The Americans with Disabilities Act: Website Accessibility and a Foreign Solution to a Domestic Problem

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COMMENT

THE AMERICANS WITH DISABILITIES ACT: WEBSITE ACCESSIBILITY AND A FOREIGN SOLUTION TO A DOMESTIC PROBLEM

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I. INTRODUCTION

In 1990, Congress passed the Americans with Disabilities Act (ADA) with the intent to eliminate discrimination based on disabilities and provide standards and guidance on addressing such discrimination. Despite providing valuable protections to a large and underserved group, the law remains a product of its time. Over the past thirty years, its language has received neither the attention nor the maintenance such an imperative piece of legislation deserves or needs. In the ADA’s lifetime, internet usage has exploded. What was a novel technological innovation in 1990 is now a necessary tool for most Americans.

Notwithstanding the overwhelming usage of this tool, the outdated and ambiguous language of the ADA provides no explicit guarantee of website accessibility for disabled persons. Even with increasing numbers of people advocating for accessible websites, a disparity remains between people with and without a disability and internet access. No part of the statute explicitly extends protections to the internet, and while accessibility is improving, significant portions of the internet are inaccessible. People with visual impairments may use screen readers, software that translates text on the screen to speech and reads webpages aloud. This software relies on hidden code to determine which language to read in, something websites frequently fail to account for.

Additionally, visually impaired people may be unable to parse a significant number of websites that fail to account for text contrast, a ratio between the color of text and its background. As society becomes increasingly reliant on the internet, accessibility issues become more problematic for those impacted by them. Accordingly, the frequency of federal civil suits for violations of Title III of the ADA has increased dramatically over the past several years.

While little change has been made to the ADA, significant action has been taken by standard-setting organizations, like the World Wide Web Consortium (W3C), and by foreign governments to create a readily

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4. See DIAMOND WEB SERVICES, 3RD ANNUAL STATE OF ACCESSIBILITY REPORT 9 (2021), https://diamond.la/ (noting a 22% year-over-year increase in accessibility of the top one hundred most accessed websites, but also indicating that 38% of those websites remain inaccessible or difficult to access).

5. See The 5 Most Common Website Accessibility Issues (And How to Fix them), BUREAU OF INTERNET ACCESSIBILITY (Sep. 23, 2021), https://www.boia.org/blog/the-5-most-common-website-accessibility-issues-and-how-to-fix-them (stating 28.9% of a sample of websites failed to set a language variable, neglecting an accessibility guideline standard).

6. See id. (finding “low contrast” text included on 86.4% of websites in a study).

accessible internet. W3C’s Web Accessibility Initiative (WAI) has developed the Web Content Accessibility Guidelines (WCAG), creating a series of accessibility recommendations for all websites.\(^8\) The European Union has enacted several directives that rely on similar principles for accessibility. Rather than being recommendations like WAI’s standards, these directives are legal requirements that members of the European Union are obligated to enforce.\(^9\)

The United States is a sovereign nation; accordingly, the laws of other nations or assemblies do not bind the country. However, Congress and state legislatures are free to use foreign legislation as a template and have done so recently. California passed a groundbreaking privacy protection law in 2018, codifying the first protections for consumers in the United States concerning the collection of personal information by private companies.\(^10\) While this was first-of-its-kind legislation in the United States, the California act was based largely on the General Data Protection Regulation established in 2016 by the European Union.\(^11\)

This promulgation of European rulemaking is a prime example of the so-called “Brussels Effect,” where the European Union either intentionally or inadvertently impacts the global legal landscape through its policy making.\(^12\) For at least the past decade, Europe’s influence on digital regulation has dominated global corporations; even corporations based in the United States have opted to follow European digital privacy regulations.\(^13\)

Similarly, as European regulations often reverberate throughout the world, a corresponding effect is seen within the United States. Regulations

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8. See WCAG 2 Overview, WEB ACCESSIBILITY INITIATIVE (Nov. 1, 2022), https://www.w3.org/WAI/standards-guidelines/wcag/ [https://perma.cc/8MVG-QU2E] (introducing WCAG’s goal of creating a standard for web accessibility by ensuring websites are “perceivable, operable, understandable, and robust”).


11. Id. at 24–26 (mentioning the relationship between the GDPR and CCPA).


13. Id. at 24–26 (mentioning that American companies conform to only the European standard, as it is stricter and more frequently enforced).
from states with larger economies, like California, tend to flow to other states and dictate specific types of regulation throughout the United States.\textsuperscript{14} This legislative persuasion is precisely what has precipitated from California’s privacy regulation. In 2021 alone, four states adopted broad data privacy laws, and several others have adopted at least some form of consumer privacy law.\textsuperscript{15}

This Comment argues that the most efficient way to reach a positive resolution to the question of whether the Americans with Disabilities Act includes websites as places of public accommodation is to embrace the Brussels and California Effects. States should adapt existing European legislation, encouraging the promulgation of accessible internet standards at the state level in lieu of slow, ineffective, or uncertain federal action from the legislative, executive, and judicial branches, respectively. As this Comment will illustrate, a federal solution would be preferable to ensure uniformity, but Congress, administrative agencies, and the Supreme Court have all failed to address internet accessibility, despite having several opportunities to do so. If states choose to lean on the European framework and the standards established by WAI, the resulting legislation should be relatively uniform. Given the apparent ambivalence of the federal government to the issue, slight disparities between state-level solutions are preferable over continued inaction.

II. HISTORY OF AMERICAN WEBSITE ACCESSIBILITY LAW WITHIN THE ADA

A. The Americans with Disabilities Act of 1990, and the Ambiguity of “Public Accommodations”

The Americans with Disabilities Act was designed to eliminate discrimination on the basis of disability.\textsuperscript{16} The ADA had overwhelming congressional support; the House of Representatives passed the ADA on a

\textsuperscript{14} Id. at 1, 5 (establishing the “California Effect” as a smaller-scale version of the “Brussels Effect”).


bipartisan vote of 377–28 and by the Senate on similar margins, 91–6. The bill was signed into law on July 26, 1990, and as described by President George H.W. Bush, was groundbreaking:

This legislation is comprehensive because the barriers faced by individuals with disabilities are wide-ranging. Existing laws and regulations under the Rehabilitation Act of 1973 have been effective with respect to the Federal Government, its contractors, and the recipients of Federal funds. However, they have left broad areas of American life untouched or inadequately addressed. Many of our young people, who have benefited from the equal educational opportunity guaranteed under the Rehabilitation Act and the Education of the Handicapped Act, have found themselves on graduation day still shut out of the mainstream of American life. They have faced persistent discrimination in the workplace and barriers posed by inaccessible public transportation, public accommodations, and telecommunications.

As President Bush described, previous legislation provided for some amount of protection against discrimination but was only effective to a limited extent. The ADA was designed to remedy those limits by targeting five broad areas: employment, public services and transportation, public accommodations, telecommunications, and other miscellany.

1. The ADA By Title

Each title of the ADA was designed to target the elimination of disability discrimination in a specific area. Title I empowers the Equal Employment Opportunity Commission to enforce prohibitions against disability discrimination by public and private sector employers over certain sizes.
Title II is broken into two subtitles. The first bars discrimination by public entities, while the second focuses on public transportation. Title IV forbids disability discrimination for telecommunication services by common carriers that provide phone, radio, or television services. Title V concerns minutia, such as the preclusion of other federal statutes and a prohibition against retaliation.

