The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 10 | Number 1 Article 2

12-1-2007

Justice for None: The Fourth Circuit's Decision in Denny v. Elizabeth Arden Salons, Inc. Undermines the Civil Rights Act of 1964.

Sarah Martinez

NOTE

JUSTICE FOR NONE: THE FOURTH CIRCUIT'S DECISION IN *DENNY V. ELIZABETH ARDEN SALONS, INC.* UNDERMINES THE CIVIL RIGHTS ACT OF 1964

SARAH MARTINEZ*

* Sarah Martinez, University of California School of Law, Candidate for J.D., May 2008; University of California Berkeley, B.A. American Studies, May 2002.

I. INTRODUCTION

"It ought to be possible for American consumers of any color to receive equal service in places of public accommodation, such as *hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street . . . .*"[1]

In the statement above, President John F. Kennedy articulated one of the most basic democratic principles. In 1963, however, the notion that the law should treat all people equally was revolutionary.[2] In response to mass demonstrations demanding equality, Congress passed the Civil Rights Act of 1964 (hereinafter the "Act.")[3]

The public accommodations provision of the Act outlaws discrimination in many public establishments.[4] Since the Act's inception, courts

---

1. President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) (transcript available in John F. Kennedy Presidential Library & Museum) *available at* http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm (emphasis added).

2. *See* Brown v. Bd. of Educ., 349 U.S. 294, 294 (1955) (overruling the separate-but-equal doctrine instituted by Plessy v. Ferguson, 163 U.S. 537 (1896) after decades of segregation); *see also* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (adopting the "separate-but-equal" doctrine, which states enforced through the 1950s); *see also* Liza Featherstone, *Classroom Lessons About Segregation*, NEWSDAY, Jan. 21, 2007, at C29 (reviewing SUSAN EATON, THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL (2007) (book review) (noting that prior to the *Brown v. Board of Education* decision, schools did not provide equal education for black children despite "separate-but-equal" doctrine and commenting that inequality still exists); *see also* Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, at 78 (exploring alternative outcomes of the *Brown v. Board of Education* decision); *see also* Michael Jay Friedman, *State Dept.: Enlisting the Courts in the Civil Rights Fight*, U.S. FED. NEWS, Jan. 1, 2007 (describing history and efforts to overturn *the* "separate-but-equal" doctrine); *but see* Linda Greenhouse, *Court in Transition: William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A16 (describing Chief Justice Rehnquist's memorandum asserting that courts should reaffirm the "separate-but-equal doctrine" promoted by the *Plessy v. Ferguson* decision).

3. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (outlawing racial discrimination in many areas of public life); *see also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 678–79 (1995) (describing the role mass resistance and violence in Birmingham civil rights demonstrations played in changing public opinion and ultimately the introduction of the Act); *see also* Ron Ferguson, *We Must Strive to Keep King's Dream Alive Today*, HERALD, Jan. 15, 2007 at 15 (describing the violent police response to demonstrators in Birmingham and President Kennedy's response of initiating the Act); *see also* Lynette Clemetson, *The Nation: A Nation Transformed: Inspired by the Speech, They, Too, Had a Dream*, N.Y. TIMES, Aug. 24, 2003, at 412 (describing fear of violent retribution against participating in civil rights demonstrations).

4. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006); *see generally* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1427

have grappled with identifying what establishments qualify as public accommodations.[5] Specifically, 42 U.S.C. § 2000a(b)(3) (hereinafter "subsection (b)(3)"), which covers places of entertainment, has general and inclusive language that has been subject to the widest interpretation.[6]

Courts have inconsistently interpreted the scope of subsection (b)(3)'s "places of entertainment" provision.[7] One camp reads subsection (b) broadly to include establishments that the Act does not expressly list, such as health spas and amusement parks.[8] The other camp, however, interprets subsection (b) rigidly to exclude any establishments that the Act does not explicitly list.[9]

(2003) (noting effects of the Act on racial relations and that the Act marked the end of some "institutionalized discrimination").

5. *See* United States v. Allen, 341 F.3d 870, 878 (9th Cir. 2003) (recognizing a park as a place of entertainment under Title II); *see also* Rousseve v. Shape Spa for Health and Beauty, Inc., 516 F.2d 64, 68 (5th Cir. 1975) (holding a spa as falling under subsection (b)(3)); *see also* Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1340 n.12 (2d Cir. 1974) (noting that Congress's goal of preventing public accommodations from racially discriminating is incompatible with a narrow interpretation of subsection (b)(3)); *see also* Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 351–53 (5th Cir. 1968) (interpreting the Act broadly to extend the Act's protection to all citizens for equal enjoyment of public accommodation establishments).

6. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (protecting establishments like theaters, sports arenas, and other places of entertainment as places of public accommodation); *see also* Daniel v. Paul, 395 U.S. 298, 307–08 (1969) (rejecting a strict statutory interpretation of "place of entertainment" provision); *see also Rousseve*, 516 F.2d at 67 (adopting a broad interpretation of subsection (b)(3) in deciding whether a spa was place of entertainment); *see also Miller*, 394 F.2d at 350–51 (noting that if Congress had wished to confine subsection (b)(3) to places of exhibition, Congress would have worded the provision to name only places of exhibition); *see generally* Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 863 (N.D. Ohio 2000) (adopting a narrow interpretation of subsection (b)(3) to exclude establishments the Act may cover if located within another place of entertainment).

7. *Compare* Daniel v. Paul, 395 U.S. 298, 306 (1969) (rejecting a strict textual reading of the "place of entertainment" provision), *and Allen*, 341 F.3d at 878 (adopting the Supreme Court's inclusive interpretation of a "place of entertainment"), *and Rousseve*, 516 F.2d at 67 (interpreting subsection (b)(3) liberally), *and Miller*, 394 F.2d at 350–51 (applying a broad interpretation of subsection (b)(3)), *with* Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 431 (4th Cir. 2006) (confining subsection (b)(3) within a narrow interpretation), *and Halton*, 94 F. Supp. 2d at 863 (interpreting subsection (b)(3) narrowly).

8. *See Allen*, 341 F.3d at 876 (holding a park to be place of entertainment under subsection (b)(3)); *see also Rousseve*, 516 F.2d at 65 (holding that the Act protects women's health spas because spas are places of entertainment); *see also Miller*, 394 F.2d at 344–45(holding that the Act protects amusement parks because amusement parks are places of entertainment).

9. *See Denny*, 456 F.3d at 431 (adopting a plain language interpretation of Act to exclude spas); *see also* Halton v. Great Clips, Inc., 94 F. Supp. 2d at 863 (adopting a narrow textual interpretation of subsection (b)(3)).

