Integrating the Internet

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Abstract

This Article argues that the paradigmatic right of people with disabilities "to live in the world" naturally encompasses the right "to live in the Internet." It further argues that the Internet is rightly understood as a place of public accommodation under antidiscrimination law. Because public accommodations are indispensable to integration, civil rights advocates have long argued that marginalized groups must have equal access to the physical institutions that enable one to learn, socialize, transact business, find jobs, and attend school. The Web now provides all of these opportunities and more, but people with disabilities are unable to traverse vast stretches of its interface. This virtual embargo is indefensible, especially when one recalls that the entire Web was constructed over the last twenty-five years and is further constructed every day. Exclusion from the Internet will cast an even wider shadow as an aging U.S. population with visual, hearing, motor, and cognitive impairments increasingly faces barriers to access. Unless immediate attention is given, the virtual exclusion of people with disabilities—and others, such as elders and non-native English speakers—will quickly overshadow the ADA's previous achievements in the physical sphere.

Accordingly, this Article develops the claim that the Internet is a place of public accommodation, which must be integrated, by showing that the same concerns that motivated access for African Americans under the Civil Rights Act of 1964 now compel Web accessibility for people with disabilities under the Americans with Disabilities Act. The issue is, however, even more pressing because the Internet is broad enough to encompass all of the traditional categories of public accommodations—as well as social arenas like education and work. In this way, access to the Internet provides an unprecedented opportunity to overcome attitudinal barriers, because almost all people now interact frequently through the Web. Moreover, because disabilities are not apparent online, the Internet facilitates the social engagement of people who might not otherwise interact. Finally, Internet accessibility provokes reconsideration of the constitutional rights of individuals with disabilities. Integrating the Internet will advance—instead of infringe upon—their rights to democratic self-governance, personal autonomy, and self-expression.

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Introduction

Nearly fifty years ago, disability rights icon Jacobus tenBroek argued for the right of people with disabilities "to live in the world."[1] Achieving that right required access to "common modes of transportation, communication, and interchange," including "full and equal access to places of public accommodation," which enable communal interaction.[2] Long before there was an Americans with Disabilities Act ("ADA"),[3] tenBroek understood that without equal access to public places the disabled would be socially excluded through both conscious aversion and thoughtless indifference.[4] Just like everyone else, individuals with disabilities need the opportunity to participate in "the life of the community."[5]

Subsequent federal statutes embodied tenBroek's vision for social integration. The Rehabilitation Act of 1973[6] prohibited entities

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1 *See* Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 Calif. L. Rev. 841, 843, 847–48 (1966) (arguing for disability integration as "the policy of the nation," and suggesting legal innovations to effectuate the right of people with disabilities "to live in the world").

2 *Id.* at 917–18.

3 Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

4 *See* tenBroek, *supra* note 1, at 842 (discussing how the inability of people with disabilities to ambulate in public spaces is often a reflection of attitudinal biases or thoughtlessness).

5 *Id.* at 843.

6 Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–796 (2012)).

receiving federal funding from excluding people with disabilities.[7] Other notable legislation soon required that children with disabilities receive free and appropriate public education, and that public housing and air travel each be accessible to those with disabilities.[8] In 1990, the ADA extended this integration mandate to the private marketplace (Title I),[9] to public services and transportation (Title II),[10] and to goods and services provided by public accommodations (Title III).[11] While Title I is regarded as underachieving,[12] Titles II and III have been fairly successful in removing structural barriers to social participation.[13]

Title III has not, however, adequately extended to the Internet. The ADA has played a central role in compelling the accessibility of a host of software applications, cell phones, ATMs, and e-book reading devices.[14] But the Internet itself has resisted accessibility compliance.[15] In applying tenBroek's eloquent terms, the Internet is one of today's "common modes" of "communication[ ] and interchange" and provides fundamental "access to the world."[16] Nevertheless, the vast majority of commercial websites are inaccessible to people with cer-

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7 *Id.* § 504, 29 U.S.C. § 794 (2012).

8 *See* Individuals with Disabilities Education Act § 612, 20 U.S.C. § 1412 (2012) (guaranteeing each child with a disability an "individualized education program" so that she can receive a "free appropriate public education"); Fair Housing Amendments Act (FHAA) of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2012)) (prohibiting discrimination on the basis of handicap in the sale or rental of housing); Air Carrier Access Act (ACAA) of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (codified as amended at 49 U.S.C. § 41705 (2012)) (prohibiting any carrier from discriminating against an "otherwise qualified individual" with a mental or physical handicap).

9 ADA §§ 101–108, 42 U.S.C. §§ 12111–12117 (2012).

10 *Id.* §§ 201–246, 42 U.S.C. §§ 12131–12165.

11 *Id.* §§ 301–310, 42 U.S.C. §§ 12181–12189.

12 *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1812–13 (2005) (noting that "the legal scholarship focused on Title I of the ADA views the ADA as disappointing").

13 *See id.* at 1874–75; *see also* Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1659 (2010) (book review) (noting that litigation brought under Titles II and III of the ADA has a higher success rate than Title 1 employment cases).

14 *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 80 (2010) [hereinafter *Hearing on Achieving the Promise of the ADA*] (statement of Daniel F. Goldstein, Partner, Brown, Goldstein & Levy, LLP), *available at* http://judiciary.house.gov/_files/hearings/printers/111th/111-95_56070.PDF.

15 *See id.* ("[A]s we stand here today, we are not even halfway there on making the Internet accessible . . . .").

16 tenBroek, *supra* note 1, at 917–18.

tain disabilities, and narrow statutory interpretations have stymied Title III's potential to address their exclusion.[17]

Barriers to inclusion exist, and persist, despite the overwhelmingly modern construction of the Internet's architecture. Failure to provide Internet access is not analogous to a city's reluctance to retrofit a historical building. New websites go up every day—and are then redesigned every two to three years—without apparent consideration for people with visual, hearing, motor, or cognitive impairments.[18] Or worse, consideration is given to making such websites inclusive, but despite the small costs and demonstrable benefits of website accessibility, nothing changes.[19] Failure to insist on Internet accessibility will exclude a broad group of people from an increasing number of online business, educational, and social networking opportunities.[20]

This Article develops the claim that the Internet is rightly understood as a place of public accommodation,[21] which must be integrated. It provides a unique and enriched understanding of the Internet's re-

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17 *See infra* Part I.C.

18 *See* PAUL T. JAEGER, DISABILITY AND THE INTERNET: CONFRONTING A DIGITAL DIVIDE 3 (2012) ("Many developers of websites . . . simply do not consider persons with disabilities when they create or update products."); *see also infra* Part I.B.

19 Tim Springer, chief executive of a business that "advises companies on accessibility, said companies can expect to pay about 10% of their total website costs on retrofitting. But if they phase in accessibility as they naturally upgrade their website, they usually spend much less—between 1% and 3%." Joe Palazzolo, *Disabled Sue over Web Shopping*, WALL ST. J. (Mar. 21, 2013, 6:54 PM), http://online.wsj.com/article/SB10001424127887324373204578374483679498140.html; *see also* Evan Hill, *Settlement over Target's Website Marks a Win for ADA Plaintiffs*, RECORDER (Aug. 28, 2008), http://www.therecorder.com/id=1202424119025/Settlement-over-Targets-Web-Site-Marks-a-Win-for-ADA-Plaintiffs-?slreturn=20150204110623 (noting a six million dollar settlement requiring Target to make its website more accessible).

20 This Article has chosen the language of accessibility to direct the focus towards people with disabilities. When it discusses "Internet accessibility," this Article is principally concerned with the opportunity to traverse and navigate the Internet, which means mediating and utilizing the Internet's constituent websites. Accessibility is thus accomplished through designing the Internet in a way that achieves "universal usability." JAEGER, *supra* note 18, at 25. There are of course other barriers when it comes to accessibility, such as lack of awareness, financial barriers, or cultural norms. *See* NAT'L COUNCIL ON DISABILITY, THE POWER OF DIGITAL INCLUSION: TECHNOLOGY'S IMPACT ON EMPLOYMENT AND OPPORTUNITIES FOR PEOPLE WITH DISABILITIES 73 (2011) [hereinafter POWER OF DIGITAL INCLUSION], *available at* http://www.ncd.gov/publications/2011/Oct042011. Still, this Article has chosen to focus on the functional accessibility of navigating the Internet; without this form of accessibility, knowing about the Internet's opportunities and signing up with an Internet service provider would be relatively meaningless.

21 Title III extends the ADA's nondiscrimination mandate to places of "public accommodation"—twelve categories of commercial entities that provide services to the public. 42 U.S.C. § 12181(7) (2012). These places must be accessible to people with disabilities. *See id.* § 12182(a). Qualifying businesses are required to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differ-

lationship to disability by focusing on the Web's sociological, historical, and constitutional dimensions.[22] We ground our arguments in disability law, civil rights history, and constitutional law, and in doing so invoke broad normative and societal considerations.[23]

Integrating public accommodations under the Civil Rights Act of 1964 ("CRA")[24] was critical to equalizing opportunities in society for African Americans and other minorities.[25] Moreover, Congress understood that simply insisting on nondiscrimination in employment was by itself unlikely to be of much consequence. Equality of opportunity also required nondiscrimination when it came to attending college or transacting business at libraries, banks, and gas stations.[26] Much as physical access to these accommodations was critical for social interaction and consequent equality of opportunity,[27] virtual access is now critical for integrating people with disabilities and breaking down stereotypes. The same concerns that motivated access

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ently than other individuals because of the absence of auxiliary aids and services." *Id.* § 12182(b)(2)(A)(iii).

22 The nexus of disability and the Internet has been generally neglected, and especially so within the field of disability studies. JAEGER, *supra* note 18, at 15 ("Despite the enormity of the Internet in the social, political, educational, and economic lives of every member of society, the Internet is fairly neglected in the field of disability studies. One could read a great many disability studies books and articles from the past fifteen years and find few references to Internet-related issues.").

23 The only previous legal scholarship to address this issue consists of student notes that invoke valuable doctrine, but are in want of normative grounding or of broader implication. *See* Jonathan Bick, Note, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 208 (2000) (arguing that Title III of the ADA applies to Internet websites); Jeffrey Scott Ranen, Note, *Was Blind but Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 392 (2002) (same); Adam M. Schloss, Note, *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 (2001) (same); Matthew A. Stowe, Note, *Interpreting "Place of Public Accommodation" Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 327 (2000) (same).

24 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); *see also* Civil Rights Act of 1964 Title II, 42 U.S.C. §§ 2000a–2000a-6 (2012) (prohibiting discrimination by public accommodations).

25 *See, e.g.*, Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005) (noting that Title VII of the Civil Rights Act of 1964 was "a powerful engine for social change by equalizing employment opportunities for African-Americans, women, Latinos/as and Asian-Americans").

26 *See generally* H.R. REP. NO. 88-914, at 16, 18 (1963) (noting that "enactment of Federal legislation dealing with the most troublesome problems [of discrimination] will create an atmosphere conducive to . . . resolution of other forms of discrimination").

27 *See Civil Rights—Public Accommodations: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 689, 691–701 (1963) [hereinafter *Hearing on Civil Rights and Public Accommodations*] (noting the substantial economic costs that result due to racial discrimination).

for African Americans under the CRA now animate people with disabilities' need to access the Internet. As much as the CRA fostered deep social reconstruction, integrating the Internet requires revising baseline social norms and expectations regarding access and inclusion in the virtual world for people with a range of print-related disabilities.

Integrating the Internet presents an unprecedented opportunity to increase social participation for people with disabilities. The Internet is rightly understood as a place of public accommodation, but its poor accessibility is much more than just another structural barrier for people with disabilities. The Web presents a means for traversing all of the traditional categories of public accommodations—such as retail stores, banks, and places of recreation[28]—as well as exploiting opportunities like education and work. Additionally, while the Internet is only about twenty-five years old, eighty-seven percent of American adults now use the Web.[29] The breadth of this usage—combined with the fact that disabilities are much less apparent online—makes the Internet a unique and prominent venue for removing biases from society;[30] it also allows people to interact who might not otherwise communicate offline. Integrating the Internet thus holds the promise of positively and radically transforming the lived experiences of many persons with disabilities.

Part I examines the critical role of the Internet as a means of accessing the world and explains how its architecture excludes certain people with disabilities. Part I also highlights the ADA's failure to remedy this situation. Next, Part II studies legislative histories to demonstrate that the very principles which urged the racial desegregation of public accommodations under the CRA now compel the integration of people with disabilities into the Internet under the ADA. A virtual world that is inclusive of people with disabilities is a normative goal similar to the integrative principles envisioned for race and sex. Participation in virtual spaces has the same capacity as presence in physical spaces to break down stigmas and facilitate social interaction among people who otherwise might not interrelate. Ultimately, if

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28 *See id.* at 689 ("[A]ll citizens should have equal access to places of public accommodation, including hotels, motels, restaurants, theaters, retail stores . . . and other businesses . . . .").

29 PEW RESEARCH CTR., THE WEB AT 25 IN THE U.S. 4–5 (2014) [hereinafter THE WEB AT 25] *available at* http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf.

30 *See infra* Part III.B (discussing how interpersonal contact with people who are different, under appropriate conditions, may help people realize their own biases, lead to cross-group relationships, and over time, yield a bona fide appreciation for difference).

inclusive and collaborative communities and social networks are to develop in the twenty-first century, they will do so online.

Part III contends that the manner in which we resolve Internet accessibility has the capacity to preserve or infringe the constitutional rights of people with disabilities. First, the Internet has created opportunities for democratic engagement that were inconceivable just a decade ago; the Web has become the new "public square" for learning about one's community, influencing others' views, and participating in political processes.[31] Second, there is a constitutional and dignitary interest that resides in each human being to communicate their ideas and thoughts to others, and the Internet facilitates this as well as any technology in memory. In particular, the right to free speech means the right to communicatively exercise one's discursive capacities and, over time, facilitate the formation of self.[32] Exclusion from the Internet and its constituent websites thus limits opportunities to exercise rights to democratic self-governance and self-expression.

Finally, how American law and society resolves Internet accessibility will impact an immense number of individuals. Approximately one-sixth of the United States population has a disability,[33] and many individuals within this group encounter barriers to Internet navigability.[34] Moreover, disability prevalence is itself inherently fluid. In America, as the population ages and people live longer, the percentage of the population with disabilities will only increase.[35] Additionally, Web accessibility is an issue for many who might not self-identify or qualify under current laws as "disabled." Satisfying legal definitions of disability has long proven to be a poor proxy for whether a person's impairments require accessibility or accommodations.[36] Ac-

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31 *See infra* Part III.A.

32 *See infra* Part III.B.

33 JAEGER, *supra* note 18, at 4, 18 (observing that 54.5 million people in the United States have a disability—18.7% of America's population in 2005—and that the number of people with disabilities worldwide was approaching 1 billion in 2010).

