to cover only instances similar to the items explicitly listed.⁷⁴ In doing so, the

had discriminated against him with respect to the enjoyment of the goods and services provided by a public accommodation. The district court found that the bridge tournament was not a public accommodation because it “provided its services over the Internet.” See Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 970 (2004). The opinion was unpublished. *Id.* On appeal, the Department of Justice filed an amicus curiae brief in support of the plaintiff’s position that the bridge tournament was a place of public accommodation. ADA GOES ONLINE, *supra* note 8, at 16. However, the decision of the district court was affirmed on other grounds in a brief per curiam opinion. See *Hooks v. OKbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000).

65 *Access Now*, 227 F. Supp. 2d at 1315.

66 *Id.* at 1316.

67 *Id.* at 1318.

68 *Id.* at 1319.

69 *Id.* at 1318–19.

70 *Id.* at 1318 (citing *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000)).

71 *Id.* at 1318.

72 *Id.*

73 *Id.*

74 *Id.*

court interpreted the three general terms “exhibition,” “display,” and “sales establishment” as covering only physical structures.⁷⁵

Additionally, the court also applied, but found lacking, the nexus approach. Unlike *Rendon*, where the plaintiffs established a nexus between a good or service and a physical theater, the plaintiffs here sought “equal access to Southwest’s virtual ‘ticket counters’ as they exist online.”⁷⁶ Since neither southwest.com in general nor the counter in particular had any location in physical space, the nexus test failed and the court dismissed the claims.⁷⁷

In 2006, the Ninth Circuit addressed this question again in *National Federation of the Blind v. Target Corp.*⁷⁸ There, plaintiffs challenged certain aspects of target.com which remained inaccessible to their screenreading technology.⁷⁹ The case differed from *Access Now*, however, because the plaintiffs alleged that these technological accessibility barriers prevented not only access to services provided through target.com, but also to physical Target stores.⁸⁰ Accordingly, the case presented the question whether the scope of the ADA covered instances in which a nexus existed between a challenged service (here, target.com) and a physical structure (here, a brick-and-mortar Target store).⁸¹ In applying the nexus test, the court stated that the approach did not merely apply to barriers of physical access, but to all barriers to the goods and services of a place of public accommodation.⁸² The court found that Target stores fell within the public accommodation provision and that “many of the benefits and privileges of the website are services of the Target stores” to which disabled individuals have a right of access under the ADA.⁸³ In keeping with this approach, the court found that the ADA did not cover aspects of target.com that had no connection to the physical Target stores.⁸⁴ Therefore, though the court followed the Ninth Circuit precedent established in *Weyer* that a place of public accommodation refers to a physical space, it included website services related to that physical space as goods and services connected with a place of public accommodation.⁸⁵

Following the distinction set out in *Access Now* and *Target*, the Northern District of California dismissed claims against Facebook,⁸⁶ eBay,⁸⁷ and Net-

75 *Id.* at 1319.

76 *Id.* at 1321.

77 *Id.* at 1321–22.

78 452 F. Supp. 2d 946 (N.D. Cal. 2006).

79 *Id.* at 950.

80 *Id.* at 952, 954.

81 *Id.* at 954.

82 *Id.* at 953–54.

83 *Id.* at 954, 956.

84 *Id.* at 956.

85 *Id.*

86 *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115–16 (N.D. Cal. 2011).

87 *Earll v. eBay, Inc.*, No. 5:11-cv-00262-JF (HRL), 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011).

flix,⁸⁸ all because these websites operated wholly in cyberspace with no connection to a physical, brick-and-mortar structure.

A recent string of settlements has disrupted this trend. In 2012, the National Association of the Deaf reached a settlement with Netflix after surviving summary judgment on its claim that Netflix's Watch Instantly video streaming service was a public accommodation.⁸⁹ Plaintiffs relied on the *Carparts* language that argued that interpreting the statute to prohibit discrimination where a physical structure exists but to permit it for companies existing only by phone or mail would lead to absurd, irrational results that Congress could not have intended.⁹⁰ The court agreed and, by extension, applied this rationale to the Internet for the first time.⁹¹ In doing so, the court explicitly relied on the explanation of the *Carparts* court that such an approach was consistent with the broad remedial purpose of the statute.⁹² The DOJ filed a statement of interest in this case, stating that it "has long interpreted" websites to be covered by Title III,⁹³ and the fact that it had not yet promulgated regulations covering websites should not be used to "support any inference whatsoever" that the ADA does not, or should not, cover websites.⁹⁴

After this decision, Netflix—the decision from California notwithstanding—agreed in a consent decree to make all of its streaming videos accessible to the hearing-impaired by incorporating closed captioning within two years.⁹⁵

In March 2014, the DOJ reached a similar settlement with the tax preparation service H&R Block, in which the company agreed to make the services provided through its website, its Online Tax Preparation Products and, notably, its mobile applications, accessible to the blind.⁹⁶ Though H&R Block also operates physical retail stores, the consent decree treats the website and mobile applications as separate entities owned by the company. The decree states that H&R Block will conform its websites and mobile applications to W3C guidelines within specified time frames⁹⁷ and will ensure that all third

88 *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–25 (N.D. Cal. 2012) (analyzing the facts under the ADA to find that Netflix had not violated two state public accommodations statutes).

89 *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 202 (D. Mass. 2012).

90 *Id.* at 200.

91 *Id.* (noting that the discrepancy in coverage between phone- and mail-based businesses and traditional businesses outlined in *Carparts* "applies with equal force to services purchased over the Internet").

92 *Id.*

93 Statement of Interest of the United States of America in Opposition to Defendant's Motion for Judgment on the Pleadings at 4, *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (No. 11-cv-30168-MAP).

94 *Id.* at 12.

95 Consent Decree at § 3(b), *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, No. 11-30168-MAP (D. Mass. 2012) [hereinafter *Netflix Consent Decree*].

96 H&R Block Consent Decree, *supra* note 17, § 6.

97 *Id.* §§ 12(a)–(b).

party plug-ins used on its sites also comply with these guidelines.⁹⁸ The decree makes a special exception for the plug-in, which displays the locations of retail stores on an inaccessible map application, granting H&R Block an extension of an additional fourteen months to find an accessible solution.⁹⁹

The DOJ reached a second agreement with Peapod, the operators of an online-only grocery store, on November 17, 2014.¹⁰⁰ Unlike the H&R Block settlement, which was reached as part of a class action suit, the DOJ instituted this action directly by invoking its authority to initiate compliance reviews under Title III of the ADA.¹⁰¹ In a decree analogous to that of H&R Block, Peapod agreed to adopt W3C guidelines for its websites, mobile applications,¹⁰² and third-party content, subject to certain exceptions.¹⁰³ Like Netflix, it also agreed to adopt an accessibility coordinator, formulate an accessibility policy, train personnel, and solicit consumer feedback on compliance.¹⁰⁴

The DOJ's Netflix Statement of Interest, as well as its involvement in the Peapod and H&R Block consent decrees, illustrate the current Department's position that private, commercial websites with no connection to physical structures fall within the scope of the ADA. By extension, the Department takes the position that it has authority to promulgate regulations on the subject.¹⁰⁵ In particular, the Peapod Settlement Agreement—representing the DOJ's most recent action on this issue—states that the parties agree that if the DOJ should pass Title III regulations under the ADA governing the accessibility of websites, then either party can request a meeting to discuss whether such regulations necessitate modification of the agreement.¹⁰⁶ Notwithstanding these assertions, the Department has taken only the first step toward regulating the area by issuing an advanced notice of proposed rulemaking on July 26, 2010¹⁰⁷—ten years after the passage of similar regulations pertaining to the websites of federal agencies.¹⁰⁸ While the period for public comment ended in January 2011,¹⁰⁹ the Attorney General has taken no action since that time and has continually pushed back the date for the proposed notice

98 *Id.* § 12(c).