The Fourth Circuit Court of Appeals follows the latter approach.[10] In *Denny v. Elizabeth Arden Salons, Inc.*, the Fourth Circuit held that a full-service spa is not a place of public accommodation.[11] The Court applied a strict textual interpretation of the Act.[12] In so ruling, the Court undermined the Act's purpose of affording equal protection by adopting arbitrary distinctions between full-service spas and other spas.

This Note argues that the Fourth Circuit's narrow interpretation of the Act's public accommodations provision in the *Denny* decision wrongly constricts the Act's broad remedial purpose.[13] Part I outlines the creation, existence, and debilitation of the Act. Part II describes the Fourth Circuit's ruling in *Denny*. Part III argues that the Fourth Circuit wrongly decided the public accommodations issue in *Denny*. Specifically, the Court erred by imposing a strict statutory approach to interpreting subsection (b)(3), contrary to United States Supreme Court precedent.[14] In addition, the Fourth Circuit Court's interpretation does not comport with subsection (b)(3)'s broad remedial language. Finally, *Denny* devalues the Act's purpose of protecting all citizens equally, regardless of race. Accordingly, if the United States Supreme Court grants certiorari, the high Court should reverse *Denny v. Elizabeth Arden Salons, Inc.*, and hold that spas do fall within the scope of subsection (b)(3).

II. BACKGROUND

The landmark signing of the Civil Rights Act of 1964 was the crowning achievement of the Civil Rights Movement in the United States.[15] Hailed by civil rights leaders at the time and marked with celebration since, the Act became a standard vehicle for equality under the law.[16] As time has

10. *See Denny*, 456 F.3d at 431.

11. *Id.*

12. *See id.* (reasoning that the Act's textual substance omits beauty spas in every single provision and therefore Title II does not protect spas as places of public accommodation); *but see* United States v. Beach Associates, Inc., 286 F. Supp. 801, 808–09 (D. Md. 1968) (stating that courts should liberally construe the Act in accordance with congressional intent to eliminate unfair "humiliation of racial discrimination" and inconveniences incident to discrimination).

13. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (listing various public establishments that affect commerce as qualifying as places of entertainment).

14. *See Daniel*, 395 U.S. at 307–08 (rejecting a strict statutory interpretation of subsection (b)(3)).

15. *See* Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157, 1203–04 (2006); *see also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 679 (1995).

16. *See* Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 14

passed, however, memories of this struggle for equality have slowly faded, while courts have recognized fewer establishments as falling within the Act's scope.[17] Considering this varied history, an analysis of *Denny* requires reviewing the Act's original purpose, its text, and recent interpretations of that text by the courts.

A. *Congress's Legislative Intent and Constitutional Authority*

Congress passed the Act to restore social stability and to protect all persons equally from racial discrimination in places of public accommodation.[18] The Act was largely a response to bitter racial tensions plaguing the United States in the 1950s and 1960s.[19] Racial inequities, however, predate the Act and are no secret in American history.[20]

Congressional ratification of the Reconstruction Amendments marked a radical shift in the legal and constitutional rights of former slaves and their descendants.[21] After the abolition of slavery in 1865, Congress rati-

---

(2001) (celebrating and revering the Act as the most effective contemporary civil rights bill in American history); *see also* Richard W. Stevenson, *Bush Marks 40th Anniversary of the Civil Rights Act*, N.Y. TIMES, July 2, 2004, at A16.

17. *See Denny*, 456 F.3d at 431; *see also Halton*, 94 F. Supp. 2d at 863; *see also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 678–79 (1995) (attributing a contemporary disassociation with the Act to the passage of time and to fading memories of human rights violations, indignities, and struggles for freedom in America).

18. *See* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 671–72 (1995); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (guaranteeing equal access to all persons regardless of race).

19. *See Daniel*, 395 U.S. at 307 (citing 110 CONG. REC. 7402 (1964)) (describing scenes of police arresting national clerics and sending them to jail as proof of dysfunctional and outdated public accommodations laws); *see also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 646 (1995) (noting that all Americans watched disturbing broadcasts of vicious police dogs attacking children praying on sidewalks, and other inhumane treatment).

20. *See* Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 880–81 (1994); *see also* C. Ray Cliett, Comment, *How a Note or a Grope Can Be a Justification for the Killing of a Homosexual: An Analysis of the Effects of the Supreme Court's Views on Homosexuals, African-Americans and Women*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 219, 233–35 (2003) (outlining the historical context of racial segregation from slavery through Civil Rights Movement of 1960s).

21. *See* U.S. CONST. amend. XIII; *see also* U.S. CONST. amend XIV; *see also* U.S. CONST. amend XV; *see also* President Abraham Lincoln, The Emancipation Proclamation (Jan. 1, 1863), *available at* www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html; *see also* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1981 n.106 (2006) (noting that courts recognized racial equality after Congress passed the Reconstruction Amendments).

fied the Fourteenth Amendment to embrace descendants of slaves as equal citizens of this country.[22] The Fourteenth Amendment grants citizenship to all persons born within the United States and entitles them to equal protection under the law.[23] However, states ignored Fourteenth Amendment values of equality and segregated people of color for generations.[24]

The institution of inferior status and different treatment of non-Whites under the law generated several waves of civil rights activism.[25] Racial tensions finally exploded into the Civil Rights Movement of the 1950s and 1960s.[26] Segregationists' violent responses to peaceful sit-ins magnified the humiliation that non-Whites endured.[27] In 1963, mass demonstrations in Birmingham, Alabama prompted the Act's introduction.[28] The whole world watched as segregationists violently attacked peaceful

---

22. *See* U.S. CONST. amend. XIV, § 1 (granting citizenship to all persons born in United States, prohibiting states from imposing laws that would reduce privileges, and guaranteeing all persons "equal protection of the laws"); *see also* Scott v. Sandford, 60 U.S. 393, 393–94 (1856) (Congress ratified the Fourteenth Amendment after the *Scott v. Sandford* decision, which held that descendants of slaves were not citizens of this country); *see also* U.S. CONST. amend. XIII (officially ending slavery in 1865).

23. U.S. CONST. amend. XIV.

24. *See* U.S. CONST. amend. XV; *see also* U.S. CONST. amend. XIX; *Brown*, 347 U.S. at 493 (rejecting the "separate-but-equal" doctrine that legalized segregation); *see also* Christopher A. Bracey, *The Cul De Sac of Race Preference Disclosure*, 79 S. CAL. L. REV. 1231, 1239 n.14 (2006); *see also* LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 97, 153 n.290 (2006) (rebuking an "immoral institution of slavery" and noting its existence until the Emancipation Proclamation and the Thirteenth Amendment).

