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Cover Page Footnote

J.D. 2018, *cum laude*, The Catholic University of America, Columbus School of Law. The author's primary academic legal interest is the changing legal landscape surrounding the internet. The author is currently pursuing a law license in Pennsylvania and hopes to obtain work in the criminal prosecution or employment law fields. He offers his sincere thanks to Sean Flaim, his mentor in this topic, without whom the writing of this comment would be impossible.

FROM STOREFRONT TO DASHBOARD: THE USE OF THE AMERICANS WITH DISABILITIES ACT TO GOVERN WEBSITES

Kelby Carlson⁺

According to the U.S. Census Bureau, approximately one-fifth of the United States population has at least one disability.¹ The year 2018 marks the twenty-eighth year since Congress enacted the Americans with Disabilities Act (ADA),² and since then, society has been reshaped dramatically by the Internet, which officially came into existence shortly before the ADA.³ Within several years of the enactment of the ADA, the Internet became the subject of litigation by people with disabilities.

Title III of the ADA governs “places of public accommodation,” which the ADA enumerates at some length,⁴ and applies to privately owned entities. Although it contains no direct or unambiguous language concerning the Internet,⁵ it was not long before the notion of “place” came up for review in the courts. The earliest discussion of this issue was in *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*⁶ In that case, the First Circuit held that an insurance carrier who provided its services via the Internet was a place of public accommodation, even though its service was not directly provided at a physical location.⁷ In doing so, the court took a broad interpretation of the ADA’s definition of a public accommodation, construing it to apply not only to physical structures but also to provisional services to which the public had equal access.⁸

Other courts interpreted the ADA in a stricter fashion. In 1997, the Sixth Circuit dismissed the plaintiff’s case in *Parker v. Metropolitan Life Insurance*

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1. As of 2010, this number was approximately 19%, with half of the disabled respondents reporting a “severe” disability. *Nearly One in Five People Have a Disability in the US, Census Bureau Reports*, UNITED STATES CENSUS BUREAU (Jul. 25, 2012), <https://www.census.gov/newroom/releases/archives/miscellaneous/cb12-134.html>.

2. 42 U.S.C § 12101 (2009).

3. Tim Berners-Lee, *The World Wide Web: Past, Present and Future*, WORLD WIDE WEB CONSORTIUM (Aug. 1996), <https://www.w3.org/People/Berners-Lee/1996/ppf.html>.

4. *See id.*

5. 42 U.S.C § 12181(7)(A)–(L) (2014).

6. 37 F.3d 12 (1st Cir. 1994).

7. *Id.* at 19.

8. *Id.*

Co.,⁹ holding that the ADA only governed physical locations.¹⁰ The circuits split over the next few years: the Sixth and Eleventh Circuits tended to interpret the ADA narrowly, ruling for defendants, while the First and Ninth Circuits construed the ADA broadly, finding it governed more than just physical locations, and, therefore, ruled for plaintiffs.¹¹ These splits continued when plaintiffs began bringing suits against entities based on the lack of accessibility of electronic communications¹² and websites on the Internet. For instance, in 2006, the Ninth Circuit, in an issue of first impression in *National Federation of the Blind v. Target Corp.*,¹³ ruled that a retailer's website was a place of public accommodation because it provided indirect access to the store itself and, therefore, was governed by Title III of the ADA.¹⁴ Over the next decade, litigants continued to dispute the definition of "place of public accommodation" and courts continued to diverge in their holdings.

This Comment argues that courts and scholars have given insufficient attention to the concept of place. Place means more than simply "a discrete physical location." The law, far from being a structural entity that forms *ex nihilo*, arises in part out of human language, which in turn arises from human experience. This Comment offers evidence that both the average person and the court should conceive of "place" in a broad sense. To do so, this Comment draws on jurisprudence outside the field of disability law, namely the realms of trespass and search-and-seizure.

Part I provides an overview of the text and legislative history of the ADA, along with varying case law which treats non-physical spaces as places of public accommodation. Part II analyzes philosophy and legal scholarship on the interpretation of place as a nonphysical concept and surveys different solutions to the problem of websites as public accommodation under the ADA. Additionally, this Comment demonstrates that law applicable to the Internet outside the context of the ADA, such as courts' rulings on Internet searches and seizures under the Fourth Amendment and trespass to chattels under tort law, has been applied to the Internet already and consistently treats the Internet in the same manner it does a physical location. Finally, Part III points to the Department of Justice's potential recognition of this fact as they prepare to apply the Web Content Accessibility Guidelines 2.0 to publicly-operated websites under Title II of the ADA, and argues that it should do likewise to Title III.

9. 121 F.3d 1006, 1019 (6th Cir. 1997).

10. *Id.* at 1022 (Martin, B., dissenting).

11. See generally *infra* Part A (discussing how Courts from various circuits determine what is a place and why this distinction is significant).

12. See *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1280 (11th Cir. 2002).

13. 452 F. Supp. 2d 946 (N. D. Cal. 2006).

14. *Id.* at 956.

I. GOING PLACES: COURTS INTERPRET “PLACE” AND WHY IT MATTERS

A. *Enacting the Americans with Disabilities Act*

Until 1990, the most important predecessor of the ADA was Section 504 of the Rehabilitation Act of 1973 (“the Act”).¹⁵ While the Act made steps toward ensuring federal rights for people with disabilities, the language of the Act primarily encompassed federal programs, and, therefore was not as effective as disability activists hoped it would be.¹⁶ During the Reagan administration, some disability lobbyists sought to classify “disability” as a right under the Civil Rights Act of 1964 while others argued a separate act would accomplish more because disability rights concerned specific matters.¹⁷ By 1990, lobbyists convinced Congress to enact the ADA, the most comprehensive American law aimed at protecting the rights of people with disabilities, and encouraging them to flourish publicly.¹⁸

Legislative history confirms that Congress sought to provide a national mandate that would improve the lives of the disabled.¹⁹ According to Congress, a primary purpose of the law was to curb discrimination against the disabled.²⁰ Congress stated that discrimination encompassed “segregation, exclusion, or other denial of benefits, services, or opportunities to people with disabilities that are as effective and meaningful as those provided to others.”²¹ Discrimination,

15. 29 U.S.C. §§ 701–797. (2012).

16. For the primary example, Section 794 of the statute reads:

No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service.

Id. § 794.

17. DORIS AMES FLEISCHER & FRIEDA AMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 89 (2001).

18. 42 U.S.C. §§ 12101–12213 (2012).

19. The introduction to the House Report for the enacted law states that the purpose of the ADA is:

(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 the 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.

H.R. Rep. 101-485(II), pt.2 at 329 (1990).

20. *Id.* at 274.

21. *Id.* at 29.

moreover, can arise either through design or by effect; it can be the result of intent or “thoughtlessness.”²²

Specifically, Congress found that discrimination occurred in areas such as “public transportation, public services, and telecommunications.”²³ In addressing the isolation many of the disabled experience due to discrimination, Congress noted that many people with disabilities do not attend movies, sporting events, the theater, restaurants, grocery stores, or churches,²⁴ because of transportation, architecture, or communications barriers to intent, entry, or participation.²⁵

In an effort to overcome such discrimination, Congress enacted the ADA, thereby legislating the removal of barriers to public participation of the disabled, both socially and vocationally.²⁶ In the ADA, Congress defines a disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”²⁷ The conception of a major life activity is quite broad, but encompasses many of the standard activities one would engage in frequently, such as attending church or visiting a grocery store.²⁸

There are several titles of the ADA. Title II governs the practices of governmental organizations,²⁹ while Title III, which this Comment addresses, governs employers and places of public accommodation.³⁰ According to title III of the ADA, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”³¹ Congress included a wide spectrum of entities under the umbrella of a public accommodation, such as auditoriums, private schools, grocery stores, public transportation, theaters, and other places of entertainment.³² The ADA provides that discrimination encompasses denial

22. *Id.* Congress also refers to the lack of careful design without the intent to discriminate as “benign neglect.” *Id.*

23. H.R. Rep. 101-485(II), pt.2 at 329 (1990).

24. *Id.* at 34.

