

Online Banking and (In)Accessibility

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As the COVID-19 pandemic forced many Americans to increase their dependence on online and mobile banking, many people with disabilities—in particular those with visual and dexterity impairments—were excluded from that opportunity because bank websites were inaccessible. For the past twenty years, no scholars have meaningfully considered looking outside the Americans with Disabilities Act (ADA) to achieve web accessibility for people with disabilities. In light of the regulatory whiplash, judicial stalemate, and congressional inaction regarding the ADA's applicability online, consumer protection laws offer a desirable alternative approach to secure access for people with disabilities to at least one significant subset of online spaces: banks.

The Consumer Protection Financial Bureau's 2021 call for research on the scale of discrimination consumers with disabilities experience illustrates the gap in the literature on disability and credit. This Article begins to fill that gap by presenting the first empirical data on the inaccessibility of bank mortgage and credit web pages. While inaccessible banking technologies arguably violate protections found in the Fair Housing Act, the Truth in Lending Act, and the Dodd Frank Act, this Article concludes that amending the Equal Credit Opportunity Act to add disability as a protected class is the best way to ensure fair and equal access for all consumers in an increasingly virtual economy.

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“*[M]ost civil rights problems are best addressed by a mix of strategies . . .*”¹

INTRODUCTION

Margaret is 77-year-old widow who lives alone in a rural community in western Oklahoma. The deteriorating effects of glaucoma in both of Margaret’s eyes left her legally blind in her early seventies. Since suffering from a stroke last year, Margaret has no mobility in her hands.

Going to the bank requires Margaret to catch a ride with a family member or friend. Frustrated by the resultant lack of privacy and convenience, Margaret decides to try online banking. Due to her dexterity and vision impairments, Margaret relies on two adaptive technologies to navigate the web: (1) A screen-reader, which relays the written information on a site audibly and (2) a keyboard adapter, which allows her to use her elbow to navigate through web pages without a mouse or conventional keyboard.

Unfortunately, Margaret cannot navigate to the bank website’s “create an account” link by using only the keyboard’s tab key because there is a break in the site’s navigation path. Margaret tries a new bank website. There, she decides to look at credit card offerings. Fortunately, she can navigate from the homepage to the credit card offerings page because the site is fully navigable by keyboard. But understanding any information on the credit card page proves frustrating. Margaret’s screen-reader cannot relay all of the advertised credit cards’ necessary terms because the website shows some of the cards’ features as images without alternate text. Frustrated, Margaret gives up.²

¹ Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby)*, 123 YALE L.J. 2338, 2843 (2014).

² This story is loosely based on multiple consumer stories on the “Level Access” website. See *Making Online Banking and ATMs Accessible to People with Disabilities*, LEVELACCESS, <https://www.levelaccess.com/resources/making-online-banking-atms-accessible-people-disabilities/> (last visited Mar. 30, 2021).

Margaret’s story does not have to begin and end with frustration. Consumer law can alleviate the financial exclusion that consumers with disabilities experience online by requiring bank websites to follow web accessibility standards. People with disabilities,³ as “the world’s largest minority,”⁴ are a significant consumer demographic. In the United States, almost 8.12 million noninstitutionalized people with disabilities are employed,⁵ and 35 percent of households have at least one member with a disability.⁶ Compared to consumers without disabilities, “consumers with disabilities spend more money on average per shopping trip” and shop more frequently throughout the year.⁷

Despite this consumer group’s size and strength, consumer law almost categorically fails to protect consumers with disabilities.⁸ As banking, lending, and credit cards shift to predominantly online access points,⁹ inaccessible bank websites leave consumers like Margaret

³ This article uses “person first language,” which “puts the person before the disability.” *See, e.g., Office of Disability Rights*, DC.GOV, <https://odr.dc.gov/page/people-first-language> (last visited Mar. 31, 2021). This use is for consistency and is not meant to reflect an endorsement of either side in the debate over “person-first” or “identity-first” (e.g., “disabled person”) language.

⁴ *Factsheet on Persons with Disabilities*, UNITED NATIONS, <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> (estimating that 1 billion people, or 15% of the global population, live with a disability); *see also Anniversary of Americans with Disabilities Act: July 26, 2020*, CENSUS.GOV (June 17, 2020), <https://www.census.gov/newsroom/facts-for-features/2020/disabilities-act.html#:~:text=40.6%20million%20or%2012.6%25,the%20United%20States%20in%202018> (reporting 40.6 million persons, or 12.6% of the “total civilian noninstitutionalized population” in the United States, have a disability).

⁵ *See American Community Survey, Employment Status by Disability Status and Type*, CENSUS.GOV (2018), <https://data.census.gov/cedsci/table?t=Disability&tid=ACSDT1Y2018.B18120&hidePreview=true> (reporting employment statistics for persons with disabilities).

⁶ Jonathan Lazar, *The Potential Role of US Consumer Protection Laws in Improving Digital Accessibility for People with Disabilities*, 22 U. PA. J.L. & SOC. CHANGE 185, 190 (2019) (citing NIELSON, REACHING PREVALENT, DIVERSE CONSUMERS 8 (2016), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/reaching-prevalent-diverse-consumers-with-disabilities.pdf>).

⁷ *Id.*

⁸ *See, e.g., Equal Credit and Opportunity Act*, 15 U.S.C. § 1691 (providing antidiscrimination protection for credit applicants on the basis of “race, color, religion, national origin, sex or marital status, or age). The only federal consumer protection law that explicitly includes disability as a protected class is the Fair Housing Act. *See* 42 U.S.C. §§ 3601–19, 3631.

⁹ *See* ACCENTURE, 2016 NORTH AMERICA CONSUMER DIGITAL BANKING SURVEY 12 (2016), https://www.accenture.com/t20160609T222453__w_/us-en/_acnmedia/PDF-22/Accenture-2016-North-America-Consumer-Digital-Banking-Survey.pdf (“The Internet is the dominant channel: Consumers use online banking the most frequently—60 percent use it at least weekly.”).

without access to the most fundamental financial products, like checking accounts and bank-issued credit cards.¹⁰ In particular, bank websites that are incompatible with accessibility aids implicitly exclude consumers with visual or dexterity impairments.¹¹ Meanwhile, Congress, regulators, and courts have repeatedly declined to extend the broad protections in the Americans with Disability Act (ADA) to websites.¹²

In January 2021, the Consumer Financial Protection Bureau (CFPB) issued a statement calling for research on whether consumers with disabilities suffered discrimination in access to credit and in credit transactions.¹³ The CFPB needs data documenting the scale of inaccessibility barriers that bank websites pose to people with disabilities and scholarship considering whether consumer laws like the Equal Credit Opportunity Act (ECOA) should protect against these obstacles.¹⁴ This Article seeks to meet that need. In addition to presenting data to support the case that Congress should amend the ECOA to include disability as a protected class because

¹⁰ See *infra* notes 60–62 and accompanying text (presenting statistics on the banked rates of persons with disabilities).

¹¹ See Brian Wentz et. al., *Exploring the Accessibility of Banking and Finance Systems for Blind Users*, 22 FIRST MONDAY (Mar. 2017), <https://firstmonday.org/ojs/index.php/fm/article/view/7036/5922> (summarizing the findings of a 2017 study of blind users, the researchers remarked, “Web and app accessibility for banking and finance is clearly far from where it should be, as is obvious by the high percentage of respondents noting accessibility problems”); see also Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 592 (2020).

(“The more than seven million Americans who are blind or visually impaired have witnessed the revolution of web and mobile applications pass with inconsistent, broken, or missing support for screen readers.”).

¹² See *infra* notes 134–146 and accompanying text (explaining the litigation, congressional action (or lack thereof), and agency vacillation on the applicability of ADA’s Title III to commercially operated websites).

¹³ See CONSUMER FIN. PROT. BUREAU, TASKFORCE ON FEDERAL CONSUMER FINANCIAL REPORT VOLUME II 60–61 (2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf.

¹⁴ *Id.* This paper extends the findings of the only empirical study documenting financial institution website accessibility barriers. See Brian Wentz et. al., *Documenting the Accessibility of 100 US Bank and Finance Websites*, 18 SPRINGER NATURE 871, 872 (2018) (“There is also no formal documentation or baseline of such US-based [banking] institutions for their current or historic level of accessibility.”). Note that the Wentz et. al. study is different from my study because it reviewed bank homepages. My study reviews banks’ credit card and home mortgage product offerings. As of March 14, 2021, only one article explored whether consumer law could offer relief to persons with disabilities suffering from inaccessible online banks; a professor of computer sciences and technology wrote that article. See generally Lazar, *supra* note 6 (outlining a few consumer laws that may apply in the web accessibility debate). While Lazar’s research is a helpful starting point, legal scholars need to join the discussion.

people with disabilities suffer wide-scale discrimination in accessing online banking, this paper also posits novel ways that disability rights advocates could use consumer protection laws to add pressure to banks to make conventional credit and banking more accessible online.

Disability-rights advocates have argued for decades that the ADA requires accessibility on commercial websites.¹⁵ But after consistently losing the battle to expand the ADA to websites in Congress—and unpredictably waging the war in the courts—it is time that advocates consider using consumer law to fight web inaccessibility. Relying on consumer law allows lawmakers and judges to limit online accessibility compliance requirements to bank websites, which will likely create less controversy than extending the ADA to every webpage on the internet. Though undoubtedly too narrow and unsatisfactory to some, this small step toward compliance is valuable in creating social norms and expectations that could lead to broader voluntary compliance.¹⁶ Online banking is a desirable next step in the fight for online accessibility because access to the comparatively affordable credit that banks offer is “essential to modern economic life in America.”¹⁷

Consumer law offers both universalist and targeted, discrimination-based relief mechanisms for persons with disabilities who experience inaccessible bank websites.¹⁸ The tactical, substantive, and expressive appeal of either approach—universalist or targeted—is

¹⁵ The range of websites that would fall under an accessibility mandate have differed by scholar. Compare Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449 (2015) with John D. Inazu and Johanna Smith, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World* (Mar. 18, 2021). Washington University in St. Louis Legal Studies Research Paper No. 21-03-01, Wisconsin Law Review, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3807530>.

¹⁶ See Stephanie Stern, *A Social Norm Theory of Regulating Housing Speech Under the Fair Housing Act*, 84 MO. L. REV. 435, 552 (2019) (“The effect of norms is so robust that even a single communication that suggests a social norm influences listeners’ prejudice and behavior.”).

¹⁷ Jim Hawkins & Tiffany C. Penner, *Advertising Injustices: Marketing Race and Credit in America*, 70 EMORY L.J. 1619, 1625 (2021).

¹⁸ See *infra* Part IV (discussing the potential solutions that consumer law offers).

greatly disputed.¹⁹ This paper aligns with constitutional and civil rights scholar Sam Bagenstos's view that some mix of both targeted, discrimination-based and universalist approaches is ideal for addressing civil rights.²⁰

The Truth in Lending Act's requirement for "clear[] and conspicuous" disclosure of the cost of credit²¹ and the Dodd-Frank Act's prohibition against unfair, deceptive, or abusive acts or practices²² are universalist approaches to combatting bank website inaccessibility because they do not premise consumer protection on class membership.²³ In contrast, the Fair Housing Act (FHA) and ECOA are targeted approaches to civil rights because their protections only reach members of specific classes.²⁴

My argument that consumer law can alleviate the economic exclusion that people with disabilities experience by requiring banks to follow web accessibility guidelines will proceed in four parts. First, Part I shows that consumers with disabilities face a disparity in access to online banking and affordable credit. Next, Part II explains how disability-related barriers on websites contribute to the credit and banking disparity that consumers with disabilities face. Part II has three Sections: (1) describing what digital accessibility means and explaining web accessibility

¹⁹ See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 793–94 (2011) (arguing that universalist appeals are more persuasive to courts and inclusive to an increasingly diverse polity); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1341–55 (2012) (arguing that discrimination-neutral claims are more promising than antidiscrimination claims); Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory*, 16 LEWIS & CLARK L. REV. 527, 552 (2012) (stating that universalist approaches are superior for securing workplace protections). *But see* Bagenstos, *supra* note 1, at 2852–55 (summarizing the literature critiquing the supposed tactical advantages of "universalist" approaches).

²⁰ Bagenstos, *supra* note 1, at 2855 ("[W]here targeted approaches are highly contentious and the universalist alternatives are relatively non-burdensome and are not understood by political and judicial actors as simply replacing targeted measures—universalist approaches are likely to be more tactically effective than targeted ones Where universalist approaches impose significant burdens on regulated entities or are politically understood as *really* being aimed at achieving targeted goals—they will be less so.")

²¹ See 12 C.F.R. § 1026.16(b)(1) (explaining that the "clearly and conspicuously" standard applies to disclosures required under § 10.26.6(a)(1) and (a)(2) and § 10.26.6(b)(3)).

²² 12 U.S.C. § 5531.

²³ See *infra* Part IV.A (analyzing the normative differences between targeted and universalist approaches).

²⁴ See *infra* Part IV.B.

standards, (2) exploring the sparse existing data on bank website accessibility, and (3) presenting the first empirical review of accessibility barriers on banks' credit cards and mortgage webpages. Part III explains why it makes sense for advocates and scholars to consider alternatives to the ADA for achieving the web accessibility. Part III also briefly considers the normative distinctions and tradeoffs between consumer and disability-rights law as avenues for relief. Finally, Part IV proposes how consumer law applies to inaccessible online banking. Part IV has two Sections: (1) exploring the applicability of two universalist consumer laws and (2) suggesting applications and amendments to two antidiscrimination consumer laws.