99 *Id.*

100 Peapod Settlement Agreement, *supra* note 17, § 12.

101 *Id.* § 3.

102 *Id.* §§ 12(a)–(c).

103 *Id.* §§ 12(c)–(e).

104 *Id.* §§ 13–20; *see also* H&R Block Consent Decree, *supra* note 17, §§ 13–20 (outlining the same provisions for the H&R Block Consent Decree).

105 *See* 42 U.S.C. § 12186(b) (2012).

106 Peapod Settlement Agreement, *supra* note 17, § 12(f).

107 *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (proposed July 26, 2010).

108 *See* 36 C.F.R. § 1194.1 (2014).

109 *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (proposed July 26, 2010).

of rulemaking as it approaches. Most recently, the Department set the date for March 2015.¹¹⁰ However, as of July 2015, the Department has neither continued with the rulemaking process nor set a new date on which the rulemaking process will begin.

II. THE ARGUMENT AGAINST INCLUDING WEBSITES AS PUBLIC ACCOMMODATIONS

The preceding case law review indicates a move toward tacitly accepting that the ADA's public accommodations provision covers websites, even websites wholly divorced from physical structures.¹¹¹ Nevertheless, undertaking an assessment of whether the statute supports this interpretation still holds value. If an examination shows that the statutory text does not support the current, inclusive interpretation, then those seeking to clearly establish their rights of access to private commercial websites must act to have such rights expressly outlined in the statute, lest future courts or administrative personnel adopt a narrower, more restrictive view. This Part relies upon the text's plain meaning, Congress's failure to amend in the wake of historical events, and the statute's standards purpose to conclude that the Act does not permit continuing to follow the current interpretation.

A. Plain Meaning

As stated earlier, the ADA defines place of public accommodation as a business that must fall into at least one of twelve listed categories.¹¹² Each of the twelve categories provides a list of examples and ends with a slightly broader invocation such as "other service establishment," "other place of public gathering," or "other social service center establishment."¹¹³ Settling the question whether these catch-all phrases can be extended to cover websites begins with an examination of the plain language of the statute. Two well-known canons of construction—*ejusdem generis* and *noscitur a sociis*—demonstrate that the plain meaning of the public accommodations definition refers only to physical structures.

First, the *ejusdem generis* canon states that judges should read general words following a list of specifically enumerated terms to apply only to the

110 See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations, RIN of 1190-AA61, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=1190-AA61> (listing the new notice of proposed rulemaking date as March, 2015); see also *More Delay for DOJ Web Regs—Does it Matter?*, L. OFF. LAINEY FEINGOLD (June 2, 2014), <http://llegal.com/2014/06/doj-delay/> (noting that the DOJ has continually pushed the dates back as they approach).

111 See, e.g., Adriana Gardella, *Does Your Website Violate The Americans With Disabilities Act?*, FORBES (Apr. 2, 2015, 03:49 PM), <http://www.forbes.com/sites/adrianagardella/2015/04/02/does-your-website-violate-the-americans-with-disabilities-act/> (noting the rise in suits by plaintiffs and the DOJ's increasing review of websites for compliance, and recommending that retail website operators hire a consultant to ensure compliance with W3C guidelines).

112 42 U.S.C. § 12181(7) (2012).

113 *Id.* §§ 12181(7)(A)–(I).

same “general kind or class” as the enumerated terms.¹¹⁴ Here, since each of the twelve separate categories contains lists of physical structures, judges should interpret the final, broader phrases to also apply only to physical structures. To provide one example, one category prohibits discrimination in “an auditorium, convention center, lecture hall, or other place of public gathering.”¹¹⁵ Standing alone, “place of public gathering” could invoke images of a website providing streaming lectures, concerts, or other such content. Applying the canon, however, constrains this interpretation and indicates that the final phrase only covers structures with attributes similar to those possessed by the listed exemplars, including having a physical location in space.

Second, application of the *noscitur a sociis* canon, which dictates that “a word is known by the company it keeps,”¹¹⁶ strengthens this interpretation. Not only do all of the specific exemplars refer to physical structures,¹¹⁷ but six of the twelve catch-all phrases also contain specific language that cabins their application to physical structures. Five of the twelve phrases use the word “establishment,”¹¹⁸ which strongly connotes a physical place and structure.¹¹⁹ The seventh listed category prevents discrimination in a “terminal, depot, or other station used for specified public transportation.”¹²⁰ Use of the word “station” here also clearly refers to a physical space. The section as a whole, as well as its twelve composite sub-parts, plainly speaks only to physical spaces.

Other provisions within the Act concerning public accommodations also support an interpretation covering only physical structures. Section 12186(b) delegates to the Attorney General the authority to promulgate regulations concerning the covered public accommodations, excluding transportation services.¹²¹ These standards must be consistent with the regulations passed by the Architectural and Transportation Barriers Compliance Board.¹²² In turn, the Board’s standards must “ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication.”¹²³ Here, too, the text confines itself purely to physical structures.¹²⁴ The Act also contains a section entitled “New Construction and Alterations in Public Accommodations

114 *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 78 (1990).

115 42 U.S.C. § 12181(7)(D).

116 *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 694 (1995).

117 42 U.S.C. §§ 12181(7)(A)–(L).

118 *See id.* §§ 12181(7)(A), (B), (E), (F), (K).

119 *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 778 (1986) (defining establishment as “a more or less fixed and usu. sizable *place of business or residence* together with all the things that are an essential part of it (as *grounds, furniture, fixtures, retinue, employees*)” (emphasis added)).

120 42 U.S.C. § 12181(7)(G).

121 *Id.* § 12186(b).

122 *Id.* § 12186(c).

123 *Id.* § 12204(b).

