I. INTRODUCTION

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

You think this is strange and attempt to access other sites, but you find the same results. You then decide to hop in your car and drive down to the local travel agency to purchase a ticket. However, when you get to the travel agent’s office, there is no door. No door! This seems ludicrous of course, because anyone who would design a building would think it necessary to include a door. You think: “How could this travel agent possibly conduct business without a door to his building?” Alfred Hitchcock would find these results normal. However, most people would be disheartened and even angered at the inability to access the travel agency, either electronically or physically. The architect of a building would not think twice about the necessity of a door, but the door may only be accessible after ascending several steps. The steps could preclude a person with a mobility impairment from accessing the service.

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

The Internet is a popular, useful, and essential tool that is becoming increasingly necessary for use a screen reader to operate a computer or to navigate the web); see also Judy Heim, Locking out the Disabled, PC WORLD, Sept. 2000, at 182 (“These shopping services are so important for people who are unable to drive, and for those of us who are unable to peruse the aisles.”).
Americans with Disabilities Act of
world. Users are precluded from utilizing its wealth of in-
vision impairments, find themselves unable to
everyday

Although laws proscribe discrimination against persons with disabilities, there is much confusion regarding how these same laws apply in the non-
physical world of the Internet. Title III of the
prohibits discrimination against persons with
disabilities in "places of public accommodation." It is
unclear, however, whether a place of public accom-
modation, such as a travel agent’s office, also in-
cludes a non-physical place of public accommodation,
such as a travel agent’s website.

This Comment examines the application of Ti-
tle III to the Internet. Part II examines the history
of disability discrimination and the application of
this problem to the Internet in light of statistical
evidence. It also examines interpretations of the
applicability of Title III to the Internet by federal
circuit courts and the Department of Justice. Part
II concludes that conflict exists among the federal
appellate courts and that the Supreme Court
needs to resolve this confusion. Part III provides
arguments for the application of Title III to the
Internet. Part III.A provides that the Internet is
subject to the non-discrimination mandates of Ti-
title III, and that any contrary interpretation would
frustrate the plain language and defeat the pur-
pose of the statute. This Comment also finds Ti-
title III to be constitutional as applied to the In-
ternet. Part III.B finds that Title III is a permissi-
ble exercise of Congress’ commerce power as ap-
plied to the Internet. Finally, Part III.C finds that
Title III as applied to the Internet does not violate
the First Amendment to the Constitution.

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

A. History of Discrimination on the Basis
of Disability

History is replete with instances of overt dis-
crimination against persons with disabilities. However, discrimination can be more passive and
less obvious, permeating many aspects of a dis-
abled individual’s daily activities. Often the dis-
criminator is not even aware that he or she is dis-

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

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(providing a thorough explanation of the history, structure,
and capabilities of the Internet). The Supreme Court also
emphasizes the utilitarian breadth of the Internet in Ashcroft

7 See generally Cynthia D. Waddell, The Growing Digital Di-
vide In Access for People with Disabilities: Overcoming Barriers to
Participation, at http://www.icdri.org/CynthiaW/the_digital_
divide.htm (May 25 & 26, 1999) [hereinafter The Growing Digital
Divide] (finding that the use of graphics and tables with-
out accessibility functions can create electronic barriers for
persons who use screen-readers to navigate the Internet).

8 See id.

9 See id.

10 Title III of the Americans with Disabilities Act of 1990,
provides as a general rule, "[n]o individual shall be discrimi-
nated against on the basis of disability in the full and equal
enjoyment of the goods, services, facilities, privileges, advan-
tages, or accommodations of any place of public accommoda-
tion by any person who owns, leases (or leases to), or oper-

12 See 42 U.S.C. §12102(2) (providing the statutory defi-
nition in the ADA of disability as "a physical or mental im-
pairment that substantially limits one or more of the major
life activities of such individual . . . a record of such an impair-
ment . . . or being regarded as having such an impair-
ment"). See generally The Disability Social History Project,
Disability History Timeline, at http://www.disabilityhistory.
org/timeline_new.html (last modified Sept. 23, 2005) (pro-
viding a brief history of the disability rights movement).
Historically, disability discrimination has been pervasive in
the United States and internationally. See, e.g., Buck v. Bell, 274
U.S. 200 (1927) (Holmes, J.) (holding a Virginia statute au-
thorizing the forced sterilization of persons with disabilities
not a violation of due process or equal protection rights
under the Fourteenth Amendment). Specifically, the Buck
Court found "[i]t is better for all the world, if . . . society can
prevent those who are manifestly unfit from continuing their
kind . . . . Three generations of imbeciles are enough." Id at
207.

fering numerous examples of discrimination against persons
with disabilities in various aspects of life).

