Individuals with disabilities[7] represent a significant consumer demographic.[8] Currently, at least one consumer antidiscrimination law protects people with disabilities, and general consumer protection laws could be used to remedy many of the difficulties consumers with disabilities face online.[9] As banking, lending, and credit cards shift increasingly online,[10] inaccessible apps[11] and websites[12] leave consumers like Margaret without access to the most fundamental financial products, like checking accounts and bank-issued credit cards.[13] In particular, consumers with low vision and dexterity cannot access websites and apps that are incompatible with accessibility aids.[14]

7. This Article uses "People First Language," which "puts the person before the disability." *See, e.g.*, *People First Language: Usage Guidelines*, DC.GOV: OFF. OF DISABILITY RTS., https://odr.dc.gov/page/people-first-language (last visited Mar. 29, 2024) [https://perma.cc/4W8K-4AP8]. 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., "person with a disability" vs. "disabled person") language. *Compare Disability Language Style Guide*, NAT'L CTR. ON DISABILITY & JOURNALISM (Aug. 2021), https://ncdj.org/wp-content/uploads/2021/08/NCDJ-STYLE-GUIDE-EDIT-2021-SILVERMAN.pdf [https://perma.cc/PVH8-HGCR] (declining to recommend "person-first" language as a universal default but referring to "people with disabilities" throughout its style guide over "disabled people"), *with* Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism,"* 110 CALIF. L. REV. 1157, 1159 n.5 (2022) ("I tend to use the identity-first term 'disabled people,' as is currently common among scholars, writers, and advocates who identify as disabled.").

8. People with disabilities are "the world's largest minority." *Factsheet on Persons with Disabilities*, UNITED NATIONS: DEP'T ECON. & SOC. AFFS., https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html (last visited Mar. 29, 2024) [https://perma.cc/76NJ-DLAV] (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 [https://perma.cc/WDN3-M8DN] (reporting 40.6 million persons, or 12.6% of the "total civilian noninstitutionalized population" in the United States, have a disability). In the United States, almost 8.12 million noninstitutionalized people with disabilities are employed. *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 [https://perma.cc/QU2C-R7UN] (reporting employment statistics for persons with disabilities). Additionally, 35% of households have at least one member with a disability. 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 *Reaching Prevalent, Diverse Consumers with Disabilities*, NIELSEN (Oct. 26, 2016), https://nielseniq.com/global/en/insights/report/2016/reaching-prevalent-diverse-consumers-with-disabilities/ [https://perma.cc/6H7Q-3FSC]). Compared to consumers without disabilities, "consumers with disabilities spend on average more money per shopping trip" and shop more frequently throughout the year. Lazar, *supra* note 8, at 190.

9. The Fair Housing Act explicitly includes disability as a protected class. *See* 42 U.S.C. §§ 3601–19, 3631. *But see* Equal Credit and Opportunity Act, 15 U.S.C. § 1691(a)(1) (providing antidiscrimination protection for credit applicants on the basis of "race, color, religion, national origin, sex or marital status, or age" but not disability).

10. *See* Mark Henricks & Doug Whiteman, *How to Open a Bank Account Online: Your Complete Step-By-Step Guide*, FORBES ADVISOR (July 24, 2023, 10:22 AM), https://www.forbes.com/advisor/banking/open-online-bank-account/ [https://perma.cc/5VDH-DWAV]; Penny Crosman, *The Rise of the Invisible Bank*, AM. BANKER, https://www.americanbanker.com/news/the-rise-of-the-invisible-bank (last visited Mar. 29, 2024) [https://perma.cc/RAR5-8875].

11. Jacob O. Wobbrock, *Large-Scale Analysis Finds Many Mobile Apps Are Inaccessible*, UW CREATE, https://create.uw.edu/large-scale-analysis-finds-many-mobile-apps-are-inaccessible%ef%bf%bc/ (last visited Mar. 29, 2024) [https://perma.cc/5YKC-QYPK].

12. *See* discussion *infra* Section III.C.

13. *See infra* notes 110–13 and accompanying text (presenting statistics on the banked rates of people with disabilities).

14. *See* Brian Wentz, Dung (June) Pham & Kailee Tressler, *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 [https://perma.cc/FS44-9BFE] (summarizing the findings of a 2017 study of blind users, the

Bradley Areheart and Michael Stein first considered the ADA's applicability to web accessibility in 2015.[15] Areheart and Stein argued that the ADA required digital access and called for full, unrestricted extension of the ADA's accessibility requirements for public accommodations to websites.[16] More recently, Johanna Smith and Professor John Inazu crafted the first comprehensive legislative proposal for amending the ADA to require access to constrained, limited categories of digital spaces.[17] Though a promising proposal, the proposal requires policymakers to go further than necessary to address the simple, urgent problem of exclusion from financial goods and services offered in a digital medium.[18]

Policymakers are beginning to consider the way that fintech expansion might negatively affect consumers with disabilities.[19] In 2021, the Consumer Financial Protection Bureau ("CFPB") issued a statement noting the need for research on whether consumers with disabilities suffered discrimination in access to credit and in credit transactions.[20] The CFPB's statement highlights the gap in the literature on disability and fintech. And it illustrates an opportunity to address web inaccessibility, at least with respect to the barriers it poses to credit access, outside the traditional ADA-box.[21]

This Article fills a gap in the disability rights literature by considering how consumer protection laws might ameliorate digital discrimination against people with physical disabilities. It also shows that even after years of ADA lawsuits and settlements, people with disabilities face significant obstacles to navigating the digital platforms of the United States' top banking institutions. While acknowledging that reforming the ADA is the most obvious way to confront digital inaccessibility, this Article proposes that consumer protection laws offer a desirable alternative—an incremental, politically attractive, and relatively efficient option after decades of uncertainty regarding the ADA's applicability online.[22]

researchers remarked, "[w]eb 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.").

15. Areheart & Stein, *supra* note 3, at 451.

16. Smith & Inazu, *supra* note 3, at 722 (noting Areheart & Stein as the first and only professional piece to conduct a statutory and normative exposition of the ADA's applicability to the web).

17. *Id.* at 765–78.

18. *Id.* at 781–82.

19. Fintech includes services "offering credit, processing payments, giving advice, managing assets, issuing currencies, and helping with legal compliance." Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 238 (2018). As used in this Article, "fintech" refers to technologies offering credit, processing payments, and issuing currencies.

20. *See* BUREAU OF CONSUMER FIN. PROT., TASKFORCE ON FEDERAL CONSUMER FINANCIAL LAW REPORT VOLUME II 60–61 (2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2022-01_amended.pdf [https://perma.cc/F3BV-43Y9].

21. *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838, 2843 (2014) ("[M]ost civil rights problems are best addressed by a mix of strategies . . . .").

22. *Id.* This Article extends the findings of the only empirical study documenting financial institution website accessibility barriers. *See* Wentz et al., *supra* note 1, at 872 ("[T]here is 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

Disability rights advocates have long posited that Title III of the ADA requires accessibility on commercial websites.[23] But after unsuccessful attempts to expand the ADA through legislation and unpredictable efforts to expand it through judicial interpretation,[24] it is time to consider a role for consumer protection law in the fight for web accessibility. A consumer-based approach would allow lawmakers to limit online accessibility compliance requirements to the consumer market, which will likely create less controversy than extending the ADA to every webpage on the Internet and create a regulatory sandbox before requiring the broader implementation that the ADA may eventually facilitate.

This Article has three goals. First, it seeks to spur advocates and financial institutions to consider the rights that consumer protection laws arguably create for clients with disabilities to access financial products online. Second, it aims to set a foundation for a fresh academic exploration of ADA-alternatives to achieving web accessibility by providing an overview of the consumer laws that inaccessible fintech implicate. Finally, it hopes to encourage support for the most efficient option for legislative action in this area—an amendment to the Equal Credit Opportunity Act ("ECOA").