124 *See* Maroney, *supra* note 9, at 198.

and Commercial Facilities.”¹²⁵ The section contains two sets of standards outlining what constitutes discrimination in “public accommodations and commercial facilities.”¹²⁶ The first makes it discriminatory “to design and construct [inaccessible] facilities for first occupancy” after a specified time frame.¹²⁷ The second makes it discriminatory to alter “a facility” used by “an establishment” in a way that is not accessible to the disabled.¹²⁸ In particular, the provision dictates that “to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area” should remain accessible.¹²⁹ Finally, the section specifically exempts certain types of buildings from the mandate to install elevators.¹³⁰ Read as a whole, this section removes any remaining ambiguity in the meaning of terms such as “facility,” “entity,” “public accommodation,” and “establishment” that might otherwise remain open to a broader interpretation. More important, this section disproves the assertion of the *Carparts* court that nothing in the Act’s language makes reference to physical boundaries or structures.¹³¹ Rather, all references to public accommodations pertain to physical structures, and all prohibitions against discrimination in the access to new facilities describe physical aspects of those structures.

Two principal rejoinders counter this textual approach. The first involves invoking the absurdity doctrine as evidence that such an interpretation leads to a result so incongruent with the purpose of the statute that no reasonable member of Congress would have agreed to it. The second holds that even if the initial statute contemplated only physical structures, the fact that people frequently speak of the Internet and websites as though they are physical places brings such websites squarely within the statute’s coverage.

1. The Absurdity Doctrine

The animating premise of the absurdity doctrine is that if applying a statute according to its letter would “sharply contradict[] commonly held social values,” then the statute must contain a failure of expression which Congress would have corrected if it had noticed.¹³² Applied here, it holds that interpreting the public accommodations provisions to cover only physical structures leads to absurd results because it would prohibit disability-based discrimination against an in-store customer while permitting similar discrimination by an entity that conducted all of its business by phone,

125 42 U.S.C. § 12183.

126 *Id.* § 12183(a).

127 *Id.* § 12183(a)(1).

128 *Id.* § 12183(a)(2).

129 *Id.*

130 *Id.* § 12183(b).

131 See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994).

132 See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389–90 (2003).

mail,¹³³ and, through extension into the digital age, the Internet.¹³⁴ Thus, this doctrine involves reading the statute in light of its legislative intent. It also heavily emphasizes the ADA's broad remedial purpose; it argues that the narrower interpretation absurdly thwarts both Congress's very purpose in enacting the statute as well as the social values espoused and promoted through the Act.

Applying the absurdity doctrine here presents four distinct issues. First, those advancing this line of reasoning bolster their argument with the obvious fact that the Internet simply had not yet become a household phenomenon in 1990, rendering Congress incapable of foreseeing and, hence, including websites within the statute's scope.¹³⁵ The DOJ, for instance, has analogized excluding websites from the ADA to claiming that the First Amendment does not cover electronic speech because such speech did not exist at the founding.¹³⁶ This comparison lacks merit because it overlooks the fact that, though the Internet did not enjoy widespread popularity in 1990, entities that conducted businesses solely or primarily by phone or catalog did exist. The question is not whether members of Congress could or could not have foreseen a world in which the Internet dominated commercial life; the question is whether they could have addressed through legislation their own contemporaneous experience in which business entities interacted with customers through means other than a walk-in physical structure. As at least one state had done in its public accommodations statutes, Congress could have written broad language that unquestionably encompassed "a business . . . of any kind" that held itself out to the public,¹³⁷ but they did not do so. Many reasons exist as to why Congress may not have addressed mail- and phone-order businesses under the statute. They could have believed that this area did not constitute a major source of discrimination facing disabled Americans, they could have lost the battle during the legislative process, or they could have simply written the language poorly. However it came about, the fact that the statute does not expressly address phone- and mail-order businesses as public accommodations does not rise to the level of manifest unreasonableness such that invoking the absurdity doctrine becomes appropriate. This is especially true given that the ADA is a statute riddled with compromise (discussed below).

Second, the argument presupposes that applying the statute would contradict widely held social values because it would prevent disabled individuals

133 See *Carparts*, 37 F.3d at 19.

134 See *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

135 See *id.* ("[S]uch web-based services did not exist when the ADA was passed in 1990 and, thus, could not have been explicitly included in the Act"); Brief of the United States as Amicus Curiae in Support of Appellant at *16, *Hooks v. OKBridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891) [hereinafter Brief of the United States].

136 Brief of the United States, *supra* note 135, at *17.

137 See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1415 & n.593 (1996) (describing Minnesota's broad public accommodations statute).

from enjoying the same rights as able-bodied individuals, which was the very purpose behind the enactment of Title III.¹³⁸ But this raises the question: what right of access to public accommodations did able-bodied individuals enjoy in 1990? In his extensive analysis of public accommodation history and case law, Professor Joseph Singer shows that neither the common law nor federal statutes fully support the modern public policies and social values that favor equal rights of access to all businesses that hold themselves out to the public.¹³⁹ Notably for purposes of this discussion, Singer frames his article, published in 1996, around his conclusion that the owner of a retail establishment could, prominent civil rights legislation notwithstanding, still arguably lawfully exclude an African-American customer.¹⁴⁰ Singer argues that at and before the founding, all “common callings” incurred a duty both to serve all individuals and to charge them a reasonable price.¹⁴¹ This duty stemmed from an implied contract in fact where, because the owner of a common calling held out his property as being open to the public, he incurred the duty to accommodate anyone from the public who might wish to enter.¹⁴²

Singer contends that American case law followed this broad “holding out” theory¹⁴³ until the post-Reconstruction and Jim Crow era, at which time it narrowed quite considerably.¹⁴⁴ Segregationists pushed for a narrower conception of public accommodations law that covered only inns and common carriers in an attempt to justify excluding African Americans from other businesses held out to the public.¹⁴⁵ Importantly, the fact that the duty to serve arose from an implied duty rather than from a statutory command

138 See, e.g., *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200 (“*Carparts*’s reasoning applies with equal force to services purchased over the Internet In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would ‘run afoul of the purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.’” (quoting *Carparts*, 37 F.3d at 20)); see also *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (noting, in dicta, that the “core meaning” of the prohibition against discrimination in places of public accommodation “is that the owner or operator of a . . . Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility” (citation omitted)).

139 Singer, *supra* note 137, at 1289–91 (describing this principle in the context of race discrimination in retail stores).

140 *Id.* at 1286–90.

141 *Id.* at 1303–04.

142 *Id.* at 1298.

143 *Id.* at 1312.

144 *Id.* at 1402 (noting that this process “unalterably changed” the common law right of access such that “courts and legal commentators [began] to state categorically that businesses other than innkeepers and common carriers had no duty to serve the public unless a statute limited their discretion”).