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

15 Congress has sought to protect select groups of indi-
viduals from discriminatory treatment based solely on status.
Among these status positions are persons with disabilities. 42
bility Rights Movement, which has relied heavily on the Civil Rights Movement, developed in response to pervasive discrimination. The Civil Rights Act of 1964, which prohibits discrimination or segregation on the basis of “race, color, religion, or national origin,” provided the framework for disability rights legislation such as the Rehabilitation Act of 1973 and the ADA.

Among the landmark disability rights laws is Section 504 of the Rehabilitation Act of 1973 (“Section 504”), which prohibits discrimination on the basis of disability in programs that receive federal financial assistance. The ADA’s non-discrimination mandates are based on Section 504 and the Civil Rights Act of 1964. The ADA essentially extends Section 504’s non-discrimination mandate beyond federal agencies and recipients of federal financial assistance to state and local governments, public transportation entities, and private entities holding themselves out to the public while engaged in commerce.

Federal government agencies are also bound by electronic access non-discrimination mandates. On July 21, 2001, the Rehabilitation Act of 1973 was amended, making federal agencies responsible for providing accessible websites. Section 508 of the Rehabilitation Act of 1973 (“Section 508”) requires that all electronic and information technologies that federal agencies develop, procure, maintain, or use must be usable by persons with disabilities in a manner that is comparable to non-disabled users, unless an undue burden would result. This mandate proscribes discrimination against both federal government employees seeking to access information technologies and members of the public soliciting information from federal agencies.

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

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

Although existing statutes, such as the ADA, pro-


24 See Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500 (Dec. 21, 2000). The Access Board, an independent federal agency, provides the standards for electronic and information technology accessibility pursuant to Section 508. See The Architectural Barriers Act of 1968, 42 U.S.C. §4151 (2000). The Access Board was established under Section 502 of the Rehabilitation Act of 1973, 29 U.S.C. §792 (2000). See generally The Access Board, at http://www.access-board.gov (last visited Mar. 25, 2003); see also Steve Mendelsohn and Ron Hager, Access to Information and Electronic Technology Offered by the U.S. Government, Section 508 of the Federal Rehabilitation Act, 6 Advocate 1 (National Assistive Technology Advocacy Project, Buffalo, N.Y.), Jan./Mar. 2001 (providing a detailed examination of the entities covered by Section 508 as well as exemptions from the law): just as Section 504 set the stage for the passage of the ADA, some argue that Section 508 sets the stage for enforcement of the ADA or a future statutory amendment to the ADA to make the non-discrimination mandate unmistakably clear that it applies to the Internet. See Latresa McLawhorn, Comment, Recent Development: Leveling of the Accessibility Playing Field: Section 508 of the Rehabilitation Act, 5 N.C. J. Law & Tech. 63, 75 (2001). This Comment finds that Title III already applies to the Internet and thus, the argument for amending the statute is not applicable here..


26 42 U.S.C. §§12101(a)(2)-(5).

27 Id. §12101(b).
vide mechanisms for enforcing the civil rights of persons with disabilities, discrimination is still pervasive. 28 One such area where discrimination is still pervasive is the Internet. 29

B. E- Barriers to Internet Accessibility

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

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

Opponents of enforcing the application of Title III to the Internet argue that it would be overly burdensome on private Internet websites. 38 Experts argue that it is possible, and that there are ample resources providing services, often free, to make private websites accessible. 39 Among these are the City of San Jose, California, web accessibil-
ity project and the World Wide Web Consortium Web Accessibility Initiative. Other resources providing services for websites seeking accessibility, such as Bobby, "test web pages and help expose and repair barriers to accessibility and encourage compliance with existing accessibility guidelines." The Bobby service, which is sponsored by IBM, will either test a website under Section 508 guidelines or under W3C "Web Content Accessibility Guidelines 1.0" based on user preference. The Bobby site also provides an icon that can be placed on a website to advertise its accessibility. The Alliance for Technology Access also provides helpful information on accessibility. The Trace Center, at the College of Engineering at the University of Wisconsin-Madison, provides useful and free technical assistance on universal design and accessibility. Nevertheless, experts on the issue report that the use of graphical websites without textual labels preclude persons who use screen readers from accessing the site. This concern is amplified in light of the number of individuals who are precluded from utilizing the Internet's wealth of information and resources.