I. THE FORGOTTEN CONSUMER: DISABILITY & DISPARATE USE OF BANKING & CREDIT

Websites are the dominant and most preferred way that American consumers interact with banks.²⁵ Meanwhile, physical bank branches are increasingly absent from many neighborhoods.²⁶ The Federal Bureau of Investigations²⁷ reported an unprecedented 50 percent surge in online and mobile banking in 2020,²⁷ likely the result of stay-at-home orders and precautions taken during the COVID-19 pandemic.²⁸ The online banking expansion may seem like a welcome innovation for people at a high risk of infection or with physical impairments that

²⁵ See *supra* note 9 and accompanying text.

²⁶ Cassandra Jones Havard, *Doin' Banks*, 5 U. PA. J.L. & PUB. AFFS. 317, 328–30 (2020) (noting that “[b]ank deserts,” defined as areas without a bank branch within a 10-mile radius, are on the rise).

²⁷ See *Increased Use of Mobile Banking Apps Could Lead to Exploitation*, FBI (June 20, 2020), <https://www.ic3.gov/Media/Y2020/PSA200610>; see also Rebecca Lake, *Mobile And Online Banking Security During COVID-19: What You Need To Know*, FORBES (June 16, 2020, 7:12 am EDT), <https://www.forbes.com/sites/advisor/2020/06/16/mobile-and-online-banking-security-during-covid-19-what-you-need-to-know/?sh=625c6eca206c>; Alan McIntyre et. al., *Banking Consumer Study: Making Digital More Human*, Accenture (Dec. 8, 2020), <https://www.accenture.com/us-en/insights/banking/consumer-study-making-digital-banking-more-human> (finding that “50 percent of consumers now interact with their bank through mobile apps or websites at least once a week”).

²⁸ See Amanda Moreland et. al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WEEKLY REP. 1198, 1198–99 (2020).

pose obstacles to independent transit.²⁹ But, as digital banking services expand and physical bank branches contract, many consumers with disabilities face a new obstacle: inaccessible websites.³⁰

The last decade has seen no shortage of disability discrimination suits against inaccessible commercial websites, primarily under the Americans with Disabilities Act (ADA).³¹ Still, there is almost no research exploring the social and economic challenges that inaccessible bank websites perpetuate against people with disabilities and even less scholarship considering whether consumer law can help alleviate these challenges.³² Moreover, the limited research exploring whether internet banking discriminates against vulnerable populations often excludes people with disabilities from the analysis.³³

Until recently, it made sense that most literature discussing the risks of online banking did not include people with disabilities; the majority of people with disabilities did not have (or were presumed to not have³⁴) internet access.³⁵ Over the past decade, however, internet access

²⁹ See Brian Wentz et. al., *supra* note 11, at 871 (explaining a recent survey of blind users that indicated a “preference to use the Web for banking and finance versus physical locations”); cf. Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 459 (2015) (explaining why electronic commerce theoretically offers a welcome alternative to traversing outside the home for persons with some physical disabilities).

³⁰ See *infra* Part II.C–D (reporting on the only other study of US bank webpage accessibility and presenting the complementary inaccessibility findings of my research).

³¹ See *infra* note 134–139 and accompanying text (explaining the many suits against webpages for failure to comply with Title III of the ADA’s public accommodation mandate and the resultant circuit split on if and when the ADA’s public accommodation mandate truly applies to a website).

³² *Supra* note 14 and accompanying text (discussing the only study, published in 2020, reviewing the scale of inaccessibility on bank websites).

³³ On March 13, 2021, I entered the “Secondary Sources” portal in Westlaw. I searched “‘disabil!’ and ‘consumer protection’ and ‘online bank!’ or ‘bank website,’” which yielded 38 articles. I reviewed each. The only article discussing the risks of online banks excluded persons with disabilities. See Cheryl R. Lee, *Cyberbanking: A New Frontier for Discrimination*, 26 RUTGERS COMPUT. & TECH. L.J. 277, 277 n.3 (2000) (“This article will focus on one risk cyberbanking poses to the consuming public: the risk that lending institutions will not adhere to federal fair lending laws in their online transactions and discriminate against borrowers based upon their *race, gender or national origin.*”) (emphasis added).

³⁴ The National Telecommunications and Information Administration, which has tracked access to and use of internet by Americans across demographical differences, did not even begin considering use distinctions on the basis of disability until 2010. See *Digital Nation Data Explorer*, NAT’L TELECOMM. & INFO. ADMIN., <https://www.ntia.gov/data/digital-nation-data-explorer#sel=internetUser&demo=disability&pc=prop&disp=chart> (last visited Nov. 4, 2021) [*Hereinafter* “*Digital Nation Data*”].

³⁵ See *id.* (explaining that the inquiry into discrimination against persons with disabilities was unneeded because the only discrimination was disproportionate access to the internet).

has significantly expanded for Americans with disabilities.³⁶ The next Section presents the data showing a significant increase in internet access and use across varied device platforms for Americans with disabilities.

A. A Majority of People with Disabilities *Theoretically* Have Access to Online Banking Because They Have Access to the Internet

A majority of all Americans—including people with disabilities—now have regular internet access.³⁷ The most recent National Telecommunication and Information Administration (NTIA) survey reports that between 2009 and 2019, access to the internet (at any location) for people with disabilities grew by over 22 percent.³⁸ Over the past decade, residential internet access for people with disabilities grew by almost 20 percent.³⁹ In 2019, 64 percent of Americans with disabilities had access to the internet “at any location” and 60 percent could access the internet at home.⁴⁰

A 2021 Pew Research Center study found that 93% of U.S. adults say they use the internet.⁴¹ Though the study did not differentiate on the basis of disability, it does shed light on the “digital divide” across other demographic indicators that correlate positively with likelihood

³⁶ See Evelyn Remaley, *NTIA Data Reveal Shifts in Technology Use, Persistent Digital Divide*, NAT'L TELECOMM. & INFO. ADMIN. (June 10, 2020), <https://www.ntia.doc.gov/blog/2020/ntia-data-reveal-shifts-technology-use-persistent-digital-divide> (“The pace of growth in Internet use has been relatively stable over the past decade, increasing by 11 percentage points since 2009.”); see also *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#who-uses-the-internet> (illustrating growth in internet use by “age,” “race,” “gender,” “income,” “education,” and “community”) [*Hereinafter “Internet/Broadband Fact Sheet”*].

³⁷ Peter Blanck, *The Struggle for Web eQuality by Persons with Cognitive Disabilities*, 32 BEHAV. SCI. L. 4, 8 (2014) (“Since the year 2000, use of the web has increased more than five-fold globally. Web usage is expected to accelerate for those who have previously faced barriers to it, including those with disabilities.”).

³⁸ *Digital Nation Data Explorer*, NAT'L TELECOMM. & INFO. ADMIN., <https://www.ntia.gov/data/digital-nation-data-explorer#sel=internetUser&demo=disability&pc=prop&disp=chart> (last visited Feb. 10, 2021) (filtering for “Internet Use (Any Location),” “Disability Status,” and “Proportion,” the data demonstrates that 41.4% in 2009 and 63.8% in 2019) [*Hereinafter “Digital Nation Data”*].

³⁹ *Id.* (filtering for “Internet Use at Home,” “Disability Status,” and “Proportion”).

⁴⁰ *Id.*

⁴¹ *Digital Nation Data*, *supra* note 36.

of disability.⁴² For instance, even those in the lowest annual income group—less than \$30,000 for household—reported 86% use of the internet.⁴³ The demographic that accounted for the widest gap in internet use in the Pew study was education.⁴⁴ In 2019, respondents with less than a high school degree reported 71% internet use.⁴⁵ In 2021, when Pew combined respondents who completed high school with those who did not, that respondent group reported 86% internet use.⁴⁶ Internet use across race—divided by “White,” “Black,” and “Hispanic,”—differed by less than 5%.⁴⁷

People with disabilities have also gained access to the internet through expanded use of smartphones. While the latest NITA data still demonstrates a large digital divide in access to the web via apps,⁴⁸ more than half of persons with disabilities in the U.S. used smartphones in 2019.⁴⁹ Between 2011 and 2017, smartphone use by people with disabilities grew by 10% to 15% every two years.⁵⁰ Pew data from 2021 showed a 50% increase in American’s smartphone ownership between 2012 and 2021.⁵¹ In 2021, 85% of all Americans owned a smartphone.⁵² Again, the Pew study did not distinguish on the basis of disability, but it does offer insight into related demographic indicators. Gaps of almost 20% in smartphone use existed for those at the

⁴² Elizabeth A. Courtney-Long et. al., *Socioeconomic Factors at the Intersection of Race and Ethnicity Influencing Health Risks for People with Disabilities*, NAT’L INST. HEALTH (Apr. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5055843/>.

⁴³ *Digital Nation Data*, *supra* note 36. Unsurprisingly, however, those in the highest income bracket surveyed (\$75,000+) reported 99% use. *Id.*

⁴⁴ *Id.* (reviewing figure 2, “Who uses the internet” and “Education” tab).

⁴⁵ *Id.*

⁴⁶ *Id.* It is unclear why Pew chose to combine these data categories in 2021.

⁴⁷ Surprisingly, White respondents (93%) had slightly less access than Hispanic respondents (95%). *Digital Nation Data*, *supra* note 36 (reviewing figure 2, “Who uses the internet” and filtering by “Race” tab). Black respondents had the least access (91%). *Id.*

⁴⁸ In 2019, 78% of persons without disabilities used smartphones. *Id.* (filtering for “Smartphone Use,” “Disability Status,” and “Proportion”). Conversely, only 55% of people with disabilities used smartphones. *Id.*

⁴⁹ *Id.* (filtering for “Smartphone Use,” “Disability Status,” and “Proportion”).

⁵⁰ *Id.*

⁵¹ *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [Hereinafter “*Mobile Fact Sheet*”].

⁵² *Id.*

highest and lowest ends of the income and education spectrums reporting.⁵³ Respondents making less than \$30,000 in annual household income and those who had not attended college both reported around 75% smartphone ownership.⁵⁴ The group with the lowest percentage of smartphone ownership was those over the age of 65, of which only 61% own a smartphone.⁵⁵ Race was even less of a factor for smartphone use than internet access: smartphone ownership by race (reporting on “White,” “Black,” and “Hispanic”) varied by only 2%.⁵⁶

Though the “digital divide” persists, the gap is undeniably shrinking every year and a majority of people with disabilities have access to the internet at their homes and through smartphones. The recently expanded scope of internet access for people with disabilities increases the likelihood that consumers with disabilities could access online banking services.⁵⁷ Yet, despite theoretical access to banks online, many bank websites pose numerous barriers for consumers with disabilities.⁵⁸ These digital barriers likely contribute to the disparities in access to financial products that consumers with disabilities experience.

B. People with Disabilities Are Unlikely to Use Mainstream Financial Products

Despite expanded access to the internet, consumers with disabilities continue to experience exclusion from mainstream financial products. Specifically, people with disabilities are almost 20% less likely than people without disabilities to use “online financial services” such as “[b]anking, [i]nvesting, [and] [p]aying bills.”⁵⁹ Only 63% of people with disabilities have

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (reviewing “Who owns cellphones and smartphones”).

⁵⁷ *See supra* note 29 and accompanying text.

⁵⁸ *See infra* Part II.C–D (discussing empirical findings on bank website inaccessibility); *see also supra* note 11 and accompanying text.

⁵⁹ *See Digital Nation Data, supra* note 38 (filtering for “Using Online Financial Services (Banking, Investing, Paying Bills, etc.),” “Disability Status,” and “Proportion”).

credit cards, compared with 80% of persons without disabilities.⁶⁰ Consumers with disabilities are almost twice as likely to use non-bank borrowing methods (such as payday loans) than their peers without disabilities.⁶¹ Studies also note disparities in access to checking and savings accounts.⁶²

The most intuitive explanation for the disparity in use and access to mainstream financial products may be the relative poverty or unemployment that people with disabilities experience.⁶³ While relative poverty or unemployment may have some bearing on unbanked rates, researchers controlling for “income, education, employment status, race[,] and age,” found that at least “one-third of the gap in unbanked rates between households with and without disabilities is related to the disability.”⁶⁴ In fact, as income level increases, people with disabilities become *even less likely* than people without disabilities at the same income level to use mainstream banking

⁶⁰ See NAT’L DISABILITY INST., FINANCIAL CAPABILITY OF ADULTS WITH DISABILITIES: FINDINGS FROM THE NATIONAL FINANCIAL CAPABILITY STUDY 4, 40–41 (2017), <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/01/ndi-finra-report-2017.pdf> [hereinafter “FINANCIAL CAPABILITY OF ADULTS WITH DISABILITIES”].

⁶¹ See *id.* at 40 (finding that 42% of persons with disabilities use fringe lending options, as compared to only 25% of persons without disability); see also *id.* at 38 (“Respondents with disabilities are more likely to be unbanked, defined as having neither a checking nor a savings account (12 percent compared with 6 percent.)”); Annie Harper et. al., *Disabled, Poor, and Poorly Served: Access to and Use of Financial Services by People with Serious Mental Illness*, 92 SOC. SERV. R. 202, 210 (2018) (“People with disabilities are more likely than those without to lack access to bank credit, such as credit cards or a bank line of credit, and instead use high-cost credit from the alternative financial services sector such as car title lenders, payday lenders, refund anticipation loans, pawnshops, and rent-to-own stores.”).