34 *See infra* Part II.B.

35 *See* JAEGER, *supra* note 18, at 4 ("[P]ersons with disabilities will continue to increase as a portion of the population as the baby boom generation ages.").

36 This is clear both from the fact that the ADA—after operating for almost twenty years—required an amendment to dramatically expand the scope of disability, and that the ADA still requires mediating the disability-versus-ability binary categories. In other words, one must prove her impairment is severe enough to qualify for rights under the ADA and at the same time show that she is qualified for the benefits in question. *See* Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 209–25 (2008) (analyzing this disability-versus-ability tension). The result under the ADA has been that the measure of disability must be "just right" to establish an individual's worthiness to invoke the statute's protections. *Id.* at 209. This unsatisfying

cordingly, although Internet accessibility is a particularly apt issue for people with disabilities, this Article's broader application must stay front and center: exclusion affects both those who do not consider themselves disabled and those whom the law does not consider disabled, and it will affect those who are not yet disabled (by any measure) if they live long enough.[37]

I. THE RIGHT TO LIVE IN THE INTERNET

The Internet has become a hub for every kind of human activity, from education to recreation to commerce. It is no longer merely a window to the world. For a growing number of people, the Internet *is* their world—a place where one can do nearly everything one needs or wants to do.[38] The Web provides virtual opportunities for people to shop, meet new people, converse with friends and family, transact business, network and find jobs, bank, read the newspaper, watch movies, and attend classes.[39] This state of affairs will only intensify as businesses and opportunities increasingly exist only online. For example, there are now "virtual worlds" that exist exclusively online and provide people with opportunities to interact with others.[40] It is in this light that tenBroek's focus on the right of people with disabilities "to

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tension and miserly approach to effecting greater access has led some scholars to argue in favor of a broader, universal-like right to reasonable accommodation. *See generally* Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689 (2014) (arguing for extending an ADA-type reasonable accommodation mandate "to all work-capable members of the general population for whom accommodation is necessary to give them meaningful access" to enable their ability to work).

37 Nearly everyone will be disabled if they live long enough. Bradley A. Areheart, *GINA, Privacy, and Antisubordination*, 46 GA. L. REV. 705, 716 (2012). The prevalence of disability increases with age. JAEGER, *supra* note 18, at 18. Consider that thirteen percent of people ages twenty-one to sixty-four have a disability, but fifty-three percent of persons over age seventy-five have a disability. *Id.*

38 *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 6 (2000) [hereinafter *Hearing on Applicability of the ADA to Private Internet Sites*] (statement of Gary Wunder, Programmer Analyst-Expert, ITS-HOSP Business Apps, The University of Missouri) ("The Internet is not just a window on the world but more and more the Internet is the world.").

39 *See* Shani Else, Note, *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, 1123–24 (2008) ("The internet is designed to be used as a place, is used as a place, and individuals think of the internet as a place.").

40 These "virtual worlds" feature simulated physical environments that evolve whether or not any particular person is present. Kevin W. Saunders, *Virtual Worlds—Real Courts*, 52 VILL. L. REV. 187, 190–93 (2007); *see also* Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893, 904–08 (2008).

live in the world" naturally encompasses their right to live in the Internet.[41]

The percentage of American adults using the Internet has precipitously grown from fourteen percent in 1995 to forty-six percent in 2000 to eighty-seven percent in 2014.[42] Yet people with disabilities use the Internet at approximately half the rate of the population at large.[43] Lack of access to the Web limits opportunities for people with disabilities to learn, work, shop, play, and interact with others.[44] This exclusion will cast an increasingly wide shadow as an aging population's visual, hearing, motor, and cognitive impairments create new barriers to Internet access.[45] The normal aging process causes alterations in functioning, distancing people from the mental and physical capabilities of their youth.[46] There are many reasons to think that the best response to aging is not to shunt older citizens into an isolated existence.[47] Meanwhile, more accessible interfaces on the Web would benefit everyone—including those not completely excluded but for whom Internet use may be challenging, such as non-native English speakers or the elderly—by ensuring clear illustrations, well-organized content, and unambiguous navigation.[48]

A. The Internet for People with Disabilities

The Internet is an indispensable part of day-to-day life in the modern world. Core life activities such as commerce, education, em-

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41 tenBroek, *supra* note 1, at 847–48.

42 THE WEB AT 25, *supra* note 29.

43 JAEGER, *supra* note 18, at 2, 21 (citing studies comparing the rate of Internet usage for people with disabilities with the rate of usage amongst the population as a whole); *see infra* notes 76–80 and accompanying text (discussing how the scope of people excluded from the Internet is broad and only widening due in part to a graying population).

44 *See* Carrie L. Kiedrowski, Note, *The Applicability of the ADA to Private Internet Web Sites*, 49 CLEV. ST. L. REV. 719, 721 (2001).

45 *See infra* notes 76–80 and accompanying text.

46 *See* Stein et al., *supra* note 36, at 693.

47 *See id.* at 749–55 (arguing that there are structural, expressive, economic, and hedonic benefits to making the workplace more accessible). There are similar benefits to expanding—and not limiting—opportunities for social engagement through Internet accessibility.

48 *See Introduction to Web Accessibility*, WEBAIM, http://webaim.org/intro/ (last updated Apr. 22, 2014); *see also* JAEGER, *supra* note 18, at 172 (arguing that numerous people would benefit from "the clarity and ease of use" resulting from making the Internet broadly accessible to people with disabilities). An even earlier example is provided in an article by Elizabeth Emens on the third-party benefits of ADA accommodations. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008). Emens describes an academic speaker being asked by someone with a visual impairment to describe aloud a complicated and tiny diagram. *Id.* at 841. In this situation, the accommodation, when extended, benefited many other people with no visual impairments by providing meaningful access to the displayed diagram. *See id.*

ployment, personal relationships, and recreation are digitalized with greater frequency.[49] However, unless attention is given to accessibility, the inevitable result will be shifting the exclusion of people with disabilities from physical spaces to virtual ones.[50] For example, while mainstream society is increasingly finding and applying for jobs online, there are considerable accessibility barriers to those websites for the disabled.[51] Hence, although the Internet has the potential to make it easier for people with disabilities to apply for and find jobs,[52] that prospect depends on individual website accessibility.[53] Ironically, at a time when there are fewer physical architectural barriers than ever before, digital architectural barriers are springing up every day to undermine Title III's normative social integration mandate.[54]

On one level, this new form of exclusion is much like exclusion from previous conduits of information, such as the telephone, television, and books.[55] And yet, the inaccessibility of the Internet has broader consequences for the disabled, because it denies opportunities for communal interaction that the telephone, television, or books could never provide.[56] As one commentator has noted, "the Internet has the potential to be the greatest mechanism for inclusion of people with disabilities ever invented."[57] All the same, a constantly expanding but inaccessible Internet creates new barriers for people with

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49 *See* JAEGER, *supra* note 18, at 177.

50 *See id.* at 177 (arguing that "[t]he virtual world has the potential to revive the physical exclusions of the past with compound interest").

51 *See, e.g.*, Jonathan Lazar et al., *Investigating the Accessibility and Usability of Job Application Web Sites for Blind Users*, 7 J. USABILITY STUD. 68, 69, 84 (2012) (noting the inaccessibility of online employment websites).

52 *Cf.* POWER OF DIGITAL INCLUSION, *supra* note 20, at 72 ("By lowering the cost of information, the Internet can enhance the ability of low-income people to gain human capital and find and compete for good jobs.").

53 *See* NAT'L COUNCIL ON DISABILITY, THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT: ASSESSING THE PROGRESS TOWARD ACHIEVING THE GOALS OF THE AMERICANS WITH DISABILITIES ACT 105 (2007), *available at* http://www.ncd.gov/publications/2007/07262007#toc94 (discussing improved public facility access after enactment of the ADA).

54 *See* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1020 (6th Cir. 1997) (Martin, C.J., dissenting) (arguing that if Title III's applicability is limited to physical structures, "the same technological advances that have offered disabled individuals unprecedented freedom may now operate to deprive them of rights that Title III would otherwise guarantee. As the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted.").

55 JAEGER, *supra* note 18, at 4.

56 *Id.* at 4 ("While it is not a new problem, unequal access to the Internet is a broader problem than these previous gaps in access due to the scope of the Internet in social, education, government, entertainment, communication, information seeking, and other functions.").

57 *Id.* at 33.

disabilities, and new opportunities for everyone else. In this way, Web exclusion is a formidable problem that uniquely undermines social equality, and the gulf between people with disabilities and the mainstream population will widen further with inaction.

Moreover, the need to access the Internet is often heightened for people with disabilities. This is due in part to the unique ability of the Internet to help people with disabilities live independently. Consider a person with a visual impairment who would like to read the newspaper each day. Before the Web, that person would be forced to rely on others to read the newspaper to her, or to wait for costly audio recordings or Braille printouts.[58] With the Internet, she can access newspaper content online at the same time as any other reader, but only if the content is accessible. Similarly, whereas ninety-nine percent of books are unavailable in Braille, digital books can open up an entire world of literature to the blind—if they are made accessible.[59]

Additionally, people with certain disabilities may find it difficult or even impossible to leave their homes or to communicate telephonically. For these individuals, electronic commerce may be the best or only way for them to independently obtain certain goods or services. There are also many benefits associated with an electronic marketplace, including a wider selection of goods, lower cost, and home delivery. In particular, if a company offers special prices available only on its website (as many do) and the website itself is inaccessible (as many are),[60] it could lead to discriminatory pricing in the acquisition of goods—especially when service fees are added for speaking to customer representatives.[61] Even if people with disabilities are able to leave their homes, it is likely more convenient for them to transact business from home.

In a related vein, universities are increasingly offering classes and entire programs online,[62] and such opportunities can greatly aid peo-

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58 *Introduction to Web Accessibility*, *supra* note 48.

59 Peter White, *Where Does a Blind Man Spend His Holidays? In a Bookshop, of Course*, GUARDIAN, Aug. 18, 2012, at 33.

60 *See generally* Jonathan Lazar et al., *Improving Web Accessibility: A Study of Webmaster Perceptions*, 20 COMPUTERS IN HUM. BEHAV. 269 (2004) (examining the reasons for website inaccessibility).

61 *See, e.g.*, Jonathan Lazar et al., *Potential Pricing Discrimination Due to Inaccessible Web Sites*, *in* HUMAN-COMPUTER INTERACTION—INTERACT 2011, at 108 (Pedro Campos et al. eds., 2011), *available at* http://link.springer.com/chapter/10.1007%2F978-3-642-23774-4_11 (chronicling this pricing effect through specific evidence).

62 *See* PEW RESEARCH CTR., THE DIGITAL REVOLUTION AND HIGHER EDUCATION: COLLEGE PRESIDENTS, PUBLIC DIFFER ON VALUE OF ONLINE LEARNING 3 (2011), *available at* http://www.pewsocialtrends.org/files/2011/08/online-learning.pdf.

ple whose impairments make it difficult to navigate the public sphere. Even for those institutions that do not offer classes or programs online, most brick-and-mortar colleges depend on Web-related technologies to coordinate educational logistics, such as housing, course registration, and discussion groups.[63] Without Internet access to such opportunities, a group of individuals that is already statistically likely to be educationally and socioeconomically disadvantaged will be disadvantaged even further.[64] Conversely, expanding educational opportunities for the disabled holds tremendous long-term promise for social integration given the paramount importance of both school and work, combined with the fact that education and employment levels of people with disabilities are low relative to the general population.[65]

Further, for both external and endogenous reasons, people with disabilities may have a greater need to access healthcare information, and such information is increasingly available and disseminated through the Internet.[66] Hosts of websites now provide information about "causes, risk factors, complications, tests, and diagnoses, treatment and drugs, prevention, and alternative therapies for just about any disease or illness."[67] Additionally, the federal government is spending billions to incentivize healthcare institutions to make medical and health records electronic;[68] and healthcare and insurance providers now offer greater opportunities than ever to access such records at the press of a button.[69] Access to these opportunities all hinge upon Internet accessibility, and there are many more—such as emergency

63 Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35–36) [hereinafter Accessibility of Web].

64 Some progress has been made. In late 2011, Penn State entered into a settlement with the National Federation of the Blind to provide an environment of accessible technology for students who are visually impaired. *Settlement Between Penn State University and National Federation of the Blind*, PennState Accessibility, http://accessibility.psu.edu/nfbpsusettlement (last visited Mar. 21, 2015). Louisiana Tech entered into a similar settlement in the middle of 2013. *See* Press Release, Nat'l Fed'n of the Blind, National Federation of the Blind Praises DOJ Settlement with Louisiana Tech (July 24, 2013), *available at* https://nfb.org/national-federation-blind-praises-doj-settlement-louisiana-tech.

65 *See* Jaeger, *supra* note 18, at 6; *see also* Richard V. Burkhauser & Mary C. Daly, The Declining Work and Welfare of People with Disabilities 15–20 (2011) (documenting the widening gap between general employment rates and those specific to disabled men and women); Power of Digital Inclusion, *supra* note 20, at 36.

66 Accessibility of Web, *supra* note 63, at 43,462.

67 *Id.*

68 Reed Abelson, Julie Creswell & Griffin J. Palmer, *Medicare Bills Rise as Records Turn Electronic*, N.Y. Times, Sept. 22, 2012, at A1.

69 Accessibility of Web, *supra* note 63, at 43,462.

alerts,[70] voter registration,[71] and applying for social benefits or services[72]—that disparately impact those with disabilities.

The Internet likewise provides unprecedented opportunities for nonverbal communication. For instance, persons who are deaf and hard-of-hearing are able to communicate with anyone through the Internet without the use of an interpreter or other paid intermediary.[73] They also can use the Internet to choose which film to go to, both in terms of schedule and for determining which performances are signed, rather than communicating via TTY with the box office.[74] Or consider the opportunities for individuals with autism to express themselves, on their own terms, with as much time and psychic buffer as needed to interpret social signals and communicate in return in a socially accepted modality.[75]

Despite these opportunities, the number of people with disabilities who likely encounter barriers to Internet use is significant. The 2010 Census shows that, of those ages fifteen and older, about eight million people have difficulty seeing, with two million either blind or otherwise unable to see.[76] Nearly eight million have difficulty hearing, including one million who are deaf or otherwise have a severe difficulty hearing.[77] And nearly one million people are unable to grasp

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70 *See, e.g.*, D.C. Homeland Sec. & Emergency Mgmt. Agency, *AlertDC—Alerts Straight to Your Devices*, DC.GOV, http://hsema.dc.gov/page/alertdc (last visited Mar. 21, 2015) (noting that emergency alerts are available via email).

71 *See, e.g.*, *Online Voter Registration*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx (last updated Dec. 10, 2014) (discussing the availability of online voter registration).