C. Statistical Evidence

Excluding persons with disabilities from using the Internet is cause for concern. Nearly one-in-five Americans has one or more mental or physical disability. Other sources indicate that there are approximately 750 million people with one or more disabilities in the world. In 2000, the Census Bureau reported that nearly 42% of United States citizens, sixty-five years and older, had some type of disability. At that time, 54.7 million people were elderly; this number is expected to increase to 69.4 million by the year 2030 as the baby-boom generation ages.

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

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42 Id.
43 Id.
46 See The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (2000) (statement of Dr. Steven Lucas, Senior Vice President, Privaseek, Inc.).
48 See generally, H.R. Rep. No. 101-485 (offering numerous examples of individuals with disabilities excluded from mainstream activities and the adverse effects of such discrimination on those persons and society in general); see also, 42 U.S.C. §12101(a)(9) (2002) (providing that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity"); see Sally McGarne, Is the Web Truly Accessible to the Disabled?, CNET.com (Jan. 26, 2000) (on file with the author) (providing that 50% of Americans were online in 2000, that 76% of Americans with disabilities were online in 2000, and that approximately 98% of websites were inaccessible to disabled persons in 2000); see also Humphrey Taylor, How the Internet is Improving the Lives of Americans with Disabilities, at http://www.harrisinteractive.com/harris_poll/index.asp?PID=93 (June 7, 2000) (providing a survey of 555 adults with disabilities and

614 adults without disabilities taken between March 22, 2000 and April 5, 2000). The survey finds that on average, adults with disabilities spend twice as much time on the Internet than adults without disabilities. Id.
51 Census 2000 Brief, supra note 49. The percentage is equivalent to almost 14 million Americans. The census report excludes people in the military and people who are in institutions. Id.
52 DEP’T OF COMMERCE, AGING IN THE UNITED STATES—PAST, PRESENT AND FUTURE, at http://www.census.gov/ ipc/prod/97agewc.pdf (last visited Mar. 25, 2004). Because disability often comes with age, and because the Baby-boom generation is increasingly dependent on the Internet, website accessibility is an investment in our future. Id.
53 Nat’l Fed’n for the Blind, Blindness Statistics, at http://www.nfb.org/stats.htm (last modified Oct. 30, 2002) [hereinafter BLINDNESS STATISTICS]. The World Health Organization, in 1994, estimated that 38 million people around the world were blind and that there were an estimated 110 million additional cases of low vision. See World Health Org. Info., Fact Sheet N 142, Blindness and Visual Disability, at http://www.who.int/inf-fs/en/fact142.html (Feb. 1997). "The Fact Sheet provides that "]the estimated worldwide prevalence of blindness is 0.7%, ranging from 0.3% in the Established Market Economies and Former Socialist Economies of Europe to 0.6% in China to 1% in India to 1.4% in Sub-Saharan Africa." Id.
54 See Screen Readers and the Web, supra note 1.
ment may use a screen-reader, equipped with voice activated devices, to navigate the Internet.\textsuperscript{55}

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

It is impossible to determine the exact number of people precluded from accessing parts of the Internet and calculating the number would lead to an understatement of the problem.\textsuperscript{65} In the end, what is important is that many individuals are precluded from using the Internet because of e-barriers to access. Much of the problem springs from confusion in the law as to whether Title III applies to the Internet.\textsuperscript{66}

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

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

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

55 See Screen Readers and the Web, supra note 1.
57 Id.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
64 Id.
66 See discussion infra Part II. D.
68 See id.
69 42 U.S.C. §12182(a) (emphasis added).
72 Hayes Statement, supra note 38 (“the Internet is an evolving media, not a physical structure . . . if we apply regulations based on the technologies and possibilities of today, we may in fact limit the development of better access tools simply because we couldn’t conceive of them when the regulation was drafted.”); see also Taylor, supra note 38 (providing arguments against the application of Title III to the Internet).
74 See Konkright, supra note 73, for a discussion of federal court interpretations of whether a public accommodation is limited to a physical place in the insurance context. See e.g., Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (holding that public accommodations are limited to physical places); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010-11 (6th Cir. 1997) (holding that public accommodations are limited to physical structures).
75 See, e.g., Carparts Distrib. Ctr., Inc. v. Auto. Wholesale’s Ass’n. of New England, Inc., 57 F.3d 12, 26 (1st Cir. 1994) (holding that places of public accommodation are not limited to physical structures); cf. Doukas v. Metro. Life Ins. Co., 950 F. Supp. 422, 425-26 (D.N.H. 1996) (holding that a public accommodation cannot deny a person with a disability the services or goods it would provide non-disabled patrons).
court case, decided in 2000, specifically discusses whether Title III applies to the Internet, and it held in the negative.\textsuperscript{76} The most promising case on the issue was filed by the National Federation for the Blind against America Online,\textsuperscript{77} alleging that the Internet service was inaccessible for blind users; however, the case settled out of court in 2000.\textsuperscript{78}