The case that consumer protection laws can alleviate the economic exclusion that people with disabilities face online proceeds in four parts. Part II begins by tracing the history of the disability rights and consumer protection movements. [25] This history helps position the need for digital consumer rights within the long fight for participatory justice in both the disability and consumer rights contexts. It then shows that consumers with disabilities face a disparity in access to online banking and mainline credit even after controlling for income levels. Part III explains how disability-related barriers on fintech platforms contribute to the credit and banking disparity that consumers with disabilities face.[26] It proceeds in three Sections: (1) describing what digital accessibility means and explaining web accessibility standards,[27] (2) illustrating how people with disabilities navigate the web with the help of accessibility aids,[28] and (3) exploring the sparse existing data on fintech accessibility and building upon it with the first accessibility review of bank web pages that directly attach to consumer protections—pages featuring credit cards and mortgage applications.[29] Part IV first traces the fractured understanding of the ADA's applicability online and explains

and home mortgage product offerings. To date, only one article explores whether consumer law could offer relief to people with disabilities suffering from inaccessible online banks; a professor of computer sciences and technology wrote that article. *See generally* Lazar, *supra* note 8 (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.

23. The range of websites that would fall under an accessibility mandate have differed by scholar. *Compare* Areheart & Stein, *supra* note 3, at 451, *with* Smith & Inazu, *supra* note 3, at 723.

24. Smith & Inazu, *supra* note 3, at 723.

25. *See* discussion *infra* Part II.

26. *See* discussion *infra* Part III.

27. *See* discussion *infra* Section III.A.

28. *See* discussion *infra* Section III.B.

29. *See* discussion *infra* Section III.C.

why it is time to think outside the ADA-box.[30] Next, Part IV briefly considers the normative distinctions and tradeoffs between universalist (or, generally applicable) and targeted (or, protected-class specific) approaches to achieving civil rights.[31] Finally, Part V concludes with analyzing how the primary universalist and anti-discrimination consumer laws apply to inaccessible digital banking.[32]

II. THE FORGOTTEN CONSUMER

This Part makes the case that digital inaccessibility uniquely harms consumers with disabilities and perpetuates economic subrogation of people with disabilities. It begins by briefly recounting the disability rights and consumer protection movements to frame the historical context behind the fight to ensure inclusion for all consumers of digital financial products and services.[33] Then, it explains that though consumers with disabilities are *theoretically* well-positioned to participate in online financial services, like digital banking, they are not fully participating.[34] This unaccounted for exclusion is likely related to systemic digital inaccessibility, which has traditionally been explored only under a disability law framework.[35] Digital banking and consumer financial products present an opportunity, however, to explore new avenues to advance civil rights in the digital age.

A. Consumers with Disabilities: A Tale of Two Movements

Before exploring consumer protection and disability rights laws in practice, this Section pauses to consider the movements that led to their respective civil rights victories. An appreciation for the movements, including the actors and conditions that made them possible, informs the strategy in wielding their respective tools to ameliorate digital discrimination.

1. The Disability Rights Movement

The starting point for understanding the disability rights movement begins with America's ironically labeled "progressive" era, spanning over the early twentieth century. The eugenics movement that flourished during this period purported to rationalize—scientifically and morally—an effort to eradicate people with mental and physical disabilities.[36] Justice Thurgood Marshall eloquently summarized the prevailing view of the day in *City of Cleburne*: "Fueled by the

30. *See* discussion *infra* Section IV.A.
31. *See* discussion *infra* Section IV.B.1.
32. *See* discussion *infra* Subsections IV.B.2–3.
33. *See* discussion *infra* Section II.A.
34. *See* discussion *infra* Section II.B.
35. *See* Smith & Inazu, *supra* note 3, at 723.
36. SAMUEL R. BAGENSTOS, UNIV. CASEBOOK SERIES, DISABILITY RIGHTS LAW: CASES & MATERIALS 4 (Saul Levmore et al. eds., 3d ed. 2021) (describing the eugenics movement as "an effort to use the professions of medicine and law to discourage or prevent reproduction among those groups considered 'weak' or 'feebleminded'").

rising tide of Social Darwinism, the 'science' of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the 'feebleminded' as a 'menace to society and civilization . . . responsible in large degree for many if not all of our social problems.'"[37] This manifested in mass institutionalization that "kept 'defective' people away from the general population."[38]

The social attitude towards people with disabilities during the progressive period is eerily captured in the infamous *Buck v. Bell* case, where Justice Holmes upheld state-imposed sterilization on the basis of disability to ensure that "menac[ing]" people with disabilities did not harm the "best citizens" (people without disabilities) by "sap[ping] the strength of the state."[39] Indeed, many of the academic, economic, and social leaders of the progressive era sincerely believed that "charitable" convictions justified segregation, sterilization, and demonization of all people who did not conform to physical or mental constructions of normalcy.[40] Many states did not even recognize people with disabilities as citizens.[41]

Berkely Professor Jacobus tenBroek was a key influencer in the disability rights movement whose scholarship spurred a shift in the way American law responded to people with disabilities.[42] As he explained, the dominant legal

37. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461–62 (1985) (quoting H. GODDARD, THE POSSIBILITIES OF RESEARCH AS APPLIED TO THE PREVENTION OF FEEBLEMINDEDNESS, PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 307 (1915)).

38. Tani, *supra* note 7, at 1165 (first citing Michael Rembis, *Disability and the History of Eugenics*, *in* THE OXFORD HANDBOOK OF DISABILITY HISTORY 85 (Michael Rembis, Catherine Kudlick & Kim E. Nielsen eds., 2018); and then citing Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgetting History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 436–61 (2018)). Mass institutionalization of people who were perceived as non-normative in their physical appearance or function continued—and increased—well into the midcentury. Tani, *supra* note 7, at 1166 ("Between 1946 and 1967, the number of people with intellectual disabilities living in institutions increased by 65 percent (twice the growth rate of the general population).").

39. 274 U.S. 200, 207 (1927).

40. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 400–01 (1991) (first citing REPORT OF THE VT. STATE SCHOOL FOR FEEBLE-MINDED CHILDREN 17–18 (1916); then citing CALIFORNIA BD. OF CHARITIES AND CORRECTIONS REP. 41 (1905); then citing REPORT OF THE BD. OF BLDG. COMM'RS OF THE STATE OF ORE. RELATIVE TO THE LOCATION AND ESTABLISHMENT OF AN INST. FOR FEEBLE-MINDED AND EPILEPTIC PERSONS, TO THE TWENTY-FOURTH LEGIS. ASSEMBLY, REGULAR SESS. 22–23 (1906); then citing REPORT OF THE COMM'N ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLEMINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PA. 43 (1913); then citing BOARD OF TRUSTEES OF THE UTAH STATE TRAINING SCHOOL BIENNIAL REP. 3 (1938); and then citing SOUTH DAKOTA COMM. FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED BIENNIAL REP. 3 (1932)).

41. *See, e.g.*, 1920 Miss. Laws 476; *see also, e.g.*, WILLIAM HEMINGWAY, THE ANNOTATED MISSISSIPPI CODE: SUPPLEMENT OF 1921, at 476 (1921).