72 *See, e.g.*, *How to Apply Online for Social Security Retirement Benefits*, SOC. SECURITY ADMIN., http://www.ssa.gov/retirement/about.htm (last visited Mar. 21, 2015) (discussing how to apply for Social Security benefits online).

73 *See* NAT'L COUNCIL ON DISABILITY, THE NEED FOR FEDERAL LEGISLATION AND REGULATION PROHIBITING TELECOMMUNICATIONS AND INFORMATION SERVICES DISCRIMINATION 20–24 (2006).

74 *See id.* (noting the potential impact that new technologies can generally have on the lives of persons with disabilities, and highlighting some features for the deaf and hard-of-hearing community); *id.* at 32–33 ("Although TTY use is steadily declining among deaf and hard of hearing Americans, individuals with hearing loss who live in rural or other areas who do not have wireless data or broadband service in their communities, or who have incomes that are too low to afford these alternative services, still rely on TTYs as their primary mode of communication.").

75 *See* Ari Ne'eman, President, Autistic Self Advocacy Network, Statement at FCC Field Hearing on Broadband Access for People with Disabilities (Nov. 6, 2009), *available at* http://www.fcc.gov/events/field-hearing-broadband-access-people-disabilities (see minute 59:00).

76 MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 8 (2012), *available at* http://www.census.gov/prod/2012pubs/p70-131.pdf.

77 *Id.*

objects.[78] These are just three categories of people who require assistive technologies and/or encounter barriers to Internet site accessibility. The number of people with disabilities who encounter barriers to Internet use (which also includes certain cognitive impairments[79]) is broader, and will only grow as the baby boom generation ages.[80]

Finally, there is a wealth of literature documenting how discrete industries on the Web tend to exclude people with disabilities. Within each industry there are likely to be uniquely detrimental effects. If the excluding industry consists of travel websites, people with disabilities could face higher prices, with the ultimate effect being that they travel less than they might otherwise.[81] If the offending industry consists of job application websites, the immediate effect will be that people with disabilities do not learn of job openings, and consequently are employed at lower levels.[82] If the inaccessible industry consists of e-mail providers, the effects may be too kaleidoscopic to even begin fashioning conclusions.[83] With all that is at stake, one might wonder: how exactly is the Internet built to include or exclude?

B. The Internet's Exclusionary Architecture

Just as most people ordinarily do not think about curb cuts, ramps, or elevators when approaching a building, most people on the Internet do not consider structural issues relating to accessibility.[84] Sadly, this oversight extends to some of the people who own, design, and maintain commercial websites.[85] Exclusion from the Internet is a very real problem for people with disabilities, and not just for those

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78 *Id.*

79 Certain cognitive impairments may correlate with hearing loss. *See* Tomader Taha Abdel Rahman et al., *Central Auditory Processing in Elderly with Mild Cognitive Impairment*, 11 GERIATRICS GERONTOLOGY INT'L 304 (2011).

80 JAEGER, *supra* note 18, at 4; *see also* Michael P. Anderson, Note, *Ensuring Equal Access to the Internet for the Elderly: The Need to Amend Title III of the ADA*, 19 ELDER L.J. 159, 162 (2011) (observing that the elderly are particularly affected by website inaccessibility).

81 *See, e.g.*, Jonathan Lazar et al., Societal Inclusion: Evaluating the Accessibility of Job Placement and Travel Web Sites (2011) (unpublished manuscript), *available at* http://include11.kinetixevents.co.uk/rca/rca2011/paper_final/F433_2313.DOC.

82 *See, e.g.*, Lazar et al., *supra* note 51, at 69, 73 (noting the inaccessibility of online employment websites).

83 *See generally* Brian Wentz & Jonathan Lazar, *Usability Evaluation of Email Applications by Blind Users*, 6 J. USABILITY STUD. 75 (2011) (finding usability issues with mainstream e-mail applications).

84 *See* Lazar et al., *supra* note 60, at 271.

85 This observation was made over a decade ago, based on empirical evidence. *See id.* (surveying 175 webmasters).

with visual impairments.[86] When it comes to website accessibility, affected groups also include those with hearing, cognitive, or motor (especially dexterity-impacting) impairments.[87] Many disabled individuals use assistive technologies of one kind or another, such as speech-based browsers that read web-based content aloud, or voice-based browsers that can be controlled through voice commands.[88] Several analytically discrete obstacles flow from the interactions between people with disabilities, these adaptive technologies, and the content on the Internet.

First, many people with visual impairments use screen-reader technology to navigate the Web. Screen-reading computer programs convert visual information into speech by reading electronic text out loud.[89] Nonetheless, people using screen-readers to browse the Internet often run into several impediments. To start, a screen-reader depends upon nontext content having appropriate textual alternatives, without which a screen-reader cannot interpret the content.[90] Images and photographs are the most common form of this nontext barrier, as many do not have textual alternatives to describe the image.[91] If the visual cue cannot be "read," the person using a screen-reader will not be able to know what the image or photograph depicts.[92] In addition, the alternative text provided may not make sense on its own, such as links with the phrase "click here" or "more."[93]

Websites relying only upon color to convey content present another potential roadblock.[94] Such information is inaccessible to a

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86 *See supra* Part II.A.

87 *See supra* Part II.A.

88 *See* John M. Slatin, *The Art of ALT: Toward a More Accessible Web*, 18 COMPUTERS & COMPOSITION 73, 75 (2001) (exploring how "accessibility is *situated* in particular contexts and *distributed* across a number of interacting constituents").

89 Accessibility of Web, *supra* note 63, at 43,462.

90 *Id.*; *see Web Content Accessibility Guidelines 2.0*, W3C, at Guideline 1.1 (Dec. 11, 2008), www.w3.org/TR/WCAG20/ [hereinafter WCAG 2.0] ("Text Alternatives: Provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language.").

91 Accessibility of Web, *supra* note 63, at 43,462.

92 *Id.*

93 *See Alternative Text*, WEBAIM, http://webaim.org/techniques/alttext/ (last updated Aug. 29, 2013); *Introduction to Web Accessibility*, *supra* note 48.

94 *See* WCAG 2.0, *supra* note 90, at Guideline 1.4.1 (indicating that website accessibility requires that "[c]olor is not used as the only visual means of conveying information, indicating an action, prompting a response, or distinguishing a visual element"); *see also id.* at Guideline 1.3 (stating that website content should be "presented in different ways . . . without losing information or structure" to improve website accessibility).

screen-reader, as well as to someone who is colorblind.[95] Similarly, those with low vision may have difficulty using websites that do not allow changes in the site's font size or color contrast.[96] Data tables or graphs form a special case, as the data cells must have carefully constructed headers and captions for the person who "reads" by hearing to fully appreciate the table or graph.[97] In short, websites must be designed to allow screen-readers and similar assistive technology to retrieve information from a website and present it in a logical, orderly, and accessible way.[98] But, as indicated above, there are numerous ways for a website to hinder compatibility with assistive technologies.[99]

Second, visual or dexterity-based impairments may make it impossible to effectively use a mouse or trackpad, requiring the individual to use a keyboard to navigate websites.[100] For example, a quadriplegic will have limited or no manual dexterity and be unable to use a mouse. She may instead use a mouth stick to type in keyboard commands. Or she might use voice-recognition technology to navigate through the links on a given page.[101] Many websites, however, are not constructed to allow users to tab through the links on a webpage or to otherwise support keyboard alternatives in lieu of a mouse.[102] The links for traversing the site may also be too small or unduly cluttered.[103] Thus, facilitating nonmouse access requires special attention to the website's structure and underlying code.

Third, individuals with hearing and certain cognitive impairments[104] may be unable to access information through videos or mul-

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95 *See Introduction to Web Accessibility*, *supra* note 48.

96 Accessibility of Web, *supra* note 63, at 43,462; *see* WCAG 2.0, *supra* note 90, at Guideline 1.4.4 ("Resize text: Except for captions and images of text, text can be resized without assistive technology up to 200 percent without loss of content or functionality."); *id.* at Guideline 1.4.8 (prescribing standards for modifying visual presentation of blocks of text, including font size, line spacing, and color contrast).

97 *Introduction to Web Accessibility*, *supra* note 48; *see* Accessibility of Web, *supra* note 63, at 43,462 (noting that websites "may contain tables with header and row identifiers that display data, but fail to provide associated cells for each header and row so that the table information can be interpreted by a screen reader").

98 *See* WCAG 2.0, *supra* note 90, at Principle 4 ("Robust—Content must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies.").

99 *See id.* at Guideline 4.1.

100 Accessibility of Web, *supra* note 63, at 43,462.

101 *Id.*

102 *Id.*

103 JAEGER, *supra* note 18, at 2.

104 *See supra* note 79.

timedia content, where such information conduits are not captioned.[105] Internet accessibility for these individuals is a matter of ensuring that all audio content on a webpage is available in an accessible format, such as captioning or transcripts.[106] For a company like Netflix, closed-captioning is all that is necessary to make its videos' audio content accessible to the deaf or hearing impaired. However, in the case of Netflix, achieving such accessibility required litigation.[107] Moreover, the vast majority of video or multimedia content on the Internet is not captioned.[108] For those with seizure disorders, Internet content that flashes too much may pose a danger to their health.[109]

Critics of requiring website accessibility have argued that there would be an excessive financial cost to convert existing and new websites into an accessible format.[110] However, the cost of removing bar-

105 Accessibility of Web, *supra* note 63, at 43,462.

106 *Id.*

107 The National Association of the Deaf sued Netflix, alleging that the company discriminated against those with hearing impairments by failing to provide captions for its movies. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012). After the court asserted—in a critical but outlier holding—that Netflix's "Watch Instantly" website was a place of public accommodation under the ADA, *id.* at 202, Netflix settled the case. *See infra* note 150 (discussing the aftermath of *Netflix*).

Notable to this discussion is the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), Pub. L. No. 111-260, 124 Stat. 2751 (codified in scattered sections of 47 U.S.C.). The CVAA directs the Federal Communications Commission ("FCC") to promulgate rules on a variety of accessibility topics, from mobile phones to the captioning of Internet protocol video. CVAA § 104(a), 47 U.S.C. § 617(e) (2012). Following the passage of the CVAA, the FCC issued rules requiring closed-captioning for any broadcast or cable programming retransmitted on the Internet. 47 C.F.R. § 79.4(b) (2013). These closed-captioning requirements apply only to full-length videos and programming that originally airs in the United States, and they do not apply to consumer-generated media. *Id.* § 79.4(a)–(b).

108 John D. Sutter, *An Engineer's Quest to Caption the Web*, CNN (Feb. 9, 2010, 9:14 AM), http://www.cnn.com/2010/TECH/02/09/deaf.internet.captions/index.html ("Almost no video on the Internet comes paired with text captioning for the deaf."); *see also* Josh Benjamin, *Closed-Captions on the Web: An Unfinished Battle*, AAPD (June 5, 2012), http://www.aapd.com/resources/power-grid-blog/closed-captions-on-the-web.html.

109 JAEGER, *supra* note 18, at 2; *see* WCAG 2.0, *supra* note 90, at Guideline 2.3.

110 For example, during rulemaking for "Nondiscrimination on the Basis of Disability in Air Travel," airlines claimed that the expense of making their websites accessible would be excessive. Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, 78 Fed. Reg. 67,882, 67,891 (Nov. 12, 2013) (to be codified at 14 C.F.R. pts. 382, 399; 49 C.F.R. pt. 27) [hereinafter Nondiscrimination in Air Travel]. In particular, they argued that "the cost of making large numbers of infrequently visited pages accessible will outweigh any benefit to the few people with disabilities who might visit them." *Id.* They proposed making core air travel functions accessible on a mobile or text alternative website in lieu of making their primary websites accessible. *Id.* One carrier even suggested just providing the disabled with a phone number to an accessible phone line where equivalent information could be obtained. *Id.*

The Department of Transportation ("DOT") found all of these options unacceptable, be-

riers to Internet accessibility is relatively small when compared to the potential benefits.[111] Accessibility is cheaper still when built directly into new website construction.[112] Indeed, there are relatively simple technical standards, such as the Web Content Accessibility Guidelines ("WCAG"),[113] that an organization can follow to ensure its websites are designed to be accessible and compatible with the aforementioned assistive technologies.[114] Retrofitting inevitably leads to unnecessary expense and unnecessary delay.[115] Moreover, remedying the impediments noted above rarely impacts the visual appearance of a site.[116] Most of the needed structure is invisible, such as embedding alternate text or tags for images.[117] Or if the nontext content is pure decoration, it needs only to be implemented in such a way that it can be ignored by assistive technologies.[118] Where rare changes to website appearance are needed, they will often be useful for everyone—including groups not necessarily excluded, like elders and non-native English

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cause the purpose of requiring website accessibility is "to attempt to ensure that passengers with disabilities have equal access to the same information and services available to passengers without disabilities." *Id.* at 67,892. The DOT ultimately found that—despite cost complaints from airlines—the monetized benefits of the rule would exceed its monetized costs by $13.5 million over a ten-year period (using a three percent discount rate). *Id.* at 67,911. It also noted that the qualitative and nonquantitative benefits of "achieving full inclusion and access" would justify the rule even without the anticipated monetary gains. *Id.*

111 *See id.* at 67,911.

112 *See* JAEGER, *supra* note 18, at 44 ("The cost of accessibility, when accounted for from the outset of design, is practically nothing . . . ." (citations omitted)); Brian Wentz et al., *Retrofitting Accessibility: The Legal Inequality of After-the-Fact Online Access for Persons with Disabilities in the United States*, FIRST MONDAY (Nov. 7, 2011), http://firstmonday.org/ojs/index.php/fm/article/view/3666/3077 (discussing the higher costs of retrofitting versus planning for accessibility). This general fact calls to mind disability advocate and architect Ron Mace's testimony on behalf of the ADA in 1989 that "there is absolutely no reason why new buildings constructed in America cannot be barrier-free since additional cost is not the factor." S. REP. NO. 101-116, at 10–11 (1989).

113 WCAG 2.0, *supra* note 90. The DOT has observed that "WCAG 2.0 is by far the frontrunner among the existing accessibility standards worldwide." Nondiscrimination in Air Travel, *supra* note 110, at 67,888. The World Wide Web Consortium ("W3C")—a group originally led by the Massachusetts Institute of Technology and the European Laboratory for Particle Physics—established a Web Accessibility Initiative ("WAI") in 1997 that in turn promulgated the WCAG guidelines. JAEGER, *supra* note 18, at 49. The most recent, second-generation guidelines are readily available. *See* WCAG 2.0, *supra* note 90.

114 *See* Wentz et al., *supra* note 112.