Courts holding that Title III does not apply to the Internet conflict with the position of the Department of Justice. In 1996, after United States Senator Harkin of Iowa received a constituent letter concerning whether the ADA applied to the Internet, he sought guidance from the Department of Justice.\textsuperscript{79} In response, the Department of Justice issued an advisory letter stating that entities covered by the ADA "are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media, such as the Internet."\textsuperscript{80} The Department of Justice has also submitted an amicus brief opinion in the Court of Appeals for the Fifth Circuit in favor of Title III applicability to the Internet.\textsuperscript{81} Nonetheless, the conflict among circuits concerning whether Title III is limited to physical places still exists,\textsuperscript{82} and questions remain as to whether Title III applies to the Internet.\textsuperscript{83} These issues have created unfortunate economic and social restrictions on the digital market which beg their resolution before the Supreme Court.\textsuperscript{84}

III. ARGUMENTS FOR APPLYING TITLE III TO THE INTERNET

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

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\textsuperscript{76} See id. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 564 (7th Cir. 1999) (holding that Title III prohibits public accommodations from denying access to goods and services but does not regulate the content or substance of the goods or services.).

\textsuperscript{77} See Access Now v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (holding that an airline Internet website is not a place of public accommodation within the meaning of Title III).


\textsuperscript{80} See U.S. SUP. CT. R. 10(a) (providing that the Supreme Court will grant certiorari on a matter when courts of appeals conflict); see also Braxton v. United States, 500 U.S. 344, 347 (1991) (providing that "a principal purpose for which [the Supreme Court uses] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law"). Resolution and uniformity of the law by the Supreme Court is particularly compelling in this case because under the current state of affairs, private Internet websites are subject to liability in some federal circuits while exempt in others. Id.
ternet places artificial restraints on the market. Furthermore, Title III does not offend the First Amendment, but strengthens its essential functions.

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

1. Statutory Interpretation of Title III

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

A fundamental principle of statutory interpretation is that a statute should be given its plain and literal meaning unless some ambiguity in the terms should arise. The word “place” may connote several meanings. For example, a literal meaning dictionary search of the word “place” uncovers, at the minimum, seventeen definitions, from “[a]n area with definite or indefinite boundaries; a portion of space” to “[a] dwelling; a house” to “[a] locality, such as a town or city.” The definitions continue, to include “job, post, or position,” a “[h]igh rank or status,” or “particular situation or circumstance.” Looking at the word “place” in the context of “place of public accommodation,” it seems that two reasonable interpretations of the word may coexist. A “place of public accommodation” could be an “area with definite . . . boundaries” such as a house or a pharmacy. A “place of public accommodation” could simultaneously be “an area with . . . indefinite boundaries; a portion of space” such as the mind or outer space (although this “place” is arguably not accommodating to the public). Similarly, it seems that an interpretation of the phrase “place of public accommodation” that includes cyberspace does not offend the definition of “[a]n area with definite or indefinite boundaries; a portion of space.” For example, a pharmaceutical drug distributor on the Internet would be a place where one could purchase prescription drugs, although one need not actually enter a physical structure to get there. Similarly, one may purchase airline tickets at a travel agent’s office or online, where entrance into the physical travel office is not necessary or possible.

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

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

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86 Id. (emphasis added).
87 Id. (emphasis added). This is the issue or principle of law in conflict among the federal appellate courts with regard to the application of Title III to the Internet. See cases and accompanying text supra notes 74-76.
88 See, e.g., Smith v. United States, 508 U.S. 223, 228 (1993) (providing “[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning”).
90 Id.
91 Id.
92 Id.
93 Id. (emphasis added).
94 See cases cited supra notes 74-76.
include “a motion picture house, theater, concert hall, stadium, or other place of exhibition;” as well as “an auditorium, convention center, lecture hall, or other place of public gathering.”97 Furthermore, public accommodations include “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;” as well as “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.”98 Continuing, public accommodations include “a museum, library, gallery, or other place of public display or collection;” as well as “a park, zoo, amusement park, or other place of recreation” and “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.”99 Finally, included within the statutory definition of a public accommodation is “a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment” and “a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.”100

Clearly, private Internet websites could encompass several of these areas. The Internet can be a “place of exhibition,” a “place of public gathering,” a “sales or rental establishment,” a “service establishment,” a “place of public display or collection,” a “place of recreation,” and a “place of education.”101 One may access the Internet to watch the daily news, to chat with friends, to rent a DVD, or to attend class. Certainly, these activities can be construed as types of recreation, service or exhibition and whether the accessing of these materials is for education, recreation, or some other reason, the Internet is one place in which to do it.102