42. Samuel R. Bagenstos, *From Integrationism to Equal Protection: tenBroek and the Next 25 Years of Disability Rights*, 13 U. ST. THOMAS L.J. 13, 13 (2016). Professor tenBroek's "calls for participatory justice" also had a great influence on welfare rights and racial justice. Michael A. Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J.C.L. & C.R. 167, 168–70 (2008); *see also* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 306 n.17 (1971); MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 20–21 (1993). In addition to Professor tenBroek's prophetic writing, the broader civil rights movement, return of veterans from the Vietnam War (many with disabilities), and the Independent Living Movement that formed at Berkeley University also played key roles in forming the "full-fledged American disability rights movement." *See* BAGENSTOS, *supra* note 36, at 8.

response during the progressive era was one of "custodialism," which saw the state's purpose as protecting and maintaining people with disabilities as functional wards of the state.[43] Professor tenBroek championed a movement away from custodialism towards "integrationism," which sought to create environments and supports that allowed people with disabilities to exist as full participants in community life.[44]

Modern constitutional and disability rights scholar Professor Sam R. Bagenstos attributes the "first American disability rights statutes," which imposed liability on drivers who did not yield to blind pedestrians, to Professor tenBroek's *Right to Live in the World* article.[45] These laws were unique because—rather than ensuring support or provision for people with disabilities—they operated to increase independence. As Bagenstos explains, these laws "guarantee[d] that people with disabilities could maneuver in society with everyone else, without caretakers accompanying them every step of the way."[46]

These piecemeal state laws quickly morphed into more far-reaching federal laws aimed at integrating people with disabilities into the mainstream of American life.[47] First, in 1968, the Architectural Barriers Act imposed accessibility guidelines on government facilities like courts and post offices.[48] Five years later, the Rehabilitation Act of 1973 (or, the "Rehab Act") extended accessibility obligations to all federally funded programs and activities, which worked to open up more spaces in healthcare, education, and transportation.[49] In 1975, Congress adopted what would later be known the Individuals with Disabilities Education Act, which obligated schools to educate children with disabilities in "the least restrictive environment,"[50] echoing the mandate in *Brown v. Board of Education*.[51] The Developmentally Disabled Assistance and Bill of Rights Act of 1975 financially incentivized states to deinstitutionalize, and its "bill of rights" established the "treatment, services, and habilitation that people with developmental disabilities were entitled to receive."[52] Congress later extended disability rights to the realm of private contracts and consumer law when it passed the 1988 Fair

43. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 842 (1966).

44. *Id.* at 843–47.

45. Bagenstos, *supra* note 42, at 14–15 (citing tenBroek, *supra* note 43, at 902–11).

46. *Id.*

47. *Id.* at 15.

48. Act of August 12, 1968, Pub. L. No. 90-480, 82 Stat. 718.; *see also Architectural Barriers Act (ABA) of 1968*, U.S. ACCESS BD., https://www.access-board.gov/law/aba.html (last visited Mar. 29, 2024) [https://perma.cc/ELG6-F8S6] ("The law requires that buildings or facilities that were designed, built, or altered with federal dollars or leased by federal agencies after August 12, 1968 be accessible.").

49. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355.

50. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 792; *see also* 20 U.S.C. § 1412(a)(5).

51. *See generally* 347 U.S. 483 (1954).

52. Tani, *supra* note 7, at 1183–84 (citing Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486).

Housing Amendments Act[53] to prohibit sellers or leasers of residential properties from discriminating against people with disabilities.[54]

The disability rights movement was not limited to academia and legislatures—far from it. Litigation and mass demonstrations shifted social consciousness.[55] Perhaps the most famous of all grassroots-organizing efforts in American history was the Section 504 Sit-In of 1977, an effort by and with people with disabilities.[56] Four years earlier, President Nixon had signed the Rehab Act, but the Act was left toothless without any implementing regulations to govern enforceability.[57] Losing patience with writing letters, lobbying, and imploring legislators to pass regulations, disability-rights activists launched nationwide occupations at federal buildings.[58] The longest occupation occurred in San Francisco, where more than 100 protesters with disabilities, interpreters, and advocates sat in the halls of the agency charged with implementing Section 504 regulations for twenty-two days.[59] This event still holds the record as the longest-running occupation of a federal building in the United States,[60] and it ultimately led to enabling regulations for the Rehab Act.[61] Nonetheless, the Rehab Act remained relatively impotent, which led Congress to pass the ADA in 1990.[62] The ADA is widely considered the most comprehensive and important piece of disability rights legislation.[63]

In the ADA's "findings" section, Congress recognized the "serious and pervasive social problem" with historic, persistent isolation and segregation that people with disabilities experience in daily life.[64] Appealing to a cost-benefit justification,[65] Congress complained of the expense and national strain that resulted from denying people with disabilities equal opportunity, independence, and economic self-sufficiency.[66] The ADA's "reasonable accommodation" mandates require local governments, employers, and places open to the public to affirmatively act to ensure that people with disabilities can fully participate in their workforces, programs, or places of business.[67] When courts narrowly construed

53. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (modifying the 1968 Fair Housing Act).

54. *See* 42 U.S.C. § 3604(f).

55. Some of the most pivotal victories from litigation came not from the ultimate judicial outcome, but from the societal conversations and settlements they sparked. *See generally* Tani, *supra* note 7.

56. Karen Tani, *After 504: Training the Citizen-Enforcers of Disability Rights*, 42 DISABILITY STUD. Q., at 26 (2023) (describing the sit-in as "the stuff of legend").

57. Julia Carmel, *Before the A.D.A., There Was Section 504*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/us/504-sit-in-disability-rights.html [https://perma.cc/TP4M-DRRQ].

58. *Id.*

59. Cook, *supra* note 40, at 394; Carmel, *supra* note 57.

60. Carmel, *supra* note 57.

61. *Id.*

62. *Id.*

63. Cook, supra note 40, at 466.

64. 42 U.S.C. § 12101(a)(2), (5).

65. "This cost or burden narrative is one that runs across disability law cases and that disabled Americans have routinely encountered in their efforts to secure equal opportunity . . . about whether the thing associated with the cost is 'worth it.'" Tani, *supra* note 7, at 1211–13 (citing Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 207 (2012)).

66. 42 U.S.C. § 12101(a)(7)–(8); Bagenstos, *supra* note 42, at 16.

67. 42 U.S.C. § 12112(a); *id.* § 12132; *id.* § 12182.

the ADA's disability definitions and widely restricted membership in its protected class, Congress intervened to bolster the law's provisions with the ADA Amendments Act ("ADAAA").[68]

Although legal and social discrimination and even animus against people with disabilities persists,[69] the ADA represented an important shift in how the American government related to its citizens with disabilities. Professor Bagenstoes aptly summarizes the ADA's foundational ideal:

> [T]he major institutions of society were designed without people with disabilities in mind. But people with disabilities have a claim in justice to demand that those institutions be designed with the understanding that they are full members of society like anyone else and can be expected to participate fully in them—as subjects with their own projects, choices, and independence, rather than as objects to be cared for.[70]

The ADA creates a framework for people with disabilities to demand participation in many areas of everyday life—like shopping, going to the doctor's office, engaging in recreation and sports, patronizing movie theaters and casinos, and even setting sail on a cruise.[71] Yet, one space that most Americans occupy every day is too often inaccessible: the web. As discussed in Section IV.A, it is still unclear if the ADA ensures a right to the digital spaces that we navigate in our computers and smartphones.[72]

Other legal scholars have recently decried the dangers of this gaping hole in the ADA's tapestry of protected spaces.[73] But none have considered the overlap between digital discrimination and other protected rights or non-ADA tools—like consumer laws—for chipping away at the barriers inaccessible websites pose to full integration for people with disabilities.[74]

2. The Consumer Protection Movement

The consumer protection movement has come in waves as changes in technology and the marketplace spurred sufficient public uncertainty and concern to warrant collective mobilization for market regulation. There have been at least

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

69. *See, e.g.*, Jasmine E. Harris, *America's 'Disability Alibi'*, S.F. CHRON. (June 5, 2020), https://www.sfchronicle.com/opinion/openforum/article/America-s-disability-alibi-15318663.php [https://perma.cc/KDE8-GVBB]; Jasmine E. Harris, The Aesthetics of Disability, COLUM. L. REV. 895, 899 (2019) (citing HARDEEP AIDEN & ANDREA MCCARTHY, SCOPE, CURRENT ATTITUDES TOWARDS DISABLED PEOPLE 3 (2014), https://research-information.bristol.ac.uk/files/88783477/Aiden_and_McCarthy_2014.pdf [https://perma.cc/JC6W-YSAB]) ("[A] recent qualitative study concluded that one in five adults aged eighteen to thirty-four admits to having intentionally avoided talking to a person with disabilities due to uncertainty about how to communicate."); Brigham A. Fordham, *Disability and Designer Babies*, 45 VAL. U. L. REV. 1473, 1475–76 (2011).