⁶² See FINANCIAL CAPABILITY OF ADULTS WITH DISABILITIES, *supra* note 60, at 38 (“[T]hose with disabilities are less likely than others to have a checking account (84 percent compared with 91 percent) or a savings account (61 percent compared with 77 percent).”).

⁶³ Debra L. Brucker, *Variations in Poverty by Family Characteristics Among Working-Age Adults with Disabilities*, 69 INTERDISC. J. APPLIED FAM. SCI. 792, 792 (2020) (“In the United States, persons with disabilities face a substantially higher risk of living in poverty than persons without disabilities.”); Lazar, *supra* note 6, at 190 (“The employment rate is 51% for hearing impairments and 41.8% for visual impairments, with no nationally collected statistics reported for people with motor impairments that would impact their computer usage.”). Research shows that lack of access to mainstream bank and credit options can cause employment barriers and impact career prospects for persons with disabilities. See MICHAEL MORRIS & NANETTE GOODMAN, INTEGRATING FINANCIAL CAPABILITY AND ASSET BUILDING STRATEGIES INTO THE PUBLIC WORKFORCE DEVELOPMENT SYSTEM 6–7 (2015), http://leadcenter.org/system/files/resource/downloadable_version/integrating_fin_cap_asset_dev.pdf.

⁶⁴ Harper et. al., *supra* note 61, at 208; see also Fumiko Hayashi & Sabrina Minhas, *Who Are the Underbanked? Characteristics Beyond Income*, 103 ECON. R. 55, 60–62, 64–66 (2018) (showing that even when controlling for other variables such as education, race, citizenship, language, marital status, and internet access, disability status had a statistically significant effect on the likelihood that a person was unbanked or underbanked).

services.⁶⁵ This trend indicates that socioeconomic factors alone cannot explain the banking and credit disparity that consumers with disabilities experience. The next Part presents research indicating that accessibility barriers—particularly those experienced online—exclude consumers with disabilities from mainstream banks.

II. DISABILITY-RELATED BARRIERS TO BANKING: WEBSITE INACCESSIBILITY

Some may reasonably assume that decades of litigation, primarily asking whether the Americans with Disabilities Act (ADA) requires commercial websites to make “reasonable modifications” so that the websites’ content is accessible to people with disabilities,⁶⁶ would persuade many banks—at least the largest national banks—to voluntarily comply with accessibility guidelines.⁶⁷ That assumption is incorrect.⁶⁸ Before presenting empirical research on the pervasiveness of inaccessibility on bank websites, the next Section first explains what regulators and litigators mean when alleging that a website is inaccessible.

A. Defining Website (In)Accessibility

Some websites must already meet accessibility standards. In 1998, Congress amended the Rehabilitation Act, which prohibits the federal government from discriminating against people with disabilities.⁶⁹ The amendment added a provision requiring the government to provide

⁶⁵ NANETTE GOODMAN & MICHAEL MORRIS, BANKING STATUS AND FINANCIAL BEHAVIORS OF ADULTS WITH DISABILITIES 16 (2017), <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/11/ndi-banking-report-2019.pdf> (presenting data that indicates that “fully banked” disparities between people with disabilities and people without disabilities are most significant for individuals earning over \$50,000).

⁶⁶ See *infra* Part III.A (presenting the history of litigation and regulatory vacillation over the ADA’s applicability to web accessibility).

⁶⁷ See Wentz et. al., *supra* note 14, at 872 (describing multiple bank settlements that resulted in promises to comply with WCAG 2.0 Level AA accessibility standards); see also *Finance & Banking Web Accessibility Complaint Repository*, AUDIOEYE (July 30, 2016), <https://www.audioeye.com/post/finance-banking-website-accessibility-complaint-repository> (summarizing many web accessibility settlements with financial institutions over the past decade that required conformance with WCAG 2.0 AA accessibility standards).

⁶⁸ See *infra* Part II.C–D (presenting empirical findings on the scale of bank website inaccessibility).

⁶⁹ 29 U.S.C. § 794d(a)(1) (“When developing, procuring, maintaining, or using electronic and information technology [federal agencies] shall ensure . . . individuals with disabilities . . . have access to and use of information and data that is comparable to the access to and use [by] . . . individuals with[out] disabilities.”). *But see id.* (allowing an exception if the agency can show that compliance would cause an “undue burden”).

electronic information in an accessible format to people with disabilities.⁷⁰ The amendment also authorized the “Architectural and Transportation Barriers Compliance Board” to set standards for web accessibility.⁷¹ These standards, added to Section 508 of the Rehabilitation Act and referred to as the “§508 Standards,” are strictly limited to websites and electronic information that the federal government distributes.⁷²

Though no web accessibility standards are currently enforceable against commercial websites, regulators and interest groups have collaborated for more than two decades to publish voluntary accessibility standards. Voluntary, multinational standards govern multiple aspects of the internet.⁷³ In 1999, W3C® promulgated the first voluntary disability accessibility standards, the Web Content Accessibility Guidelines (WCAG).⁷⁴ Today, governments around the world rely on the WCAG standards to enforce web and digital accessibility.⁷⁵ The DOJ’s 2010 notice of proposed rulemaking included a request for comment for the WCAG 2.0 AA standard.⁷⁶

⁷⁰ See *Section 508 Report to the President and Congress*:

Accessibility of Federal Electronic and Information Technology, ADA.GOV (Sept. 2012), https://www.ada.gov/508/508_Report.htm#:~:text=And%2C%20in%201998%2C%20Congress%20amended,29%20U.S.C.

⁷¹ 29 U.S.C. § 794d(a)(2).

⁷² Joshua L. Friedman & Gary C. Norman, *The Norman/Friedman Principle: Equal Rights to Information and Technology Access*, 18 TEX. J. ON C.L. & C.R. 47, 63 (2012) (discussing the limited scope of the §508 Standards).

⁷³ For instance, the Internet Society creates website security policies, the Internet Corporation of Assigned Names and Numbers issues domain names, and the World Wide Web Consortium (W3C®) produces technical guidance for issues ranging from device privacy to technology internationalization. *W3C Mission*, WC3, <https://www.w3.org/Consortium/mission> (last visited Feb. 28, 2021).

⁷⁴ Marissa Sapega, *The History of Digital Accessibility and Why it Matters*, PACIELLO GRP. (Mar. 20, 2020), <https://www.paciellogroup.com/the-history-of-digital-accessibility-and-why-it-matters/>; see also *W3C Accessibility Standards Overview*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/standards-guidelines/> (last updated Jan. 6, 2021).

⁷⁵ See Lazar, *supra* note 6, at 187.

⁷⁶ See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43465 (proposed July 26, 2010). The WCAG released the updated “WCAG 2.1” Standard in 2018 and plans to release “WCAG 2.2” in 2021. See *Web Content Accessibility Guidelines (WCAG) Overview*, W3C, <https://www.w3.org/WAI/standards-guidelines/wcag/#versions> (last updated Oct. 17, 2020).

Litigants, agencies, and courts commonly reference the WCAG standards when illustrating or measuring website accessibility.⁷⁷

WCAG standards explain what makes “content” accessible to people with disabilities.⁷⁸ Content encompasses “text, images, sounds, code, [and] markup that defines [website] structure, presentation, etc.”⁷⁹ WCAG standards each have 12–13 guidelines that stem from four principles: (1) “Perceivable,” meaning that websites should present information in a way that is not reliant on a single sense or method of perception;⁸⁰ (2) “Operable,” meaning that users with dexterity impairments that make using a mouse impossible can navigate a site’s content;⁸¹ (3) “Understandable,” meaning that information is visible and understandable to a broad audience, including those who rely on text-to-speech technologies to read text aloud;⁸² and (4) “Robust,” meaning that people using assistive technologies can reliably interpret the content.⁸³

⁷⁷ See, e.g., *Domino’s Pizza, LLC*, 913 F.3d at 902–03; *id.* at 902 fn.1 (“WCAG 2.0 guidelines are private industry standards for website accessibility developed by technology and accessibility experts.”); see also *id.* (“[T]he Department of Justice has required ADA-covered entities to comply with WCAG 2.0 level AA (which incorporates level A) in many consent decrees and settlement agreements in which the United States has been a party.”).

⁷⁸ *Standards*, WC3, <https://www.w3.org/standards/> (last visited Feb. 28, 2021).

⁷⁹ *Web Content Accessibility Guidelines (WCAG) Overview*, W3C, <https://www.w3.org/WAI/standards-guidelines/wcag/#versions> (last updated Oct. 17, 2020).

⁸⁰ Guidelines related to this principle encourage text transcripts for audio content and alternative text describing photos, both of which are essential accommodations for users who rely on screen-reading technology. See *Accessibility Principles*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-principles/#standards> (last updated May 10, 2019). This principle also informs guidelines calling for strong color contrasts to assist users who are colorblind. See Lazar, *supra* note 6, at 187.

⁸¹ This principle relates to “keyboard accessibility,” which helps users relying on on-screen keyboards, switch devices, or speech recognition software to navigate websites with assistive technologies. See *Accessibility Principles*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-principles/#standards> (last updated May 10, 2019); see also Lazar, *supra* note 6, at 187 (explaining that this principle also seeks to discourage “flashing graphics that might cause seizures for users with epilepsy”).

⁸² See *Accessibility Principles*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-principles/#standards> (last updated May 10, 2019) (explaining that “this requirement helps software, including assistive technology, to process text content correctly”); see also Lazar, *supra* note 6, at 187 (explaining that “unusual idioms and jargon . . . may pose difficulty to users with cognitive or intellectual disabilities”).

⁸³ See *Accessibility Principles*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-principles/#standards> (last updated May 10, 2019).

Each WCAG standard has four testable “success criteria,” measured at three conformance levels: A, AA, and AAA.⁸⁴ For my empirical research, outlined below, I measured compliance with “WCAG 2.0 AA.” I reviewed level AA because it is the conformance level often required in DOJ settlements and is the level that the DOJ referenced in its since-withdrawn 2010 notice of proposed rulemaking for web accessibility.⁸⁵

Until recently,⁸⁶ scholars for web accessibility have not made policy recommendations regarding the types of websites that regulators and lawmakers should target for implementing web accessibility guidelines.⁸⁷ Perhaps consequentially, the most recent legislative effort to address web accessibility through ADA amendments—The Online Accessibility Act—also fails to clarify which types of websites would fall under the ADA’s “public accommodation” accessibility mandate.⁸⁸ Thus, most academic and legal discussion around accessibility relates to a website’s content requirements rather than to the type or category of the website.⁸⁹

⁸⁴ See *Web Content Accessibility Guidelines (WCAG) Overview*, W3C, <https://www.w3.org/WAI/standards-guidelines/wcag/#versions> (last updated Oct. 17, 2020).

⁸⁵ See *supra* notes 67, 77; see also *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43465 (proposed July 26, 2010). Level AA incorporates all criteria for level A. See *Understanding Conformance*, W3C, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html> (last updated Feb. 28, 2021).

⁸⁶ John Inazu and Johanna Smith have proposed guidelines based on website type, as well as other guidance for policymakers, in their forthcoming article *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*. See *supra* note 15, at 53–55. Inazu and Smith’s framework would generally apply ADA-based accessibility requirements to websites in these groups: (1) design service websites—“like WordPress and Squarespace,” (2) communication platforms—“like Facebook or Twitter,” and (3) online mediators—like websites that connect “buyers with sellers, employers with job seekers, service providers with service users, and relationship seekers with one another.” *Id.* at 24–25, 53–54.

⁸⁷ See *id.* at 5 (calling Bradley & Stein, *supra* note 15, “[t]he most significant theoretical development” for an ADA-based normative and statutory approach to web accessibility but criticizing the publication because it “left open important details about how and where the ADA should apply online, arguing instead that ‘the internet’ as a whole [is] a place of public accommodation”)

⁸⁸ See generally 116 H.R. 8478 (Oct. 1, 2020) at proposed Sec. 601(a), 601(b)(2), and 601(c)(3); see also Inazu & Smith, *supra* note 15, at 45 (discussing the bill’s weaknesses).

⁸⁹ But see Inazu & Smith, *supra* note 15, at 53–60.

B. How People with Disabilities Navigate the Web

Even though no laws or regulations currently require commercially operated websites in the United States to conform to web accessibility standards, people with disabilities are able to navigate some voluntarily compliant websites with the help of assistive technologies. For instance, people with motor and dexterity impairments can use speech recognition, eye tracking, or alternative input devices (like wands, alternative keyboards, or joysticks) to navigate websites without using a standard keyboard and mouse.⁹⁰ People with visual impairments can use screen reading technologies—which transmit website text into Braille, audio, or large print—to perceive text on websites.⁹¹ For people with hearing impairments, closed captioning tools make videos more accessible.⁹² Unless a website happens to voluntarily comply with the appropriate WCAG standards, however, assistive technologies are useless.

To illustrate the effect of incompatible content design on these assistive technologies, consider the following example of a university website infographic describing COVID-19 safety protocols with alternative text: “image with mask icon stating that masks must be worn at all times; image with stick figures stating that people must stay six feet apart; and image with thermometer stating that temperatures must be taken daily and reported if they rise above 100.4 degrees.”⁹³ Without alternative text, a website’s artificial intelligence technology “might describe

⁹⁰ *Id.* at 17; *see also*, Access Computing, *How Can People with Mobility Impairments Operate Computers?*, UNIV. WASH., <https://www.washington.edu/accesscomputing/resources/accommodations/activity-type/assistive-technology> (last visited Sept. 23, 2021); Access Computing, *What Alternative Pointing Systems are Available for Someone who Cannot use a Mouse?*, UNIV. WASH., <https://www.washington.edu/accesscomputing/what-alternative-pointing-systems-are-available-someone-who-cannot-use-mouse> (last visited Sept. 23, 2021).