25. *Id.* at 35. These findings came from testimony of numerous people with disabilities, compiled in a report by the National Council on Disability. *Id.* at 34.

26. *Id.* at 22–23.

27. 42 U.S.C. § 12102(1)(A) (2012).

28. A major life activity can include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working” as well as the use of any major bodily function. *Id.* § 12102(2)(A)–(B).

29. *Id.* § 12131.

30. *Id.* § 12181.

31. *Id.* § 12182(a).

32. The comprehensive list is laid out in 42 U.S.C. § 12181(7)(A)–(L) as follows:

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is

of participation in a public accommodation or participation on unequal grounds.³³

B. Pre-Internet Approaches to the Question of Place

Because of the statute's expansiveness, it took time for the courts to begin to address what could be classified as a place of public accommodation beyond the statute. Other examinations of the applicability of the statute have neglected to examine several pre-Internet cases interpreting Sections 12181 and 12182, which shed important light on the courts' possible approaches.

The first case to extensively address this question was *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*³⁴ The First Circuit heard the case on appeal after the district court dismissed it under the Federal Rules of Civil Procedure.³⁵ The plaintiff, Ronald Senter, was diagnosed with HIV in 1986 and with AIDS in 1991; he died in 1993.³⁶ Senter was a member of a health plan offered by the defendant, who, in 1991 announced that it would limit benefits to AIDS patients to \$25,000; general patients received \$1 million in coverage.³⁷ The plaintiff alleged, both to the district court and to the First Circuit on appeal, that the defendant, knew he had been diagnosed with

actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) 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;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

33. *Id.* § 12182(b)(1)(A)(i)–(ii).

34. 37 F.3d 12, 19–20 (1st Cir. 1997) (discussing the definition of “place of accommodation”).

35. *Id.* at 14 (citing Fed. R. Civ. P. 12(b)(6) as a basis for dismissal of the suit on a failure to state a claim).

36. *Id.*

37. *Id.*

AIDS, instituted the new policy, and failed to provide him with standard benefits outside the purview of that policy.³⁸ He brought suit contending that this policy violated both a state discrimination statute and the ADA.³⁹ The district court interpreted a public accommodation as applying exclusively to a physical structure “with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services.”⁴⁰ In contrast, the court of appeals found that the term “public accommodation” was ambiguous on its face.⁴¹ It went on to say, however, that the legislative history of the ADA,⁴² as well as Congress’s inclusion of “travel services” in its list of public accommodations, suggested that the phrase “public accommodation” was meant to encompass more than physical structures.⁴³ The court suggested that a legal outcome where, for example, a disabled customer was protected when purchasing services in a store but was unprotected when purchasing those same services over the telephone would be irrational and an “absurd result.”⁴⁴ Nevertheless, the court did not rule on the plaintiff’s claim due to the sparseness of the offered facts, and, instead, remanded the case to the district court for further proceedings.⁴⁵

The other significant pre-Internet litigation case to positively interpret the ADA as applying to non-physical structures was *Rendon v. Valleycrest Productions, Ltd.*⁴⁶ In that case, the plaintiffs alleged that Valleycrest Productions and the ABC television network violated the ADA by constructing a phone process for participation in the quiz show “Who Wants to Be a Millionaire?” which screened out disabled (particularly deaf) individuals who wanted to participate.⁴⁷ This process involved a recorded message with various questions to which the participants must respond by pressing keys on the telephone keypad within the allocated time.⁴⁸ Several plaintiffs who were unable to participate in the process either because of upper mobility impairments or inability to hear the recorded questions, brought suit because there were no alternative services available.⁴⁹ The district court granted ABC and Valleycrest’s motion to dismiss, finding that the ADA did not apply since the telephone process was not a physical location and did not qualify as a place of

38. *Id.*

39. *Id.* at 14–15.

40. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 18 (1st Cir. 1994).

41. *Id.* at 19.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 20.

46. 294 F.3d 1279, 1280 (11th Cir. 2002).

47. *Id.* at 1281.

48. *Id.* at 1280.

49. *Id.* at 1281.

public accommodation.⁵⁰ Defendants argued that, though their process did screen out people with certain disabilities, they nevertheless fell outside the ADA because the contestant hotline did not prevent plaintiff's physical access to the location at which the services were held.⁵¹ The court found this argument unpersuasive; it pointed to the ADA as specifically delineating processes that tend to screen out disabled individuals as a form of discrimination.⁵² The court further stated that, regardless of whether it took place off-site, exclusion, done with the intention to screen out or reduce access for people with disabilities constituted prohibiting access to a public accommodation.⁵³

C. Courts Apply Section 12182 Exclusively to Physical Structures

Two other circuit court cases contrast with *Carparts* and *Rendon* in their ruling on the definition of public accommodation under Section 12182 of the ADA. The first is *Parker v. Metropolitan Life Ins. Co.*⁵⁴ In *Parker*, an employee sued her employer alleging violation of the ADA.⁵⁵ The plaintiff argued that, because the employer's insurance policy provided longer-term benefits to those who became physically disabled than to those who became mentally disabled, it unnecessarily restricted her access to a public accommodation.⁵⁶ The District Court dismissed Parker's Title III claim; on appeal, the circuit court reversed.⁵⁷ After a motion for a rehearing en banc, however, the Circuit Court reversed and reaffirmed the district court's dismissal.⁵⁸ The Circuit Court stated that the insurance policy was not offered by a place of public accommodation; Parker could not go to an insurance office to receive the policy, but rather obtained it directly from her employer.⁵⁹ Furthermore, the court found that, even if the insurance policy was offered in a place of public accommodation, there still would not be a violation of the ADA.⁶⁰ The court interpreted Section 12182 as applying to services offered by a place of public accommodation and excluding the contents of those services; a bookstore, therefore, must provide access to its books, but it is not required to stock large print or braille books.⁶¹

50. *Id.*

51. *Id.* at 1283.

52. *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1285 (11th Cir. 2002).

53. *Id.* at 1286.

54. 121 F.3d 1006 (6th Cir. 1997).

55. *Id.* at 1008.

56. *Id.* at 1008–09. The plaintiff also brought her claim under the Employment Retirement Income and Security Act (ERISA) and Title I of the ADA; discussion of those claims is omitted.

57. *Id.* at 1009.

58. *Id.*

59. *Id.* at 1011–12.

60. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1012–13 (6th Cir. 1997).

61. *Id.* at 1012.

Several years later, *Weyer v. Twentieth Century Fox Film Corp.*⁶² presented nearly identical circumstances to *Parker*. In both cases, an employee purchased a group insurance policy, which offered long-term benefits to those with physical disabilities, but restricted benefits for mentally disabled employees to twenty-four months.⁶³ The insurance company Fox patronized had a more extensive and more costly policy available; the plaintiff argued that Fox should have purchased that policy and its failure to do so constituted a violation of Title III of the ADA because it offered a plan that discriminated against people with disabilities.⁶⁴ The district court granted Fox's motion for summary judgment, and Weyer appealed.⁶⁵ The court gave an almost identical ruling to *Parker*. First, the court held that the insurance carrier was not a place of public accommodation because it did not offer its services through its own physical locations and, therefore, there was no "nexus" between the two.⁶⁶ Second, the court stated, as in *Parker*, that Congress intended for Section 12182 to govern the services offered by a place of public accommodation, but not the content of those services.⁶⁷ Thus, the court affirmed the district court's grant of Fox's motion.⁶⁸

This history is important because the subsequent application of the ADA to websites—or lack thereof—cannot be fully understood without this context. Past scholarship on this subject has generally given only cursory attention to the pre-Internet jurisprudence, but context always matters when presenting history and when advocating for a particular jurisprudential step. Now that the foundation has been laid, the subsequent sections trace courts' applications of the ADA to privately owned and operated websites.