70. Bagenstos, *supra* note 42, at 16.

71. *Id.* at 17 nn.28–31.

72. *See* discussion *infra* Section IV.A.

73. *See* Samuel R. Bagenstos, *Towards an Urban Disability Agenda*, 47 FORDHAM URB. L.J. 1335, 1336 (2020).

74. Though legal scholars have not explored consumer law through a disability lens, an information sciences professor at the University of Maryland, Johnathan Lazar, has paved the way in considering the intersection of consumer and disability rights. *See* Lazar, *supra* note 8, at 190.

four eras in the movement's history: (1) The progressives' fight to increase efficiency in the 1890s, (2) President Roosevelt's New Deal legislation following the Great Depression in the 1930s, (3) President Johnson's Great Society programs in the 1960s, and (4) Congress's creation of the CFPB in 2010 following the Great Recession.[75]

The latter two periods are what laid the groundwork for the consumer protection laws explored later in this Article. The third era traces its origins to "John F. Kennedy's message to Congress in the spring of 1962."[76] In that address, Kennedy enumerated what he termed the Consumer Bill of Rights: the right to safety, the right to be informed, the right to choose, and the right to be heard in government-decision making.[77] Also in the 1960s, President Johnson created the Consumer Federation of America, which united consumer groups across the United States in their lobbying efforts and passed bills regulating consumer safety and lending protection.[78]

Congress passed most of the titles that make up the Consumer Financial Protection chapter of the U.S. Code between 1968 at 1978.[79] For instance, the Truth in Lending Act ("TILA"), enacted in 1968,[80] was the first federal law to provide consumers with a private right of action against entities in the regulated consumer financial services industry.[81] This period spurred the growth, organization, and energy necessary to establish consumer law as a valid legal practice and organizing effort. One scholar bleakly describes the social and legal reality that TILA—and other laws passed in this period—stood to upend:

> State laws were inadequate. There were few, if any, lawyers whose practice was primarily protecting consumers. Law schools offered few, if any, courses devoted to consumer law. No consumer organization produced continually updated manuals for lawyers taking consumer cases or regularly scheduled conferences at which those lawyers could learn from experienced consumer attorneys and network with others. No organization

75. ENCYCLOPEDIA OF CONSUMER MOVEMENTS 584–601 (Stephen Brobeck, Robert N. Mayer & Robert O. Hermann eds., 1997).

76. Diya Berger, A Tale of Two Movements: Consumer Protection in the U.S. from 1969 to 2010 (May 2, 2013) (Ph.D. dissertation, University of Pennsylvania) (CUREJ: College Undergraduate Research Electronic Journal, https://repository.upenn.edu/curej/168) (citing ENCYCLOPEDIA OF CONSUMER MOVEMENTS, *supra* note 75, at 590).

77. ENCYCLOPEDIA OF CONSUMER MOVEMENTS, *supra* note 75, at 590.

78. *Id*. at 589–93.

79. Subch. I, Truth in Lending Act (TILA), 15 U.S.C. § 1601 (1968), including the Fair Credit Billing Act, 15 U.S.C. § 1666 (1974) and Consumer Lease Act, 15 U.S.C. § 1667 (1976); Subch. II, Restrictions on Garnishment, 15 U.S.C. § 1671 (1968); Subch. III, Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970); Subch. IV, Equal Credit Opportunity Act. 15 U.S.C. § 1691 (1974); Subchapter V, Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1977); Subchapter VI, Electronic Funds Transfer Act, 15 U.S.C. § 1693 (1978). Regulators also received increased authority in 1975 to "define unfair and deceptive acts and practices for financial institutions." Kathleen E. Keest, *Consumer Financial Services Law and Policy: 1968–20?? In the Thick of the Battlefield for America's Economic Soul*, 26 GA. ST. U. L. REV. 1087, 1089 n.2 (2010) (citing 15 U.S.C. § 45(a)(2)).

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

81. Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1149 (2010).

> regularly represented consumers in Congress or before administrative agencies. The Federal Trade Commission (FTC) was ineffectual.[82]

The consumer protection movement also made great strides in the courts during this period. The first major Supreme Court victory in a consumer protection case was *Sniadach v. Family Finance Corp.*, which the NAACP argued.[83] Decided in 1969, the *Sniadach* court struck down, on due process grounds, Wisconsin's prejudgment garnishment law that allowed courts to freeze consumers' wages in response to creditors' requests without prior notice or an opportunity for a hearing.[84]

The movement lost ground during the last decades of the twentieth century. The Reagan Administration aggressively pursued deregulation efforts: for example, the Administration curtailed the FTC's budget and halted its enforcement actions.[85] Lobbying efforts by the credit industry resulted in Congress passing the 1980 "Truth in Lending Simplification Act," which made consumer claims more difficult.[86] Nonetheless, laws like TILA remain bulwarks in consumer law.[87]

Deregulation in the consumer space continued until market forces demanded its resurgence. "Dramatic" federal preemption of state-level fair-lending and consumer-abuse laws also played a part in the economic crises that necessitated a restructuring of the consumer financial protection regulatory framework.[88]

In 2010, the modern era began with the passing of the Dodd-Frank Act,[89] aggressively expanding the government's ability to protect consumers. The Act expanded federal enforcement of unfair, deceptive, or abusive acts or practices ("UDAAP") laws and created the CFPB.[90] Though some of Congress's efforts to insulate the CFPB from political pressure have been or may be dismantled for violating separation-of-powers principles,[91] the CFPB remains the most

82. *Id.* (footnotes omitted).

83. *Id.* at 1149 n.9, 1158 (noting that the NAACP's involvement indicated a sentiment that "there was a close connection between civil rights and consumer rights").

84. Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342 (1969).

85. Budnitz, *supra* note 81, at 1167.

86. *See, e.g.*, Elizabeth J. Keeler, *The Truth in Lending Simplification and Reform Act of 1980: Is "Simplification" Better for Both Consumer and Creditor?*, 8 NOVA L. REV. 175, 175 (1983) (noting deregulation as an inhibitor in the consumer's ability to "receive adequate information about [a potential] available mortgage").

87. Budnitz, *supra* note 81, at 1155 (citing ELIZABETH RENUART & KATHLEEN KEEST, TRUTH IN LENDING 4 (6th ed. 2007)) ("[TILA] continues to impose many requirements upon creditors and provides consumers with meaningful remedies such as actual damages, statutory damages, costs, attorney['s] fees . . . .").

88. Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 122–24 (2013); *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 79–83 (2008).

89. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

90. Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1064–73 (2016).