⁹¹ Inazu & Smith, *supra* note 15, at 17; *see also*, Access Computing, *Assistive Technology*, UNIV. WASH., <https://www.washington.edu/accesscomputing/resources/accommodations/activity-type/assistive-technology> (last visited Sept. 23, 2021).

⁹² *Id.*

⁹³ *Id.* at 18 (citation omitted).

the image as, ‘mask, stick figures, thermometer.’”⁹⁴ As Areheart explains, websites without accessible design may inhibit users of alternative keyboards from navigating websites:

A quadriplegic will have limited or no manual dexterity and be unable to use a mouse. She may instead use a mouth stick to type in keyboard commands. Or she might use voice-recognition technology to navigate through the links on a given page. Many websites, however, are not constructed to allow users to tab through the links on a webpage or to otherwise support keyboard alternatives in lieu of a mouse. The links for traversing the site may also be too small or unduly cluttered.⁹⁵

Trying to navigate an inaccessible website with assistive technology tools is like trying to take a stroller—designed for smooth, urban sidewalks—on a rugged, off-trail, mountain hike. The vehicle is only successful if terrain is built for it; likewise, assistive technologies only help users when a website is accessible.

C. The Limited Data on Bank Website Accessibility: Bank Homepages

In 2021, the Consumer Financial Protection Bureau called for research on the scale of discrimination that consumers with disabilities face.⁹⁶ At the time, only one piece of scholarship explored the harm that inaccessible websites pose to consumers to disabilities. In 2019, Wentz et. al., a research team of five software engineers and computer scientists, conducted the first empirical accessibility review of US bank and financial institution websites.⁹⁷ The researchers checked for compliance with the WCAG 2.0 A and AA accessibility standards.⁹⁸ That study reviewed the website homepages of the largest 100 financial institutions in the United States,

⁹⁴ *Id.* at 18 (citation omitted); *see also* Areheart & Stein, *supra* note 15, at 463–64 (illustrating other ways that inaccessible websites pose barriers to users of screen reading technologies).

⁹⁵ Areheart & Stein, *supra* note 15, at 464 (citations omitted).

⁹⁶ *See* CONSUMER FIN. PROT. BUREAU, TASKFORCE ON FEDERAL CONSUMER FINANCIAL REPORT VOLUME II 60–61 (2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf.

⁹⁷ Wentz et. al., *supra* note 14, at 872.

⁹⁸ *Id.*

adjusted to account for at least one bank in every state.⁹⁹ The sample primarily (but not exclusively) consisted of domestic banks.¹⁰⁰

The Wentz et. al. study results indicated that most bank homepages, even banks involved in settlements requiring compliance with WCAG standards, grossly failed to comply with both sets of accessibility standards.¹⁰¹ The data gathering methodology relied solely on human assessors to review the sites and report violations.¹⁰² This study—though limited in its focus—provides a foundation for the argument that bank website inaccessibility is a significant problem.

My study, outlined below, adds to this very limited foundation for three reasons. First, a comprehensive case that bank websites exclude people with disabilities requires both subjective, human findings and multiple, objective machine-automated reports.¹⁰³ Second, the regulators considering whether disability-based discrimination in consumer spheres warrants amendments to antidiscrimination consumer laws cannot rely on only one study.¹⁰⁴ Third, barriers on a bank’s homepage do not directly indicate that the bank’s site interferes with consumers’ access to credit in a way that implicates consumer protection law.¹⁰⁵ Specifically, the Wentz et. al. study did not review the accessibility of webpages offering customers credit cards or home mortgages.¹⁰⁶ The

⁹⁹ *Id.* at 872–73 (explaining the way that the researchers chose the representative sample).

¹⁰⁰ The study included a review of some non-bank financial websites, such as Google Finance and Fool. *Id.* at 879 (listing the institutions included in the study).

¹⁰¹ *Id.*

¹⁰² *Id.* at 873. The researchers preferred to use human testers over automated testers because automated tools sometimes produce widely varied reports. *See id.* (citing Vigo et. al., *Benchmarking Web Accessibility Tools: Measuring the Harm of Sole Reliance on Automated Tests 1* (May 2013), in *PROCS. 10TH INT’L CROSS-DISCIPLINARY CONF. ON WEB ACCESSIBILITY. But see* Vahid Garousi, *Exploring the Industry’s Challenges in Software Testing: An Empirical Study*, 35 *J. SOFTW. EVAL. PROC.* 1, 11 (explaining that there is a “wide spectrum” of human tester expertise and that human testers are unable to correct subjective biases in software review).

¹⁰³ *See* Vigo et. al., *supra* note 102, at 9 (recommending that researchers who rely on automated tools to test web accessibility use multiple tools).

¹⁰⁴ *See infra* Part IV.B.ii (discussing the Consumer Financial Protection Bureau’s call for more research documenting the scope of discrimination experienced by consumers with disabilities in access to credit in order to decide whether to advise Congress to amend the Equal Credit Opportunity Act to add disability as a protected class).

¹⁰⁵ *See infra* Part IV.A (explaining the relationship between web accessibility and consumer protection laws that aim to ensure fair, equal, and informed access to credit).

¹⁰⁶ *See* Wentz et. al., *supra* note 14, at 873 (explaining that evaluators reviewed the “home page” for all 100 websites). In Part IV, I posit that the credit card page could come under the reach of the Truth in Lending Act, the

next Section explains my study and findings on bank website inaccessibility, which used accessibility testing tools to objectively review and code accessibility errors of bank webpages offering credit cards and home mortgages.

D. New Data on Bank Website Accessibility: Credit Cards & Mortgages

To generate the list of bank sites reviewed for my study, I downloaded the most recent quarterly financial report for all FDIC-insured financial institutions.¹⁰⁷ From that data, I selected the report organized by “Assets and Liabilities” so that I could filter by total assets.¹⁰⁸ Total assets is the most commonly used indicator of a bank’s overall size and influence.¹⁰⁹ From the list of 5,011 FDIC-insured institutions, I selected a test sample of the ten largest¹¹⁰ domestic banks by total assets.

To test the websites for compliance, I ran each page through multiple automated web accessibility tools and averaged the results. A 2020 study comparing the performance of six frequently used and free accessibility evaluation tools informed my selection of tools.¹¹¹ From the six tools in that study, I removed those that did not allow me to limit the compliance review

Dodd-Frank Act, or a revised Equal Credit Opportunity Act. *See infra* Part IV.B.ii. A bank’s inaccessible home mortgage page may trigger Fair Housing Act protections. *See infra* Part IV.B.i.

¹⁰⁷ To retrieve this data, I followed this path: FDIC.gov, click on the “industry analysis” tab, select “Bank Data & Statistics,” choose “Download all SDI Data,” click “Quarterly Financial Data SDI,” and, finally, select the latest monthly report. At the time I gathered the data, the latest monthly report was December 2020.

¹⁰⁸ The Wentz et. al. study selected banks based on total assets, deposits, and branch locations. Wentz. et. al., *supra* note 14, at 873. I chose banks by total assets only.

¹⁰⁹ Jan Schildbach, *Large or Small? How to Measure Bank Size*, EU MONITOR 7 (Apr. 25, 2017), https://www.dbresearch.com/PROD/RPS_EN-PROD/Region/REGION.alias (choose “Europe” from icons; then search in the search bar for “large or small”; click on the title “Large or small? How to measure bank size”; then click on the blue “PDF 796k” text box) (“[T]otal assets remain an indicator that central bankers and financial supervisors are very much in [favor] of.”).

¹¹⁰ For my study of credit card offerings, my final list comprised of ten of the eleven largest banks because at least one of the compatibility testing services could not read the page for PNC Bank. For my study of home mortgage offerings pages, my final list comprised of ten of the thirteen largest banks because TAW and CynthiaSays were both unable to run scans on these banks: PNC Bank, TD Bank, and Capital One. The final list of institutions drew from banks headquartered in eleven states: NE, MO, IL, UT, KS, IN, NC, SD, OH, DE, and NY. Further research should expand the sample to include a representative institution from every state. Total assets spanned from approximately three billion to two hundred million.

¹¹¹ *See* Marian Padure & Costin Pribeanu, *Comparing Six Free Accessibility Evaluation Tools*, 24 INFORMATICA ECONOMICA [INFO. ECON.] 1, 15 (2020).

to a specific version of WCAG standards and those that did not give results at a WCAG-guideline level.¹¹² That left three tools for my study: ACchecker, CynthiaSays,¹¹³ and TAW.¹¹⁴ For each financial institution’s website, I tested pages describing credit card offerings and home mortgage loans for compliance with WCAG 2.0 AA standards. For each page reviewed, I documented the average number of errors by each of the four categories that the three tools reported.

Table 1 shows errors in each accessibility guideline category for every bank credit card page. Notably, seventy percent of the banks had more than ten errors in the “Perceivable” category. Half of the banks had more than five errors in the “Operable” category.

Table 1 – Credit Card Offerings Page Compliance with WCAG 2.0 AA

Largest Banks by Assets	Guideline 1 Perceivable	Guideline 2 Operable	Guideline 3 Understandable	Guideline 4 Robust
Bank # 1	13	4	3	1
Bank # 2	13	7	4	106
Bank # 3	18	4	3	52
Bank # 4	14	4	5	2
Bank # 5	58	4	20	16
Bank # 6	6	4	3	4
Bank # 7	18	5	8	9
Bank # 8	12	6	5	8
Bank # 9	5	9	3	153
Bank # 10	7	5	4	6

¹¹² Two other free accessibility checker cites, Total Validator and WAVE do not provide guideline-level reports. See *Wave Web Accessibility Evaluation Tool*, WAVE, <https://wave.webaim.org/> (last visited Mar. 23, 2021); *Test Your Website Today with Total Validator*, TOTAL VALIDATOR, <https://www.totalvalidator.com/> (last visited Mar. 23, 2021). Mauve meets the criteria described above, but it is not part of the study because it frequently crashed while attempting to run reports. See MAUVE, <https://mauve.isti.cnr.it/singleValidation.jsp> (last visited Mar. 23, 2021).

¹¹³ CynthiaSays gives compliance reports at various degrees of specificity, but it does not display errors in a summary form. For efficiency, I recorded the total number of violated criteria, which means that the overall number of errors is higher than the numbers reported here.

¹¹⁴ See *Web Accessibility Checker*, ACHECKER, <https://achecker.ca/checker/index.php> (last visited Mar. 23, 2021); *Free WCAG 2.0 and Section 508 Web Accessibility Scans*, CYNTHIASAYS, <http://www.cynthiasays.com/> (last visited Mar. 23, 2021); *Web Accessibility Test*, TAW, <https://www.tawdis.net/> (last visited Mar. 23, 2021).

The degree of noncompliance errors in the “Perceivable” and “Operable” categories are particularly concerning. The “Robust” and “Understandable” categories represent content requirements that are relatively subjective and concerned with cognitive disabilities, which are difficult to address with any adaptive technology tools.¹¹⁵ Conversely, the “Perceivable” and “Operable” categories have direct and serious consequences for users with visual or dexterity impairments, which are relatively objective.¹¹⁶ The objective nature of these categories makes compliance with them a more feasible starting point for implementing web accessibility guidelines and should make them easier for websites to protect against.

The most basic requirement in the “Perceivable” category is that a webpage provide text alternatives for non-text content.¹¹⁷ Information conveyed in images on these error-ridden pages is likely hidden from consumers with visual impairments who rely on screen-reading technology.¹¹⁸ Pages that are not “Operable” pose barriers to those with mobility impairments who may rely on keyboard-only navigation.¹¹⁹

Table 2 reveals that similar barriers exist on pages advertising home mortgage products and services. The pervasiveness of errors for these banks, some of which were involved in previous ADA settlement negotiations requiring compliance with WCAG 2.0 AA standards,¹²⁰

¹¹⁵ See *Introduction to Understanding WCAG 2.0*, WCAG, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html> (last visited Apr. 21, 2021).

¹¹⁶ See *id.*

¹¹⁷ *Text Alternatives, Understanding Guideline 1.1*, WC3, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/text-equiv.html> (last visited Mar. 27, 2021).

¹¹⁸ *Id.* (explaining that the aim of guideline 1.1 is to “provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language”); see also *supra* Part II.C (explaining how screen-readers make accessing virtual content possible).

¹¹⁹ See *Web Content Accessibility Guidelines (WCAG) 2.0*, WC3 (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/> (explaining the “operable” guideline); see also *supra* Part II.C

¹²⁰ Wells Fargo, one of the banks reviewed in this study, settled a suit against the DOJ alleging ADA violations more than *twenty years ago*, part of which included an assurance by Wells Fargo that it would “ensure that its . . . websites are accessible to individuals with disabilities. See *Settlement Agreement Between the United States of America and Wells Fargo & Company Under the Americans with Disabilities Act DJ # 202-11-239*, U.S. DEPT. JUST. C.R. DIV., https://www.ada.gov/enforce_current.htm (last updated August 2, 2012).

indicates that banks are unlikely to opt to self-regulate or change behavior because of the threat of (or reaction to) ADA lawsuits.

