"No Voting About Us Without Us": The Iowa Caucuses and the Americans with Disabilities Act

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ABSTRACT

Jim Omvig is one of over 700,000 Iowans, and 61 million Americans, living with a disability. Because the Iowa caucuses do not make accommodations for voters with disabilities, he was unable to participate in the state's 2020 caucuses. This note examines whether the exclusion of voters like Mr. Omvig from the Iowa caucuses violates the Americans with Disabilities Act (ADA).

The note proceeds in four parts. Part I begins by introducing the Iowa caucuses and the problems they pose to voters with disabilities. It then introduces the ADA, which prohibits places of public accommodation from discriminating in the provision of goods and services on the basis of disability. Part II then proposes a novel framework for interpreting the ADA's definition of public accommodation, which prominent civil rights scholars have characterized as creating a serious ambiguity in the law that has not yet been addressed in academic literature. Part III applies this framework to the Iowa caucuses, concluding caucuses are covered places of accommodation that must comply with the ADA's nondiscrimination mandate. Part IV concludes by discussing the implications of this conclusion.

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INTRODUCTION

Jim Omvig is among the proud class of Iowans who voted in the state's first caucuses in the 1970's.[1] Today, he fears he may never caucus again.[2] Blind and suffering from severe neuropathy, Omvig cannot leave his home unassisted.[3] Nevertheless, Omvig committed to participating in Iowa's 2020 caucuses.[4] To ensure he could vote on caucus day, Omvig contacted his local precinct chair to request transportation services to his caucus site.[5] His request was denied.[6] Undeterred, Omvig proposed sending a proxy to caucus for him.[7] This, too, was denied.[8] Finally, Omvig pled for an absentee ballot.[9] Again, denied.[10] So, for the first time in nearly fifty years, Jim Omvig did not caucus in 2020.[11] And he now believes he may have caucused for the last time.[12]

Jim Omvig's predicament is not unique. Over 61 million Americans,[13] and over 700,000 Iowans,[14] live with a disability. For many Iowans, this makes participating in caucuses impossible.[15] Barriers to participation are as diverse as the voters themselves: Access to transportation, suitable seating, and auxiliary aids are but a few of the obstacles Iowans with disabilities may face on caucus day.[16] And both the Democratic National Party and Republican National Party maintain they have no legal obligation to provide accommodations to caucus-goers with disabilities.[17]

This note examines the validity of that claim.

The note proceeds in four parts. Part I provides background on caucuses and on the Americans with Disabilities Act (ADA). With respect to caucuses, the note examines Iowa's caucuses specifically. But the

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[1] *See* Telephone Interview with Annie Matte, Communications and Voting Outreach Coordinator, Disability Rights Iowa (May 5, 2020).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *Disability Impacts All of Us*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html [https://perma.cc/C9SF-W42N] (last visited May 9, 2020).

[14] *Disability & Health U.S. State Profile Data for Iowa*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/iowa.html [https://perma.cc/38PP-XJEJ] (last visited May 9, 2020).

[15] *See* Interview with Annie Matte, *supra* note 1.

[16] *See id.*

[17] Telephone Interview with Jane Hudson, Executive Director, Disability Rights Iowa & Annie Matte, Communications and Voting Outreach Coordinator, Disability Rights Iowa (Mar. 11, 2020).

analysis also applies to political caucuses generally. With respect to the ADA, the note analyzes Title III. The ADA is comprised of five parts, two of which prohibit discrimination on the basis of disability in public places. Title II prohibits discrimination by public entities,[18] whereas Title III prohibits discrimination by private entities operating places of public accommodation.[19] Title II indisputably covers traditional primaries and general elections,[20] which are run by states. Caucuses, however, are run by private political parties,[21] so any ADA coverage must be found in Title III.

Part II proposes an interpretive framework for analyzing Title III claims. Title III defines places of public accommodation through a list of twelve categories of covered entities.[22] Within each category, Title III enumerates places that are expressly covered followed by a catchall phrase extending the category's reach. For example, the category applicable to caucuses extends liability to "an auditorium, convention center, lecture hall, or other place of public gathering."[23] This category, like its eleven counterparts, enumerates covered *venues* before concluding with a catchall *activity*. The mismatch between the *venue-based* list and the *activity-based* catchall invites two possible theories of interpretation which this note calls the *venue-based* theory and the *activity-based* theory.[24] Under the venue-based theory, only venues sharing the characteristics of venues enumerated in a particular category are public accommodations. Under the activity-based theory, each category's designated activity is covered, regardless of the venue in which it takes place. This note concludes that the activity-based theory—which subsumes the venue-based theory—is the proper mode of interpretation for Title III claims. This part's development of the activity-based theory is a necessary predicate to Part III, which applies the theory to caucuses. But Part II's analysis also stands wholly independent from caucuses: The activity-based theory provides a necessary framework for analyzing any Title III claim not involving an enumerated venue—including but not limited to caucuses.

Part III applies the activity-based theory discussed in Part II to the Iowa caucuses. Caucuses take place in a variety of venues: public schools, churches, restaurants, and more. Under the venue-based theory, some

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[18] 42 U.S.C. § 12132.

[19] *Id.* § 12182.

[20] *See The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, U.S. DEP'T OF JUSTICE, https://www.ada.gov/ada_voting/ada_voting_ta.htm [https://perma.cc/SG9B-EXX6] (Sept. 2014) ("Title II of the ADA requires state and local governments ('public entities') to ensure that people with disabilities have a full and equal opportunity to vote.").

[21] DEMOCRATIC NATIONAL COMMITTEE, REPORT OF THE DEMOCRATIC CHANGE COMMISSION 4–5 (2009).

[22] 42 U.S.C. § 12181(7).

[23] *Id.* § 12181(7)(D).

[24] Civil rights scholars called this juxtaposition between the list and catchall a problematic yet unexplored ambiguity in Title III. *See* Telephone Interview with Irving Gornstein, Executive Director, Supreme Court Institute, Georgetown University Law Center (Apr. 3, 2020); Telephone Interview with Paul Smith, Professor from Practice, Georgetown University Law Center (Apr. 27, 2020).

caucuses—like those held in restaurants—are covered by Title III,[25] but most caucuses—like those held in public schools—are not.[26] The activity-based theory, however, covers all caucuses as places of public gathering. Part III demonstrates why caucuses are covered places of public accommodation under the activity-based theory and addresses both statutory and constitutional counterarguments to this conclusion.

Finally, Part IV concludes. The part briefly recaps why the novel activity-based theory is the proper framework for determining Title III liability and why the Iowa caucuses are covered places of public accommodation under this analysis. It then discusses what this conclusion might mean for voters who, like Jim Omvig, are currently excluded from the Iowa caucuses.

I. THE IOWA CAUCUSES AND THE ADA

This part provides the political, social, and legal background framing the note's analysis. Namely, it introduces (A) the Iowa caucuses and (B) the ADA. More specifically, the part begins with a discussion of how caucuses work and the accessibility problems they present. It then introduces the ADA, with a particular focus on Title III.

A. The Iowa Caucuses

Iowa's first-in-the-nation caucuses command a powerful place in presidential politics. Indeed, "Every winner of a competitive major-party presidential nomination contest since 1980 except one started off by winning the Iowa caucuses, the New Hampshire primary, or both."[27] In 2020, the Iowa caucuses attracted 13 percent of Democratic primary season campaign spending[28] despite representing just 1 percent of the Party's pledged delegates.[29] This section discusses how Iowa's caucuses

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[25] Restaurants are among the enumerated places of public accommodation in Title III. 42 U.S.C. § 12181(7)(B).

[26] Title III covers *private* schools, but not public schools which are covered as public entities under Title II. *See id.* § 12181(7)(J).

[27] Andrew Prokop, *Why the Iowa caucuses matter*, VOX (Feb. 3, 2020), https://www.vox.com/2020/2/3/21113394/iowa-democratic-caucus-2020-explained [https://perma.cc/4P6G-DKAX].

[28] POLITICO, 2020 POLITICAL SPENDING PROJECTIONS 6 (2020), https://www.politico.com/f/?id=0000016b-b029-d027-a97f-f6a95aca0000 [https://perma.cc/STY5-8HAG].

[29] Andrew Prokop, *How the Iowa caucus results will actually work—and why 2020's could be more confusing than ever*, VOX (Feb. 3, 2020), https://www.vox.com/2020/1/30/21083701/iowa-caucuses-results-delegates-math [https://perma.cc/BL6N-B77U].

work and the accessibility problems they create.

Caucus Basics. The mechanics of a caucus are second nature to Iowans but arcane to most others.[30] They work like this. Every presidential election year, the major political parties hold caucuses in each of Iowa's nearly 1,700 precincts.[31] Caucuses are essentially party meetings where members congregate to support their favored candidate.[32] They are run by political parties—not states—and administered by volunteers.[33] Caucus night begins with registered party voters assembling at their local precinct site at 7:00 p.m.[34] The caucus then kicks off with the so-called "first alignment": The caucus chair instructs caucus-goers to cast their votes by congregating in groups around their preferred candidate's designated precinct captain.[35] Once these groups are formed, the caucus chair counts the number of caucus-goers supporting each candidate.[36] To be clear, the caucus chair counts votes by tallying the number of individual voters assembled around a precinct captain—not through written ballots.[37] Any candidate who garners support from at least 15 percent of the site's caucus-goers becomes "viable," and is now eligible to receive a share of the site's delegates.[38] Voters whose candidates do not achieve viability in the first alignment must now disband to cast their vote for a candidate who is viable.[39] This phase of the process sparks a kind of electoral red rover: members of viable groups compete to win the support of realigning voters.[40] When the dust settles on the second alignment, the caucus chair conducts a final count of the number of supporters for each viable candidate and apportions the precinct's delegates accordingly.[41] As these political salons play out across the state, delegates are aggregated to produce the ultimate prize: the winner of the Iowa caucuses and a head start toward the party's ultimate nomination.[42]

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[30] *See* Telephone Interview with Rachel P. Caufield, Director, Iowa Caucus Project (Apr. 24, 2020).

[31] Drew DeSilver, *What to know about the Iowa caucuses*, PEW (Jan. 21, 2020), https://www.pewresearch.org/fact-tank/2020/01/31/what-to-know-about-the-iowa-caucuses/ [https://perma.cc/SN28-U8KP].

[32] *See id.*

[33] *See* DEMOCRATIC NATIONAL COMMITTEE, *supra* note 21.

[34] DeSilver, *supra* note 31.

[35] Reid J. Epstein, Keith Collins & Larry Buchanan, *How the Iowa Caucuses Work*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/interactive/2020/01/31/us/politics/what-is-iowa-caucus.html [https://perma.cc/3BQ2-X5ZA]; *2020 Caucus Training: "Module 8: Presidential Preference Cards"*, IOWA DEMOCRATIC PARTY, https://iowademocrats.org/2020-caucus-training-module-8/ [https://perma.cc/7PD9-ARUY] (last visited May 9, 2020).

[36] Epstein, *supra* note 35.

[37] *Id.*; *see also* 2020 Caucus Training, *supra* note 35 (explaining "presidential preference cards" are used to keep a paper trail, not to count votes).

[38] Epstein, *supra* note 35.

[39] Epstein, *supra* note 35. Multiple non-viable groups may also form a new viable group to support another candidate. *See id.*

[40] *See* Epstein, *supra* note 35.

[41] *See* Epstein, *supra* note 35.

[42] *See* DeSilver, *supra* note 31.

Caucus Locations. As Part II of this note makes clear, one theory of ADA liability suggests a caucus's physical location is legally significant. It is therefore worth briefly discussing where Iowa's caucuses are held.[43] The Iowa Code requires caucuses "be held in a building which is publicly owned or is suitable for and from time to time made available for holding public meetings wherever it is possible to do so."[44] So it is no surprise that 56 percent of caucuses are held in public school facilities.[45] Another 21 percent are held in community centers, 9 percent in other government buildings, 4 percent in churches, and 2 percent in private retail establishments.[46] The remaining 7 percent are held in an assortment of other locations ranging from farm houses to union halls.[47] The diversity of caucus sites—and their corresponding legal obligations—gives rise to a varied set of accessibility challenges.

