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Denny v. Elizabeth Arden Salons, Inc.: Condoning Race Discrimination in Resembling Places of Public Accommodation under Title II

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DENNY V. ELIZABETH ARDEN SALONS, INC.: CONDONING RACE DISCRIMINATION IN RESEMBLING PLACES OF PUBLIC ACCOMMODATION UNDER TITLE II

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In *Denny v. Elizabeth Arden Salons, Inc.*,[1] the Court of Appeals for the Fourth Circuit considered whether a beauty salon is a "place of public accommodation," specifically a "place of entertainment," under Title II of the Civil Rights Act of 1964 [hereinafter "the 1964 Act"].[2] The Fourth Circuit held that Title II does not consider a beauty salon as a "place of entertainment" within the statute's meaning.[3] In its holding, the court made three errors. First, the court misunderstood its role under the separation of powers doctrine.[4] Second, the court strayed from controlling precedent.[5] Lastly, the court's decision undermined the original motivating purpose behind the enactment of Title II.[6] As a result, the Fourth Circuit articulated a new, unsupported rule that will simultaneously allow for future arbitrary decisions in lower federal courts within the Circuit and possibly beyond, and continue to perpetuate the legacy of race discrimination in our society. To prevent such an outcome, the United States Supreme Court should grant certiorari and reverse the Fourth Circuit's decision.

I. THE CASE

On May 26, 2002, plaintiff Seandria Denny, an African-American woman, purchased a spa package for her mother, Jean Denny, at the Red Door Salon and Spa, located in a shopping center in Tysons Corner, Virginia.[7] The Red Door Salon and Spa is an upscale beauty salon and day spa with locations in Virginia and other states,

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1. Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006).
2. 42 U.S.C. § 2000a (2006); *see also Denny*, 456 F.3d at 431.
3. *See infra* Part III; *Denny*, 456 F.3d at 434; 42 U.S.C. § 2000a(b)(3) (2006) ("Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action . . . any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment . . . .").
4. *See infra* Part IV.A.
5. *See infra* Part IV.B.
6. *See infra* Part IV.C.
7. *Denny*, 456 F.3d at 429–30.

which offers a wide array of beauty services including hair, skin, and nail care, makeup artistry, massages, and facials.[8]

Four days after Seandria Denny's purchase, Jean Denny arrived at the salon to redeem her gift package, which included a massage, facial, manicure, hair styling, and lunch.[9] While Jean Denny enjoyed her gift package, Seandria Denny called the Red Door Salon and Spa and requested that a hair coloring service be added to her mother's spa package.[10] The salon receptionist approved the request and added the hair coloring service to Jean Denny's spa treatments for the day.[11]

Later that day, Seandria Denny stopped by the salon to check on her mother and to pay for the additional hair coloring service.[12] Upon her arrival, however, Seandria Denny learned that the salon had not performed the hair coloring service on her mother because the salon did not "do black people's hair."[13] According to Seandria Denny, when she requested that one of the salon's many stylists do her mother's hair, each stylist had refused.[14]

On May 20, 2004, plaintiffs Seandria and Jean Denny brought suit against Elizabeth Arden Salons, Inc. in the United States District Court for the Eastern District of Virginia, alleging two incidents of discrimination under Title II of the Civil Rights Act of 1964 and § 1981.[15] In bringing their Title II claim, the plaintiffs argued that the salon qualified as a "place of entertainment" under § 2000a(b)(3) of Title II.[16] The district court granted the defendant's motion for summary judgment on all claims, including the Title II claim.[17] Specifically, the court held that the "place of entertainment" language of Title II did not apply to salons.[18] Plaintiffs appealed to the Court of Appeals for the Fourth Circuit to determine whether a beauty salon is a

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8. *Id.* at 429.

9. *Id.* at 430.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* In response to this comment, Seandria Denny explained to the receptionist that her mother's hair was straight and similar to Caucasian hair, but the receptionist insisted that the salon did not do African-American hair. *Id.*

14. *Id.* Salon manager Chelsey Orth, however, had a different recollection of the incident. *Id.* She contended that, "[s]ince the hair coloring would have added an hour to Jean Denny's visit, Orth was unable to include it on such short notice." *Id.*

15. *Id.* at 431. Plaintiffs also filed a state law claim of intentional infliction of emotional distress. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

"place of entertainment" and, thus, a "place of public accommodation" entitled to Title II protection.[19]

II. LEGAL BACKGROUND

The history of the 1964 Act reveals that legislative politics, strategic behavior, and compromise were factors that allowed the 1964 Act to become law and overcome the Jim Crow laws that mandated *de jure* segregation throughout the South.[20] Relying on this context and legislative history, federal courts took different approaches in interpreting the breadth of Title II in the years that followed its passage.[21]

A. Title II of the Civil Rights Act of 1964

Title II of the Civil Rights Act of 1964 provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[22] The public accommodations provision in Title II of the 1964 Act developed from the antiquated 1875 Civil Rights Act, which was invalidated in the *Civil Rights Cases* of 1883 when the Supreme Court found that Congress had no power to prohibit private discrimination in places of public accommodation.[23] This "places of public accommodation" language was later incorporated into the 1964 Act.[24] To avoid the fate of the 1875 Civil Rights Act, the drafters of the 1964 Act linked Title II to the Commerce Clause, thus barring private business owners from discriminating based on the premise that discrimination impairs travel and thus affects interstate commerce.[25]

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19. *Id.*

20. *See* discussion *infra* Part II.B; *see also* Daniel B. Rodriquez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1537 (2003).

21. *See* discussion *infra* Part II.C–D.

22. 42 U.S.C § 2000a(a) (2006).

23. Civil Rights Cases, 109 U.S. 3, 11 (1883) (finding that the Constitution does not grant Congress the authority to prohibit private discrimination in public accommodations).

24. *See id.* at 9.

25. Daniel v. Paul, 395 U.S. 298, 301 (1969); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (affirming the reasoning of Congress in connecting discrimination and interstate commerce); *Public Accommodations on Trial*, TIME, Oct. 16, 1964, *available at* http://www.time.com/time/magazine/article/0,9171,876252-1,00.html; *see* 42 U.S.C. § 2000a(b) (2006). *See generally infra* notes 46–48 and accompanying text.