D. *The ADA and the Internet Under Section 12182*

1. *Access Now, Target, and the "Nexus Test"*

Eventually, courts began to address whether websites constitute public places. The advent of extended jurisprudence addressing the link between Title III of the ADA and the Internet arose in 2002, with *Access Now, Inc. v. Southwest Airlines, Co.*⁶⁹ Unlike prior cases, there was no single incident of discrimination which resulted in the lawsuit. Instead, Access Now, an advocacy organization for the disabled, and Robert Gumson, a blind individual, sought injunctive relief

62. 198 F.3d 1104 (9th Cir. 2000).

63. *Id.* at 1107–08.

64. *Id.* at 1108.

65. *Id.*

66. *Id.* at 1114–15 (citing *Parker*, 294 F.3d at 1010–11). The language of a "nexus" between a place and a nonphysical structure will become significant in this analysis.

67. *Id.* at 1115.

68. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1119 (9th Cir. 2000).

69. 227 F. Supp. 2d 1312, 1314 (S. D. Fla. 2002).

and a declaratory judgment against Southwest Airlines.⁷⁰ Southwest Airlines was the first airline to create its own website.⁷¹ In arguing Southwest violated the ADA by virtue of the inaccessibility of its website, plaintiffs asserted that the website was unusable by individuals using a screen reader—a piece of assistive technology that transforms information on a screen into synthesized speech.⁷² The plaintiffs contended that, by failing to provide alternative text to improve the accessibility of its website and by failing to include a “skip navigation” link that would allow blind individuals to bypass the navigation bars on the website, Southwest was violating Section 12182 of the ADA.⁷³

In deciding whether Southwest’s website was a place of public accommodation under Sections 12181 and 12182, the court used the same standard as the court in *Rendon*.⁷⁴ According to the court, the “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”⁷⁵ The court did not agree with plaintiff’s attempt to combine different terms in Section 12181—namely, “exhibition,” “display,” and “sales establishment”—to assert that Southwest fell under the definition of place of public accommodation.⁷⁶ Instead, the court interpreted the statute such that “[t]he general terms, “exhibition,” “display,” and “sales establishment,” are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely: “motion picture house, theater, concert hall, stadium;” “museum, library, gallery;” and “bakery, grocery store, clothing store, hardware store, shopping center,” respectively.”⁷⁷ The plaintiffs relied on the holding from *Rendon* to argue there was a nexus between the services Southwest offered on their website and the physical services offered (air travel).⁷⁸ The court disagreed, saying:

whereas the defendants in *Rendon* conceded, and the Eleventh Circuit agreed, that the game show at issue took place at a physical, public accommodation (a concrete television studio), and that the fast finger telephone selection process used to select contestants tended to screen out disabled individuals, the Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a

70. *Id.*

71. *Id.* at 1315 (citing *Southwest Airlines Fact Sheet*, (last accessed Oct. 16, 2002), http://www.southwest.com/about_swa/press/factsheet.html).

72. *Id.* at 1316.

73. *Id.* Travel websites can be particularly complicated for screen reader users, as their forms are often multi-page, contain dynamic content and sometimes require timed responses. This fact has not changed in the intervening years since this case.

74. *Id.* at 1317.

75. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1317 (S. D. Fla. 2002).

76. *Id.* at 1318–19.

77. *Id.* at 1319.

78. *Id.*

means to accessing a concrete space such as the specific television studio in Rendon.⁷⁹

In dismissing the claim, the court relied particularly on the convergence of (1) a website with (2) a verifiable, unchanging physical location not in terms of services but in terms of offering of services.⁸⁰ The court reasoned that since a website did not exist in any one location, the plaintiffs could not prove a denial of a particular service.⁸¹ A contrasting, frequently-cited case would come four years later with *National Federation of the Blind v. Target Corp.*⁸²

Much like *Southwest*, this suit concerned the accessibility of the interface of a website operated by an already-existing service.⁸³ Through Target.com, an individual can “access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store” as well as purchase items from the store itself.⁸⁴ The plaintiffs stated that building an accessible website is relatively simple and not economically prohibitive; the primary requirements are embedded text inside graphics and the ability for screen readers to read navigation links.⁸⁵

The plaintiffs brought suit under several state and federal laws, including Title III of the ADA; the defendant then removed the case to federal court and filed a motion to dismiss for failure to state a claim.⁸⁶ The defendant and the plaintiff both argued, implicitly, based on a nexus theory. The defendant denied discrimination, asserting that the inaccessibility of *Target.com* was not covered since the company was not denying access to the Target stores themselves.⁸⁷ Conversely, the plaintiff’s argued that, because *Target.com* was a hub by which one could receive services traditionally received at physical stores—such as refilling a prescription—the inaccessibility of *Target.com* was functionally a denial of access to the physical store as well.⁸⁸

The court addressed several of the defendant’s Title III arguments. First, it held that denial of access “off-site” could still amount to discrimination if the service offered by the entity itself was denied or restricted.⁸⁹ The court held that,

79. *Id.* at 1321.

80. *Id.*

81. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S. D. Fla. 2002). Thus, because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency. *Id.*

82. 452 F. Supp. 2d 946 (N. D. Cal. 2006).

83. *Id.* at 949–50.

84. *Id.* at 949.

85. *Id.* at 949–50.

86. *Id.* at 949–51.

87. *Id.* at 952.

88. *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N. D. Cal. 2006).

89. *Id.* at 953.

to the extent that the defendant argued that the plaintiff's claims of discrimination were false purely because the denial did not occur at a physical location, the arguments failed.⁹⁰ Furthermore, the court held that, even where a physical location existed, denial of direct access to the physical location did not constitute the only ground for discrimination.⁹¹ Relying on *Rendon*, the court held that, if there was a physical location offering particular services, even if those services extended beyond the physical location itself, then the failure to maintain equal access for the disabled and nondisabled alike could constitute discrimination.⁹² Thus, it is not simply access to the physical location that must be equal; there must also be equal access to all of the services provided through or by that location.⁹³ Courts in the Ninth Circuit have continued this line of thinking, repeatedly upholding the "nexus" test as recently as 2017.⁹⁴

2. *After Target: Courts Address Internet-Exclusive Services—Netflix, and Scribd*

Eventually courts began to take on cases in which the accessibility of a service was not tied to any particular physical location at all. These cases have become especially prevalent in light of the reality that many people now obtain certain goods and services exclusively via the Internet itself. This Comment examines four illustrative cases, from different circuits, and their approaches to this question over the last few years.

The first case, *Cullen v. Netflix, Inc.*,⁹⁵ was litigated in the same district as *Target*. Netflix is a video rental service that, since 2008, has offered an increasing number of productions available to be streamed through its website.⁹⁶ Starting in 2009, Netflix announced plans to begin providing subtitles for their programming, with successive announcements indicating further development.⁹⁷ Cullen filed a class-action lawsuit, arguing that deaf subscribers reasonably relied on them in purchasing their subscriptions and anticipated that closed captioning would be forthcoming.⁹⁸ Though Cullen brought suit under California state law, the court's holding is relevant because, in part of his argument, Cullen relied on an ADA violation which would also violate the state law in question.⁹⁹ However, the court found no "nexus" between Netflix's

90. *Id.* at 953–54.

91. *Id.* at 952–55.

92. *Id.* at 953.

93. *Id.* at 953–55.

94. *See Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at *7 (C.D. Cal. Oct. 3, 2017).

95. 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

96. *Id.* at 1020–21.

97. *Id.* at 1021.