Title III covers public accommodations. In defining public accommodations, the statute lists twelve sets of applicable private entities, and this list is the primary cause for judicial discord and the circuit split that has grown out of the ADA. While the list seems exclusive, as it does not include a catchall or articulate that the twelve sets are general categories or provide examples of public accommodations, the congressional record makes Congress’s intention with Title III clear. In the House of Representatives, Rep. Steny Hoyer explained:

The purpose of this title is to finally open up all areas of American life to people with disabilities. In order to set forth clearly the range of places covered under this title, the act lists 12 categories of places that are considered public accommodations under the law. While this list is exclusive, it is intended that the categories be interpreted broadly to include the range of places that would belong within the category. . . . The point is that a person alleging discrimination does not have to prove that a particular business is similar to one of the businesses listed for example, similar to a grocery store, but rather, that the business falls within the general category described.

The approach taken by the ADA is essentially to focus on the future. Thus, while only “readily achievable” changes are required for existing facilities, the

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22. See id. §§ 12131–12134 (defining public entities to include local and state government and associated institutions).
23. Id §§ 12141–12165.
26. Id. §§ 12181–12189.
27. Id. § 12181(7).
ADA establishes high standards for any new construction or alterations undertaken by public accommodations or commercial facilities.\(^{28}\)

From this statement, it is clear that Congress’s intent in Title III is to provide examples of places of public accommodation, but not limit persons to only being free from discrimination while in a physical location itemized in one of the twelve categories. Rep. Hoyer goes as far as to say Congress’s intent is “that the categories be interpreted broadly” rather than exclusively.\(^{29}\) He articulates that the purpose of the ADA is to “open up all areas of American life to people with disabilities” not just the physical locations.\(^{30}\)


The ADA has not existed unaltered since its inception, and substantial portions of the law were clarified under the ADA Amendments Act of 2008.\(^{31}\) While nearly three-fourths of adults in the country were internet users at the time,\(^{32}\) the 2008 Act served only to clarify the scope of the ADA’s protection primarily in response to two holdings by the Supreme Court that drastically narrowed it.\(^{33}\) Even with this opportunity to clearly articulate that the law covered digital, as well as physical locations, Congress


\(^{29}\) Id.

\(^{30}\) Id. Certainly, this statement, especially when viewed alongside Title IV of the ADA, should lead to the conclusion that Congress intended to cast a wide net with the ADA and prevent discrimination in more than just physical locations. However, some courts continue to decline to consider congressional intent when evaluating the statute.


\(^{32}\) Internet/Broadband Fact Sheet, supra note 2.

\(^{33}\) ADA Amendments Act § 2(a) (codified as amended at 42 U.S.C. § 12101(a)). Near the turn of the century, the Supreme Court established a trend of strictly interpreting the ADA. The Supreme Court first found that in determining whether a person was disabled within the meaning of the Act, an impairment that could be remediated using corrective measures, like glasses for deteriorated vision, would not be considered within scope. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999) (holding disabilities within the scope of the ADA must be determined with consideration given to corrective measures, prompting the ADA Amendments Act of 2008), superseded by statute ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Then, in 2002, the Court unanimously further restricted the application of the ADA by determining that for a person to be “substantially limited” within the scope of the ADA he must, on a long-term basis, be unable or extremely limited in performing a task. See Toyota Motor Mfg., Ky, Inc. v. Williams, 534 U.S. 184, 198 (2002) (narrowing the scope of the ADA’s protections by imposing a strict interpretation of “substantially limits” within the statute, contributing to the eventual codification of the ADA Amendments Act of 2008), superseded by statute ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.
allowed the statute to remain ambiguous, leaving interpretation of congressional intent to the judiciary.

3. The Future of the Americans with Disabilities Act

Throughout the thirty-plus years the Americans with Disabilities Act has been law, courts have struggled to consistently interpret congressional intent. Circuits disagreed within seven years of its implementation, and as technology usage has continued to expand, so have the numbers of courts on either side. With the Supreme Court recently denying certiorari to a case that would have resolved this split, few avenues to resolution remain. In Robles v. Domino’s Pizza, the Ninth Circuit took a middle-of-the-road approach, holding that websites and phone applications could be places of public accommodation so long as they enabled access to the services provided by a physical location.

The Department of Justice, through the enforcement powers granted to it in the ADA, could promulgate a rule clarifying that website accessibility is included under its protections. However, in light of the Supreme Court’s recent decision pertaining to administrative rulemaking powers, such a rule, without specific direction from Congress, would likely fail in court. While even an invalid rule may provide moral support to impacted parties, it would not provide the resolution that is so clearly needed.

Finally, rather than authorize the Attorney General to issue such a rule or wait for the Supreme Court to grant certiorari to resolve the circuit split, Congress could instead amend the ADA to specifically include websites as places of public accommodation, providing a clear resolution to any debate.

34. Compare Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc., 37 F.3d 12, 20 (1st Cir. 1994) (holding public accommodations are not limited to physical structures), with Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1014 (6th Cir. 1997) (finding public accommodations are physical places).


37. Id. at 905–06.


39. See West Virginia v. EPA, No. 20-1530, slip op. at 28 (U.S. June 20, 2022) (requiring administrative agencies to have “clear congressional authorization” to promulgate important issues) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); see also 28 C.F.R. Pt. 36, App. A (2022) (indicating the Department of Justice’s willingness to identify web sites as covered under the ADA: “[T]he Department has taken the position that [T]itle III covers access to Web sites of public accommodations.”).
behind its intent in passing the ADA. This pathway would preclude the major questions doctrine—the judicial hindrance to administrative agency rulemaking endorsed in *West Virginia v. EPA.*\(^{40}\) Amending the ADA would also allow Congress to future-proof the legislation, preventing judicial discord for future major technological innovations. Despite a divided political environment, the ADA’s historical transcendence of political ideologies and consistent bipartisan support make this pathway a viable option, regardless of administration or congressional makeup.\(^{41}\) At the federal level, it appears that Congressional action represents the most promising avenue for achieving a universally accessible internet.

Recent history surrounding another area neglected by federal legislation has shown that if the federal government fails to act, state governments may act independently and, in doing so, may look outside the United States for guidance. California enacted significant consumer protection regulation (the California Consumer Privacy Act or CCPA)\(^ {42}\) two years after the European Union enacted its General Data Protection Regulation (GDPR).\(^ {43}\) While these regulations have some differences, it is clear that the GDPR was used to formulate the CCPA.\(^ {44}\) Congress has now introduced its own analog to the GDPR.\(^ {45}\) Should it be made law, the bill would be an affirmation of the regulations passed by California and other states and a ringing endorsement of the process followed: foreign legislation begetting state legislation, in turn begetting federal legislation.\(^ {46}\)

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\(^{40}\) *See West Virginia*, slip op. at 31 (emphasizing large-scale decisions are the responsibility of Congress, and not of other governmental entities unless Congress delegates the specific power).


\(^{42}\) CAL. CIV. CODE § 1798.100 (West 2022).


\(^{45}\) American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022)).

As it was with consumer privacy protection rulemaking, the European Union may also be a guiding star for website accessibility legislation. In 2016, the EU issued a Directive “on the accessibility of the websites and mobile applications of public sector bodies (“Web Accessibility Directive”). This law not only provided that public sector organizations have accessible websites, but also established coherent standards for what website accessibility is. In 2019, the EU expanded the Web Accessibility Directive to include the private sector through a second directive, the European Accessibility Act. Article 2 of the legislation provides a laundry list of products and services within the rule’s scope and requires compliance by June 28, 2025.