Table 2 – Home Mortgage Page Compliance with WCAG 2.0 AA

Largest Banks by Assets	Guideline 1 Perceivable	Guideline 2 Operable	Guideline 3 Understandable	Guideline 4 Robust
Bank # 1	9	5	4	1
Bank # 2	30	6	10	38
Bank # 3	7	4	3	6
Bank # 4	11	4	4	1
Bank # 5	13	7	4	8
Bank # 6	7	5	3	42
Bank # 7	12	5	5	5
Bank # 8	15	11	4	3
Bank # 9	20	7	10	17
Bank # 10	5	5	4	1

The scale of noncompliance documented in the Wentz et. al. study and corroborated by my research should concern both disability-rights advocates and banks, which are already facing uncertain ADA litigation.¹²¹ As discussed below, the inaccessibility on these particular pages likely exposes banks to consumer protection claims regardless of how the contentious question of whether the ADA mandates their accessibility is resolved in the courts.¹²²

¹²¹ In 2019, the Supreme Court denied certiorari—declining to weigh in—on the question of web accessibility under the ADA presented in the Ninth Circuit case *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019). *Orders of the Court – Term Year 2019*, SCOTUS, <https://www.supremecourt.gov/orders/ordersofthecourt/19> (select Order List corresponding to “10/07/19”). In *Dominos*, the Ninth Circuit found that a pizza chain’s website was clearly a “place of public accommodation” to which people with disabilities were entitled to “full and equal enjoyment” under the ADA. *Id.* at 904. The Ninth Circuit relied in part upon the DOJ’s position that “repeatedly affirmed” that “Title III [applied] to Web sites of public accommodations.” *Id.* at 906 (citing a notice of proposed rulemaking from 2010, which the DOJ rescinded in 2017, noting that it now questioned whether regulating web accessibility was “necessary” or “appropriate”); see also *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60932, 60932 (published Dec. 26, 2017) (emphasis added).

¹²² See *supra* Section IV.

The next Part explores why the ADA may never solve this problem and the normative considerations of turning to consumer law for limited, targeted implementation of web accessibility guidelines to bank websites.

III. HOPE DEFERRED & THE AMERICANS WITH DISABILITIES ACT (ADA)

Because scholars have traditionally argued that the Americans with Disabilities Act (ADA) provides the only needed legal basis for web accessibility, it is worthwhile to pause to consider why it is practically and normatively worth looking outside the ADA-box before proposing consumer law as a desirable alternative.

The ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹²³ Congress passed the ADA in 1990.¹²⁴ At that time, neither lawmakers nor the general public understood how the internet would transform commerce, communication, and access to the "full and equal enjoyment"¹²⁵ of modern life.¹²⁶ The ADA prohibits discrimination against people with disabilities by an employer (Title I), by the federal government (Title II), and by "place[s] of public accommodation" (Title III).¹²⁷

Under Title III, the Department of Justice (DOJ) can bring an agency enforcement action against inaccessible public accommodations, but "private enforcement suits are the primary

¹²³ Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327, 329 (1990) (codified as amended in 42 U.S.C. § 12101(b)(1) (2012)) (stating the ADA's purpose).

¹²⁴ 42 U.S.C. §§ 12101-12213.

¹²⁵ *Id.* § 12182(a) ("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.");

¹²⁶ *See Reid, supra note* , at 595 ("[The] ADA's inception in a pre-Internet society, where the goal of an accessible world necessarily took root in physical places."); *see also Areheart & Stein, supra note 29*, at 468 ("At the time the ADA was enacted, Congress could not have anticipated the role the Internet would play in society within the next decade."); *Friedman & Norman, supra note 72*, at 62 (explaining the internet's "robust expansion" soon after Congress passed the ADA).

¹²⁷ *See* 42 U.S.C. § 12182 ("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.")

method of obtaining compliance with the [ADA].”¹²⁸ Stating a claim under Title III requires that a plaintiff show:

(1) that she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against her by denying her a full and equal opportunity to enjoy the services defendants provide.¹²⁹

The first Section below describes the history of the fight to apply the ADA to commercial websites. The second Section addresses the normative considerations of looking beyond the ADA to consumer law for relief from web inaccessibility.

A. The Reason that the ADA is Unlikely to Make the Web Accessible (Soon)

Plaintiffs bringing a Title III discrimination claim against a public entity for its inaccessible website must convince the court that the website fits within the scope of a Title III “place of public accommodation.”¹³⁰ Title III features a non-exclusive list of spaces that the statute clearly covers.¹³¹ The list includes banks; it does not include websites.¹³² The Supreme Court has directed courts to construe Title III’s list “liberally.”¹³³

Circuit courts are split regarding whether and when commercial websites are a “public accommodation” under Title III. The Ninth, Sixth, and Third Circuits either limit “place of public accommodation” to physical places or require a strong “nexus” between a physical place

¹²⁸ *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 871 (9th Cir. 2017) (citing *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011)).

¹²⁹ *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008) (citing 42 U.S.C. § 12182(a)).

¹³⁰ *See, e.g., Jones v. Lanier Fed. Credit Union*, 335 F. Supp. 3d. 1273, 1277–78 (N.D. Ga. 2018) (discussing 42 U.S.C. § 12182(a)).

¹³¹ 42 U.S.C. § 12181(7) (including banks as places of public accommodation); *see also* *PGA Tour v. Martin*, 532 U.S. 661 (2001) (holding that the list in §12181(7) is not exclusive for determining Title III’s coverage).

¹³² *See* 42 U.S.C. §12181(7).

¹³³ *PGA Tour*, 532 U.S. at 662 (“The phrase ‘public accommodation’ is defined in terms of 12 extensive categories, § 12181(7), which the legislative history indicates should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled.”).

and the goods or services provided through a website.¹³⁴ These decisions seem to rely on the physical nature of the non-exclusive list of “public accommodations” enumerated in the statute.¹³⁵ On the other end of the spectrum, courts in the Seventh, Second, and First Circuits extend Title III protections to all websites, rejecting the need to require a “nexus” between a physical location and the website.¹³⁶ Decisions in these circuits emphasize Congress’s intent that the ADA adapt to technological changes, address informational disparities, and provide individuals with disabilities full enjoyment of the goods or services available to the general public.¹³⁷ Courts in other circuits lack consistency.¹³⁸

In the context of access to credit, courts following the “nexus” rule have required plaintiffs to plead that an inaccessible website deterred them from visiting a physical location,

¹³⁴ See, e.g., *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904–06 (9th Cir. 2019) (finding that a Domino’s website and app were “public accommodations” under the ADA because their inaccessibility impeded access to the goods and services offered by the physical restaurant); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3rd Cir. 1998) (holding that the phrase “public accommodation” unambiguously refers only to physical access); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (holding that a place of public accommodation is synonymous to a physical place).

¹³⁵ See, e.g., *Parker*, 121 F.3d at 1014 (“Every term listed in § 12181(7) and subsection (F) is a physical place open to public access.”).

¹³⁶ See, e.g., *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (citations omitted) (“An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store . . . [t]he site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services.”); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 199–201 (D. Mass. 2012) (holding that Netflix’s website, offering on-demand streaming service, is a place of public accommodation even if accessed exclusively at home because “[t]he ADA covers services ‘of’ a public accommodation, not services ‘at’ or ‘in’ a public accommodation”); *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 567, 576 (D. Vt. 2015) (finding that a website that houses a digital library is a public accommodation and that “excluding businesses that sell services through the Internet from the ADA would ‘run afoul of the purposes of the ADA’”) (quoting *Netflix*, 869 F. Supp. 2d at 200).

¹³⁷ See, e.g., *Scribd Inc.*, 97 F. Supp. 3d at 574 (“[T]he ADA’s legislative history indicates that] an important area of concern is information exchange.”); *Netflix, Inc.*, 869 F. Supp. 2d at 200 (“In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would . . . severely frustrate Congress’s intent that individuals with disabilities fully enjoy [all available] goods, services, privileges and advantages.”) (quoting *Carparts Distrib. Ctr. v. Auto. Wholesaler’s Assoc.*, 37 F.3d 12, 19 (1st Cir. 1994)).

¹³⁸ The Eleventh Circuit—for instance—has not clearly adopted a “nexus” approach, but it held in a recent unpublished opinion that a blind consumer whose screen reading software was incompatible with a Dunkin’ Donuts website could state a plausible claim for relief under the ADA. See *Haynes v. Dunkin’ Donuts, LLC*, 741 Fed. Appx. 752, 753–54 (11th Cir. 2018). Lower courts in the Eleventh Circuit have consistently refused to apply the ADA to a website unless the site is tethered to a physical location. See *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1320 (S.D. Fla. 2017) (citing examples).

despite that a bank’s website may offer full services online to those able to access them.¹³⁹ In 2019, the Supreme Court denied certiorari on the question of whether websites and digital applications are places of public accommodation under the ADA.¹⁴⁰ In the midst of judicial uncertainty, some banks have opted to settle with ADA plaintiffs, promising to follow web accessibility guidelines before the courts can weigh in.¹⁴¹

The 2008 ADA Amendments (ADAA) Act gave Congress the chance to update Title III and provide clear guidance to the courts.¹⁴² In response to judicial narrowing of ADA protection, Congress passed the ADAA to ease the threshold burden for showing a disability by expanding the definition of “substantially limit[ing] in a major life activity” and clarifying that a person’s ability to mitigate the effect of his or her disability has no bearing on whether the ADA protections extend to cover that person on the basis of his or her disability. Despite significant pressure and public discourse on the topic of web accessibility, Congress declined to extend the meaning of a “place of public accommodation” to websites in 2008.¹⁴³

¹³⁹ See *Jones v. Ft. McPherson Credit Union*, 347 F. Supp. 3d 1351, 1354–55 (N.D. Ga. 2018); *Lanier Fed. Credit Union*, 335 F. Supp. 3d. at 1278; *Gniewkowski v. Lettuce Entertain You Enters., Inc*, 251 F. Supp. 3d 908 (W.D. Pa. 2017) (“[T]his website impediment purportedly has had a negative impact on [the consumers with disabilities’] ability to frequent [the bank’s] brick and mortar locations.”).

¹⁴⁰ The Supreme Court faced the question on appeal from Domino’s Pizza in the case *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019). *Orders of the Court – Term Year 2019*, SCOTUS, <https://www.supremecourt.gov/orders/ordersofthecourt/19> (select Order List corresponding to “10/07/19”). In *Dominos*, the Ninth Circuit found that a pizza chain’s website was clearly a “place of public accommodation” to which people with disabilities were entitled to “full and equal enjoyment” under the ADA. *Id.* at 904. The Ninth Circuit relied in part upon the DOJ’s position that “repeatedly affirmed” that “Title III [applied] to Web sites of public accommodations.” *Id.* at 906 (citing a notice of proposed rulemaking from 2010, which the DOJ rescinded in 2017, noting that it now questioned whether regulating web accessibility was “necessary” or “appropriate”); see also *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60932, 60932 (published Dec. 26, 2017) (emphasis added).

¹⁴¹ See *Wentz et. al.*, *supra* note 14, at 872 (describing settlements involving Santander Bank (f/k/a Sovereign Bank), HSBC, and Charles Schwab, which each resulted in promises to comply with WCAG 2.0 Level AA accessibility standards).

¹⁴² See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

¹⁴³ *Areheart & Stein*, *supra* note 29, at 469 (“It is . . . surprising that the ADA Amendments Act of 2008 did not address Internet accessibility under Title III, because the question had by that time been raised in multiple forums.”).

The DOJ, the agency charged with enforcing the ADA, has also failed to clarify whether it believes that Title III applies to online spaces. In 2010, the DOJ published an advanced notice of proposed rulemaking to “establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the internet . . . accessible to individuals with disabilities.”¹⁴⁴ In 2017, the Department withdrew the notice, stating that it was “evaluating whether promulgating regulations about the accessibility of web information and services is *necessary and appropriate*.”¹⁴⁵ Since 2017, the DOJ has not published any proposed regulations related to web accessibility.¹⁴⁶

Though some likely hoped a Democratic administration would reignite the DOJ’s interest in extending ADA protections to websites, after nearly a year in office, the Biden Administration has not even revived the conversation around web accessibility.¹⁴⁷ The past decade of vacillation and inaction does not inspire much hope for change by agency action. Moreover, it seems unlikely that the DOJ would receive judicial deference even if it interpreted “place[s] of public accommodation[s]” to include websites because Congress declined to extend the ADA to online

¹⁴⁴ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43460 (proposed July 26, 2010).

¹⁴⁵ Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932, 60932 (published Dec. 26, 2017) (emphasis added); Reid, *supra* note 11, at 600–01 (“[The] 2010 DOJ rulemaking to implement Title III website regulations languished and then was formally withdrawn in 2017 . . .”).

¹⁴⁶ On March 20, 2021, I used the Federal Register’s advanced search function to verify this statement. *See Advanced Document Search*, FED. REG., <https://www.federalregister.gov/documents/search#advanced> (last visited Mar. 20, 2021). I filtered “publication date” from “12/27/2017” to “03/20/2021,” limited the “Affected CFR Part” to 28 C.F.R. 36, identified “Department of Justice” as the implementing agency, and selected “Rule,” “Proposed Rule,” or “Notice” for the “Type.” Then, I searched “disability.” The search rendered a single, unrelated document: “Civil Monetary Penalties Inflation Adjustment.”

¹⁴⁷ On September 27, 2021, I used the Federal Register’s advanced search function to verify this statement. *See Advanced Document Search*, FED. REG., <https://www.federalregister.gov/documents/search#advanced> (last visited Sept. 27, 2021). I filtered “publication date” from “12/27/2017” to “09/27/2021,” identified “Department of Justice” as the implementing agency, and selected “Rule,” “Proposed Rule,” or “Notice” for the “Type,” and searched “disability” and “internet.” The search rendered no results.

“places” in the ADAA, making it difficult to argue that Congress meant for the Act’s protection to extend that far.