25. *See* Christopher Coleman, et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663, 670 (2005) (referring to the Montgomery Bus Boycott and noting that daily humiliation of the Black community forced the Black community to mobilize); *see also* Joshua Zeitz, *1964: The Year the Sixties Began: Viewing a Transformation That Still Affects All of Us Through the Prism of a Single Year*, AM. HERITAGE, Oct. 1, 2006 at 32 (recognizing that there were long time grassroots civil rights efforts pressing for a public accommodations bill).

26. *See generally* RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 7:1 (3d ed. 2007) (1994) (noting the historical backdrop for the Act and the "forced separation of races").

27. LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 97, 136 (2006) (noting the impact that television had by showing images of police brutality and segregationists' violence against brave civil rights activists enduring such vulgar abuses).

28. *See Daniel*, 395 U.S. at 307; *see also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 646 (1995) (describing vicious attacks on non-violent demonstrators for asserting right to equality).

demonstrators who were fighting for equality.[29] Televised broadcasts aired images of vicious police dogs attacking praying Black children and fire fighters shooting children with water cannons.[30] The sight of increasing police brutality and segregationists' reprisals towards peaceful demonstrators outraged viewers.[31] This escalating violence and mass domestic instability forced the federal government to take action.[32]

Initially, President Kennedy opposed any civil rights bill, fearing that such a controversial bill would devastate the Democratic Party.[33] In the wake of national outrage over the violence in Birmingham, however, he ordered civil rights legislation to be drafted.[34] In response to bitter racial tensions, social chaos, national outrage over widespread violence, and presidential pressure (which was significantly enhanced when President Lyndon B. Johnson assumed office), Congress passed the Act.[35]

---

29. *See* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 646 (1995); *see also* LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 97, 136–37 (2006) (recognizing that Americans who had access to television but lived far from violence felt abuses first-hand and noting television's role in producing "national outrage").

30. *See* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 646 (1995).

31. *See* LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIV.RTS. & SOC. JUST. 97, 136 –37 (2006).

32. *See* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 671–72 (1995).

33. *See id.* at 645 (noting that President Kennedy feared the Act would fail and believed that congressional deliberations over such a controversial bill "could divide and destroy the Democratic party"); *see also* Michael Taylor, *In the Civil-Rights Arena, JFK Was Mostly a Man of Inaction*, RICH. TIMES DISPATCH, July 30, 2006, at K2 (noting President Kennedy was reluctant to advocate for legislation and he only acted out of fear that protestors would ultimately respond to violence with violence).

34. *See* President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) (transcript available in John F. Kennedy Presidential Library & Museum) *available at* http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm (stating the need for civil rights reform); *see also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 646–47, 671–72 (1995); *cf.* Faye Cocchiara & Myrtle P. Bell, *Latinas and Black Women: Key Factors for a Growing Proportion of the U.S. Workforce*, 25 EQUAL OPPORTUNITIES INT'L, Sept. 21, 2006, at § 4 (recognizing years of civil rights organizing and activism).

35. Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 21–22 (2001) (noting televised violence in Birmingham was impetus for President Kennedy to persuade Congress to pass the Act). President Kennedy sent Congress a draft of the Act on June 19, 1963. *Id.* Congress ratified the Act on June 19, 1964. *Id. See also* Jody Allen &

B. *The Civil Rights Act of 1964*

The Act is a remedial statute that outlaws various types of racial discrimination.[36] Specifically, Title II of the Act entitles all persons, regardless of race, to the equal enjoyment of the services and privileges of public accommodations.[37] A direct result of years of civil rights agitation, the Act demonstrates Fourteenth Amendment values of equality by sanctioning racial discrimination in public accommodations.[38] The United States Supreme Court has recognized Congress's authority to attach these values therein.[39]

Title II opens with subsection (a), which describes both the type of conduct the Act prohibits and the rights that all persons deserve.[40] Subsection (b) lists a number of establishments that qualify as places of public accommodation, requiring them to treat all persons equally.[41] For example, subsection (b)(1) of the Act identifies lodgings, and subsection (b)(2) identifies restaurants.[42]

Subsection (b)(3) is Title II's broadest provision.[43] This provision provides that "other place[s] of exhibition or entertainment" are considered a place of public accommodation within the scope of the Act.[44] Subsection (b)(3) does not define what constitutes a place of entertainment.[45] Courts have attempted to define places of entertainment but have grappled with subsection (b)(3)'s amorphous language.[46] While the courts

---

Brian Daugherity, *Recovering a "Lost" Story Using Oral History: The United States Supreme Court's Historic* Green v. New Kent County, Virginia, *Decision*, ORAL HIST. REV. June 22, 2006, at 25 (noting the cumulative effect of non-violent demonstrations, social chaos, and pressure from President Lyndon B. Johnson on Congress).

36. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006); *see also* BLACK'S LAW DICTIONARY 572 (8th ed. 2004) (defining entertainment as something that provides amusement).

37. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

38. *See* DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 212 (1972); *see also* U.S. CONST. amend. XIV.

39. *See* U.S. Const. amend. XIV, § 5; *see also* U.S. CONST. amend. XIV, § 1; *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 286 (1964) (Douglas, J., concurring) (recognizing Congress's basis for the Act under its Commerce Clause powers and that Congress also properly used its Fourteenth Amendment authority to sanction racial segregation).

40. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

41. *See id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

46. *See Daniel*, 395 U.S. at 306; *see also Allen*, 341 F.3d at 877 n.6, *see also Miller*, 394 F.2d at 350–51; *contra Denny*, 456 F.3d at 431 (restricting subsection (b)(3) to a narrow interpretation).

have played a central role in defining the Act's parameters under subsection (b)(3), their holdings have markedly differed.