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

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

97 42 U.S.C. §§12181(7)(C), (D) (emphasis added).
98 Id. §§12181(7)(E), (F) (emphasis added).
99 Id. §§12181(7)(H)-(J) (emphasis added).
100 Id. §§12181(7)(K), (L) (emphasis added).
101 Id. §§12181(7)(A)-(L).
104 See, e.g., United States v. Article of Drug . . . Bacto-
conclude that Congress was concerned with discrimination in non-physical places.\textsuperscript{107}

2. Congressional Intent

To determine the congressional intent of a statute, principles of statutory interpretation provide that "[t]he purpose, subject matter, the context, the legislative history, and the executive interpretation of that statute are aids to construction."\textsuperscript{108} When examining the history of the ADA and the circumstances surrounding its enactment, it seems unlikely that Congress would have intended to "invoke the sweep of congressional authority, including the power to ... regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities" in physical places, but then completely disregard non-physical places.\textsuperscript{109} Such an interpretation would prohibit a travel agent with an office in Cleveland, Ohio from discriminating on the basis of disability, but would allow an online travel website to discriminate at will.\textsuperscript{110} This absurd result would allow online public accommodations to escape liability, which conflicts with the numerous provisions of Title III which prohibit contracting services out to escape liability.\textsuperscript{111}

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

When the ADA was passed in 1990, the Internet are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals") (emphasis added). See also 42 U.S.C. §12101(a)(9) (providing that the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity") (emphasis added).

\textsuperscript{111} 42 U.S.C. §12101(a)(9).

\textsuperscript{112} See Smith, 508 U.S. at 229 (providing that an expansive statutory term must be given the expansive interpretation unless Congress similarly provides a limitation). The Smith Court provides that "[h]ad Congress intended [a] narrow construction ... it could have so indicated. It did not, and we decline to introduce that additional requirement on our own." Id. Congress was also concerned with the economics of barrier removal on businesses. It is illogical to assume that Congress, concerned with the effect of Title III on businesses, would apply the statute to physical places while simultaneously exempting non-physical places without specifically enumerating this intention to do so. See generally H.R. Rep. No. 101-485 (providing numerous concerns about the economic impact of requiring businesses to make changes so as to accommodate persons with disabilities). Particularly, Congress was concerned with the economic impact that required alterations could have on businesses, both large and small. Therefore, Congress provided for tax credits and tax deductions for all of the modifications that a business would be required to make. See 26 U.S.C. §44 (2000) (providing a maximum tax credit of up to $5,000 per year to help small businesses recover the costs related to accessibility modifications); see also 26 U.S.C. §190(c) (2000) (providing a maximum tax deduction of $15,000 per year for both large and small businesses to cover the costs of accessibility modifications.). Whether or not the tax incentives arising from the

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

\textsuperscript{108} See United States v. Cooper Corp., 312 U.S. 600, 605 (1941).

\textsuperscript{109} 42 U.S.C. §12101(b)(4) (emphasis added).

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

\textsuperscript{111} See generally 42 U.S.C. §12182. See also H.R. REP. NO. 101-485, PT. 2, AT 101 (1990) (providing "[t]he intent of the contractual prohibitions of section 503(b)(1)(A)(ii)-(iii) [codified as 42 U.S.C. §12182(b)(1)(A)(ii)-(iii)] is to prohibit a public accommodation from doing indirectly through a contractual relationship, what it may not do directly").

\textsuperscript{112} See also 42 U.S.C. §12101(a)(6) (providing that "[c]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally") (emphasis added). See also 42 U.S.C. §12101(a)(8) (providing that the "Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals") (emphasis added).
was a very young industry. However, the youth of an industry hardly negates the clear legislative purpose of the ADA. As noted, Congress was concerned that “discrimination against individuals with disabilities persists in such critical areas as ... public accommodations, education, ... [and] communication,” all three of which are available via the Internet. It is illogical to assume that Congress would pass legislation with the intention of eliminating discrimination, only in physical places. The plain language of Title III reveals no such intent.