145 *Id.* at 1300; see also A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 54 (2005) (argu-

allowed segregationists to advance their arguments more easily.¹⁴⁶ This effort was so successful that it “unalterably changed” the common law right of access.¹⁴⁷ By the time civil rights efforts redoubled in the 1960s, a presumed right to exclude had replaced the holding out theory unless a statute explicitly circumscribed a business owner’s discretion.¹⁴⁸

Therefore, advocates for the absurdity doctrine must rely on the application of an anachronistic understanding of rights of access to public accommodations to support their argument. In 1990, members of the able-bodied public did not enjoy a legally enconced, indiscriminate right of access to every business that held itself out to the public. Proponents for the inclusion of websites thus cannot argue that interpreting the statute to exclude them would thwart Congress’s intent to give the disabled equal access to “the goods, services, privileges and advantages, available indiscriminately to other members of the general public.”¹⁴⁹

Third, the absurdity argument presupposes not only that Congress would have included the Internet had the Internet enjoyed widespread use in 1990, but also that this inclusion would have survived bicameralism and presentment unscathed by legislative compromise. Since judges cannot ascertain the outcomes that would have resulted from a hypothetical legislative proposal, presuming success grants a windfall to the disabled which they may not actually have achieved in reality.

Fourth, as a more general matter, the absurdity doctrine implicates separation of powers concerns by inviting the Court to enter the exclusively congressional realm of policymaking.¹⁵⁰ It is the province of the Court to say what the law is,¹⁵¹ not “to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest.”¹⁵² As the *Access Now* court noted, if the statute clearly speaks to the issue, then the Court must adhere to its text and leave it to Congress to correct its own errors and to effectuate its policy goals clearly.¹⁵³

2. The Internet as Physical Place

An alternative rejoinder to a strict textual interpretation holds that websites fall squarely within the “catch-all” phrases of the statute because, in com-

ing that progressive legislatures used the same emerging common law duty to serve only travelers as their “entering wedge” to seek broader equal rights for African Americans).

146 Singer, *supra* note 137, at 1298 (noting that the law also did not “expressly immunize” businesses from the duty to serve).

147 *Id.* at 1402.

148 *Id.*

149 Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (quoting Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc., 37 F.3d 12, 20 (1st Cir. 1994)).

150 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

151 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

152 *Tenn. Valley Auth.*, 437 U.S. at 196 (Powell, J., dissenting).

153 *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

mon usage, society refers to the Internet as a physical space.¹⁵⁴ People “build” web “sites” which must close to undergo construction, for example. This argument lacks substance for the very simple reason that the English language is riddled with metaphorical attempts to describe abstract concepts in concrete terms. The common parlance of English language disparages the “ivory tower” of academia, touts the value of free expression through “a marketplace of ideas,” and advocates “keeping a place in one’s heart” for those one loves. Women seeking to reach the pinnacle of success fight to break the glass ceiling while social commentators lament the burning of bridges and the building up of walls in personal relationships. Successful communication involves the sharing of common meanings, and these examples show that, though parity in the terminology exists, English speakers do not confuse metaphorical speech with references to an actual, physical structure.

So, too, with the Internet. Though the English language has conceptualized it using metaphors borrowed from the physical realm, Americans, as well as the Supreme Court,¹⁵⁵ commonly understand the Internet as having no physical features and adhering to no physical place or structure. Simultaneously, the common understanding of words such as “establishment” refers to physical, brick-and-mortar structures. Allowing for the extension of statutory terms through the invocation of metaphorical analogies would vastly expand the breadth of Congress’s power in this and many other technology-related contexts. To prevent this from occurring, judges should interpret statutory terms according to their commonly accepted shared meanings unless Congress has indicated that a specialized meaning should be used instead. Congress is free to pass a statute that clearly and unambiguously applies to the Internet using the proper terminology, something unquestionably within its legitimate authority.

B. *The Use of Legislative History*

The courts and commentators have also turned to legislative history to argue for a broader interpretation of the ADA’s Public Accommodations Provision.¹⁵⁶ This view reads the legislative history alongside the broad remedial purpose of the statute to argue that Congress’s principal purpose was to enact a statute that forwarded broad public policy considerations. Therefore, the statute should be read broadly in order to effectuate those policy goals.¹⁵⁷ These supportive fragments include a sentence in the Senate

154 See Colin Crawford, *Cyberplace: Defining a Right to Internet Access Through Public Accommodation Law*, 76 TEMP. L. REV. 225, 229–30 (2003); ADA GOES ONLINE, *supra* note 8, at 24–25.

155 See *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (describing cyberspace as being “located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet”).

156 See *supra* note 8.

157 See, e.g., Brief of the United States, *supra* note 135, at *15–16 (acknowledging the *eiusdem generis* canon, but arguing that any tension between the ordinary meaning of the

Report stating that “[t]he Committee intends that the ‘other similar’ terminology should be construed liberally consistent with the intent of the legislation.”¹⁵⁸ Additionally, the House Report states that “the types of accommodation[s] and services . . . should keep pace with the rapidly changing technology of the times.”¹⁵⁹

The principal objection to the use of legislative history—namely, that relying upon extra-statutory sources risks upsetting the legislative compromise and the protections afforded by the bicameralism and presentment process¹⁶⁰—features prominently in a discussion of the ADA due to the overwhelmingly bipartisan support the bill garnered in Congress. The House approved the bill by a vote of 377 to 28, whereas the Senate passed it by a margin of 91 to 6.¹⁶¹ Representative Tony Coelho, who sponsored the bill in the House, later stated that “if [the Act] had become a Democratic bill, [the ADA] would have lost. . . . It had to be bipartisan.”¹⁶² The National Council on Disability, a federal independent agency charged with formulating disability-related policy, helped foster discussions surrounding the ADA. It later described the efforts to achieve bipartisanship as including “cooperative meetings” between both political parties “to craft compromise provisions and revise problematic language in the bills.”¹⁶³ These meetings also included members of the business sector in order “to work out a *bipartisan compromise bill* that could obtain the support of the business community as well as that of the disability community.”¹⁶⁴ This self-conscious desire to amass wide bipartisan support and cooperation from the business community emphasizes

catch-all phrases and the list of exemplars should be resolved in favor of “Congress’s ‘obvious and dominating general purpose’” (quoting *Miller v. Amusement Enters. Inc.* 394 F.2d 342, 350 (5th Cir. 1968)).

158 S. REP. NO. 101-116, at 59 (1989).

159 H.R. REP. NO. 101-485, pt. 2, at 108 (1990).

160 Under this view, the intent of individual legislators lacks relevance when interpreting the statute because judges cannot know what legislators sacrificed in order to get a large enough consensus to pass the final iteration of the statutory text. Judges can only know what Congress “intended” by looking at the terms of the text as they objectively exist in the statute, not to subjective intents of individual legislators. Stated succinctly, “it is easy to announce intents and hard to enact laws.” *Cont’l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990). Instead, “[w]e are governed by laws, not by the intentions of legislatures. . . . ‘The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.’” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)). Looking outside the text that passed bicameralism and presentment means ignoring “the gamut of the process” including “committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on.” Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 64 (1988).

161 NAT’L COUNCIL ON DISABILITY, RIGHTING THE ADA 30–31 (2004).

162 *Id.* at 31 (second and third alterations in original).