C. *Court Interpretations of the Public Accommodations Provision*

Since Congress passed the Act more than forty years ago, courts have not uniformly interpreted the places of entertainment provision.[47] Some courts define subsection (b)(3)'s scope by utilizing a narrow interpretation.[48] This approach limits the number of recognized public establishments. One district court, for example, restricted subsection (b)(3)'s scope to exclude hair salons.[49]

Other courts have interpreted this provision broadly to protect many establishments not explicitly named in subsection (b)(3).[50] For example, the Fifth Circuit held that a women's health spa is a place of entertainment in *Rousseve v. Shape Spa for Health and Beauty, Inc.*[51] The Fifth Circuit also held that subsection (b)(3) covers amusement parks as places of entertainment.[52]

Notably, the United States Supreme Court has endorsed the more inclusive statutory interpretation of subsection (b)(3).[53] In *Daniel v. Paul*, the Supreme Court held that subsection (b)(3) included a snack bar within a private establishment.[54] The Court also noted that places of entertainment do not solely include places that attract spectators; this provision further includes places presenting alternate sources of entertainment.[55] In rejecting a narrow interpretation, the Court reasoned that subsection (b)(3) calls for broader coverage.[56]

---

47. *Compare Daniel*, 395 U.S. at 306, *and Allen*, 341 F.3d at 878, *and Rousseve*, 516 F.2d at 67, *and Miller*, 394 F.2d at 350–51, *with Denny*, 456 F.3d at 431, *and Halton.*, 94 F. Supp. 2d at 863.

48. *See Denny*, 456 F.3d at 431 (arguing that the Act's text does not expressly name spas and therefore they are excluded from Title II); *see also Halton*, 94 F. Supp. 2d at 863 (applying a narrow interpretation of subsection (b)(3)).

49. *See Halton*, 94 F. Supp. 2d at 862.

50. *See Daniel*, 395 U.S. at 305–08 (interpreting the Act as including a snack bar within private establishment); *see also Rousseve*, 516 F.2d at 65 (holding that a women's health spa is place of entertainment); *see also* United States v. DeRosier, 473 F.2d 749, 751–52 (5th Cir. 1973) (applying the Act to a tavern with jukebox and other entertainment services); *see also* Scott v. Young, 421 F.2d 143, 144–45 (4th Cir. 1970) (finding a privately owned recreational facility as place of entertainment); *see also Miller*, 394 F.2d at 344–45 (holding an amusement park to be place of entertainment).

51. 516 F.2d at 66.

52. *See Miller*, 394 F.2d at 344-45.

53. *See Daniel*, 395 U.S. at 307 (reasoning that broader interpretations are more faithful to Act's original purpose).

54. *Id.* at 305.

55. *Id.* at 305-306.

56. *Id.* at 307–08.

In so holding, the *Daniel* Court used a dictionary to guide its analysis of the phrase "place of entertainment."[57] The Court defined places of entertainment as places existing for the purpose of "causing someone's time to pass agreeably."[58] As a result, the Court found that subsection (b)(3) encompasses a wide range of establishments.[59]

Additional Supreme Court precedent suggests that an inclusive reading of the Act is appropriate because of its remedial nature.[60] A remedial statute is one that aims to remedy certain social wrongs.[61] In *Herman & MacLean v. Huddleston*, the Court reasoned that a narrow interpretation of the securities statute at issue would undermine its remedial purpose.[62]

The statute, section 10(b) of the Securities Exchange Act of 1934, is a general "catchall" provision granting remedies to defrauded purchasers or sellers of stock.[63] The Court rejected the argument that liability under a similar statute excludes a remedy under section 10(b).[64] Noting that Congress wrote section 10(b) to penalize the conduct at issue, the Court found that restricting its application diminishes its curative effect.[65] The Court applied this inclusive approach in accordance with section 10(b)'s broad remedial purpose of outlawing fraud in the market.[66]

---

57. *Id.* at 306 n.7.

58. *Daniel*, 395 U.S. at 306 n.7 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 757).

59. *Id.*

60. *Cf.* Herman & MacLean v. Huddleston, 459 U.S. 375, 386–87 (1983) (recognizing repeated Supreme Court precedent construing remedial statutes flexibly); *see* Peyton v. Rowe, 391 U.S. 54, 65 (1968) (stating that courts should broadly interpret remedial statutes); *see also* Stewart v. Kahn, 78 U.S. 493, 505 (1870) (noting that interpretations of remedial statutes should consider harms preceding statute, remedies, goal, and legislative intent that influenced Congress).

61. Benjamin V. Madison, III, *RICO, Judicial Activism, and the Roots of Separation of Powers*, 43 BRANDEIS L.J. 29, 30 (2004) (noting statute prohibiting racketeering as correcting social wrongs).

62. 459 U.S. at 386–87; *cf. Daniel*, 395 U.S. at 307–08 (reasoning that Title II's paramount purpose is to remove humiliation and indignities of discriminatory denials to places seemingly open to general public); *see Allen*, 341 F.3d at 878 (applying Supreme Court's inclusive interpretation of place of entertainment).

63. *Herman & MacLean*, 459 U.S. at 375; *see* Securities Act of 1933, Pub. L. No. 109–279, § 11, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. § 77k (2006)) (creating liability against certain individuals completing registration statement for material omissions or misstatements); *see also* Securities Exchange Act of 1934, Pub. L. 109-279, § 10(b), 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. § 78j(b) (2006)) (outlawing any fraudulent sales or purchases of stocks).

64. *Herman & MacLean*, 459 U.S. at 375.

65. *Id.*; *see Daniel*, 395 U.S. at 307–08; *see also Peyton*, 391 U.S. at 65; *see also Stewart*, 78 U.S. at 505.

66. *See Herman & MacLean*, 459 U.S. at 387.

In sum, United States Supreme Court precedent supports an inclusive reading of remedial statutes and of subsection (b)(3).[67] Some courts, however, have adopted a narrow interpretation and limited Title II to those places expressly listed in subsection (b).[68] The Fourth Circuit used such an approach in *Denny*.[69]

III. *DENNY V. ELIZABETH ARDEN SALONS, INC.*

In *Denny*, the issue before the Fourth Circuit was whether a spa is a place of entertainment under subsection (b)(3).[70] Adopting a narrow interpretation of the Act, the Court held that a spa is not a place of entertainment.[71] In so holding, the Fourth Circuit dismissed plaintiffs' discrimination claim.

A. *Factual and Procedural Background*

Elizabeth Arden Salons, Inc. ("Arden") is an upscale beauty salon and day spa that offers beauty services to the general public.[72] One of the plaintiffs purchased a spa package for her mother, which included a manicure, facial, massage, lunch, and hairstyle.[73] On the day of the appointment, Plaintiff called Arden to add a hair coloring and arranged to come in to pay for it that day.[74] When Plaintiff arrived, Arden's receptionist refused to provide service and told her that there was a "problem" because Arden does not "do [B]lack people's hair."[75]

Among other causes of action, plaintiffs sued under Title II of the Act, arguing that Arden qualifies as a place of entertainment under subsection

---

67. *See Daniel*, 395 U.S. at 307–08; *but cf. Herman & MacLean*, 459 U.S. at 386–87 (recognizing need for flexible interpretations of remedial statutes); *see also Peyton*, 391 U.S. at 65 (holding that courts should broadly interpret remedial statutes); *see also Stewart*, 78 U.S. at 505 (noting that interpretations of remedial statutes should consider harms preceding statute, remedies, goal, and legislative intent that influenced Congress).