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

3. The Yeskey Decision

Title II of the ADA prohibits discrimination against persons with disabilities by state and local governments in the provision of “services, programs, and activities.” In 1998, the Supreme Court, presented with a novel question of statutory interpretation, determined that Title II’s non-discrimination mandate applied to places operated by state and local governments that were not specifically mentioned in the statute. Justice Antonin Scalia, writing for the unanimous Court in Pennsylvania Department of Corrections v. Yeskey, held that “the plain text of Title II of the ADA unambiguously extends to state prison inmates,” despite there being no reference to inmates in the statute or legislative history. Although the findings of the ADA enumerate that Congress found that “discrimination against individuals with disabilities persists in such critical areas as ... institutionalization,” Title II does not specifically enumerate state prison inmates. Nonetheless, the Yeskey Court determined that “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”

In determining that Title II of the ADA “demonstrates breadth,” the Court held that “the plain text of Title II of the ADA unambiguously extends to state prison inmates.” This case is analogous to Title III’s application to the Internet. Although Congress has not specifically enumerated that discrimination on the Internet is pervasive, it has recognized the barriers faced by persons with disabilities “in such critical areas as ... public accommodations, education, ... [and] communication.” The Internet’s explosive growth and increasing social utility could not have been “expressly anticipated by Congress,” since it was force Title III as applied to the Internet has great consequences. Whether Congress specifically foresaw these consequences on the Internet is unclear at best. However, Congress clearly foresaw the effects of discrimination against persons with disabilities generally.
such a new medium when the ADA was enacted. Nor could Congress envision the numerous e-barriers. However, Congress’ stated purpose of the ADA, to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” is unmistakable and unambiguous.

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

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

The constitutional principle of “enumerated powers” commands that “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.” The principle that “[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten” is as old as the Constitution itself. Title III of the ADA relies on the Commerce Clause as authority for Congress’ prohibition of discrimination by places of public accommodation against persons with disabilities. Specifically, the Constitution provides Congress the authority, inter alia, “[t]o regulate Commerce . . . among the several States” and the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” namely the power to regulate commerce. The Supreme Court has consistently upheld Congress’s authority, pursuant to the Commerce Clause, to enact remedial legislation to prohibit discrimination by private entities that affect commerce. These cases also determine the extent of congressional authority to prohibit discrimination by such public accommodations, even though they may be local in their affectation.

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

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

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128 See generally, Internet Timeline, supra note 116 (providing examples of the youth of the Internet in 1990).
129 Id.
130 42 U.S.C. §12101(b)(1).
131 See id. §12101(b)(4). Although Congress provides the Fourteenth Amendment as an authority to regulate and prohibit discrimination in addition to the Commerce Clause, the Fourteenth Amendment only applies to the states, and thus is not applicable in the discussion here. However, Title II of the ADA, which prohibits discrimination by state and local governments against persons with disabilities, is authorized by the Fourteenth Amendment. An examination of Title II as applied to the Internet would prove equally useful. See generally United States v. Morrison, 529 U.S. 598 (2000) (discussing authorities by which Congress may legislate).
132 See, e.g., Computer Assocs. Int’l Inc. v. Altai, Inc., 982 F.2d 693, 698 (2d Cir. 1992) (affording a discussion of binary code, the language of ones and zeros that a computer uses to process information).
133 Morrison, 529 U.S. at 607.
134 Id. (citing Marbury v. Madison, 5 U.S. 137, 176 (1803) (Marshall, C. J.)).
135 See 42 U.S.C. §12101(b)(4) (providing that Congress intends to “invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major area of discrimination faced day-to-day by people with disabilities”). In addressing discrimination against persons with disabilities by private entities, Congress may only do so pursuant to the Article I Commerce Clause. The Fourteenth Amendment only applies to the states. See generally Morrison, 529 U.S. at 607, for a discussion of congressional authority to legislate.
136 U.S. Const. art. I, §8, cl. 3.
137 U.S. Const. art. I, §8, cl. 18. See also McCulloch v. Maryland, 17 U.S. 316, 352 (1819) (providing the rule of law that Congress may regulate activities falling outside the enumerated powers to effectuate the enumerated power).
139 See Katzenbach, 379 U.S. at 301; see also Heart of Atlanta, 379 U.S. at 258.
140 See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661, 677 (2001) (providing that golf courses may not discriminate on the basis of disability pursuant to Title III).
141 See generally Gibbons v. Ogden, 22 U.S. 1 (1824).
142 See generally United States v. Hill, 248 U.S. 420 (1919) (holding the prohibition of the transport of liquor for one’s
ping, \textsuperscript{143} and fleeing a state to avoid prosecution. \textsuperscript{144} Although the manufacture of goods is not in itself interstate commerce, if the shipment of those goods is destined for interstate commerce, Congress may regulate it pursuant to the Commerce Clause. \textsuperscript{145}

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

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

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

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

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

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

\textsuperscript{146} 42 U.S.C. §12182(a) (2000).