163 *Id.* at 32.

164 *Id.* at 33 (emphasis added).

both the nature and magnitude of the compromises that in all probability took place during the ADA's consideration to achieve such a successful bipartisan result. And, indeed, the Act is replete with such overt compromises. For example, the Act expressly exempts over-the-road buses from installing accessible restrooms if doing so would result in a loss of seating space.¹⁶⁵ Subject to certain exceptions, facilities with fewer than three stories or consisting of less than three thousand square feet do not need to install an elevator.¹⁶⁶ These and copious other examples¹⁶⁷ demonstrate the level of give-and-take that took place during the formulation of the legislation.

Another ancillary, common objection to the use of legislative history bears mention due to its particular relevance to this Act. Legislation that heavily implicates special interest groups can incentivize legislators to pepper the legislative history with choice snippets of supportive material so as to influence interpretations of the statute, even if those views lacked support at the time of enactment.¹⁶⁸ This concern applies rigorously here, since both private business and disability rights interest groups featured prominently in discussions surrounding the Act.¹⁶⁹

165 42 U.S.C. § 12186(a)(2)(C) (2012).

166 *Id.* § 12183(b).

167 *See, e.g., id.* § 12187 (exempting private clubs and religious organizations); *id.* § 12182(b)(2)(A)(ii) (exempting businesses from modifying practices and procedures if doing so would “fundamentally alter” the nature of the goods and services provided); *id.* § 12183(a)(1) (exempting construction of accessible buildings for first occupancy if doing so would be “structurally impractical”).

168 *See* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) (“The more you use legislative history, the phonier it will become. Downtown Washington law firms make it their business to create legislative history; that is a regular part of their practice. They send up statements that can be read on the floor or statements that can be inserted into committee reports. . . . It’s not that we use it because it’s there. It’s there because we use it.”).

169 Three other generally applicable objections to the use of legislative history also apply here. First, some textualists contest the claim that House and Senate committee reports accurately reflect aggregated congressional intent because they question the premise that individual congressmen read and rely upon the substance of the reports. *See, e.g.,* Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment) (“I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports . . . [and] that very few of those who did read them set off for the nearest law library to check out what was actually said in . . . the more than 50 other cases cited by the House and Senate Reports . . .”). Second, social choice theory research indicates that ordering effects, such as when in the day the bill is discussed, can influence how Congressmen vote on the bill. *See, e.g.,* Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (noting that the ability to control the order in which Congress decides issues gives the person in control of the agenda the ability to manipulate ordering effects such that he can gain support for issues which otherwise would have been voted down). Third, even in an ideal world where all Congressmen read and discussed every clause of every report, it remains impossible to know the final reasons why a particular person votes for a bill or the language contained within it. The myriad reasons behind why people, even practiced decisionmakers, make

In addition, continued congressional silence on the issue of Internet coverage in the wake of two historical events undermines these intentionalist arguments. The first occurred in 2000, when the Subcommittee on the Constitution of the House Committee on the Judiciary held a hearing entitled “The Applicability of the Americans with Disabilities Act to Private Internet Sites.”¹⁷⁰ Committee members heard testimony from those advocating for the inclusion of private commercial websites under the Public Accommodations Provision.¹⁷¹ Two years before the hearing, the Electronic and Information Technology Access Advisory Committee proposed and passed rules for making federal department and agency websites accessible to the disabled.¹⁷² The impetus for these rules arose after Congress expressly amended the Rehabilitation Act of 1973, which requires the federal government and other federal fund recipients to extend equal employment opportunities and facilities access to the disabled.¹⁷³ The amendments expressly added a right of equal access to electronic information technology.¹⁷⁴ In many ways, the Rehabilitation Act served as the precursor to the ADA. The two statutes fulfill similar purposes, and the ADA draws heavily upon language from the Rehabilitation Act.¹⁷⁵ The ADA also uses lessons learned from experience enforcing the Rehabilitation Act to craft more aggressive methods to eradicate discrimination.¹⁷⁶ Yet, notwithstanding the statutes’ similar goals and the Rehab Act amendments two years earlier, the committee took no action after the hearing to follow a similar course of action for the ADA.¹⁷⁷

The second event took place in 2007. After both the circuit split in interpreting the public accommodations definition had arisen and the hearing had taken place, Congress did undertake to amend the ADA significantly. Discussion of the amendment process again illustrates the great level of compromise involved in this Act and the necessity for interpreting the terms as they exist, and only as they exist, in the text of the statute.

The push to amend the Act arose after the Supreme Court decided three cases that narrowly interpreted the Act’s definition of disability under Title I, which prohibits disability-based employment discrimination.¹⁷⁸ The Court’s decisions removed many previously eligible individuals with disabili-

choices counsel against turning to legislative history in order to decipher intent, especially in an omnibus comprehensive bill with voluminous legislative history such as the ADA.

170 *Applicability of the Americans With Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 31–32 (2000).

171 *Id.*

172 *See* 36 C.F.R. § 1194.1 (2014).

173 *See* 29 U.S.C. § 701 (2012).

174 *See id.* § 794d.

175 *See* Maroney, *supra* note 9, at 199–200.

176 *See id.*

177 *See* Moberly, *supra* note 64, at 964.

178 *See* Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187, 192–93 (2008).

ties from the Act's protection and caused interpretive issues in the lower courts.¹⁷⁹ The National Council on Disability as well as disability rights advocates and lawmakers sought to overturn the Court's holdings, reinstate the original definition of disability, and provide additional clarifying language to prevent further challenges regarding what constituted a disability under the Act.¹⁸⁰ Some of the original drafters of the ADA partook in this process.¹⁸¹ These drafters "used their understanding of Congress's original intent to create a bill that carries 'out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection.'"¹⁸²

The bill was introduced in both houses on July 26, 2007;¹⁸³ the Department of Justice and members of the business community opposed the amendment effort.¹⁸⁴ Of particular note is the fact that some in the business community expressed reservations about the "extreme breadth" of the proposed amendments.¹⁸⁵ To counteract this opposition and to maintain the broad bipartisan support that the Act had enjoyed for the prior seventeen years, multiple parties undertook a lengthy and detailed negotiation process.¹⁸⁶ Beginning in February 2008, groups from the disability rights and business communities met frequently over thirteen weeks to propose model language for the amendments.¹⁸⁷ Prior to beginning negotiations, each group signed a document promising to defend and promote the provisions in the final "compromise language" to Congress.¹⁸⁸ Once Congress had received the model bill, the agreement also bound the parties not to support any congressionally proposed changes unless all negotiators agreed to them.¹⁸⁹ On May 15, 2008, after—in the words of one of the negotiators—"thirteen weeks of meetings between the disability and business negotiating teams, endless drafting and redrafting of legislative language . . . and numerous meetings and calls for internal vetting within the separate communities

179 *Id.* at 193.

180 *See id.* at 187, 194–95.