68. *See generally Denny*, 456 F.3d at 427 (holding that because Act does not mention spas under subsection (b)(3) they are exempt); *see also Halton*, 94 F. Supp. 2d at 856 (adopting narrow interpretation of subsection (b)(3)).

69. *Denny*, 456 F.3d at 427.

70. *Id.* at 434 (conceding that sufficient evidence established probability of racial discrimination under "viable" right to contract claim).

71. *Id.* at 427.

72. *See* Red Door Spas, http://www.reddoorspas.com/gc/location.asp (last visited July 31, 2007).

73. *Denny*, 456 F.3d at 430.

74. *Id.*

75. *Id* (quoting allegation that Arden's receptionist stated that Arden did not "do black people's hair"). In contrast, Arden's manager recounted this differently and claimed that the service plaintiff requested was on too short notice. *Id.*

(b)(3).[76] The district court entered summary judgment for Arden on all counts.[77] With respect to the Act, the court reasoned that Arden is not a place of public accommodation because spas do not fall under subsection (b)(3).[78] On appeal, the Fourth Circuit affirmed.[79]

B. *Rationale*

The Fourth Circuit concluded that beauty spas are not places of entertainment, and therefore not places of public accommodation.[80] The *Denny* Court reasoned that the Act's provision protecting places of entertainment is plain on its face and does not need further discussion.[81] According to the Court, a textual reading of the Act shows that a commercial day spa is not included as a place of entertainment.[82]

The Fourth Circuit insisted that Congress designed the Act in a calculating manner to include only those establishments the Act expressly names.[83] Moreover, the Court proclaimed that if Congress had intended to include salons or spas as places of entertainment, it could have done so easily.[84] The Court also noted that beauty salons and barbershops are so common that Congress could not have overlooked their omission.[85]

The Fourth Circuit also distinguished between the text of subsections (b)(1)-(2) and subsection (b)(3) to underscore a pattern of exclusivity.[86] These preceding subsections expressly list hotels, restaurants, and the like.[87] The Court asserted that Congress's decision to protect hotels and restaurants in separate provisions reinforces a plain language interpretation of subsection (b)(3).[88] The *Denny* Court claimed that Congress

76. Plaintiff sued on three claims, including Title II, intentional infliction of emotional distress, and § 1981 of the Civil Rights Act of 1866. *Denny*, 456 F.3d at 429. The Civil Rights Act of 1866 provides all people, regardless of race, the right to "make and enforce contracts." Civil Rights Act of 1964, 42 U.S.C. § 1981 (2006). This statute also guarantees enjoyment and security of property and persons equally regardless of race. *Id.*

77. *Denny*, 456 F.3d at 429.

78. *Id.*

79. *Id.* at 492.

80. *Id.* at 433.

81. *Id.* at 431.

82. *Denny,* 456 F.3d at 433.

83. *Id.*

84. *Id.*

85. *Id.* at 434.

86. *Id.* at 432 (citing 42 U.S.C. § 2000a(b)(1)-(2) (2006)).

87. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

88. *Denny*, 456 F.3d at 432 (concluding that Congress consciously omitted establishments that offer salon services).

made a conscious decision not to cover spas like Arden and similar establishments when drafting the Act.[89]

Moreover, the Court methodically tried to reinforce a textual interpretation of subsection (b)(3) by referring to the dictionary definition of "place."[90] The dictionary defines "place" as a space "used for a particular purpose."[91] The Fourth Circuit synthesized this definition with the word "entertainment" to define "place of entertainment" as a place whose particular purpose is to entertain.[92]

Having formulated a definition to support a textual argument, the Court equated Arden with a maintenance service business.[93] The Court cited *Halton v. Great Clips, Inc.*, a district court case held that subsection (b)(3) does not include hair salons as places of entertainment.[94] The *Denny* Court likened Arden to the *Great Clips* hair salon, stating it was just a business that offered maintenance services.[95]

Next, the Fourth Circuit distinguished the Fifth Circuit's holding in *Rousseve v. Shape Spa for Health & Beauty, Inc.* that determined subsection (b)(3) includes health spas.[96] Like Arden, the *Rousseve* spa offered beauty services to its clients, and the *Denny* Court accepted the holding in *Rousseve* that women's health spas are places of entertainment.[97] However, the *Denny* Court distinguished the *Rousseve* facility by focusing on its recreational services, like fitness classes, which Arden did not offer.[98] The Fourth Circuit found Arden more similar to the hair salon in *Great Clips*—a haircut business offering maintenance services—than the spa in *Rousseve*.[99] Finding that Arden was not a place of entertainment, the Court concluded that the Act did not protect plaintiffs from Arden's discriminatory practices.[100]

---

89. *Id.*

90. *Id.* at 431 (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1478 (2d ed. 1987) defining "place" as "a space . . . used for a particular purpose").

91. *Id.*

92. *Id.*

93. *Denny*, 456 F.3d at 431–32.

94. *See id.* at 433; *see also Halton*, 94 F. Supp. 2d at 862 (holding that hair salons are not places of entertainment but instead are service businesses).

95. *See Denny*, 456 F.3d at 433.

96. *Id.*; *see Rousseve*, 516 F.2d at 65.

97. *Denny*, 456 F.3d at 433; *see also Rousseve*, 516 F.2d at 65.

98. *Denny*, 456 F.3d at 433 n.1.

99. *Id.*; *see also Rousseve*, 516 F.2d at 65.

100. *Denny*, 456 F.3d at 433 (noting that the Fourth Circuit accepted *Rousseve*'s holding that a women's health spa is a place of entertainment despite its omission in the Act); *see Rousseve*, 516 F.2d at 65.

IV. ANALYSIS

The Fourth Circuit erred in finding that the spa at issue in *Denny* did not qualify as a place of entertainment under subsection (b)(3). Specifically, the Court analyzed only half of subsection (b)(3)'s relevant language. The *Denny* Court also failed to take into account Supreme Court precedent defining "place of entertainment."[101] Moreover, the *Denny* Court ignored the Act's remedial nature and broad scope. Finally, the Act's historical context and legislative intent reflect that Congress wrote the Act to prohibit this kind of racial discrimination. Thus, the Supreme Court should reverse the Fourth Circuit's holding in accordance with long standing precedent and declare Arden a "place of public accommodation."