98. *Id.*

99. *Id.* at 1023.

website and any particular physical location.¹⁰⁰ Netflix offered its streaming service exclusively online, so the court determined that, under *Target's* precedent, the nexus test failed and the streaming service was not a place of public accommodation.¹⁰¹

The second case involving Netflix, *National Ass'n of the Deaf v. Netflix, Inc.*,¹⁰² came to the opposite conclusion. Like in *Cullen*, the National Association of the Deaf brought suit under the ADA, claiming that only a small number of Netflix's shows were captioned and that Netflix failed to categorize accurately its captioned films, thereby prohibiting deaf individuals from making use of Netflix's personalized film recommendations.¹⁰³ The plaintiffs argued that Netflix fell under several of the examples of places of public accommodation in 42 U.S.C. § 12181, and thus was analogous to a regular physical store.¹⁰⁴ Agreeing with the First Circuit's decision in *Carparts*, the court said that a decision to exclude from the ADA those businesses that market their services via the Internet 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."¹⁰⁵

The court went on to state that the categories of public accommodation are exemplary, and not comprehensive.¹⁰⁶ Thus, it did not matter whether the plaintiffs could demonstrate that Netflix matched one or more examples in any of the categories. Rather, it mattered that its inclusion in any given category could be justified.¹⁰⁷ Finally, the court rejected defendant's argument that their streaming service was not a place of public accommodation because it was accessed primarily in private residences.¹⁰⁸ The court stated that the ADA "covers 'the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation.'"¹⁰⁹ To hold otherwise would exempt such entities as plumbers and deliverymen from the ADA entirely.¹¹⁰ Finally, the most recent

100. *Id.* at 1023–24.

101. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012). The court did not address whether there could be a nexus between Netflix's online website and the distribution centers from which it mailed the DVDs it also offered as an alternative to streaming. *Id.*

102. 869 F. Supp. 2d 196 (D. Mass. 2012).

103. *Id.* at 199.

104. *Id.* at 200. The four categories plaintiffs referred to were "place of recreation," "place of exhibition and entertainment," "sales or rental establishment," and "service establishment." *Id.* (quoting portions of 42 U.S.C. § 12181(7) (2012)).

105. *Id.* (quoting *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 20 (1st Cir. 1994)).

106. *Id.* at 201.

107. *Id.*

108. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012).

109. *Id.*

110. *Id.*

decision rejecting the nexus test is *National Federation of the Blind v. Scribd, Inc.*¹¹¹ Scribd is an online service that provides access to more than 40 million books for a monthly subscription fee.¹¹² The plaintiffs asserted that, since Scribd had an entirely visual interface, it was incompatible with screen readers, and therefore discriminated against the blind in a place of public accommodation.¹¹³ The court ruled that the text of Section 12182 was ambiguous on its face and enumerated the various circuit splits ruling different ways on the question.¹¹⁴ In addition, the court found that, according to canons of statutory construction and legislative history, the ADA is best interpreted in a broad, liberal and technologically-evolving fashion.¹¹⁵ Although the court ruled that plaintiffs had a successful claim and denied Scribd's motion to dismiss, it did not rule on whether Scribd fell under any of the categories of public accommodation described in Section 12181.¹¹⁶

II. GEOGRAPHY, SPATIALITY AND THE INTERNET

This Comment will now move from the relevant case law to the argument that the term “places” means more than a discrete physical location. Before addressing the legal question, it is necessary to lay a philosophical foundation for the argument. As demonstrated above, courts seem reluctant to examine the possibility of websites as places in the conventional sense of the word. While the statement that websites themselves are not places in terms of physical locations is obvious, the idea that place as a concept is restricted only to the physical realm is less obvious. This section outlines several approaches to this question: the first is philosophical and examines the concept of spatiality in particular and the Internet's relationship to physical geography. It is followed by an examination of ADA scholarship on place along with courts' treatment of place in the context of trespass and search and seizure.

A. *Place, Space, and Philosophy*

Before explicating the physicality of the Internet itself, it is worth briefly discussing the philosophical conception of place, and whether it is justifiable to conceive of place as more variegated idea than simply a bounded physical location.

111. 97 F. Supp. 3d 565 (D. Vt. 2015).

112. *Id.* at 567.

113. *Id.*

114. *Id.* at 568–71.

115. *Id.* at 573–74.

116. *Id.* at 576.

There are few philosophers who have investigated the idea of place.¹¹⁷ One of the most accomplished is Jeff Malpas,¹¹⁸ whose area of work includes “philosophical topography.” Malpas analyzes the relationship between place and mind to arrive at an externalist conception of place.¹¹⁹ Far from being a contingent feature of human experience, place is one of the primary conceptions humans use to orient themselves in the world.¹²⁰ “Place” is difficult to define because the word is used in so many ways.¹²¹ The primary sense of place is bound up with the concepts of dimensionality and location.¹²² The concept “place,” however, is bound up with the concept of space, whose meaning is also debated. While “space” is understood exclusively in terms of physical

117. Contemporary philosophers of phenomenology give particular attention to the subject—Bachelard, Foucault, Merleau-Ponty and Heidegger perhaps being the most well-known. *See generally* EDWARD CASEY, *THE FATE OF PLACE: A PHILOSOPHICAL HISTORY* (1997) (a seminal treatment which covers the history of place in western philosophy in exhaustive detail).

118. Malpas is currently a distinguished professor at the University of Tasmania in Australia. *See generally* J. E. MALPAS, *PLACE AND EXPERIENCE: A PHILOSOPHICAL TOPOGRAPHY* (1999).

119. Externalism is a theory that posits that one’s inner life at least partially comprises external factors, including location. From the Stanford Encyclopedia of Philosophy:

In its most general formulation, externalism with regard to a property K is a thesis about how K is individuated. It says that whether a creature has K or not depends in part on facts about how the creature is related to its external environment. In other words, it is metaphysically possible that there are two intrinsically indistinguishable creatures, only one of which has property K, as a result of them being situated in different environment. To give a trivial example, externalism is true of mosquito bites since having them requires having been bitten by a mosquito. A mark on the skin created by careful micro-surgery is not a mosquito bite, even if it is intrinsically indistinguishable from a real one.

Externalism About Mental Content, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/content-externalism/> (last visited Oct. 22, 2014).

120. Malpas explained:

There is good reason to suppose that the human relationship to place is a fundamental structure in what makes possible the sort of life that is characteristically human, while also being determining, in some way that requires clarification, of human identity. In that case, it is not surprising that place, and associated notions of spatiality and embodiment, should have come to such prominence in so many different disciplines and in the work of so many different writers and researchers.

MALPAS, *supra* note 118, at 13.

121. The Oxford English Dictionary’s definition of place extends over five pages, but Malpas elucidates five main senses of the word:

- (i) a definite but open space, particularly a bounded, open space within a city or town;
- (ii) a more generalized sense of space, extension, dimensionality or ‘room’ (and, understood as identical with a certain conception of space, place may, in this sense, be opposed to time);
- (iii) location or position within some order (whether it be a spatial or some other kind of ordering, hierarchical or not);
- (iv) a particular locale or environment that has a character of its own; and
- (v) an abode or that within which something exists or within which it dwells.

Id. at 19–22.

122. *Id.* at 25.

extension, “place” is restricted to the realm of physical location.¹²³ Although Malpas does not limit the idea of place to the idea of the human experience in a physical location, he does argue for the integral nature of place to human experience itself.¹²⁴

For the purposes of this Comment, Malpas’s exploration of the objective and subjective dimensions of space is more important than his exploration of the relationship between place and mind. If space goes beyond simply a dimension or “container” for various physical phenomena—as in much of modern philosophy¹²⁵—but must also be understood in subjective appropriation, then there is room to consider both space and place as extending beyond the physical realm into areas that mediate a different idea of space. Malpas argues that the human conception of space is, in part, dependent on the fact that one is related to objects within it.¹²⁶ One cannot conceive of space apart from one’s own connection to other bodies within space. In light of this basic fact, Malpas distinguishes between egocentric and allocentric space. Egocentric space is centered on a creature’s own experience or activity, whereas allocentric space is centered on a particular feature of the environment.¹²⁷

These philosophical considerations matter because, if place is related to experience in this way, then physical location is merely a “jumping-off point” for understanding the conceptual realm of place; it is not a completely restrictive category. Although conceptions of “place” must take into account the basic features of a physical location, one can do so while still incorporating websites into that scheme. A key way of doing so—and a way that all humans do, all of the time—is through the use of metaphors.