Title II includes hotels, restaurants, places of entertainment, and other entities located within these covered establishments in the definition of "places of public accommodation."[26] For Title II to apply, these listed accommodations must affect interstate commerce or, alternatively, must engage in state-supported activities of discrimination or segregation.[27] In enacting this statute, Congress sought to guarantee individuals "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . ."[28] In particular, the drafters included the "places of public accommodation" provision to extinguish the blatant and offensive racial barriers that existed at the time, evident in the clearly segregated facilities that either excluded African-Americans from participating in certain activities altogether, or provided a sub-standard version of the facility for African-Americans to use.[29]

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26. 42 U.S.C. § 2000a(b) (2006) states that:

> Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
> (1) any inn, hotel, motel or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment and (B) which holds itself out as serving patrons of such covered establishment.

Id.; Michael F. Roessler, *We are not Amused: The Narrow Interpretation of Title II's Place-of-Entertainment Provision in* Denny v. Elizabeth Arden Salons, Inc., 85 N.C. L. REV 1259, 1262 (2007).

27. 42 U.S.C. § 2000a(b) (2006).

28. *Id.*

29. David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 9, 11–13 (Bernard Grofman ed., 2000); *see also* Randall Kennedy, *The Struggle for Racial Equality in Public Accommodations*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 156 (Bernard Grofman ed., 2000).

B. Enacting the Legislation

In response to the persistent racial agony that permeated the nation's social and legal structures, Congress enacted the Civil Rights Act of 1964.[30] Prior to the 1964 Act, Congress passed three Civil Rights Acts during the Reconstruction period of 1865–1877 and two others in 1957 and 1960.[31] Although some important strides were made in preserving the civil rights of African-Americans, most of those Civil Rights Acts did little to eradicate the discrimination that African-Americans experienced on a daily basis.[32]

The turning point in the fight for African-Americans' civil rights was the 1963 March on Birmingham to protest segregation in public accommodations throughout the South.[33] The peaceful protesters encountered much violence from the local law enforcement, and media coverage of this historic event brought the reality of the South's racial caste system to the forefront of the American psyche.[34] Seeing the impact of this media attention, the Southern Christian Leadership Conference and allied interest groups, all of whom preferred a non-violent approach to the fight for civil rights, began an intense lobbying campaign for federal legislation that addressed the problem of segregation.[35] Civil rights groups feared that without legislative action, demonstrations would continue to spread throughout the South and into the North, perpetuating widespread disruption and racial violence.[36]

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30. Kennedy, *supra* note 29, at 158.

31. Llewellyn E. Thompson, *The Civil Rights Act of 1964: Present at Its Birth*, 29 U.S.F. L. REV. 681, 682–84 (1995). The Civil Rights Act of 1866 aimed to "guarantee former slaves equal rights under the law, including the right to make and enforce contracts and certain other property rights." *Id.* at 682–83. The Civil Rights Act of 1871 sought to protect southern African-Americans from the Ku Klux Klan and its sympathizers by providing both a state and a federal civil remedy for abuses being committed. *Id.* at 683. The Civil Rights Act of 1875 prohibited racial discrimination in certain public places. *Id.* The Civil Rights Act of 1957 established a civil rights commission to protect individuals' rights to equal protection and allowed courts to grant injunctions in support of those rights. *Id.* at 684. The Civil Rights Act of 1960 established federal inspection of local voter registration. *See id.*

32. *See id.* at 682–84.

33. Filvaroff & Wolfinger, *supra* note 29, at 11.

34. *Id.* at 11–12. Birmingham made two important impacts: (1) the graphic images of peaceful black demonstrators being brutally beaten heightened the public demand for civil rights legislation; and (2) the presidential administration began to recognize that inaction would be detrimental to the nation and also damaging to the 1964 election. *Id.* at 13; *see also* David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 671 (1995).

35. *See* Filvaroff & Wolfinger, *supra* note 29, at 12.

36. *Id.* at 13.

Both the administrations of John F. Kennedy and Lyndon B. Johnson pioneered the Civil Rights Act of 1964.[37] President Kennedy began the process of gaining support for the legislation in a nationally televised address on June 11, 1963.[38] Kennedy urged Americans to take action to guarantee equality in society.[39] He then submitted a civil rights legislation proposal to Congress, and included language intended to remedy the permeating segregation problems in places of public accommodation including restaurants, lunch counters, hotels, and theaters.[40] The bill specifically aimed to remedy the widespread discrimination against African-Americans in the South.[41] On July 2, 1964, one year after Kennedy's submission to Congress, President Johnson signed this bill as the Civil Rights Act of 1964.[42] In a nationally televised address, Johnson declared:

> We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy those rights . . . . We can understand—without rancor or hatred—how all this happened. But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.[43]

> The trumping argument was that without action to create new legal remedies, demonstrations would continue to spread throughout the South and into the North; the country would be torn by widespread civil disruption if not outright racial violence. The president and his party would be blamed. Such a climate would be as disastrous as an economic depression for Kennedy's prospects for re-election. In order to avoid widespread violence, the president had to make a serious attempt to deal with the demonstrators' grievances.

Id.

37. Kennedy, *supra* note 29, at 159.

38. See President John F. Kennedy, *Television Address on Civil Rights, June 11, 1963, in* CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE 490 (Jonathan Birnbaum & Clarence Taylor eds., 2000).

39. *Id.* at 490–91.

40. *See* Filvaroff & Wolfinger, *supra* note 29, at 12–13.

41. *Id.* at 29.

42. *Id.* at 26; *see also* Oppenheimer, *supra* note 34, at 645; Robert Pear, *Civil Rights Act is Assessed as 'Modest' Step*, N.Y. TIMES, July 1, 1984, at A15.

43. President Lyndon B. Johnson, *Radio and Television Remarks Upon Signing the Civil Rights Bill*, July 2, 1964, http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640702.asp.

This Civil Rights Act was a monumental achievement and legislative landmark in the Civil Rights Movement.[44] It vindicated the deprivation of personal dignity, promoted equal access in public establishments, and improved the quality of life for many African-Americans and other minority groups throughout the United States.[45]

C. Establishing the Constitutionality and Purpose of Title II in Heart of Atlanta Motel

In *Heart of Atlanta Motel v. United States*, the United States Supreme Court established Title II as a constitutionally valid means of desegregating places of public accommodation.[46] The Court explained that the constitutional support for Title II came from the Commerce Clause of the United States Constitution, which empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[47] In essence, Title II forbids racial discrimination in places of public accommodation if its operations affect interstate commerce.[48]

In *Heart of Atlanta Motel*, a motel was charged with violating Title II for its refusal to serve African-American customers.[49] The motel operator challenged the constitutionality of the Act, alleging that Congress exceeded its Commerce Clause powers by depriving motels of the right to choose their customers.[50] The Supreme Court disagreed.[51] Writing for the majority, Justice Clark explained that "the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years."[52] Justice Clark specified that Title II is limited to places having "a direct and substantial relation to the interstate flow of goods and people" and, therefore, such places have no right to select guests as they choose because it would negatively affect interstate commerce.[53] *Heart of Atlanta Motel* was a pivotal case

44. *See* Oppenheimer, *supra* note 34, at 645.