115 *Id.*; *see also* JAEGER, *supra* note 18, at 44; NAT'L COUNCIL ON DISABILITY, OVER THE HORIZON: POTENTIAL IMPACT OF EMERGING TRENDS IN INFORMATION AND COMMUNICATION TECHNOLOGY ON DISABILITY POLICY AND PRACTICE 27 (2006) [hereinafter OVER THE HORIZON], *available at* http://www.ncd.gov/publications/2006/Dec262006.

116 Accessibility of Web, *supra* note 63, at 43,462.

117 *Id.*

118 WCAG 2.0, *supra* note 90, at Guideline 1.1.

speakers—such as modifications to the site's layout and structure to make it more logical and intuitive.[119]

Under these circumstances, there is a pressing need for greater acknowledgment of Title III's pertinence.[120] If companies receive clear guidance on the ADA's applicability to websites and other forms of Internet technology, building in accessibility will soon become standard and even cheaper, potentially precipitating improvements to existing technologies.[121] Indeed, even in the current environment, there has been an outgrowth of free or inexpensive technologies that can evaluate current levels of website accessibility and correct any design defects.[122] Federal direction is needed to move beyond the current patchwork of state standards, which have left people with disabilities bereft of meaningful protections and businesses unsure of their obligations.[123] Standardization is particularly apposite in this context, because the reach of the Internet is not constrained by state borders. Such guidance would serve global educational, instrumental, and expressive functions.

One of the promises in achieving Internet inclusion is to take a physical world that is built of vertical hierarchies and exclusionary norms and transform it into an inclusive, collaborative community.[124] Collaborative communities are defined as social organisms in which

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119 *See* Accessibility of Web, *supra* note 63, at 43,462.

120 *See Hearing on Achieving the Promise of the ADA*, *supra* note 14, at 5. Certainly any such guidance will require careful implementation, including careful consideration of the pace at which such requirements are phased in. Such rules should also address website developers, who often list accessibility as a separate line item when it comes to competitive proposals. This may lead a procurement officer to choose a less expensive "option," even though choosing that option could lead to civil liability. *Id.* at 97–98 (statement of Daniel F. Goldstein, Partner, Brown, Goldstein & Levy, LLP).

121 *Id.* at 88–89 ("When new technologies find acceptance in the marketplace, their adoption and improvement often occurs with dizzying speed. When accessibility is not built in from the outset, however, the disability community suffers significant competitive disadvantages whose later correction may come only as that technology is being replaced by something newer or better.").

122 The developers of WCAG 2.0 have made available an array of free technical resources to assist companies in implementing standards that will help ensure website accessibility. *How to Meet WCAG 2.0: A Customizable Quick Reference to Web Content Accessibility Guidelines 2.0 Requirements (Success Criteria) and Techniques*, W3C, http://www.w3.org/WAI/WCAG20/quickref/ (last updated Sept. 16, 2014).

123 *Hearing on Achieving the Promise of the ADA*, *supra* note 14, at 103 ("[I]n the IT industry it is very important to know what your development target is when product managers are making decisions about what features to implement. And if they see a range of different standards in every State or in different parts of the Federal Government, there is much less incentive [to meet such standards].").

124 *See generally* Paul S. Adler & Charles Heckscher, *Towards Collaborative Community*, *in* THE FIRM AS A COLLABORATIVE COMMUNITY: RECONSTRUCTING TRUST IN THE KNOWLEDGE

authority and power relationships are more horizontal, and through which persons can both maintain their individual identities and interact in social networks.[125] Initial research has already demonstrated the potential of the Internet for strengthening community interactions and developing social and human capital.[126] Researchers have previously noted the significance of collaborative communities for persons with disabilities, but they can be difficult to achieve in face-to-face interactions given the natural proclivity to indulge one's biases.[127]

C. The Internet and the ADA

When Congress enacted the ADA in 1990, the Internet was in its infancy and its transformative potential was beyond comprehension for most people.[128] At that time, universities and the U.S. government were the main consumers of the Internet, with activities primarily limited to research, military uses, and various other governmental functions.[129] Commercial Internet service providers such as AOL, Prodigy, and CompuServe were only beginning to emerge; it was these entities that would ultimately enable large-scale use by individuals.[130] At the time the ADA was enacted, Congress could not have anticipated the role the Internet would play in society within the next decade.[131]

ECONOMY 11 (Charles Heckscher & Paul S. Adler eds., 2006) (arguing that continued economic and societal progress requires collaborative communities).

125 *Id.* at 16–17; *see also* Ronald S. Burt, *Autonomy in a Social Topology*, 85 AM. J. SOC. 892, 899–900 (1980); Gerhard Fischer et al., *Beyond Binary Choices: Integrating Individual and Social Creativity*, 63 INT'L J. HUM.-COMPUTER STUD. 482 (2005).

126 *See* Nicole B. Ellison et al., *The Benefits of Facebook "Friends": Social Capital and College Students' Use of Online Social Network Sites*, 12 J. COMPUTER-MEDIATED COMM. 1143 (2007) (finding a positive relationship between certain kinds of Facebook use and the maintenance and creation of social capital).

127 POWER OF DIGITAL INCLUSION, *supra* note 20, at 69–71; *see also* Tal Araten-Bergman & Michael Ashley Stein, *Employment, Social Capital and Community Participation Among Israelis with Disabilities*, 48 WORK 381, 387–88 (2014); Carolyn Ells, *Lessons About Autonomy from the Experience of Disability*, 27 SOC. THEORY & PRAC. 599, 608, 611–13 (2001).

128 Lawrence Lessig, *The Death of Cyberspace*, 57 WASH. & LEE L. REV. 337, 337 (2000) ("[I]t was not until the early 1990s that the Internet became an idea in the minds of ordinary people.").

129 *See* MICHAEL L. RUSTAD, GLOBAL INTERNET LAW IN A NUTSHELL 9 (2d ed. 2013).

130 *See id.* at 9–10.

131 *See* Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 979 (2004) ("The Internet barely existed when Congress enacted the ADA in 1990. Thus any Congressional intent to apply the ADA specifically to the Internet seems speculative at best."); *see also* Michael O. Finnigan, Jr. et al., *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 U. CIN. L. REV. 1795, 1814 (2007) (arguing that Congress could not have "realized in 1990 how crucial the Internet would become to everyday life").

Thus, it is unsurprising that the original ADA did not mention the Internet. There was nothing close to standards for Internet or website accessibility, like WCAG 2.0, in 1990.[132] It is, however, somewhat surprising that the ADA Amendments Act of 2008[133] did not address Internet accessibility under Title III, because the question had by that time been raised in multiple forums.[134] Title III prohibits "place[s] of public accommodation" from discriminating on the basis of disability in the services they provide.[135] The ADA defines "place of public accommodation" through a listing of twelve categories (along with specific examples) of commercial entities that provide services to the public.[136] If the services offered by a place of public accommodation are not accessible to people with disabilities, the entity is subject to

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132 *See* WCAG 2.0, *supra* note 90 (prescribing recommendations for making Web content more accessible). The first version of the WCAG was recommended in 1999, nine years after the passage of the ADA. *See Web Content Accessibility Guidelines 1.0*, W3C (May 5, 1999), http://www.w3.org/TR/WCAG10/.

133 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

134 By the time of the ADA Amendments Act, Congress had directly considered the applicability of the ADA to commercial websites and had likely heard of the several court cases raising this precise question. *See generally Hearing on Applicability of the ADA to Private Internet Sites*, *supra* note 38, at 27 (discussing concerns "in applying the ADA to the Internet"). The Department of Justice had similarly taken a clear position on Title III's applicability to websites of public accommodations as early as 1996. *See* Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Hon. Tom Harkin, U.S. Senator (Sept. 9, 1996), *available at* http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt ("Covered entities under 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. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well."). That letter did not, however, address the more contemporary concern of whether entities that do business exclusively on the Internet are covered by the ADA.

135 42 U.S.C. § 12182(a) (2012) (prohibiting discrimination by places of public accommodation "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").

136 The Act defines "public accommodation" to include twelve categories, each of which lists specific commercial establishments:

> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> (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 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;

potential liability.[137] Qualifying entities are required to make reasonable modifications to their "policies, practices, [and] procedures," and provide auxiliary aids if necessary, to ensure access for the disabled community.[138] The exceptions to this requirement include cases where the modifications are not reasonable, the efforts "fundamentally alter" the nature of the entity, or such efforts constitute an "undue burden."[139]

The ADA does not explicitly list the Internet or commercial websites as a place of public accommodation.[140] The definition of "public accommodation" provides many examples of physical locations, but it does not indicate whether an entity without a physical presence may qualify.[141] Congress, however, generally expected that the statute would evolve over time,[142] and, in particular, Congress intended the twelve categories of public accommodation to be illustrative and nonexhaustive.[143] Consistent with this intent, the Department of Justice

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> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
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> (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
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> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id. § 12181(7).

137 *Id.* § 12188.

138 *Id.* § 12182(b)(2)(A)(ii)–(iii).

139 *Id.* § 12182(b)(2)(A)(iii). Whether a modification is reasonable is determined in part by four factors: (1) the cost and complexity of the modification, (2) the overall impact of the modifications on the business's operation, (3) the business's overall financial resources, and (4) the type of operations of the entity. *See id.* § 12181(9). Whether something is an undue burden involves consideration of factors that are nearly identical to those involving the reasonableness of modifications. *Id.* § 12111(10)(B).

140 *See id.* § 12181(7).

141 *See id.* (defining places of public accommodation to include brick-and-mortar type entities, such as hotels, restaurants, theaters, auditoriums, bakeries, banks, museums, gymnasiums, and private schools).

142 Accessibility of Web, *supra* note 63, at 43,463.

143 S. REP. NO. 101-116, at 54 (1989) (contemplating that as technology progressed, the ADA's protections would need to keep pace).

("DOJ") stated in its original ADA regulations that Title III should be interpreted to keep pace with developing technologies.[144]

Courts, however, have constrained Title III's application to online places through two doctrinal interpretations that impact the relationship between commercial websites and public accommodations. Some courts have reasoned that the examples listed under the definition of public accommodations are all physical places and thus a plaintiff must allege there has been discrimination in a physical venue.[145] Other courts have taken a slightly broader interpretation of Title III by holding that the ADA may apply to services and goods that are not physically provided to customers, but only if such services or goods have a sufficient nexus to an actual tangible place of accommodation.[146] Courts employing either of these interpretations have found that Title III's accessibility requirements generally do not extend to commercial websites.[147] These two doctrinal paths, taken together, constitute a major limitation on Web accessibility under ADA juris-

144 *See* 28 C.F.R. pt. 36, app. B, at 727 (2010) ("Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. . . . [T]he list [of auxiliary aids that the DOJ provided] is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and such an attempt would omit new devices that will become available with emerging technology.").

145 *See, e.g.*, McNeil v. Time Ins. Co., 205 F.3d 179, 185–86 (5th Cir. 2000) (affirming a district court's decision holding that Title III only requires "physical access to places of public accommodation"); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (holding that an insurance company's employer-provided disability plan is not what Congress addressed under Title III, which did include "such matters as ramps and elevators so that disabled people can get to the office"); Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (noting that "we do not find the term 'public accommodation' or the terms in 42 U.S.C. § 12181(7) to refer to non-physical access"); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997) (holding that the "good" that the plaintiff sought, a long-term disability insurance policy obtained through her employer rather than from a physical structure, was not from a place of public accommodation); Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) (finding that the televised broadcast of the NFL was not a covered "service" under Title III because "the prohibitions of Title III are restricted to 'places' of public accommodation"); *cf.* Clegg v. Cult Awareness Network, 18 F.3d 752, 756 (9th Cir. 1994) (holding that nonprofit organization was not a public accommodation under Title II of the Civil Rights Act of 1964 because the organization did not sell goods and services from a public facility).

146 *See, e.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999) (holding that because the statutory language "is not limited to physical products, but includes contracts and other intangibles," it can certainly extend to products "such as an insurance policy"); *see also* Renden v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1284–86 (11th Cir. 2002) (same for television show contestants' telephone hotline); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 30–32 (2d Cir. 2000) (same for insurance underwriting).

147 *E.g.*, Access Now, Inc. v. Sw. 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

prudence, especially given the increasing number of companies that operate exclusively online;[148] such companies feel that they have no Title III obligation because they have limited or no physical presence.[149]

The result is that no federal court of appeals has established affirmative precedent that entities doing business exclusively on the Internet are covered by the ADA.[150] Indeed, the caselaw gives only conflicting answers to the question of how Title III applies to the Internet.[151] There have been successful settlements in the area of Internet accessibility over the last decade,[152] but these do not bind other

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to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.").

148 *Hearing on Achieving the Promise of the ADA*, *supra* note 14, at 86.

149 The narrow and historically constrained interpretation of Title III is also ironic, because one of the ADA's authors and precipitators has explained that the primary reason for using Title II of the CRA's language in the ADA was to provide text with which courts would be familiar and able to readily apply. *See* Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 285–86 (2008).

150 *See Hearing on Achieving the Promise of the ADA*, *supra* note 14, at 81. The case closest to providing useful precedent is *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England*, 37 F.3d 12 (1st Cir. 1994). In *Carparts*, the First Circuit observed in dicta that "one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services." *Carparts*, 37 F.3d at 19. Its holding, however, was narrower, stating that the ADA's definition of public accommodations was not limited only to actual physical structures, but included health benefit plans. *Id.* at 20.

One recent district court opinion has been particular cause for hope in the disability community. In 2012, the U.S. District Court for Massachusetts held that websites may be understood, from a legal perspective, as places of public accommodation. Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–02 (D. Mass. 2012). The Court observed that the ADA lists twelve categories of entities that qualify as places of public accommodation and held that three of those may have applied in the case of Netflix: "place of exhibition or entertainment," "rental establishment," and "service establishment." *Id.* at 201. Just as Target did, *see supra* note 19, Netflix settled the matter shortly after the motion for judgment on the pleadings. Dara Kerr, *Netflix and Deaf-Rights Group Settle Suit over Video Captions*, CNET (Oct. 11, 2012, 6:21 PM), http://news.cnet.com/8301-1023_3-57531033-93/netflix-and-deaf-rights-group-settle-suit-over-video-captions. It was a victory for those with hearing impairments, but the settlement precluded the case from going up to the circuit court level and potentially becoming binding precedent.

151 *See* Accessibility of Web, *supra* note 63, at 43,464 (observing that "differing standards for determining Web accessibility[ ] and repeated calls for Department [of Justice] action indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III").