91. *See, e.g.*, Seila Law, LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020). The Supreme Court heard oral arguments on October 3, 2023, on an appeal from a lower court's determination that the CFPB's unique funding mechanism violates the Constitution. Amy Howe, *Court Will Review Constitutionality of Consumer-Watchdog Agency's Funding*, SCOTUSBLOG (Feb. 27, 2023, 11:27 AM), https://www.scotusblog.com/2023/02/supreme-

integrated and powerful force of regulatory power in the history of the consumer protection movement. The CFPB's increased enforcement authority presents an opportunity to test the boundaries of consumer protections on a new case study: the consumer with a disability.

B. Financial Exclusion

Inaccessible digital financial products and services may entrench economic inequality. The digital divide is shrinking each year. Though disparity remains, a majority of people with disabilities now have regular access to the Internet,[92] which means that people with disabilities should theoretically be able to access online banks and fintech products. But—despite the hypothetical access to broadband and computers—people with disabilities remain disproportionately less likely to use mainstream banks and credit than peers of the same income category.[93] As banks and financial products increasingly move to an online-only format, the risks of inaccessible websites perpetuating consumer harm and economic inequality grow.

1. The Digital Divide Is Shrinking

The digital divide refers to the disparity in access to broadband internet and the tools most commonly associated with navigating the web, like a desktop, laptop, smartphone, or a tablet.[94] The government has tracked "the divide between those with access to new technologies and those without" since 1990 and referred to it as "one of America's leading economic and civil rights issues."[95] The divide in access to computers or broadband can be stark by some measures. For instance, just over half of low-income respondents to a Pew Research Study conducted in 2021 reported having both a computer and Internet access at home, whereas higher-income respondents almost all reported access to these tools and technologies.[96]

court-will-review-constitutionality-of-consumer-watchdog-agencys-funding-cfpb/ [https://perma.cc/D9HC-ECSM].

92. Lisa von Wiegen & Shannon M. Oltmann, *A Different Democratic Divide: How the Current U.S. Online Court Record System Exacerbates Inequality*, 112 LAW LIBR. J. 257, 267–68 (2020).

93. *Id.*

94. It can also refer to gaps in skill, information, or literacy of technologies commonly used to access the web. *See id.* (collecting different definitions); *see also* Smith & Inazu, *supra* note 16, at 733 n.69 (quoting Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 7 (2002)) ("[D]igital divide encompasses a wide spectrum of disparities and differences based on race, gender, age, income, education, type of household, geographic location, physical abilities, and the level of economic development.").

95. Larry Irving, *Introduction*, *in* OWEN ADAMS, U.S. DEP'T OF COM., NAT'L TELECOMM. & INFO. ADMIN., FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE: A REPORT ON THE TELECOMMUNICATIONS AND INFORMATION GAP IN AMERICA, at xiii (1999), https://web.archive.org/web/20230616092250/https://www.ntia.gov/legacy/ntiahome/fttn99/introduction.html [https://perma.cc/UM3U-QF2C].

96. Emily Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/ [https://perma.cc/MHH4-PSQU].

The digital divide for people with disabilities, however, is actually shrinking each year. Today, a majority of all Americans—including people with disabilities—regularly use the Internet.[97] The most recent National Telecommunication and Information Administration ("NTIA") survey reports that between 2009 and 2019, Internet use (at any location) for people with disabilities grew by over 22%.[98] Similarly, over the same period, Internet access at home for people with disabilities grew by almost 20%.[99]

People with disabilities have also gained access to the Internet through expanded smartphone use. While the latest NTIA data still demonstrates disparities in access to the web via apps,[100] more than half of people with disabilities in the U.S. used smartphones in 2019.[101] Between 2011 and 2017, smartphone use by people with disabilities grew by a range of 10% to 15% every two years.[102]

Pew data from 2021 showed a 50% increase in Americans' smartphone ownership between 2012 and 2021.[103] As of 2021, 85% of all Americans owned a smartphone.[104] The Pew study did not parse data by disability, but its findings on demographic indicators that often overlap with disability offer some insights. Gaps of almost 20% in smartphone use existed for those at the highest and lowest ends of the income and education spectrums.[105] Respondents making less than $30,000 in annual household income and those who had not attended college

97. 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 . . . .").

98. *Digital Nation Data Explorer*, U.S. DEP'T OF COM.: NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/other-publication/2022/digital-nation-data-explorer#sel=internetUser&disp=map [hereinafter Digital Nation Data] (last visited Mar. 29, 2024) (choose "Chart," then select "Table," then select "Internet Use," and then filter for "Internet Use (Any Location)," "Disability Status," and "Percent of Age 3+ Civilian Persons (age 15+ for disability detail)") (showing that disability status grew from 41.4% in 2009 and 63.8% in 2019) [https://perma.cc/JE9N-DYUF].

99. *Id.* (choose "Chart," then select "Table," then select "Internet Use," and then filter for "Internet Use at Home," "Disability Status," and "Percent of Age 3+ Civilian Persons (age 15+ for disability detail)") [https://perma.cc/4NP8-3QB6]. At the end of that period, almost 60% used the internet at home. *Id.* (using the same parameters and filters) [https://perma.cc/4NP8-3QB6]. At that same time, approximately 64% of Americans with disabilities regularly used the Internet "at any location." *Id.* (choose "Chart," then select "Table," then select "Internet Use," and then filter for "Internet Use (Any Location)," "Disability Status," and "Percent of Age 3+ Civilian Persons (age 15+ for disability detail)") [https://perma.cc/JE9N-DYUF].

100. In 2019, approximately 78% of people without disabilities used smartphones. *Id.* (choose "Chart," then select "Table," then select "Device Use," and then filter for "Smartphone Use," "Disability Status," and "Percent of Age 3+ Civilian Persons (age 15+ for disability detail)") [https://perma.cc/2NCJ-3SMJ]. Conversely, only about 55% of people with disabilities used smartphones. *Id.* (using the same parameters and filters) [https://perma.cc/2NCJ-3SMJ].

101. *Id.* (choose "Chart," then select "Table," then select "Device Use," and then filter for "Smartphone Use," "Disability Status," and "Percent of Age 3+ Civilian Persons (age 15+ for disability detail)") [https://perma.cc/2NCJ-3SMJ].

102. *Id.* (choose "Chart," then select "Table," then select "Device Use," and then filter for "Smartphone Use," "Disability Status," and "Percent of Age 3+ Civilian Persons (age 15+ for disability detail)") [https://perma.cc/2NCJ-3SMJ].

103. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/ [hereinafter Mobile Fact Sheet] [https://perma.cc/6UL3-CHGH].

104. *Id.*

105. *See id.* (reviewing "Who owns cellphones and smartphones").

both reported around 75% smartphone ownership.[106] Even the group with the highest likelihood of disability, respondents over the age of 65, reported over 60% use of smartphones.[107] Race was even less of a determinator of smartphone use than Internet access: smartphone ownership by race (reporting on "White," "Black," and "Hispanic") varied by only 2%.[108]

Though the "digital divide" persists, the gap is shrinking every year, and a majority of people with disabilities have access to the Internet. The recently expanded scope of Internet access for people with disabilities increases the likelihood that consumers with disabilities could access fintech products—including consumer credit and bank services—online. Yet, despite theoretical access, many fintech websites pose numerous barriers for consumers with disabilities in actually navigating and perceiving the content that exists in digital spaces.[109] These barriers likely contribute to the financial products access disparities that consumers with disabilities experience.

2. Inaccessible Banks Perpetuate the Financial Divide

Despite expanded access to the Internet, consumers with disabilities continue to experience exclusion from mainstream financial products. People with disabilities are almost 20% less likely than people without disabilities to use online financial services such as banking, investing, and paying bills.[110] Only 63% of consumers with disabilities have credit cards, compared with 80% of consumers without disabilities.[111] Consumers with disabilities are almost twice as likely to use non-bank borrowing methods—like payday, title, and refund-anticipation loans, rent-to-own, and pawnshops—than their peers without

106. *Id.*

107. *Id.*

108. *Id.*

109. *See infra* Subsections III.C.1–2 (discussing empirical findings on bank website inaccessibility); *see also supra* note 21 and accompanying text.