45. *See* Sandra J. Colhour, Note, *Title II of the Civil Rights Act of 1964 and Membership Organizations Unconnected to a Physical Facility*, 59 MO. L. REV. 807, 816 (1994).

46. Heart of Atlanta Motel v. United States, 379 U.S. 241, 257, 261 (1964).

47. Kennedy, *supra* note 29, at 159; *see also* U.S. CONST. art. I, § 8, cl. 3.

48. 42 U.S.C. § 2000a(c) (2006).

49. *See Heart of Atlanta Motel*, 379 U.S. at 243.

50. *Id.* at 243–44.

51. *Id.* at 258–62.

52. *Id.* at 261.

53. *Id.* at 250–51.

that both explained the reasoning behind Title II and also proclaimed the intolerability of racial discrimination that disrupted interstate commerce.[54]

D. Interpreting a "Place of Public Accommodation"

Cases arising after *Heart of Atlanta Motel* dealt primarily with determining the applicability of Title II to certain types of places rather than its constitutionality. The most famous case to address the applicability issue was *Daniel v. Paul*,[55] in which the United States Supreme Court established the precedent for broadly applying Title II to various places of public accommodation.[56] Shortly after the *Daniel* decision, the Fourth Circuit was more receptive to following precedent than in later years.[57] However, unlike the Fourth Circuit, the Fifth Circuit has consistently interpreted Title II to include establishments not expressly mentioned in the text.[58] Other federal courts have similarly maintained a more liberal reading of Title II and the places to which it applies.[59]

1. The United States Supreme Court's Broad Interpretation

In *Daniel v. Paul*,[60] the United States Supreme Court established precedent for interpreting the general scope and applicability of Title II.[61] In this case, a group of African-Americans brought a class action suit against a recreational facility after they were denied access to the facility.[62] The class alleged that the discrimination

54. *But see id.* at 279–80 (Douglas, J., concurring) (arguing that the decision should not have been solely based on the Commerce Clause because racism was more a human rights issue rather than an issue of the shipping of goods across interstate lines).

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

56. *See id.* at 307–08; *infra* Part II.D.1.

57. *See infra* Part II.D.2; *see also* United States v. Cent. Carolina Bank & Trust Co., 431 F.2d 972, 974 (4th Cir. 1970).

58. *See infra* Part II.D.3; *see also* Rousseve v. Shape Spa for Health and Beauty, Inc., 516 F.2d 64, 67 (5th Cir. 1975). *See generally* Miller v. Amusement Enter., Inc., 394 F.2d 342 (5th Cir. 1968).

59. *See infra* Part II.D.4. *Denny v. Elizabeth Arden Salons, Inc.* was a case of first impression for the Fourth Circuit because it was the first time the court had tackled the issue of whether a beauty salon or similar place of beauty constituted "a place of public accommodation" under the statute. *See generally* Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006).

60. 395 U.S. 298 (1969).

61. *See id.* at 307–08.

62. *Id.* at 300.

was illegal because the recreational facility was protected under Title II.[63] The recreational facility offered swimming, boating, sunbathing, picnicking, miniature golf, dancing facilities, and a snack bar.[64] The Court held that the entire recreational facility was subject to Title II protection as a place of entertainment because the facility's snack bar qualified as a covered establishment under Title II.[65]

The Court based its decision on three findings.[66] Writing for the majority, Justice Brennan first found that the snack bar was "principally engaged in selling food for consumption on the premises."[67] He explained that an establishment "is a covered public accommodation if it 'serves or offers to serve interstate travelers or [if] a substantial portion of the food which it serves . . . has moved in commerce.'"[68] Second, Justice Brennan argued that since the facility advertised to interstate travelers in a monthly magazine, newspaper, and radio station broadcasts, the recreational facility offered to serve out of state travelers.[69] Lastly, Justice Brennan found that a "substantial portion" of the food served at the snack bar had traveled through interstate commerce because most of it came from other states.[70]

Importantly, Justice Brennan continued his analysis by noting that the places of public accommodation provision encompasses not only the places of public accommodation that are enumerated in Title II, but also includes a wide range of establishments that are not explicitly named.[71] Justice Brennan rejected respondents' argument that Title II's "place of entertainment" provision refers only to establishments where "patrons are entertained as spectators or listeners" and found that Title II also implies "direct participation in some sport or activity."[72] He explained instead that, although Congress' discussion of Title II focused on "places of spectator entertainment rather than recreational areas," its scope should be based on Congress' greater goals of eliminating discrimination in places

63. *Id.*
64. *Id.* at 301.
65. *Id.* at 303–04.
66. *Id.* at 303–08.
67. *Id.* at 304.
68. *Id.*
69. *Id.*
70. *Id.* at 305.
71. *Id.* at 307–08.
72. *Id.* at 306.

where the public engages in leisure activities.[73] Finding support in the Fifth Circuit's 1970 decision in *Miller v. Amusement Enterprises, Inc.*,[74] Justice Brennan argued that Congress intended for "entertainment" to be read broadly, referring to a definition of the term as "the act of diverting, amusing, or causing someone's time to pass agreeably . . . ."[75] Using this broad interpretation of "entertainment," Brennan concluded that the recreational facility at issue was covered under Title II and, therefore, that its discriminatory practices violated the 1964 Act.[76] By looking to the statute's overriding purpose as the guide for judicial interpretation, the *Daniel* decision established the appropriate method for interpreting Title II and its provisions.[77]

2. The Fourth Circuit's Early Inclusive View

In 1970, the Fourth Circuit maintained an unrestricted view regarding the definition of a "place of entertainment" under Title II.[78] In *United States v. Central Carolina Bank and Trust Company*, the Attorney General brought an action against a North Carolina golf course and pro shop that excluded African-Americans from patronage, arguing that the facility qualified as a "place of entertainment" under Title II of the Civil Rights Act of 1964.[79] The court explained that "[p]laces of entertainment affect commerce only if their 'sources of entertainment' move in commerce."[80] Because a majority of the pro shop's equipment and golf carts were manufactured outside the state, the Fourth Circuit held that the golf course and the pro shop were engaging in interstate commerce.[81] Therefore, following the reasoning in *Daniel*, the Fourth Circuit determined that the golf course and pro

73. *Id.* at 307–08. Justice Brennan argued that the scope should be focused on "the primary objects of Congress' concern when a natural reading of its language would call for broader coverage." *Id.* at 307.