Until recently,¹⁴⁸ scholars for web accessibility have not made policy recommendations regarding the types of websites that regulators and lawmakers should target for implementing web accessibility guidelines.¹⁴⁹ Perhaps consequentially, the most recent legislative effort to address web accessibility through ADA amendments—The Online Accessibility Act—also fails to clarify which types of websites would fall under the ADA’s “public accommodation” accessibility mandate.¹⁵⁰ Thus, most academic and legal discussion around accessibility relates to a website’s content requirements rather than to the type or category of the website.¹⁵¹ The resultant ambiguity leaves it to lawmakers and regulators to the thorny task of sorting out “the web” into categories that warrant regulation and categories that may warrant exceptions from regulatory burden and oversight.

John Inazu and Johanna Smith are the first to propose guidelines for ADA application based on website type, as well as other guidance for policymakers, in their forthcoming article *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*. Inazu and Smith’s framework would generally apply ADA “public accommodation” accessibility requirements to websites in these groups: (1) design service websites—“like WordPress and Squarespace,” (2) communication platforms—“like Facebook or Twitter,” and (3) online mediators—like websites that connect “buyers with sellers, employers with job seekers, service

¹⁴⁸ See *supra* note 15, at 53–55.

¹⁴⁹ See *id.* at 5 (calling Bradley & Stein, *supra* note 15, “[t]he most significant theoretical development” for an ADA-based normative and statutory approach to web accessibility but criticizing the publication because it “left open important details about how and where the ADA should apply online, arguing instead that ‘the internet’ as a whole [is] a place of public accommodation”)

¹⁵⁰ See generally 116 H.R. 8478 (Oct. 1, 2020) at proposed Sec. 601(a), 601(b)(2), and 601(c)(3); see also Inazu & Smith, *supra* note 15, at 45 (discussing the bill’s weaknesses).

¹⁵¹ But see Inazu & Smith, *supra* note 15, at 53–60.

providers with service users, and relationship seekers with one another.”¹⁵² The authors explain how these online spaces track most closely to those physical spaces that require access under the ADA and First Amendment.¹⁵³ Though a promising step forward in the academic discourse, this framework will still require significant political will to combat the wide range of stakeholders that would be affected by such broad-reaching regulation. While this article supports the proposal made by Inazu and Smith, it posits that regulating major bank websites through consumer protection laws is a desirable first step for legislators and regulators to gain public and industry support through narrow, tailored regulatory focus before imposing broad, sweeping accessibility regulations online.

Because courts, regulators, and Congress are reluctant to categorically extend the ADA’s Title III mandate to all commercial websites, advocates must consider alternative legal strategies to achieve incremental web accessibility. The next Part proposes one promising alternative: consumer law. First, the Section below analyzes the normative benefits and tradeoffs between “targeted” antidiscrimination law, like the ADA, and “universalist” consumer laws, like the Truth in Lending Act (TILA).

B. The Normative and Practical Tradeoffs Between the ADA and Consumer Protection Law as Mechanisms to Achieve Web Accessibility

In her article, *Consumer Remedies for Civil Rights*, Kate Sablosky Elengold argues that consumer law is sometimes a welcome alternative to antidiscrimination law for combatting economic subordination.¹⁵⁴ Some consumer laws are normatively complicated supplements to

¹⁵² *Id.* at 24–25, 53–54.

¹⁵³ *Id.* at 27.

¹⁵⁴ See Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587, 591 (2019) (“[The Essay] argues . . . that a consumer protection claim is a viable avenue to remedying certain forms of discrimination commonly considered under traditional antidiscrimination law . . . [and] that such an approach has fewer hurdles to clear and a higher likelihood of success than a traditional civil rights claim.”).

antidiscrimination law because they are “universalist approach[es] to remedying discrimination.”¹⁵⁵ Universalist approaches provide relief to all persons without considering class membership or identity.¹⁵⁶ Some scholars criticize this disregard to class status as “a post racial, colorblind perception.”¹⁵⁷

Antidiscrimination law seems like the obvious tool for enacting antisubordination protections in the marketplace.¹⁵⁸ But the shrinking scope of economic antidiscrimination protections,¹⁵⁹ as well as the Supreme Court’s shift away from a robust antidiscrimination jurisprudence,¹⁶⁰ justifies creative extensions of universalist consumer law to complement traditional antidiscrimination protections.¹⁶¹

There are also unique advantages for litigants pursuing relief under universalist consumer laws. First, consumer protection may offer more expansive and inclusive protection to persons seeking relief on the basis of disability, which is sometimes hard to define and is not a protected class in some “targeted” antidiscrimination consumer laws.¹⁶² For instance, discrimination-

¹⁵⁵ *Id.*

¹⁵⁶ See Bagenstos, *supra* note 1, at 2842 (“[A universalist approach] either guarantees a uniform floor of rights or benefits for all persons or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws.”).

¹⁵⁷ Sablosky Elingold, *supra* note 154, at 632.

¹⁵⁸ *Id.* at 630–39 (explaining the inherent drawbacks of a “universalist” approach to economic subordination that civil rights and antidiscrimination law do not implicate).

¹⁵⁹ *Id.* at 592 (“[T]he antidiscrimination doctrine has developed narrowly, severing the relationship between economic and civil rights”); see also *id.* 600–04 (tracing the shrinking scope of antidiscrimination protection).

¹⁶⁰ See *id.* at 606 (“Leading constitutional and civil rights scholars have traced a recent shift in Supreme Court jurisprudence away from robust substantive equal protection and civil rights doctrine.”) (citing Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1143 (2002); Reva B. Seigel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1286-303 (2011); and Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011); cf. Bagenstos, *supra* note 1, at 2849 (“In recent years, courts have often read antidiscrimination laws narrowly.”)).

¹⁶¹ See Sablosky Elingold, *supra* note 154, at 620 (“[B]ecause economic citizenship is inextricable from political and social citizenship, promoting full and fair access to consumer systems will advance the group-based equality goals of historic civil rights movements.”).

¹⁶² See Areheart & Stein, *supra* note 29, at 452 (“Internet accessibility helps . . . those with impairments not rising to a statutorily prescribed level of ‘disability’ status.”); Yoshino, *supra* note **Error! Bookmark not defined.**, at 793 (asserting that universalistic appeals are inclusive than class-based appeals). The Fair Housing Act (FHA) is the only consumer protection law that prohibits discrimination on the basis of disability. See Part IV.B.i (discussing the FHA).

neutral consumer protection laws focus on a defendant’s “bad act” and eliminate the plaintiff’s burden to establish identity or membership in a protected group, which some argue makes consumer protection statutes “more inclusive and flexible” than antidiscrimination statutes.¹⁶³ Additionally, antidiscrimination claims can be more invasive and emotionally taxing for plaintiffs because they place the plaintiff’s identity at the forefront of the inquiry.¹⁶⁴ Finally, “negative rights,” such as the right to avoid discrimination, are less likely to influence consumer markets and more difficult for individual claimants to prove than positive rights, such as the right to information.¹⁶⁵

Thus, though not without normative tradeoffs or criticisms, universalist consumer laws are likely to be more successful than discrimination-based claims where they can supplement antidiscrimination claims by consumers with disabilities who face exclusion from online banking and credit. The next Part considers the applicability of, first, universalist consumer laws and, second, antidiscrimination consumer laws.

IV. PROPOSALS: APPLYING CONSUMER PROTECTION LAWS TO WEB INACCESSIBILITY

Despite years of lawsuits, settlements, amendments, and agency actions considering web accessibility under the Americans with Disabilities Act (ADA),¹⁶⁶ many banks are still noncompliant with web accessibility guidelines.¹⁶⁷ Though arguably not required by law, some

¹⁶³ Sablosky Elengold, *supra* note 154, at 613–14.

¹⁶⁴ *See id.* at 607 (explaining that a black female plaintiff bringing an antidiscrimination claim may face “extensive and invasive” questioning of her sense of identity, feelings about racism, and experiences with sexism); *id.* at 617 (“[B]y choosing not to assert discrimination, [a plaintiff] may escape the bias and unfair treatment that many antidiscrimination plaintiffs face from judges and juries.”).

¹⁶⁵ *See* Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1060 (1996) (“Because violations of more narrowly drawn positive rights are easier to establish, they are likely to have more deterrent influence on merchants than are vague, admonitory laws [such as the ECOA].”).

¹⁶⁶ *See supra* notes 134–146 and accompanying text (explaining the litigation, congressional action (or lack thereof), and agency vacillation on the applicability of the ADA’s Title III to publicly operated websites).

¹⁶⁷ *See supra* Part II.C–D.

of these non-compliant banks have promised as a condition of settlement to disputes with the Department of Justice (DOJ) or private citizens to voluntarily implement WCAG standards to their websites.¹⁶⁸ Still, the sites are noncompliant.¹⁶⁹

Compared to the ADA, consumer law offers lawmakers a more politically appealing tool for implementing web accessibility guidelines because it targets and limits the regulatory burden. Years of vacillation without change indicates that regulators are reluctant to require compliance for *all* websites.¹⁷⁰ Even the category-limiting proposals discussed above by Inazu and Smith¹⁷¹ would require a huge showing of public support and political will. Meanwhile many courts prefer to limit regulatory imposition based on a website's purpose, size, or nexus to a physical place of business.¹⁷²

Consumer law offers lawmakers and judges a strategic and narrow way to begin addressing web accessibility in the context of banking and credit. Though surely an unsatisfyingly narrow recommendation to some disability-rights advocates, this limited approach represents an important, incremental step toward full web accessibility.¹⁷³ A small step toward compliance creates social norms and expectations that could lead to broader voluntary compliance.¹⁷⁴ Additionally, lawmakers and judges will likely face less resistance implementing an incremental approach that focuses compliance requirements only on bank websites than extending the ADA to every webpage on the internet. Finally, bank website accessibility is

¹⁶⁸ See *supra* note 120 and accompanying text.

¹⁶⁹ See *supra* Part II.C–D.

¹⁷⁰ See *supra* Part III.A.

¹⁷¹ See *supra* note 15.

¹⁷² *Id.*

¹⁷³ See Areheart & Stein, *supra* note 15, at 452–53 (arguing that Title III should apply to the entire internet without limitation). *But see* Inazu & Smith, *supra* note 15, at 5 (noting that “all or nothing” approaches to web accessibility is risky because it assumes that courts and policymakers have the political will to classify the whole internet as a public accommodation).

¹⁷⁴ See Stern, *supra* note 16 (explaining that even a small change is important for creating social norms and broader change).

important because access to reasonably priced credit is critical to civil rights and financial health in modern America.¹⁷⁵

The first Section below discusses universalist consumer laws. The second Section explores the antidiscrimination consumer laws.

A. Universalist Consumer Protection Laws

This Section considers whether “universalist” (i.e., class-neutral) consumer protection laws offer any relief for the harms people with disabilities experience when using inaccessible bank websites. The first subsection considers two requirements under the Truth in Lending Act (TILA). The second subsection considers the Dodd-Frank Act’s prohibition against unfair, deceptive, or abusive acts or practices (UDAAPs).

i. The Truth in Lending Act (TILA)

First passed in 1968,¹⁷⁶ the Truth in Lending Act (TILA) established the first mandatory, uniform disclosure requirement imposed nationally on the U.S. consumer credit market.¹⁷⁷ Driven by the belief that informed consumers make the best choices,¹⁷⁸ Congress passed TILA to “guarantee the accurate and meaningful disclosure of the costs of consumer credit.”¹⁷⁹

¹⁷⁵ Hawkins & Penner, *supra* note 17 (emphasizing the centrality of credit to economic health and stability).

¹⁷⁶ Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 157 (1968).

¹⁷⁷ See Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL’Y 199, 209 (2005).

¹⁷⁸ See Lea Krivinskas Shepard, *It’s All About the Principal: Preserving Consumers’ Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. REV. 171, 184–85 (2010) (“Before TILA, consumers found it difficult or impossible to comparison shop for credit . . . [t]o remedy this problem, TILA . . . attempt[ed] to both (1) increase transparency and competition in the credit markets and (2) promote the informed use of credit.”) (quotation marks omitted).

¹⁷⁹ Edwards, *supra* note 177, at 210 (quoting ELIZABETH RENUART & KATHLEEN E. KEEST, TRUTH IN LENDING § 1.1.1 (4th ed. 1999)); see also 15 U.S.C. §1601 (describing TILA’s purpose as “assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him[her] and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices”).

TILA’s most important disclosures are those explicitly tied to the cost of credit: the finance charge¹⁸⁰ and the annual percentage rate (APR).¹⁸¹ During the numerous revisions to TILA over the past five decades,¹⁸² Congress tailored and expanded disclosure requirements depending on the type of credit transaction, such as a credit card versus a home mortgage, and the context of the disclosure, such as online versus mailed advertisements.¹⁸³ The Consumer Financial Protection Bureau (CFPB) sets forth TILA’s many protections and prohibitions in 12 C.F.R. § 1026 (“Regulation Z”).¹⁸⁴

Two of TILA’s requirements—those related to open-end credit advertising and online credit agreement posting—may offer relief to consumers with disabilities who encounter an inaccessible bank website. Regulation Z requires that advertisements for open-end credit (such as a credit card application on a bank website) disclose transaction terms “clearly and conspicuously.”¹⁸⁵ Also, TILA requires that creditors “maintain an Internet site” on which the creditor must post the “written agreement between the creditor and the consumer for each credit card account under an open-end consumer credit plan.”¹⁸⁶

Judges could interpret TILA’s advertising disclosure requirements to put the Act within reach of plaintiffs with disabilities who cannot perceive the disclosures due to the lender’s

¹⁸⁰ See 12 C.F.R. § 226.4(d) (defining finance charge); see also Edwards, *supra* note 177, at 213 n.76 (“The finance charge is the consumer’s cost of credit, in dollars and cents.”) (quoting RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING 107 (Robert A. Cook et al. eds., 2000)).