B. Circuits Split: Broad and Differing Interpretations of Title III by the Circuit Courts

Federal Courts have heard challenges to Title III of the ADA regarding the meaning of “public accommodations” since the early years of the Act’s implementation. Many of these challenges, while not directly concerning websites, challenged the idea that Title III applied only to physical locations. Even in these pre-internet challenges in the first decade of the ADA’s implementation, a schism emerged between the circuits, as some

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48. See id. at 5 (“The four principles of accessibility are: perceivability . . . operability . . . understandability . . . and robustness . . .”).
50. Id. at 70, 83–4.
51. See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc., 37 F.3d 12, 20 (1st Cir. 1994) (holding public accommodations are not limited to physical structures but can include insurance plans: “Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry.”); Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed’n of Grain Millers, AFL-CIO-CLC, 268 F.3d 456, 459 (7th Cir. 2001) (determining “public accommodation” does not need to be interpreted literally, but that the lynchpin is whether the business offers services to the public).
courts refused to read the ADA broadly, holding that the Act was limited to real spaces. 52

Nearly three decades of litigation later, cases involving websites are still prevalent, and the appellate courts have established three schools of thought for applying Title III. Courts that apply the statute to websites either do so through a nexus test, where the function of the website must be sufficiently linked to a physical location, 53 or through a broad interpretation of congressional intent. 54 Alternatively, courts that do not include websites as places of public accommodation generally read Section 12182 strictly, not reading in congressional intent, even from other sections of the Act. 55

III. THE FOREIGN INFLUENCE ON LEGISLATION: FROM GDPR TO CCPA AND EAA TO AN ADA SOLUTION?

As a pioneer in rulemaking for digital spaces, the European Union has demonstrated a pathway to uniform website regulation. Three pieces of legislation—the General Data Protection Regulation, Web Accessibility

52. See Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1019 (6th Cir. 1997) (finding Title III does not prohibit insurance companies from differentiating between persons on a basis of disability); Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (holding public accommodations must be places); McNeil v. Time Ins. Co., 205 F.3d 179, 188 (5th Cir. 2000) (determining Title III requires only access to a public accommodation be regulated, not the good or service provided by that accommodation); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000) (holding a disability policy not to be a place of public accommodation, as a plain reading of Title III limits its protections to physical location access).

53. See Rendon v. Valycrest Prods., Ltd., 294 F.3d 1279, 1285 (11th Cir. 2002) (determining a public accommodation is identified through an examination of the nexus surrounding the service and location); Markett v. Five Guys Enters. LLC, No. 17-CV-788 (KBF), 2017 WL 5054568, at *2 (S.D.N.Y. July 21, 2017) (denying a motion to dismiss because websites can either be places of public accommodation or sufficiently linked to one where the ADA applies); Haynes v. Dunkin’ Donuts LLC, 741 F. App’x 752, 754 (11th Cir. 2018) (holding the ADA disallows disability-based discrimination for all goods and services associated with a place of public accommodation, even those that are not tangible).

54. See Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (denying motion to dismiss, suggesting public accommodations should be construed liberally and may include websites, even if not connected to a physical location); Doe v. Mut. of Omaha Ins. Co. 179 F.3d 557, 559 (7th Cir. 1999) (ratifying the holding of Carparts Distrib. Cir. Inc. v. Auto. Wholesaler’s Ass’n of New England Inc. and expressly including websites as places of public accommodation); Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 201 (D. Mass. 2012) (holding websites, even those not accessed from a public location, can be public accommodations within the meaning of the ADA).

55. See Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1284 (11th Cir. 2021), vacated as moot on reh’g, 21 F.4th 775 (11th Cir. 2021) (adopter a narrow reading of the ADA, holding websites cannot be places of public accommodation); Magee v. Coca-Cola Refreshments USA, Inc., 833 F.3d 530, 536 (5th Cir. 2016) (“Congress’s own examples of such liberal construction confine the term ‘sales establishment’ to actual stores.”).
Directive, and European Accessibility Act—are at the forefront of digital legislation.

The first, dealing with the collection and use of personal information, has promulgated a series of state, and now federal, legislation in the United States. The GDPR and its successive state-side legislation has shown that both state legislatures and Congress are willing to entertain foreign legislation as a template. Now, the second and third European directives provide such templates for the United States to potentially amend the Americans with Disabilities Act to ensure websites are accessible for all.

A. General Data Protection Regulation: A Prime Example to Follow

A landmark piece of legislation, the General Data Protection Regulation, was adopted by the European Union in April 2016, and went into effect on May 25, 2018. It provides for transparent collection and processing of personal data and requires organizations collecting and processing data to demonstrate consent by the people whose data they have collected. The regulation also ensures individuals have a “right to erasure” or a guarantee that organizations that collect their data must erase that data under several circumstances.

The GDPR prompted a flurry of discussion regarding an individual’s right to privacy, and resulted in the passage of several analogs, including the California Consumer Privacy Act. While not an exact duplicate of the GDPR, the CCPA was clearly influenced and based on the European regulation. As there is no federal data privacy law or regulation that predates the CCPA, it would seem clear that the California legislature was heavily influenced by the European Union’s legislation.

After its implementation in January 2020, the CCPA was further refined by the California legislature, and other states have begun to adopt their own

57. Id. at 9.
58. Id. at 17–18.
59. CAL. CIV. CODE § 1798.100 (West 2022).
60. See CCPA and GDPR Comparison Chart, supra note 44 (comparing CCPA with GDPR and highlighting similarities, such as the right to erasure, the ability of individuals to have their data protected, differences in security, and the ability to correct errors).
variations of data privacy regulations, all with no successful action to regulate data privacy at the federal level. While some federal legislation has been proposed, the fastest course of action may be achieved at the state level, using the GDPR and its analogs as guides for adapting accessibility regulation.

B. Web Accessibility Directive: A Public Sector Baseline

The Web Accessibility Directive, passed in October 2016 and implemented incrementally through 2021, requires countries in the European Union to have standardized and accessible websites and mobile applications. The legislation also created a committee to coordinate accessibility standards, and requires regular reporting on compliance. While not a universal solution to accessibility issues, the Web Accessibility Directive has provided a foundation for the implementation of internet-wide standards, and has shown that such regulation is possible.

As part of the Web Accessibility Directive, the European Union adopted an accessibility standard, and has twice amended that standard to further enhance it and closer align it with the Web Content Accessibility Guideline standards. The most recent version of these standards went into effect on


63. See infra Section IV.B (discussing the proposed Online Accessibility Act, 56 H.R. 77, and the Websites and Software Applications Accessibility Act as part of the potential path to a second congressional amendment to the ADA).

64. See Council Directive 2016/2102, art.4, 2016 O.J. (L 327) 1, 10 (EU) (“Member States shall ensure that public sector bodies take the necessary measures to make their websites and mobile applications more accessible by making them perceivable, operable, understandable and robust.”).


February 12, 2022, and now holds public sector websites in the EU to an elevated standard. The standards require that websites ensure accessibility for all people by adhering to a number of criteria, including meeting text contrast requirements according to the WCAG standard and providing documentation explaining how to use accessibility features, a standard that is exclusive to the European rules.

The United States has endorsed the idea of uniform accessibility standards for websites. For example, Congress passed a federal analog in an amendment to the Rehabilitation Act of 1973. Section 508 of the Rehabilitation Act requires federal websites be made accessible, and subsequent rulemaking by the United States Access Board requires those websites conform to WCAG 2.0 standards. Similar to the Web Accessibility Directive, the Rehabilitation Act is limited to public sector websites only, but even so, this provides a baseline for future internet regulation, which should include privately owned websites.

C. European Accessibility Act: An Extension to the Private Sector

The most recent addition to the trifecta of European data and internet regulation is the European Accessibility Act. This legislation requires private sector websites and mobile application be made accessible, thus expanding the coverage of the Web Accessibility Directive. Private entities under the Act are held to the same standards as public websites under the

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70. See id. (itemizing, in rows 44 and 133, context and documentation requirements within the European standard); see also Web Content Accessibility Guidelines (WCAG) 2.1, WORLD WIDE WEB CONSORTIUM (June 5, 2018), https://www.w3.org/TR/WCAG21/#contrast-minimum (detailing the appropriate standard for text contrast); EUR. TELECOMM. STANDARDS INST., ACCESSIBILITY REQUIREMENTS FOR ICT PRODUCTS AND SERVICES 84 (2021) (illustrating product documentation requirements under the European standard).
74. See id. at 77 (“The obligations of this Directive should apply equally to economic operators from the public and private sectors.”).
Web Accessibility Directive.Countries in the European Union were required to adopt laws conforming with the directive by June 28, 2022 and must implement them within three years. What remains to be seen as the deadline for implementation approaches is whether international retailers will apply these standards to their websites worldwide, or implement accessibility changes only for the European market.