74. Miller v. Amusement Enter., Inc., 394 F.2d 342 (5th Cir. 1968) (finding that an amusement park was a "place of entertainment" within the public accommodation provisions).

75. *Daniel*, 395 U.S. at 306 & n.7, 307–08. Justice Brennan focused on the larger purpose of the statute to justify a broad interpretation. *Id.* at 307–08; *see also* Roessler, *supra* note 26, at 1263.

76. *Daniel*, 395 U.S. at 307–08.

77. Roessler, *supra* note 26, at 1264.

78. *See* United States v. Cent. Carolina Bank & Trust Co., 431 F.2d 972, 974 (4th Cir. 1970).

79. *Id.*

80. *Id.* at 975 n.5.

81. *Id.* at 974. "If the products and services provided by the pro shop are 'sources of entertainment which move in commerce,' Hillandale [the golf course] is a covered establishment and is subject to the Act's requirement of non-discrimination. Under *Daniel v. Paul*, there can be little question but that they are." Id. (internal citations omitted).

shop together constituted a "place of entertainment" and were subject to the provisions of Title II.[82]

3. The Fifth Circuit's Broad Viewpoint

Unlike the Fourth Circuit whose Title II approach has changed over time, the Court of Appeals for the Fifth Circuit has consistently applied a broad and liberal approach to interpreting Title II.[83] One year prior to the *Daniel* decision, the Fifth Circuit interpreted Title II in the landmark 1968 decision *Miller v. Amusement Enterprises, Inc.*[84]

In *Miller*, an African-American plaintiff brought an action under Title II against an amusement park that denied African-Americans access.[85] The Fifth Circuit found the amusement park to be a place of public accommodation under Title II—particularly, "a place of entertainment"—because of its general purpose to entertain, combined with its numerous direct and indirect contacts with interstate commerce.[86] Specifically, the court considered the amusement park a "place of entertainment" because it had eleven major mechanical rides, an ice skating rink, and a small concession stand; furthermore, the court found that it had engaged in interstate commerce because it had advertised its business over the radio and television to the public.[87] The Fifth Circuit held that "any establishment which presents a performance for the amusement or interest of a viewing public would be included" under Title II.[88] In its decision, the Fifth Circuit articulated the proposition later discussed and clarified in *Daniel* that the legislature did not intend for Title II to be narrowly construed.[89] The court explained that if Congress meant to confine the span of covered establishments, it would have used exclusive, instead of inclusive, language about what constitutes a covered establishment.[90]

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82. *Id.*

83. *See generally* Miller v. Amusement Enter., Inc., 394 F.2d 342 (5th Cir. 1968) (holding that an amusement park was a "place of entertainment" under the public accommodations provision of the 1964 Act); Rousseve v. Shape Spa for Health and Beauty, Inc., 516 F.2d 64 (5th Cir. 1975) (holding that a women's health spa was a "place of entertainment" under the public accommodations provision of the 1964 Act).

84. 394 F.2d 342.

85. *Id.* at 345.

86. *Id.* at 348–49.

87. *Id.* at 351.

88. *Id.* at 348.

89. *Id.*

90. *Id.* at 350–51. Specifically, the court argued that if Congress intended for a limited reading of the statute it would have "concluded such section with the phrase 'and other places

As one of the first cases to discuss recreational facilities as falling under Title II, *Miller* laid the foundation for courts to use a broad interpretation of Title II to include a particular establishment under the statute and thus end that establishment's practice of discrimination.[91]

Seven years after *Miller*, the Fifth Circuit expanded the definition of "entertainment" endorsed in both *Daniel* and *Miller* to include a beauty and health spa in the case of *Rousseve v. Shape Spa for Health and Beauty, Inc.*[92] The court held that the "place of entertainment" language of Title II should be read to include recreational areas and spectator entertainment.[93] Since 9,000 to 12,000 members used the facility yearly, the facility was advertised on television, in daily newspapers and over the telephone, and had equipment that was manufactured outside of the state, the Fifth Circuit concluded that the spa's operations affected commerce and that the advertisements and programs were that of a "recreational nature."[94] In its decision, the Fifth Circuit acknowledged that health and exercise studios differ from the establishments at issue in *Miller* and *Daniel*, but ultimately reasoned that the definition of the term "place of entertainment" was not strained by their inclusion.[95] *Miller* and *Rousseve* are strong examples of cases where the Fifth Circuit's interpretation of Title II was based on Congress' overriding purpose of eliminating discrimination in public places.[96]

4. Other Federal Courts' Views

Other federal courts have interpreted the "place of public accommodation" provision of Title II broadly and have specifically considered the question of whether barbershops or beauty salons are included."[97] In the 1965 case *Pinkney v. Meloy*,[98] an African-American patron sued a barber who refused to cut his hair in a hotel

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of exhibition' rather than ending the section with the language 'or other place of exhibition *or entertainment*.'" *Id.* (emphasis in original).

91. *See id.* at 349.

92. Rousseve v. Shape Spa for Health and Beauty, Inc., 516 F.2d 64, 67 (5th Cir. 1975).

93. *Id.*

94. *Id.* at 66, 68.

95. *Id.* at 67.

96. *See also* United States v. DeRosier, 473 F.2d 749, 751 (5th Cir. 1973) (finding that a neighborhood bar was a place of entertainment).

97. *See generally* Pinkney v. Meloy, 241 F. Supp. 943 (N.D. Fla. 1965); Halton v. Great Clips, Inc., 94 F. Supp. 2d 856 (N.D. Ohio 2000).