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


\textsuperscript{150} U.S. Const. art. I, §8, cl. 3.

\textsuperscript{151} Champion \textit{v. Ames}, 188 U.S. 321, 363-64 (1903). This case is also commonly referred to as “The Lottery Case.”

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

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

\textsuperscript{154} \textit{See}, \textit{e.g.}, Katzenbach \textit{v. McClung}, 379 U.S. 294, 304 (1964) (providing that Congress may prohibit discrimination on the basis of race, color, religion, or national origin by public accommodations, whose operations affect commerce); \textit{see also} Heart of Atlanta Motel \textit{v. United States}, 379 U.S. 241, 252-53 (1964) (providing same).
precluded from accessing websites.\textsuperscript{155} Congress has a legitimate concern in making websites accessible. Unburdening the free flow of commerce justifies mandating that places of public accommodation on the Internet provide websites that are accessible by all persons.

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

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

C. Whether the Application of Title III to the Internet Would Offend First Amendment Jurisprudence

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

The initial question is whether the non-discrimination mandate of Title III, requiring websites to be accessible, is a regulation of verbal speech, non-verbal speech, or non-speech conduct. Here, classifying Internet speech as either verbal or non-verbal speech-related conduct depends on the content of the website. Some websites provide text only, while others depict activities and conduct through pictures. A website could depict cardboard shacks in a park\textsuperscript{163} or a person burning a draft card on courthouse steps.\textsuperscript{164} In either case, requiring these pictures to include text labels for accessibility purposes is the congressional regulation of non-verbal speech. Thus, the Internet contains both forms of verbal and non-verbal speech.\textsuperscript{165} This Comment primarily focuses on non-verbal Internet speech. However, it ultimately shows that non-verbal Internet speech is amount to "forced speech" and would violate the First Amendment; \textit{see also} Hayes \textit{Statement}, supra note 38 (testifying that "there are serious constitutional implications arising from the application of Title III to the Internet). \textit{Contra}, Peter David Blanck and Leonard A. Sandler, \textit{Feature Article ADA Title III and the Internet: Technologies and Civil Rights, 24 Mental & Physical Disability L. Rep. 855} (2000) (providing an analysis of Title III as applied to the Internet subject to principles of First Amendment jurisprudence).\textsuperscript{166}

\textsuperscript{155} \textit{See} Blindness Statistics, \textit{supra} note 53 (providing statistical evidence of the e-barrier problem).

\textsuperscript{156} \textit{See} Wickard \textit{v}. Filburn, 317 U.S. 111, 127-29 (1942).

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


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

\textsuperscript{156} \textit{See} Taylor, \textit{supra} note 38, at 45 (arguing that the application of Title III to private Internet Websites would
subject to the same test as verbal Internet speech. Therefore, it is irrelevant whether Title III is regulating verbal or non-verbal speech.\(^{166}\)

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

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

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

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

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

\(^{167}\) Id. at 376-77.

\(^{168}\) Id.

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

\(^{170}\) We assume here that Title III applies to the Internet. \textit{See discussion supra, Part III.A.}

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

\(^{172}\) See id. §§12101(a)(1)-(2).


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

\[\text{But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.}\]

\(^{175}\) See 42 U.S.C. §12101.


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

\(^{177}\) \textit{Clark}, 468 U.S. at 298. It is clear that Title III is not concerned with the regulation of the content of e-speech, such as obscenity or defamation on the Internet. See Reno v. ACLU, 521 U.S. 844 (1997); N.Y. Times Co. v. Sullivan 376 U.S. 254 (1964). Nor is Title III concerned with regulating sexually explicit material that might be accessible to minors on the Internet. See Ashcroft v. ACLU, 555 U.S. 564 (2002). Title III is concerned with eliminating discrimination against persons with disabilities in the accessing of public accommodations operating in commerce on the Internet. See 42 U.S.C. §§12181-12189. Therefore, Title III is a regulation of the manner in which speech is transmitted, not a restraint on the content.
2. Title III As Applied to the Internet: Content Restrictions or Time, Place or Manner Restrictions on E-Speech

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

The Supreme Court has not yet decided the forum in which the Internet falls for purposes of time, place, and manner restrictions. However, the Court recently has shed light on the placement of the Internet. In United States v. American Library Association, the Court refused to apply traditional public forum and designated public forum principles to a public library that provides Internet access. The Court avoided the issue of whether the Internet in itself is a traditional public forum, a designated public forum, a non-public forum, or a private forum. The Court stated, "we would hesitate to import the public forum doctrine... wholesale into the context of the Internet... [w]e are wary of the notion that a particular analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area." Although the Internet-forum issue for purposes of First Amendment jurisprudence has not yet been resolved, it seems that the Court has ruled out a public forum application. We will assume, in light of American Library Association, that the Internet is either a non-public forum or a private forum. Nevertheless, this Comment will also analyze Title III under the public forum doctrine, which will show that ultimately, the statute passes both rational basis and strict scrutiny review under the First Amendment.