Regardless of the choices made by these private companies, now is the time for American lawmakers to embrace the opportunity to resolve the circuit split regarding the ADA and decide whether the internet should be included as a place of public accommodation. Through the Web Accessibility Directive and European Accessibility Act, the European Union clearly believes accessible websites are vital for its population and economy and that all persons should have access to products and services, even if that product or service is available on a digital-only medium. Given that one in four American adults have some sort of disability, it would seem logical for Congress to arrive at the same realization.

IV. THE FUTURE STATE OF THE PLACE OF PUBLIC ACCOMMODATION:
WHAT COULD HAPPEN AND WHAT SHOULD HAPPEN?

Given the depth of the circuit split and a strong preference for their previous rulings, unless action is taken outside of the appellate courts, the question of whether websites can be places of public accommodation under the ADA will remain unanswered for the foreseeable future. This continued disparity could have drastic consequences, leading to forum shopping for an ever-increasing number of Title III cases and to companies region-locking websites to avoid potential location-based liability.

75. See id. at 102–03 (providing websites be held to consistent standards to be “perceivable, operable, understandable and robust”).
76. Id. at 97.
77. See id. at 70 (determining an inclusive society requires products and services to be accessible for persons with disabilities).
79. See Launey & Vu, supra note 7 (explaining how plaintiffs prefer to file in state courts where the law is more favorable to them).
80. C.f. Ivana Kottasová, These Companies Are Getting Killed by GDPR, CNN Bus. (May 11, 2018), https://money.cnn.com/2018/05/11/technology/gdpr-tech-companies-losers/index.html [https://perma.cc/SU6T-XFHQ] (describing the impact of non-universal regulations and the means through which some companies will attempt to comply, including removing their product from the impacted market).
Circumventing these problems is paramount; more importantly, resolving this circuit split would provide clarity, reassurance, and protection to millions of disabled people across the country. Additionally, settling the circuit split would reduce the strain put on the judiciary by the rising number of Title III cases. Having a definitive answer to whether “places of public accommodation” include websites could have a chilling effect on the amount of suits that go to trial.

There are four primary pathways to resolution outside of the appellate courts. First, the Supreme Court could hear an appeal and rule on the issue. This could result in any of the three views discussed above being adopted. Second, Congress could amend the Americans with Disabilities Act for the second time, updating the language to be inclusive of the internet and providing futureproofing to compensate for the next “big new thing” in the world of technology. Third, the executive agencies tasked with enforcement of the ADA could promulgate rules that provide a clear interpretation of congressional intent. Fourth and finally, as with data privacy, individual states could implement their own laws, requiring websites to be accessible.

A. The Supreme Court Takes on the Split

Should the Supreme Court take up an appeal on a Title III issue, few predictors exist to determine the result. However, of the predictors that can be found, the outlook for proponents of websites as places of public accommodation is bleak. The Court has heard few cases on the ADA in general, but the Court has traditionally upheld a strict interpretation of the statute, a trend that seems unlikely to change.

1. A Brief Review of the Supreme Court’s History with the ADA

In 1999, twin sisters sued United Air Lines after they were denied the opportunity to be employed as pilots because they did not meet the airline’s minimum vision requirement for global pilots. After the Tenth Circuit upheld a decision to dismiss for failure to state a claim based on a strict interpretation of “substantial limitation” as articulated in Title I of the ADA,

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81. See Disability Inclusion, supra note 78 (providing sixty-one million Americans have a disability).
82. See Launey & Vu, supra note 7 (tracking over 2,500 Title III federal suits filed in 2021).
the Supreme Court granted certiorari. In a 7–2 decision, the Court held that the ADA required corrective measures to be taken into account in determining whether a person is disabled. The Court explained the Act only protected plaintiffs if they were substantially limited in a major life activity, such as working, not just limited by being denied a specific job. In his dissent Justice Stevens, joined by Justice Breyer, argued for a broader interpretation, not limiting the definition of “disabled” based on mitigating factors. While this worded dissent may provide hope to accessibility advocates of a possible shift in opinion on the Court, only one of the nine justices remains a sitting justice, and Justice Thomas sided with the majority and its strict interpretation of the Act.

Again in 2002, the same Supreme Court heard another appeal on Title I of the ADA, argued on behalf of the petitioner by the now-Chief Justice John Roberts. In Toyota Motor Mfg. v. Williams, the Court unanimously held that a narrow reading of the ADA should be applied by the judiciary, and that to be protected by the Act, a person must have a long-term impairment that hinders the performance of “activities that are of central importance to most people’s daily lives.” While Justice Thomas is the only remaining active member of the Court who was sitting at the time of this decision, it is important to note Chief Justice Roberts appeared as attorney for the petitioners and advocated for this narrow interpretation.

The above cases, while overturned by the ADA Amendments Act of 2008, indicate an unwillingness of the Court to read the language of the Americans with Disabilities Act as providing sweeping protections to

84. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(A) (defining a disability as: “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”) (emphasis added); Sutton, 527 U.S. at 477.
85. Sutton, 527 U.S. at 488.
86. See id. at 493 (“Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a substantially limiting impairment.”).
87. Id. at 498 (Stevens, J., dissenting) (“When an employer refuses to hire the individual ‘because of’ his prosthesis . . . that employer has unquestionably discriminated against the individual in violation of the Act.”), superseded by statute ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.
88. Id. at 474 (majority opinion).
91. Id. at 198.
92. Id. at 186.
disabled persons.\footnote{See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a) 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101) (expressing the view of Congress that the narrowing of the scope of the ADA in \textit{Toyota} and \textit{Sutton} was against the intent of the Act and that the strict interpretation of “substantially limits” by the Court was incorrect, expressly overturning the holdings in those cases).} Even though the composition of the Court has changed significantly since \textit{Toyota Motor Mfg.} was decided, the recent decision in \textit{West Virginia v. EPA} seems to indicate the Court would still be in favor of narrowly interpreting any significant statute to avoid acting as a super-legislature by assuming congressional intent and reading it into the statute.\footnote{See \textit{West Virginia v. EPA}, No. 20-1530, slip op. at 19–20 (U.S. June 20, 2022) (discussing the need for interpretation using the major questions doctrine of statutory interpretation in agencies exercising significant powers perhaps outside the scope of a congressional mandate); \textit{infra} Section IV.C (considering the chilling effect of the \textit{West Virginia} holding on large-scale administrative action, due to the revitalization of the major questions doctrine, and the likely success of a challenge to an administrative agency, such as the Department of Justice, implementing a rule requiring website accessibility, resulting in a need for Congressional action regardless of an administrative agency taking action).} While both the above cases were tied to employment and based on Title I, the logic used by the Court to reach its conclusions indicates a strong preference to apply the literal meaning of the words within the statute without considering congressional intent in resolving issues that arise within the ADA.