98. 241 F. Supp. 943.

barbershop.[99] The court decided that "[t]he location of the barbershop within the physical premises of the hotel, a place of public accommodation, and its holding itself out to patrons of the hotel being within a place of accommodation places this defendant under the coverage of the [1964] Act."[100] The court explained that the 1964 Act does not cover all barbershops, but only those located "within the physical premises or a place of public accommodation such as a hotel or motel" and serves patrons of that hotel or motel.[101] The *Pinkney* court based its holding on the location of the barbershop rather than the barbershop's activities and operations.[102]

In contrast, a federal district court in Ohio held in its 2000 decision, *Halton v. Great Clips, Inc.*, that a hair salon located in a shopping center did not qualify as a "place of public accommodation."[103] The court reasoned that the facts were distinguishable from *Rousseve* and concluded that a hair salon was not a "place of entertainment" because the salon did not engage in any recreational activities to bring it under the statute's broad definition of entertainment.[104] In contrast to *Pinkney*, the court in *Halton* based its holding on the salon's activities rather than its location.[105]

III. THE COURT'S REASONING

In *Denny v. Elizabeth Arden Salons, Inc.*, the Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of the Title II claim, holding that the salon did not constitute a "place of public accommodation" as defined under Title II.[106] In writing the majority opinion, Judge Wilkinson narrowly interpreted the statute's language.[107] Circuit Judge King dissented in part from this opinion.[108]

The court began its opinion by assessing whether Congress intended for Title II to cover beauty salons.[109] The court explained that, since the passing of the 1964 Act, no court has interpreted the "place of entertainment" provision within the "place of public

99. *Id.* at 946.
100. *Id.* at 947.
101. *Id.*
102. *See id.*
103. Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 862 (N.D. Ohio 2000).
104. *Id.*
105. *Id.* at 862–64.
106. Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 429 (4th Cir. 2006).
107. *Id.* at 429–31.
108. *Id.* at 437.
109. *Id.* at 431–32.

accommodation" provision of Title II to include a beauty salon like the one in *Denny*.[110] In following this line of reasoning, the court strictly interpreted the statutory language and reasoned that Congress wrote the statute to include only those establishments expressly named.[111] In other words, the court reasoned that Congress would have listed a beauty salon if it intended for its coverage; instead, the legislature specifically chose not to cover places that provide salon services.[112] If the legislature intended the term "place of entertainment" to cover places with "tangential entertainment value," the court reasoned that Congress would not have created separate establishment subsections in the statute.[113] Moreover, the court contrasted Title II with the Americans with Disabilities Act, in which Congress explicitly lists beauty shops as places of public accommodation under the statute.[114]

After noting that beauty salons were not explicitly mentioned in the text of Title II, the court determined whether a beauty salon bears any relation to those "places of entertainment" specifically listed in the statute.[115] In so doing, the court focused mainly on the salon's operations.[116] Unlike a theater, concert hall, or sports arena—which are designed to entertain their patrons in the traditional sense—the court reasoned that the function of the salon in this case was fundamentally different.[117] The court explained that the beauty salon offered its customers hair, skin, and body care and, therefore, did not equate to the experience of attending a movie, symphony or sports match.[118] The court further noted that the salon was "designed to market high-quality hair, skin, and body care, not amusement."[119] The court found that Title II's prohibition of racial discrimination does not extend to "service establishment[s] with incidental relaxation value."[120] Despite the salon's stated purpose in rendering relaxation to its customers, the court concluded that Congress had not intended for a "place of entertainment" to encompass any service establishment that provided "tangential entertainment," but instead was limited to

110. *Id.* at 432–33.
111. *Id.* at 432.
112. *Id.*
113. *Id.*; *see* 42 U.S.C. § 2000a(b) (2006).
114. *Denny*, 456 F.3d at 432.
115. *Id.* at 431–32.
116. *Id.*
117. *Id.*
118. *Id.* at 432.
119. *Id.* at 434.
120. *Id.* at 433 n.1.

establishments enumerated in the statute or those closely related to such establishments.[121]

The court then looked to precedent and argued that no case has found Title II to cover a salon like the one in *Denny*.[122] Comparing the facts of *Denny* with those in *Daniel v. Paul* and *Rousseve v. Shape Spa for Health and Beauty, Inc.*—both of which concluded that establishments not explicitly listed under Title II could qualify as "places of entertainment"—the court found no similarities among the cases.[123] Specifically, the court reasoned that *Denny* and *Daniel* were not analogous because the "body maintenance services with tangential entertainment value" performed in the salon were not comparable to the "amusement business" at issue in *Daniel*, where the amusement park's purpose was to sell entertainment to its customers.[124] Similarly, the court differentiated the establishment in *Denny* from that in *Rousseve* because the spa in *Rousseve* had recreational areas and facilities including gymnasium equipment and swimming pools, while the spa in *Denny* solely provided services for hair, skin, and nails and did not have any additional recreational facilities.[125] The court further explained that the services the salon offered in *Denny* were not analogous to that of any of the establishments that previous courts found as a "place of entertainment."[126]

Lastly, the court proclaimed the issue of whether the scope of Title II includes beauty salons and barbershops as a matter of legislative debate, reasoning that "[i]t remains our job to respect what Congress has said, not to put words in its mouth."[127] As a result, the court practiced judicial restraint and refused to read Title II as covering the beauty salon.[128] The majority concluded that Title II did not provide the plaintiffs with protection from the salon's discriminatory practices.[129]

In a dissenting opinion, Judge King argued that the majority erred in finding that the salon did not fall within the ambit of the Civil Rights Act of 1964.[130] Judge King identified two fatal errors in the

121. *Id.* at 432.
122. *Id.* at 433.
123. *Id.* at 432–33.
124. *Id.* at 432.
125. *Id.* at 433.
126. *Id.* at 432.
127. *Id.* at 434.
128. *Id.*
129. *Id.*
130. *Id.* at 437 (King, J., dissenting).

majority's analysis.[131] First, he argued that the majority failed to follow relevant precedent, including *Daniel*, and did not reasonably interpret the statutory language of Title II.[132] Second, he explained that the majority's reasoning relied on a "crucial factual misapprehension" by categorizing the Red Door Salon and Spa as merely a hair salon.[133] Specifically, he argued that a salon's purpose is not just to provide beauty services, but it is also to provide entertainment to its patrons.[134] Under *Daniel*'s broad construction of the statute, he reasoned that the salon qualifies as a place of public accommodation within the meaning of Title II because of its purpose to provide entertainment.[135]

IV. ANALYSIS

In *Denny v. Elizabeth Arden Salons, Inc.*, the Court of Appeals for the Fourth Circuit held that a beauty salon is not a "place of public accommodation" under Title II of the Civil Rights Act of 1964.[136] In so holding, the Fourth Circuit puts forth poor reasoning that ultimately ignores over forty years of progress in the battle to gain equal access to places of public accommodation. Specifically, the court makes a flawed separation of powers argument to justify its narrow reading of Title II.[137] In addition, the court takes a conservative approach towards civil rights issues and fails to follow precedent by neglecting its earlier willingness to read Title II inclusively.[138] In other words, it considers those establishments enumerated in Title II as the exclusive list of places covered under the statute, therefore excluding beauty salons and countless other establishments from the requirement to provide equal access to places of public accommodation.[139] Lastly, the Fourth Circuit's decision ignores Congress' overriding purpose in enacting Title II and takes a step backward in the fight for equal rights.[140] The *Denny* decision sends the message that racial discrimination is an acceptable practice in most public places, or in other words, in places not expressly listed under Title II.