A. *The Denny Court Improperly Defined "Place of Entertainment"*

The *Denny* Court's reasoning in rejecting spas as places of entertainment is rife with error. The Court attempted to define "place of entertainment" using a dictionary.[102] However, the Court only defined "place," and overlooked existing Supreme Court precedent defining "entertainment."[103]

The Court's definition of "place" was incomplete because it lacked a corresponding definition of "entertainment."[104] The dispute about whether a spa is a "place of entertainment" turns on the meaning of "entertainment" and not solely on the meaning of "place."[105] The *Denny* Court defined the meaning of "place" as being a space "set apart or used for a particular purpose."[106] While the definition of "place" has some relevance, it has a common sense meaning, and is not central to the entertainment aspect of subdivision (b)(3).[107] Moreover, the *Denny* Court failed to use, or even mention, the definition of "entertainment" in its

---

101. *See Daniel*, 395 U.S. at 306 (using dictionary to define "entertainment").

102. *Denny*, 456 F.3d at 431.

103. *See Daniel*, 395 U.S. at 306; *see also id.* at 431 (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, at 1478) (defining "place" and not "entertainment").

104. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (the language at issue in subsection (b)(3) is "place[s] of entertainment").

105. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006); *see also Daniel*, 395 U.S. at 306 (focusing on meaning of "entertainment" in its analysis); *but see Denny*, 456 F.3d at 431 (focusing on meaning of "place" in its analysis).

106. *Denny*, 456 F.3d at 431 (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1478 (2d ed. 1987)).

107. *See Daniel*, 395 U.S. at 306 n.7 (defining "entertainment" but not discussing the definition of "place").

analysis.[108] Thus, the *Denny* Court's conclusion, by defining only half of the provision in controversy, is inadequate.

The *Denny* Court also failed to apply Supreme Court precedent defining "entertainment."[109] In *Daniel v. Paul*, the United States Supreme Court defined entertainment as "the act of diverting, amusing, or causing someone's time to pass agreeably."[110] *Daniel* interpreted subsection (b)(3) as applying not only to businesses that attract spectators, but also to those that offer other sources of entertainment.[111]

Had the *Denny* Court properly applied this Supreme Court precedent, it would have concluded that Arden is a place of entertainment.[112] Arden is a place with a particular purpose of making customers' time pass pleasantly.[113] Arden is not a mere hairstyling or maintenance business as the *Denny* Court held, nor is Arden comparable to a barbershop.[114] By failing to define the entire phrase "place of entertainment" or apply Supreme Court precedent, the Fourth Circuit erred in excluding Arden from subsection (b)(3).

Opponents may argue that interpreting subsection (b)(3) to exclude spas is fitting because spas are not similar to other recognized places of entertainment. For example, some courts have recognized amusement parks, snack bars, and taverns as places of entertainment.[115] Spas are not similar to amusement parks because spas are not equipped with enter-

---

108. *See Denny*, 456 F.3d at 431–32.

109. *Id.* at 432 (rejecting argument limiting places of entertainment to places where consumers are spectators or listeners). The Fourth Circuit rejected a broad interpretation of subsection (b)(3) and dismissed Supreme Court precedent. *Id. See generally Daniel*, 395 U.S. 298 (noting that natural reading of subsection (b)(3) is not restrictive but instead liberal and covers broad range of establishments); *see also Allen*, 341 F.3d at 870 (describing various activities other than spectator activities that qualified park as place of entertainment).

110. 395 U.S. at 306 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 757) (defining "entertainment" as encompassing activities that cause "someone's time to pass agreeably"); *see also Allen*, 341 F.3d at 877 n.6 (finding park where plaintiffs were passing time agreeably was place of entertainment).

111. *Daniel*, 395 U.S. at 306.

112. *See id.*

113. *See id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 757) (defining "entertainment" according to dictionary meaning as "the act of diverting, amusing, or causing someone's time to pass agreeably."); *see also Denny*, 456 F.3d at 439–40 (King, J., dissenting) (finding Arden's purpose was to entertain by amusing, providing recreation, and pampering clients).

114. *Denny*, 456 F.3d at 433 (citing *Halton*, 94 F. Supp. 2d at 862) (comparing Arden's full service upscale spa to economy hair salon); *see also* Red Door Spas, http://www.reddoorspas.com/gc/location.asp (last visited Feb. 7, 2007) (advertising wide range of services).

115. *See Daniel*, 395 U.S. at 307–08 (finding snack bar to be place of entertainment); *see also DeRosier*, 473 F.2d at 751–52 (holding that tavern with jukebox is place of entertainment); *see also Scott*, 421 F.2d at 143 (finding recreational facility to be place of

taining roller coasters and other rides.[116] Spas are also not similar to snack bars or taverns, which offer other sources of entertainment.[117] Because spas are not very similar to this group of recognized establishments, spas are not places of entertainment.[118]

This reasoning, however, is flawed because subsection (b)(3) protects "other" places of entertainment rather than "similar" places of entertainment.[119] The fact that some courts have identified snack bars and taverns as places of entertainment does not mean that spas are not places of entertainment.[120] The Supreme Court's analysis in *Daniel* serves as additional evidence that the Act does not strictly protect "similar" places of entertainment as named in subsection (b)(3).[121] The Fourth Circuit Court's analysis was incomplete because it only defined "place" and failed to consider the applicable Supreme Court precedent defining "entertainment."

B. *Because the Act is a Remedial Statute, the* Denny *Court Should Have Interpreted Subsection (b)(3) Broadly*

In addition to conducting a deficient statutory analysis, the Fourth Circuit failed to apply a broad interpretation to the Act, a remedial statute. The United States Supreme Court noted in *Huddleston* that it has consistently construed remedial statutes flexibly and not restrictively.[122] The Court also held in *Daniel* that a natural reading of subsection (b)(3) calls for broad coverage.[123] The Court acknowledged the social harms of ra-

---

entertainment); *see also Miller*, 394 F.2d at 344–45 (holding amusement park to be place of entertainment).

116. *See generally Miller*, 394 F.2d at 342 (recognizing amusement park as place of public accommodation).

117. *See Daniel*, 395 U.S. at 307–08 (holding snack bar to be place of entertainment); *see also DeRosier*, 473 F.2d at 751–52 (finding tavern to be place of entertainment).

118. *See Denny*, 456 F.3d at 431–32 (characterizing spas as body maintenance businesses and not like places of entertainment).

119. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006); *see Daniel*, 395 U.S. at 307 (rejecting inference that subsection (b)(3)'s scope only covers Congress's primary concerns); *see also* United States v. Baird, 85 F.3d 450, 453 (9th Cir. 1996) (rejecting narrow construction of subsection (b)(3) that would alter provision to mean "similar" places of entertainment).