However, should the Supreme Court hear the issue, there is hope for advocates of the broader interpretations of Title III. Additional insight that can be gleaned from existing case law as to how the Supreme Court might rule on a Title III issue comes from a case in the Third Circuit, \textit{Ford v. Schering-Plough Corp.}\footnote{\textit{Ford v. Schering-Plough Corp.}, 145 F.3d 601 (3d Cir. 1998).} As discussed above, in this case the court held that a public accommodation under Title III must be a place, and therefore a physical location, based on a narrow reading of the statute.\footnote{See \textit{id.} at 612 (“The plain meaning of Title III is that a public accommodation is a place.”).} The concurring opinion in \textit{Ford}, authored by Justice Alito, refused to validate the proposition that Title III was limited only to physical locations and the need to resolve the already-existing circuit split.\footnote{See \textit{id.} at 615 (Alito, J. concurring) (indicating the issue of determining what public accommodation means is more difficult than the majority opinion suggests).} While not a ringing endorsement of public accommodations encompassing the non-physical, Justice Alito’s dismissal of the issue until a clear case comes along provides some support that the Supreme Court would consider a broad definition and provides a possible reason for denial of certiorari in \textit{Robles}, as that case
had supplemental issues stretching beyond the inclusion of websites under the ADA.98

Despite joining the earlier opinions which articulated a narrow interpretation of the Americans with Disabilities Act, Justice Thomas recently authored an opinion indicating a willingness to endorse websites as places of public accommodation.99 While his willingness to do so appears to turn on legislation that makes clear digital spaces are a place of public accommodation, this recent shift may provide an indicator to accessibility advocates that the Supreme Court could be open to acknowledging a broader view of the ADA than it has in the past.

Additionally, other recent Supreme Court jurisprudence has provided more indicators that the Court is willing to extend protections traditionally limited to physical locations to digital locations. In Packingham v. North Carolina,100 a First Amendment case about a North Carolina law that prevented sex offenders from accessing certain websites, like Facebook that allow minors to access and use the platform, the Court struck down the law as overbroad.101 In this opinion, Justice Kennedy, in dicta, referred to social media as “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”102 Social media websites have no corresponding physical location, they are not providing access to a good or service, such as pizza delivery in Robles, and therefore have no clear nexus to a physical place of public accommodation. This seems to be an endorsement of the broad interpretation of the ADA, ensuring that people, with or without disabilities, have a “right to fully participate in all aspects of society.”103 The concurrence, again penned by Justice Alito, tempers, but does not preclude, the Court’s openness to treating websites as “public streets and parks.”104 Packingham, a more

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99. See Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1226 (2021) (Thomas, J. concurring) (charting a pathway for legislators to regulate social media as public accommodations due to the services they provide).
101. Id. at 1738 (“[T]he Government may not suppress lawful speech as the means to suppress unlawful speech . . . [which] is what North Carolina has done here.”) (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)) (internal quotation marks omitted).
102. Id. at 1737.
104. See Packingham, 582 U.S. 98 at 110 (Alito, J., concurring) (expressing concern that some courts or states may misinterpret the majority’s language and assume regulation of all websites is
modern case, provides insight into the positions of five sitting Justices, all of whom have indicated an openness to the idea of treating the internet and websites as public places, including websites without an associated physical location.\(^{105}\)

2. An Uncertain Result

With the available data, there seems to be significant uncertainty as to which side of the circuit split the Supreme Court would land if it granted certiorari to a Title III case. While recent jurisprudence has offered the possibility of including the internet as a public space, one of the Court’s most recent decisions has deferred major economic decisions to Congress. Given that the ADA is predicated on the powers of Congress to regulate commerce and enforce the Fourteenth Amendment,\(^ {106}\) it seems possible that the Supreme Court may prefer to defer this issue to Congress as well, rather than act as a super legislature and resolve the dispute on its own.\(^ {107}\)

B. Congressional Action: The Case for the Second Major Amendment to the ADA

A more direct path to resolution of the circuit split may be through federal legislation. If Congress were to amend the Americans with Disabilities Act to include websites as places of public accommodation

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105. See id. at 1736–37. The majority, including Justices Sotomayor and Kagan, expresses concern that websites such as Amazon.com and Webmd.com could be included under the broad language of the North Carolina statute. The Court goes on to discuss the extreme impact to a person’s First Amendment rights should they be barred from accessing social media sites:

Social media allows users to gain access to information and communicate . . . North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any soapbox.

Id. at 1737 (quoting Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 870 (1997)) (internal quotation marks omitted). Justice Alito, joined by Chief Justice Roberts and Justice Thomas, refuses to go as far as to equate the internet and the town square in his concurrence, but agrees with the majority that limited access to the internet does curtail protected access to information and free speech. Id. at 1743 (Alito, J., concurring).


107. See West Virginia v. EPA, No. 20-1530, slip op. at 17, 25–26 (U.S. June 20, 2022) (discussing the presumption and preference of the judiciary to leave decisions that potentially have major economic consequences to Congress, not judges or administrative agencies).
under Title III, it could settle the circuit split without relying on the Supreme Court to devise congressional intent. Amending the Act would allow Congress to explicitly codify its intent and clarify that in order to achieve the purposes set forth in the ADA, its provisions must apply in all public spaces, physical or digital, and clarify what is clearly a source of judicial confusion.

Despite seemingly increased partisanship in modern society and Congress, both the ADA and its 2008 amendment garnered significant congressional support.\textsuperscript{108} Even though some studies show Congress is more divided than ever, the support the ADA received was not dependent on political ideology.\textsuperscript{109} Therefore, there is no indication that a proposed amendment to clarify congressional intent would fail to pass in either chamber of Congress.

Despite the rise in cases pertaining to Title III, few pieces of legislation have been proposed to remedy the issue. In the 117\textsuperscript{th} Congress, three proposals to amend the ADA were made.\textsuperscript{110} While the first proposal, the ADA Compliance for Customer Entry to Stores and Services Act, focused on physical accommodations, it also contained a provision to commission a study into a uniform accessibility standard or alternative for website access but would have done little to immediately resolve the issue at hand.\textsuperscript{111} Nonetheless, a study would at least have provided acknowledgement from the federal government of the deficiency in the current language of the ADA.

The second proposal, the Online Accessibility Act, went a step further and required “substantial compliance” with a uniform accessibility standard.\textsuperscript{112} This bill did away with the distinction between places of public

\textsuperscript{108} See ADA History—In Their Own Words: Part Three, supra note 17 (noting the passage of the ADA by a vote of 377–28 in the House of Representatives and 91–6 in the Senate); Griffin & Lynett, supra note 41 (reporting the passage of the ADA Amendments Act by a vote of 402–17 in the House of Representatives and a unanimous passage of the Act in the Senate).

\textsuperscript{109} See Drew DeSilver, The Polarization in Today’s Congress Has Roots that Go Back Decades, P\textsc{EW}R\textsc{SCH}.\textsc{CTR}. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/XPU6-X2EV] (analyzing the partisan divide in Congress, which does not align with the results of the votes in either 1990 or 2008 when the Americans with Disabilities Act and the ADA Amendments Act were passed, respectively).

\textsuperscript{110} ADA Compliance for Customer Entry to Stores and Services Act, H.R. 77, 117th Cong. (2021); Online Accessibility Act, H.R. 1100, 117th Cong. (2021); Websites and Software Applications Accessibility Act, S. 4998, 117th Cong. (2022); Websites and Software Applications Accessibility Act, H.R. 9021, 117th Cong. (2022).

\textsuperscript{111} H.R. 77 § 6.

\textsuperscript{112} H.R. 1100 § 2 (2021) (mandating compliance with the WCAG 2.0 standard).
accommodation with respect to the internet and instead would have required all “consumer facing websites” to either comply with the accessibility standard or provide an alternate means of access to users that “is equivalent to access the content available on such website.”

On the surface, the Online Accessibility Act appeared to remedy the two main issues with website accountability encountered today; it explicitly added language referring to websites and the internet to the ADA and it set a defined accessibility standard for businesses to ensure universal compliance. However, commentators have had mixed reactions to this proposal. Some believe the proposal to be a step in the right direction towards standardization and accessibility, and others view it as providing protection to businesses rather than accessibility to people with disabilities, while also removing remedies for inaccessibility from impacted citizens.