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 441 ("The name 'Elizabeth Arden Red Door Salon and Spa' implies a place where patrons come to relax and divert from their everyday lives.").

135. *Id.*; see also discussion supra Part II.D.1.

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

137. *See* discussion *infra* Part IV.A.

138. *See* discussion *infra* Part IV.B.

139. *See* discussion *infra* Part IV.B.

140. *See* discussion *infra* Part IV.C.

A. The Fourth Circuit Makes a Flawed Separation of Powers Argument

In its decision, the Fourth Circuit emphasizes that the judiciary's role is to follow closely the statutory language and not interpret legislative intent because such interpretation would intrude upon legislative powers.[141] The majority here follows this view and determines the meaning of the 1964 Act by looking solely to its explicit language.[142] However, the court's narrow interpretation of its role distorts the theory of separation of powers. The court's fear of overstepping its constitutionally mandated powers[143] results in an overly cautious and unreasonably narrow reading of Title II prohibitions.

The United States Constitution created a federal government of enumerated powers, where each governmental branch has distinct functions that cannot be delegated to any of the other branches.[144] The separation of powers theory is based on this idea of separate roles for specific branches.[145] It is generally understood that the legislature drafts and executes laws, the executive enforces the laws, and the judiciary interprets the laws.[146] The Founders believed that these distinct functions would create a balance between the branches and a self-regulating system of checks and balances.[147]

The theory of separation of powers seeks to prevent the "arbitrary government or tyranny which may arise from the concentration of power" in one branch, and provides the government branches with the power to fight off encroachment.[148] The theory should not be misunderstood as being a strict distribution of functions between the three government branches; rather, the separation of powers doctrine should be viewed as a network of rules and principles that ensures that power is not concentrated in one branch of government.[149] However, the Constitution contains no provision expressly declaring that the powers of the three government branches

141. *Denny*, 456 F.3d at 434 ("We note . . . that we have interpreted the statute as it does read, not perhaps as it should read.").

142. *Id.*

143. *See* U.S. CONST. art. III, § 1.

144. *See supra* note 143.

145. Eric Barendt, *Separation of Powers and Constitutional Government, in* THE RULE OF LAW AND THE SEPARATION OF POWERS 277 (Richard Bellamy ed., 2005).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 284.

be separated.[150] Rather, the separation of powers theory was thought to be implicit in the government structure under the U.S. Constitution.[151]

In *Denny*, the Fourth Circuit views its judicial powers as a strict function rather than as part of an intertwining network with the legislature.[152] The court's strict and narrow understanding of its constitutional powers leads to a strict and narrow reading of Title II.[153] Contrary to the court's view, a broader interpretation of Title II would not have led to government tyranny, but instead would have been a proper check on the legislature in the scheme of a self-correcting government.[154] Tyranny generally occurs from violating the separation of powers doctrine, not when the separate powers are balanced and work in harmony as an intertwining network.[155] The *Denny* case does not present an opportunity for the judiciary to usurp legislative control; instead, it presents an opportunity for the judiciary to perform its most basic function: to interpret a statute. Even if the court interpreted the statute liberally, the basic tenants of federalism would have remained intact, two African-American plaintiffs would have received the justice they deserve and, most importantly, the court would have made a clear statement regarding the intolerability of discrimination.

The Fourth Circuit seeks to remain faithful to Congress' words and legislative intent with respect to the covered establishments under Title II. Often, examining the text of a statute best determines legislative intent. However, the plain text of Title II is ambiguous as to whether the legislature intended for establishments such as beauty salons—which resemble some of the enumerated establishments covered under Title II—to be included under the statute.[156] One interpretation of this ambiguity is that Congress intended for a broad interpretation of the statute.[157] The United States Supreme Court in

150. See *id.*

151. *Id.* at 275–78; *see* Clinton v. Jones, 520 U.S. 681, 699 (1997) ("The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government."); *see also* Mistretta v. U.S., 488 U.S. 361, 380–81 (1989) (finding that the lines between the three branches of government are unclear at times).

152. *See* Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 434 (4th Cir. 2006).

153. *See* id.

154. *See generally* United States v. Lopez, 514 U.S. 549 (1995) (confirming the purpose of the separation of powers doctrine).

155. *See* Barendt, *supra* note 145, at 278–79.

156. *See generally* Colhour, *supra* note 45 (discussing the question of congressional intent and the application of Title II to entities that do not clearly resemble those explicitly listed in the statute). *See also* Rodriguez & Weingast, *supra* note 20, at 1537–38 (acknowledging that the legislative history of the Civil Rights Act of 1964 is confusing and difficult to assess in statutory interpretation).

157. *See* Colhour, *supra* note 45, at 817.

Daniel v. Paul adopts this precise view.[158] In *Daniel*, the Court interpreted the phrase "or other places of exhibition or entertainment" as incorporating other establishments that are not expressly listed, but closely resemble the listed places.[159] Although a beauty salon is not a large public venue like those listed in Title II, it resembles those places because individuals visit a beauty salon not only to obtain beauty services, but also to gossip, congregate, interact, listen to music, watch television, and relax. In other words, a beauty salon—like a movie theater or concert hall—allows an individual to enjoy himself and be entertained.[160] Given this understanding of a beauty salon, it is not unreasonable to expect that Title II would include such an establishment.

In short, the court possesses the power to decide the breadth and power of Title II. Within its constitutionally mandated power, the Fourth Circuit could have expanded the scope of Title II to include beauty salons. Unfortunately, under the guise of separation of powers, the Fourth Circuit interprets Title II incredibly narrowly and, as a result, refuses to adequately exercise its judicial power.