152 The first major settlement was with America Online ("AOL"), a major Internet service provider that was not accessible to those with visual impairments. Daniel Goldstein & Gregory Care, *Disability Rights and Access to the Digital World: An Advocate's Analysis of an Emerging Field*, FED. LAW., Dec. 2012, at 54, 56. This high-profile suit was brought by the National Federation for the Blind, but settled by AOL in relatively short order, with AOL agreeing to make its software accessible. *See id.* Other settlements have followed in AOL's wake, including agree-

businesses. Moreover, some of these agreements have expired and therefore do not address accessibility issues under current technology.[153]

Courts have essentially punted the issue to Congress,[154] leaving people with disabilities to hope businesses will be convinced of the justice or economic benefits of making their websites accessible. To date, commercial enterprises operating on the Web have been reluctant to voluntarily make their sites accessible, despite the low costs and potentially large returns from increasing their consumer base.[155]

The DOJ has yet to issue regulations regarding Internet accessibility obligations under Title III.[156] The DOJ first took the stance that websites of public accommodations were covered under Title III in 1996.[157] It also argued for Internet coverage under Title III in several amicus briefs.[158] However, the DOJ has not issued rules on the sub-

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ments with Target, Penn State, H&R Block, Intuit, and HD Vest. *Id.* at 56–57; Press Release, Conn. Attorney Gen.'s Office, Attorney General, National Federation of Blind Applaud On-Line Tax Filing Services for Agreeing to Make Sites Blind-Accessible for 2000 Tax Season (Apr. 17, 2000), *available at* http://www.ct.gov/AG/cwp/view.asp?a=1775&q=283012.

153 *Settlement Agreement Between the United States of America, Pacific Gateway, Ltd., and Marriott International, Inc. Under the Americans with Disabilities Act of 1990*, ADA.GOV, http://www.ada.gov/pacific-gateway.htm (last visited Mar. 21, 2015); *cf.* OVER THE HORIZON, *supra* note 115, at 29 (explaining how access requirements tied to specific technologies can quickly become obsolete).

154 *See, e.g.*, Access Now, Inc. v. Sw. Airlines Co., 227 F. Supp. 2d 1312, 1321 n.13 (S.D. Fla. 2002) ("As Congress has created the statutorily defined rights under the ADA, it is the role of Congress, and not this Court, to specifically expand the ADA's definition of 'public accommodation' beyond physical, concrete places of public accommodation, to include 'virtual' places of public accommodation.").

155 *Hearing on Achieving the Promise of the ADA*, *supra* note 14, at 80 (noting that "97 percent of university home pages contain significant accessibility barriers"); *see also* Accessibility of Web, *supra* note 63, at 43,464 ("It is clear that the system of voluntary compliance has proved inadequate in providing Web site accessibility to individuals with disabilities."); JAEGER, *supra* note 18, at 72–75 (explaining that industry has proven resistant to voluntarily making accessible products). In this respect, we are witnessing a market failure that parallels that of employers not hiring people with disabilities despite minimal accommodation costs and generous tax incentives. *See* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

156 One would expect DOJ regulations to mandate the application of Title III accessibility requirements to commercial websites. Although it has not yet issued any Title II regulations, it has supported such an application of Title III. *See, e.g.*, 28 C.F.R. pt. 36, app. A, at 831 (2014) ("Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations. . . . The Department did not issue proposed regulations as part of its NPRM, and thus is unable to issue specific regulatory language on Web site accessibility at this time.").

157 Letter from Deval L. Patrick, *supra* note 134.

158 *See, e.g.*, Brief of the United States as Amicus Curiae in Support of Appellant, Hooks v. OKBridge, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891), 1999 WL 33806215.

ject despite commentators urging it to address the issue for over a decade.[159] The DOJ issued an Advance Notice of Proposed Rulemaking on the subject of Internet accessibility in July 2010,[160] and most recently announced that it will issue a Notice of Proposed Rulemaking in June of 2015 to address the potential obligation of public accommodations to make the goods or services they offer via the Internet accessible to individuals with disabilities.[161]

The government should immediately clarify that Title III applies to websites and other services provided by public accommodations, whether or not those accommodations operate brick-and-mortar establishments.[162] Merely changing the law is no cure-all, but it will bring us closer to the root of the problem, which is technological in nature. Changing the law will result in greater scrutiny regarding the accessibility of both new and existing technologies—which is necessary to achieve universal usability of Internet services.[163]

Finally, whatever legal steps are taken will require vigilant enforcement from the DOJ.[164] Federal government website accessibility has been required for a decade, but studies show compliance levels are low.[165] In the context of public accommodations, it will also be critical for businesses to perceive the "business case" of making their

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159 Accessibility of Web, *supra* note 63, at 43,461 (noting that the DOJ received numerous comments regarding web accessibility in response to its 2004 Advance Notice of Proposed Rulemaking and its 2008 Notice of Proposed Rulemaking—neither of which proposed the subject of web accessibility).

160 *See id.* at 43,460.

161 *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, FED. REG., https://www.federalregister.gov/regulations/1190-AA61/nondiscrimination-on-the-basis-of-disability-accessibility-of-web-information-and-services-of-public (last visited Mar. 23, 2015). Relatedly, the Department of Transportation issued a final rule in November of 2013 requiring airlines to make their websites accessible. Nondiscrimination in Air Travel, *supra* note 110.

162 Naturally, there should be a distinction between personal websites and those intended for public consumption, similar to Title III not mandating architectural accessibility for private residences. In addition, new and existing content should garner different treatment when phasing in website accessibility, just as architectural accessibility was phased in under the original ADA. *See* Accessibility of Web, *supra* note 63, at 43,466 (distinguishing between new and existing websites when it comes to respective, appropriate timeframes for accomplishing accessibility). Further, any standards issued by the DOJ or courts should be "technology agnostic" or such rules will quickly become outdated. Cyndi Rowland, *ADA ANPRM Response*, WEBAIM (Jan. 31, 2011), http://webaim.org/blog/ada-anprm-response/.

163 JAEGER, *supra* note 18, at 169.

164 *See* OVER THE HORIZON, *supra* note 115, at 35–36 ("Without enforcement there is no economic incentive to follow accessibility guidelines. In fact, there is a disincentive because companies that focus on accessibility worry that, while they are spending time and effort on accessibility, their competitors are spending their resources on other activities.").

165 JAEGER, *supra* note 18, at 3.

Internet-based products accessible.[166] Through their effect on profitability, market demand and enforced regulation can sustain a strong business case for public accommodations.[167]

Although this Article focuses on Internet accessibility justified by reference to traditionally understood civil rights, the benefits to third parties may prove considerable.[168] Just as ramps or automatic doors may be helpful to a parent with a stroller or someone who is carrying boxes,[169] making the Internet more accessible generally benefits all users.[170] For example, closed-captioning for videos is useful for everyone when such videos are shown in stores, airports, or other noisy venues, and can be especially helpful for non-native English speakers.[171] Similarly, the same technology that makes a document searchable for everyone also "makes it accessible for people with print disabilities."[172] Finally, as observed above, Internet accessibility helps not only those with disabilities, but also those with impairments not rising to a statutorily prescribed level of "disability" status—and will therefore likely benefit us all if we live long enough.[173]

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166 OVER THE HORIZON, *supra* note 115, at 34–36.

167 *Id.* at 35.

168 *Id.* at 5 (encouraging the identification of instances where accessibility features have "mainstream market appeal"). An inordinate focus on third-party benefits, however, can create the impression that a free market will naturally correct the aforementioned impediments to website accessibility. This Article argues that a governmental mandate is still warranted for both prudential and expressive reasons. *See* S. REP. NO. 101-116, at 19 (1989) (observing that "there is a need to ensure that the Federal Government plays a central role in enforcing [the ADA's] standards on behalf of individuals with disabilities").

169 This utilitarian argument in favor of ecumenical usage is at the heart of the Universal Design philosophy. *See, e.g.*, Ronald L. Mace et al., *Accessible Environments: Toward Universal Design*, *in* DESIGN INTERVENTION: TOWARD A MORE HUMANE ARCHITECTURE 155, 156 (Wolfgang F.E. Preiser et al. eds., 1991); *see also* Emens, *supra* note 48, at 841–42 (arguing that courts and agencies fail to recognize the benefits of ADA accommodations to third parties); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 349–50 (2009) (same).

170 *See, e.g.*, Nondiscrimination in Air Travel, *supra* note 110, at 67,911 (observing that the process of making carriers' websites accessible should "result in an improved ability to identify and clean up existing errors and performance issues (e.g., broken links and circular references)"); *Introduction to Web Accessibility*, *supra* note 48 (arguing that everyone benefits from features that help ensure website accessibility, such as captions, clear illustrations, well-organized content, and unambiguous navigation).

171 *See Closed Captioning on Television*, FED. COMM. COMMISSION, http://www.fcc.gov/archive/201011?page=10 (last visited Mar. 21, 2015) ("For individuals whose native language is not English, English language captions improve comprehension and fluency.").

172 Jonathan Lazar et al., *Understanding the Connection Between HCI and Freedom of Information and Access Laws*, INTERACTIONS, Nov.–Dec. 2013, at 60, 62.

173 *See supra* notes 33-37 and accompanying text (explaining that Internet accessibility affects not just those with disabilities, but also those whom the law does not consider disabled, and will affect those who are not yet disabled if they live long enough); *see also* Anderson, *supra* note

But no appreciation of *what* must be done to accomplish Internet accessibility can be complete without an understanding of *why* it must be done. Parts II and III explain why the Internet must be integrated. Beyond the practical reasons outlined above, constitutional considerations and the United States's history of civil rights compel a fully accessible Internet.

II. Civil Rights and Public Accommodations

The legislative histories of public accommodations under the CRA and the ADA provide further insight into the normative justifications for ensuring that people with disabilities have equal access to the Internet. The same principles that urged the desegregation of public spaces on the basis of race compel the integration of people with disabilities into the Internet. Inclusion in virtual spaces has the same capacity as presence in physical spaces to facilitate social interaction among people who might not otherwise interact, and consequently to break down stigmas. Internet accessibility is further consonant with the historical justifications for Title II of the CRA, which include human dignity, commerce, and democratic considerations.

A. The Civil Rights Act of 1964 and Public Accommodations

Title II of the CRA prohibits racial segregation and discrimination in places of public accommodation.[174] The main justifications supporting its passage involved: (1) eliminating the stigma of being excluded from places of public accommodation;[175] (2) enhancing the economy by removing obstacles to the free flow of commerce;[176] and

80, at 162 (observing that the elderly are particularly affected by website inaccessibility). Here, it is also important to understand that impairments exist on a continuum and that we will each have one or more relatively severe impairments, at some point, if we live long enough. *Cf.* Bradley A. Areheart, *Disability Trouble*, 29 Yale L. & Pol'y Rev. 347, 373–74 (2011) (illustrating how impairments naturally exist on a continuum).

174 *See* 42 U.S.C. §§ 2000a–2000a-6 (2012).

175 *See, e.g.*, S. Rep. No. 88-872, at 16 (1964) (stating that the primary purpose of the Act was to solve the problem of "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments"); *see also* Daniel v. Paul, 395 U.S. 298, 307–08 (1969) (noting that the primary purpose of Title II was "'to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public'" (quoting H.R. Rep. No. 88-914, at 18 (1963))).

176 *See, e.g.*, S. Rep. No. 88-872, at 17–21 (describing the relationship between discrimination and interstate commerce and highlighting the negative economic effect of discrimination on places of public accommodation); *see also* Newman v. Piggie Park Enters., Inc., 377 F.2d 433, 436 (4th Cir. 1967) (observing that Congress, in passing Title II of the CRA, sought to eliminate an unnecessary and substantial impairment of interstate travel and commerce).

(3) enabling the full participation of all citizens in our democratic culture through equal access to public accommodations.[177]

Although the CRA was constitutionally founded in the Commerce Clause, the Kennedy Administration conceded that its primary motivation was a concern for human dignity.[178] The Supreme Court agreed, averring in *Heart of Atlanta Motel, Inc. v. United States*[179] that the primary purpose of Title II "was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[180] While concurring, Justice Goldberg poignantly explained that indignity arose equally from "the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States."[181]

In this respect, the Court in *Heart of Atlanta* explained that Congress was concerned not only with the quantitative effect of racial segregation in public accommodations—such as the overwhelming number of miles African Americans were forced to travel between cities just to find accessible lodging—but also with the qualitative impact of such segregation.[182] Specifically, Congress passed Title II to remedy the ways in which racial segregation in public accommodations deprived African Americans of the "pleasure and convenience" that other individuals experienced when making use of them.[183] In the case of exclusion from hotels, this manifested in African Americans experiencing the indignity of having to frequently impose upon friends to host them overnight.[184] Moreover, the Court declared that it did not matter that technological advances such as "the coming of automobiles" had brought about changes in travel patterns since "1878

177 *See, e.g.*, *Hearing on Civil Rights and Public Accommodations*, *supra* note 27, at 689 (statement of Hon. Franklin D. Roosevelt, Jr., Undersecretary of Commerce, Department of Commerce) ("[W]e . . . support this legislation primarily because we believe that discriminatory practices are inconsistent with our democratic ideals and cannot continue to be tolerated in a democratic society.").

178 Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1109 (2005).

179 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

180 *Id.* at 250 (internal quotation marks omitted).

181 *Id.* at 292 (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16).

182 *Id.* at 252–53 (majority opinion); *id.* at 292 (Goldberg, J., concurring) ("Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." (quoting S. REP. NO. 88-872, at 16)); *see also* S. REP. NO. 88-872, at 17–18 (highlighting the necessity of driving long distances to find lodging).

183 *Heart of Atlanta*, 379 U.S. at 253; *see also* S. REP. NO. 88-872, at 17.

184 *Heart of Atlanta*, 379 U.S. at 252–53.

when this Court first passed upon state regulation of racial segregation in commerce."[185] The move toward more frequent and extensive travel by all Americans simply helped "emphasize the soundness" of the Court's previous decision.[186]

A second goal driving the enactment of Title II of the CRA was the facilitation of interstate commerce via the removal of racial segregation in public services and accommodations.[187] There was "overwhelming evidence" that such discrimination had an adverse economic impact on interstate commerce.[188] In *Daniel v. Paul*,[189] the Court highlighted this economic purpose behind the CRA when it observed that narrowing the market of consumers by racial discrimination necessarily limits the potential volume of interstate purchases.[190]

Although the Senate Commerce Committee did not include specific findings for the economic-based argument in the bill's preamble, supporters of the Act like Undersecretary of Commerce Franklin D. Roosevelt, Jr.—whose father was arguably the most famous person with a disability in American history, and who surely must have witnessed numerous barriers to inclusion[191]—provided statistical evidence highlighting the negative impact on commerce caused by racial exclusion from public accommodations.[192] For instance, Roosevelt offered proof that African Americans were spending "less for recreation, dining out, and expenses incident to travel in areas of limited

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185 *Id.* at 256.

186 *Id.* (internal quotation marks omitted).

187 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 301–04 (1964); S. REP. NO. 88-872, at 17.

188 *Heart of Atlanta*, 379 U.S. at 252–53.