B. *The Geography of the Net and Metaphors of Place*

The Internet is not a physical location. Neither, however, is it a free-floating concept totally severed from various physical concepts. One can see this by way of metaphors applied to the Internet. Dan Hunter,¹²⁸ in his seminal work *Cyberspace as Place and the Tragedy of the Digital Anticommunist*,¹²⁹ briefly outlined the history of metaphors surrounding cyberspace. The Internet is a “frontier;” people “cross into a landscape unlike any which humanity has experienced before;” a “region without physical shape or form.”¹³⁰ Websites are

123. *Id.* at 27–28.

124. *Id.* at 31–32.

125. This includes Descartes, Newton, Kant, and Swinburne. *See id.* at 28–30.

126. MALPAS, *supra* note 118, at 49.

127. *Id.* at 53.

128. Dan Hunter is the “Robert F. Irwin IV Term Assistant Professor of Legal Studies, Wharton School, University of Pennsylvania.” *See* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003).

129. *Id.*

130. *Id.* at 455 n.85.

divided between public and private, with “walls” and “locks” that can be constructed or broken down.¹³¹

Hunter draws on the interaction theory of metaphor, particularly as articulated by George Lakoff, to explain the relevance of metaphor to cyberspace.¹³² “[I]nteraction theory . . . discusses the role that metaphor plays in structuring the way we think.”¹³³ In interaction theory, the “source” of the metaphor—the domain from which the metaphorical features are drawn— and the target—the subject of the metaphor itself—interact such that cognitive information is transferred from source to target.¹³⁴ The target and source relate to one another through a system of relationships, creating a new set of assumptions that cannot be expressed in any other way.¹³⁵ Lakoff draws upon a body of empirical evidence to argue that humans in general have a series of common cognitive metaphors underlying their thinking; thus, linguistic metaphors shape the way we consider broader concepts.¹³⁶

Hunter argues on the basis of the ubiquity of spatial metaphors to the Internet, that place is a common cognitive metaphor that people will likely always apply to the Internet in general and websites in particular.¹³⁷ Recent scholarship in the fields of computer science and geography has explored the significance of physicality to the Internet, and the various ways it effects and interacts with world geography. Kellerman maps several spatial dimensions onto the Internet; the most relevant for our purposes are information, communications and screen spaces.¹³⁸ When combined, the features of these spaces strongly resemble the

131. *Id.* at 455–56.

132. *Id.* at 472.

133. *Id.* at 465.

134. *Id.* at 467.

135. Hunter illustrates the basics of the theory with the metaphor “man is a wolf”:

For instance, “man is a wolf” is not about the wolf qua thing, but rather the system of relationships that are signaled by the presence of the word “wolf.” When we hear the metaphor, we are influenced by all the commonplaces of the source system. The source system selects and emphasizes some features of the target system while suppressing others. So we interpret “wolf” on the basis of our knowledge and “associated commonplaces” about wolves. When presented with the metaphor, we are immediately assailed with recollections about wolves being “ferocious, territorial, and possessive.” The source selects and emphasizes those “wolf-like” aspects that are already present in our view of man.

Id. at 468 (internal citations omitted).

136. *Id.* at 469–70 (offering as a particular example the mapping of features of war onto legal and other types of arguments).

137. *See id.* at 481. Hunter argues for policy reasons that the overuse of such a metaphor will have deleterious consequences of people’s rights of access online. Hunter’s argument is powerful and deserves engagement; subject matter and space considerations preclude discussion of his policy arguments herein.

138. AHARON KELLERMAN, GEOGRAPHIC INTERPRETATIONS OF THE INTERNET 28 (2016).

conceptions of place outlined above by Malpas.¹³⁹ Finally, even the non-physical aspects of the Internet are inevitably grounded in the physical structures of satellites, fiber-optic cables and computers.¹⁴⁰

C. *Various Approaches to the Question: Expansive and Narrow, Nexus and Storefront Tests*

Like the various circuits, the realm of legal scholarship is divided on the question of whether a website can be considered a place of public accommodation. The majority of scholars argue along the lines of Target's nexus test, with some nuancing it and reaching for something like a commercial/noncommercial distinction.¹⁴¹

Scholarly arguments about the ADA's jurisdiction of the Internet are comparatively rare, and did not appear until the early 2000s. In the early 2000s, legal scholars began discussing the best ways for courts to ensure accessibility on the Internet. As early as 2001, scholars were arguing for a broad application of Title III of the ADA to Internet websites.¹⁴² Pre-*Southwest*, courts and scholars both acknowledged that Congress likely intended to govern more than simply physical locations under Title III of the ADA.¹⁴³ Nevertheless, the Internet is not identical to physical locations, and Adam Schloss¹⁴⁴ in particular raised concerns about the long-term financial viability of websites governed under Title III.¹⁴⁵ Michael O. Finnigan and Heather M. Lutz¹⁴⁶ argue further that, on textual grounds, the statutory language of the ADA excludes Internet websites by default under "canon expression unius (the inclusion of some items

139. Information and communications spaces constitute the realms whereby users obtain various pieces of data and send and receive it with other parties; the "screen-space" of the Internet structures these interactions in a visual way, thus combining the subjective and objective notions of space in a non-physical way. Of interest is the fact that Kellerman never discusses the oral interface used by most blind people in the form of screen readers. *See id.* §§ 2.4.1–2.4.3 (2016).

140. Barney Warf, *Global Geographies of the Internet* § 1.4 (2016). This reality would suggest that the nexus test discussed above is unnecessarily narrow and fails to take into account not only the nonphysical spatiality of the Internet but websites unavoidably links to physical structures.

141. *See infra* for a comparison of the content/non-content distinction with a service/non-service distinction.

142. Adam N. Schloss, *WEB-SIGHT FOR VISUALLY-DISABLED PEOPLE: DOES TITLE III OF THE AMERICANS WITH DISABILITIES ACT APPLY TO INTERNET WEBSITES?*, 35 COLUM. J.L. & SOC. PROBS. 35, 49–50 (2001).

143. Schloss points out several notable media not discussed in the above sections of this article, including correspondence courses, telephone access and mandatory closed captioning capabilities for televisions. *Id.* at 46–48.

144. J.D. Columbia Law School, 2002.

145. Schloss proposed that Congress incentivize compliance with Title III by subsidizing larger websites, in hopes of increasing profitability of compliance and increasing the likelihood that competitors would then proceed to raise their own accessibility standards. Schloss, *supra* note 142, at 55–57.

146. Contributing Members, 2006–2007 University of Cincinnati Law Review.

in a statute indicates the exclusion of other items not included in the statute).¹⁴⁷ O’Finnigan and Lutz go on to say that Congress did not amend Title III to address telecommunications, thus evidencing a clear intent to excluded intangible access from the definition of place of public accommodation.¹⁴⁸ Finally in addressing *Target* specifically, they argue that Target’s website does not satisfy a nexus test. Target is a legal corporation and not a physical entity; thus it is impossible for Target’s website to be linked to any particular physical location.¹⁴⁹ This argument rests on shaky foundations. Legally, while it is possible to distinguish a corporation itself from the physical locations it operates, pressing this distinction in an ADA context could easily allow corporations to evade responsibilities under the act by, for example, claiming that the store owners and managers were responsible for each location’s compliance, thus immunizing the corporation from any litigation.

The approaches of Adam Schloss and Heather Lutz are not favored by all scholars, as courts began applying the nexus test, or something like it, to Title III Internet cases before them.¹⁵⁰ Typical jurisprudence advocating the nexus test matched the descriptions and arguments of the courts. The nexus test “best reflects the language of the ADA” and “best reflects the nature of the Internet.”¹⁵¹ The discrimination provisions of the ADA ensure that, although there must be a connection between the website and a physical location, the barriers to access need not be tangible.¹⁵² Richard Moberly argues for a broader

147. Michael O. Finnigan, Jr., Brian C. Griffith, & Heather M. Lutz, *ACCOMMODATING CYBERSPACE: APPLICATION OF THE AMERICANS WITH DISABILITIES ACT TO THE INTERNET*, 75 U. CIN. L. REV. 1795, 1818 (2007).