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

First Amendment jurisprudence holds that Congress may regulate the manner of speech in non-public and private fora if the regulations are viewpoint neutral and are reasonably related to a legitimate governmental purpose. Here, Congress' stated intent of eliminating discrimination against persons with disabilities is viewpoint neutral because it does not regulate in favor of one viewpoint over another. It promotes all viewpoints, only requiring that persons with disabilities have access to the website if it is provided on the Internet and the website is engaged in commerce.
Furthermore, Title III is reasonably related to a legitimate governmental purpose because Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 189 Affirmative legislation such as the ADA brings persons with disabilities into mainstream activities and reduces dependency and nonproductivity, a reasonable Congressional endeavor. 190 Congress has a legitimate governmental interest in preventing discrimination in places of public accommodation, 191 and requiring websites to eliminate e-barriers is a reasonable way to effectuate that purpose. 192

4. Public Fora: Strict Scrutiny

Even if Title III, as a regulation of the manner of speech, was analyzed as a traditional public forum or designated public forum, the result would be the same. Congress may only regulate a public forum if the regulation is content neutral, meaning the regulation must be viewpoint neutral, subject matter neutral, and speaker neutral. 193 As stated previously, Title III is viewpoint neutral because it does not regulate in favor of one viewpoint over another. 194 Title III is subject matter neutral because it does not regulate in favor of one subject over another; it simply requires a website to discuss a subject in a manner that is accessible to persons with disabilities. Finally, Title III is speaker neutral because it does not regulate in favor of one speaker over another.

Strict scrutiny also requires that congressional regulations of public fora be narrowly tailored 195 to serve significant government interests, 196 leaving open ample alternative means to communicate speech. 197 Clearly, the elimination of discrimination against persons with disabilities to unburden commerce and to allow persons with disabilities to live independent lives constitutes such significant government interests. 198 Furthermore, Title III is narrowly tailored to meet this end because it does not burden substantially more speech than is necessary to effectuate the end of
website accessibility.199 Finally, a website has ample alternative means of expressing speech if it were unable to make accessible modifications for some reason.200 In the end, Title III in no way requires a website provider to implement any particular content on a website, but does require a website, operating in commerce, to provide speech in a manner that is equally accessible to persons with disabilities.

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

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

The First Amendment does not guarantee unbridled protection in the delivery of speech, and Congress may regulate speech so long as the regulation is reasonable.203 According to the Supreme Court, imprecise laws can be attacked on their face on two grounds: overbreadth and vagueness.204 Thus, a complete facial analysis of a manner statute, such as Title III, requires an examination of overbreadth and vagueness.

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

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

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

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

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


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

205 Id. at 52 (internal quotations omitted).


208 Nor is the requiring of private Internet websites to be accessible a restriction on the creativity of a website. Although website accessibility requires the use of text labels and “Alt” tags, this does not mean that websites must abandon visual and aesthetic creativity. Changes to websites, so as to facilitate their accessibility, are hidden within the code of the website. See Judy Heim, Locking out the Disabled. PC World, Sept. 2000, at 181 (providing that misunderstandings of the implementations that accessible websites require leads
speech, it amplifies it. Since Title III does not burden more speech than is necessary to accomplish the ends of Internet accessibility, Title III is not overbroad in application.

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

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

III. CONCLUSION

It is clear from the plain meaning of the statute and the intent of Title III that the Internet is within the scope of its regulation. A contrary reading of the statute would foster the illogical result that Congress intended to prevent discrimination in all places of physical locale while simultaneously exempting businesses with non-physical locales. This interpretation has no basis in the statute.

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

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

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

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\(^{210}\) See id.


\(^{212}\) In this debate, there is no evidence that private Internet websites would rather not emerge in Internet Web-speaking for commercial purposes than be subject to liability under Title III. Although there is confusion in the law as to whether Title III applies to the Internet, the addition of disability friendly features is as burdensome as using the proper computer language so anyone can access the website. But cf. Gentile v. State Bar, 501 U.S. 1030, 1048-51 (1991) (holding a statute prohibiting attorneys representing clients in a pending case from making statements that would have a substantial likelihood of prejudicing a trial as void for vagueness because it does not provide sufficient standards by which to judge whether statements are illegal).