189 Daniel v. Paul, 395 U.S. 298 (1969).

190 *Id.* at 307 n.10; Timothy J. Lowry, Case Note, *Fourteenth Amendment—Americans with Disabilities Act of 1990—Public Accommodations—Professional Athletic Association Prohibited from Denying Golfer Afflicted with a Degenerative Circulatory Disorder Equal Access to Its Tournaments and Qualifying Stages, Because the Use of a Golf Cart Is Not a Modification that Would "Fundamentally Alter the Nature" of Professional Tours or Events*—PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879 (2001)*, 12 SETON HALL CONST. L.J. 647, 663 & n.97 (2002) (citing 110 CONG. REC. 7402 (1964)).

191 *Cf.* HUGH GREGORY GALLAGHER, FDR'S SPLENDID DECEPTION: THE MOVING STORY OF ROOSEVELT'S MASSIVE DISABILITY—AND THE INTENSE EFFORTS TO CONCEAL IT FROM THE PUBLIC (1999). Gallagher, although not a lawyer, was the author of the first civil rights act for people with disabilities in the United States, the 1968 Architectural Barriers Act, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4157 (2012)), which required the accessibility of every new federally funded building and the retrofitting of many existing ones. *See* Adam Bernstein, *Hugh Gallagher Dies; Crusaded for Disabled*, WASH. POST, July 16, 2004, at B4.

192 *Hearing on Civil Rights and Public Accommodations*, *supra* note 27, at 691–700 (statement of Hon. Franklin D. Roosevelt, Jr., Undersecretary of Commerce, Department of Commerce).

access to public facilities," and "reported that an American Legion Convention expecting 50,000 persons was changed from New Orleans to Miami, Florida, because the convention could not be assured of desegregated facilities in the Louisiana city."[193]

A third purpose motivating the passage of Title II of the CRA was promoting the full exercise of democracy by ensuring the availability of public accommodations to all citizens.[194] In submitting the proposed act to Congress, President Kennedy stated, "no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from . . . public accommodations and facilities."[195] Justice Douglas later ratified President Kennedy's sentiment, declaring in *Bell v. Maryland*[196] that "the right to be served in places of public accommodations is an incident of national citizenship."[197] Discrimination against African Americans in places of public accommodations made them second-class citizens.[198] It denied them the privileges and immunities of national citizenship and was a vestige of slavery that continued to shackle and demean them even though slavery had been abolished for a century.[199] Powerfully, Senator Humphrey, one of the CRA's sponsors, stated that African Americans did not seek separation from their fellow citizens; instead, they sought "participation and inclusion" in their communities, enjoying the rights and privileges of citizenship while accepting its "duties and burdens."[200] "Surely," Senator Humphrey declared, "Congress can do nothing less than to permit them to do their job, to be parts of the total community, and to be parts of the life of this Nation."[201]

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193 LESLIE A. CAROTHERS, THE PUBLIC ACCOMMODATIONS LAW OF 1964: ARGUMENTS, ISSUES AND ATTITUDES IN A LEGAL DEBATE 12 (1968); *see also Hearing on Civil Rights and Public Accommodations*, *supra* note 27, at 691–700.

194 *See, e.g.*, *Hearing on Civil Rights and Public Accommodations*, *supra* note 27, at 691–700.

195 Special Message to the Congress on Civil Rights and Job Opportunities, 1963 PUB. PAPERS 483, 485 (June 19, 1963) (internal quotation marks omitted).

196 Bell v. Maryland, 378 U.S. 226 (1964).

197 *Id.* at 250 (Douglas, J., concurring).

198 *Id.* at 260.

199 *See id.* Michael Stein had the privilege of serving with Robert Bell, then Chief Judge of the Court of Appeals for Maryland, on an ADA committee for the National Center for State Courts. Judge Bell's views on inclusion for people with disabilities were an extension of those for which he advocated on behalf of persons of color, and Professor Stein expresses deep gratitude to "the Chief" for his friendship and support.

200 110 CONG. REC. 6532 (1964) (statement of Sen. Humphrey).

201 *Id.*

Since the passage of the CRA, scholars have noted the close tie between racial integration of public accommodations and well-functioning democracies. Racial "[i]ntegration is not only a remedy for injustice"; it is essential for a truly democratic society.[202] People from different races lead different lives and have diverse "interests, values, conflicts, hopes and fears."[203] Racial integration, particularly in places of public accommodation, is thus necessary to ensure the collective exchange of ideas essential in a democratic society.[204] In her book, *The Imperative of Integration*, Professor Elizabeth Anderson demonstrates that full access to social participation and public accommodations is a key requirement for a robust democratic culture.[205] Anderson explains that sustained association is necessary to realize a democratic culture where "shared norms of mutual respect" facilitate intergroup communication about "problems and policies of public interest."[206] She goes on to highlight the benefits that accrue to society when diverse racial groups interact with and learn from one another.[207] At the same time, Anderson points out that achieving integration for some socially salient groups requires "formal desegregation," meaning the affirmative use of laws and policies to abolish formal barriers to such association.[208] The next section sets forth the normative justifications for such action in the context of Internet accessibility.

B. The ADA, Public Accommodations, and the Internet

The rationales underlying social inclusion for people with disabilities under Title III of the ADA parallel the CRA's same integrative concerns for African Americans and other minorities.[209]

The history of people with disabilities' isolation from their communities in the United States is reminiscent of the segregation and stigma experienced by racial minorities. Families and communities historically supported people with disabilities.[210] That changed in the

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202 Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 21 (2004).

203 *Id.* at 22.

204 *Id.* at 21–22.

205 ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 21–22 (2010).

206 *Id.* at 111.

207 *Id.*

208 *Id.* at 116–17.

209 For a detailed and international perspective on the relative success of programs to include people with disabilities socially, see ARIE RIMMERMAN, SOCIAL INCLUSION OF PEOPLE WITH DISABILITIES: NATIONAL AND INTERNATIONAL PERSPECTIVES (2013).

210 RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL

West (and increasingly in developing countries) as the traditional forms of support dissolved.[211] Disabled persons were soon pushed into custodial institutions that removed individuals with disabilities from their communities and cut them off from able-bodied persons.[212] The nineteenth century saw the creation (and later, expansion) in the United States of separate educational, medical, and custodial institutions for people with disabilities.[213] Ironically, although the impetus for the creation of these facilities was grounded in well-intended charity, it often resulted in horrific living conditions.[214] These included electric shock therapy to "cure patients of mental illness"[215] and involuntary sterilization,[216] which Justice Holmes justified on the infamous ground that "[t]hree generations of imbeciles are enough."[217] In brief, Americans with disabilities were historically rendered out of sight and without voice.[218]

With this history in mind, it is no surprise that when Senator Humphrey tried unavailingly to amend the CRA in 1972 to prohibit disability discrimination, he recalled the same types of invisibility and exclusion that African Americans had faced.[219] He observed that people with disabilities have the right to "know the dignity to which every human being is entitled."[220] He argued that "too often we keep chil-

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DISABILITY POLICY 15 (1984) ("In most cultures, disabled people have been supported within the context of the family and the community."); David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, *in* HANDBOOK OF DISABILITY STUDIES 11, 14 (Gary L. Albrecht et al. eds., 2001) (observing that in the earliest periods of recorded history the norm was for society to care for the disabled).

211 *See* SCOTCH, *supra* note 210, at 15 ("[A]s family and community support systems broke down, physically and mentally disabled persons were relegated to custodial institutions.").

212 *Id.*

213 *Id.* at 15–16; Braddock & Parish, *supra* note 210, at 36–39.

214 Braddock & Parish, *supra* note 210, at 52 (exploring people with disabilities' history of "abuse, neglect, sterilization, stigma, euthanasia, segregation, and institutionalization"); Michael Ashley Stein, Penelope J.S. Stein & Peter Blanck, *Disability*, *in* 2 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 334, 335–36 (Stanley N. Katz et al. eds., 2009).

215 Braddock & Parish, *supra* note 210, at 41.

216 *Id.* at 40 ("Between 1907 and 1949, there were more than 47,000 recorded sterilizations of people with mental disabilities in 30 states.").

217 Buck v. Bell, 274 U.S. 200, 207 (1927).

218 *See* Braddock & Parish, *supra* note 210, at 29–42 (canvassing how the history of people with disabilities in the United States was marked by invisibility and deplorability).

219 *Compare* 118 CONG. REC. 525 (1972) (statement of Sen. Humphrey) ("The time has come when we can no longer tolerate the invisibility of the handicapped in America."), *with* 110 CONG. REC. 6532 (1964) (statement of Sen. Humphrey) ("Congress can do nothing less than to permit [African Americans] to do their job, to be parts of the total community, and to be parts of the life of this Nation.").

220 118 CONG. REC. 525 (1972) (statement of Sen. Humphrey).

dren, whom we regard as 'different' or a 'disturbing influence,' out of our schools and community activities altogether."[221]

Early court decisions were thus focused on undoing the de facto segregation of people with disabilities. In the 1970s, *Wyatt v. Stickney*[222] checked the "indiscriminate institutionalization of mentally disabled persons,"[223] and *Mills v. Board of Education*[224]—a judicial precursor to what is now the Individuals with Disabilities Education Act[225]—held that all disabled children were entitled to an appropriate education and training.[226] Correspondingly, in *City of Cleburne v. Cleburne Living Center, Inc.*,[227] the Supreme Court held that a zoning ordinance was unconstitutional when it would have prevented the development of a group home for persons with intellectual disabilities in a residential neighborhood.[228] Justice Marshall, who was at the forefront of combating de jure racial partitioning,[229] strikingly characterized the history of separating out persons with disabilities as a regime of "segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow."[230]

When ADA sponsor Senator Lowell Weicker provided his opening remarks for the bill, he drew the same parallel by analogizing the detrimental effects of excluding disabled individuals from public accommodations with similar restrictions based on race.[231] Referring to African Americans' restricted access to seating on buses, Senator Weicker noted that disabled individuals "can't get on the bus at all."[232] Timothy Cook of the National Disability Action Center likewise found lessons for disability in earlier efforts directed at racial integration.[233] He recalled the lesson taught by Rosa Parks and *Brown v.*

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221 *Id.*

222 Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

223 SCOTCH, *supra* note 210, at 37.

224 Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

225 Individuals with Disabilities Education Act (IDEA) of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended in scattered sections of 20 U.S.C.).

226 SCOTCH, *supra* note 210, at 37-38.

227 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

228 *Id.* at 450.

229 *See generally* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994) (discussing the role Justice Marshall played in fighting segregation).

230 *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part).

231 *See* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 175 (2005).

232 *Id.* (internal quotation marks omitted).

233 S. REP. NO. 101-116, at 6 (1989).

Board of Education[234]: that "segregation affects one's heart and mind in ways that may never be undone."[235]

The ADA hearings were focused on people with disabilities' segregation from their communities.[236] A national Harris poll at the time found that the vast majority of people with disabilities did not attend movies, musical performances, or sporting events.[237] Similarly, it found that many people with disabilities *never* frequented restaurants or grocery stores or attended church.[238] Other compelling testimony included anecdotes of the way in which disability segregation was often laced with animus: a wheelchair user was removed from an auction house because she was deemed "disgusting to look at";[239] people with Down Syndrome were barred from a zoo after a keeper feared they would frighten the chimpanzees;[240] an academically competitive child was banned from attending public school when a teacher alleged his physical appearance "produced a nauseating effect" upon classmates;[241] and a competent arthritic woman was denied a job because of the college trustees' belief that "normal students shouldn't see her."[242]

As a result of extensive hearings, Congress found that disabled individuals had been subject to many forms of discrimination, "including outright intentional exclusion,"[243] as well as more invidious forms of exclusion that arose through policies, practices, and "exclusionary qualification standards and criteria."[244] Moreover, Congress explicitly declared in its findings that people with disabilities had been "rele-

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234 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

235 S. REP. NO. 101-116, at 6 (1989) (internal quotation marks omitted).

236 *E.g.*, *id.* (statement of Judith Heumann) ("My entrance into mainstream society was blocked by discrimination and segregation. Segregation was not only on an institutional level but also acted as an obstruction to social integration."); *id.* at 10 ("[I]t is clear that an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation."); *id.* at 12 ("Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society."); *id.* at 14 (referring to people with disabilities as "a discrete and insular minority"); *id.* at 19 (calling for the integration of people with disabilities); *id.* at 55 (noting that Title III's provisions, taken together, "are intended to prohibit exclusion and segregation of individuals with disabilities").

237 *Id.* at 10.

238 *Id.*

239 *Id.* at 6 (statement of Judith Heumann).

240 *Id.* at 6–7 (recollecting a 1988 *Washington Post* story).

241 *Id.* at 7 (internal quotation marks omitted) (citing condemnation of this case in *Alexander v. Choate*, 469 U.S. 287 (1985)).

242 *Id.* (citing recollection of this case in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987)).

243 42 U.S.C. § 12101(a)(5) (2006).

244 *Id.*

gated to a position of political powerlessness in our society"[245] and subjected to continuing "unfair and unnecessary discrimination and prejudice"[246] in areas that included education, transportation, access to public services, and voting.[247]

These legislative findings evoke memories of racial segregation and are consonant with the core claim of Social Model theorists: disability is a social—not individual or medical—problem constituted by "all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements."[248] The Attorney General at the time stated that "we must bring Americans with disabilities into the mainstream of society: 'in other words, full participation in and access to all aspects of society.'"[249]

The ADA was thus passed to overcome disability segregation. The statute was an omnibus effort at social assimilation, and the legislative history is replete with evidence of that.[250] Advocates sought wholesale integration, and for good reason. As social psychologists have long contended,[251] interpersonal contact with people who are different, under appropriate conditions, may have a variety of positive effects.[252] It can help people realize their own biases, lead to cross-group relationships, and over time, yield an appreciation for diversity.[253] The authors of the ADA similarly understood that the best

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245 *Id.* § 12101(a)(7).

246 *Id.* § 12101(a)(9).

247 *Id.* § 12101(a)(3).

248 MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 33 (1996). These observations were in contrast to the traditional view of disability being located squarely within the individual and redressable only by medical institutions. *Id.* at 31–37. For more on the social model of disability, see generally Areheart, *supra* note 173 (discussing how society has socially constructed the term disability).

249 S. REP. NO. 101-116, at 10 (1989).

250 *See id.* at 19, 55–57.

251 *See id.* at 17–19.

252 This phenomenon is generally termed the "contact hypothesis." *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE 281 (1954) ("Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in the pursuit of common goals . . . provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups."); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 753, 758–61, 766 (2006) (conducting a quantitative meta-analysis of the contact hypothesis research literature and concluding that contact typically reduces intergroup prejudice).