148. *Id.* at 1820.

149. *Id.* at 1823. This approach is similar to that in *Southwest*, though going farther in asserting that a corporation is always legally distinct from a physical location such that services offered by that corporation would never be governed under Section 12182 of the ADA. Though understated, this is a key plank in their argument. The nexus test is unintelligible if a distinction between a corporation and a physical location is made in this manner; thus leaving little if any room for the ADA to affect the Internet at all.

150. See *supra* pp. 12–20, regarding the discussion of *Southwest* and *Target*.

151. Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 978, 988 (2004).

152. *Id.* at 985–86. Thus Moberly states:

Under the nexus approach, then, a connection must exist between a physical place of public accommodation and the discriminatory action or inaccessible service. This connection, however, is not limited only to whether an individual with a disability can physically access a place of public accommodation. By referencing discriminatory actions taken with regard to a broad range of activities of a public accommodation, in addition to the accommodation’s facilities, the statutory text indicates that the connection simply must be toward some aspect of the place of public accommodation’s offerings to the public. The nexus can involve both tangible and intangible discriminatory actions, including refusing to provide auxiliary aids to ensure effective communication or failing to make reasonable modifications in policies or procedures to provide an individual with a disability full use of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

interpretation of the nexus test, under which courts should treat a website as “a means by which the public is able to enjoy the ‘goods, services, . . . privileges, [and] advantages’ of a physical place of public accommodation.”¹⁵³ This approach is nearly identical to the view of the nexus test the California court applied in *Target* and has been popular with many courts since then.

Several scholars, while favoring the nexus test, prefer to speak instead in terms of commercial versus noncommercial distinctions among websites.¹⁵⁴ Scholars interpret this distinction in both a broad and a narrow fashion. Trevor Crowley¹⁵⁵ offers a narrow “storefront test,” which has similar language to the classic nexus test:

Any website that acts as a storefront for an entity that offers a substantial amount of its goods or services from a physical facility may be subject to Title III if the facility and the website together form an entity that would otherwise fall under one of the enumerated places of public accommodation.¹⁵⁶

Crowley differentiates his approach from the nexus test by arguing that what is important is (a) the physical nature of the goods or services on offer and (b) the link of the website to a discrete, physical location, but not (c) the symmetry between what a website offers for sale and what the physical location offers for sale.¹⁵⁷ In fact, the physical location might not have to sell anything if the website itself were operating as a store. So, for example, Netflix’s mail-order DVD service would be governed under Title III while its “watch instantly” streaming service would not.¹⁵⁸

Another popular but broader distinction is between commercial and noncommercial websites. This requirement is less stringent than either a nexus or storefront test.¹⁵⁹ All a website would need to do to fall under the commercial definition is affect interstate commerce and sell services similar enough to the enumerated establishments in the statute.¹⁶⁰ A similar approach suggests that as

Id. at 986.

153. *Id.* at 995.

154. See generally Trevor Crowley, *Wheelchair Ramps In Cyberspace: Bringing The Americans With Disabilities Act Into The 21st Century*, 2013 B.Y.U. L. REV. 651 (2013); Nikki D. Kessling, *Why The Target “Nexus Test” Leaves Disabled Americans Disconnected: A Better Approach To Determine Whether Private Commercial Websites Are “Places Of Public Accommodation”*, 45 HOUS. L. REV. 991 (2008).

155. “J.D. Candidate, April 2014, J. Reuben Clark Law School, Brigham Young University. An earlier version of this paper received the 2013 Student Paper Award from the Disabilities Division, Society for the Study of Social Problems (SSSP), and was presented at the SSSP 2013 Annual Meeting.” Crowley, *supra* note 155, at 651.

156. *Id.* at 652.

157. *Id.* at 686–87.

158. *Id.* at 688. The difficulty with Crowley’s analysis on this point is that he seems to have failed to predict that an entity could offer goods or services through a storefront-like website that was nevertheless linked to no physical location. See *infra* pp. 37–38.

159. Kessling, *supra* note 155, at 996–97.

160. *Id.* at 1025.

long as a website is linked to one of the twelve entities listed in Title III, it is irrelevant whether the website itself qualifies as a place. Instead, as long as the website is maintained and operated from a physical location, Title III can govern the website.¹⁶¹

The most recent argument in favor of applying the ADA to certain websites dispenses with the “place” defense entirely and is similar to a distinction that will shortly follow: namely, that of “content” on offer at a website.¹⁶² The procedure is as follows:

Procedurally, the content test would follow in two parts. First, the court would classify the material provided by the website. Second, once the court has categorized the website, it would see if what the website provides falls within one of the categories provided by Congress in its definition of public accommodation. Take, for example, a website that sells clothing. First, since the website sells clothing, the court could classify it as a clothing store or sales establishment. Second, the court would then look at the categories provided by Congress in its definition of public accommodation. Since “clothing store” and “sales establishment” are two categories included in Congress’s definition, this website would be a public accommodation and subject to Title III of the ADA.¹⁶³

Finally, there are arguments that the nexus, storefront and commerce tests are all insufficient, and that the Internet itself should be considered a place. The Internet as place is captured in the metaphorical language used to describe it. One “surfs the web;” one can even “enter” or “leave” certain public fora, such as social media. On this account, “[w]hat constitutes a place is more of a social construct than a matter of defining precisely what characteristics must be present

161. Kenneth Kronstadt, *Looking Behind the Curtain: Applying Title III of the Americans with Disabilities Act to the Businesses Behind Commercial Websites*, 81 S. CAL. L. REV. 111, 132–33 (2007). Kronstadt’s position is subtly but importantly different from the nexus test:

Considering a business operating a website in this manner renders obsolete theoretical arguments of whether the Internet itself is a place. This approach instead shifts the focus of the debate regarding the public accommodation provision away from what venues should accommodate the disabled to the types of commercial services Congress intended to be made available free from discrimination. An entity providing the types of commercial services Congress included within the twelve categories should qualify as a place of public accommodation even if it serves the public solely via a website. The PACE approach is consistent with the language of the ADA, the purpose behind the ADA’s enactment, and the nature of the Internet, yet it allows the ADA to adapt to a changing world without disturbing the plain meaning of the word “place.”

Id. This approach is broader than Crowley’s, since it does not require the website to be purveying physical goods. In that way, however, it strikes this writer as confused; Kronstadt would appear to want to have his cake and eat it too, conceiving of a website itself as wholly accidental to the existence of most commercial entities. But why should the mere fact that, for example, a website is linked to a physical server automatically put it under the umbrella of Title III simply because it has a “physical” location?

162. Carly Schiff, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV. 2315, 2346 (2016).

163. *Id.*

for a ‘place’ to exist.”¹⁶⁴ People use websites like places; they talk about them like places; and websites were designed, in some sense, to be places.¹⁶⁵ A recent article applying the ADA to the Internet is more concerned with administrative costs and benefits, but nevertheless states that the nexus test is a “stop-gap measure taken from physical corollaries that just does not effectively apply to the Internet.”¹⁶⁶

D. Cyberspace and Place in Legal Scholarship: Trespass and the Fourth Amendment as Test Cases

A significant lacuna in prior scholarship arguing for or against the ADA’s application to Internet websites is the examination of other areas of jurisprudence to see how courts have understood the Internet generally. Arguments over whether the Internet is a place cannot get far relying only on the statutory language of the ADA and the small field of precedent the question has generated. Fortunately, although courts have not held directly that the Internet is to be treated as a place, they have generally treated it as such by implication in their rulings on other questions. In particular, this Comment examines court rulings on the tort of trespass and searches and seizures under the Fourth Amendment.