181 *Id.* at 187; *see also* EMILY A. BENFER, AM. CONST. SOC'Y, THE ADA AMENDMENTS ACT: AN OVERVIEW OF RECENT CHANGES TO THE AMERICANS WITH DISABILITIES ACT 2 (2009).

182 BENFER, *supra* note 181, at 1 (quoting ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3554 (codified as amended at 42 U.S.C. § 12101(b)(1) (2012))).

183 *See* Feldblum et al., *supra* note 178, at 198.

184 *Id.* at 229.

185 *Id.* at 229 & n.162.

186 *Id.* at 229–31.

187 *Id.* at 229; *id.* at 229 n.166 (noting that the business representatives consisted of members from the Chamber of Commerce, the National Association of Manufacturers, and the Society of Human Resource Management).

188 *Id.* at 229–30.

189 *Id.* at 230; *see also id.* at 229 n.166 (listing Chai Feldblum and Kevin Barry, two of the article's authors, as negotiators in the meetings).

. . . as well as numerous meetings with the larger disability community[], a final compromise was reached.”¹⁹⁰

Though the bill passed the House,¹⁹¹ Senators challenged its language and raised additional concerns in July 2008.¹⁹² This necessitated a third version of the amendments in order to effectuate a “final compromise” between “the key Senate offices and . . . the business and disability communities.”¹⁹³ The final product, representing twelve months and three iterations of compromise, passed unanimously in both houses of Congress and was signed by President George W. Bush on September 25, 2008.¹⁹⁴ The amendments did not discuss or amend anything relating to the public accommodations provisions.

This lengthy amendment process exemplifies the level of elaborate compromise that characterizes the ADA due to its self-conscious attempt to maintain bipartisan support and cooperation from private businesses. The reaction to the amendments by the business community is also illustrative. Given the negative pushback expressed in a context where Congress sought only to restore the original understanding to which the parties had previously agreed, it seems highly unlikely that raising the issue of extending public accommodations to websites would not have engendered similar pushback, discussion, and a need for compromise.¹⁹⁵ Additionally, in its only attempt to actively clarify and restore the intent of the ADA, Congress took no steps to guarantee that places of public accommodations do, or should, cover private, commercial websites.

C. *A Look at the ADA’s Second Purpose*

A final point counseling against an expansive interpretation of public accommodations involves returning to the text of the Act and assessing the question in light of the statute’s equally important standards purpose. Examination of the statutory scheme reveals an extensive set of rights secured under a coterminous set of standards. Further, each standard utilizes a different set of liability rules and exemptions. This comprehensiveness indicates that Congress chose to create an enforcement scheme in which the two purposes work in tandem: the standards serve as the vehicles through which the Act effectuates its broad remedial purpose of eradicating disability-based discrimination.¹⁹⁶

190 *Id.* at 230.

191 *Id.* at 230–31.

192 *Id.* at 231.

193 *Id.* at 239.

194 *Id.* at 239–40.

195 See Brian Wentz et al., *Retrofitting Accessibility: The Legal Inequality of After-the-Fact Online Access for Persons with Disabilities in the United States*, FIRST MONDAY (Nov. 7, 2011), <http://firstmonday.org/article/view/3666/3077> (listing nine common concerns about making technology accessible, including cost increases, development time, niche markets, aesthetics, and the possibility that the needs of every disability will never be met).

196 42 U.S.C. § 12101(b)(2) (2012).

Section 12182 begins the Title with a broad prohibition against discrimination in places of public accommodation.¹⁹⁷ The remainder of the section contains eighteen separate prohibitions, or standards, against discrimination in a host of more targeted areas including physical access, eligibility requirements, and participation in activities.¹⁹⁸ These standards differ depending on the behavior being targeted. For instance, an entity must reasonably modify policies to make goods and services available to the disabled unless doing so would “fundamentally alter the nature of such goods.”¹⁹⁹ In contrast, the Act obligates the same entity to remove all architectural barriers wherever readily achievable²⁰⁰ and, if unable to do so, to provide goods and services through alternative means wherever readily achievable.²⁰¹

Sections 12183 and 12184 together enact nine additional standards specifically identifying conduct constituting discriminatory barriers to physical access. Section 12183 provides two sets of standards by which the construction or alteration of new facilities will be measured,²⁰² while Section 12184 provides seven sets of standards that govern certain privately provided transportation services.²⁰³ Here, too, the liability rules differ and are subject to varying exemptions, depending on the conduct being targeted.²⁰⁴

These twenty-seven definitions of discriminatory conduct, contained within just one of the Act’s titles, exemplify the breadth and level of detail provided in the statute concerning the rights it secures. In keeping with its task of providing a clear and comprehensive mandate, the Act does not merely prohibit discrimination globally and broadly delegate authority to an executive agency to define the contours of what constitutes discrimination. Instead, the Act creates a detailed set of rules that—on the face of the statute alone—give notice to both disabled individuals and affected businesses regarding their rights and responsibilities as well as the standards of review courts must utilize when assessing compliance.²⁰⁵ This enforcement scheme additionally benefits the disabled individual by triggering governmental action to promulgate accompanying regulations.²⁰⁶ Should this not occur, the statute’s text still enables a disabled individual to connect any infringement to at least one of the many standards contained within the Act, thereby

197 *Id.* § 12182(a).

198 *Id.* § 12182(b).

199 *Id.* § 12182(b)(2)(A)(ii).

200 *Id.* § 12182(b)(2)(A)(iv).

201 *Id.* § 12182(b)(2)(A)(v).

202 *Id.* §§ 12183(a)(1)–(a)(2).

203 *Id.* §§ 12184(b)(1)–(b)(7).

204 *Compare id.* § 12184(6) (making it per se unlawful to lease new inaccessible railway cars, subjected to no exemption), *with id.* § 12184(7) (prohibiting the use of remanufactured railway cars unless the company can show that they have made the cars accessible “to the maximum extent feasible”).

205 *See* *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand To make the warning fair, so far as possible the line should be clear.”).

206 *See* 42 U.S.C. § 12186(b).

eliminating any ambiguity as to whether discrimination has or has not taken place. Should the DOJ lag behind in its responsibility to pass regulations, then, a disabled plaintiff retains the ability to vindicate his rights in a private cause of action.

This analysis lends credence to the *Access Now* court's admonition that "[w]here Congress has created specifically enumerated rights and expressed the intent of setting forth 'clear, strong, consistent, enforceable standards,'" courts should not expand those rights, lest they "create new rights without well-defined standards."²⁰⁷ Any disparity between the Act's goal of completely eradicating discrimination and the areas reached by the Act's standards should be resolved by including standards covering those situations expressly, along with respective liability rules and exemptions. To do otherwise undercuts the very enforcement scheme that Congress chose to utilize to address the needs of the disabled and carry out the purposes of the Act.