The third and most recent proposal, the Websites and Software Applications Accessibility Act, was a bicameral bill. Like the Online Accessibility Act, this bill also called for the adoption of a uniform accessibility standard, but unlike the Online Accessibility Act, the Websites and Software Applications Accessibility Act did not dictate what the

113. Id.

114. See id. (creating a Title VI within the Americans with Disabilities Act which explicitly includes websites under the purview of the ADA and requiring compliance with the WCAG 2.0 standard or the provision of an alternate and equivalent avenue to access the information available online). While setting an enforceable, universal accessibility standard for the United States appears to be a step in the correct direction, it is puzzling as to why WCAG 2.0 was chosen, especially in light of the European Union decision to update its standard to an enhanced version of WCAG 2.1. See Commission Decision 2021/1339, art. 2, 2021 O.J. (L 289) 53, 54 (EC) (updating the applicable standard for website accessibility to EN 301 549 v3.2.1); Latest Changes to Accessibility Standard, supra note 69 (comparing European standard requirements with WCAG 2.1). Even when disregarding European legislation, the decision to set a standard at WCAG 2.0 remains confusing, as the World Wide Web Consortium has been recommending WCAG 2.1 over 2.0 since June 2018. See Web Content Accessibility Guidelines (WCAG) 2.1, supra note 70 (noting the W3C recommendation date of June 5, 2018).

115. See Hassan Ahmad, Beyond Sight: Modernizing the Americans with Disabilities Act and Ensuring Internet Equality for the Visually Impaired, 25 J. GENDER, RACE & JUST. 321, 352–53 (2022) (celebrating the Online Accessibility Act’s provisions that require websites comply with a set standard but decrying the provisions that allow websites to avoid complying with those standards if they “provide an alternative means of access”).


standard must be, allowing for flexibility and adaptation to new technology, in the same manner as its European predecessor, the Web Accessibility Directive. This legislation would have barred discrimination based on disability and expressly included businesses that do not have a physical location, eliminating the ambiguity that has caused the circuit split on Title III of the ADA. The Websites and Software Applications Accessibility Act also would have impacted a wider range of technology than that of the Online Accessibility Act. As it was currently drafted, some commentators believe that if made law, the Websites and Software Applications Accessibility Act would provide the impetus to ensure businesses prioritize accessibility as they develop websites. While none of these proposals became law in the 117th Congress, they all have been introduced in the 118th Congress and are promising signs that Congress may be in the early stages of addressing this issue.

118. See Websites and Software Applications Accessibility Act § 2(b)(2) (delegating power to the executive branch to set, enforce, and update accessibility standards).

119. See id. § 2(b)(4) (articulating Congressional intent to allow flexibility in the law to aid in the adaptation of accessibility standards for new technology). Considering the Supreme Court's holding in West Virginia v. EPA, this articulation within the bill itself is especially important, as it provides "clear congressional authorization" for executive agencies to promulgate and change regulations without violating the major questions doctrine. See West Virginia v. EPA, No. 20-1530, slip op. at 19 (U.S. June 20, 2022) (holding administrative agencies are limited by their mandate from Congress and bear the burden of showing their grant of authority) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) (internal quotation marks omitted); infra Section IV.C (detailing the current limitations on the Department of Justice's ability to issue a new rule declaring websites places of public accommodation).

120. See Council Directive 2016/2102, art.6, 2016 O.J. (L 327) 1, 10–11 (EU) (adopting a minimum standard for accessibility compliance but establishing a pathway to update or replace the standard so long as the change does not cause a reduction in accessibility).

121. See Websites and Software Applications Accessibility Act § 3(8)(b) (including public accommodations in scope "regardless of whether the public accommodation or testing entity owns, operates, or utilizes a physical location for covered use").

122. Compare id. §§ 3(4), 7(a)(2) (extending accessibility requirements to software that runs on a litany of devices including those developed in the future, and preserving an individual cause of action), with Online Accessibility Act, H.R. 1100, 117th Cong. § 2 (limiting individual causes of action to a period only after several other actions have been exhausted and extending accessibility requirements only to public websites and certain applications).


124. ADA Compliance for Customer Entry to Stores and Services Act, H.R. 241, 118th Cong. (2023); Home Internet Accessibility Act, H.R. 827, 118th Cong. (2023); Websites and Software
C. Clarification Through Administrative Action

The Department of Justice (DOJ) is charged with enforcing Title III of the Americans with Disabilities Act.\textsuperscript{125} As part of this charge, the DOJ may issue rules to clarify the statute and enforcement thereof. In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking in which it determined a need for clarification of Title III, in part due to the circuit split.\textsuperscript{126} In this request for public comment, the DOJ appeared to be leaning towards adopting a standardized set of accessibility guidelines and asked for input to inform its decision-making process.\textsuperscript{127} Unfortunately, issuing the request for comment was the extent of the DOJ’s action. The issued request was withdrawn over seven years later in a second notice that explained the DOJ would “continue to assess whether specific technical standards are necessary and appropriate to assist covered entities with complying with the ADA.”\textsuperscript{128}

Even if the DOJ restarted the rulemaking process and reassumed its position that websites are encompassed as places of public accommodation, there is a new substantial barrier recently endorsed by the judiciary that could hinder or block promulgation of a final rule outright. In 2022, the Supreme Court, in \textit{West Virginia v. EPA}, hamstrung the administrative rulemaking process for agencies that issue rules with potentially major economic consequences.\textsuperscript{129} Under this revitalized major questions doctrine, for the Court to ensure agencies are not “asserting highly consequential power beyond what Congress could reasonably be understood to have granted[,]”\textsuperscript{130} the agency must “point to clear congressional authorization for the power it claims.”\textsuperscript{131}

Here, a rule mandating conformance to a universal standard would certainly have a significant economic impact. Most websites are not

\textsuperscript{125} Americans with Disabilities Act of 1990, 42 U.S.C. § 12188(b).
\textsuperscript{126} See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460–1, 43463 (July 26, 2010) (discussing the various approaches courts had taken in analyzing Title III cases and determining that the Act mandates “nondiscrimination by a place of public accommodation . . . including those offered via Web sites.”).
\textsuperscript{127} See id. at 43465–67 (detailing the WCAG 2.0 standard and asking questions pertaining to the feasibility and consequences of adopting the standard).
\textsuperscript{129} West Virginia v. EPA, No. 20-1530, slip op. at 19 (U.S. June 20, 2022).
\textsuperscript{130} Id. at 20.
\textsuperscript{131} Id. at 19. (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
accessible, and with some studies estimating considerable time requirements to make websites accessible, the cost of labor alone could be extraordinary. Due to this potential impact, unless the DOJ could point to specific instructions from Congress to regulate websites under the ADA, a court may stay the rule under the West Virginia precedent. The ADA gives the DOJ the power to enforce Title III through the Attorney General, but does not specifically articulate a grant of power for the DOJ to promulgate a rule mandating compliance with a specific accessibility standard. Despite the legislative records of the Americans with Disabilities Act of 1990 and its 2008 amendment containing emphatic endorsements of the ADA’s broad scope and Congress’s intent to ensure the government prevent all forms of disability discrimination, it is questionable whether the Court would find anything but a direct statement of intent in the language of the law to be sufficient to survive the test.

D. From State to Nation – The Pathway to an American Accessibility Act

1. Is Federal Action the Only Way to Resolve the Circuit Split?

Federal action would yield the ideal remedy to the circuit split because it would provide consistency across the country and prevent any discord that


134. See West Virginia, slip op. at 4 (Kagan, J., dissenting) (discussing how the Court refused to grant leeway to Congress providing a broad grant of power to the EPA).


136. See 136 Cong. Rec. E1913–01 at E1918 (daily ed. June 13, 1990) (speech of Rep. Steny Hoyer) (discussing the broad coverage Congress intended the ADA to have); West Virginia, slip op. at 31 (finding a lack of a grant of Congressional authority within the statutory section in question).
may arise from fifty similar but not identical state laws. The potential actions by the administrative agencies, Congress, or the Supreme Court are by far the most frequently advocated for resolutions to the circuit split on Title III.\(^{137}\) While commentators differ in their preferred resolution strategy, nearly all believe that a federally driven solution is the best or only resolution. Advocates for judicial resolution believe that the Supreme Court would adopt a broad interpretation of places of public accommodation, but proponents of other solutions are less sure.\(^{138}\) Despite these differences of opinion, contemporary discussion of solutions to the circuit split remains cloistered within the federal level of government.

2. A State-Based Approach, Based on Global Accessibility Standards

There is another pathway to nationally recognized website accessibility rights. Action by states to resolve the ambiguity in the Americans with Disabilities Act (ADA) may be the solution to the circuit split.\(^{137}\) The ambiguity in the ADA arises from the Supreme Court’s interpretation that places of public accommodation are limited to physical spaces.\(^{138}\) This limit was established by the Supreme Court in the case of \(^{137}\) _Heard v. University of Alabama_, 503 U.S. 410 (1992), and has been echoed in subsequent cases.\(^{138}\)

\(^{137}\) See Christopher Mullen, Note, _Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility_, 11 DREXEL L. REV. 745, 768 (2019) (advocating for Congress to amend Title III to expressly include websites as places of public accommodation); Michele Astor-Pratt, Comment, _There’s No Place Like Dot-Com: Are Websites Places of Public Accommodation Under Title III of the ADA?_, 63 B.C. L. REV. (E-SUPP.) II.-31, II.-43 to II.-44 (Apr. 29, 2022) (arguing for judicial resolution of the split through broad interpretation of congressional intent); Ella G. Clifford, Article, _Remaining Barriers to Accessibility: Americans with Disabilities Act and Websites_, 2022 B.C. INTELL. PROP & TECH. F. 1, 11–13 (Aug. 1, 2022) (supporting either a judicial or administrative adoption of the broad interpretation of Title III to allow for future flexibility); Elliza Guta, Article, _Clicks, Bricks, and Politics: Website Accessibility under the Title II and Title III of the Americans with Disabilities Act_, 73 MERCER L. REV. 693, 725–26 (2022) (supporting a combination of congressional and administrative remedies to ensure clarity and avoid continued judicial confusion); Ahmad, supra note 115, at 352–54 (endorsing the Online Accessibility Act and further congressional amendments to the ADA); Zachary E. Shapiro et al., _Designing an Americans with Abilities Act: Consciousness, Capabilities, and Civil Rights_, 63 B.C. L. REV. 1729, 1730–32 (May 2022) (proposing Congress pass a new law, beyond the Americans with Disabilities Act, to ensure continued accessibility by providing for the continued adoption of new and developing technology).

\(^{138}\) See Astor-Pratt, supra note 137, at II.-43 to II.-44 (Apr. 29, 2022) (asserting Title III is ambiguous so courts must consider the congressional purpose for enacting the ADA, which would lead to the conclusion that websites should be included as places of public accommodation); Clifford, supra note 137, at 11, 13 (calling for a Supreme Court decision to eliminate judicial confusion and resolution to be broad and flexible). But see Sarah S. S. Seo, Note, _Failed Analogies: Justice Thomas’s Concurrence in Biden v. Knight First Amendment Institute_, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L. J 1070, 1100–01 (2022) (arguing some websites, like social media, cannot be places of public accommodation regardless of judicial interpretation of the ADA); Mullen, supra note 137, at 771–72 (relying on the Supreme Court resolving the circuit split only as a method of last resort); Guta, supra note 137, at 722–23 (expressing exasperation with the Supreme Court’s continued inaction on Title III and articulating that even should the Supreme Court hold that broad interpretation of the ADA is correct, broad interpretation without a defined accessibility standard would continue to cause disparate harm to people with disabilities).
Disabilities Act may be the quickest and most probable way to resolve the issue at hand, especially given the recent refusal of the Supreme Court to hear *Robles* and rule on the circuit split. Other states may be incentivized to follow a large, economically powerful state or a state central to corporate governance that enacts accessibility legislation requiring conformance to an accessibility standard, perhaps by using the European Accessibility Act as a blueprint. This phenomenon, dubbed the “California Effect,” allows for eventual national regulation by enacting regulation at the state level of government. While the “California Effect” has traditionally been viewed as applicable primarily to environmental legislation, the ongoing spread of data protection regulation across the United States lends credence to the ability of a large state to influence digital regulation.

As was the case with the CCPA, a state implementing accessibility legislation would not be striking out into the world on its own. The European Union, through the Web Accessibility Directive and European Accessibility Act, has laid a template for other countries and states to follow in creating an accessible internet. This international promulgation of regulation from the European Union is the “Brussels Effect,” a global version of the California Effect. While some commentators decry the Brussels Effect as unilateral globalization and a slight to international sovereignty, foreign countries and states are not forced to adopt European regulation but instead choose to do so to ensure continued commerce with Europe, or in the case of digital accessibility, because it is a good idea. A standard for accessibility has been set, vetted, updated, and adopted by two large international bodies, the European Union and Australia. Because the


140. See *Bradford*, supra note 12, at 5 (introducing the California Effect to control and regulate higher level entities through uniform standards adopted at a smaller level).

141. Compare *id.* at 8 (discussing the California Effect as having a limited scope) with 2021 Consumer Data Privacy Legislation, *supra* note 15 (highlighting year-after-year increases in consumer privacy legislation since the passage of the CCPA and crediting the CCPA for the rapidly increasing amount of consumer privacy legislation in recent years).


143. See *Bradford*, supra note 12, at 3 (describing the reach of European policy as the Brussels Effect).

144. See *id.* at 51–52 (comparing and contrasting incentives for countries outside the European Union to accept the Brussels Effect or fight against it).
United States does not have an accepted standardized accessibility standard, embracing the Brussels Effect and using the Web Accessibility Directive and European Accessibility Act as templates for American legislation would be an efficient solution for an issue that began over thirty years ago.

Despite the effect having California as its namesake, California is not the only state with the ability to influence legislation across the country; in fact, an east coast state may be the most influential regarding website accessibility. In 2021, federal Title III cases were overwhelmingly filed in New York. Like California, New York has a large population and is economically influential amongst the states. As an economic powerhouse and the hub for Title III activity, the state has the potential to hold considerable sway over businesses, and should the New York legislature provide for website accessibility, it is a reasonable assumption that companies would choose to conform their websites, rather than face penalties or remove their business from the state. As been demonstrated with the CCPA, the California Effect is not immediate; however, states have taken more action on Consumer Data Protection in the four years since the CCPA has become law than the federal government has taken to resolve the ambiguity of Title III in the nearly thirty-three years the ADA has been law. Legislative expedience is clearly relative; however, accessibility advocates would prefer action that may take a decade to spread across the country rather than no action at all. California or New York could begin to implement legislation to spearhead systematic change.

Some commentators have expressed concern about the impacts of state-level legislation creating jurisdictional strife or causing issues for businesses unexpectedly held to a state’s standards where they do not routinely operate. These apprehensions should not prevent states from legislating

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147. 2021 Consumer Data Privacy Legislation, supra note 15 (highlighting the increase in consumer privacy bills in the years following the enactment of the CCPA, with the number of proposed bills growing 600% in a period of three years).