253 *See* Jody Heymann, Michael Ashley Stein & Gonzalo Moreno, *Disability, Employment, and Inclusion Worldwide*, *in* DISABILITY AND EQUITY AT WORK 1, 2 (Jody Heymann, Michael

way to reduce stigma and prejudice was to strategically force the issue of integration, and ultimately interaction.[254] In summarizing the legislation, the statute's authors declared there was a "compelling need" for a "comprehensive national mandate" to end discrimination and integrate people with disabilities "into the economic and social mainstream of American life."[255]

The ADA, from a formal legal point of view, and in the lived experiences of persons with disabilities, has advanced this integration mandate.[256] Despite the ADA's shortcomings in advancing employment opportunities for Americans with disabilities,[257] Title III has been generally effective in making public accommodations accessible.[258] Contributing to these efforts have been significant rulings by

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Ashley Stein & Gonzalo Moreno eds., 2014) (observing that even "required interactions can be powerful vehicles for wider social transformation"); *see also* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1954 (2009) ("One explanation for the positive impact of contact on intergroup bias is that it reduces the salience of race and sex. The underlying mechanism appears to be both cognitive and motivational. Cognitively, intergroup contact decategorizes group boundaries, so that group members view themselves and others more as either individuals, or part of one larger group—and less as members of separate, competing groups. Motivationally, forming a 'common group identity' triggers the same positive attitudes that characterize ingroup bias, therefore leading people to see each other more generously." (footnotes omitted)).

254 *Cf.* S. REP. NO. 101-116, at 15 (1989) (discussing the problem of stigma); *id.* at 19 (discussing social integration motivation).

255 *Id.* at 19.

256 *See* Waterstone, *supra* note 12, at 1808–10, 1874–75 (finding that the ADA's integration mandate has been generally successful, especially when analyzed through the lenses of Titles II and III).

257 BURKHAUSER & DALY, *supra* note 65, at 102 (observing that the ADA has not achieved improved employment outcomes for people with disabilities, but that this is due primarily to the way in which "[Social Security Disability Insurance] and [Supplemental Security Income] programs continue to substitute for, and thus discourage, work"); COLKER, *supra* note 231, at 69 (observing that no study has shown the ADA to have a positive impact on the employment rate of people with disabilities).

258 *See* Waterstone, *supra* note 12, at 1840 (analyzing case data and concluding that Title III cases have generally advanced the cause of disability rights); *id.* at 1829 (finding that results under Titles II and III are less pro-defendant and more pro-plaintiff than under Title I).

the Supreme Court,[259] as well as consistent lower federal court victories.[260]

Most notably, there has been significant progress towards achieving a disability-inclusive society since the passage of the ADA. A series of reports conducted by the National Council on Disability ("NCD"), an independent federal agency, has documented the dramatic improvement in the daily lives of people with disabilities arising from the improved accessibility of the physical environment. One such report, *Voices of Freedom: America Speaks Out on the ADA*,[261] resulted from thousands of interviews with individuals with disabilities from every state, speaking to the transformation the ADA has had on their ability to participate in their own communities.[262] Nevertheless,

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259 *See generally* United States v. Georgia, 546 U.S. 151, 159 (2006) (holding that Title II of the ADA "validly abrogates state sovereign immunity" as applied to cases in which the conduct that violated the statute also violated the Fourteenth Amendment); Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 142 (2005) (holding that the ADA generally applies to foreign cruise ships in American waters except when Title III regulates a vessel's internal affairs); Tennessee v. Lane, 541 U.S. 509, 532–34 (2004) (holding that Title II of the ADA validly abrogates state sovereign immunity when applied to protect the fundamental right of access to courts); PGA Tour, Inc. v. Martin, 532 U.S. 661, 680 (2001) (upholding the accommodation right of a disabled professional golfer to use a golf cart rather than walk during a PGA tour); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 587 (1999) (holding that the ADA, under certain circumstances, requires states to provide services to individuals with disabilities in community settings rather than in institutions); Bragdon v. Abbott, 524 U.S. 624, 641–42, 648 (1998) (holding that the ADA protects an individual with asymptomatic HIV against a dentist's discriminatory refusal to provide her treatment, unless the dentist can establish the existence of a "direct threat" to health or safety); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998) (holding that Title II of the ADA extends to state prison inmates).

260 *See* Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1290 (2012) (observing that disability cause lawyers have focused their efforts less on Supreme Court cases, and more on "lower federal court public accommodation cases that generated settlements and rulings affecting large numbers of people with diverse disabilities").

261 *See* NAT'L COUNCIL ON DISABILITY, VOICES OF FREEDOM: AMERICA SPEAKS OUT ON THE ADA (1995), *available at* http://files.eric.ed.gov/fulltext/ED386833.pdf.

262 *See, e.g.*, *id.* at 9 (statement of Kristopher Hazard, Tennessee) ("Before the ADA was passed, my family couldn't go any place together because of my Mom's wheelchair. But now many places are accessible, and we can go on outings as a family. I'm glad for the ADA."); *id.* at 11 (statement of Ronald Giovagnoli, New Hampshire) ("Before we had the ADA, it was difficult to convince the business community . . . to accommodate physically challenged people like myself who use wheelchairs. But ever since . . . people have begun to realize that consumers who are physically challenged are no longer isolated, but are integrated into society . . . ." (alterations in original)); *id.* at 9 (statement of Gary Tidmore, Wisconsin) ("The first time a group came to the hotel and needed equipment for the hearing impaired, the Inn rented the equipment from another hotel. Then we purchased our own equipment, with the input of some consumers with hearing impairments. Today the Inn on the Park is equipped with TDDs, bed shakers, close captioned TV, brailled menus, emergency evacuation procedures, and a range of wheelchair accessible rooms.").

Title III has yet to achieve access to the Internet, and exclusion from its interface is demeaning. Virtual exclusion is especially galling when contrasted with the dramatic improvements in the physical environment following the passage of the ADA. Thus, while the physical world is improving access and social equality for people with disabilities, the virtual world—which increasingly *is* the world[263]—erects further barriers.[264]

In addition to the stigmatic concerns discussed above,[265] Title III of the ADA was, much like Title II of the CRA, passed to address economic concerns—including those associated with the hindrances of interstate commerce. During debate over the passage of the ADA, the Attorney General testified that achieving disability integration would result in "increased spending on consumer goods, and increased tax revenues."[266] This suggests that the exclusion of many disabled persons from commercial websites also impacts interstate commerce. With so many transactions occurring online today,[267] the exclusion of people with disabilities and those with related impairments from the Internet likely has a negative impact on our economy.

A 2011 NCD report, for instance, documented the impact that exclusion from the Internet has on the economic well-being of Americans with disabilities.[268] It noted that the Internet lowers the costs of information and networking—the Internet can enhance the ability of people with disabilities "to gain human capital and find and compete for good jobs."[269] Conversely, exclusion of people with disabilities from the Internet may further unlevel the playing field for jobs.[270]

The fact that the Internet is a new, technologically advanced form of transacting business should not exclude it from the definition of public accommodations under the statute. The "coming of automobiles" argument did not alter the *Heart of Atlanta* Court's determina-

263 *See supra* notes 38–48 and accompanying text (describing the ever-increasing importance of the Internet).

264 *See supra* Part II.B.

265 *See supra* notes 235–56 and accompanying text.

266 S. REP. NO. 101-116, at 16 (1989).

267 *See supra* Part I.A.

268 *See generally* POWER OF DIGITAL INCLUSION, *supra* note 20 (discussing how the disabled are impacted by nonaccessible technologies).

269 *Id.* at 72. "The Internet underpins the shift to a network-based society, sharing information quickly and efficiently, supporting social networking, and in a real sense leveling the playing field." *Id.* at 81.

270 *See id.* at 212 ("As social networking sites become a major mechanism for matching potential employees with potential employers, access to such sites, and to the right connections within them, will become increasingly important for finding work.").

tion that public accommodations must be integrated;[271] nor should the ever-evolving and unanticipated nature of the Internet suggest that the integration of new technologies was outside the scope of congressional intent.[272]

Moreover, when the ADA was passed, witnesses testified about the need to not artificially limit places of public accommodations to traditional categories, such as "restaurants, hotels, and places of entertainment."[273] They instead stressed "the need to define places of public accommodations to include all places open to the public."[274] With this exhortation in mind, the focus of the ADA should not be on medical or technological advances (although equal access to these innovations can be quite beneficial), but rather on the discrimination that accompanies the fault lines between disability and social structures.[275] Notably, the fact that Title III of the ADA is more expansive than Title II of the CRA further militates in favor of a broad conception of public accommodations under Title III.[276] Without such an expansive interpretation, tenBroek's assertion that people with disabilities should have "the legal right to be abroad in the land" loses force.[277]

Finally, Title III of the ADA was concerned about fostering people with disabilities' democratic possibilities. As Justice Douglas de-

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271 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964).

272 There are additional reasons to surmise that the ADA was constructed to be responsive to unanticipated needs. First, the ADA was constructed to be flexible. For example, there are no per se disabilities, and that inquiry has long been an individualized one, which might be said to give courts flexibility in the question of who is covered by the statute. *See* Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 328 (1997). There is other evidence that the drafters of the ADA were aware the future would bring changes that could not be anticipated. For example, the statute was, and is, full of nonexhaustive, illustrative lists—such as those for "major life activities." 42 U.S.C. § 12102(2) (2012) ("[M]ajor life activities include, but are not limited to . . . ."). There is also the new, post-amendments rule of construction that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals." *Id.* § 12102(4)(A).

273 S. REP. NO. 101-116, at 10 (1989).

274 *Id.*

275 *See* Stein et al., *supra* note 36, at 694 (maintaining that the force of disability antidiscrimination laws ought to be on eviscerating the underlying causes of prejudice rather than on secondary issues such as technical statutory coverage).

276 *See* Burgdorf, Jr., *supra* note 149, at 286 (observing that Title II of the CRA's coverage "pales in comparison to the array of public accommodations covered by the ADA"). *See generally* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) (discussing the legislative history of Title III of the ADA in relation to Title II of the CRA, and detailing how the former was intentionally made to be broader).

277 tenBroek, *supra* note 1, at 841.

clared fifty years ago, the right to make use of "public accommodations is an incident of national citizenship."[278] This is no less true in the context of the ADA and has special salience when applied to use of the Internet. Exclusion of a substantial minority of persons from the Web uniquely impairs a collective and democratic exchange of ideas. It is an affront to our constitutional heritage, especially as society moves increasingly online. To participate and be part of the entire community includes being a member of the online community with equal access to its economy. Markedly, exclusion from the Internet poses an even more direct threat to our democracy and the First Amendment, as will be explained below.

III. THE INTERNET AND THE CONSTITUTION

Beyond social justice, policy, and historical justifications, strong constitutional considerations warrant addressing Internet accessibility. The Internet is now the primary conduit for the exercise of First Amendment rights. The Web's relationship to the Constitution is made obvious by reference to two of the traditional justifications for First Amendment principles: the right to democratic self-governance[279] and the right to personal autonomy and self-expression.[280] In this way, the ability to traverse the Internet is tied to one's opportunity to effectuate First Amendment rights. Exclusion from the Internet and its constituent websites concomitantly limits opportunities to exercise those self-governance and self-expression rights.[281] De-

278 Bell v. Maryland, 378 U.S. 226, 250 (1964) (Douglas, J., concurring).

279 *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2362-63 (2000) (stating that "[t]he democratic theory of the First Amendment . . . protects speech insofar as it is required by the practice of self-government"); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1804 (1995) [hereinafter Sunstein, *Cyberspeech*] ("[T]he goals of the First Amendment are closely connected with the founding commitment to a particular kind of polity: a deliberative democracy among informed citizens who are political equals."); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 316 (1992) ("[W]e should understand the free speech principle to be centered above all on political thought. In this way the free speech principle should always be seen through the lens of democracy.").

280 *See, e.g.*, C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 259 (2011) (asserting that the "most appealing" theory of the First Amendment regards "the constitutional status of free speech as required respect for a person's autonomy in her speech choices"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) ("Speech is protected [by the Free Speech Clause] not as a means to a collective good but because of the value of speech conduct to the individual."); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (characterizing individual self-realization as the "only one true value" of free speech).

281 *See infra* Part III.A–B.

spite many populations being disadvantaged and underserved by information policy,[282] those with impairments, as further elucidated below, are impacted in a particularly salient way.

A. Democratic Self-Governance

Free speech is at the heart of representative democracy. It includes both the individual "dignitary will to self-assertion" and the collective benefit of resisting authoritarianism.[283] An equal opportunity to shape a just legal order requires both the right to speak and the right to access information.[284] The absence of these rights may ultimately exclude some groups from engaging in self-governance on an equal basis.[285]

The Internet has created opportunities for democratic engagement that were unthinkable a decade or two ago. The Web has become the new "public square" for learning about one's community, influencing others' views, and participating in political processes.[286] To illustrate: when one mother recently found out that her disabled son's schooling would no longer be funded, she started an online petition that generated more than 7,000 signatures within a few days.[287] That petition, in turn, forced the city council to act and helped salvage her child's education.[288]

In order to fulfill its basic duties, a vibrant democracy must guarantee equal access to information and political power for all of its citizens.[289] The Internet has a fundamental role in facilitating this flow of

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282 *See* JAEGER, *supra* note 18, at 13-14; Paul T. Jaeger, Mega M. Subramaniam, Cassandra B. Jones & John Carlo Bertot, *Diversity and LIS Education: Inclusion and the Age of Information*, 52 J. EDUC. FOR LIBR. & INFO. SCI. 166, 166 (2011).

283 Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. (forthcoming 2015), *available at* http://ssrn.com/abstract=2390234.

284 As Justice Brennan eloquently stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24–25 (Lawbook Exch., Ltd. 2000) (1948) (noting that self-government relies not just on "the words of the speakers, but the minds of the hearers").

285 *See* Tsesis, *supra* note 283, at 25–31.

286 *See* Brie Rogers Lowery, *The Internet Is Making Democracy Stronger and More Vibrant*, HERALDSCOTLAND (Feb. 4, 2014), http://www.heraldscotland.com/comment/letters/the-internet-is-making-democracy-stronger-and-more-vibrant.23347955 (discussing how the internet has "shaken up political engagement in a way that would have been unthinkable 10 years ago").

287 *Id.*

288 *Id.*

289 Sarah Hawthorne, Jeffrey Senge & Norman Coombs, *The Law and Library Access for Patrons with Disabilities*, INFO. TECH. & DISABILITIES J. (Aug. 1997), http://itd.athenpro.org/volume4/number1/article5.html.

information. Half of all adults now get their local news from the Internet.[290] Another part of engaging politically involves knowing what activities the government is performing or avoiding. The Freedom of Information Act ("FOIA")[291] gives citizens the right to request and receive federal government documents, subject to temporal and national security considerations.[292] But a recent lawsuit suggests that documents being provided pursuant to FOIA may not be accessible to people with print disabilities.[293] Moreover, since 1998, all federal agencies have been required under Section 508 of the Rehabilitation Act[294] to ensure that their electronic records are accessible.[295] Recent data uncovered by the DOJ, however, suggests that compliance with that law is relatively poor.[296] Consequently, lack of equal access to information through the Web hinders Americans with disabilities (and others who are similarly situated) from exercising their constitutional right to information.