Accessibility Problems. Though candidates come and go, critics and defenders of the Iowa caucuses remain a fixture of the process. Criticism of the caucuses, and Iowa's first-in-the-nation status, is wide-ranging: Voter turnout is routinely lower than in other party primaries;[48] the electorate is over 90 percent white;[49] and errors in delegate counts plagued the 2012,[50] 2016,[51] and 2020 caucuses,[52] changing the result in some years and leaving the winner unclear in others. But in 2020 a new source of criticism gained traction—accessibility.[53]

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[43] The data presented here is based on the 2020 Iowa Democratic caucuses. The figures are based on data obtained by the author from the Iowa Democratic Party. Venue-type classifications are based on the author's independent analysis of the data.

[44] IOWA CODE § 43.93 (2020).

[45] *See* Orion de Nevers, 2020 Iowa Caucus Location Charting (April 2020) (unpublished research) (on file with author).

[46] *See id.*

[47] *See id.*

[48] DeSilver, *supra* note 31.

[49] *Id.* By contrast only 74 percent of Americans over age eighteen are white. *Id.*

[50] A.G. Sulzberger, *A Symbol of Democracy Is Criticized as Undemocratic*, N.Y. TIMES (Feb. 2, 2012), https://www.nytimes.com/2012/02/03/us/politics/after-iowa-reliability-is-questioned-in-caucus-system.html [https://perma.cc/28QU-4U7Q].

[51] Trip Gabriel & Patrick Healy, *Confusion Over Final Tally in Iowa Democratic Caucuses*, N.Y. TIMES, https://www.nytimes.com/live/iowa-caucus-2016-election/confusion-over-final-tally-in-iowa-democratic-caucuses/ [https://perma.cc/33J9-XKM3] (last visited May 9, 2020).

[52] Adam Edelman, *Iowa officially gives Buttigieg the largest delegate count, followed closely by Sanders*, NBC (Feb. 9, 2020), https://www.nbcnews.com/politics/2020-election/iowa-officially-gives-buttigieg-largest-delegate-count-followed-closely-sanders-n1132531 [https://perma.cc/99KP-UGTJ].

[53] *See, e.g.*, Abigail Abrams, *Disability Advocates Push to Make the Iowa Caucuses More Accessible*, TIME (Jan. 28, 2020), https://time.com/5772156/iowa-caucuses-disabilities/ [https://perma.cc/7U3D-JDPC]; Katie Akin, *Iowa parties, disability activists scramble to prepare for Caucus Day; concerns linger*, DES MOINES REGISTER (Jan. 24, 2020, 5:41 PM); Maggie Astor, *Caucusing in Iowa With a Disability: Red Tape and Unreturned Calls*, N.Y. TIMES (Jan. 28, 2020), https://www.nytimes.com/2020/01/26/us/politics/iowa-caucuses-disabilities.html [https://perma.cc/WM6U-QCZ2]; Sam Levine, *'You basically are nothing': the Americans shut out of the Iowa caucuses*, THE GUARDIAN (Feb. 3, 2020), https://www.theguardian.com/us-news/2020/feb/03/americans-shut-out-iowa-caucuses [https://perma.cc/GE3A-TJLD]; Jeff Mordock, *Lip service: Disability advocates slam Democrats' plan for 'satellite' Iowa caucus sites*, WASHINGTON TIMES (Jan. 12, 2020),

The Iowa caucuses' accessibility problems for voters with disabilities are self-evident. Caucuses require in-person participation. This means arranging transportation to a caucus site, navigating snow-covered sidewalks, and waiting in long lines to gain access to buildings not necessarily designed to accommodate visitors with disabilities. Caucuses also require active engagement. Responding to visual and verbal cues is necessary to support the correct candidate at each alignment. And caucuses can take hours. So appropriate seating, the ability to withstand large crowds and bright rooms, and stable enough health to remain at the caucus site are prerequisites to participating. Depending on a voter's disability, any one of these impediments may make caucusing impossible.

In recent years, both major political parties have pushed to brand themselves as promoting accessibility, but with little follow-through.[54] Disability Rights Iowa (DRI) is an advocacy organization for Iowans with disabilities. In June 2019, the group contacted both parties to discuss accommodations for the 2020 caucuses.[55] DRI made two requests: post a caucus accommodation request form on the party site and hire a dedicated staffer to ensure caucus accessibility.[56] Both the Democratic and Republican Parties agreed in principle.[57] But neither acted until mid-January—just two weeks before the caucuses.[58] By then, it was too late to alert most Iowans with disabilities to the accommodation request form; and for many of the 387 voters who submitted accommodation requests, no response came.[59]

At bottom, the Parties' inertia in accommodating voters with disabilities stems from their position that they are under no legal obligation to do so. Whether that contention is correct hinges on the ADA: the civil rights legislation prohibiting discrimination on the basis of disability.

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https://www.washingtontimes.com/news/2020/jan/12/disability-advocates-slam-democrats-plan-for-satel/ [https://perma.cc/JG83-D7EY]; Ella Nilsen, *The Iowa caucuses have a big accessibility problem*, VOX (Feb. 3, 2020), https://www.vox.com/2020/2/3/21116044/iowa-caucuses-2020-accessibility-problem [https://perma.cc/N46W-ZYS2]; Alexandra Skores, *Caucus changes prove to add issues in reporting preferred candidate, turnout*, THE DAILY IOWAN (Feb. 4, 2020), https://dailyiowan.com/2020/02/04/caucus-changes-prove-to-add-issues-in-reporting-preferred-candidate-turnout/ [https://perma.cc/KG5R-L2KC]; Juana Summers, *Democrats Pressured To Make Iowa Caucuses More Accessible*, NPR (Jan. 30, 2020), https://www.npr.org/2020/01/30/801118564/democrats-pressured-to-make-iowa-caucuses-more-accessible [https://perma.cc/NN3V-CZGR]; Juana Summers, *For Some Iowa Voters, Caucuses Remain A Barrier To Participation*, NPR (Jan. 31, 2020), https://www.npr.org/2020/01/31/801251408/for-some-iowa-voters-caucuses-remain-a-barrier-to-participation [https://perma.cc/E6FL-WZKM]; Matt Vasilogambros, *Confusion Reigned in Iowa Caucus — Even Before the Chaotic Results*, STATELINE (Feb. 5, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/02/05/confusion-reigned-in-iowa-caucus-even-before-the-chaotic-results [https://perma.cc/RN8G-3YK8]; Rylee Wilson, *Accessibility issues persist in 2020 Iowa caucuses*, THE DAILY IOWAN (Feb. 4, 2020), https://dailyiowan.com/2020/02/04/accessibility-issues-persist-in-2020-iowa-caucuses/ [https://perma.cc/8BK5-K2BK].

[54] *See* Akin, *supra* note 53.

[55] *See* Interview with Jane Hudson & Annie Matte, *supra* note 17.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

B. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 provides a broad proscription on disability-based discrimination. As the Act's Findings section outlines, the law responded to new data revealing that 43 million Americans were living with a disability, and that Americans with disabilities increasingly live in societal isolation due to systemic discrimination.[60] The ADA was enacted to reintegrate individuals with disabilities.[61]

The ADA. The Act was overwhelmingly popular from introduction to enactment. Iowa Democrat Tom Harkin introduced the Bill on the Senate Floor in May 1989, joined by a bipartisan contingent comprising a full one-third of the Senate.[62] Little more than a year later the Bill became law, winning 377 votes in the House before passing the Senate by a vote of 91-6.[63] In an emotional ceremony on the Senate Floor, Senator Harkin dedicated the Bill's passage to his deaf brother, using sign language to pronounce that, "Today, Congress opens the doors to all Americans with disabilities. . . . Today we say no to ignorance, no to fear, no to prejudice."[64] Weeks later, a crowd of 3,000 cheered as President George H.W. Bush signed the ADA into law on the White House lawn.[65]

Introduced on the twenty-fifth anniversary of the Civil Rights Act of 1964, and passed a year later, the ADA was heralded as "the most significant civil rights bill to pass the Congress in a quarter of a century."[66] The ADA was passed with sweeping goals. The Act is captioned, "A Bill to establish a clear and comprehensive prohibition of discrimination on the basis of disability."[67] These prohibitions are provided in three principal parts: Title I prohibits discrimination on the basis of disability in

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[60] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a), 104 Stat. 327; *see also* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 415–22 (1991) [hereinafter Burgdorf, Analysis and Implications] (detailing the origins of the ADA).

[61] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a), 104 Stat. 327.

[62] *See* 135 Cong. Rec. S4979-02, S4984 (1989).

[63] *S.933 - Americans with Disabilities Act of 1990*, CONGRESS.GOV, https://www.congress.gov/bill/101st-congress/senate-bill/933/actions?KWICView=false [https://perma.cc/CT8T-4CPP] (last visited May 9, 2020).

[64] Steven A. Holmes, *Rights Bill for Disabled Is Sent to Bush*, N.Y. TIMES, July 14, 1990, at A11 https://www.nytimes.com/1990/07/14/us/rights-bill-for-disabled-is-sent-to-bush.html?searchResultPosition=1 [https://perma.cc/E6JD-VHP5].

[65] Burgdorf, Analysis and Implications, *supra* note 60, at 413-15; *see also* Joseph Shapiro, *Remembering George H.W. Bush, A Champion For People With Disabilities*, NPR (Dec. 3, 2018), https://www.npr.org/2018/12/03/672817727/remembering-george-h-w-bush-a-champion-for-people-with-disabilities [https://perma.cc/523W-549G]; *see also* Susan K. Donius, *From the Archives: A Landmark Moment for Americans with Disabilities*, OBAMA WHITEHOUSE (July 26, 2012), https://obamawhitehouse.archives.gov/blog/2012/07/26/archives-landmark-moment-americans-disabilities [https://perma.cc/ZK4V-6MJ5].

[66] Steven A. Holmes, *House, 377-28, Approves Bill to Protect Disabled*, N.Y TIMES (July 13, 1990), https://www.nytimes.com/1990/07/13/us/house-377-28-approves-bill-to-protect-disabled.html?searchResultPosition=2 [https://perma.cc/HZ4F-6WCG].

[67] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a), 104 Stat. 327.

employment;[68] Title II prohibits discrimination on the basis of disability by public entities;[69] and Title III prohibits discrimination on the basis of disability by private entities in places of public accommodation.[70] Together, these three components address nearly all "major areas of public life."[71]

Title III. Title III's public accommodations provision is the most likely source of ADA coverage for political caucuses. As discussed above, caucuses are run by private political parties, unlike primaries, which are run by states. Title II squarely covers primaries,[72] but any accessibility requirements for caucuses must be found in Title III.[73]

Title III prohibits private entities from discriminating on the basis of disability in "place[s] of public accommodation."[74] It defines places of public accommodation by example, enumerating twelve categories of covered places.[75] As relevant here, one such category covers "an

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[68] 42 U.S.C. § 12112.

[69] *Id.* § 12132.

[70] *Id.* § 12182. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) ("[T]he ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III).") (internal footnotes omitted).

[71] Martin, 532 U.S. at 675.

[72] *See The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, U.S. DEP'T OF JUSTICE, https://www.ada.gov/ada_voting/ada_voting_ta.htm [https://perma.cc/DQV7-HANV] (Sept. 2014) ("Title II of the ADA requires state and local governments ('public entities') to ensure that people with disabilities have a full and equal opportunity to vote.").

[73] This note exclusively analyzes whether caucuses are places of public accommodation under Title III. A second theory is that caucuses are covered under Title II because they serve a public function. *See generally* Smith v. Allwright, 321 U.S. 649 (1944) (holding Texas's Democratic Party-run primary was state action because it served a public function). Title II liability, however, could require analyzing caucuses on a county-by-county basis. *See* Milliken v. Bradley, 418 U.S. 717, 745 (1974) (invalidating multi-district desegregation plan covering districts where no segregation finding had been made). Accordingly, this note focuses on Title III because it applies to caucuses writ large and is therefore a more practical mechanism for relief. The note makes no comment on the viability of the Title II theory.

[74] 42 U.S.C. §§ 12181(7), 12182.

[75] *Id.* § 12181(7). The full definition provides:

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

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such

proprietor;

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

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

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

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

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

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

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

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

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

auditorium, convention center, lecture hall, or other place of public gathering."[76] Places of public accommodation covered by Title III must make "reasonable modifications" to "accommodat[e] individuals with disabilities."[77] These modifications may include removing "architectural" and "communication barriers" where feasible and providing auxiliary aids if necessary.[78] Consequently, to state a Title III claim a plaintiff must establish: (i) they are disabled within the meaning of the ADA; (ii) the defendant owns, leases, or operates a place of public accommodation; and (iii) the defendant discriminated against the plaintiff on the basis of disability by failing to provide a reasonable modification that was necessary for the plaintiff to enjoy the defendant's goods or services.[79] This note focuses solely on the second element of a Title III claim: Whether the Iowa caucuses are a place of public accommodation.[80]

II. INTERPRETING THE ADA: THE VENUE-BASED AND ACTIVITY-BASED THEORIES

Title III's definition of places of public accommodation invites two theories of interpretation: a *venue-based* theory and an *activity-based* theory. This part discusses (A) the ADA's text; (B) the *ejusdem generis* canon of construction; (C) the ADA's legislative history; and (D) Supreme Court precedent to determine which theory more faithfully interprets the ADA. It concludes that the activity-based theory provides the proper framework for determining whether a place is a public accommodation under Title III.

A. Title III's Text

Analyzing Title III begins with the text,[81] discussed in this section. This section shows that Title III's definition of places of public

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education;

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

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

[76] *Id.* § 12181(7)(D).

[77] *Id.* § 12182(b)(2)(a).

[78] *Id.* § 12182(b)(2)(a).

[79] *See, e.g.*, Camarillo v. Carrols Corp., 518 F.3d 153, 156 (2d Cir. 2008); Matheis v. CSL Plasma, Inc., 936 F.3d 171, 175 (3d Cir. 2019); Hillesheim v. Myron's Cards & Gifts, Inc., 897 F.3d 953, 956 (8th Cir. 2018); Molski v. M.J. Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007).

[80] The note does not address the first or third elements, nor does it devote time to the "operating" requirement which is met here per *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001).

[81] *See* Elena Kagan, Associate Justice, U.S. Supreme Court, The Justice Antonin Scalia Lecture at Harvard Law School (Nov. 18, 2015) ("We're all textualists now.").

accommodation lends itself to two possible theories of interpretation: a venue-based theory and an activity-based theory. It concludes that, as a textual matter, either theory is permissible. The ambiguity must therefore be resolved using the additional interpretive tools discussed in the remainder of this part.

Title III's Text. Title III states that, "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."[82] The lynchpin for Title III liability, then, is whether an alleged violation occurred in a "place of public accommodation."

The ADA defines "place of public accommodation" by example. Title III's "Definitions" section enumerates twelve categories of places that are covered public accommodations.[83] Each category provides specific examples of covered places, followed by a catchall clause extending the category's coverage to like places. For example, Title III covers "auditorium[s], convention center[s], lecture hall[s], or other place[s] of public gathering."[84] Although the twelve categories are exhaustive, the examples within each category are not.[85] Title III liability therefore extends to any place falling within one of the twelve statutorily defined groups.

Two Theories of Interpretation. The crux of the public accommodation analysis is determining whether a particular place falls within a covered category. This task is muddied by an internal inconsistency in the formulation of Title III's categories: each category begins with a list of *venues* but is followed by a catchall term describing an *activity*.[86] The ADA's coverage of "an auditorium, convention center, lecture hall" (venues) "or other place of public gathering" (activity) illustrates the point.[87] So too does the category covering "a park, zoo, amusement park" (venues) "or other place of recreation" (activity).[88] And the list goes on, ticking off twelve groups described in the venue-activity sequence.

This structure invites two theories of interpretation: Title III liability attaches based on the nature of a place as a venue, or Title III liability attaches based on the nature of the activity a place hosts. Said another way,

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[82] 42 U.S.C. § 12182(a).

[83] *Id.* § 12181(7). For the full definition, see *supra*, note 75.

[84] *Id.* § 12181(7)(D).

[85] U.S. DEP'T OF JUSTICE, ADA TITLE III TECHNICAL ASSISTANCE MANUAL, 6 (2020), https://www.ada.gov/taman3.html [https://perma.cc/2BSJ-VJT3] (So "auditorium[s], convention center[s], [and] lecture hall[s]" are merely illustrations of covered "place[s] of public gathering," but "place[s] of public gathering" and its eleven neighboring groups are the only twelve categories of accommodation the Act covers); 42 U.S.C. § 12181(7)(D).

[86] *See* 42 U.S.C. 12182.

[87] *Id.* § 12181(7)(D).

[88] *Id.* § 12181(I).

determining whether a private entity is subject to Title III liability requires resolving whether liability attaches because the entity operates a venue sharing the characteristics of those venues enumerated in Title III, or because the entity operates an activity described in Title III, wherever that activity takes place.

The distinction matters. Caucuses illustrate why. Caucuses are held in a range of places: restaurants, churches, and public schools among others. So, under the venue-based theory, a textual reading of Title III extends coverage to caucuses held in restaurants,[89] but not to caucuses held in public schools.[90] But caucuses are also plainly places of public gathering. So, under the activity-based theory, a textual reading of Title III extends coverage to caucuses wherever they are held.[91] Whether the interpreter analyzes Title III under the venue-based or activity-based theory may therefore be dispositive in resolving many Title III claims—the Iowa caucuses among them.

The Venue-Based Theory. The venue-based theory is the most natural reading of the statute. To begin with, Title III's substantive prohibition prevents discrimination in the offerings of any "*place* of public accommodation."[92] Webster's dictionary defines "place" as a "physical environment."[93] This definition endorses a reading of the statute rooted in the physical characteristics of the location—in other words, reading the statute to extend liability through a venue-based approach.

What's more, the Act takes a location-centric approach to defining public accommodation. Each category begins with enumerated examples of venues—like auditoriums, convention centers, and lecture halls. Only then does it conclude with the activity-centric catchall, "place of public gathering."[94] This seems to clearly frame the definition as venue-based. Had Congress intended an activity-based definition, it could easily have reframed the groups to provide examples of activities rather than venues. For instance, Congress could have rewritten the public gathering category to apply to "performances, conferences, lectures, or other public gatherings." Simpler still, Congress could have proscribed private entities from discriminating in "all public gatherings" without including the potentially cabining examples. Instead, Congress defined each category of public accommodation in terms of location.[95] The venue-based theory is therefore the most natural interpretation of the Act.

The Activity-Based Theory. Though analyzing Title III through a venue-based lens is the most natural mechanism for identifying prototypical places of public accommodation, Title III's text

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[89] *Id.* § 12181(7)(B).
[90] *See id.* § 12181(7)(J).
[91] *See id.* § 12181(7).
[92] *Id.* § 12182.
[93] *Place*, MERRIAM-WEBSTER.
[94] *See* 42 U.S.C. § 12181(7).
[95] *See id.*

accommodates the activity-based theory as well.

Most obviously, the Act's catchall phrases plainly describe activities—not venues. These broadening clauses include descriptors like: "establishment *serving food or drink*"[96]; "place of *exhibition or entertainment*"[97]; and "place of *public gathering*."[98] These clauses can plainly be read to bring a place within Title III's scope on the basis of the activity the place hosts, rather than the place's shared characteristics with the venues enumerated in Title III. For example, a plain reading of Title III could surely cover a snow cone stand serving cold treats in a public park as an "establishment serving food or drink"; a dive-in movie hosted at a local apartment complex as a "place of exhibition or entertainment"; and, yes, a caucus hosted in a public school as a "place of public gathering," even though none of these venues share physical characteristics with their category's counterparts.

Furthermore, Congress could easily have limited Title III to a venue-based application if it had intended to keep a narrow definition of places of public accommodation. First, instead of using activity-based catchall clauses, Congress could have ended each list with a phrase like "or other *similar venue*." This would have been an obvious mechanism for cabining the application of Title III to only the class of enumerated facilities. Alternatively, Congress could have limited Title III's scope by selecting catchall language like "or other place *with the primary purpose of providing* exhibition or entertainment." This would have provided a useful descriptor of the kinds of like-venues that ought to fall within Title III without extending liability to the apartment complex during dive-in movie nights. Finally, Congress could have included more exceptions to Title III. Title III includes a discrete section providing "exemptions for private clubs and religious organizations."[99] The section is brief—one sentence covering two lines in the U.S. Code—and specific: limited to private clubs and religious organizations.[100] Congress could have provided more expansive exemptions: it could have exempted specific venues (like food trucks), specific activities (like voting), or places functioning outside their primary purpose (like dive-in movies). It chose not to. Title III's text—the best indicator of Congress's intent[101]—therefore permits *both* the venue-based *and* the activity-based theories of interpretation.

With the choice between theories unresolved by the text alone, the remainder of this part calls upon additional tools of statutory interpretation to resolve the ambiguity: canons, legislative history, and Supreme Court precedent.

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[96] *Id.* § 12181(7)(b) (emphasis added).

[97] *Id.* § 12181(7)(c) (emphasis added).

[98] *Id.* § 12181(7)(d) (emphasis added).

[99] *Id.* § 12187.

[100] *See id.*

[101] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words.") (quoting Gardner v. Collins, 2 Pet. 58, 93 (1829)).

B. The Ejusdem Generis Canon

The *ejusdem generis* canon is particularly relevant to interpreting Title III. Standing alone, the canon commends the venue-based theory. But other factors counsel against giving the canon dispositive weight in this analysis. The canon, and these countervailing factors, are discussed in turn below.[102]

1. Ejusdem Generis supports the venue-based theory

Ejusdem generis, literally translated, is Latin for "of the same kind."[103] The canon teaches that a general catchall phrase at the end of a list only extends to other members of the class the list identifies.[104] For example, a statute providing a tax write-off to owners of "dogs, cats, horses, cattle, and other animals" provides relief to owners of other *domesticated* animals.[105] It does not grant tax relief to the owner of a hippopotamus.[106] In essence, the canon inserts the word "similar" into the list after the word "other."[107] In this manner, *ejusdem generis* ensures the list preceding the catchall term is not superfluous: If our tax code applied to any keeper of ungulates, the enumeration in the code would be meaningless because the write-off would apply to owners of any animal, not just owners of the class of animals identified in the statute.[108]

Title III contains classic examples of enumerated lists, each followed by a catchall phrase. It provides twelve categories of public accommodations, with each category defined through a list of places

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[102] This note relies principally on Justice Antonin Scalia and Bryan Garner's *Reading Law: The Interpretation of Legal Texts* in selecting and defining canons of construction. For this reason, the canon that "remedial statutes should be liberally construed" is not discussed. Though the ADA is a remedial statute, and many judges would therefore find this canon persuasive in suggesting an activity-based approach, Scalia and Garner reject the canon. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 364–66 (2012). At least six Justices on the current Supreme Court are therefore unlikely to find it persuasive in construing the ADA. With this in mind, this note instead relies on canonical rules Scalia and Garner endorse.

[103] *Ejusdem Generis*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/ejusdem_generis [https://perma.cc/3DBY-A45W] (last visited May 9, 2020).

[104] SCALIA & A. GARNER, *supra* note 102, at 199; *see also* Yates v. United States, 574 U.S. 528, 545 (2015) (quoting Wash. St. Dep't. of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003)) ("[W]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.").

[105] *See* SCALIA & GARNER, *supra* note 102, at 212.

[106] *See* SCALIA & GARNER, *supra* note 102, at 199 (emphasis removed). But query whether Joe Exotic's tigers warrant tax relief. See Tiger King (Netflix 2020).

[107] *See* SCALIA & GARNER, *supra* note 102, at 199.

[108] *See* SCALIA & GARNER, *supra* note 102, at 199–200; *see also* CSX Transp., Inc. v. Ala. Dep't. of Rev., 562 U.S. 277, 295 (2011) ("We typically use ejusdem generis to ensure that a general word will not render specific words meaningless.").

followed by a catchall term.[109] Recall the category: "an auditorium, convention center, lecture hall, or other place of public gathering."[110] Applying *ejusdem generis*, the definition becomes: " . . . or other *similar* place of public gathering."[111] This prevents rendering the words "auditorium, convention center, [and] lecture hall" superfluous, ensuring those examples inform—and limit—the scope of covered "place[s] of public gathering." With this in mind, "an auditorium, convention center, lecture hall, or other *similar* place of public gathering" extends to conference halls just as surely as it does not extend to bus stops. Applying the canon, public accommodations must only be places "of the same kind" as those enumerated in the definition. In other words, *ejusdem generis* dictates interpreting Title III under the venue-based—and not the activity-based—theory.

2. *Ejusdem Generis is not dispositive*

Canons of construction are not dispositive in statutory interpretation—and for good reason. Canons are "grounded in grammar, logic, and reason," but logic and reason must still prevail when the canon would ascribe meaning to a word that is in clear conflict with the word's context, plain meaning, or other more persuasive sources.[112]

Context. The *ejusdem generis* canon is not dispositive when context dictates otherwise.[113] Imagine that our tax code is now a sign above a storefront. It reads: "Dogs, cats, horses, cattle, and other animals prohibited."[114] Blindly applying *ejusdem generis*, an interpreter would conclude the store banned only domesticated animals. But, given the context, any reasonable jurist would conclude the sign prohibited *all* animals from entering the store—not just the domestic animals the sign addresses.[115] No one would believe the sign permits Gayla Peevey to stroll in with the hippopotamus she got for Christmas.[116]

Two sources of contextual clues caution against giving *ejusdem generis* dispositive weight in interpreting Title III. First, as its caption states, the ADA is a "comprehensive" proscription on disability-based discrimination.[117] In declaring itself a "comprehensive" and "consistent"

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[109] 42 U.S.C. § 12181(7).

[110] *Id.* § 12181(7)(D).

[111] *See id.*

[112] *See* SCALIA & GARNER, *supra* note 102, at 211–13.

[113] *See id.* at 212.

[114] This hypothetical is adapted from the one used by Scalia and Garner. *See id.*

[115] *See id.*

[116] GAYLA PEEVEY, I WANT A HIPPOPOTAMUS FOR CHRISTMAS (Columbia Records 1953).

[117] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(b), 104 Stat. 327, 329 (1990).

mandate,[118] the ADA's text specifically precludes arbitrary distinctions that prevent discrimination in some aspects of society but permit it in others.[119] Applying *ejusdem generis* in support of the venue-based theory would undermine the law's comprehensive nature. Second, as Part II.C discusses in more depth, the ADA's legislative history offers additional context demonstrating that Congress specifically rejected applying *ejusdem generis* to the public accommodation definition: Title III's examples are intended to be illustrative, but not limiting,[120] and Congress deliberately removed the word "similar" from the public accommodation catchalls.[121] Applying *ejusdem generis* to undo Congress's work would be inapposite with the ADA's design. The ADA's textual and legislative context warn against applying *ejusdem generis* to the definition of public accommodation.

Plain meaning. The role of canons in statutory interpretation also shows that applying *ejusdem generis* to Title III is inappropriate. Canons of construction are only called upon in interpreting ambiguous language.[122] A court could easily determine the activity-based nature of Title III's catchalls unambiguously commands the activity-based approach. In other words, "public gathering" covers public gatherings. Period.

Forecasting when plain meaning precludes canons is straightforward in theory. But it requires a crystal ball in practice. Consider *Yates v. United States*.[123] In *Yates*, the Supreme Court addressed whether a fish was a "record, document, or tangible object" in an obstruction of justice statute.[124] A plurality said no, applying *ejusdem generis* to define the ambiguous phrase "tangible object" as referring only to objects similar to records or documents: the fish was not a tangible object.[125] But four Justices dissented, finding the canon inapplicable because the term "tangible object" is unambiguous: the fish was a tangible object.[126] The ninth Justice, concurring in the judgment, called the application of *ejusdem generis* imperfect under the circumstances, and deemed it insufficient to

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[118] *Id.*

[119] In doing so, the ADA prevents the "pastrami sandwiches but not prescriptions" problem is discussed in Part II.C, below.

[120] *See infra* Part II.C.

[121] *See* H.R. REP. No. 101-485, at 77–78 (1990); S. REP. No. 101-116, at 56–57 (1989).

[122] Yates v. United States, 574 U.S. 528, 564 (2015) (Kagan, J., dissenting) (*ejusdem generis* should be used "to resolve ambiguity, not create it"); Harrison v. PPG Indus., Inc., 446 U.S. 578, 588 (1980) (quoting United States v. Powell, 423 U.S. 87, 91 (1975)) (internal quotation marks omitted) (*ejusdem generis* is "only an instrumentality for ascertaining the correct meaning of words when there is uncertainty"); *see* SCALIA & GARNER, *supra* note 102, at 212 (quoting Anderson v. Anderson, [1895] 1 Q.B. 749, 755 (per Rigby, L.J.)) ("[O]ver and over again [the canon has] been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them.").

[123] Yates v. United States, 574 U.S. 528, 531 (2015).

[124] *Id.*

[125] *Id.* at 545–46.

[126] *Id.* at 563–65 (Kagan, J., dissenting).

resolve the case.[127]

The ADA's plain meaning could easily divide jurists in applying *ejusdem generis* just as "tangible object" did in *Yates*. Though not conclusive in undermining use of the canon here, it cautions against relying on it.

Hierarchy of authority. Finally, *ejusdem generis* is a rule of construction—not of law—that must yield to more persuasive authorities.[128] The Supreme Court has not expressly discussed the dual-theories for Title III interpretation this note outlines. But, as Part II.D discusses, the Court has weighed in on the issue by implication. In *PGA Tour, Inc. v. Martin*, the Court concluded that the PGA Tour itself—not just the golf courses on which the Tour is held—is a place of public accommodation.[129] In doing so, the Court implicitly rejected applying *ejusdem generis* to Title III: a golf *tournament*, unlike a golf *course*, bears no resemblance to any *venue* enumerated in Title III.[130] *Martin* therefore provides strike three against invoking *ejusdem generis* to limit Title III to the venue-based theory.

All told, relying on the canon to follow the venue-based theory despite Title III's context, plain meaning, and Supreme Court precedent would be subpar interpretation.

C. Title III's Legislative History

The legislative history of Title III clearly favors the activity-based theory. This section provides the relevant legislative evidence. In sum: (i) the House endorsed the activity-based theory; (ii) Congress did not intend Title III's enumerative definition to limit its scope; and (iii) Congress designed the ADA to be comprehensive in nature.

1. The House Endorsed the Activity-Based Theory

The House Report from May 15, 1990 describes the version of the Senate Bill the House would pass seven days later.[131] The original Senate Bill did not define "public accommodations" using enumerated categories.[132] Instead, it used a more general definition: "privately operated establishments that are used by the general public. . . ."[133] Only

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[127] *Id.* at 550 (Alito, J. concurring).

[128] SCALIA & GARNER, *supra* note 102, at 212.

[129] PGA Tour, Inc. v. Martin, 532 U.S. 661, 677 (2001).

[130] *See* 42 U.S.C. § 12181(7).

[131] *See generally* H.R. REP. No. 101-485, pt. 3 (1990).

[132] *Id.* at 53.

[133] 135 CONG. REC. S4947, S4990 (1989).

later did the Senate adopt the enumerative approach.[134] The House Report addressed this change.

The Report begins by discussing the categories. "These 12 listed categories are exhaustive. However, within each category, the bill lists only a number of examples. . . . This list is only a representative sample of the types of entities covered under this category."[135] The Report then specifically dictates interpreting the list per the activity-based theory: "A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition."[136] It continues, "Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient that the jewelry store sells items to the public."[137] This evidence shows the House believed the ADA's definition of public accommodation would be interpreted using an activity-based approach.

2. *The History of Title III's Enumeration*

The ADA's drafters did not believe Title III's enumeration limited its scope. As just discussed, Title III initially defined public accommodations simply as "privately operated establishments that are used by the general public."[138] But Attorney General Dick Thornburgh, testifying to the Senate on behalf of the Bush Administration, expressed the Administration's discomfort with the definition's lack of specificity.[139] To alleviate this concern, Congress adopted the enumerative definition of public accommodation that ultimately passed.[140] But though the enumerative approach could have cabined Title III's coverage, the Administration agreed the new language was "equal [in] the breadth of scope of the more generic approach it supplanted."[141] Thus, the venues in Title III are illustrative while maintaining the original language's breadth in covering "almost every facet of American life in which a business establishment or other entity serves or comes into contact with members of the general public."[142] This history shows the ADA's ratifiers did not

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[134] H.R. REP. No. 101-485, pt. 3, at 26 (1990).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] 135 CONG. REC. S4979-02, S4990 (1989).

[139] *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the S. Comm. on Labor and Human Res.*, 101st Cong. 99 (1989) [hereinafter Hearings on S. 933] (statement of Dick Thornburgh, Attorney General, United States of America); *see also* Robert L. Burgdorf Jr., *"Equal Members of the Community": The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 551, 558 (1991) [hereinafter Burgdorf, Equal Members].

[140] Burgdorf, Equal Members, *supra* note 139, at 558.

[141] *See* Burgdorf, Analysis and Implications, *supra* note 60, at 495–96.

[142] *Id.* at 471.

intend Title III's enumeration to invite a venue-based theory of interpretation.

Title III's expansive coverage responded to the "pastrami sandwiches but not prescriptions" problem plaguing the definition of public accommodation in Title II of the Civil Rights Act of 1964.[143] The Civil Rights Act's definition of public accommodation targeted places like hotels and restaurants where racial discrimination was most pronounced.[144] Testifying on the Senate floor, the ADA's initial drafter, Robert Burgdorf Jr., described the arbitrary results such a definition created: "It makes no sense that you can't be discriminated against on the basis of your disability [if] you want to buy a pastrami sandwich at the local deli, but that you can be discriminated against next door at the pharmacy where you need to fill a prescription."[145] Burgdorf's "pastrami sandwiches but not prescriptions" testimony became a "rallying cry" for an expansive definition of public accommodation in Title III, and in adopting his recommendation both the House and Senate committee reports quoted his testimony.[146] Congress's condemnation of a "pastrami sandwiches but not prescriptions" outcome rejects the venue-based theory; that approach would generate the kind of arbitrary distinctions Congress drafted Title III to avoid.

3. *The ADA's Coverage is Comprehensive*

Finally, the comprehensive nature of the ADA supports the activity-based theory. Congress intended the ADA to make nearly every area of public life accessible to people with disabilities. Indeed, the ADA begins with the caption: "A Bill To establish a clear and *comprehensive* prohibition of discrimination on the basis of disability."[147] It executes this objective in Title II and Title III: Title II prohibits public entities, including state and local governments,[148] from discriminating on the basis of disability,[149] while Title III prohibits private entities from discriminating on the basis of disability in places of public accommodation.[150] Through these mechanisms, Congress made the ADA the backbone of a body of legislation prohibiting disability-based discrimination in almost all

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[143] *Id.* at 496.

[144] *See* Hearings on S. 933, *supra* note 139 (statement of Robert L. Burgdorf, Jr., Vice President, Project ACTION of the National Easter Seal Society) ("Title II was designed to deal with the worst problems of discrimination that were faced in 1964. It chose to attack segregated hotels, motels, inns, restaurants, et cetera—places where the sit-ins had been occurring.").

[145] *Id.*

[146] Burgdorf, Equal Members, *supra* note 139, at 558.

[147] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a), 104 Stat. 327.

[148] 42 U.S.C. § 12131.

[149] *Id.* § 12132.

[150] *Id.* § 12181. Title III does, however, provide an exception for private clubs and religious organizations. *Id.* § 12187.

publicly accessible places: The ADA is complemented by Section 504 of the Rehabilitation Act, which prohibits the federal government, and recipients of federal funds, from discriminating on the basis of disability,[151] and the Fair Housing Act, which proscribes disability-based discrimination in housing.[152] Congress intended this trio of legislation to result in near-universal protection for people with disabilities.[153]

Congress's goal of making the ADA the cornerstone in a wall of legislation prohibiting discrimination on the basis of disability confirms the validity of the activity-based approach. Congress was concerned not with picking and choosing venues that would or would not be covered by Title III, but with providing illustrations that would extend Title III's coverage to "every facet of American life."[154] It would be antithetical to Congress's design to cover activities when they take place in venues similar to those enumerated in Title III, but not when they occur in other locations.

D. Precedent Supports the Activity-Based Theory

Case law interpreting "places of public accommodation" under Title III is limited.155 And the precedent that does exist does not definitively resolve the question presented here: No case addresses whether Title III should be interpreted through a venue-based or activity-based lens. But the leading Supreme Court case interpreting "places of public accommodation" does seem to implicitly accept the activity-based approach.

In *PGA Tour, Inc. v. Martin*, the Supreme Court confronted a case involving a professional golfer whose degenerative circulatory disorder made walking an eighteen-hole golf course impossible.[156] The golfer, Martin, entered the qualifying tournament for the PGA Tour and

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[151] 29 U.S.C. § 794.

[152] 42 U.S.C. § 3604(c).

[153] *See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary*, 101st Cong. 339–40 (1989) [hereinafter Hearings on H.R. 2273] (statement of Robert L. Burgdorf, Jr., Vice President, Project ACTION of the National Easter Seal Society) ("While the definition of public accommodations in the ADA is broad, it certainly does not include every new building in the U.S. Private homes, apartments, condominiums, cooperatives, and other private housing facilities and residences are not included (many multifamily residences are subject to the accessibility requirements of the Fair Housing Amendments Act). Buildings owned by the federal government are not included (these are already subject to accessibility requirements under the Architectural Barriers Act and Section 504). Buildings owned by state and local governments are not within the definition of public accommodation, but most will be covered by the 'public service' provisions in Title II.").

[154] *See* Burgdorf, Analysis and Implications, *supra* note 60, at 471.

[155] *See* Ruth Colker, ADA Title III: A Fragile Compromise, 21 BERKELEY J. EMP. & LAB. L. 377, 379–80 (2000) (explaining that there have been relatively few lawsuits brought under Title III because damages are not an available remedy).

[156] PGA Tour, Inc. v. Martin, 532 U.S. 661, 668 (2001).

progressed to the final round.[157] That round prohibited the use of golf carts, so Martin requested an exception to the rule that would enable him to continue participating in the tournament.[158] The PGA denied Martin's request.[159] Martin filed suit under Title III and the case reached the Supreme Court to determine, among other things, whether the PGA Tour is a place of public accommodation.[160]

The Court held in the affirmative, concluding that both the PGA Tour and its qualifying tournaments are public accommodations.[161] In determining Title III covers the PGA Tour by its "plain terms," the Court made four swift points.[162] First, PGA Tour events occur on golf courses, which Title III specifically identifies as places of public accommodation.[163] Second, during its events the Tour is an operator of those courses.[164] Third, as a golf course operator, the PGA Tour cannot discriminate in the privileges its golf courses offer.[165] Fourth, competing in the PGA tournament is a privilege of the Tour's golf courses.[166] Accordingly, the Court concluded the PGA Tour is a place of public accommodation.[167]

The *Martin* decision is inherently activity-based. The Court did not simply conclude that each golf course on which the PGA Tour takes place—its venues—are places of public accommodation. Instead, it held the PGA Tour itself is a place of public accommodation.[168] The PGA was therefore required to modify the rules of the PGA Tour writ large to accommodate golfers with disabilities.[169] By designating the PGA Tour as a place of public accommodation, the *Martin* decision swings in favor of the activity-based theory.[170]

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This part has examined two approaches for interpreting Title III's definition of public accommodation: the venue-based and activity-based

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[157] *Id.* at 669.
[158] *Id.*
[159] *Id.*
[160] *See id.* at 674.
[161] *See id.* at 677.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *See id.* at 690.
[170] Lower courts have followed *Martin's* lead in extending the ADA beyond venues, primarily in cases designating the NCAA a place of public accommodation. *See, e.g.*, Matthews v. NCAA, 179 F. Supp. 2d 1209, 1222–23 (E.D. Wash. 2001); Cole v. Nat'l Collegiate Athletic Ass'n, 120 F.Supp.2d 1060 (N.D.Ga.2000); Tatum v. Nat'l Collegiate Athletic Ass'n, 992 F.Supp. 1114 (E.D.Mo.1998); Ganden v. Nat'l Collegiate Athletic Ass'n, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996). Though other courts have concluded membership organizations are not places of public accommodation because Title III covers places, not entities, these cases were predominantly decided prior to *Martin*. *See, e.g.*, Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (USA Hockey not a place of public accommodation).

theories. In Section A, the part determines Title III's text permits either theory, and that additional interpretive tools are therefore necessary to resolve the question. Section B shows that the *ejusdem generis* canon would dictate a venue-based approach but concludes the canon should not be given dispositive weight here. Section C demonstrates the ADA's legislative history supports the activity-based theory. Section D provides Supreme Court precedent reaching the same result. This part therefore concludes that the activity-based theory is the proper framework for interpreting Title III. The note will now turn to the Iowa caucuses, applying the activity-based theory to determine whether the caucuses are places of public accommodation under the ADA.

III. THE ADA COVERS THE IOWA CAUCUSES UNDER THE ACTIVITY-BASED THEORY

Part II set forth an activity-based framework as the proper theory for interpreting Title III's definition of places of public accommodation. This part applies that framework to the Iowa caucuses. The part discusses (A) the ADA's text; (B) its legislative history; and (C) the consequences of applying the ADA to caucuses, concluding all three support the application. It then discusses the principal counterarguments—two statutory and one constitutional—to this conclusion. Finding these counterarguments unpersuasive, the part determines the Iowa caucuses are "places of public gathering," and therefore covered public accommodations under Title III of the ADA.

A. The ADA's Text

Under the activity-based theory, the ADA's text covers caucuses as places of public accommodation. Principally, Title III's definition of public accommodations includes "places of public gathering." Moreover, the ADA's Findings section identifies voting discrimination as one of the foremost concerns the ADA addresses.

Places of Public Gathering. Among Title III's twelve categories of public accommodations is the group: "auditorium, convention center, lecture hall, or other place of public gathering."[171] Under the activity-based theory, this definition covers any place of public gathering. So, places of public gathering are covered whether or not they occur in a venue that shares attributes with auditoriums, convention centers, and lecture halls.

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[171] 42 U.S.C. § 12181(7)(D).

Caucuses are, by definition, places of public gathering. Indeed, the Iowa Republican Party defines caucuses as places where "political party members *gather*,"[172] and the Iowa Democratic Party describes them as occurring in "community *gathering* places."[173] Finally, the Iowa Code requires parties to hold caucuses at places "suitable for and from time to time made available for holding public meetings."[174] The ADA's text therefore plainly covers caucuses as places of public gathering.

Voter Discrimination Findings. As discussed in Part I, Congress passed the ADA in direct response to empirical evidence that systematic discrimination against individuals with disabilities resulted in their segregation and isolation from mainstream society.[175] The ADA specifically identifies voting as a source of this isolation.[176] In its first substantive section, the ADA outlines its Findings and resulting Purposes.[177] In its Findings, the ADA identifies "discrimination against individuals with disabilities persist[ing] in such critical areas as . . . voting."[178] In its Purposes, the ADA sets out to provide a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[179] Together, the ADA's Findings and Purposes indicate that the law was designed to eliminate voting discrimination against people with disabilities. This is further textual support for the conclusion that caucuses are places of public accommodation.[180]

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[172] *Caucus FAQ*, IOWA GOP, https://www.iowagop.org/caucus-faq/ [https://perma.cc/9K85-PVHV] (last visited May 9, 2020) (emphasis added).

[173] *Iowa Democratic Party Announces Satellite Caucus Locations for 2020 Caucuses*, IOWA DEMOCRATIC PARTY, https://iowademocrats.org/iowa-democratic-party-announces-satellite-caucus-locations-2020-caucuses/ [https://perma.cc/P6XR-K6S9] (last visited May 9, 2020) (emphasis added).

[174] Iowa Code § 43.93 (2020) ("Each precinct caucus shall be held in a building which is publicly owned or is suitable for and from time to time made available for holding public meetings wherever it is possible to do so."). The Iowa Democratic Party's Constitution also mandates that caucuses "be held at public meeting facilities or sites used for public meetings . . . where possible." IOWA DEMOCRATIC PARTY CONST., art. II, § 2(a) (as amended, 2018).

[175] *See supra* Part I.B; *see also* 42 U.S.C. § 12101(a)(2) (finding "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); Burgdorf: Analysis and Implications, *supra* note 60, at 432–34 (tracing the ADA's origins to the results of the Louis Harris poll and subsequent publication of *Towards Independence*).

[176] *See* 42 U.S.C. § 12101(a)(3).

[177] *See id.* § 12101.

[178] *Id.* § 12101(a)(3).

[179] *Id.* § 12101(b)(1).

[180] Indeed, the Supreme Court has previously relied on the ADA's findings section to resolve ambiguity in the statute. In *Sutton* the Court addressed the question of whether the term "disability" includes correctable disabilities such as vision impairment. *See* Sutton v. United Airlines, 527 U.S. 471, 475 (1999). In holding that it does not, the Court found it "critical[]" to note that the ADA's findings section provides that 43,000,000 Americans live with a disability. *Id.* at 484. Because interpreting the statute to include correctable disabilities would result in coverage for far more than 43,000,000 people, the Court determined that the Act's findings section "require[d] the conclusion" that the ADA does not cover correctable disabilities. *Id.* A concurring Justice Ginsburg wrote separately to emphasize the importance of interpreting the statute in light of Congress's stated findings. *Id.* at 494 (Ginsburg, J., concurring) ("The strongest clues to Congress' perception of the domain of the Americans with Disabilities Act of 1990 (ADA), as I see it, are [its] legislative findings. . . ."). Applying this principle from *Sutton*, Title III's public accommodations provision should be interpreted

B. Legislative History

Applying the ADA to caucuses fits squarely within the "evil" the ADA was "designed to remedy."[181] For starters, Congress passed the ADA in direct response to disenfranchisement of voters with disabilities. Moreover, addressing voting discrimination is part and parcel of the ADA's spirit as a Civil Rights Act for people with disabilities.

1. The ADA was a direct response to disenfranchisement of voters with disabilities

The ADA's legislative history includes extensive discussion of disenfranchisement of voters with disabilities. At a general level, the legislative history identifies the franchise as a "major problem" for people with disabilities. More specifically, Congress identified poll place accessibility and forced absentee voting as the major sources of disenfranchisement. With these issues in mind, Congress seems to clearly have intended that the ADA prohibit discrimination in voting—in primaries and caucuses alike.

Access to Voting: A "Major Problem." At a general level, the legislative evidence highlights voting as one of the "major problems" that "limit[s the] independence" of individuals with disabilities.[182] This evidence was forcefully demonstrated by Dr. Stephen Fawcett who presented the results of an annual survey of thousands of individuals with disabilities conducted by the University of Kansas.[183] The survey's respondents identified eighteen categories of "major problems" people with disabilities face.[184] Among these "consumer-identified" problems

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as preventing discrimination in the areas identified in the ADA's findings section. Because voting is one of these enumerated sources of discrimination, it follows that Title III covers those private entities which operate voting facilities, in other words, caucuses.

[181] Holy Trinity Church v. United States, 143 U.S. 457, 463 (1892) ("Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."). Though *Holy Trinity* itself has fallen out of favor, interpreting ambiguous statutory language to give effect to Congress's intent has not. *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471, 496 (1999) (Stevens, J., Dissenting) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.") (quoting Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979)); *see also* King v. Burwell, 135 S. Ct. 2480, 2494 (2015) (interpreting "by the State" in the Affordable Care Act as making tax credits available on both state and federal exchanges because it "would be implausible that Congress meant the Act to" provide tax credits on state exchanges only).

[182] *See* Hearings on H.R. 2273 *supra* note 153, at 339–40 (statement of Stephen B. Fawcett, Ph.D., Professor of Human Development and Research Associate of the Research and Training Center on Independent Living [RTCIL], and Barbara Bradford, Training Associate [RTCIL]).

[183] *Id.*

[184] *Id.*

was community discouragement of voting by people with disabilities.[185] The respondents identified "inaccessible registration sites, polling places, and lack of transportation" as major hurdles inhibiting democratic participation by voters with disabilities.[186]

Poll Accessibility and Forced Absentee Voting. The ADA's hearings identify poll place accessibility and forced absentee voting as leading forms of discrimination that voters with disabilities face. Several witnesses testified to difficulties accessing local polling places. One witness discussed the "demeaning" experience of being made a "public spectacle" at polls in Indiana where election officials carried voting machines to the cars of voters with disabilities who could not access the polling stations themselves.[187] Another described the leap of faith voting required her to take as a voter in Connecticut: Due to a visual impairment she was forced to trust others to tell her which lever to pull on the voting machine to cast her desired vote.[188] A third witness testified that a full one-third of Tennessee's polling places were "totally inaccessible" to voters with disabilities.[189] And yet another witness recounted having to register to vote on a lift outside the Portsmouth City Hall on a cold New Hampshire morning because the building itself was inaccessible.[190]

The inaccessibility of physical polls forces many voters with disabilities to vote absentee. But this poses problems of its own. In some states, registering to vote absentee is "expensive," "humiliating," and involves persevering through an "extensive draconian process."[191] In other states, absentee voters with disabilities are required to vote over a month in advance, forcing them to choose candidates before the culmination of major debates.[192] And even when voters with disabilities are able to participate as absentee voters, the de facto requirement that they vote by mail deprives them of the right—available to all other voters—to change their vote on Election Day.[193]

A Bill to Protect the Franchise. In light of this testimony, the members of Congress who passed the ADA understood it as eliminating

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[185] *Id.*

[186] *Id.*

[187] *See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on Educ. and Labor*, 101st Cong. 43 (1989) [hereinafter Labor Hearings on H.R. 2273] (statement of Nanette Bowling, Staff Liaison to the Mayor's Advisory Council for Handicapped Individuals, Office of Mayor Bob Sargent, Kokomo, Indiana).

[188] *See Americans with Disabilities Act of 1988: Hearings on H.R. 4498 Before the House Comm. on Educ. And Labor*, 100th Cong. 48 (1988) [hereinafter Hearings on H.R. 4498] (statement of Ellen, M. Telker, Attorney at Law, Milford, CT).

[189] *See* Hearings on S. 933, *supra* note 139 (statement of Dr. Mary Lynn Fletcher, Director of Disability Services, Loudon County, Tennessee).

[190] *See* Hearings on H.R. 4498, *supra*, note 188 (statement of Sandy Gorski, Portsmouth, New Hampshire).

[191] *See* Hearings on S. 933, *supra* note 139 (statement of Dr. Mary Lynn Fletcher, Director of Disability Services, Loudon County, Tennessee).

[192] *See id.* (statement of Neil Hartigan, Attorney General, State of Illinois).

[193] *See* Labor Hearings on H.R. 2273 *supra* note 187 (statement of Nanette Bowling, Staff Liaison to the Mayor's Advisory Council for Handicapped Individuals, Office of Mayor Bob Sargent, Kokomo, Indiana).

disability-based discrimination in voting. Congressional hearings on the ADA began with members welcoming the Bill as one that would end discrimination against voters with disabilities.[194] When Senator Harkin introduced the ADA on the Senate floor, he identified the inaccessibility of voting places for people with disabilities as a major ongoing civil rights violation the ADA addressed.[195] In accord with Senator Harkin, the initial Committee Report—referred unanimously to the Senate by the Committee on Labor and Human Resources—explicitly cited the problems with both poll accessibility and forced absentee voting as reasons for adopting the Bill.[196] It is no surprise, then, that the ADA itself ultimately identified disenfranchisement as one of the most important forms of discrimination the ADA addresses.[197]

Though the ADA seems clearly designed to cover voting accessibility, the word "caucus" never appears in the law's legislative history.[198] And it is Title II of the ADA—not Title III—that "requires state and local governments . . . to ensure that people with disabilities have a full and equal opportunity to vote."[199] But the ADA was almost certainly not intended to protect voters in state-run primaries—which thirty-eight states held in the 1988 presidential election—but not in party-run caucuses, held in the remaining twelve states. For starters, caucuses present an even more pronounced form of the poll accessibility and absentee voting problems that animated Congress in passing the ADA.[200] Moreover, it would contradict the ADA's "comprehensive" nature to proscribe discrimination in primaries but not in caucuses.[201] Lastly, the ADA's stated purpose of providing a "consistent" and "national" standard would fail if it protected voting in some states but not in others.[202] Congress's desire to prohibit voting discrimination nationwide reinforces the textual support for applying the ADA to caucuses.

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[194] *See Americans with Disabilities Act of 1988: Hearings on S. 2345 Before the Comm. on Labor and Human Res.*, 100th Cong. 20 (1988) (statement of James Jeffords, United States Representative, State of Vermont).

[195] *See id.* (statement of Tom Harkin, United States Senator, State of Iowa).

[196] S. REP. No. 101-116 at 10 (1989).

[197] *See* 42 U.S.C. § 12101(a)(3).

[198] *See generally* ADA-LH TOC, 1990 WL 10080016 (A.&P.L.H.).

[199] *See The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, U.S. DEP'T OF JUSTICE, https://www.ada.gov/ada_voting/ada_voting_ta.htm [https://perma.cc/XA4X-AEQ2] (last visited May 9, 2020); *see also ADA Checklist for Polling Places*, U.S. DEP'T OF JUSTICE, https://www.ada.gov/votingchecklist.htm#toc1 [https://perma.cc/2NDS-TCSJ] (last visited May 9, 2020) (providing an ADA checklist for polling places).

[200] Caucuses exacerbate accessibility problems by requiring active, on-site participation. *See* Part I.B, *supra.* And absentee voting is not an option. *See id.*

[201] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a), 104 Stat. 327.

[202] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a), 104 Stat. 327.

2. *The ADA is a Civil Rights Act for People with Disabilities*

The ADA's civil rights spirit reinforces its application to caucuses. Congress conceived the ADA as a modern Civil Rights Act for people with disabilities, and President Bush signed it into law with this in mind. Senator Harkin introduced the ADA as "a broad and remedial bill of rights for individuals with disabilities," terming it a modern "emancipation proclamation."[203] Signing the Bill into law a year later, President Bush heralded the ADA as a "historic new Civil Rights Act. . . for people with disabilities,"[204] comparing it to the Declaration of Independence.[205] Throughout the process, members of Congress called attention to the introduction of the Bill on the twenty-fifth anniversary of the Civil Rights Act of 1964, calling for legislation that would extend that law's antidiscrimination protections to people with disabilities.[206]

The ADA's status as a landmark civil rights statute compels a reading that protects the right to vote—the most basic of civil rights.[207] In establishing the now axiomatic precept of "one person, one vote" in 1964,

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[203] *See* 135 Cong. Rec. S4979-02, S4984 (1989) (statement of Tom Harkin, United States Senator, State of Iowa).

[204] Burgdorf, Analysis and Implications, *supra* note 60 at 413–14 (internal quotations omitted).

[205] President George H.W. Bush, Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990).

[206] *See* 135 Cong. Rec. S4979-02, S4984 (1989) (statement of Ted Kennedy, United States Senator, State of Massachusetts) ("This year we celebrate the 25th anniversary of the Civil Rights Act of 1964. That legislation helped bring about one of the greatest peaceful transformations in our history for millions of Americans who were victims of racial discrimination, and this legislation can do the same for millions of citizens who are disabled."); *id.* (statement of Paul Simon, United States Senator, State of Illinois) ("It is 25 years since we enacted the Civil Rights Act of 1964 . . . But as we celebrate that event, we are recognizing that we did not complete the job back in 1964 for all of the minorities who need equal access to opportunity in this Nation. The time has come to complete the guarantee of nondiscrimination for the more than 40 million Americans who must overcome not just a disabling condition, but the superstition, fear, and prejudice that accompanies it."); *id.* (statement of Lincoln Chafee, United States Senator, State of Rhode Island) ("The 1964 Civil Rights Act was a landmark act in this Nation's civil rights history. But for too long, it has been an unfinished landmark, because its provisions do not afford protection to the 36 million Americans who are disabled. The Americans With Disabilities Act would address this long-standing gap by extending the relevant protections of the 1964 Civil Rights Act to those with disabilities."); *see also id.* (statement of John McCain, United States Senator, State of Arizona) ("The Americans With Disabilities Act of 1989 will offer the disabled community an omnibus civil rights statute."); *id.* (statement of Joseph Lieberman, United States Senator, State of Connecticut) ("This legislation, a civil rights act for people with disabilities, states that in no aspect of our society may we unjustly discriminate against those with disabilities."); *id.* (statement of Donald Riegle, United States Senator, State of Michigan) ("This historic legislation will secure the civil rights of 43 million disabled Americans. For too long the disabled citizens of this country have not been afforded the rights guaranteed under the Civil Rights Act of 1964 or the Fair Housing Act of 1968."); *id.* (statement of Jim Jeffords, United States Senator, State of Vermont) ("The Americans With Disabilities Act builds on earlier antidiscrimination statutes such as the Civil Rights Act of 1964, the Fair Housing Amendment Act of 1988, and most notably, the Rehabilitation Act of 1973. To a large extent, the Americans With Disabilities Act simply enhances the application of these earlier laws . . . .").

[207] *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); *see also* Dr. Martin Luther King, Jr., Address at the Prayer Pilgrimage for Freedom: Give Us the Ballot (May 17, 1957) ("Give us the ballot, and we will no longer have to worry the federal government about our basic rights.").

the Supreme Court deemed voting a "fundamental matter in a free and democratic society" because of its role as a "preservative of other basic civil and political rights."[208] The next year, President Lyndon Johnson addressed Congress in his historic speech, "The American Promise."[209] In it, President Johnson lamented Congress's retraction of voting provisions from the Civil Rights Act of 1964, urging Congress to finish the job by passing the Voting Rights Act of 1965.[210] Speaking to a joint session of Congress just one week after Bloody Sunday, the President urged, "[m]any of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote."[211] Less than six months later, President Johnson signed the Voting Rights Act into law.[212] As it is rooted in the civil rights achievements of 1964 and 1965, the ADA must be understood as protecting the right to vote.

C. Consequences of Applying the ADA to Caucuses

The practical consequences of a statute's interpretation provide a check on permissible interpretations of its text.[213] This section examines whether the consequences of applying the ADA to caucuses suggest such an interpretation is inappropriate. The section first outlines the primary consequentialist arguments against applying Title III to caucuses. It then addresses those arguments, concluding that the consequences of interpreting caucuses as places of public accommodation are consistent with the statute's purpose.

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[208] Reynolds, 377 U.S. at 561–62.

[209] President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965).

[210] *Id.*

[211] *Id.*

[212] *See The Voting Rights Act of 1965, August 6, 1965*, NATIONAL ARCHIVES, https://www.archives.gov/legislative/features/voting-rights-1965/vra.html [https://perma.cc/7PUN-PYGU] (last visited May 9, 2020).

[213] Professor Irving Gornstein, Lecture in Civil Rights Statutes Course at Georgetown University Law Center (Mar. 30, 2020) (discussing consequentialism as a crucial method for divining Congressional intent); *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 180–81 (2005) ("[I]f retaliation were not prohibited, Title IX's enforcement scheme would unravel. . . We should not assume that Congress left such a gap in its scheme."). *But see* SCALIA & GARNER, *supra* note 102, at 352–54 ("The half-truth that consequences of a decision provide the key to sound interpretation."). One famous example of consequential interpretation goes as follows: A zoning law provides "no drinking saloon may exist within a mile of any schoolhouse." A court interprets the law as requiring schoolhouses to relocate. The consequences of this outcome relative to the statutory scheme illustrate the impropriety of the court's decision. *See* SCALIA & GARNER, *supra* note 102, at 63 (quoting DUDLEY CAMMETT LUNT, THE ROAD TO LAW 187 (1932)).

1. Consequentialist arguments against Title III coverage of caucuses

The primary consequentialist argument against interpreting "places of public accommodation" to include caucuses is that the requirement would force precinct closures.[214] Taken to its logical conclusion, the argument could be understood as suggesting that the financial burden of achieving ADA compliance across thousands of caucus sites would make Title III a de facto ban on the caucus system writ large. Surely the 101st Congress did not intend the ADA to end the centuries-old caucus system by implication.[215]

This argument is based on the expense and availability of providing accommodations in thousands of statewide caucus sites. Indeed in recent years, states, which are subject to Title II, have repeatedly closed polling places, citing the expense of achieving ADA compliance.[216] For example, in 2018, Randolph County, Georgia closed seven of its nine polling places just three months before the state's gubernatorial election based on estimates that achieving compliance would cost "tens of thousands of dollars."[217] This justification is commonplace. The Disability Rights Network reports that counties across Arkansas, Georgia, Kansas, Louisiana, Mississippi, Ohio, Pennsylvania, and Texas have cited Title II compliance costs in closing polling places since 2014.[218] Some counties estimated the closures will generate hundreds of thousands of dollars in savings.[219] If the Congress that ratified the ADA intended to promote voting accessibility, they could not have intended an application of the ADA that would close voting sites.

2. Consequentialist Arguments are Misplaced

Consequentialist arguments against extending Title III coverage to caucuses are misplaced for three reasons: the arguments overstate the cost of ADA compliance, Title III's language expressly mitigates feasibility concerns, and Congress believed the ADA's benefits outweighed its costs.

Overstated Costs. The costs of ADA compliance are overstated.

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[214] *See* NATIONAL DISABILITY RIGHTS NETWORK, BLOCKING THE BALLOT BOX: ENDING MISUSE OF THE ADA TO CLOSE POLLING PLACES 36–39, 41 (2020) (discussing poll closures attributed to the cost of Title II compliance).

[215] Thirteen of the fifty states held caucuses in the 1988 presidential election, the last presidential nomination contest prior to the ADA's passage. *See* KEVIN COLEMAN, CONG. RESEARCH SERV., 88–190 GOV, DELEGATE TOTALS AND DATES FOR PRESIDENTIAL PRIMARIES AND CAUCUSES, 1988 (1988).

[216] NATIONAL DISABILITY RIGHTS NETWORK, *supra* note 214, at 36.

[217] *Id.* at 37–39.

[218] *See id.* at 37–44.

[219] *See id.* at 39-41.

Jurisdictions like Randolph County provide no basis for their cost estimates,[220] possibly basing them on large-scale, permanent modifications rather than equally permissible low-cost, temporary solutions.[221] Other sources indicate that polling locations can achieve ADA compliance for around $750—far less than the unsubstantiated claims precincts like Randolph County assert.[222] In fact, Rhode Island—the nation's only state with 100% ADA-compliant polling places—achieved compliance for less than $400 per site.[223] Some other polling places have achieved ADA compliance with no cost at all, relying on donations and volunteer labor.[224] This data suggests that consequentialist arguments asserting Title III coverage would end the viability of caucuses are misguided.

Mitigating Language. Title III's language is tailored to mitigate feasibility concerns. The cost of implementation, particularly for small businesses, was a major objection to the ADA in Congress.[225] Congress considered and rejected proposals to exempt small businesses from ADA compliance, reasoning that small businesses are too critical to public life to exempt them from the ADA's antidiscrimination mandate.[226] Instead, Congress built safety valves into the ADA's language to ensure implementation would be feasible for organizations of all kinds.

First, the ADA requires public accommodations make "reasonable modifications" to accommodate "individuals with disabilities."[227] The reasonableness requirement ensures ADA requirements are tailored to a particular entity's ability to comply. Second, public accommodations must remove "architectural barriers" to accessibility only if doing so is "readily achievable."[228] A public accommodation's size and resources are considered as part of this determination.[229] Third, the requirement that public accommodations provide "auxiliary aids and services" when necessary to prevent discrimination is relieved if doing so would pose an

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[220] *See id.* at 39. Furthermore, some reports indicate that Randolph County's explanation of its closures as resulting from ADA compliance costs are a pretext for race-based voter suppression in a contentious gubernatorial election.

[221] Indeed, DOJ publishes recommendations for achieving temporary election day compliance at little to no cost. *See generally Solutions for Five Common ADA Access Problems at Polling Places*, U.S. DEP'T. OF JUSTICE, https://www.ada.gov/ada_voting/voting_solutions_ta/polling_place_solutions.htm [https://perma.cc/4577-LQCU] (last visited May 9, 2020) (providing low-cost temporary solutions for polling place accessibility).

[222] Symposium, *The End of the Beginning for Election Reform*, 9 GEO. J. ON POVERTY L. & POL'Y 285, 339 (2002).

[223] *See Election Reform: Hearings Before the Committee on Rules and Administration, U.S. Senate*, 107th Cong. 217 (2001) (statement of James C. Dickson, Vice President, Am. Ass'n for People with Disabilities).

[224] NATIONAL DISABILITY RIGHTS NETWORK, *supra* note 214, at 63.

[225] *See* Burgdorf, Equal Members, *supra* note 139, at 577.

[226] *Id.*

[227] 42 U.S.C. § 12182(b)(2)(A)(ii).

[228] *Id.* § 12182(b)(2)(A)(iv).

[229] *Id.* § 12181(9).

"undue burden."[230] So a caucus in an area where sign language translators are available would likely be required to provide them; a caucus held where no translator is available might not be.[231] In light of Title III's mitigation of feasibility concerns, consequentialist objections carry even less weight.

Cost-Benefit Tradeoff. Congress believed the ADA's benefits outweighed its costs. Congress recognized the ADA would impose costs on public accommodations—but pressed on with the belief that a price tag cannot be put on civil rights.[232] What's more, in considering the ADA Congress assessed not only the financial costs of implementing its measures but also the opportunity costs of failing to do so.[233] In promoting the bill, both Congress and the Bush Administration emphasized the untold economic harms of isolating people with disabilities from society—and the substantial economic benefits the country would reap from inclusion.[234] The ADA memorialized this value judgment in its findings section, stating that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[235] Thus, Congress designed the ADA to impose costs on caucuses and other public accommodations—and deemed it well worth the price.

D. Additional Counterarguments

Three remaining counterarguments to caucuses as places of public accommodation are worth addressing: two statutory and one constitutional. From a statutory standpoint, in addition to conforming with one of the categories in Title III's definitional list, a public accommodation must in fact be open to the "public"[236] and "affect commerce."[237] From a constitutional perspective, regulating political parties may implicate the First Amendment freedom of association. The statutory objections do not pose serious concerns; this part begins by briefly addressing why. The constitutional question raises a more complicated issue; the part's second section addresses it in detail. The part concludes that, though legitimate

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[230] *Id.* § 12182(b)(2)(A)(iii).

[231] *See* Burgdorf, Equal Members, *supra* note 139, at 578; *see also* 28 C.F.R. § 36.303(b)(1) (1991) ("auxiliary aids" includes "qualified interpreters").

[232] *See* 135 Cong. Rec. 8507 (1989) (statement of Sen. Harkin).

[233] Hearings on S. 933, *supra* note 139 (statement of Dick Thornburgh, Att'y Gen. of the United States).

[234] *See* 135 Cong. Rec. 8508 (1989) (statement of Sen. Harkin); *see also* Burgdorf, Analysis and Implications, *supra* note 60 at 437 (stating the economic cost of prejudice on the basis of disability).

[235] 42 U.S.C. § 12101(a)(8).

[236] Jankey v. Twentieth Century Fox Film Corp., 212 F.3d 1159, 1161 (9th Cir. 2000).

[237] 42 U.S.C. § 12181(7).

considerations, neither the statutory nor constitutional objections ultimately preclude caucuses as places of public accommodation.

1. Statutory objections do not preclude applying the ADA to caucuses

Open to the Public. Places of public accommodation must in fact be open to the public.[238] But "open to the public" is construed broadly. Private membership swim clubs,[239] sports team fan clubs,[240] and fraternal organizations[241] are all considered open to the public despite their various membership requirements. Indeed, the Supreme Court in *Martin* determined that the PGA Tour—competing in which requires a $3,000 fee, two letters of recommendation, and placing in the top 4% of the qualifying tournament[242]—is open to the public.[243] Iowa's caucuses are much less restrictive. Though party caucuses are only open to voters registered with that party, any eligible voter may register upon arrival at the caucus site.[244] The public, therefore, has more access to a caucus than it does *seats* at the PGA Tour—not to mention *playing* in it.[245] Caucuses, therefore, satisfy the open-to-the-public requirement *a fortiori*.

Affecting Commerce. Places of public accommodation must also "affect commerce."[246] The use of this term in the ADA has an "extremely broad application" because it applies to "the full scope of coverage of the Commerce Clause of the Constitution."[247] Under the Commerce Clause, Congress may regulate any activity that "substantially relate[s] to" or "substantially affect[s] interstate commerce."[248] This includes activities that are not themselves commercial.[249] And it even encompasses

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[238] *See* Jankey, 212 F.3d at 1161.

[239] Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 438–39 (1973) (holding that the same analysis applies for determining whether a private entity is open to the public under the Civil Rights Act of 1964 and the ADA); *see* 28 C.F.R. § 36.104 (1991) (noting that a private club means a private club or establishment exempt from coverage under Title II of the Civil Rights Act of 1964).

[240] *See* 28 C.F.R. § 35 Appendix A (2010) (stating that the facilities of private clubs that are made available to customers of a place of public accommodation are included in the ADA).

[241] United States v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137, 472 F. Supp. 1174, 1176–77 (E.D. Wis. 1979).

[242] PGA Tour, Inc. v. Martin, 532 U.S. 661, 664–66 (2001).

[243] *Id.* at 679–80.

[244] IOWA DEMOCRATIC PARTY, IOWA DELEGATE SELECTION PLAN FOR THE 2020 DEMOCRATIC NATIONAL CONVENTION 1 (2020).

[245] Kiernan Clark, *The Biggest Crowds in Golf History*, GOLFSHAKE (Jan. 28, 2020), https://www.golfshake.com/news/view/14699/The_Biggest_Crowds_in_Golf_History.html [https://perma.cc/JNP4-H5J4].

[246] 42 U.S.C. § 12181(7).

[247] *See* U.S. DEP'T. OF JUSTICE, GUIDANCE ON ADA REGULATION ON NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES § 36.104 (1991).

[248] United States v. Lopez, 514 U.S. 549, 558–59 (1995).

[249] Gonzales v. Raich, 545 U.S. 1, 22 (2005); *see also id.* at 36 (Scalia, J., concurring) ("As we

noneconomic activities that do not substantially affect commerce when they are a necessary part of a broader scheme that does.[250] Caucuses are noncommercial in nature, but it is hard to imagine an activity with a greater effect on commerce than voting. Moreover, Congress viewed voting as an indispensable component of the ADA's plan to integrate individuals with disabilities into society—an indisputably commercial end.[251] Caucuses, therefore, fall comfortably within Congress's "extremely broad" ability to regulate commerce.

2. *Constitutional objections do not preclude applying the ADA to caucuses*

Any voting regulation must be considered in light of the First Amendment freedom of association. Two distinct branches of First Amendment law are worth discussing: (a) the application of generally applicable laws to political parties and (b) state laws expressly regulating the electoral process.

a. *Infringement of generally applicable laws on freedom of association.*

The Supreme Court has not addressed the constitutionality of generally applicable laws that affect the rights of political parties. But it has confronted the more general conflict between laws of general applicability and the rights of organizations engaging in "expressive association."[252] Under this line of cases, courts engage in a three-step inquiry to determine if a generally applicable law violates a group's First Amendment rights.

The three-part test begins with two threshold considerations that, if met, trigger "close scrutiny"[253] in step three. First, to implicate the First Amendment, the group must engage in expressive association.[254] Second,

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implicitly acknowledged in Lopez, however, Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.").

[250] Gonzales, 545 U.S. at 22 (2005); *id.* at 37 (Scalia, J., concurring).

[251] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 12101(a), 104 Stat. 327.

[252] Christian Legal Soc. Chapter of the Univ. of Ca v. Martinez, 561 U.S. 661, 680 (2010); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

[253] Martinez, 561 U.S. at 680 ("[T]his Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve 'compelling state interests' that are 'unrelated to the suppression of ideas'—interests that cannot be advanced 'through . . . significantly less restrictive [means].'").

[254] Dale, 530 U.S. at 648.

the law must "significantly affect" the organization's "ability to advocate public or private viewpoints."[255] Finally, to pass constitutional muster in cases where these conditions are met, the law must serve "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[256]

Two cases help illustrate the analysis. In *Roberts v. United States Jaycees*, the Court required an all-male civic organization to admit women in accordance with state public accommodation laws.[257] At step one, the Court determined the Jaycees engage in expressive association, citing the group's public advocacy of fiscal and social policies.[258] At step two, the Court held that by dictating the group's internal structure, the law significantly affected the Jaycees' ability to advocate its viewpoints.[259] At step three, however, the Court concluded the law survived close scrutiny.[260] In doing so, the Court deemed eliminating discrimination a state interest "of the highest order"; determined the restriction was unrelated to the group's viewpoint; and concluded the law was the "State's. . . least restrictive means of achieving its ends."[261] In so holding, the Court acknowledged the law may result in "some incidental abridgment" of the Jaycees' protected speech, but found this effect "necessary to accomplish the state's legitimate purposes."[262] The Court therefore held the state public accommodation law did not violate the First Amendment as applied to the Jaycees.[263]

By contrast, the Court held a state public accommodation law was unconstitutional as applied to the Boy Scouts in *Boy Scouts of America v. Dale*.[264] The *Dale* Court confronted a case in which the Boy Scouts revoked the membership of an assistant scoutmaster because he identified as gay.[265] The Court proceeded through the three-part test set forth in *Roberts*. First, the Court determined the Boy Scouts "engages in expressive activity" because it promotes a specific "system of values."[266] Second, the presence of a gay scoutmaster significantly affected this expression because it directly contravened the Boy Scouts' value system, which expressly provides that "homosexual conduct [is not] a legitimate form of behavior."[267] Third, the Court applied close scrutiny, this time

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[255] *Id.* at 650.

[256] *Id.* at 648 (2000) (quoting Roberts, 468 U.S. at 618).

[257] Roberts, 468 U.S. at 612.

[258] *Id.* at 622, 626–27 (citing United States Jaycees v. McClure, 709 F.2d 1560, 1569–70 (8th Cir. 1983) (summarizing the group's position on balancing the budget, permitting prayer in public schools, and expanding economic development in Alaska)).

[259] Roberts, 468 U.S. at 623.

[260] *Id.* at 624.

[261] *Id.* at 623–24.

[262] *Id.* at 628–29.

[263] *Id.*

[264] Dale, 530 U.S. at 656.

[265] *Id.* at 644-45.

[266] *Id.* at 649–50.

[267] *Id.* at 654 (internal quotation marks omitted).

holding the public accommodation law did violate associational rights.[268] Distinguishing *Roberts*—where the law was unrelated to the Jaycees' viewpoint—the *Dale* Court identified a direct conflict between the Boy Scouts's expressed viewpoint and the law's required activity.[269] The State's public accommodation law, therefore, could not survive close scrutiny and violated the First Amendment as applied to the Boy Scouts.[270]

Applying this analysis to the Iowa caucuses, Title III withstands First Amendment scrutiny. Beginning with step one, caucuses are the quintessential expressive association, engaging in political advocacy at the highest level. Step two presents a closer question. The practical and financial obstacles to accessibility requirements may pose an incidental burden on expressive association.[271] But accessibility requirements do not directly implicate expressive content itself like the membership requirements in *Roberts* and *Dale*. Furthermore, as discussed in Part III.C, the cost of ADA compliance is both overstated by regulated entities and mitigated by Title III's language.[272] For these reasons, a political party's First Amendment challenge to the ADA would likely fail at step two; if it did not, it would fail at step three.

Step three analysis of Title III's application to political caucuses produces the same result as *Roberts*. To begin with, public accommodation laws serve a government interest "of the highest order."[273] Furthermore, prohibiting discrimination on the basis of disability is aligned with—not in tension with—the viewpoints of both major political parties.[274] Finally, the scope of public accommodation laws is "necessary to accomplish the state's legitimate purposes."[275] Because requiring a political party to accommodate individuals with disabilities does not compel activity inconsistent with the party's viewpoints, it does not violate the party's right to expressive association.

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[268] *Id.* at 656.

[269] *Id.* at 656–59.

[270] *Id.* at 659.

[271] *See* Part III.C, *supra.*

[272] *See* Part III.C, *supra.*

[273] Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

[274] *See Americans with Disabilities*, DEMOCRATIC NATIONAL PARTY (May 9, 2020), https://democrats.org/who-we-are/who-we-serve/americans-with-disabilities [https://perma.cc/7EPZ-EAA5]; COMM. ON ARRANGEMENTS FOR THE 2016 REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016 9 (2020).

[275] Roberts, 468 U.S. at 628–29.

b. State restrictions on the electoral process.

The second line of cases addresses laws expressly regulating the electoral process. Under these cases, the validity of an election restriction generally turns on the level of scrutiny a reviewing court applies.[276] And the Court's standard of review varies: where a law imposes "severe burdens" on associational rights, the Court applies strict scrutiny; where a law imposes a lesser burden, the Court applies a "less exacting" standard of review.[277] In effect, then, laws regulating election restrictions will be valid unless they impose a "severe burden" on freedom of association.[278] Though this test proffers no "bright line"[279] separating "valid from invalid restrictions,"[280] it does balance the necessary role of the state in ensuring orderly elections against the state qua regulator's inevitable interference with associational rights.[281]

The cases invalidating election laws as severe burdens on associational rights fall into two main categories. First, restrictions on party governance impose a severe burden on associational rights. Second, unreasonable restrictions on ballot access impose a severe burden on associational rights. Cases in either category are therefore subject to strict scrutiny and are presumptively invalid.

Party Governance Cases. The Supreme Court has rejected several states' attempts to dictate party governance. In *Democratic Party of the United States v. Wisconsin el rel. La Follette*, the Court invalidated a Wisconsin law requiring delegates to the Democratic National Convention to support the winner of the state's Democratic primary, contravening Democratic Party rules.[282] Likewise, in *Tashjian v. Republican Party of Connecticut*, the Court struck down Connecticut's requirement that parties hold closed primaries.[283] And again in *Eu v. San Francisco County Democratic Central Committee*, the Court held a California law restricting the organization and composition of party leadership violated the political

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[276] *Compare* Clingman v. Beaver, 544 U.S. 581, 593 (2005) (state law requiring semi-closed primary withstood minimal scrutiny) *with* Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217, 225 (1986) (state law requiring closed primary failed strict scrutiny).

[277] Clingman, 544 U.S. at 602 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)); *see also id.* at 592 ("[A]s our cases since *Tashjian* have clarified, strict scrutiny is appropriate only if the burden is severe.").

[278] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 351 (1997) ("Lesser burdens. . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.").

[279] *Id.* at 359.

[280] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

[281] *See* Clingman, 544 U.S. at 593. Indeed, the Court has repeatedly emphasized that given the fact-bound nature of these cases there is "no substitute for the hard judgments that must be made." *See, e.g.*, Timmons, 520 U.S. at 359 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)); Tashjian, 479 U.S. at 224 n.13 (same); Celebrezze, 460 U.S. at 789–90 (same).

[282] Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 109–12 (1981).

[283] Tashjian, 479 U.S. at 225.

party's First Amendment rights.[284] In each case, the Court emphasized that political parties have a constitutional right to exercise discretion in pursuing their political goals.

The rationale underlying party-governance cases finds an analog in First Amendment forum jurisprudence. Forum doctrine goes like this: A state may regulate the "time, place, and manner" of private speech occurring in a "traditional" or "designated" public forum (like a city street or public park), but may not regulate the content or views of speech expressed in such a forum.[285] By contrast, in a "nonpublic forum" (like a public university) a state may regulate not only the time, place, and manner of speech, but may also impose any other "reasonable" restriction so long as it is not designed to suppress a certain point of view.[286] Party-governance cases, then, are analogous to "traditional" public forums. A state may not dictate party governance that affects the content or views of a party's expression. So a state may not control how delegates vote at the Democratic National Convention. But this is not to say parties are immune from time, place, and manner restrictions—a state may enforce its fire code on the building where the Convention takes place.

Applying the ADA to political caucuses does not affect a party's ability to express its views. It is merely a time, place, and manner restriction. The restrictions in *Wisconsin el rel. La Follette*, *Tashjian*, and *Eu* curtailed the parties' discretion in nominating candidates. The ADA imposes no such burden on parties' substantive decision-making processes. Instead, like a fire code, the extent of the ADA's effects is limited to when caucuses occur, where caucuses are held, and the procedures used on caucus night. The ADA's time, place, and manner restrictions therefore do not impose a severe burden on associational rights.

Ballot-Access Cases. The second category of severe burden involves ballot-access cases. These cases teach that unreasonable barriers to the ballot violate the First Amendment. For example, in *Bullock v. Carter* the Supreme Court invalidated a Texas filing fee that charged candidates up to $8,900[287] to participate in the state's primary elections because it effectively conditioned running for office on the ability to pay.[288] Similarly, in *Anderson v. Celebrezze* the Court held Ohio's early filing deadline for independent presidential candidates violated the First Amendment because it precluded "late-emerging" candidates from

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[284] Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 229–33 (1989).

[285] Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018).

[286] *Id.*

[287] According to the Bureau of Labor Statistics, $8,900 in 1972, the year *Bullock* was decided, is equivalent to $55,000 today. *See CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS (May 9, 2020) https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=8%2C900&year1=197201&year2=202003 [https://perma.cc/8YGK-RGR].

[288] Bullock v. Carter, 405 U.S. 134, 149 (1972). The Court did, however, emphasize that reasonable filing fees would be permissible. *See id.* ("It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts.").

participating.[289]

Lower courts toe the line. In *Republican Party of Arkansas v. Faulkner County*, the Eighth Circuit invalidated an Arkansas law mandating that political parties hold and fund primary elections for any contested seats before nominating a candidate in the general election.[290] In reaching its conclusion, the court was particularly concerned with the dearth of poll locations in Republican Party primaries due to the Party's funding capacity.[291] And in *Libertarian Party of South Dakota v. Krebs*, the district court sustained a challenge to South Dakota's condition that new political parties obtain signatures from 2.5 percent of the state by March to place candidates on the general election ballot.[292] The law imposed a severe burden due to the expense of gathering the requisite signatures, and the difficulty of doing so during South Dakota's winter months.[293] The state failed to offer compelling support for either requirement.[294]

The ADA implicates the ballot-access cases in the sense that it conditions a party's ballot access on ADA compliance. As discussed in Part III.C, opponents will likely invoke the burden of ADA compliance, forecasting a cascade of cost-related poll closures. But as Part III.C responds, these costs are overstated. Moreover, the ADA cannot, by its own terms, impose unreasonable barriers to ballot access.[295] Title III is expressly cabined to requiring "reasonable modifications,"[296] "readily achievable" architectural alterations,[297] and auxiliary services that do not create an "undue burden."[298] Title III is therefore statutorily precluded from imposing the kind of unreasonable barrier the ballot access cases proscribe.

All told, First Amendment objections to the ADA are unlikely to prevail. Principally, the application of the ADA to caucuses is unlikely to trigger strict scrutiny. First, the ADA is a law of general applicability that does not implicate the expressive content of political parties. Second, even as a de facto restriction on electoral processes, the ADA does not regulate party governance in a way that affects party views and does not present an unreasonable barrier to ballot access. Even if the ADA did trigger strict scrutiny, it would likely survive. The ADA serves a government interest "of the highest order" in a manner "necessary to accomplish the state's legitimate purposes."[299] With this obstacle overcome, the path is clear for

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[289] Anderson v. Celebrezze, 460 U.S. 780, 792 (1983).

[290] Republican Party of Ark. v. Faulkner Cty., 49 F.3d 1289, 1301 (8th Cir. 1995).

[291] *See id.* at 1297–98.

[292] Libertarian Party of S. Dakota v. Krebs, 290 F. Supp. 3d 902, 914 (D.S.D. 2018).

[293] *Id.* at 910.

[294] *Id.*

[295] *See supra* Part III.C.

[296] 42 U.S.C. § 12182(b)(2)(A)(ii).

[297] *Id.* § 12182(b)(2)(A)(iv).

[298] *Id.* § 12182(b)(2)(A)(iii).

[299] *See* Roberts v. United States Jaycees, 468 U.S. 609, 623–24 (1984).

concluding the Iowa caucuses are public accommodations.

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Part III applies the activity-based theory, developed in Part II, to the Iowa caucuses. It discusses text, legislative history, and consequences in determining caucuses are "places of public gathering." The part then discusses counterarguments and finds them unavailing. Part III therefore concludes that the Iowa caucuses are places of public accommodation under Title III of the ADA.

IV. CONCLUSION

Jim Omvig was excluded from the 2020 Iowa caucuses because of his disability. According to both the Democratic and Republican National Parties, he had no legal recourse for this discrimination.[300] This note examines the validity of that position and concludes it is incorrect.

The note rejects the Parties' claim over the course of three principal parts. Part I introduces both the Iowa caucuses and the ADA. Part II discusses two theories for interpreting Title III's definition of places of public accommodation, concluding the activity-based theory is the proper framework for analyzing Title III claims. Part III applies this theory to the Iowa caucuses, determining the ADA covers caucuses as "places of public gathering." In sum, this note argues that Jim Omvig, and voters like him, can no longer be discriminated against in the Iowa caucuses.

As covered public accommodations, caucuses must meet three basic requirements. They must make "reasonable modifications" to "accommodate[e] individuals with disabilities"; remove "architectural" and "communication barriers" where "readily achievable"; and provide auxiliary aids unless doing so presents an "undue burden."[301] It is outside the scope of this note to determine exactly which accommodations are "reasonable," "readily achievable," or present an "undue burden." But the note can suggest some ideas for what it might include.

ADA protection might require caucuses to provide guaranteed seating for voters like Laura Smith caucusing with multiple sclerosis.[302] It might mean offering expedited entry to voters like Anna Phelps caucusing with respiratory disorders.[303] It could mandate wheelchair accessible ramps for voters like Emmanuel Smith.[304] And, perhaps, it would give Jim Omvig, and the 700,000 other Iowans with disabilities,[305] the assurance that they will never have to miss a caucus again.

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[300] Interview with Jane Hudson & Annie Matte, *supra* note 17.

[301] 42 U.S.C. § 12182(b)(2)(a).

[302] Astor, *supra* note 53.

[303] *Id.*

[304] *Id.*

[305] *Disability & Health U.S. State Profile Data for Iowa*, *supra* note 14.

The disability community has long rallied around the mantra, "Nothing about us without us."[306] Under the ADA, this means "No voting about us without us" either.

[306] Abrams, *supra* note 53.