120. *See Daniel*, 395 U.S. at 306 (defining entertainment broadly).

121. *Id.*

122. *Herman & MacLean*, 459 U.S. at 386–87 ("A cumulative construction of the securities laws also furthers their broad remedial purposes. In enacting the 1934 Act, Congress stated that its purpose was to impose requirements necessary to make [securities] regulation and control reasonably complete and effective.").

123. 395 U.S. at 307 ("[I]t does not follow that the scope of § 201 (b)(3) should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage.").

cial discrimination and the Act's purpose of reproaching those wrongs.[124] Recognizing that various remedial statutes redress these and similar injuries, the Court has rejected strict textual readings of such statutes.[125] To hold otherwise would shrink the value of remedial statutes to superficial levels and diminish their enforcement capacities.

This reasoning for a broad interpretation is particularly persuasive in the context of racial discrimination.[126] During the Civil Rights Movement, people of color protested against the harms of long-standing subjugation and denials of equal access to public facilities.[127] Congress passed the Act in response to the widespread civil rights agitation of the 1950s and 1960s and under constitutional principles of equality. Serving a remedial purpose, the Act entitles all individuals to equal enjoyment of services and public facilities.[128]

By interpreting Title II so as to deny plaintiffs relief for Arden's intentional racial discrimination, the Fourth Circuit ignored this remedial purpose.[129] The Court excluded all establishments that Title II does not expressly list, thereby stifling the Act's broad remedial nature.[130] Moreover, despite acknowledging subsection (b)(3) as a "catchall" provision, the Court nevertheless limited its scope.[131] In so holding, the *Denny*

---

124. *Id.*

125. *Id.* at 307–08 (preferring broader interpretation of Act and rejecting restrictive reading as unnatural).

126. *See Miller*, 394 F.2d at 349 (reading subsection (b)(3) with "open minds" receptive to Act's overriding purpose to secure equal enjoyment of places of entertainment for all citizens).

127. *See* Christopher A. Bracey, *The Cul De Sac of Race Preference Disclosure*, 79 S. CAL. L. REV. 1231, 1238–40 (2006).

128. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006); *see also Daniel*, 395 U.S. at 307–08.

129. *See Denny*, 456 F.3d at 431–32 (acknowledging Title II's anti-discrimination purpose in other places of entertainment); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (covering all hotels, inns, and other establishments that offer lodging to travelers and exempting certain smaller accommodations where proprietor actually lives); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (protecting any lunchroom, restaurant, and other establishment that primarily sells food to customers, including gas stations and retail establishments that also serve food on premises).

130. *See Denny*, 456 F.3d at 431–32 (acknowledging Title II's anti-discrimination purpose in other places of entertainment); *see also* 42 U.S.C. § 2000a (2006) (covering all hotels, inns, and other establishments that offer lodging to travelers and exempting certain smaller accommodations where proprietor actually lives); *see also* 42 U.S.C. 2000a (protecting any lunchroom, restaurant, and other establishment that primarily sells food to customers, including gas stations and retail establishments that also serve food on premises).

131. *See Denny,* 465 F.3d at 431-32 (referring to subsection (b)(3) as a "catchall" provision).

Court erred by not applying Supreme Court precedent calling for a broad interpretation.[132]

Opponents would reject broad interpretations of the Act out of fear that the Act's scope will exceed an already considerable list of protected establishments.[133]

The fact that Title II lists separate categories for protected establishments, however, does not mean that these lists are exhaustive.[134] Subsection (b)(3)'s broad language indicates that this list is illustrative rather than exclusive.[135] Congress did not have to name spas expressly because subsection (b)(3) acts as a broader catchall provision.[136] Moreover, Title II cannot cover unlimited establishments because Congress already limited its scope to establishments listed in Title II, like places of entertainment.[137]

In sum, rendering subsection (b)(3) as an exhaustive provision in defining the Act's parameters shrinks the list of targeted establishments, contrary to the Act's remedial nature.[138] Racial discrimination in particular requires generous applications of remedial laws like the Act. Narrow interpretations that exclude qualifying public establishments undermine the Act's original purpose of equality for all citizens.

---

132. *See* United States v. Tobeler, 311 F.3d 1201, 1206 (9th Cir. 2002) (confirming that subsection (b)(3) requires broad interpretation instead of narrow interpretation to effect redress prescribed by Act).

133. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1418, 1444 n.5 (2002) (noting opponents' interests in narrow constructions of Act to counter "far-reaching effects"); *see also* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1418, 1524–25 (2002) (describing opposition to Act as "super-statute" exceeding parameters Congress set in "four corners" of statute).

134. *See Allen*, 341 F.3d at 878 (rejecting idea that subsection (b)(3) is exhaustive list of places of entertainment); *see also Miller*, 394 F.2d 342 (rejecting narrow interpretations of subsection (b)(3) because this provision includes establishments providing pleasurable activities to customers).

135. *See* Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 873 (9th Cir. 2004) (describing importance of liberal interpretation of public accommodations statutes because discrimination does not solely occur in categories of public accommodations as prescribed in remedial statutes).

136. *See Denny*, 456 F.3d at 431 (referring to subsection (b)(3) as a "catchall" provision).

137. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

138. *See Miller*, 394 F.2d at 349 (affirming Act's compatibility with liberal interpretations as firmly established under its purpose); *cf. Disabled Rights Action Comm.*, 375 F.3d at 873 (9th Cir. 2004) (reasoning that making discriminating agencies liable satisfies the Americans with Disabilities Act's objective to entitle disabled persons equal access to events they would have been excluded from previously).

C. *A Plain Interpretation of the Act Undermines Congressional Intent*

The Act engenders Fourteenth Amendment values of equality and outlaws separate treatment of non-Whites in places of public accommodation.[139] Refusing service for "Black people's hair" subordinates Black women and is the precise type of discrimination targeted in the Act.[140] Thus, the Fourth Circuit's decision undermines Title II's primary objective of eliminating humiliation in this type of public establishment.[141]

1. *Denny* Involved Precisely the Type of Place the Act Covers and the Type of Discrimination the Act Prohibits

Excluding consumers from enjoying and accessing commercial services in spas on the basis of race subordinates people of color and diminishes Title II's protections.[142] Arden overtly discriminated against Mrs. Denny based on her hair type.[143] Hair type is a indistinguishable characteristic and an immutable component of a Black person's racial identity.[144]

---

139. *See generally* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

140. *Daniel*, 395 U.S. at 307–08 (showing that the Court considered congressional discussions covering Title II's breadth and Act's textual focus on establishments similar to sporting and spectator arenas). However, the Court did not agree that the Act's scope is limited to Congress's primary concerns. *Id.* Instead, the Court adopted a liberal interpretation of the Act considering the Act's overall purpose to eliminate daily indignities of discrimination from seemingly public establishments. *Id. See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 393 (1991).