Several cases in the late 1990s and early 2000s established precedent for treating computer networks and websites as places or the equivalent of physical property through the common law tort of trespass. The first such class of cases involved Internet service providers litigating over the mass sending of millions of emails to a server. Bulk email must be sifted and eliminated by computer networks, and that can put strain on servers, increase subscriber costs, and, ultimately, harm the companies’ network and profit.¹⁶⁷ In using the common law standards for trespass to chattel, the courts asked whether (1) the defendant intentionally caused a contact with the server; (2) whether the contact was unauthorized; and (3) whether the contact caused damage to the server.¹⁶⁸ In *CompuServe v. Cyber Promotions, Inc.* the court held that a physical disposition was only one of the ways a party could commit the tort of trespass to chattel; other kinds of nonphysical interferences could also be trespasses.¹⁶⁹

164. Shani Else, *Courts Must Welcome The Reality of the Modern World: Cyberspace is a Place under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1146 (2008).

165. *Id.* at 1146.

166. Deeva V. Shah, *Web Accessibility For Impaired Users: Applying Physical Solutions To Digital Problems*, 38 HASTINGS COMM. & ENT. L.J. 215, 232, 234 (2016).

167. See e.g., *Compuserve Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1019 (1997) (bulk emails sent to company increased bills to subscribers, who then threatened to unsubscribe); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 549 (1998) (individual head of corporation sent over 60 million emails to AOL, generating 50,000 member complaints and costing AOL money).

168. *CompuServe*, 962 F. Supp. at 1020–24. See also *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (ruling that an internet trespass did not require physical damage to the property).

169. *CompuServe.*, 962 F.Supp. at 1022.

Sending mass spam email is not the only action courts had to judge when litigating trespass issues. Another prominent issue was the use of electronic robots or aggregators to rapidly compile information from a website, usually to increase the competitiveness of a rival website. In *eBay, Inc. v. Bitter's Edge, Inc.*,¹⁷⁰ the defendant was an auction aggregator who enlisted a "scraper" to obtain auction data from eBay despite eBay's attempts to disable robots from using the site.¹⁷¹ Likewise in *Register.com, Inc. v. Verio Inc.*,¹⁷² the defendant obtained information about the plaintiff's customers through an electronic robot and began sending mass emails soliciting their business.¹⁷³ The court in *eBay* ruled that the actions of Bitter's Edge were likely sufficient to cause ongoing harm so the court should view the action as a trespass to chattel and grant an injunction.¹⁷⁴ Likewise, in *Register.com*, because of the strain on Register.com's database and the intentional interference of plaintiff's possession by the defendant, the court found that Verio's use of a robot constituted a trespass to chattel.¹⁷⁵ All of these cases indicate the courts' general willingness to treat interaction with and damage to nonphysical networks as analogous to damage to and interference with actual physical property. Courts have had little hesitation about doing so. It is arguable that, given the legislative history set out above, interpreting a place of public accommodation along similar lines is even more justifiable.¹⁷⁶

Similarly, in applying the Fourth Amendment to the Internet, a move such as treating the nonphysical Internet with physical metaphors is almost inevitable given the Fourth Amendment's plain language. The full text of the Fourth Amendment is as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁷⁷

In ruling on a search-and-seizure case where the question concerned invasion of privacy by searching of an employee's text message, the Supreme Court assumed for the sake of argument that "the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere."¹⁷⁸ In part, this assumption was based on the fact that "rapid changes in

170. 100 F. Supp. 2d 1058 (N. D. Cal. 2000).

171. *Id.* at 1061–62.

172. 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

173. *Id.* at 243.

174. *eBay*, 100 F. Supp. 2d at 1067–70.

175. *Register.com*, 126 F. Supp. 2d at 250–52.

176. *See supra* Part I.

177. U.S. CONST. Amend. IV.

178. *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010).

the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.”¹⁷⁹ Recently, scholars have reviewed various court rulings on searching and seizing data across United States borders.¹⁸⁰ In *Warshak v. United States*,¹⁸¹ the Sixth Circuit Court of Appeals ruled that “e-mail is an ever-increasing mode of private communication, and protecting shared communications through this medium is as important to Fourth Amendment principles today as protecting telephone conversations has been in the past.”¹⁸²

Space considerations preclude an exhaustive review of Fourth Amendment jurisprudence as applied to evolving technology, but scholarship addressing this question is abundant.¹⁸³ Instead, this Comment draws on the insights of others and argues that courts should use the same types of flexible standards applied to Fourth Amendment cases when examining cases under the ADA. Orin Kerr makes the case in *Applying the Fourth Amendment: A General Approach*, for a judicial approach to the Fourth Amendment that assumes “technological neutrality.”¹⁸⁴ Technology neutrality “posits that judges will interpret the Fourth Amendment in the online environment so that it has roughly the same role in new Internet crime investigations that it has established in traditional physical investigations.”¹⁸⁵ Judges generally assume a neutral though cautious

179. *Id.* at 759.

180. Orin S. Kerr, *The Fourth Amendment and the Global Internet*, 67 STAN. L. REV. 285, 315 (2015). In legal scholarship concerning the fourth amendment, the link between Internet locations and physical locations is less controversial:

Internet communications regularly travel around the world. Communications can travel almost anywhere in the course of delivery, and they can be collected anywhere they travel. Communications from those abroad routinely travel through or to the United States, and those in the United States routinely send Internet communications abroad. Imagine a person in Paris sends an e-mail using a service provider in California that is destined for another suspect in New York who uses an e-mail service hosted in London. That e-mail could be obtained in California, New York, Paris, London, or any place in between where the communication passes, including at the U.S. border. Once collected by the government, the data can be sent anywhere on the planet for analysis.

Id. at 316.

181. 490 F.3d 455 (6th Cir. 2007).

182. *Id.* at 473.

183. See generally David A. Couillard, *Defogging The Cloud: Applying Fourth Amendment Principles To Evolving Privacy Expectations In Cloud Computing*, 93 MINN. L. REV. 2205 (2009); Spenser S. Kady, *Reconciling Privacy With Progress: Fourth Amendment Protection Of E-Mail Stored With And Sent Through A Third-Party Internet Service Provider*, 61 DRAKE L. REV. 225 (2012); Orin S. Kerr, *The Fourth Amendment and the Global Internet*, 67 STAN. L. REV. 285 (2015); Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614 (2011).

184. Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1007 (2010).

185. *Id.* at 1015.

stance towards applying the Fourth Amendment to new technology in light of the Supreme Court's adoption of a pragmatic approach to the question.¹⁸⁶

In adopting a stance of technology neutrality, Kerr seeks to stick closely to principles already established in Fourth Amendment law.¹⁸⁷ To that end, he advocates for the replacement of the distinction between inside and outside physical locations with a distinction between content and non-content media in an online context.¹⁸⁸ He says that this distinction

[C]aptures the basic function of the inside/outside distinction. Outside surveillance is usually surveillance relating to identity, location, and time. By watching a person in public, the police normally can learn where he was at a particular time and where he was going. In contrast, inside surveillance more often exposes private thoughts. By breaking into a person's private spaces, the police can obtain insights into the contents of the person's mind that he normally keeps to himself or only shares with a trusted few. That distinction correlates reasonably accurately to the online distinction between content and non-content surveillance. Online, non-content surveillance is usually surveillance related to identity, location, and time; content surveillance is surveillance of private thoughts and speech.¹⁸⁹

Surveillance of non-content items would include all of the communication tags and information about where the content originated and the parties to whom it was transmitted.¹⁹⁰

These assumptions—technological neutrality and the transferability of legal distinctions from a physical to a digital realm—apply to the ADA. Like the content/non-content distinction Kerr constructs for the Fourth Amendment, this Comment agrees with the prior scholarship suggesting a commercial/noncommercial test. The enumerated places of public accommodation in Section 12182 are all linked to commerce. It is both relatively straightforward and intuitive to examine a particular website and determine if it offers such services. However, there should be one important public policy caveat: “commercial” should probably not be so broad as to include all websites that make any money. The vast majority of websites recoup money, even if in very small amounts, from advertising revenue. Applying the service/non-service distinction to sites inclusive of all that receive money that way would mean that there is no site to which the ADA would not apply. Much like how Congress was careful to delineate which public spaces must be altered for accessibility, a prerequisite amount of care should be required for application of the ADA to the Internet. This distinction would recognize the reality of the

186. *Id.* at 1016–17.