110. *See Digital Nation Data*, *supra* note 98 (choose "Chart," then select "Table," then select "Online Activities," and then filter for "Using Online Financial Services (Banking, Investing, Paying Bills, etc.)," "Disability Status," and "Percent of Age 3+ Civilian Persons (age 15+ for disability detail)") [https://perma.cc/F6YK-4XWW].

111. *See* NANETTE GOODMAN, BONNIE O'DAY, MICHAEL MORRIS, NAT'L DISABILITY INST., FINANCIAL CAPABILITY OF ADULTS WITH DISABILITIES: FINDINGS FROM THE NATIONAL FINANCIAL CAPABILITY STUDY 4 (2017), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/01/ndi-finra-report-2017.pdf [https://perma.cc/56AP-GLTL] [hereinafter FINANCIAL CAPABILITY OF ADULTS WITH DISABILITIES].

disabilities.[112] Additionally, people with disabilities are more likely than the general population to be "unbanked" (*i.e.*, to lack a checking or savings account).[113]

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.[114] 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."[115] 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 services.[116] While existing data does not conclusively explain why, this trend indicates that socioeconomic factors alone cannot explain the banking and credit disparity that consumers with disabilities experience. Perhaps those consumers with disabilities who are not forced into a banking regime through the receipt of social welfare are not incentivized in the absence of such a pull to use a banking system that is not accessibly designed.

112. *See id.* at 44–45 (finding that 42% of persons with disabilities use fringe lending options, as compared to only 25% of persons without disability); *see also* Annie Harper, Martha Staeheli, Dawn Edwards, Yolanda Herring & Michaella Baker, *Disabled, Poor, and Poorly Served: Access to and Use of Financial Services by People with Serious Mental Illness*, 92 SOC. SERV. REV. 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.

113. *See* GOODMAN ET AL., *supra* note 111, 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).").

114. Debra L. Brucker, *Variations in Poverty by Family Characteristics Among Working-Age Adults with Disabilities*, 69 FAMILY RELS. 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 8, 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 (2018), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2018/12/integrating-fin-cap-asset-building-strategies.pdf [https://perma.cc/3ZZJ-5NQ6].

115. Harper et al., *supra* note 112, at 208; *see also* Fumiko Hayashi & Sabrina Minhas, *Who Are the Underbanked? Characteristics Beyond Income*, 103 ECON. REV. 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).

116. NANETTE GOODMAN & MICHAEL MORRIS, NAT'L DISABILITY INST., BANKING STATUS AND FINANCIAL BEHAVIORS OF ADULTS WITH DISABILITIES: FINDINGS FROM THE 2017 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS AND FOCUS GROUP RESEARCH 23 (2019), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/11/ndi-banking-report-2019.pdf [https://perma.cc/GA25-U4Z9] (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).

3. The Implications

Access to fair, mainstream consumer credit was central to the civil rights movement[117] and it remains important to upward financial mobility.[118] As Professor Adam J. Levitin points out: "Without credit, certain things in life would be much more difficult or impossible . . . A car? A house? An education? All would be difficult to finance, and that would change what life was like."[119] And access to mainstream banking services also matters to financial stability.[120] The exclusion from mainstream banks creates a vacuum that is often filled by predatory and high-cost forms of lending.[121] And, as Professor Cassandra Jones Havard points out, access to the resources held by mainstream financial institutions is not just about improving the lives of those individuals, it helps everyone:

> Participation in the financial mainstream has macro and micro effects. Mainstream consumers are often financially stable and have economic mobility. They build wealth, acquire assets, establish credit, and obtain affordable loans. They accumulate savings and have insurance to buffer a crisis. Society benefits when individuals have the necessary tools to develop the skills needed to manage their resources and risks.[122]

The concern for increased access to financial products often centers on the dearth of conventional banks in low-income or minority neighborhoods.[123] Given this problem with access to brick-and-mortar facilities, some scholars heralded the digital-banking boom as the long-awaited solution to banking inequality.[124] But web inaccessibility may exacerbate—rather than relieve—banking inequality for consumers with limited vision and dexterity who rely on adaptability

117. Jim Hawkins & Tiffany C. Penner, *Advertising Injustices: Marketing Race and Credit in America*, 70 EMORY L.J. 1619, 1621 (2021); *cf.* Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587, 620 (2019) (identifying "economic citizenship" as a "key" to civil rights).

118. Cassandra Jones Havard, *Doin' Banks*, 5 U. PA. J.L. & PUB. AFFS. 317, 329 (2020) ("Accessing credit, such as mortgages and small business loans, builds wealth of individuals and businesses and affects the economic mobility and the economic development of a community.").

119. ADAM J. LEVITIN, CONSUMER FINANCE LAW: MARKETS AND REGULATION 1 (1st ed. 2018); *see also* Cassandra Jones Havard, *"On the Take": The Black Box of Credit Scoring and Mortgage Discrimination*, 20 B.U. PUB. INT. L.J. 241, 243–44 (2011) ("Evidence suggests that lending disparities are key in determining how individuals accumulate housing equity.").

120. Monica Eaton-Cardone, *Greater Access to Banking Could Help Millions Living in Poverty*, FORBES (Sept. 4, 2020, 7:30 AM), https://www.forbes.com/sites/forbestechcouncil/2020/09/04/greater-access-to-banking-could-help-millions-living-in-poverty/?sh=3e1de8631e63 [https://perma.cc/XA3C-9W23].

121. Mehrsa Baradaran, *Credit, Morality, and the Small-Dollar Loan*, 55 HARV. C.R.-C.L. L. REV. 63, 89–90 (2020); Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 141–77 (2004); *cf.* Havard, *supra* note 119, at 242 n.2 (2011) ("The historical constraints on access to credit for minority and lower[-]income communities resulted in a much greater market penetration of subprime mortgage products in lower and moderate income areas.").

122. Havard, *supra* note 119, at 320–21; *see also id.* at 338–52 (describing the private and public benefits of participation within the mainstream banking system); Katherine Carter & Patrick Hain, *How Equitable Access to Banking Improves Economic Conditions for Everyone*, NAT'L LEAGUE OF CITIES (July 10, 2020), https://www.nlc.org/article/2020/07/10/how-equitable-access-to-banking-improves-economic-conditions-for-everyone/ [https://perma.cc/4AQ5-J7DD].

123. Havard, *supra* note 119, at 320–21.

124. *See* Catherine Martin Christopher, *Mobile Banking: The Answer for the Unbanked in America?*, 65 CATH. U. L. REV. 221, 222 (2015).

tools to navigate online. Unlike conventional banks, digital banks offer consumers constant access: "Digital-only banks have always been available to their customers 24-hours a day, seven days week, and throughout the year, offering them financial services tailored to their individual needs."[125] But this service remains unreachable by many who rely on accessibility tools to navigate the web. And the inequality this creates is exponentially increasing as more banks move services online, with some banks now accessible via only the web.[126]

The next Part shows how accessibility barriers—particularly those experienced online—exclude consumers with disabilities from mainstream digital financial products.