The Internet has tremendous potential for galvanizing political participation—with much of that potential already being realized. Americans now commonly go online to sign petitions, contact government officials, and comment on news stories.[297] Nearly forty percent of all American adults use social networking sites to act politically.[298] This includes sharing thoughts on political issues, reposting political content, following elected officials or candidates for office, and encouraging others to vote or otherwise take action on political issues.[299] Voters use the Internet to learn about candidates' views and to cri-

290 PEW RESEARCH CTR., HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY 13 (2011); *see also id.* at 22 ("The internet has already surpassed newspapers as a source Americans turn to for national and international news. The findings from this survey now show its emerging role as a source for local news and information as well." (footnote omitted)).

291 Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012).

292 *Id.* Information about FOIA, including the process of making requests, is set forth in a website maintained by the DOJ, which is available at http://www.foia.gov/.

293 Lazar et al., *supra* note 172, at 61–63 (citing and analyzing the arguments in *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*).

294 Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

295 29 U.S.C. § 794d(a) (2012).

296 Lazar et al., *supra* note 172, at 62 (citing U.S. DEP'T OF JUSTICE, SECTION 508 REPORT TO THE PRESIDENT AND CONGRESS: ACCESSIBILITY OF FEDERAL ELECTRONIC AND INFORMATION TECHNOLOGY (2012), *available at* http://www.ada.gov/508/508_Report.htm).

297 PEW RESEARCH CTR., CIVIC ENGAGEMENT IN THE DIGITAL AGE 3 (2013) [hereinafter CIVIC ENGAGEMENT IN THE DIGITAL AGE], *available at* http://www.pewinternet.org/files/oldmedia//Files/Reports/2013/PIP_CivicEngagementintheDigitalAge.pdf.

298 In 2012, thirty-nine percent of adults acted politically using social media. *Id.* The proportion of the population who does so will only increase given the surging popularity of social media sites such as Twitter.

299 *Id.* at 2–3.

tique them.[300] Candidates similarly get their names and views out to the masses via the Web.[301] About half of the states now allow online voting registration,[302] and the Internet is slowly being considered as a way to actually vote.[303] Smaller jurisdictions have already experimented with online voting, which could in the future become the "new normal."[304]

These technological developments are especially pertinent for the less privileged.[305] People with power or means have always had a voice and the ability to obtain the information they need to engage democratically—they have always had a place in the public square. By contrast, the Internet opens up the public square to everyone else.[306] Anyone who now wants to stand on a cyber-corner and spread her views may do so. There is space for everyone at the digital table of public deliberation. Yet for the attractiveness of these metaphors, they fail us if attention is not given to disability-related accessibility, which can also enable other segments of the population.

The way in which political and civic functions have moved online holds immense promise for people with disabilities. For the impaired

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300 *See* Eszter Hargittai & Aaron Shaw, *Digitally Savvy Citizenship: The Role of Internet Skills and Engagement in Young Adults' Political Participation Around the 2008 Presidential Election*, 57 J. BROADCASTING & ELECTRONIC MEDIA 115, 115–16 (2013) (surveying ways in which young adults complemented traditional media information through use of Internet sources).

301 Kevin M. Wagner & Jason Gainous, *Electronic Grassroots: Does Online Campaigning Work?*, 15 J. LEGIS. STUD. 502, 502 (2009) (finding that presence on the Internet is "a significant predictor of the total votes candidates garnered . . . even when controlling for variables such as funding, incumbency and experience").

302 Elisabeth MacNamara, *Online Voter Registration: Improving Access to Voting*, HUFFPOST POL. (Apr. 22, 2014, 5:59 AM), http://www.huffingtonpost.com/elisabeth-macnamara/online-voter-registration_b_4824917.html.

303 *See generally* Ben Giles, *Tech Executives Offer Vision of Online Voting for Arizona*, ARIZ. CAPITOL TIMES (Feb. 27, 2013, 11:02 AM), http://azcapitoltimes.com/news/2013/02/27/tech-executives-offer-vision-of-online-voting-for-arizona/. Florida and West Virginia, for example, already provide online voting for military and U.S. citizens who are overseas during elections. *Id.*

304 Alexander H. Trechsel & Urs Gasser, *Casting Votes on the Internet: Switzerland and the Future of Elections*, HARV. INT'L. REV., Spring 2013, at 53, 53–54 (discussing "over ten years of experience with Internet voting" for regional governments in Switzerland).

305 *Democracy and Technology*, NAT'L DEMOCRATIC INST., https://www.ndi.org/democracy-and-technology (last visited Mar. 22, 2015) (arguing that the Internet can help "overcome resource disparities and entrenched monopolies of power and voice"). As far back as 1995, Cass Sunstein suggested that the democratic opportunities in cyberspace might be of "particular benefit for people of moderate or low income." Sunstein, *Cyberspeech*, *supra* note 279, at 1784.

306 Class differences still impact political engagement of all kinds—including activity online. CIVIC ENGAGEMENT IN THE DIGITAL AGE, *supra* note 297, at 2. The effect is, however, less pronounced in the social media context. *Id.* at 4.

who are unable to leave their homes, the Internet opens wide the door to public discourse. For those able to leave, but for whom social interaction is difficult, the ease of the Web may now motivate them to engage. And for those with impairments that make communicating difficult (e.g., speech or hearing impairments, or individuals on the autistic spectrum), the Internet furthers free speech in rather obvious ways.

When the Internet is inaccessible, though, it undercuts critical opportunities for political and civic engagement. In the aforementioned contexts, accessibility is the difference between being able to read other people's ideas (right to information), and engage with those ideas (right to free speech), or not. If one cannot traverse the Internet, her speech on the Internet is chilled. To take a prominent example, the prospect of online voting holds tremendous promise for people with disabilities, but unless we are thoughtful about ensuring accessibility, it may be just one more technology with the potential for advancing the quality of life for individuals with disabilities that again goes unrealized.[307]

In 1995, Cass Sunstein argued in the context of cyberspace "that instead of allowing new technologies to use democratic processes for their own purposes, constitutional law should be concerned with harnessing those technologies for democratic ends—including the founding aspirations to public deliberation, citizenship, political equality, and even a certain kind of virtue."[308] Sunstein's prescient concern applies directly to the way in which the Internet holds the power to either undercut or underscore democratic self-governance.[309] The Internet, however, must first be made accessible and broadly inclusive to support these First Amendment goals.

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307 The telephone is one previous technology that required thoughtful consideration when it came to accessibility. It was a boon for the blind. And its inventor, Alexander Graham Bell, thought the telephone would help close the communication gap for the deaf. But Dr. I. King Jordan, the first deaf president of Gallaudet University, observed in 1989: "Not only did the telephone not help close the gap, but in many ways it widened it and has become one more barrier in the lives of deaf people." S. REP. NO. 101-116, at 13 (1989) (internal quotation marks omitted). ADA proponents thus sought accessibility for telecommunications, which ended up codified as Title IV of the ADA, at 47 U.S.C. § 225.

308 Sunstein, *Cyberspeech*, *supra* note 279, at 1804.

309 *See id.* at 1765.

B. Personal Autonomy and Self-Expression

The right to free speech means the right to communicatively exercise one's discursive capacities.[310] Disclosing ideas to and interacting with others allows people to share thoughts, feelings, and other personal information that would otherwise "remain purely phenomenological."[311] While there can be obvious instrumentalities to speech (e.g., the democratic ends explored above), the benefit may also be understood as largely intrinsic. Free speech, over time, facilitates the formation of self.[312] There is, in this way, a dignitary interest that resides in each human being to communicate one's ideas and thoughts to others.[313] Scholars have thus argued that the commitment to personal autonomy is a strong underlying reason for courts to safeguard and treasure free speech.[314]

Personal autonomy, in this context, is not the ability to remain separate and independent from others, but the ability to learn how one thinks or feels about something through recursive discourse.[315] One scholar writes, "the possibility and condition of independence depends not on separation from others but on particular and extensive sorts of interconnections with others and with the social and political

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310 Tsesis, *supra* note 283, at 16–17; *see also* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1950 (2013) (describing surveillance as an infringement of self-construction).

311 Tsesis, *supra* note 283, at 18.

312 *See id.* ("Personal identity is tied to the ability to formulate opinions and ascertain facts.").

313 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) (Brennan, J., dissenting) (stating that free expression under the First Amendment is "intrinsic to individual liberty and dignity"); Tsesis, *supra* note 283, at 17–18; *see also* RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1253 (2013) (asserting that protections of anonymity speech "embraced the self-fulfillment and individual-autonomy goals of the First Amendment").

314 *See* Tsesis, *supra* note 283, at 22 ("The autonomy value of self-expression is undoubtedly at the heart of why the United States and other liberal democracies place such a high value on its protection.").

315 *See* Bruce Jennings, Daniel Callahan & Arthur L. Caplan, *Ethical Challenges of Chronic Illness*, HASTINGS CENTER REP., Feb./Mar. 1988, at 1, 12 ("Autonomy is not some a priori property of persons abstractly conceived. It is an achievement of selves who are socially embedded and physically embodied.").

fabric of one's community."[316] It is thus access to social spaces and generative relationships that makes true autonomy possible.[317]

Just as with political speech, the Internet has opened up new opportunities for personal self-expression that were previously inconceivable. Nearly everyone, regardless of relationships or access to specific forums, now has a place to communicate and work out their thoughts or feelings on any topic. Whether through blogging, chat rooms, social media, or email, ample opportunities exist for deliberatively engaging with others via the Internet. And people who might not interact offline can share ideas or interact together online. In this way, the Web may be seen as a quintessential collaborative community, in which relationships exist on a plane that is much more horizontal than in real life.[318]

Further, online speech holds immense promise for people with disabilities. Those people who have difficulty leaving their homes or traveling to meet up in public locations can now communicate in comfort. For others, getting about may not be an issue, but opportunities to interact with others may not be fulsome due to social bias or the way in which certain impairments impede one's ability to communicate. The latter category might include people for whom speech or hearing is difficult or those on the autism spectrum.[319] The Internet thus presents a unique opportunity to build social capital with relatively low effort and minimal hedonic costs.[320]

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316 Ells, *supra* note 127, at 606. Ells further explains:

> [W]e are only dependent or independent with regard to certain specified tasks and in light of certain specified assumptions. We are all dependent upon others to help equip us with the basic provisions of a healthy and happy life (e.g., food, shelter, electricity, potable water, affection, and so on), but these dependencies usually go unnoticed. We might be considered independent with regard to some task to the extent that certain opportunities are already available to us or, conversely, we might be considered dependent to the extent that needed opportunities are not available without the intervention of others. Thus, labels of independence and dependence are largely relative to circumstances.

Id. at 602–03.

317 *Id.* at 606. *See generally* Janet E. Lord & Michael Ashley Stein, *Contingent Participation and Coercive Care: Feminist and Communitarian Theories of Disability and Legal Capacity*, *in* COERCIVE CARE: RIGHTS, LAW AND POLICY 31, 31–32 (Bernadette McSherry & Ian Freckelton eds., 2013) (arguing that autonomy is predicated on interdependence rather than on atomistic notions).

318 *See supra* notes 125–26 and accompanying text (discussing collaborative communities).

319 *See supra* note 75 and accompanying text (discussing the virtue of the Internet for someone with autism).

320 *See* Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 401 (2006) (discussing "hedonic costs" for accommodating individuals with mental illnesses).

Having the option to interact with others via the Internet also enables the legal capacity of persons with disabilities. In contrast to the history of isolation and coercive care historically imposed upon people with disabilities,[321] equal access to the Web permits them to exercise rights that are critical to community membership. Social conditions—here, the agency of Internet access—impact not only the development of autonomy, but also the appreciation of the range of choices available for the exercise of autonomy. To illustrate: rights afforded by statute or regulation may meaningfully enhance life for people with disabilities in the community, but only if they know about such rights and can appreciate their range of choices to act upon such rights. Moreover, although traditional understandings of autonomy promote the values of independence, self-sufficiency, and separation, feminist understandings highlight the value of interconnectedness.[322] Being embedded in social relations is, in this view, a precondition for empowerment.[323] As noted by Professor Carlos Ball, we all depend upon each other and are social, relational beings that form communities based upon interactions with others.[324]

When Internet accessibility is foreclosed by exclusionary design, people with disabilities are impaired in effectuating their constitutional rights—even as the capacity to effectuate those same rights is constantly expanding for others not so impaired. However, if the Internet and its constituent websites are accessible, a person with a disability can express herself and interact with others from wherever she is located. It is not necessary to travel anywhere or expend social capital she may not have. Internet accessibility thus has the positive capacity to enable the constitutional rights of people with disabilities to democratic self-governance, autonomy, and personal self-expression.

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321 *See supra* notes 209–18 and accompanying text (discussing the history of isolation and abuse suffered by those with disabilities).

322 *See, e.g.*, Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, *in* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 8–10 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

323 Professor Sandel, for example, points to the constitutive role of community in the self's development. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 53–55 (1982); *see also* CHRISTINE M. KOGGEL, PERSPECTIVES ON EQUALITY: CONSTRUCTING A RELATIONAL THEORY 48, 51–53 (1998).

324 *See* Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 108 (2005).

Conclusion

This Article argues that people with disabilities have a legal and constitutional right to live in the world, and by extension, to live in the Internet. Appreciating the historical context for both Title II of the CRA and Title III of the ADA establishes that the Internet is just the type of public accommodation Congress sought as a means to integrate people with disabilities into mainstream American society. Beyond history and legislative intent, this Article situates the sociological literature to demonstrate how the Internet resonates as a place of public accommodation.

But the Internet is broader still. The Web presents a means for traversing all of the traditional categories of public accommodations, as well as exploiting life-transforming opportunities like education and work. Unless Internet accessibility is achieved, the exclusion of people with disabilities—and others, such as the elderly and non-native English speakers—will simply migrate from physical spaces to virtual ones. Moreover, the Internet directly manifests the self-governance and self-expression rights guaranteed by the First Amendment. The issue of Internet access thus stands to undercut or underscore such constitutional entitlements.

Before us lies an unprecedented opportunity to increase social inclusion for people with disabilities. The breadth of Internet usage by American adults, together with the fact that disabilities are typically not apparent online, means that the Internet is a unique and prominent venue for de-biasing. Integrating the Internet holds out the promise of developing a global and collaborative community that can break up embedded stereotypes and hierarchies and reinvent traditional power relationships into more horizontal ones. If these concerns are taken seriously and acted upon, it may result in a space where persons with disabilities (and others) can interact often and freely, and thereby meaningfully enhance their social and human capital.