¹⁸¹ See Edwards, *supra* note 177, at 214 (providing a simple definition of APR as, “relative or percentage cost of credit on a yearly basis”) (quotation marks omitted).

¹⁸² See Krivenskaskas Shepard, *supra* note 178, at 187–88 (summarizing the most significant TILA amendments over its long history).

¹⁸³ See Edwards, *supra* note 177, at 215–16; see also Krivenskaskas Shepard, *supra* note 178, at 185–86.

¹⁸⁴ *Compliance Guide to Small Entities*, FED. RSRV., <https://www.federalreserve.gov/supervisionreg/regzcg.htm> (last updated Sept. 11, 2019).

¹⁸⁵ See 12 C.F.R. § 1026.16(b)(1) (explaining that the “clearly and conspicuously” standard applies to disclosures required under § 10.26.6(a)(1) and (a)(2) and § 10.26.6(b)(3)); see also 12 C.F.R. pt. 1026, Supp 1, at § 1226.16(b)(1) (stating that the “clearly and conspicuously” standard applies to: (1) “[t]riggering terms,” (2) “[i]mplicit terms,” (3) “[m]embership fees,” (4) “[d]eferred billing and deferred payment options,” (5) “[v]ariable rate plans,” and (6) “[m]embership fees for open-end (not home secured) plans”).

¹⁸⁶ 15 U.S.C. § 1632(d)(5).

inaccessible website. An inaccessible bank webpage that advertises credit cards may not present the finance charge or APR in a way that makes them readily perceivable to a consumer who relies on screen-reading technology. The sparse caselaw developed around the open-ended credit advertisement disclosure requirements makes it difficult to assess how courts would respond to TILA in this context.¹⁸⁷

A credit agreement posted on an inaccessible bank website is likely meaningless to the consumer who is unable to perceive the agreement's contents.¹⁸⁸ There is not much caselaw on TILA's requirement that creditors post the written credit card agreement online for consumers to access.¹⁸⁹ The one case concerning this provision, *Billings v. TD Bank, NA*, implied that if a consumer could show that his inability to access the posted agreement was the lender's fault, the consumer would have a colorable claim under this provision.¹⁹⁰

In *Billings*, a consumer applied for and received a bank-issued credit card from TD Bank.¹⁹¹ Disputes arose after the consumer attempted to use the card and learned that it had been placed on hold after the bank found an error in the consumer's on-file address.¹⁹² During the ensuing back-and-forth over the validity of fees, credit report threats, and subsequent payment, the consumer attempted to review his credit card agreement online but "[the bank's]

¹⁸⁷ Using Westlaw Edge's "citing references" function, I found only one case that cites 12 C.F.R. § 1026.16. *See Schwartz v. HSBC Bank USA, N.A.*, No. 13 Civ. 769 (PAE), 2013 WL 5677059 (S.D.N.Y. Oct. 18, 2013) (dismissing a plaintiff who claimed that mailed disclosures applying introductory rates violated TILA because the introductory rate fell under the promotional rate exception to disclosure requirements).

¹⁸⁸ *See Billings v. TD Bank, NA*, No. 13-2969, 2013 WL 3989572, at *6 (Aug. 1, 2013) (implying that it would be unlawful under 15 U.S.C. 1632 for a creditor to post the credit agreement online in a manner that makes it inaccessible to the consumer).

¹⁸⁹ On March 17, 2021, I searched for cases discussing this provision by clicking on the "citing references" tab in Westlaw Edge for 15 U.S.C. § 1632, limited the results to cases, and then searched "Internet site" within the results. This search resulted in two cases, and only one discussed the requirements of subparagraph (d)(5). *See Billings*, 2013 WL 3989572, at *5-6 (dismissing the plaintiff's claim that the defendant "refused to grant him access" to the credit card agreement on its internet site because he pleaded no "facts explaining why he was unable to access the credit card agreement or why his inability to access the site was [the] [d]efendant's fault").

¹⁹⁰ *See id.*

¹⁹¹ *Id.* at *1.

¹⁹² *Id.*

computerized www.program *denied* [the consumer] access.”¹⁹³ The consumer sued the bank claiming, in part, violation to 15 U.S.C. § 1632(d)(5), the requirement that creditors post credit agreements online for consumers to access.¹⁹⁴ The bank filed at 12(b)(6) motion to dismiss.¹⁹⁵

The *Billings* court agreed that TILA “essentially mandate[s] that creditors must maintain a website *providing access* to the credit card agreement.”¹⁹⁶ Still, the court granted the bank’s motion to dismiss the claim because the consumer did “not plead facts explaining why he was unable to access the credit card agreement or [showing] why his inability to access the site was [the bank’s] fault.”¹⁹⁷ The court’s reasoning implies that if a consumer could show how a creditor’s actions or inactions prevented the consumer from accessing the credit agreement, perhaps because a creditor’s website was incompatible with navigation aids, the court would have preserved the consumer’s TILA action.

In sum, TILA offers two promising, but largely untested, provisions that could be interpreted to require accessible bank websites. Another potentially applicable discrimination-neutral consumer law is the Dodd-Frank Act and its protections against unfair, deceptive, or abusive acts or practices (UDAAPs), discussed below.

ii. *Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs)*

Passed in 2010, the Dodd-Frank Act granted the Consumer Financial Protection Bureau (CFPB) regulatory and enforcement authority to prevent “unfair, deceptive, or abusive acts or practices” (UDAAPs).¹⁹⁸ The CFPB can enforce violations through litigation in federal court or

¹⁹³ *Id.* at *1–2.

¹⁹⁴ *Id.* at *2.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *5 (emphasis added).

¹⁹⁷ *Id.* at *6 (emphasis added).

¹⁹⁸ 12 U.S.C. § 5531.

through agency adjudication, but it cannot create a private right of action.¹⁹⁹ Many states have similar consumer protection laws that allow for individual enforcement by consumers.²⁰⁰

Because each state statute varies considerably,²⁰¹ the next part considers only whether the CFPB could act within its statutory authority under UDAAP to protect consumers with disabilities from encountering inaccessible bank websites.

Unique standards each apply to whether a practice is unfair, deceptive, or abusive.²⁰²

First, a practice is “unfair” if it: “(1) causes or is likely to cause substantial injury to consumers, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.”²⁰³

The first requirement of an “unfair” action, for substantial injury, usually encompasses monetary harm, but the CFPB has sometimes interpreted it more broadly.²⁰⁴ Bethany A. Corbin explains: “The term ‘injury’ encompasses monetary harm, such as fees and costs paid by the consumer as a result of the unfair practice, but also extends to severe emotional distress.”²⁰⁵

Courts do not require actual injury as long as plaintiffs can show a “significant risk” of impending, concrete harm.²⁰⁶

¹⁹⁹ Natasha Sarin, *What’s in Your Wallet (and What Should the Law Do About It?)*, 87 U. CHI. L. REV. 553, 582 (2020); Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANK & FIN. L. 321, 355 (2013).

²⁰⁰ NAT’L POLICY & LEGAL ANALYSIS NETWORK, CONSUMER PROTECTION: AN OVERVIEW OF STATE LAWS AND ENFORCEMENT 1 (2010), <https://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-agconsumer-2010.pdf>; Levitin, *supra* note 199, at 357–58.

²⁰¹ See generally CAROLYN CARTER, CONSUMER PROTECTION IN THE STATES; A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf> (providing a comprehensive survey on state UDAP laws). Notably, at least nine states exempt “all or a very wide range of lenders and creditors” from liability under the state UDAP statute. *Id.* at 19.

²⁰² See 12 U.S.C. § 5531.

²⁰³ See Sarin, *supra* note 199, at 582 (summarizing 12 U.S.C. § 5531(c)(1)(A)–(B)) (internal quotations omitted).

²⁰⁴ See *id.* at 582–83 (“[A] risk of concrete harm is often sufficient to merit UDAAP intervention.”). Some state-level UDAP statutes allow recovery for “mental anguish, physical pain and suffering, or consequential damages.” See Sablosky Elengold, *supra* note 154, at 617.

²⁰⁵ Bethany A. Corbin, *Should I Stay or Should I Go: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PENN ST. L. REV. 421, 437 (2015) (emphasis added).

²⁰⁶ *Id.*

The second aspect of an unfair practice is that it is “not reasonably avoidable.”²⁰⁷ The “not reasonably avoidable” element encompasses a practice that makes it difficult for a consumer to make informed decisions regarding a credit transaction.²⁰⁸ Though consumers with disabilities could perhaps overcome the barriers of an inaccessible website by asking a friend or relative to convey information to them, that request would likely force them to divulge sensitive, financial information.²⁰⁹ It is doubtful that the broadly interpreted “not reasonably avoidable” standard would ask consumers with disabilities to take on this risk.²¹⁰

Finally, the CFPB balances the allegedly unfair practice against the corresponding benefits to consumers and competition.²¹¹ Implementing the WCAG guidelines would benefit all bank customers.²¹² Additionally, the cost to make a website accessible is relatively insignificant, especially if adapted into cyclical updates.²¹³ Therefore, banks will have a hard time arguing that the benefits to consumers and competition outweigh the cost of websites accessibility.

One example of an “unfair” practice under the CFPB’s recent enforcement actions is a creditor’s failure to prevent its subsidiaries from inaccurately and inadequately conveying

²⁰⁷ See 12 U.S.C. § 5531.

²⁰⁸ Areheart & Stein, *supra* note 29, at 437.

²⁰⁹ See Wentz et. al., *supra* note 11, at 22 (“This research documents the previously anecdotal frustration and concern from blind users who are unable to use certain interfaces and features, and therefore regularly have to set aside their independence to ask for assistance.”).

²¹⁰ See Sarin, *supra* note 199, at 583 (discussing examples of regulatory actions by the CFPB that illustrate the “broad” application of the “not reasonably avoidable” element). *But see* Corbin, *supra* note 206, at 437 (“As a matter of practice, the CFPB has determined that an injury caused by transactions that occur without a consumer’s knowledge or an injury that can only be avoided by spending large amounts of money or resources is not reasonably avoidable.”).

²¹¹ See *supra* note 203 and accompanying text.

²¹² See Areheart & Stein, *supra* note 29, at 475 (“Just as ramps or automatic doors may be helpful to a parent with a stroller or someone who is carrying boxes, making the Internet more accessible generally benefits all users. For example . . . the same technology that makes a document searchable for everyone also ‘makes it accessible for people with print disabilities’ . . . Finally . . . Internet accessibility helps . . . those with impairments not rising to a statutorily prescribed level of ‘disability’ status.”).

²¹³ See *id.* at 452 (explaining that companies typically update or redesign websites every two to three years, unlike the pace of renovations for physical buildings); *see also id.* at 452 n.19 (citing an accessibility consultant who stated that companies can expect to pay 10% of their total website cost if attempting to incorporate all accessibility guidelines in one update, but that they could spend between only 1% and 3% if incorporating accessibility into upgrades).

information about credit to potential borrowers.²¹⁴ This is analogous to a lender failing to portray information on its credit application website in a way that a person using adaptive technology, such as a screen reader, can perceive.

UDAAP's second category covers "deceptive" acts or practices. An act or omission is deceptive if it is likely to mislead consumers, the consumers interpretation of the act or omission is reasonable under the circumstances, and the act or omission is material.²¹⁵ False advertising, or failing to deliver on a product or price promised to a consumer, is the most common form of unfair or deceptive practices.²¹⁶

Because web inaccessibility prevents consumers from perceiving information, the CFPB could conceivably interpret inaccessible bank websites as a representation or omission that is likely to mislead consumers. The second two elements, whether the omission was reasonable and whether the misleading practice is material, would depend on the exact website and which kind of information the site portrayed in an imperceivable manner.²¹⁷

The final type UDAAP prong protects against "abusive" acts or practices.²¹⁸ A practice may be abusive if it: (1) materially obstructs a consumer's ability to understand the terms or conditions of financial products or services; or (2) unreasonably takes advantage of a consumer by capitalizing on the consumer's ignorance or inability to protect against the "material risks,

²¹⁴ See Sarin, *supra* note 199, at 583.

²¹⁵ CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2013-07: PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 2 (2013), https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

²¹⁶ See Sablosky Elengold, *supra* note 154, at 99.

²¹⁷ It is conceivable that a bank's failure to ensure that consumers with disabilities can perceive "material" information such as an APR on credit card offerings on its website is a deceptive act.

²¹⁸ Patrick M. Corrigan, *Abusive Acts and Practices: Dodd-Frank's Behaviorally Informed Authority over Consumer Credit Markets and Its Application to Teaser Rates*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 125, 143 (2015); Joshua L. Roquemore, *The CFPB's Ambiguous Abusive Standard*, 22 N.C. BANKING INST. 191, 208 (2018).

costs, or conditions” of a product or service. This type also contains an estoppel provision, protecting consumers who reasonably rely on “a covered person to act in his or her interests.”²¹⁹

The “abusive” UDAAP prong is the most open-ended and undefined of the three.²²⁰ It is conceivable that a consumer-friendly administration could apply this provision to find that a bank’s inaccessible website “materially interferes with the ability” of a disabled consumer to “understand a term or condition” of that bank’s credit card or home loan products.²²¹ But the CFPB could most reasonably interpret the challenges that inaccessible bank websites pose as “unfair.”²²²

In sum, there are at least two ways that inaccessible bank websites may fall under TILA’s protections: the “clearly and conspicuous” requirement for disclosures in credit card advertising and the online posting of the written credit agreement requirement. At least one federal court has found that liability would extend under the second prong where a consumer could show that a bank’s action or inaction caused the consumer’s inability to access the written agreement, regardless of whether the bank actually posted the agreement.²²³ Additionally, comparing each available UDAAP prong, the CFPB could most reasonably interpret inaccessible bank websites as “unfair.”