III. THE PROPER SOLUTION

The above discussion identifies a discrepancy between the trend in the current case law toward inclusion of websites as public accommodations and the text of the statute which does not permit such a reading. This Part advances four arguments for why disability rights advocates should pressure Congress for express amendments establishing a right of access to websites and other emerging technologies, even if they agree with the DOJ's current interpretation.

First, though the current legal trend and an express amendment might lead to similarly favorable results for the disabled, a statutory edict will remove the interpretive discretion currently enjoyed by judges and the DOJ. Thus, the amendment approach will increase the likelihood that a public policy favoring access to websites will remain in place over time. Returning to Singer's public accommodation timeline elucidates the wisdom of the statutory method. As Singer describes, pro-segregationists used the favored contemporary public policy goals of laissez-faire economics and the freedom of contract to ensconce the right to exclude as sacrosanct.²⁰⁸ After narrowing the duty of access to only inns and common carriers, segregationists argued successfully that racial segregation into separate, allegedly equal accommodations in these enterprises constituted a "reasonable regulation" of these businesses.²⁰⁹ Because the duty to serve arose from an implied common law duty, statutes often did not expressly codify it or referred only vaguely to

207 *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

208 Singer, *supra* note 137, at 1395 (inferring that the discrepancy between a school of economics that favored freedom from regulation in general and Jim Crow laws that imposed substantial regulatory burdens on businesses to perpetuate segregation shows that racial politics, not true adherence to laissez-faire economics, was the motivating factor behind this narrowing); *see also id.* at 1300 (arguing that this racially-motivated narrowing might have helped to replace the system built upon implied duties with a more fully developed laissez-faire conception).

209 *Id.* at 1298.

“public accommodations,” giving segregationists the ability to re-interpret these terms more narrowly.²¹⁰

This historical lens sheds light on the need to reduce judicial and prosecutorial discretion in the ADA context. As with post-Reconstruction public accommodation law, the current, policy-oriented approach to the ADA allows judges to read the public accommodation duty as narrowly or as expansively as they please. It also leaves room for businesses to try to evade or cabin their alleged responsibilities under the Act. This concern is of particular note given the Supreme Court’s historic penchant for construing the ADA exceedingly narrowly in other contexts, even when the Act’s comprehensive standards spoke directly to the issue.²¹¹ Enacting express statutory amendments will help alleviate this problem by forcing the judiciary to acknowledge that the ADA includes websites when applying and interpreting the law.

Similar problems arise from the interpretive discretion currently enjoyed by the Department of Justice. Though the Department has recently enforced the ADA as though it covers websites,²¹² nothing in the Act as it stands obligates the DOJ to continue doing so. The statute provides no guarantee to the disabled community that the Attorney General for the next presidential administration will pass regulations consistent with a public policy upholding a right of access to electronic information. Similarly, the Act also obligates the Attorney General to investigate “alleged violations” under the Act.²¹³ Though the DOJ will always possess prosecutorial discretion, the current statute does not clearly define and outline what constitutes a violation of a right of access to a website; an Attorney General choosing to read the statute according to its text can skirt his prosecutorial duty completely by simply announcing that violations of that sort do not fall under the provisions of Title III. Enacting amendments would remove the choice of a narrow interpretation from the Attorney General’s hands, thus facilitating consistency in interpretation and enforcement rather than leaving the rights of the disabled subject to the vagaries of the political appointments process. Further, an amendment would force the DOJ to promulgate rules accompanying these textual provisions.²¹⁴

Second, compared with a policy-oriented approach, a statutory mandate increases the likelihood of *ex ante*, prospective compliance by businesses rather than *ex post* attempts to “retrofit[] accessibility.”²¹⁵ For instance, Netflix, rather than building its site from the ground up according to univer-

210 *Id.*

211 *See* NAT’L COUNCIL ON DISABILITY, *supra* note 161, at 44–99.

212 *See supra* notes 16–17.

213 42 U.S.C. § 12188(b)(1)(A)(i) (2012).

214 *See id.* § 12186(b) (stating that the DOJ must pass accompanying regulations within one year).

215 *See generally* Wentz et al., *supra* note 195 (analogizing after-the-fact retrofitting of technology to the same issues experienced by the disabled in making pre-existing educational and transportation facilities accessible).

sal standards compelled by statutory mandate, instead agreed to retrofit its website only after litigation arose. This approach flies in the face of the ADA, which mandates immediate, universal access to places of public accommodation.²¹⁶ Instead, retrofitting results in a “glaring form of inequality” for the disabled during the gap between the release of an inaccessible product and the formulation and launch of an accessible version.²¹⁷

Third, a lack of clear standards also negatively impacts businesses subject to the ADA’s provisions by providing them with inadequate notice of their legal responsibilities. To continue with the Netflix example, the business has incurred the costs of two lawsuits as well as the cost of retrofitting its software within the timeframe specified by the consent decree. Opponents might argue that the business community could mitigate these costs by simply applying universal access principles such as the W3C standards. Though this might be true, it does not answer the wholly separate question regarding the fairness of holding a private business liable for not complying with a set of voluntary “recommendations”²¹⁸ subject to change at any time in order to comply with an as-of-yet-unsubstantiated legal duty.²¹⁹ Further, in a world of rapidly changing technology, yesterday’s universal access might easily become today’s accessibility barrier. The stipulation in the Peapod/DOJ settlement agreement that either party may seek review of the agreement should it conflict with future DOJ regulations seems to indicate that the DOJ recognizes this fact.²²⁰ Without clearly delineated standards and obligations, a business has no way of ensuring that its content, despite its best efforts, remains accessible as technology continues to develop and grow more intricate.

Fourth, a statutory approach will help secure global rights for the disabled instead of the patchwork of tentatively protected rights reached through individual enforcement actions and adjudications. This is primarily because each individual action targets only the accessibility barriers faced by a subset of the disabled community. Such an approach means that the context of the lawsuit will dictate which subgroups of the broader disabled community will enjoy the benefits of successful litigation. Comparing the Netflix consent decree with those of Peapod and H&R Block illustrates this tension. The Netflix decree did not mention W3C guidelines at all, since the chal-

216 See 42 U.S.C. § 12183 (providing guidelines both for constructing new places of public accommodations as well as how to alter those which existed at the time of the Act’s passage).

217 See Wentz et al., *supra* note 195.

218 See Caldwell et al., *supra* note 15 (describing the guidelines as covering “a wide range of recommendations for making Web content more accessible”).

219 Aside from which regulations to be used, for example, the DOJ notice of proposed rulemaking also seeks comment on whether an “incremental” approach to regulation should be used, such as applying the regulations first to businesses with a certain number of employees or which generate a certain amount of revenue. See Gardella, *supra* note 111 (noting also that beyond businesses providing products or services to the public through their website, the reach of the proposed rule is “not yet clear”).