III. INACCESSIBLE BANKS

Digital inaccessibility is not a new problem. For decades, courts, Congress, and the Department of Justice ("DOJ") have debated whether the ADA requires commercial websites to make reasonable modifications so that the websites' content is accessible to people with disabilities.[127] But no firm directive or legally enforceable standard has emerged, and banks—even the largest national banks—have persistent challenges with accessibility barriers.[128] This Part considers the inaccessibility of banking websites from a design and technology perspective.[129] It then turns to data that shines light on the scale of the problem.[130]

A. Defining Digital Accessibility

Accessibility standards are not foreign to web design, and some websites must already comply with them. In 1998, Congress amended the Rehab Act, which generally prohibits entities that receive federal funding from

125. Katarzyna Schmidt-Jessa, *The Impact of COVID-19 on Digital-Only Banks: Are They Winners or Losers?*, 24 J. BANKING REGUL. 310, 312 (June 2022).

126. Ryan Haar, *How the Pandemic Pushed a Generation of Americans to Discover the Perks (and Risks) of Online Banking*, TIME (Jan. 8, 2021), https://web.archive.org/web/20201001115616/https://time.com/nextadvisor/banking/how-the-pandemic-is-changing-banking/ [https://perma.cc/U2XH-R9Y3]; Maria Elm, *Why US Digital-Only Banks Will Keep Growing in the Next 5 Years*, BUS. INSIDER (Nov. 4, 2020, 8:46 AM) https://www.businessinsider.com/us-digital-only-bank-account-holders-will-rise-through-2024-2020-11. [https://perma.cc/WB9A-D2XB]; Tunde Olanrewaju, *The Rise of the Digital Bank*, MCKINSEY: DIGITAL (July 1, 2014) https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/the-rise-of-the-digital-bank [https://perma.cc/PFU4-47D3].

127. *See infra* Section IV.A (presenting the history of litigation and regulatory vacillation over the ADA's applicability to web accessibility).

128. *See* Wentz et al., *supra* note 1, 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) [https://perma.cc/R8B8-FGT8?type=image].

129. *See* discussion *infra* Sections III.A–B.

130. *See* discussion *infra* Section III.C.

discriminating against people with disabilities.[131] The amendment added a provision requiring the government to provide electronic information in an accessible format to people with disabilities.[132] It also authorized the Architectural and Transportation Barriers Compliance Board to set standards for web accessibility.[133] These standards, added to Section 508 of the Rehab Act and referred to as the "508 Standards," are strictly limited to websites and electronic information that the federal government distributes.[134]

Though no web accessibility standards are currently enforceable against commercial websites,[135] regulators and interest groups have collaborated for more than two decades to publish voluntary accessibility standards.[136] Voluntary, multinational standards govern multiple aspects of the Internet.[137] In 1999, W3C® promulgated the first voluntary disability accessibility standards, the Web Content Accessibility Guidelines ("WCAG").[138] Today, governments around the world rely on the WCAG standards to define and enforce digital accessibility.[139] In 2010, the DOJ issued a notice of proposed rulemaking relating to Internet accessibility, which included a request for comment on whether the government should require private entities to comply with the WCAG 2.0 AA

131. 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").

132. *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 [https://perma.cc/N4M2-SPDM].

133. 29 U.S.C. § 794d(a)(2)(A).

134. 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 Section 508 Standards).

135. Alex Margau, *Web Accessibility—A Look at Current Accessibility Laws*, CLYM (Sept. 14, 2023, 10:00 AM), https://clym.io/accessibility-news/usa-web-accessibility [https://perma.cc/NP9W-S5HD].

136. Suzanne Scacca, *The History of Web Accessibility and How It Impacts Design Today*, PROGRESS: TELERIK (May 19, 2022), https://www.telerik.com/blogs/history-web-accessibility-how-impacts-design-today [https://perma.cc/A949-5LMJ].

137. 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. *Our Mission*, WC3, https://www.w3.org/Consortium/mission (last visited Mar. 29, 2024) [https://perma.cc/PFK9-BGDT]; *Strengthening the Internet. For Everyone.*, INTERNET SOC., https://www.internetsociety.org/issues/strong-internet/ (last visited Mar. 29, 2024) [https://perma.cc/W6FM-A5RY]; *What Does ICANN Do?*, ICANN, https://www.icann.org/resources/pages/what-2012-02-25-en (last visited Mar. 29, 2024) [https://perma.cc/4WYF-YMGP].

138. Marissa Sapega, *The History of Digital Accessibility and Why It Matters*, TGPI (Mar. 20, 2020), https://www.paciellogroup.com/the-history-of-digital-accessibility-and-why-it-matters/ [https://perma.cc/EA3N-29A8]; *see also Fact Sheet for "Web Content Accessibility Guidelines 1.0,"* WEB ACCESSIBILITY INITIATIVE (May 1999), https://www.w3.org/1999/05/WCAG-REC-fact [https://perma.cc/B92C-CPR3].

139. *See* Lazar, *supra* note 8, at 187.

standard.[140] Litigants, agencies, and courts commonly reference the WCAG standards when illustrating or measuring website accessibility.[141]

The WCAG provide standards to make digital content accessible to people with disabilities.[142] Content encompasses "text, images, sounds, code, [and] markup that defines [website] structure, presentation, etc."[143] WCAG standards all rest on aspirational attributes for digital content: "perceivable, operable, understandable, and robust."[144] Generally speaking, "perceivable," means that websites should present information in a way that is not reliant on a single sense or method of perception.[145] "Operable" means that users with limited dexterity can navigate a site's content, even when using a typical mouse and keyboard is impossible.[146] "Understandable" means that information is visible and understandable to a broad audience, including those who rely on text-to-speech technologies to read text aloud.[147] Finally, "robust" means that people using assistive technologies can reliably interpret the content.[148] From these attributes come WCAG's various standards, like keyboard accessibility,[149] which in turn each contain three to thirteen implementation guidelines.[150]

Websites can be graded for success criteria by conformity with those standards. Relative conformance is calculated at three levels: A, AA, and AAA.[151] To illustrate the shortcomings of bank websites, I measured compliance with WCAG 2.0 AA because it is the conformance level often required in DOJ

140. *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. 43,460, 43,465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36). The WCAG released the updated "WCAG 2.1" Standard in 2018 and released the "WCAG 2.2" in 2023. *See Web Content Accessibility Guidelines (WCAG) Overview*, W3C (Mar. 7, 2023), https://www.w3.org/WAI/standards-guidelines/wcag/#versions [https://perma.cc/YR22-AXF8].

141. *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 902–03 (9th Cir. 2019); *id.* at 902 n.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.").

142. *Standards*, WC3, https://www.w3.org/standards/ (last visited Mar. 29, 2024) [https://perma.cc/XNY9-XZ8N].

143. *Web Content Accessibility Guidelines (WCAG) Overview*, *supra* note 140.

144. *Id.*

145. 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 (Dec. 6, 2023), https://www.w3.org/WAI/fundamentals/accessibility-principles/ [https://perma.cc/KND6-LL5S]. This principle also informs guidelines calling for strong color contrasts to assist users who are colorblind. *See* Lazar, *supra* note 8, at 187.

146. 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*, *supra* note 145; *see* Lazar, *supra* note 8, at 187.

147. *See Accessibility Principles*, *supra* note 145 (explaining that "this requirement helps software, including assistive technology, to process text content correctly").

148. *See Accessibility Principles*, *supra* note 145.

149. *See Web Content Accessibility Guidelines (WCAG) Overview*, W3C (Nov. 12, 2023), https://www.w3.org/WAI/WCAG22/quickref/?versions=2.1#keyboard-accessible [https://perma.cc/68CF-MW93].