B. The Fourth Circuit Did Not Follow Relevant Precedent

The Fourth Circuit's decision ignores the precedent established in *Daniel v. Paul*[161] and undermines the United States Supreme Court's commitment to equality.[162] The Supreme Court in *Daniel* concluded that a recreational facility fell under Title II based on one aspect of the facility—the snack bar—which it found affected commerce in its food service and advertisements.[163] In contrast, the Fourth Circuit in *Denny* does not consider in its analysis whether the beauty salon influenced interstate commerce, despite the fact that a facility's involvement in interstate commerce is a cornerstone in any Title II analysis because of the statute's reliance on the Commerce Clause.[164] Undeniably, a beauty salon—especially a nationwide chain such as Elizabeth Arden Red Door Spas—engages in interstate commerce when servicing out-of-state customers, advertising outside

158. *See* discussion *supra* Part II.D.1.

159. *See* discussion *supra* Part II.D.1.

160. *See* Daniel v. Paul, 395 U.S. 298, 306 n.7 (1969) (The Supreme Court referred to a definition of "entertainment" that defined the term as "the act of diverting, amusing, or causing someone's time to pass agreeably: [synonymous with] amusement.")

161. *Id.* at 307–08.

162. *See* discussion *supra* Part II.D.1.

163. *Daniel*, 395 U.S. at 305.

164. *See id.* at 303–04; *see also* 42 U.S.C. § 2000a(c) (2006).

the state, and buying and selling beauty products shipped across state lines.[165] Although neither the facts nor the court's decision in *Denny* discuss these details, the particular beauty salon at issue in this case more than likely engaged in these interstate commercial activities.[166]

Furthermore, the facts demonstrate that the salon serves food to its patrons: Jean Denny was eating lunch that the salon provided when the alleged altercation occurred.[167] Surely the lunch included food that was shipped across state lines, thus relating the service to interstate commerce. The salon likely engaged in interstate commerce through the advertisement and sale of its products and certainly through the food services it provided to its patrons, which in the past has been a clear indicator of interstate commerce.[168] Indeed, *Daniel* only relied on one aspect of the establishment to find that it was covered.[169] These several indications of interstate commerce surely bring the salon in *Denny* under Title II. Moreover, in *Rousseve*, the Fifth Circuit found that a beauty salon that affects interstate commerce and has programs of a "recreational nature" is specifically the type of establishment that the drafters of Title II intended to protect.[170]

Unlike the recreational activities in *Rousseve* and *Daniel*, the salon's operations in *Denny* were not of a "recreational nature" in the traditional sense.[171] However, although the Court in *Daniel* did consider the recreational nature of the establishment, it looked mainly at the establishment's dealings in interstate commerce to determine if it was a "place of entertainment" under Title II.[172] In contrast, the Fourth Circuit in *Denny* focuses its analysis solely on whether the salon's services were of a recreational, entertainment-based nature, and completely failed to follow Supreme Court precedent when it avoided any analysis of the salon's dealings in interstate commerce.[173]

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165. *See* 42 U.S.C. § 2000a(c) (2006).

166. *See* Elizabeth Arden Red Door Spas, http://www.reddoorspas.com/AboutUs.aspx (last visited Nov. 16, 2008). Elizabeth Arden Spas, LLC is the owner and operator of full service salons and day spas with thirty day spas and resort locations nationwide. *Id.*

167. *See* Denny v. Elizabeth Arden Salons, Inc. 456 F.3d 427, 430 (4th Cir. 2006).

168. *See e.g.*, *Daniel*, 395 U.S. at 305.

169. *See supra* note 163 and accompanying text.

170. *See supra* notes 93–94 and accompanying text.

171. *Compare Denny*, 456 F.3d at 429 (recreational activities included hair, skin, nail, and body treatments) *with Daniel*, 395 U.S. at 301 (recreational activities included swimming, boating, miniature golf, dancing, and a snack bar) *and* Rousseve v. Shape Spa for Health and Beauty, Inc., 516 F.2d 64, 67 (5th Cir. 1975) (recreational activities included physical exercise facilities, swimming pools, and body massages and facials).

172. *See* discussion *supra* Part II.D.1.

173. *See* discussion *supra* Part III.

Moreover, the *Denny* court was not willing to follow its own Circuit's precedent in *Central Carolina Bank and Trust Company*,[174] where the court found that a golf course and pro shop constituted a "place of entertainment" because its equipment and sources were products of interstate commerce.[175] The court in *Denny*, in contrast, looks only at whether the salon's operations were similar to other places of entertainment instead of determining whether the salon's advertising efforts or its sources of equipment had an effect on interstate commerce.[176] In doing so, the Fourth Circuit neglects to consider other aspects of the salon that could have qualified it as a "place of entertainment."[177]

In analyzing the salon's operations, the Fourth Circuit does not engage in a thorough Title II assessment and certainly does not follow binding precedent, or even strongly persuasive authority. The Fourth Circuit fails to adequately justify the rationale behind its decision. Particularly, the court neglects to give an explanation as to why it did not follow the clear precedent on this issue. It neither offers a definition of the word "entertainment" nor introduces supporting case law. In sum, the *Denny* court unnecessarily and inappropriately limits its analysis and statutory interpretation, and fails to adequately support its theory that a beauty salon does not qualify for Title II coverage.

C. The Fourth Circuit's Decision Defeats the Original Overriding Purpose of Title II

By disregarding precedent, the Fourth Circuit under-enforces Title II and fails to embrace its original spirit. Although *Heart of Atlanta Motel* established the statute's function to eliminate discrimination in places having an effect on interstate commerce, the drafters of Title II aimed to abolish racial distinctions and blatant discrimination and to promote social equality.[178] Specifically, the statute was designed to eradicate "the deprivation of personal dignity

174. United States v. Cent. Carolina Bank & Trust Co., 431 F.2d 972 (4th Cir. 1970); *see also* discussion *supra* Part II.D.2.

175. *See Cent. Carolina Bank & Trust Co.*, 431 F.2d at 974.

176. *See Denny*, 456 F.3d at 431–32 (arguing that a salon is not the same as a sports stadium, movie theater, or symphony).

177. For example, the Fourth Circuit did not consider the location of the salon as have other federal courts. *See, e.g.*, Pinkney v. Meloy, 241 F. Supp. 943, 947 (N.D. Fla. 1965); Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 863 (N.D. Ohio 2000).

178. *See supra* note 29 and accompanying text; *see also* Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1211 (1997).

that surely accompanies denials of equal access to public establishments."[179] In its analysis, however, the Fourth Circuit considers neither the statute's purpose nor its legislative history. Instead, the Fourth Circuit bases its decisions on a plain reading of the statute's text.[180] In neglecting to consider the original intent of Title II, the Fourth Circuit compromises the statute's authority. *Denny* does not consider the guiding principle established in *Daniel* that proclaimed the statute's overarching purpose, rather than the text alone, as the guide for judicial interpretation.[181] In doing so, the *Denny* court ignores decades of civil rights efforts seeking to entitle all individuals to equal enjoyment and services in public facilities.[182]

The Fourth Circuit's decision stunts the positive progress of the civil rights movement, regressing to earlier racist perspectives.[183] Courts possess the power to interpret statutes and case law in whichever manner they see fit and, therefore, have the power to change the status quo, for better or for worse. Looking at historical landmark Supreme Court decisions concerning civil rights, it is clear that court decisions can significantly influence the mindset of the majority in our society.[184] The *Denny* court's decision does not mirror the generally progressive mindset of our society concerning racial discrimination and may signify a negative turn against all the progress that has been made over the past forty-five years.

At the time of the enactment of the Civil Rights Act of 1964, theaters, lunch counters, hotels, schools, and public restrooms were the places where segregation was at issue.[185] Congress, therefore, enacted a statute that addressed segregation in places where it was most prevalent.[186] Certainly, Congress did not intend to allow or promote

179. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring).

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

181. *Id.*, *see also* Daniel v. Paul, 395 U.S. 298, 308 (1969).

182. *See e.g.*, Sarah Martinez, Note, *Justice for None: the Fourth Circuit's Decision in Denny v. Elizabeth Arden Salons, Inc. Undermines the Civil Rights Act of 1964*, 10 SCHOLAR 21, 24, 36–38 (2007) (arguing that the Fourth Circuit's narrow interpretation in the Denny decision constricts the overarching remedial purpose of the 1964 Act).

183. *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1856) (holding that African slaves could never be United States citizens); Plessy v. Ferguson, 163 U.S. 537 (1896) (mandating "separate, but equal" treatment); Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Constitution does not grant Congress the authority to prohibit private discrimination in public accommodations).

184. *See generally Dred Scott*, 60 U.S. 393; *Plessy*, 163 U.S. 537; *Civil Rights Cases*, 109 U.S. 3.

185. *See* Oppenheimer, *supra* note 38, at 648 & n.9 (describing the segregated public facilities that motivated Title II).

186. *Id.* at 671–72.

racial discrimination in places that were not listed in the statute.[187] Rather, the drafters of Title II intended for the law to progress with and adapt to changes in society because they realized that it would be impossible to anticipate later-emerging public establishments where discrimination might become an issue. For example, Congress passed the Civil Rights Act in an era where computers were just being invented and the Internet did not yet exist.[188] Because the Internet did not exist at the time of the statute's enactment, Congress could not have contemplated the Internet as a place in need of regulation to prevent discrimination.[189] The same argument applies for beauty salons since they were not places where discrimination was most prevalent at the time, even though, unlike the Internet, beauty salons were in existence.[190] To adapt to the changing times, the *Denny* court should have read Title II to include beauty salons. Certainly, the drafters of Title II intended for the broad categories explicitly listed to be inclusive of new emerging places of public accommodations. Congress hardly meant for the statute to be amended repeatedly.

The *Denny* decision indicates that a small proportion of individuals in the judicial system aim to return to our country's racially divided past. The fact that this view remains present in our federal courts is alarming. Had the court simply followed precedent and recognized the overarching purpose of Title II, the court could have promoted justice and made another step in the fight for equal rights. Instead, the court made a decision that harkens back to the days of segregated restrooms, schools, lunch counters, and buses.[191] This social paradigm was considered a shadow of the past until the *Denny* court issued its ruling.

187. *See supra* note 89 and accompanying text; see also 42 U.S.C. § 2000a (2006) (prohibiting discrimination or segregation in places of public accommodation).

188. *See* Tara E. Thompson, *Locating Discrimination: Interactive Web Sites as Public Accommodations Under Title II of the Civil Rights Act*, 2002 U. CHI. LEGAL F. 409, 410–11, 435 (2002) (arguing that internet sites, such as chat rooms and bulletin boards, qualify as public accommodations under Title II despite the fact that they are not explicitly listed in the statute).

189. *See id.*

190. *See generally* Ingrid Banks, For Blacks Only?: The Continuing Significance of Race in Post-Civil Rights Black Beauty Salon Culture (2006), http://www.allacademic.com/meta/p104101_index.html (last visited Nov. 16, 2008). Separate beauty salons for African-Americans and Caucasians were a product of de facto segregation. *Id.* at 1, 3.

191. *See* discussion *supra* Part II.A–B.

V. CONCLUSION

In *Denny v. Elizabeth Arden Salons, Inc.*, the Fourth Circuit constrains the scope of the "place of entertainment" category under Title II and deemphasizes the importance of the statute's original overriding purpose.[192] The court's decision, in turn, narrows Title II protections, making racial minorities more susceptible to discrimination in places not explicitly listed in the statute, such as beauty salons. The Fourth Circuit's argument that Congress would have included a beauty salon if it intended for its coverage is without merit. To expect Congress to amend Title II to include every potential place of public accommodation is unreasonable.

Forty-five years after the passing of the Civil Rights Act of 1964, racial discrimination continues to present a problem in the United States even though it may not be as blatant as it was at the time of Title II's enactment. Discrimination is not any more acceptable in a beauty salon than it would be in a hotel, theater, or restaurant. The Fourth Circuit failed to utilize its judicial power to interpret Title II in a way that would promote positive political and social change and, thus, failed to fulfill the promise of the Civil Rights Act of 1964.[193] Certainly, if courts continue to follow the Fourth Circuit's lead in interpreting Title II, then racial minorities will continue to be deprived of the equal access and justice that the statute sought to provide in places of public accommodation.

Denny demonstrates that discrimination is still alive and well in our country, despite the progress that has been made since the enactment of Title II. The passage of federal legislation alone does not guarantee its enforcement; courts still have the responsibility to ensure that the statute remains enforced. Therefore, to prevent another discriminatory judicial outcome in our federal courts, the United States Supreme Court should grant certiorari, reverse the Fourth Circuit's holding, and declare the beauty salon a place of public accommodation covered under Title II.

192. *See* discussion *supra* Part IV.

193. *See* discussion *supra* Part IV.C.