220 See Peapod Settlement Agreement, *supra* note 17, § 12(f).

lenged conduct only concerned video closed captioning. The decree imposed a correspondingly narrow training obligation on Netflix; it required Netflix to train its employees only on issues related to closed captioning, as opposed to all accessibility concerns.²²¹ In contrast, the H&R Block and Peapod agreements do incorporate the broader accessibility protection afforded by the W3C guidelines by requiring the companies to adhere to the standards published on December 11, 2008.²²² However, this means that should the WAI undertake to update the standards, H&R Block and Peapod might once again become inaccessible while still complying with the terms of their agreements.²²³

The possibility for future W3C standards to nullify the settlement agreements is especially troubling in light of the fact that the Web Accessibility Initiative has created a task force to rectify current forms of “cognitive” web accessibility affecting those with intellectual and learning disabilities, autism, and other conditions.²²⁴ If the WAI develops standards addressing these concerns, H&R Block and Peapod will not be legally bound to incorporate them under the consent decrees. The creation of the Task Force also demonstrates that the W3C guidelines, as currently written, do not adequately address the accessibility concerns of all disabled individuals. This makes the DOJ’s treatment of the W3C standards as the watermark of compliance problematic when juxtaposed against the ADA’s aims of fully eradicating all forms of discrimination faced by all people with disabilities. Therefore, though those with hearing, visual, and mobility disabilities have achieved varying degrees of success under each of the three respective settlement agreements, they have done so at the expense of those with other types of disabilities equally protected under the ADA.

Enforcement actions additionally work to the detriment of the disabled community because each decree limits access rights to the specific business in question. The access rights of the blind to providers of online grocery stores has not been globally secured through the Peapod agreement, nor

221 See Netflix Consent Decree, *supra* note 95, § 6.

222 See H&R Block Consent Decree, *supra* note 17, §§ 12(a)–12(b); Peapod Settlement Agreement, *supra* note 17, § 12(b).

223 The accessibility testing groups provided for in the H&R Block and Peapod agreements serve as another example of how enforcement actions secure specific rather than global rights. Both companies agreed to submit future web content to accessibility testing groups comprised only of persons with a finite set of disabilities. See H&R Block Consent Decree, *supra* note 17, § 21 (stipulating that “changes shall be tested by individuals with different disabilities, including at a minimum individuals who are blind, deaf, and/or have physical disabilities affecting manual dexterity”); Peapod Settlement Agreement, *supra* note 17, § 19.

224 The Cognitive Accessibility Task Force webpage is a wiki-page in which various contributors collaboratively express ideas and recommend alterations to the W3C guidelines. *Gap Analysis*, W3C COGNITIVE ACCESSIBILITY TASK FORCE (Sept. 6, 2015), https://www.w3.org/WAI/PF/cognitive-a11y-tf/wiki/Gap_Analysis#Section_1:_Abstract_and_Introduction. The Task Force is currently investigating accessibility gaps for those with autism, ADHD, aphasia, dementia, Down Syndrome, and others.

have the access rights of the hearing impaired to material provided through other major online streaming video libraries such as Amazon Prime and iTunes. Though other companies may choose to voluntarily adopt analogous procedures to those set out in the agreements, they do so at their discretion and, in following the procedures, potentially exclude some disabled individuals from their accessibility considerations. In this regard, too, the consent decrees provide weaker protections to the overall disabled community when compared with imposing clear statutory standards and obligations on all covered businesses.

Taken together, this discussion elucidates the need for explicit amendments to the ADA to bring not only websites but also all emerging technologies within its scope. Proponents might argue that the regulatory process will resolve these issues. Regulations promulgated by the Attorney General will create these necessary guidelines, giving plaintiffs the legal clout they need and businesses the warnings they deserve.

This argument overlooks both the magnitude of the underlying problem as well as the nature of the regulatory process. In 2015, a principal issue facing the disabled lies in accessibility to websites. However, this will not always remain the case. As technology continues to change, one can imagine a world in which some other infrastructural medium utterly supersedes the Internet. Where will the disabled be left then? The answer is right back where they started—waiting and lobbying for the government to place another retrofitting, piecemeal regulatory bandage over the newest and latest technological accessibility barrier. Relying on forced readings of the statute and the regulatory process will continually present the task of ascertaining whether or not a new form of technology does or does not fall under the auspices of the ADA. Even if it arguably does, the disabled will still remain at the beneficence of the Attorney General who could take, as he has here, six years to “consider,” let alone pass, regulations.²²⁵ There is an inherent inconsistency between a statute aiming to secure universal access for disabled individuals to the goods and services offered to the general public and an implementation interpretation forcing the same individuals to wait years for that access while the regulatory process unfolds.

Herein lies the need for express amendments that, to the greatest extent possible, would specifically enshrine the rights of the disabled statutorily rather than broadly delegating the authority to an administrative agency to define those rights. Unlike regulations, such amendments would not simply address websites or mobile applications, but any and all emerging technology associated with e-commerce. Such standards would incorporate the needs of the business community and would ideally dispel any erroneous myths about the difficulty of making technology accessible. The guidelines would outline universal requirements for personnel training on accessibility, and give businesses direction on how to ensure that their products are accessible. The amendments could lay out a process for evaluating future technology similar

225 See *supra* note 108.

to the one outlined in the Act used for assessing physical structures. This would ensure that the disabled have access to technology from the very moment it enters the market. Perhaps most important, these standards could recognize the need for prompt action in a rapidly changing technological age by holding relevant governmental agencies accountable when they fail to act promptly in the face of changed circumstances. In sum, these standards would put an end to the piecemeal approach by which the disabled have heretofore taken two steps forward and one step back by creating broad, globally applicable principles that will exert beneficial influence over the development of future case law and regulations.

CONCLUSION

This Note has sought to answer the question whether the Public Accommodations Provision of the Americans with Disabilities Act covers private, commercial websites wholly divorced from brick-and-mortar structures. In doing so, it has identified a discrepancy between the case law, which has moved toward an interpretation favoring inclusion, and the text of the statute, which does not support this reading. The developments in the case law thus far have culminated in the piecemeal procurement of rights of access to some commercial websites; however, the positive effects of these successes have been enjoyed disproportionately by those with some disabilities at the expense of individuals with other types of disabilities. Meanwhile, accessibility barriers continue to exist across the Internet in a variety of forms and in a host of contexts.

The current enforcement of the Public Accommodations Provision undermines the ADA's goal of eradicating all forms of disability-based discrimination faced by individuals living with all types of disabling conditions. The solution to this problem lies not in continuing to read the statute broadly in order to sweep more and more entities under its umbrella, but in expressly amending the statute to set out "clear, strong, consistent, enforceable standards"²²⁶ which secure the right of access for websites and all other emerging e-commerce technologies. Such an approach is in keeping with the ADA's goal of universal, immediate access to new structures, takes account of the uniquely different characteristics of technology compared to physical structures, and does not force the disabled to wait for access between the emergence of new technologies and the commencement and conclusion of the regulatory process.

226 42 U.S.C. § 12101(b)(2) (2012).