150. *Id.*

151. *See id.*

settlements and is the level that the DOJ referenced in its since-withdrawn 2010 notice of proposed rulemaking for public-entity web accessibility.[152]

Like the WCAG, most academic and legal discussion around accessibility relates to websites' content requirements rather than providing different standards based on the type or category of each website.[153] Until recently,[154] 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.[155] And the most recent legislative effort to address web accessibility through ADA amendments—The Online Accessibility Act—does not specify which types of websites would fall under the ADA's "public accommodation" accessibility mandate.[156]

B. Navigating Digital Spaces with a Disability

Even though no laws or regulations currently require commercially operated websites in the United States to conform to web accessibility standards,[157] people with disabilities are able to navigate some voluntarily compliant websites with the help of assistive technologies. For instance, people with limited motor and dexterity function 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.[158] People with limited vision can use screen-reading technologies—which transmit website text into Braille,

152. *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. 43,460, 43,465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36). Level AA incorporates all criteria for level A. *See Understanding Conformance*, W3C, https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html (last visited Mar. 29, 2024) [https://perma.cc/VDK4-E8ER].

153. *But see* Inazu & Smith, *supra* note 3, at 770–77.

154. Professor John Inazu and Johanna Smith have proposed guidelines based on website type, as well as other guidance for policymakers. *See id.* at 770–72. Professor 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 743, 758.

155. *See id.* at 722 (calling Areheart & Stein, *supra* note 3, "[t]he most significant theoretical development" for an ADA-based normative and statutory approach to web accessibility but criticizing their argument 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").

156. *See generally* H.R. 8478, 116th Cong. (2020) (codified as amended at 42 U.S.C. 12101 §§ 601(a), 601(b)(2), 601(c)(3)); *see also* Inazu & Smith, *supra* note 3, at 765 (discussing the bill's weaknesses).

157. *Is Website Accessibility a Legal Requirement*, ADA SITE COMPLIANCE (Jan. 8, 2022), https://adasitecompliance.com/website-accessibility-legal-requirement/ [https://perma.cc/7JQD-64HD].

158. Inazu & Smith, *supra* note 3, at 734; *see also How Can People with Mobility Impairments Operate Computers?*, UNIV. OF WASH. (May 24, 2022), https://www.washington.edu/doit/how-can-people-mobility-impairments-operate-computers [https://perma.cc/Y675-RFD2]; *What Alternative Pointing Systems Are Available for Someone Who Cannot Use a Mouse?*, ACCESS COMPUTING, https://www.washington.edu/accesscomputing/what-alternative-pointing-systems-are-available-someone-who-cannot-use-mouse (last visited Mar. 29, 2024) [https://perma.cc/PW4V-NZSX].

audio, or large print—to perceive text on websites.[159] For someone who is hard of hearing, closed captioning tools make videos more accessible.[160] Unless a website happens to voluntarily comply with updated WCAG standards, however, assistive technologies are often useless.

To illustrate the effect of incompatible content design on these assistive technologies, consider the following example, posited by Smith and Professor Inazu, of a university website infographic describing health and 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."[161] Without alternative text, a website's artificial intelligence technology might describe the image as merely, "mask, stick figures, thermometer."[162] As Professor Areheart explains, websites without accessible design may inhibit alternative-keyboard users from navigating websites:

> A quadriplegic may 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.[163]

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 stroller will probably frustrate the person relying on it to navigate a terrain for which it was not designed. Likewise, assistive technologies frustrate users when a website is inaccessibly designed.

C. Inaccessible Bank Websites

The following Subsections show how wide-scale inaccessible technology is in the financial sector. The data focuses on a key facet of financial markets: online banks. The first Subsection sets forth the general case that digital banks are often inaccessible by reviewing a study that coded access errors on digital bank homepages.[164] The "homepages study" illustrates a general inaccessibility problem, but it implicates only the ADA's potential legal protections.[165] My

159. Inazu & Smith, *supra* note 3, at 734; *see also Assistive Technology*, ACCESS COMPUTING, https://www.washington.edu/accesscomputing/resources/accommodations/activity-type/assistive-technology (last visited Mar. 29, 2024) [https://perma.cc/LFZ3-YFDB].

160. Assistive Technology, *supra* note 159.

161. Inazu & Smith, *supra* note 3, at 736 (internal quotation marks omitted).

162. *Id.*; *see also* Areheart & Stein, *supra* note 3, at 463–64 (illustrating other ways that inaccessible websites pose barriers to users of screen reading technologies).

163. Areheart & Stein, *supra* note 3, at 464 (citations omitted).

164. *See* discussion *infra* Subsection III.C.1.

165. *See* Areheart & Stein, *supra* note 3, at 473 n.155.

research, set forth in the second Subsection,[166] looks at two pages common to virtually all digital banks—credit card and home mortgage offerings. As explained in Part IV, these types of web pages directly implicate consumer protection laws.[167] The inaccessibility testing on these pages shows that consumer protection laws have a role to play in moving the ball forward for digital accessibility.

1. Demonstrating the Problem Generally

In 2021, when the CFPB called for research on the scale of discrimination that consumers with disabilities face,[168] only one piece of scholarship had explored the harm that inaccessible financial services provider's websites pose to consumers with disabilities.[169] In 2019, a team of five software engineers and computer scientists conducted the first empirical digital-accessibility review of US bank and financial institution websites.[170] The researchers checked for compliance with the WCAG 2.0 A and AA accessibility standards.[171] That study reviewed the website homepages of the largest 100 financial institutions in the United States, adjusted to account for at least one financial institution in every state.[172]

The bank-homepage study showed that even banks involved in settlements requiring compliance with WCAG standards did not comply with both sets of accessibility standards.[173] Thus, at least one major fintech sector—online banking—is pervasively inaccessible.[174]

My examination of banking websites adds to this limited scholarly foundation for two reasons. First, a comprehensive case that online banking excludes people with disabilities requires both subjective, human-tester findings and multiple, objective machine-automated reports.[175] Second, an examination of a bank website's homepage does not determine if the bank's digital platform conforms with consumer protection law because a generic homepage does not necessarily

166. *See* discussion *infra* Subsection III.C.2.

167. *See* discussion *infra* Section IV.B.

168. *See* BUREAU OF CONSUMER FIN. PROT., *supra* note 20, at 60–61.

169. Wentz et al., *supra* note 1, at 871.

170. *Id.* at 871–72.

171. *Id.*

172. *Id.* at 872–73 (explaining the way that the researchers chose the representative sample). The sample primarily consisted of domestic banks. *Id.*

173. *Id.*

174. *Id.*

175. The bank-homepage study researchers preferred to use human testers over automated testers because automated tools sometimes produce widely varied reports. *See id.* at 873 (citing Markel Vigo, Justin Brown & Vivienne Conway, *Benchmarking Web Accessibility Tools: Measuring the Harm of Sole Reliance on Automated Tests* 1, *in* PROCEEDINGS OF THE 10TH INTERNATIONAL CROSS-DISCIPLINARY CONFERENCE ON WEB ACCESSIBILITY (2013)). *But see* Vahid Garousi, Michael Felderer, Marco Kuhrmann, Kadir Herkiloglu & Sigrid Eldh, *Exploring the Industry's Challenges in Software Testing: An Empirical Study*, 35 J. SOFTWARE EVALUATION & PROCESS 1, 11 (2020) (explaining that there is a "wide spectrum" of human tester expertise and that human testers are unable to correct subjective biases in software review); *see also* Vigo et al., *supra*, at 9 (recommending that researchers who rely on automated tools to test web accessibility use multiple tools).

implicate consumer protections.[176] In contrast, webpages offering customers credit cards and home mortgages directly implicate consumer protection laws.[177] The next Subsection explains my study of such pages and findings on bank-website inaccessibility, which used accessibility-testing tools to objectively review and code accessibility errors.

2. New Data Implicating Consumer Laws as a Solution

To generate a list of bank sites, I downloaded the quarterly financial report for all FDIC-insured financial institutions.[178] From that data, I selected the report organized by "Assets and Liabilities" so that I could filter by total assets. