NOTE

JUSTICE SCALIA AND HIS META-CANON OF ABSURDITY

I. INTRODUCTION

A blind woman sits at home eagerly searching the Internet. She has recently purchased brand new software that allows her, for the first time in her life, to access this new invention, the World Wide Web. She is finally going to be able to do one of the many things she has never been able to do before—buy furniture without the help of anyone at all. This brand new software of hers will read, out loud, the description of every piece of furniture pictured on the website, allowing her to "browse" at her own pace, through the entire inventory of her favorite store. She will be able to compare prices, explore fabric options, even color coordinate. The independence that this will grant her cannot be measured in monetary terms. It will be the first time that a friend or family member is not burdened with the duties of driving her to a store and standing behind her while describing the various colors, shapes, and details of every piece of furniture. It will be the first time that she will not have to second guess the advice of the store clerk who, when faced with a blind woman, will readily lie about what looks good just to make a commission. It will also be the first time that she will be able to shop without knowing that every pair of eyes in the store is focused on her and her ubiquitous white cane that no matter what color you paint it, still looks exactly like what it is, and never fails to draw attention.

However, this woman's sense of freedom and independence is short-lived because the website that she has chosen is incompatible with her brand new software. The software cannot tell her what the furniture at her favorite store looks like. It cannot even tell her what it costs. The website is incompatible with her software because the website designers have chosen to make it this way. She has gone back to square one, with no independence, no freedom, and without the ability to do what average consumers do every day without thinking twice. It would seem that our justice system would provide a solution for this woman. After all, she is

being discriminated against based on the store's refusal to accommodate her disability by making modest changes to its website. But our justice system has no answer for her. Our circuits are currently split about whether or not this woman deserves her independence.[1] They are split on whether or not being excluded from the Internet is just one more thing that she should learn to deal with, like people staring, or salespeople lying. The Americans with Disabilities Act ("ADA") should protect this woman. And in some circuits it does. But not in those circuits that follow the dictates of Justice Scalia and his new meta-canon, and the absurd results that it creates.

Justice Scalia, through his role on the Supreme Court, has created a new meta-canon, which, as it has been applied by both the Justice himself[2] and by those who adhere to his strictly textualist philosophy, states that all unclear statutes must be read narrowly.[3] Recent decisions involving the application of Title III of the ADA to the Internet show that Justice Scalia's new canon of statutory interpretation will often lead to absurd and unintended results. The case studies within this Note will show that various circuits have taken Justice Scalia's meta-canon to its, arguably, inevitable conclusion, and expanded it so that the meta-canon now reads that *all* statutes must be read narrowly.

It will further be shown that the application of Justice Scalia's meta-canon is unwarranted in this context for numerous reasons. First, the meta-canon requires judges to consciously ignore the stated purpose of the ADA[4] and analogous precedent. Additionally, the meta-canon negates any influence that the Department of Justice ("DOJ"), an agency in charge of interpreting and enforcing the ADA, might have on establishing the meaning of the statute. It will be shown that within the context of the ADA, the application of this new meta-canon, the ultimate illustration of the "fire-breathing conservatives . . . led by Scalia,"[5] leads

1. For example, the Ninth Circuit has held that such discrimination constitutes a redressable injury. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006). Alternatively, the Eleventh Circuit has held that a complaint alleging such discrimination cannot survive a motion to dismiss for failure to state a claim. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1317-21 (S.D. Fla. 2002).

2. *See infra* notes 56-67 and accompanying text.

3. Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 140 (2000).

4. 42 U.S.C. § 12101(b)(4) (2000) (stating that it is the purpose of the Americans with Disabilities Act "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities").

5. JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 180 (2007).

to absurd results that could not have been contemplated or intended by Congress when it enacted the ADA.

II. THE DEBATE OVER LEGISLATIVE INTENT

In order to properly understand both the purpose and the impetus behind Justice Scalia's apparent view that unclear statutes must be read narrowly, a brief overview of the current debate regarding the methods by which statutes are interpreted and the role of legislative intent in that interpretation is necessary. Legislative intent, within the context of this discussion refers to legislative history, as it exists in extrinsic sources or "outside of the language of the statute at issue in the litigation."[6] Extrinsic sources include, for example, committee reports and certain congressional debates regarding the statute at issue.[7]

For the purposes of this Note, the two opposing sides of the legislative intent debate will be referred to as "intentionalists" and "textualists."[8] Intentionalists are those judges and scholars who look to the intent of Congress in determining the meaning of an unclear statute.[9] Textualists are those judges and scholars who prefer to glean the purpose of the statute from the text and only the text and share an inherent distrust of the very notion of congressional intent.[10] While the arguments on both sides are complex and have been subject to scrutiny in a variety of academic settings, the arguments can be briefly summarized as follows.

Intentionalists essentially argue that the legislature, in passing a statute, has a general intent regarding what that statute should mean and what effect it should have, and that such intent cannot be determined by looking solely at the words used in the text of the statute itself.[11] They argue that ignoring extrinsic evidence of legislative intent will increase the "likelihood of a court's accepting an interpretation that is absurdly at odds with the intentions of the enacting legislature"[12] and therefore circumventing the will of the legislature and undermining "legislative

6. Mikva & Lane, *supra* note 3, at 129.

7. *Id.* at 131; United States v. Am. Trucking Ass'ns, 310 U.S. 534, 546-48 (1940).

8. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423-24 (2005).

9. *Id.* at 419.

10. Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 433 (2005).

11. *See* Manning, *supra* note 8, at 423-24.

12. *See* Solan, *supra* note 10, at 432.

primacy."[13] The scenario that the intentionalists feared may well have come to pass in some of the circuit court's interpretations of the ADA.

The textualist critique stems in large part from an inherent distrust in both the legislative process and in the legislators themselves. Congress is seen as an "overreaching institution with questionable processes bent on furthering the interests of various special interests,"[14] which, due to its varied membership and complicated processes, is incapable of having a coherently identifiable intent.[15] Individual legislators are often critiqued for not having sufficient knowledge of any individual piece of legislation and voting in a certain way simply because party loyalty, or their own personal ambitions, require them to do so.[16] Furthermore, textualists fear that if legislative intent is consistently given great weight by the courts, legislators will attempt to corrupt the process by "planting" legislative history in an attempt to influence the judicial system.[17] "[A]nyone familiar with modern-day drafting of congressional committee reports is well aware, the references . . . were inserted . . . at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was . . . to influence judicial construction."[18] These suspicions of legislative history and intent have led to a certain rigid attitude towards statutory construction. As Justice Scalia himself put it, the textualist philosophy is that "[w]e are here to apply the statute, not legislative history . . . [s]tatutes are the law."[19]

13. *Id.* at 432. The Supreme Court has repeatedly focused on the idea of legislative primacy, essentially the notion that the legislature should be deferred to because "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting); *accord* Gregg v. Georgia, 428 U.S. 153, 175-76 (1976) (plurality opinion).

14. *See* Mikva & Lane, *supra* note 3, at 121.

15. *See* Manning, *supra* note 8, at 424.

16. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 80-81 (1991); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 48, 100-01 (1974).

17. John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 687-88 (1997); Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 420 (1994).

18. Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

19. Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting).

III. THE USE OF LEGISLATIVE HISTORY AS A TOOL OF STATUTORY INTERPRETATION

Through the common law, settled rules have developed outlining when the use of legislative history, and other tools of statutory interpretation such as canons of statutory construction,[20] is permissible. One of the most oft-cited rules is the "plain meaning rule,"[21] which, as articulated by Chief Justice Marshall, states that "[w]here there is no ambiguity in the words, there is no room for construction."[22] However, when a statute is unclear, "the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction."[23] Despite these well-settled rules, courts often look to extrinsic evidence of legislative intent even when a statute appears clear on its face. As Justice Holmes stated, "[i]t is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. . . . [this] does not preclude consideration of persuasive evidence if it exists."[24] The idea that relying on congressional history should be relegated to only those circumstances where the statute is unclear has been refuted in other Supreme Court cases, such as *United States v. American Trucking Ass'ns*, where the Court stated that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rules of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[25] This explains why some say that "[n]o occasion for statutory construction

20. There are numerous canons of statutory interpretation that are used in the legal field and a detailed analysis of their relevance and the critiques attached to each are beyond the scope of this analysis. For a broader discussion of canons of construction see, for example, Symposium, *Theories of Statutory Interpretation (And Their Limits)*, 38 LOY. L.A. L. REV. 1899 (2005); Ebon Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990). For a concise discussion of the canons relevant to this analysis, see *infra* notes 158-71 and accompanying text.

21. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 495 (1992) (Blackmun, J., dissenting); Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 455 (1989); Watt v. Alaska, 451 U.S. 259, 266 (1981); Maine v. Thiboutot, 448 U.S. 1, 13 (1980) (Powell, J., dissenting); Mohasco Corp. v. Silver, 447 U.S. 807, 828 (1980) (Blackmun, J., dissenting); Simpson v. United States, 435 U.S. 6, 17 (1978) (Rehnquist, J., dissenting); Interstate Commerce Comm'n v. J-T Transp. Co., 368 U.S. 81, 107 (1961) (Frankfurter, J., dissenting); Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 444 (1955) (plurality opinion); Shapiro v. United States, 335 U.S. 1, 31 (1948); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940).

22. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820).

23. Hamilton v. Rathbone, 175 U.S. 414, 419 (1899).

24. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).

25. *American Trucking Ass'ns*, 310 U.S. at 543-44.

now exists when the Court will *not* look at the legislative history."[26] This runs in direct contrast to some of the views expressed in the nineteenth century, when Justice Story, a predecessor of Justice Scalia, stated that judges should adhere to "the fair meaning of the words of the text" and not the "'probable meaning' of persons, whom they never knew, and whose opinions, and means of information, may be no better than their own."[27]

It is illustrative to note that after the Supreme Court's decision in *American Trucking Ass'ns*, "many judges, lawyers, and scholars presumed [that] the plain meaning rule had suffered its demise."[28] In fact, up until Justice Scalia's appointment to the Court in 1986, the plain meaning rule was occasionally referred to by the Supreme Court, but was never actually relied on as a basis for a decision.[29] The plain meaning rule has clearly seen a resurgence of its popularity. There are several circuits that have subscribed to Justice Scalia's meta-canon, and do not utilize the "persuasive evidence." They instead rest on what the Supreme Court, prior to Justice Scalia's presence, called a "superficial examination."[30]

Textualists of course provide a justification for their refusal to utilize this persuasive evidence, and their unadulterated adherence to the text of the statute. For textualists, if a legislative intent is to be ascertained and deemed relevant, then the text of the statute is the only tool for the job. "[P]rimacy of the language and structure of the statute [is] the basis for discerning Congress' intent in enacting the law."[31] Furthermore, textualists like Justice Scalia tend to express an extremely disdainful view of the idea that legislative history can clarify congressional intent, or the meaning of a statute. "If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."[32]

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26. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983).

27. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 407, at 390 n.1 (Da Capo Press 1970) (1833).

28. Eric S. Lasky, Note, *Perplexing Problems with Plain Meaning*, 27 HOFSTRA L. REV. 891, 895 (1999).

29. *See* Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1301-08 (1975); Karkkainen, *supra* note 17, at 436.

30. *American Trucking Ass'ns*, 310 U.S. at 544.

31. Eric W. Lam, *The Limit and Inconsistency of Application of the Plain Meaning Rule to Selected Provisions of the Bankruptcy Reform Act of 1994*, 20 HAMLINE L. REV. 111, 111 (1996).

32. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

Justice Scalia would ardently oppose those, like Justice Holmes, who say that legislative intent is relevant to the inquiry in all cases regardless of the clarity of the statute. "Scalia has argued that his [textualist] methodology is supported by the constitutional principle against delegation of lawmaking authority to legislative subgroups."[33] In other words, his meta-canon is necessary because anything that strays away from a strict plain meaning approach is simply judicial lawmaking, or judicial activism. However, "[e]ven friendly commentators find Scalia's reasoning to be an insufficient basis to prohibit all reference to legislative history."[34]

Justice Scalia's refusal to grant credence to legislative intent in "clear statutes" presents the interesting dilemma of identifying what exactly constitutes a clear statute. An unclear statute, as defined by Justice Brown, is one that is "susceptible upon its face of two constructions."[35] This creates a dilemma, as it is arguable that language being what it is, a fluid and multifaceted thing, all statutes could potentially be susceptible to multiple constructions. As will be shown, courts have differed as to whether the ADA is in fact a "clear" statute that needs no tools of statutory interpretation to help discern its meaning, or whether it is in fact "unclear."

A. Clarity of the ADA

Various courts have come to different conclusions as to the clarity of the ADA. In *Carparts Distribution Center Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, the First Circuit found that the phrase "public accommodation" was ambiguous.[36] In *Access Now, Inc. v. Southwest Airlines Co.*, the court found that the Internet website of Southwest Airlines was not covered by the ADA because "Internet" or "website[]" was not in the plain language of the statute.[37] However, the list of "public accommodations" within the ADA does include "travel service."[38] The plaintiffs argued that the ADA did in fact apply because Southwest Airlines was operating a travel service.[39] The court reiterated

33. William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1311 (1998).

34. *Id.*

35. Hamilton v. Rathbone, 175 U.S. 414, 419 (1899).

36. Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994).

37. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

38. 42 U.S.C. § 12181(7)(F) (2000).

39. *Sw. Airlines, Co.*, 227 F. Supp. 2d at 1319 n.8.

that since the Internet was not in the plain language of the statute, and since the statute was clear, the ADA did not apply to Southwest's website.[40] The Third Circuit reached a similar conclusion in finding that the ADA was unambiguous.[41] The aforementioned courts read this case in perfect accordance with Justice Scalia's meta-canon. Although the courts found that the statute was clear, they still chose to read it an extremely narrow fashion, relying only on the bare text of the statute and with a willful disregard of the ADA's purpose clause,[42] despite strong arguments to the contrary.

Southwest Airlines Inc., which will be discussed in greater depth later in this analysis, is an ideal illustration of how some courts extend Justice Scalia's meta-canon to read not only that all unclear statutes must be read narrowly, but also that *all* statutes must be read narrowly. This presents various issues, not the least of which is that the ADA is difficult to construe as a "clear" statute in no need of interpretative tools. First and foremost, the ADA does not actually define "places of public accommodation." It states only that these "places" must fall within the listed categories.[43] To assert that this is perfectly clear, particularly when attempting to resolve questions regarding matters not on the list, is somewhat illogical, as is illustrated by the circuit split regarding the clarity of the statute.

The Supreme Court has weighed in on the debate over defining a certain piece of legislation as clear or unclear. The Court has noted that "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."[44] This is starkly illustrated by the fact that in the spring of the 1993 Term, the court disagreed on the "plain" meaning of more than one in five statutes.[45] As such, one of the fatal flaws of both Justice Scalia's meta-canon and the plain meaning rule is illuminated. If everyone disagrees on what the meaning is, how can we ever assert that a statute is really clear, or even has a plain meaning?

40. *Id.* at 1319 & n.8.

41. Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998).

42. 42 U.S.C. § 12101(b) (2000).

43. *Id.* § 12181(7).

44. United States v. Turkette, 452 U.S. 576, 580 (1981).

45. George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 356 n.162 (1995). The number includes all cases decided, and is not limited to just those cases involving statutory interpretation; the cases involving interpretation of constitutional provisions were excluded. *Id.*

B. Technology and the Internet

In order to properly understand the underlying issues presented in the following case analyses, it is necessary to first explore the technological concerns that led to the debate over the application of Title III of the ADA to the Internet. As of 2000, ninety-eight percent of websites were not accessible to the disabled because the websites were not compatible with the software utilized by disabled individuals to access the Internet.[46]

The technology that would allow a blind person to access a website is nothing more than a piece of software which would "read" the text of the website out loud and would allow that individual to use a specialized keyboard to input any necessary data.[47] However, these screen access programs have various limitations.[48] For instance, when the software sees a graphic or an icon, it will alert the user that there is an icon or graphic present, but cannot determine its meaning.[49] Design choices strongly impact the software's ability to translate the text, as when a web page designer chooses to embed words within a picture or "otherwise artistically render [the] text,"[50] thereby making the text illegible to the "reading" program.

The measures a company would be required to take in order to make their website compatible with the software the blind need to access the Internet would be, according to some, "unobtrusive, inexpensive and easily accomplished, [and] the small amount of additional regulation implicated in web access would not dramatically alter the environment of cyberspace."[51] Furthermore, website designers would not face constrictive design requirements.[52]

Other industrial nations, functioning under their own versions of the ADA, have adopted web access guidelines. England and Australia have extended these guidelines to the private sector.[53] There is no indication

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46. Patrick Maroney, *The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the Americans with Disabilities Act of 1990?*, 2 VAND. J. ENT. L. & PRAC. 191, 192 (2000).

47. Symposium, *The Internet: Place, Property, or Thing—All or None of the Above?* 55 MERCER L. REV. 867, 872 (2004) (comments of Tim Willis); Maroney, *supra* note 46, at 192.

48. Maroney, *supra* note 46, at 192.

49. *Id.*

50. *Id.*

51. Steven Mendelsohn & Martin Gould, *When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the World Wide Web*, 8 COMPUTER L. REV. & TECH. J. 173, 206 (2004).

52. *Id.* at 207.

53. *See* JIM THATCHER ET AL., CONSTRUCTING ACCESSIBLE WEB CITES 42, 47 (2002).

that these guidelines have had any major impact on the functioning of either business or the Internet in those regions.[54] Furthermore, many entities, both public and private, have chosen to adopt web content accessibility guidelines and several websites were voluntarily redesigned to be accessible to the disabled.[55]

IV. JUSTICE SCALIA AND HIS METHODOLOGIES

"Scalia is first and foremost a legal formalist—meaning that to him, the rules are the rules."[56] Justice Scalia's adherence to the textualist doctrine can only partially be explained by anyone other than the Justice himself. However, it is undoubtable that his unwillingness to place great trust in legislative intent stems at least in part from the "strong suspicion of Congress [that he developed] while working for Republican presidents in the post-Watergate era."[57] Justice Scalia's disdain for legislative intent and the use of legislative history cannot be underestimated. "In the 1996 Term, for example, Scalia went so far as to refuse to join a footnote of an opinion that he otherwise joined completely. This offending footnote merely said '[w]e give no weight to the legislative history' and briefly explained why."[58] In *National Credit Union Administration v. First National Bank & Trust Co.*,[59] "Scalia joined the rest of the opinion but pointedly refused to join the footnote relying on legislative history as secondary support for the Court's holding."[60] In *Landgraf v. USI Film Products*,[61] Scalia went so far as to "chide[] Justice Stevens for looking beyond the plain language . . . to see whether the legislative history might indicate a Congressional intent."[62] Even a mere mention of the use of legislative history, or intent, was clearly more than the Justice could bear.

Justice Scalia's views of statutory interpretation, and the development of his meta-canon, are closely linked to this inherent distrust of Congress and to the Justice's unwillingness to abandon bright line rules and his, some would say overly, "consistent application of

54. Mendelsohn & Gould, *supra* note 51, at 207.
55. *Id.* at 207-08.
56. Scott Turow, *Scalia the Civil Libertarian?*, N.Y. TIMES MAGAZINE, Nov. 26, 2006, at 22.
57. ROSEN, *supra* note 5, at 180.
58. Eskridge, *supra* note 33, at 1306.
59. 522 U.S. 479 (1998).
60. Eskridge, *supra* note 33, at 1307.
61. 511 U.S. 244 (1994).
62. Linda Greenhouse, *High Court Limits 1991 Civil Rights Law to New Cases*, N.Y. TIMES, Apr. 27, 1994, at A18.

the . . . textualism methodology."[63] This strict adherence to textualism has led to the Justice's inability "to build a conservative consenus" on the Court,[64] and has left him on the fringes of many majority opinions.[65] In fact, "between 1996 and 2003, Scalia wrote more dissenting opinions than any other conservative justice, and also was less likely than all the other conservative justices to vote with the majority of the Court."[66] While this certainly shows that his influence has been less than extraordinary when it comes to his ability to sway his fellow members of the court, his doctrinal views have greatly influenced lower courts' rulings, particularly within the context of the ADA.[67]

Justice Scalia's inability to depart from his meta-canon has, arguably, made him a less effective Supreme Court Justice, as "the more influential and effective justice [is] the one more willing to moderate the application of his principles in the name of the broader good of the Court and the country."[68] Doctrinal objections to Justice Scalia are just as numerous as objections about certain aspects of his personality. The Justice has been described as "lord[ing] his intelligence over his colleagues,"[69] and in remarking on his presence on the Supreme Court, stated: "[w]hat's a smart guy like me doing in a place like this?"[70] The critiques of Justice Scalia also often fall along party lines. "Justice Scalia's flamethrowing rhetoric and his hostility to whole chapters of 20th-century jurisprudence have made him a conservative icon and a favorite face on liberal dart boards."[71]

However, the greatest critiques stem not from a personal dislike of the Justice, but rather from a fear of the effects on societal principles and institutions that a broad adoption of his methodologies will have. This fear was both realized and justified when scholars came to the realization that "[t]he legalists, led by Scalia, preferred to interpret

63. Kristi Kress Wilhelmy, Comment, *Breaking Scalia's Silence: The Dissent Justice Scalia Might Have Written in* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 U. TOL. L. REV. 611, 638 (2003).

64. Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 223 (1997).

65. For a partial listing of cases in which Justice Scalia has filed a dissenting or concurring opinion in a statutory interpretation case see *infra* note 195.

66. ROSEN, *supra* note 5, at 201.

67. *See infra* Part VI.

68. ROSEN, *supra* note 5, at 21.

69. *Id.* at 203.

70. *Id.*

71. Turow, *supra* note 56, at 22.

laws . . . strictly and were perfectly happy to rule against Congress without worrying about the practical consequences."[72]

Justice Scalia's meta-canon and the plain meaning rule were arguably rejected by the Supreme Court in 1892 as the ultimate framework for analyzing a statute. In *Church of the Holy Trinity v. United States*,[73] the Court was faced with a statute that made it unlawful for anyone to pay for an "alien's" transportation into the United States for the purposes of performing "labor or service of any kind."[74] When the Church of the Holy Trinity attempted to hire a British pastor, it appeared that the Church ran afoul of the law.[75] The Court rejected the plain meaning approach because it would have created an "absurd result[]"[76] as Congress could not have intended such consequences when passing the law.[77] The Court's realization that an absurd result should be avoided even if the plain meaning of the statute would mandate such a result runs directly contrary to Justice Scalia's meta-canon. The Court's focus on legislative intent and the purpose of the statute is antithetical to the meta-canon, as it requires judges to stray from the meaning of the text and focus at least some of their attention on fairness, reason, and justice. Even though the statute in *Church of the Holy Trinity* was clear, the Supreme Court realized, as Justice Scalia has not, that bright line rules must sometimes be abandoned in favor of avoiding absurdity. In the context of Justice Scalia's meta-canon, it is not the result that matters, it is the process by which the result is achieved that is tantamount. The Church of the Holy Trinity was capable of hiring the pastor of its choice only because of the Supreme Court's willingness to ignore the plain meaning of the statute to avoid the potential absurd result of their ruling. For the blind individuals who are the focus of the following case analysis, only a rejection of Justice Scalia's meta-canon will allow them to avoid online discrimination.

There are many who doubt Justice Scalia's ability to influence Supreme Court decisions, which may come as fantastic news or apocalyptic prophecies, depending on which side of the political spectrum one happens to reside.[78] However, Justice Scalia's immediate influence is, ultimately, not of the greatest concern. After all, dissenting

72. ROSEN, *supra* note 5, at 207.

73. 143 U.S. 457 (1892).

74. *Id.* at 458.

75. *Id.* at 457-58.

76. *Id.* at 459.

77. *Id.* ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

78. ROSEN, *supra* note 5, at 218.

opinions do sometimes become majority opinions. Justice Scalia, in fact, recognizes this limitation. "Unable to persuade his colleagues, Scalia has confessed that he writes with 'verve and panache' to ensure that his opinions are quoted by the editors of legal textbooks, so they can influence future generations of lawyers and scholars."[79] It is this future influence that could do the most harm both to the interpretation of the ADA and to other yet unknown statutes. It may yet hold true that Justice Scalia's sway over the future may be tempered by his "isolation as a law professor [which] has given his opinions an academic quality that may limit his ultimate influence."[80] However, if these predictions underestimate Justice Scalia's power to shape the future of legal thinking, and the textualist reading advocated by Justice Scalia is adopted by future generations, it will lead to a limiting of rights for not only the disabled, but for others yet unnamed.

V. THE PURPOSE OF THE ADA

The following case analyses will focus, to a certain extent, on the purpose of the ADA. When courts refer to the "purpose" of the ADA, they may be referring to the "purpose clause" of the ADA itself[81] or to other external indicators of congressional intent. The Supreme Court has stated that it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."[82] It is recognized by both sides of the ADA debate that when the statute was enacted both Congress and the President "intended [the ADA] to be broad in scope and reach all areas of *existing* society."[83] In fact, the statement of purpose within the ADA states that the ADA is intended "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[84]

Several scholars and courts have noted that reading the ADA in a narrow strict textualist fashion, even if such a reading were appropriate, would be antithetical to the purpose of the statute. The Eleventh Circuit highlighted the fact that the ADA was passed in large part to break down communications barriers that prevented the disabled from enjoying the

79. ROSEN, *supra* note 5, at 219 (quoting RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 205 (2006)).

80. ROSEN, *supra* note 5, at 220.

81. 42 U.S.C. § 12101(b) (2000).

82. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

83. Maroney, *supra* note 46, at 198-99.

84. 42 U.S.C. § 12101(b)(4) (2000).

same goods and services as the non-disabled population.[85] Allowing websites to discriminate against the disabled by immunizing them from ADA requirements erects just the kind of barriers that Congress was trying to destroy. Even those who oppose an expansive reading of the ADA admit that "[t]he ADA was enacted to make strides in eradicating the exclusion of the disabled from social, commercial, and labor settings,"[86] a purpose somewhat negated by the exclusion of the Internet from coverage under the ADA.

Furthermore, as the Internet gains even greater importance in commercial transactions and nearly every other aspect of people's day-to-day lives, and as "the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures,"[87] not applying the requirements of the ADA to the Internet will result in a situation in which "the protections of Title III will become increasingly diluted."[88] A strict textualist reading, however, would require just such a dilution of Title III protections. Justice Scalia would undoubtedly counsel that the legislature's intent in passing the ADA is irrelevant, as "[w]e are governed by laws, not by the intentions of legislators."[89]

Several circuits have noted the dangers of limiting the scope of the ADA, and have chosen to remedy what is clearly a problem. The remedy, however, directly contradicts the dictates of Justice Scalia's meta-canon.

VI. *NATIONAL FEDERATION OF THE BLIND V. TARGET CORP.*

The dispute between the National Federation of the Blind and Target Corp. is an illustrative example of a court refusing to comply with Justice Scalia's meta-canon. This case is a clear case study of how intentionalists view and interpret unclear statues. With an eye toward the actual effects that reading the ADA narrowly would have on the lives of ordinary disabled Americans, the court chose to utilize all of the sources of statutory interpretation available to it, and not stop at a merely superficial reading of the statute. As the motions for summary judgment were argued quite recently, it is uncertain what will happen with this case in the future. However, courts within the Ninth Circuit have already

85. Symposium, *supra* note 47, at 875 (comments of Tim Willis).

86. Maroney, *supra* note 46, at 193.

87. Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1020 (6th Cir. 1997) (Martin, C.J., dissenting).

88. *Id.*

89. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

adopted the precedent set by this case[90] and acceptance of this interpretation of the ADA is growing.

The defendant in this case, Target Corp., centered its argument on the fact that the ADA covered access only to "physical spaces," reasoning that "[s]ince Target.com is not a physical space," the complaint did not state a claim.[91] It further argued that the plaintiffs did not state a claim because they did not allege that they were denied physical access to Target stores. Additionally, while it is accepted that a claim may be stated for unequal access to a service, in order for the claim to survive, the court determined that there must be some connection or "nexus" between the service and the actual physical space, which the defendant alleged was lacking in the case at bar.[92]

The plaintiffs' main contention was that "Target.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation."[93] Article III of the ADA states in part:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[94]

The court defined "discrimination" as encompassing "the denial of the opportunity, by the disabled, to participate in programs or services, and providing the disabled with separate, but unequal, goods or services."[95] The court focused on the language of the statute, stating that it indicated that the defendant's argument was misplaced as "[t]he statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation."[96] Therefore, the court determined that applying the reasoning of the defendant would limit the ADA in contradiction to the plain meaning of the statute.[97] It is interesting to note that while the court determined that the statute was clear, it still refused to read it in the narrow manner that the defendant argued for, and that

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90. Milsap v. U-Haul Truck Rental Co., No. CIV 06-0209, 2006 WL 3797731, at *9-10 (D. Ariz. Dec. 20, 2006).

91. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 950 (N.D. Cal. 2006).

92. *Id.* at 952.

93. *Id.*

94. 42 U.S.C. § 12182(a) (2000).

95. *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 951 (citing 42 U.S.C. § 12182(b)(1)(A)(i-iii)).

96. *Id.* at 953.

97. *Id.*

Justice Scalia's meta-canon dictates. In fact, the court's view that a strict construction of the statute would limit the ADA in contradiction to its plain meaning is simply another way of saying that a strict textualist approach to the statute would lead to an absurd result.

As was evidenced in the *Target Corp.* case, some argue that there is a middle ground between interpreting the ADA to apply to all websites and excluding the Internet completely from ADA requirements. This approach is often referred to as the "nexus" approach. The nexus approach would apply the ADA to those websites that have a concrete connection to a physical place.[98] Since Target Corp. maintains actual physical stores, and since those stores offer largely the same goods and services as the Target website, there is a nexus, or connection, between the two and therefore the ADA should apply.

For those courts that have adopted the more expansive reading of the ADA, the nexus approach comprises, essentially, an element that must be addressed in order for a valid claim to be asserted. For instance, some courts have held that a claim that does not allege that the plaintiff was discriminated against in an actual physical location survives a motion to dismiss for failure to state a claim.[99] Such an omission "in and of itself does not entitle [defendant] to dismissal of plaintiff's Title III ADA claim."[100] However, in order to survive a motion for summary judgment, the plaintiff must allege, at the very least, that there is some connection between the services offered at the physical location and the discriminatory conduct that plaintiff alleges.[101]

As to the argument that a nexus or relationship is required between the service offered and the physical space, the court in *Target Corp.* stated that "it is clear that the purpose of the statute is broader than mere physical access,"[102] insinuating that the relationship need not be as precise as the defendant seemed to argue. However, the court nevertheless found that there was a nexus between Target.com and the physical Target store as "the challenged service here is heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores."[103]

98. Symposium, *supra* note 47, at 787 (comments of Richard E. Moberly).

99. *See, e.g.*, Milsap v. U-Haul Truck Rental Co., No. CIV 06-0209, 2006 WL 3797731, at *10 (D. Ariz. Dec. 20, 2006).

100. *Id.*

101. *Id.*

102. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006).

103. *Id.* at 955.

The court also rejected the defendant's argument that there is a clear distinction between "those services which impede physical access to a public accommodation [which would be covered by the ADA] and those merely offered by the facility [which defendant argued would not be covered by the ADA]."[104] The court noted that "[s]uch an interpretation would effectively limit the scope of Title III to the provisions of ramps, elevators and other aids that operate to remove physical barriers to entry,"[105] and would therefore go against congressional intent in passing the ADA in the first place.

Numerous scholars within the field have advanced the broad reading of the ADA adopted by the *Target Corp.* court.

> Those who support the law's application in the cyberspace cite the enormous and increasingly central role played by the Internet in education, employment, commerce, and even social and family life. . . . [I]n light of these changes to our society, denial of access to Internet . . . condemns Americans with disabilities to fewer opportunities and second-class citizenship. A statute with the broad ameliorative purposes of the ADA, if it is not to be rendered a mockery, must possess the capacity and flexibility to cover those functions, services, and activities on the web that are identical in purpose and effect to those that are expressly covered when provided in person.[106]

The Internet's omnipresent role in the average American's day-to-day life and the manner in which it could increase a disabled individual's independence is a major rationale for expanding the application of the ADA.[107]

The role that the Internet has come to play in Americans' every day lives has been taken into account by more than one court. In addition to the cases discussed in detail within this analysis, other courts have stated that the ADA should not be read narrowly and should not be limited in its scope. This is due in part to the actual wording of the statute and largely based on the fact that "the ADA is a broad and remedial statute, applicable in several different contexts."[108]

Conversely, there are credible arguments to be made for why a narrow reading of the statute might very well be mandated, particularly

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104. *Id.*

105. *Id.*

106. Mendelsohn & Gould, *supra* note 51, at 177-78.

107. Maroney, *supra* note 46, at 199.

108. Milsap v. U-Haul Truck Rental Co., No. CIV 06-0209, 2006 WL 3797731, at *5 (D. Ariz. Dec. 20, 2006).

from the strictly textualist perspective advocated for by Justice Scalia. As some commentators point out, the idea that the Internet is a "place" is somewhat irrational. "[T]he idea that the Internet is literally a place in which people travel is not only wrong but faintly ludicrous. No one is 'in' cyberspace. The Internet is merely a simple computer protocol, a piece of code that permits computer users to transmit data."[109]

However, the Internet is often described as a place because we understand and experience the Internet as though it is a place to which we go and in which we find information.[110] "We visit a web*site*. We meet people in a chat *room*. We ask people for their E-mail *address*."[111] Nonetheless, the critique has a great deal of validity, in that a "place" as it is generally understood, has physical boundaries, a discernable shape, or other describable physical characteristics.[112] A place is "mappable using objective techniques."[113] These types of characteristics are clearly lacking from the Internet. These, and other, critiques of a broad reading of the ADA strongly affected the decision reached in the following case study.

VII. *ACCESS NOW, INC. V. SOUTHWEST AIRLINES, CO.*[114]

This case presented circumstances very similar to those circumstances seen in *Target Corp.*, but unlike the district court in Northern California, a district court in Southern Florida reached a completely contrary conclusion. The court's conclusion could only have been reached if the judge had in fact subscribed to Justice Scalia's meta-canon, which she did, as will be shown by this analysis. In *Southwest Airlines, Co.*, the plaintiffs' main contention was that the company's website, Southwest.com, excluded them in violation of the ADA because it prevented blind people from accessing its "virtual ticket counters."[115] The obstacle to accessing the website was the same as the one that existed in *National Federation of the Blind v. Target Corp.*, namely that the software programs that the blind use to access the internet were incompatible with the website design used by Southwest.com.[116]

109. Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 523 (2003).

110. Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 444 (2003).

111. Symposium, *supra* note 47, at 868 (comments of Adam Milani).

112. Madison, *supra* note 110, at 486.

113. *Id.*

114. 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

115. *Id.* at 1314.

116. *Id.* at 1316.

Southwest's website permitted users without disabilities to "check airline fares and schedules, book airline, hotel, and car reservations, and stay informed of Southwest's sales and promotions."[117]

The defendant's argument in this case was virtually identical to the argument presented by the defendants in *Target Corp.* It argued that its website was not a "place of public accommodation" as defined in Title III of the ADA,[118] and, in the alternative, that there was no nexus between Southwest.com and an actual place of public accommodation.[119] It should be noted, that the nexus argument would only come into play if the court first determined that the relevant website was in fact a place of public accommodation.

The court focused its analysis on the plain meaning of the statute, and looked specifically at 42 U.S.C. § 12182, a section of the Act that lists what qualifies as a "place of public accommodation."[120] In direct contrast to the reasoning in *Target Corp.*, this court stated that "[i]n interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress's clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation."[121] The court did not feel the need to refer to outside sources to determine congressional intent, or even to give great weight to the purpose clause contained within the ADA.[122] The court quoted an Eleventh Circuit case that noted: "because Congress has provided such a comprehensive definition of 'public accommodation,' we think that the intent of Congress is clear enough."[123] The court's argument that Congress provided a comprehensive definition of "public accommodation" is in danger of veering into the absurd. As has previously been noted, Congress provided *no* definition of "public accommodation" within the text of the ADA, comprehensive or otherwise. The sum total of the "definition" to which the court refers is a listing of places that would qualify as public accommodations.[124] However, a list, no matter how lengthy, is in no way a comprehensive definition.

117. *Id.* at 1315.

118. *Id.* at 1314.

119. *Id.* at 1319.

120. *Id.* at 1317-19.

121. *Id.* at 1318 (citing Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283-84 (11th Cir. 2002) and Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1241 (11th Cir. 2000)).

122. *See id.* at 1317-19.

123. *Id.* at 1318 (quoting *Stevens*, 215 F.3d at 1241) (internal quotation omitted)).

124. *See* 42 U.S.C. § 12181(7) (2000).

The court's refusal to grant legitimacy to an analysis of congressional intent has long been echoed and supported by Justice Scalia.[125] However, like this court, Justice Scalia sometimes finds himself contradicting his own doctrinal principles in favor of other consideration. In *Kyllo v. United States*,[126] Justice Scalia wrote the majority opinion and found that although the Framers could not have foreseen certain technologies, such as thermal imaging devices, their purpose in writing the Fourth Amendment was to protect the privacy of the home.[127] According to Justice Scalia, in the Fourth Amendment context, the intent of the Framers of the Constitution was enough to override the Fourth Amendment's obvious omission of a prohibition on thermal imaging devices.[128] Why intent is relevant when dealing with thermal imaging devices, but not relevant when dealing with a disabled individual's ability to access the website, is a question to which an easy answer does not present itself. This illustrates one of the basic problems of Justice Scalia's meta-canon, namely that it often invites its adherents to contradict themselves in extraordinary ways, as the *Southwest Airlines* court did throughout its discussion of the case.

Despite the court's insistence that the statute is perfectly clear, it did rely on a canon of statutory construction to buttress its argument. The court used the canon to reaffirm the fact that Congress's listing of possible "public accommodations" precludes the inclusion of the Internet as one of these accommodations, since it is not specifically listed. "Under the rule of *ejusdem generis*, 'where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated.'"[129] The use of this canon will be addressed in greater depth at a later point, however it should be noted that using the canon at all contradicts the court's previous assertion that the statute is clear. As was previously discussed, canons of construction, like all aids to statutory interpretation, are used when the meaning of the text is unclear and its true meaning must be discerned through alternative means.[130]

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125. *See supra* notes 63-67 and accompanying text.

126. 533 U.S. 27 (2001).

127. *Id.* at 34.

128. The Fourth Amendment also fails to mention wiretaps; they however, along with various other factors too numerous to analyze within this paper, have been found to fall under the purview of the Fourth Amendment. *See, e.g.*, Berger v. New York, 388 U.S. 41, 51 (1967).

129. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (quoting Allen v. A.G. Thomas, 161 F.3d 667, 671 (11th Cir. 1998)).

130. *See supra* notes 21-27 and accompanying text.

By insisting that the statute is clear, and by basing its decision on the clarity of the statute, and then relying on canons of construction to interpret the statute, the court contradicted itself in a truly remarkable way. While the previous sentence should not in any way be construed as saying that one can never use a canon of construction to buttress an otherwise strong argument, the contradiction in this case rests on the fact that the court's original argument simply does not stand up on its own. A ruling on a clear statute, which includes such a "comprehensive definition"[131] should not have to rely on additional statutory tools of interpretation to survive.

As to the nexus argument made by the parties, the court acknowledged that it would be possible to find that a nexus existed between the website and a physical place of public accommodation, as the *Target Corp.* court did. The court chose to not follow this approach despite being supplied with additional persuasive support of the First Circuit having come to just such a conclusion.[132] Rather, the court focused on precedent that had found that the Internet was, in fact, not a "place" in that it is "a unique medium—known to its users as 'cyberspace'—*located in no particular geographical location* but available to anyone, anywhere in the world, with access to the Internet."[133]

The case on which the court relied, *Reno v. American Civil Liberties Union*, is arguably non-binding precedent, as the facts of that case are not even somewhat reminiscent of the issues presented to this court. First and foremost, *Reno v. ACLU* involved the Telecommunications Act of 1996.[134] The issue in the case was whether the provisions prohibiting the distribution of pornography to minors over the Internet were overly broad and in violation of the First Amendment.[135] The determinative factors for the Court were not in fact that the Internet was not a place of public accommodation, but rather that the statute itself was unconstitutionally broad, as it failed to provide a definition of "indecent," was punitive, and was a "content-based blanket restriction on speech."[136] As such, relying on this particular

131. *Sw. Airlines, Co.*, 227 F. Supp. 2d at 1318.

132. *Id.* at 1319. *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), was not available as precedent for this decision as it was decided four years after *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

133. *Sw. Airlines, Co.*, 227 F. Supp. 2d at 1321 (quoting Reno v. ACLU, 521 U.S. 844, 851 (1997)).

134. Reno v. ACLU, 521 U.S. at 857.

135. *Id.* at 864.

136. *Id.* at 868.

precedent at the expense of other, far more on-point, precedent was just one of the reasons that this court reached such a woefully misguided conclusion.

VIII. AGENCY INTERPRETATION

While the purpose of the statute was interpreted in two very different ways in the preceding cases, both analyses were missing a key piece of the puzzle that was brought up in various other similar settings. The missing puzzle piece centers on the manner in which the agency charged with interpreting the ADA construes the application of the ADA to the Internet.

In interpreting the meaning of federal law, "the views of the agency charged with primary responsibility for interpreting and enforcing that law are entitled to considerable weight."[137] The DOJ is one of the agencies in charge of interpreting and enforcing the ADA.[138] The DOJ has consistently supported the notion that the ADA does in fact apply to the Internet.[139] In a letter written by the DOJ to Senator Harkin, the agency explicitly stated that entities choosing to communicate through the Internet "must be prepared to offer those communications through accessible means,"[140] including "screen reading devices used by people with visual impairments."[141] The DOJ made clear that the Internet should not be excluded from coverage under the ADA as it is "an excellent source of information and, of course, people with disabilities should have access to it as effectively as people without disabilities."[142]

The DOJ has also argued for the Internet to be covered under Title III of the ADA in various amicus briefs.[143] In *Hooks v. OKBridge, Inc.*, the DOJ filed an amicus brief asserting that reading Title III of the ADA to exclude the Internet, an entity which did not exist in anything approaching its present form at the time of the ADA's passage,

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137. Mendelsohn & Gould, *supra* note 51, at 190; ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 46 (1997).

138. Mendelsohn & Gould, *supra* note 51, at 190.

139. Maroney, *supra* note 46, at 201.

140. Letter from Deval L. Patrick, Assistant Attorney General, to Senator Tom Harkin (Sept. 9, 1996) (on file with the Hofstra Law Review), *available at* http:/www.usdoj.gov/crt/foia/cltr204.txt.

141. *Id.*

142. *Id.*

143. *See* Brief of the United States as Amicus Curiae in Support of Appellant, Hooks v. OKBridge Inc., 232 F.3d 208 (5th Cir. 2000) (No. 99-50891) [hereinafter DOJ *Hooks* Amicus Brief]; Brief for the United States as Amicus Curiae in Support of Appellant at 15, Rendon v. Valleycrest Prods., 294 F.3d 1279 (11th Cir. 2002) (No. 01-11197) [hereinafter DOJ *Rendon* Amicus Brief].

> would be analogous to holding that freedom of speech and freedom of the press do not extend to electronic communications over the Internet since such communications were not mentioned in the First Amendment, or that the Fourth Amendment could not apply to the privacy of telephone conversations because telephone wires do not come within the ordinary meaning of the words "persons, papers and effects" used in the Fourth Amendment.[144]

They also provided a key distinction, which has been cited by those courts broadly applying the ADA, namely the aforementioned court in *Target Corp.*,[145] stating that "[t]he Act covers the services 'of' a place of public accommodation, not the services 'at' or 'in' a place of public accommodation,"[146] thereby negating the requirement imposed by some courts and scholars that the alleged discrimination must occur within an actual brick and mortar establishment.

The DOJ anticipated an absurd result if Title III of the ADA was read in the narrow manner mandated by Justice Scalia's meta-canon. The DOJ envisioned the following scenario:

> [A] company that offers services both on-site and through other means (such as a travel service that arranges reservations both over the phone and at a walk-in office) would be required to offer non-discriminatory services on-site, but be free to discriminate over the phone or the internet.
>
> Neither the language of the statute, nor the underlying purposes of the Act, require or permit such an absurd result.[147]

A. An Absurd Result

The absurd result that would be created if Justice Scalia's meta-canon were followed throughout the country is a direct result of the Justice's strict adherence to the textualist doctrine. The plain meaning rule that the textualists rely on has its roots in nineteenth century England.[148] The rule literally states that "[i]f the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity."[149] In this instance, Justice Scalia's meta-canon, and the plain meaning rule from which it originates, manifests a blatantly absurd

144. Mendelsohn & Gould, *supra* note 51, at 194.
145. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).
146. DOJ *Hooks* Amicus Brief, *supra* note 143, at 9.
147. *Id.* at 5.
148. *See* Karkkainen, *supra* note 17, at 433 n.124.
149. Queen v. Judge of the City of London Court (1891) 1 Q.B. 273, 290.

result, as has been recognized by various courts and governmental institutions.

The DOJ has stated that limiting the ADA in a manner that precludes its application to the Internet would lead to an absurd result.[150] The First Circuit has joined in the critique of such a limited reading of the statute stating that "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result."[151] The Seventh Circuit has echoed this reasoning, stating that the core meaning of Title III of the ADA is that

> the owner or operator of a store, hotel, . . . Web site, or other facility (whether in physical space or in electronic space), that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.[152]

The court also noted that this would run afoul of the main purpose of the ADA and would "severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."[153]

Scholars have also noted that reading the statute narrowly bars a disabled person's ability to access the Internet, and as access was what the ADA was supposed to provide, this can only be seen as an absurd result.[154] Cases are never decided in a vacuum and a vital consideration in any decision is the precedent that it will set for future cases. If Title III is found not to apply to the Internet because the Internet is not a physical location, or because there is no nexus between the website and a physical location, it will potentially create a precedent which would narrow the ADA in a manner that is both absurd and irrational.

Communications conducted over the phone, through the mail, or in any other manner that does not involve interaction in a finite physical

150. DOJ *Hooks* Amicus Brief, *supra* note 143, at 5.

151. Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994).

152. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (internal quotation omitted).

153. *Carparts*, 37 F.3d at 20.

154. *See* Symposium, *supra* note 47, at 880 (comments of Richard E. Moberly).

location, would not be covered by the ADA. However, "[t]he individual with a disability no more travels to the public accommodation's post office box or call center than to its web server. The person with a disability who takes on-line courses does not go to the campus of the private university"[155] and "[s]imilarly, the individual with a disability who sends a medical home-test kit to a laboratory for analysis never goes anywhere near the laboratory's premises."[156] All of these interactions would allow discrimination against the disabled if the narrow reading mandated by Justice Scalia's meta-canon is to be adopted. As Judge Learned Hand aptly stated "[t]here is no surer way to misread any document than to read it literally."[157]

B. Critique of Canons of Construction

Aside from the various policy and purpose arguments against a narrow reading of the ADA, there are also various reasons why the canons of construction used by the courts to justify a narrow reading are not, in fact, valid. Courts use canons of construction when a statute's meaning cannot be discerned from the plain language of the statute, essentially, when the statute is unclear.[158] Therefore, for canons to be applied to Title III of the ADA, courts must first determine that the statute is unclear. Justice Scalia's meta-canon, as it was first articulated by Abner J. Mikva and Eric Lane, applies only to unclear statutes.[159] Consequently, applying Justice Scalia's meta-canon even in conjunction with other canons of interpretation, would consistently result in a narrow reading of the statute. Certain canons lend themselves more readily to a narrow reading of a certain statute, and it will be shown that the canons used by those seeking to narrow the application of the ADA do in fact conform to Justice Scalia's meta-canon.

Noscitur a sociis is a canon of construction that states that "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."[160] This canon has been used by both those seeking to apply the ADA narrowly and those seeking to apply it broadly. Those who seek to broaden the statute to include the Internet cite the fact that Title III includes such terms as "travel service"[161] and

155. Mendelsohn & Gould, *supra* note 51, at 205.
156. *Id.*
157. Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).
158. MIKVA & LANE, *supra* note 137, at 22; Maroney, *supra* note 46, at 192.
159. Mikva & Lane, *supra* note 3, at 140.
160. BLACK'S LAW DICTIONARY 1087 (8th ed. 2004).
161. 42 U.S.C. § 12181(7)(F) (2000).

"public display."[162] The plaintiffs in *Southwest Airlines*, for instance, argued that "travel service" is exactly what Southwest.com is, and therefore the statute applies.[163] However, those who would seek to follow Justice Scalia's meta-canon and apply this statute narrowly, would look to the words surrounding "travel service," such as "beauty shop," "barber shop," or "insurance office."[164] Since all of the aforementioned listed words are physical places, *noscitur a sociis* would dictate that "travel service" should also be interpreted to apply only to those travel services that are offered in a physical space and not on the Internet.[165] The Sixth Circuit followed just this reasoning in *Parker v. Metropolitan Life Insurance Co.*[166]

Ejusdem generis is a canon of construction that states "that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same types as those listed."[167] Like the previous canon, this has been used to narrow the reading of Title III of the ADA. The rationale is that because the list of "'public accommodations'" includes only physical spaces, any general terms or words used must be interpreted as applying to only physical spaces.[168] However, this statute could also be used to justify a broad reading of the ADA, as was done by the First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England.*[169] The court noted that "[b]y including 'travel service' among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure."[170] It should be noted that although these canons should theoretically be used only when a statute is unclear, they have been used to justify a narrow reading of the ADA even when the court asserted that the ADA was in fact "clear."[171]

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162. *Id.* § 12181(7)(H).

163. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1319 (S.D. Fla. 2002).

164. 42 U.S.C. § 12181(7)(F) (2000).

165. Symposium, *supra* note 47, at 878 (comments of Richard E. Moberly).

166. Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (finding that an employer administered health plan was not within the scope of the ADA since the employee had not visited the insurance company's offices).

167. BLACK'S LAW DICTIONARY 556 (8th ed. 2004).

168. Symposium, *supra* note 47, at 878-79 (comments of Richard E. Moberly).

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

170. *Id.* at 19.

171. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

The Civil Rights Act of 1964 provides an analogy to the debate over the ADA and the various canons addressed in this section. The Fifth Circuit, in *Dean v. Ashling*, found that though "trailer parks" were not contained in the list of types of rental housing covered by the Civil Rights Act, this did not mean that Congress had meant to exclude trailer parks from coverage.[172] Our societal norms have expanded so that it seems patently absurd to deny the protections of the Civil Rights Act to those who live in trailer parks for no reason other than Congress failed to include the specific term in the Act. Congress's reason for such an exclusion can hardly be speculated at, but even the most casual observer of American political life would never assume that the omission was a conscious decision on the part of the legislature to exclude that particular group of people from the benefits the rest of us gained from the passage of the Civil Rights Act. Why then assume that Congress's omission of the word "Internet" from Title III of the ADA was a conscious decision to preclude the disabled from full and equal enjoyment of the Internet?

There are certainly numerous critiques that apply to the narrow interpretive logic applied to the ADA and mandated by Justice Scalia's meta-canon. However, the strongest critique stems from the fact that when the statute was enacted the Internet did not exist in anything approaching its current form, and its expansion was, arguably, unimaginable by even the most forward-thinking legislatures. Almost two decades ago, how many of us could have comprehended how integrally the Internet would be involved in every facet of our lives? In fact, how many of us were aware of the Internet at all at that particular time? Therefore, the question begs to be asked, "[i]n the absence of a conscious exclusion . . . does the statute's general purpose warrant overlooking the absence of electronic space from the list of places of public accommodation[s]?"[173]

C. Legislative Silence

Some scholars have cited Congress's failure to amend the Act to include the Internet as an indication that Congress never intended for the ADA to apply to the Internet at all.[174] They look to the fact that in 1998, Congress amended Section 508 of the Rehabilitation Act[175] to

172. Dean v. Ashling, 409 F.2d 754, 755-76 (5th Cir. 1969).

173. Maroney, *supra* note 46, at 199.

174. Symposium, *supra* note 47, at 881 (comments of Richard E. Moberly).

175. The Rehabilitation Act was the predecessor of the ADA but applied only to the federal government. *See id.*

specifically require federal agencies to make their websites accessible to the disabled.[176] By not taking the opportunity to make the same amendment to the ADA, scholars argue that Congress articulated its intent that the ADA should not encompass the Internet.[177]

Using legislative silence as an indicator of how the legislature intended a rule of law to be applied is a "problematic interpretive exercise."[178] The Supreme Court has echoed this concern stating "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."[179] The hesitancy to rely on legislative silence stems from many reasons, not the least of which is that it is difficult to assume that the legislature is aware of every novel issue on which the courts have ruled.[180] There are a myriad of reasons for why Congress may have chosen not to act on a specific issue, for instance: "[c]omplete disinterest; [b]elief that other measures have a stronger claim on the limited time and energy of the body; [or] [b]elief that the bill is sound in principle but politically inexpedient to be connected with."[181] Attempting to ascertain Congress's intent in passing a statute is a monumental task. Attempting to ascertain their intent in not acting at all is an exercise in futility. For these reasons, the argument that Congress's lack of action regarding Title III of the ADA is indicative of their intent, is neither particularly convincing nor worthy of further discussion.

IX. TITLES I AND II OF THE ADA

Analogizing Titles I and II of the Americans with Disabilities Act to the debate surrounding Title III provides an even greater insight as to why excluding the Internet from coverage and reading Title III in the extremely narrow manner mandated by Justice Scalia's meta-canon leads to a truly absurd result. Title I of the ADA, like Title III, does not contain an explicit reference to the Internet.[182] Title I of the ADA applies to an employer's treatment of disabled employees and requires equal treatment with respect to the terms, benefits, and conditions of employment, including the opportunity to work.[183] Courts to date have

176. *Id.*

177. *Id.*

178. MIKVA & LANE, *supra* note 137, at 37.

179. Girouard v. United States, 328 U.S. 61, 69 (1946).

180. MIKVA & LANE, *supra* note 137, at 38.

181. HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1359 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

182. Mendelsohn & Gould, *supra* note 51, at 180.

183. *See* 29 C.F.R. § 1630.4 (2006).

never found that Internet-related or Internet-based issues are outside the scope of Title I simply because the Internet was not explicitly cited within the statute.[184]

Title II of the ADA bans state and local government discrimination based on disability.[185] The statutory language states that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[186] At all levels of government there has been an increase in the use of electronic communications, including online filings of forms and agency communications with the public.[187] If courts chose to interpret Title II in the same narrow manner that some courts have interpreted Title III, then disabled individuals would find themselves further disadvantaged and excluded.

With the recent advent of electronic filing (e-filing) of court documents, a reading of Title II that precludes its application to the Internet would, for instance, result in a situation in which a blind lawyer would be essentially precluded from the practice of law. If courts are not required to make their websites accessible to the blind because the ADA does not apply to the Internet, it would be impossible for this individual to file motions, briefs, or other paperwork due to their inability to access any court's websites. It would be difficult to justify the narrow application of the ADA in this setting, as few would willingly, or convincingly, argue that a rational interpretation of the ADA could and would ban disabled individuals from becoming lawyers.

Similar circumstances arose in 1995, when a blind city commissioner in San Jose, California, sued the city for not making its website accessible.[188] Due to the inaccessibility the city commissioner was incapable of accessing the minutes of the city council meetings.[189] This resulted in the city's adoption of the San Jose Web Page Disability Access Design Standards.[190] The standards were notable, first because they validated the legitimacy of the claims filed by the disabled for

184. Mendelsohn & Gould, *supra* note 51, at 180.

185. *Id.* at 182.

186. 42 U.S.C. § 12132 (2000).

187. Mendelsohn & Gould, *supra* note 51, at 183.

188. *Id.* at 192.

189. *Id.*

190. Cynthia D. Waddell, City of San Jose, World Wide Web Page, Disability Access Design Standards (Mar. 14, 1997), http://www.icdri.org/CynthiaW/city_of_san_jose_world_wide_web_.htm.

access to the Internet, and second because they provided a framework by which access could in fact be granted.[191]

Another equally compelling example can be found in the way that the ADA applies to public transportation. Virtually all sectors of public transportation maintain a website which provides data about schedules, fares, routes, and other information.[192] In *Martin v. Metropolitan Atlanta Rapid Transit Authority*, a suit was filed against the agency under the ADA alleging that Transit Authority discriminated against the blind by not providing equal access to the information contained on its website.[193] The court granted the plaintiff's motion for a preliminary injunction, refusing to interpret the ADA in a manner that would preclude its application to the Internet.[194]

Since the Internet is not explicitly mentioned in Titles I and II any more than it is mentioned in Title III, it seems clear that in order to find that Titles I and II apply to the Internet, one would be forced to stray from the plain meaning rule and look to some extrinsic sources such as legislative intent. Such a departure from the rule runs up against the very foundation of Justice Scalia's meta-canon. This is evidenced by the fact that Justice Scalia has refused to join the majority opinion in almost every case in which the Supreme Court departed from the plain meaning rule and utilized legislative intent, and has often sharply criticized the Court for its actions.[195]

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191. Mendelsohn & Gould, *supra* note 51, at 192.

192. *Id.* at 186.

193. Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, 1364-66 (N.D. Ga. 2002).

194. *Id.* at 1377.

195. *See* Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 283 (1996) (Scalia, J., concurring in part and concurring in the judgment) ("The text's the thing. We should therefore ignore drafting history without discussing it, instead of after discussing it."); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring in part and concurring in the judgment); Conroy v. Aniskoff, 507 U.S. 511, 518-19 (1993) (Scalia, J., concurring); Smith v. United States, 508 U.S. 223, 241-47 (1993) (Scalia, J., dissenting); United States v. Thompson/Center Arms Co., 504 U.S. 505, 519 (1992) (Scalia, J., concurring); Chisom v. Roemer, 501 U.S. 380, 404-05 (1991) (Scalia, J., dissenting); Begier v. IRS, 496 U.S. 53, 67-69 (1990) (Scalia, J., concurring); Sullivan v. Finkelstein, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part); Blanchard v. Bergeron, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring in part and concurring in the judgment); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring); John Doe Agency v. John Doe Corp., 493 U.S. 146, 160-64 (1989) (Scalia, J., dissenting); United States v. Taylor, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring in part); INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

X. CONCLUSION

It seems clear that reading the ADA in the extremely narrow fashion that is mandated by Justice Scalia's meta-canon creates a result that is directly contrary to the explicit purpose of the ADA[196] and to the manner in which the statute has been interpreted by the DOJ.[197] The ADA was enacted to ensure that the disabled would have access to all of the things to which the non-disabled population readily has access. Prohibiting the disabled population from accessing the Internet makes no sense from either a logical, economic, or ethical perspective.

Logic dictates that when the DOJ states time and time again that Title III of the ADA is intended to apply to the Internet,[198] and when courts routinely interpret Titles I and II to apply to the World Wide Web,[199] excluding Title III simply makes no sense. Furthermore, with a purpose clause as expansive as the one encompassed within the ADA, there is no need to look to extrinsic sources to determine the intent of Congress. It is as explicit as a statutory purpose can be, and there does not seem to be any logical justification for blatantly ignoring the express will of Congress.

Relying on canons of construction such as *noscitur a sociis* and *ejusdem generis* to justify a narrow reading of the statute is a somewhat self-serving exercise, as it requires Congress to look into the future when they are passing a statute. It is undoubted that the Internet, as it now exists or even as it existed five or eight years ago, could not have been contemplated by Congress, particularly since it was inconceivable to some of the foremost experts in the field. Therefore, determining that discrimination against the blind is warranted based on this rationale is nonsensical. Congress cannot be expected to anticipate every technological advance that might occur in the coming decades, and a failure to anticipate such advances cannot and should not be used as a means to drastically limit the application of a statute.

As has been shown, there is also no compelling economic reason for limiting the application of the ADA.[200] Not only is altering a website economically feasible, particularly for such large companies as Target or Southwest Airlines, but the increase in Internet traffic for those sites and, implicitly, an increase in the number of individuals purchasing goods off

196. 42 U.S.C. § 12101(b) (2000).

197. *See supra* notes 139-47 and accompanying text.

198. *See* DOJ *Hooks* Amicus Brief, *supra* note 143, at 6-20; DOJ *Rendon* Amicus Brief, *supra* note 143, at 15.

199. *See supra* notes 182-87 and accompanying text.

200. *See* Mendelsohn & Gould, *supra* note 51, at 206.

those sites, creates an economic incentive to comply with the ADA. If simply ethical considerations are not enough, there is also the possibility that companies' profit margins would actually increase by granting access to disabled individuals.

While the economic implications are certainly an issue, perhaps the most compelling argument to be made concerns the long-term effects of adhering to Justice Scalia's meta-canon. The meta-canon not only requires a narrow reading of the ADA but also requires a narrow reading in virtually all cases in which statutory interpretation is at issue. As has been shown in this analysis, such a limited view of a statute requires an almost willful disregard of the purpose of the statute. When Justice Scalia articulates his approach to statutory interpretation, it becomes clear why adherence to his meta-canon will often lead to absurdity.

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated . . . I would not permit any of the historical and legislative material[s] . . . to lead me to a result different from the one that these factors suggest.[201]

Justice Scalia's suggested analysis of a statute literally mandates that legislative materials that are indicative of legislative intent must be ignored. When courts intentionally ignore congressional purpose in reaching decisions that impact vast segments of the population it can only be by sheer luck that a truly absurd result is avoided. In the context of the ADA, the absurd result created by certain courts is to limit the ability of a disabled individual to access the Internet, a forum in which, arguably, that individual could have achieved a greater sense of freedom and independence than is possible without such access.

In short, the application of Justice Scalia's meta-canon creates not only unfair, absurd, and unforeseen results for the disabled population within the context of the ADA, but creates a dangerous precedent. If all courts adopt such a strictly textualist approach, enacted statutes will be so limited in scope that Congress will be forced to return to the same issues time and time again as circumstances change and as courts remain unwilling to evolve along with the society around them. The burden that

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201. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

Justice Scalia's meta-canon creates is not borne solely by Congress, or the disabled. A strict textualist reading of every statute in accordance with the meta-canon would also burden the courts, as they would be "asked to second-guess . . . nearly every law that Congress passed."[202] Justice Scalia's meta-canon would unduly burden every facet of our legal system. For that, and the numerous aforementioned reasons, it can only be hoped that Justice Scalia's meta-canon remains an intellectual curiosity and does not infect the legal minds of future generations.

*Ella Govshtein**

202. ROSEN, *supra* note 5, at 62.

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