²¹⁹ CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2013-07: PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 4 (2013), https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

²²⁰ Stephen J. Canzona, *I’ll Know It When I See It: Defending the Consumer Financial Protection Bureau’s Approach of Interpreting the Scope of Unfair, Deceptive, Or Abusive Acts or Practices—UDAAP—Through Enforcement Actions*, 45 J. LEGIS. 60, 118 (2018) (“Although ‘abusive’ means something different than unfair or deceptive, the CFPB and Congress have failed to provide a solid, concrete definition for the term.”).

²²¹ See *supra* note 219 and accompanying text (quoting the CFPB’s description of an “abusive” act).

²²² See *supra* notes 203–214 and accompanying text (analyzing inaccessible websites under the “unfair” prong).

²²³ See *supra* notes 1911–97.

B. Antidiscrimination Consumer Laws

Consumer law only partially protects people with disabilities against discrimination.²²⁴ Peter Blanck explains why web accessibility is the necessary next step for antidiscrimination law: “Inaccessible and unusable web content sends the same message to [consumers with] disabilities: keep out of the web. Inclusion and active participation has always been the remedy to segregation, and they are the principles set out in disability rights laws for equal opportunity, independent living, and economic self-sufficiency.”²²⁵ The Fair Housing Act and the Equal Credit Opportunity Act (ECOA) are both viable antidiscrimination consumer law paths to accessibility in online banking. The ECOA does not, however, currently recognize people with disabilities as a protected class.

i. The Fair Housing Act (FHA)

In the 1970s, Congress passed a host of consumer laws that included antidiscrimination provisions.²²⁶ Of them all, only the Fair Housing Act (FHA) protected people with disabilities.²²⁷ The FHA may extend to the discriminatory treatment that people with disabilities face in navigating a bank website’s home mortgage application.²²⁸

²²⁴ See *infra* notes 226–227 and accompanying text (explaining that the Fair Housing Act is the only antidiscrimination consumer law that protects on the basis of disability).

²²⁵ See Blanck, note 37, at 30.

²²⁶ See CONSUMER FIN. PROT. BUREAU, TASKFORCE ON FEDERAL CONSUMER FINANCIAL REPORT VOLUME II 61 (2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf (discussing the ECOA, FHA, Community Reinvestment Act, and Home Mortgage Disclosure Act as part of a “push for civil rights in financial markets”).

²²⁷ *Id.*; see also 42 U.S.C. § 3604(c) (“[It is unlawful to] make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, *handicap*, familial status, or national origin”) (emphasis added).

²²⁸ On March 16, 2021, I searched the following words within the reported cases listed as “Citing References” for 42 U.S.C. § 3604: “‘disabl!’ or ‘disabil!’ w/50 ‘website’ or ‘online.’” The search resulted in 20 cases. I reviewed them each to see if any involved claimants alleging discrimination against a bank or property owner for barriers experienced online that might constitute an implied preference. *Freedman v. Suntrust Banks, Inc.* was the only case that involved a claimant alleging discrimination because of online barriers. See 139 F. Supp 3d. 271, 274–75 (D.C. 2015) (dismissing for lack of personal jurisdiction).

In *Freedman v. Suntrust Banks, Inc.*, a court recognized a FHA discrimination claim by a consumer with a disability when a bank website did not allow the applicant to enter Social Security Disability Insurance benefits as a form of income in the online mortgage application.²²⁹ In *Freedman*, the barrier that the online application posed was an automated, programmed rejection of the applicant's form of income, which was linked to her status as a person with a disability.²³⁰ An inaccessible website presents similar barriers on the basis of disability. Applicants with screen readers may not perceive, or applicants with adaptive keyboards may not navigate to, the page with the relevant application. Arguably, an automated, programmed deficiency in a lender's website that prohibits a person with a disability from even accessing the mortgage application in the first instance is an even more straightforward discrimination claim than the claim recognized in *Freedman*.

Similar to the ADA, the FHA offers two alternative methods for relief: "immediate suit in federal district court, or a simple, inexpensive, informal conciliation procedure . . . followed by litigation should conciliation efforts fail."²³¹ Thus, whether through agency action or private litigation, the CFPB and judges could interpret the FHA's protections to apply to online mortgage advertisements or application pages that are inaccessible to people with disabilities.

ii. *The Equal Credit Opportunity Act (ECOA)*

The Equal Credit Opportunity Act (ECOA) is the main law that protects consumers against discrimination by banks and financial institutions.²³² In 1974, Congress passed the ECOA to protect certain groups from discrimination in access to credit and transactions related to

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Access Living of Metro. Chicago v. Prewitt*, 111 F. Supp. 3d 890, 896 (N.D. Ill. 2015) (omission in original) (citing *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 104 (1979) (rejecting the defendant's claim that claimants must seek conciliation with a private party before filing a lawsuit under the FHA)).

²³² 15 U.S.C. § 1691.

credit.²³³ Specifically, 15 U.S.C. § 1691(a)(1) prohibits discrimination “on the basis of race, color, religion, national origin, sex²³⁴ marital status, or age” by creditors “against any applicant, with respect to any aspect of a credit transaction.”²³⁵ Plaintiffs can recover actual and punitive damages,²³⁶ equitable relief, and attorney fees against creditors who fail to comply with the ECOA.²³⁷ The ECOA does not protect consumers with disabilities.²³⁸

The Consumer Financial Protection Bureau (CFPB) administers the ECOA through Regulation B.²³⁹ As relevant to the context of inaccessible websites, Regulation B prohibits creditors from making an “oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would *discourage* on a prohibited basis a reasonable person from making or pursuing an application.”²⁴⁰

The CFPB’s official interpretation of Regulation B broadly extends the notion of discrimination to passive “polic[ies] of exclusion” and implied preferences suggested through the use of “words, symbols, models, or other forms of communication.”²⁴¹ If Congress amended the ECOA to add “disabled” as a protected class, the CFPB could very reasonably conclude that an

²³³ *Id.* § 1691(a). When initially passed in 1974, the ECOA targeted sex-discrimination. *See Corbin, supra* note 206, at 433–34. Congress updated the Act two years later to add other protected classes. *Id.*

²³⁴ Note that the CFPB recently published an interpretive rule to clarify clarified that Regulation B’s prohibition against sex discrimination “encompasses sexual orientation discrimination and gender identity discrimination.” *See Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity*, 86 Fed. Reg. 14363 (published Mar. 16, 2021) (applicable to 12 C.F.R. § 1002). This shift took place less than three months after the new administration took office and signals that the CFPB is likely to liberally extend consumer protection law.

²³⁵ 15 U.S.C. § 1691(a)(1).

²³⁶ 15 U.S.C. § 1691e (b) (capping punitive damages at \$10,000 for any individual plaintiff and at “\$500,000 or 1 per centum of the net worth of the creditor”).

²³⁷ 15 U.S.C. § 1691e (a)–(d).

²³⁸ *See* 15 U.S.C. § 1691(a)(1).

²³⁹ *See* 12 C.F.R. § 1002(12)(D); *see also Interactive Bureau Regulations*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/rules-policy/regulations/> (last visited Mar. 16, 2021); Corbin, *supra* note 206, at 436.

²⁴⁰ 12 C.F.R. § 1002.4(b) (emphasis added).

²⁴¹ *See* 12 C.F.R. pt. 1002, Supp 1, at §1002(4)(b)(ii).

inaccessible bank website uses “symbols,” “words,” and “forms of communication” that discriminate against persons with disabilities.²⁴²

In January 2021, a CFPB taskforce issued a report calling for research on whether it should advise Congress to add disability as a protected class to the ECOA:

The [CFPB] should conduct research on the propriety of amending the ECOA to include disability as a prohibited basis group, and then potentially recommend its inclusion to Congress. Conducting this research first will allow the Bureau to understand the prevalence of discrimination, and follow-up research if disability status is included will allow the Bureau to measure the effect of the law, something that was not done at the inception of the ECOA for other prohibited basis groups.²⁴³

The stage of deliberations is early, requiring more research, a recommendation by the CFPB, and a congressional response.²⁴⁴ But the inquiry, initiated by a new administration, offers hope that the CFPB may recommend that Congress expand the ECOA to cover consumers with disabilities.

The CFPB needs more research on the discrimination that consumers with disabilities encounter from financial institutions.²⁴⁵ Expert software testers should begin by corroborating and expanding the initial findings presented in this paper. Legal scholars can contribute by considering other consumer-based paths to civil rights for people with disabilities.

²⁴² *See id.* The CFPB may also have to formally adopt these interpretations as rules to ensure that they are binding. *See* *Fridman v. NYCB Mortg. Co., LLC*, 780 F.3d 773, 776–77 (7th Cir. 2015) (“CFPB Official Interpretations [that are] adopted pursuant to notice-and-comment rulemaking [may] merit deference under the framework set forth in *Chevron*.”) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, (1984); 12 C.F.R. pt. 1002, Supp 1, at Introduction (“[CFPB] [i]nterpretations will be . . . incorporated in this commentary following publication for comment in the Federal Register.”)). *But see* *AT&T Corp. v. FCC*, 967 F.3d 840, 847 (D.C. Cir. 2020) (“Publication in the Federal Register does not suggest that the matter published was meant to be a regulation, since the APA requires general statements of policy to be published as well.”). Some district courts have applied the CFPB’s supplemental interpretations without considering what degree of deference the interpretations warrant. *See, e.g.*, *Pedro v. Equifax, Inc.*, 186 F. Supp. 3d 1364 (N.D. Ga. 2016).

²⁴³ *See* CONSUMER FIN. PROT. BUREAU, TASKFORCE ON FEDERAL CONSUMER FINANCIAL REPORT VOLUME II 60–61 (2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2021-01.pdf.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 61.

Congress has not expanded the ECOA’s protections for almost half a century.²⁴⁶ It is time for Congress to revise the ECOA to guarantee consumers with disabilities the full protections of economic citizenship.²⁴⁷

CONCLUSION

Disability exists on a spectrum.²⁴⁸ The lucky among us, those who live long enough, will all experience it to some degree.²⁴⁹ For almost two years now, many Americans—with or without disabilities—have had no choice but to interact with the world through the web: the coronavirus pandemic prompted mandatory stay-home orders; people with high-risk family members voluntarily withdrew; and “Zoom”²⁵⁰ calls replaced public gatherings.²⁵¹ People with able bodies experienced the confinement and restrictions already familiar to many people with disabilities.²⁵² Like never before, consumers needed virtual access to their banks.²⁵³ Unfortunately, many bank websites that are incompatible with web accessibility guidelines subtly, though structurally, excluded consumers with disabilities.²⁵⁴ This needs to change.

Disability-rights advocates can apply consumer law to demand accessible bank websites. Though not meant to replace the ongoing fight to extend the Americans with Disabilities Act

²⁴⁶ See *supra* note 233 (noting that the most recent ECOA revision to protected classes occurred in 1976).

²⁴⁷ See Sablosky Elengold, *supra* note 154, at 620 (“[E]conomic citizenship is inextricable from political and social citizenship.”).

²⁴⁸ Bradley A. Areheart, *GINA, Privacy, and Antisubordination*, 46 GA. L. REV. 705, 716 (2012).

²⁴⁹ *Id.*; see also Ani B. Satz, *Overcoming Fragmentation in Disability and Health Law*, 60 EMORY L.J. 277 (2010) (challenging the social theory that views disability and illness as exceptional and proposing that an adapted view of Martha Fineman’s universal vulnerability theory, which “views individuals as ‘vulnerable subjects’ who may experience social, economic, or biological loss throughout their lives” is more useful for crafting policy and care for persons with disabilities) (citing Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 11–14 (2008) and Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2011)).

²⁵⁰ ZOOM, <https://zoom.us/> (last visited Apr. 24, 2021).

²⁵¹ See Reis Thebault et. al., *Sorrow and Stamina, Defiance and Despair. It’s been a Year*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/nation/interactive/2021/coronavirus-timeline/>.

²⁵² See *id.*

²⁵³ Melissa Volin, *Rapid Shift to Digital Banking During COVID-19 Accelerating Erosion in Consumer Trust, Accenture Report Finds*, ACCENTURE (Dec. 7, 2020), <https://newsroom.accenture.com/news/rapid-shift-to-digital-banking-during-covid-19-accelerating-erosion-in-consumer-trust-accenture-report-finds.htm>.

²⁵⁴ See *supra* Part II.C.

protections to the internet, consumer law offers a comparatively immediate, tailored, and politically appealing mechanism for relief. Lawmakers, advocates, and judges can interpret the Truth in Lending Act, the Dodd Frank Act's prohibition against unfair, deceptive, or abusive acts or practices, and the Fair Housing Act in ways that extend their protections to inaccessible bank websites. Additionally, the academic community should answer the Consumer Financial Protection Bureau's call for research showing the scale of discrimination that consumers with disabilities experience. This research is critical to support the CFPB's potential recommendation that Congress modify the Equal Credit Opportunity Act to protect consumers with disabilities against discrimination in access to credit and credit transactions.