187. *Id.*

188. *Id.* at 1018.

189. *Id.*

190. *Id.* 1021.

“internet of things”: that much of the service the average person relies upon is not linked to any particular physical facility or location. The flagship example is probably Uber: a cab service coordinated entirely through a mobile application, with no centralized location. Uber would, under the service/non-service distinction, clearly fall under the transportation section of Section 12182. The question, then, is what standard it is best to apply.

III. REGULATING PLACES OF PUBLIC ACCOMMODATION ON THE INTERNET: ANTICIPATING THE DEPARTMENT OF JUSTICE’S NEXT STEPS

On April 29, 2016, the Department of Justice put forward its supplemental notice of Advance Rulemaking, articulating standards it would use in judging accessibility of federal and state government websites under Title II of the ADA.¹⁹¹ Though not applicable to places of public accommodation, the overall purposes of the new regulations could easily fit under Title III as well. The guidelines are designed to ensure that all Internet users will have equal unrestricted access to all governmentally-operated websites, regardless of any disability they might have.¹⁹²

These newly proposed technical requirements are taken from the Web Content Accessibility Guidelines (WCAG) 2.0 standards, first published in 2008.¹⁹³ The Department of Justice’s proposed regulations apply to most web content created by a state or local government entity. Web content is anything displayed on a website, including the code used to construct it.¹⁹⁴ Web content does not include the computer or mobile device on which the website is accessed or the web browser, such as Internet Explorer or Mozilla Firefox, that is used.¹⁹⁵

The WCAG standards have three levels: A, AA and AAA, with level AAA being the most stringent.¹⁹⁶ The Department proposes using level AA of the

191. *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, DEPARTMENT OF JUSTICE, <https://www.ada.gov/regs2016/sanprm.html> (last visited Apr. 29, 2016).

192. *Id.* The Department of Justice plans to propose regulations for private websites sometime in 2018, date to be determined. See *New or Proposed Regulations*, DEPARTMENT OF JUSTICE, https://www.ada.gov/newproposed_regs.htm (last visited Jan. 5, 2018).

193. See *Nondiscrimination on the Basis of Disability*, *supra* note 192; *Web Content Accessibility Guidelines (WCAG) 2.0*, WORLD WIDE WEB CONSORTIUM, <https://www.w3.org/TR/WCAG20/> (last visited Nov. 20, 2016).

194. *WCAG Guidelines*, *supra* note 193.

195. *Nondiscrimination on the Basis of Disability*, *supra* note 191.

196. Each individual guideline has A, AA, and AAA standards outlined in the documents. The W3 used a factors test to determine the success criteria for each level of conformance. The factors include whether the feature is essential, whether the criterion can be satisfied for all websites and web content types, whether the success criteria can be reasonably achieved by the content creators, “whether the criterion would impose limits on ‘look and feel’ “ on the web page “(limits on function, presentation, freedom of expression, design or aesthetic that the Success Criteria might place on authors)”, and “whether there are no workarounds if the success criterion is not met.” *Understanding WCAG 2.0 Guidelines*, UNDERSTAND CONFORMANCE, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html> (last visited Jan. 9, 2016).

WCAG, which includes all of the Level A requirements, are relatively comprehensive, and are widely used internationally.¹⁹⁷ WCAG 2.0 contains specific technical standards for website accessibility that are more detailed than broader performance standards, but still allow for a degree of flexibility in implementation.¹⁹⁸ The Department has proposed adopting a two-year time limit with certain exceptions.¹⁹⁹ Under the two-year time limit, all public entities would be required to have their websites conform to WCAG 2.0 Level AA standards within two years of publication of the new regulations. The primary exception is if doing so within the time limit would fundamentally alter a service or place undue financial burden on the entity. WCAG Guideline 1.2.4, concerning live audio content, is excluded from this timeline. Instead, it may be proposed that public entities will be required to provide captioning for all live audio or synchronized media within three years of the publication of the regulations. The term “synchronized media” is audio or video displayed at the same time as other web based content that is required for understanding the complete presentation.²⁰⁰

The WCAG contain detailed checklists of how website developers can make their sites fully accessible.²⁰¹ In large part, these involve actions such as ensuring alternate access to dynamic content; providing closed captioning wherever feasible; and allowing easy navigation with hardware other than a keyboard and mouse. In other words, the guidelines are highly analogous to those reasonable accommodations typically imposed on a place of public accommodation.

In light of all of the above, the full extension of Title III of the ADA to service websites is both reasonable and easily applicable. Assuming a technologically neutral reading of the ADA, combined with Congress’s legislative intent, making Internet accessibility a matter of ADA jurisprudence is no more untenable than extending its requirements in other areas. Doing so acknowledges society’s changing technological landscape and the increasingly intertwined nature of physical and electronic goods and services likely to continue. It would, however, be prudent for Congress to make this application clear if it ever decides to amend the ADA. Doing so would be as simple as indicating that a place of public accommodation is not limited to a discrete physical location, but also encompasses nonphysical infrastructure that facilitates tangible goods or services. On this view, services such as streaming

197. *Nondiscrimination on the Basis of Disability*, *supra* note 191.

198. *Id.* Space consideration precludes a full elaboration of the content of the WCAG. For a detailed overview, see Zachary Parker, *Defending Against the Undefined: Commercial Websites’ Violations of the Americans With Disabilities Act*, 85 UMKC L. REV. 1079 (2017).

199. *Nondiscrimination on the Basis of Disability*, *supra* note 191.

200. *Id.*

201. See *WCAG Checklist*, WORD WIDE WEB CONSORTIUM, <https://www.w3.org/TR/2006/WD-WCAG20-20060427/appendixB.html> (last visited Mar. 4, 2017).

television shows would count; there is little but a semantic difference from streaming via an iPhone and playing a video via a physical DVD.

This Comment has argued that the ADA can and should be interpreted in a technologically neutral manner. Law arises from language: to understand the legal concept of place, it is unwise to limit examination only to court rulings. Instead, one must dig deeper into the ways in which humans conceive of place itself. After doing so, it becomes obvious that we speak of place in many ways that extend beyond the physical (even if the foundational metaphors we use involving place are rooted in physicality). Not only is an extra-physical conception of place coherent, but courts have also used it in ruling on other questions, including issues involving the Internet. In light of that fact, courts should extend both the average concept of place and their rulings in other areas of law into the realm of ADA litigation.

IV. CONCLUSION

Thus far, legal scholarship addressing the question of websites under the ADA has been surprisingly narrow in its focus. The majority of these scholars spend little time examining the concept of place more broadly to determine whether the word itself can ever connote something extra-physical. Likewise, few comparisons are ever made between ADA case law and other areas of relevant jurisprudence that could provide important analogies for the ADA, such as trespass and search-and-seizure law. The result is that courts have limited themselves to tests such as the nexus and storefront rules, both of which fail to consider evolving technology and the way the average person conceives of and treats the use of the Internet. Instead of these restrictive tests—which, in light of the broader considerations in this Comment, seem somewhat myopic—courts should adopt a technologically neutral outlook toward Title III of the Americans with Disabilities Act, and treat websites themselves as places of public accommodation, rather than applying a nexus or a storefront test. The Department of Justice should be the primary architect of regulating website accessibility; rather than making ad-hoc decisions, future courts should rely closely on those regulations, much as they would for other sorts of public accommodations. Future developments in this area seem encouraging; assuming the Department of Justice continues to carefully consider regulations beyond the 2016 SANPRM, courts may gradually adapt their legal analysis to take account of the changing face of the Internet and its permeation of the physical and nonphysical geography of daily life.