141. *See Daniel*, 395 U.S. at 307–08; *see also Heart of Atlanta Motel*, 379 U.S. at 291–92 (Goldberg, J., concurring) (citing S. REP. NO. 88–872, at 16 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2369–70. (highlighting Act's primary purpose of eliminating personal indignities from unequal access to public establishments that segregationists denied to people of color).

142. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 370 (1991) (noting that stigmatizing black women's hair as inferior perpetuates socio-political and economic subordination of entire racial groups).

143. *Denny*, 456 F.3d at 435 (characterizing Arden's receptionist's explanation as overt evidence of racial discrimination); *cf.* Richard Delgado, *Rodrigo's Roundelay:* Hernandez v. Texas *and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 35 (2006) (describing widespread anti-Latino discrimination in south Texas and conduct pronouncing stigma of inferior status of Latinos, such as signs excluding Latinos from bathrooms and restaurants); *see* Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1228 (2000) (describing Proposition 227's attack on non-English speakers as concealing racial discrimination with proxy of language as directly targeting Latinos).

144. *See generally* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1494 (2000) (recognizing that individuals constantly identify insignificant morphological differences as tools to delineate race and designate persons to particular racial groups); *see also* Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 873 (2006) (identifying popular notions and stereotypes of Black hair and features).

Even the Fourth Circuit recognized that the plaintiffs produced strong evidence of Arden's intent to discriminate.[145] The Court conceded that Arden refused service on an overt racial basis, but it nonetheless failed to give plaintiffs relief under the Act.[146] In so ruling, the Court disregarded this as the precise form of degradation that the Act aims to remedy.[147]

2. The Fourth Circuit Disregarded Equal Protection Values

Denny undermines the Act's objective of protecting all persons equally, irrespective of race. The Fourth Circuit's decision to exclude all establishments not expressly named in the Act creates a loophole for future Equal Protection violations in protected establishments.[148] Thus, the *Denny* decision actually helps perpetuate racial discrimination.

Additionally, *Denny* undermines equal protection by making arbitrary distinctions between full service spas and other spas.[149] The court acknowledged that the racial discrimination at issue in *Rousseve*—a spa with similarities to *Denny*—violated the Act.[150] Arden offers similar services as the *Rousseve spa,* such as body massages, facial treatments, and more.[151] However, the Court rejected plaintiffs' claim that discrimination by spas is unlawful.[152] The Fourth Circuit's contradictory interpretations compromise the Act's legitimacy.[153] In effect, the Fourth Circuit created unequal protection hinging on the court's whimsical disposition.[154] As a result, the Fourth Circuit's ahistorical ruling disregarded

145. *Denny*, 456 F.3d at 434.

146. *See id.* at 435.

147. *See generally* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

148. *See generally Miller*, 394 F.2d 349 (considering the Act's history and concluding that it aims to end racial discrimination in various establishments serving the general public interpreting the Act broadly).

149. 456 F.3d at 433; *see also Daniel*, 395 U.S. at 307–08 (recognizing that Act's "overriding purpose" was to diminish humiliation of racial discrimination from places seemingly open to general public).

150. 456 F.3d at 433.

151. *Compare id. and* Red Door Spas, http://www.reddoorspas.com/gc/location.asp (last visited July 20, 2007), *with Rousseve*, 516 F.2d at 67.

152. *See Denny*, 456 F.3d at 433.

153. *See Daniel*, 395 U.S. at 307–08; *Heart of Atlanta Motel*, 379 U.S. at 291–92 (Goldberg, J., concurring) (citing S. REP. NO. 88–872, at 16 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2369–70.) (highlighting Act's primary purpose of eliminating personal indignities from unequal access to public establishments that segregationists denied to people of color).

154. *Compare Daniel*, 395 U.S. at 306 (rejecting strict textual reading of place of entertainment provision), and *Allen*, 341 F.3d at 878 (adopting Supreme Court's inclusive interpretation of place of entertainment), and *Rousseve*, 516 F.2d at 67 (interpreting subsection (b)(3) liberally), *and Miller*, 394 F.2d at 350–51 (applying broad interpretation of subsection (b)(3)), *with Denny*, 456 F.3d at 431 (confining subsection (b)(3) with narrow

many years of hard-fought civil rights gains as it single-handedly reduced plaintiffs' civil rights with their ruling.

V. CONCLUSION

The Fourth Circuit's decision in *Denny* diminished civil rights protections that entire generations fought to attain.[155] The Court ignored the definition of "entertainment" and relevant United States Supreme Court precedent necessary for a proper analysis of subsection (b)(3). The Court should have read the Act in accordance with its remedial purpose of redressing the harms of discrimination that perpetuate inequality against racial minorities.[156] *Denny* sets dangerous precedent and will cripple the Act's civil rights protections. As a result, the United States Supreme Court should grant certiorari, reverse the Fourth Circuit's decision in *Denny*, and reaffirm pre-existing precedent.[157]

---

interpretation), *and Halton*, 94 F. Supp. 2d at 863 (N.D. Ohio 2000) (interpreting subsection (b)(3) narrowly).

155. Mark S. Weiner, *The Semiotics of Civil Rights in Consumer Society: Race, Law, and Food*, 16 INT'L J. FOR SEMIOTICS L. 4, 395–405 (2003) (describing Act's role in ending Jim Crow racial segregation and Supreme Court's decision in *Katzenbach v. McClung* upholding Act); *see generally* Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Civil Rights Act of 1964).

156. *See generally* Tobias Barrington Wolff, *Gay Rights, Black Rights: Different Battle but Similar Struggle*, L.A. TIMES, Mar. 17, 2005, *available at* 2005 WLNR 4138634 (describing treatment of African-Americans as America's "original sin" due to slavery, segregation, and subsequent harms).

157. *See Daniel*, 395 U.S. at 307–08 (rejecting strict statutory interpretation of subsection (b)(3) and adopting flexible interpretation of Act to include establishments not expressly named); *cf.* IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) (describing forcefulness of *stare decisis* in cases determining subject matter on which the United States Supreme Court has previously ruled); *see also* Rasul v. Bush, 542 U.S. 466, 506 (2004) (noting that departure from *stare decisis* requires extraordinary circumstances).