148. See Grant, supra note 116, at 86–87 (arguing against state-based legislation for accessible websites due to concerns of increased litigation, business impacts, and preemption).
on the issue nor stop legislatures from working to ensure their constituents have the ability to access websites because history has shown that the likelihood of any of the three concerns having a major impact is low. Jurisdictional strife is a moot point; states, like countries, do not have to adopt another state’s laws. States are free to do so and, as the CCPA has demonstrated, many are willing to adopt and adapt legislation from one another. 149 Should a state overreach its jurisdiction by legislating activity that does not impact its citizens and takes place outside of its physical borders, the federal judiciary will restrain the state and ensure it acts without violating Congress’s power to govern interstate commerce. Otherwise, states may regulate intrastate commerce and may impose rules and requirements on businesses that operate within their border. Finally, should states impose different requirements for accessibility, companies that operate in multiple states will be able to adapt and ensure compliance. 150

V. CONCLUSION

In the nearly thirty-three years since the Americans with Disabilities Act of 1990 became law, it has significantly improved physical accessibility for the over sixty million Americans with disabilities. A sweeping regulation, passed by Congress with the express intent of preventing discrimination based on disability and providing enforceable standards to do so, the ADA was a product of its time. 151 Congress failed to clearly articulate within the

149. See Hicks, supra note 46 (detailing other privacy laws engendered on by CCPA in seven other states)

150. For many companies, this could mean updating their operations to conform with the strictest standards, much like Microsoft and Meta have with the European Union’s General Data Privacy Regulation. See Julie Brill, Microsoft’s Commitment to GDPR, Privacy and Putting Customers in Control of Their Own Data, MICROSOFT (May 21, 2018), https://blogs.microsoft.com/on-the-issues/2018/05/21/microsofts-commitment-to-gdpr-privacy-and-putting-customers-in-control-of-their-own-data/ [https://perma.cc/M5G8-EG7M] (committing to complying with the strict European data privacy regulation for all consumers, not just those who are European citizens or in Europe); Erin Egan & Ashlie Beringer, Complying With New Privacy Laws and Offering New Privacy Protections to Everyone, No Matter Where You Live, META (April 17, 2018), https://about.fb.com/news/2018/04/new-privacy-protections/ [https://perma.cc/3ABV-NRM2] (assuring consumers worldwide that some privacy protections required by GDPR will be available to all, not just those protected by GDPR). Should several states adopt website accessibility laws, the most likely outcome seems to be that business that operate in all or some of those states will design their systems to comply with the strictest of the laws, rather than opt to either deal with the expense and risk of operating separate websites for state-by-state operations or choosing to discontinue operating in states based solely on variance in web accessibility standards.

151. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b). The astronomic growth in household internet usage that the United States has experienced in the past twenty years would have

https://commons.stmarytx.edu/thestmaryslawjournal/vol55/iss2/6
Act whether a new technology, the internet, should be included within the
definition of “places of public accommodation” and unknowingly created
ambiguity in applying the law to what would become one of the biggest
innovations of the twentieth century. Thirty years of litigation has
developed a three-pronged circuit split in order for the ADA to apply:
(1) courts that strictly interpret the law and hold that places of public
accommodation must be physical locations, (2) courts that broadly read
congressional intent into the ADA and hold that websites, even those
without an associated location must be accessible to people with disabilities,
and (3) courts that take a moderate view, requiring a nexus between the
website and a physical location, such as a portal to order takeout food.

The Supreme Court’s recent rejection of certiorari in Robles152 has allowed
judicial confusion to continue through the COVID pandemic, a time when
people have depended more on digital means to connect with the world
than ever. This judicial confusion has resulted in an explosion in the number
of lawsuits brought under Title III of the ADA.153 With no judicial
resolution in sight, commentators have called for congressional or
administrative action; however, when Congress amended the ADA in 2008,
it again neglected to clarify the law’s relationship with the internet, and
executive agencies have shown few signs of movement toward rulemaking.
While some legislation that would resolve the ambiguity has been proposed,
there is no indication as to when, or even if, it would be made law.154

The most recent Congress has shown some indicators of action in the
form of three proposed bills. First, the ADA Compliance for Customer
Entry to Stores and Services Act  would not resolve the circuit split, but
contains a provision that would at least draw focus to the need to resolve
the issue.155 Second, the Online Accessibility Act, appears on its face to

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152. Robles v. Domino’s Pizza, LLC, 913 F.3d 898 (9th Cir. 2019), cert. denied, 140 S. Ct. 122
(2019).

153. See Launey & Vu, supra note 7 (detailing statistics showing a 14% year-over-year increase
in Title III Website Accessibility lawsuits between 2020 and 2021 and a 356% increase from 2017 to
2021).

154. H.R. 77, 117th Cong. (2021); Online Accessibility Act, H.R. 1100, 117th Cong. (2021);
Websites and Software Applications Accessibility Act, S. 4998, 117th Cong. (2022); Websites and

155. See H.R. 77, 117th Cong. § 6 (2021) (providing for a study on accessibility standards and
other options for accommodations).
resolve the ambiguity in Title III by amending the ADA to include a sixth title specifically for websites and by setting a universal accessibility standard; however, upon closer examination, the Online Accessibility Act is vague and limits the individual rights of people who want to seek recourse.\footnote{See Online Accessibility Act, H.R. 1100, 117th Cong. § 2 (2021) (creating a Title VI within the Americans with Disabilities Act which explicitly includes websites under the purview of the ADA and requiring compliance with the WCAG 2.0 standard or the provision of an alternate and equivalent avenue to access the information available online).} Third, the Websites and Software Applications Accessibility Act is the most promising federal option for accessibility advocates. This bill would not only set a national accessibility standard and explicitly tie the internet to the ADA; it would also require the government to keep accessibility standards up to date as technology continues to develop.\footnote{Websites and Software Applications Accessibility Act, S. 4998, 117th Cong. § 2(b)(2), (b)(4) (2022) (articulating Congressional intent to allow flexibility in the law to provide the ability to adapt accessibility standards for new technology and delegating power to the executive to set and maintain an accessibility standard).} While the Websites and Software Applications Accessibility Act looks promising, there is no guarantee that Congress will pass it, and there is still no guarantee that an amended version of the bill will retain the clauses that make the current version so appealing.

Outside of the United States, robust and future-proof legislation has been implemented to create website accessibility standards in the European Union and Australia.\footnote{Council Directive 2016/2102, art. 4, 2016 O.J. (L 327) 1, 10 (EU); Council Directive 2019/882, 2019 O.J. (L 151) 70, 102–03 (EU); Easton, supra note 142.} These laws should serve as a template for a state legislature that decides to rise to the call. The European Union has had success in implementing and keeping the Web Accessibility Directive current and is expanding accessibility standards to private websites with the European Accessibility Act. Both directives can help lawmakers in the United States craft robust, purpose-driven accessibility laws that will resolve the issues caused by the circuit split on Title III. The United States should, on this occasion, embrace the Brussels Effect and follow in the footsteps of the European Union.

If the federal government does not act to resolve the ambiguity within Title III, the states should act independently to regulate accessibility, much like they have begun to do for consumer privacy. A large, economically strong state like New York or California, could implement legislation mandating website accessibility for its citizens, as has been the case with the California Consumer Privacy Act. The influence of the large state may cause...
other states to adopt similar standards or cause businesses that operate in multiple states to conform to those standards to maintain commerce with the implementing state. Should that initial legislation spread wide enough, it could render the federal inaction and ambiguity within Title III moot.

Regardless of what resolution settles the circuit split, finality is desperately needed. One in four American adults is impacted by disability, and Americans who are disabled are significantly less likely to use the internet. Given online media’s place in the social discourse of today’s society, surely it is of vital importance to ensure that all Americans can access and use the internet. Should Congress, administrative agencies, and the Supreme Court continue their failure to address this pressing issue, states should exercise their legislative muscle in the interest of their citizens and ensure an open, accessible digital landscape for all.

159. Disability Inclusion, supra note 78.
160. See Perrin & Atsk, supra note 3 (finding 15% of disabled Americans do not use the internet, while only 5% of Americans without a disability do not go online).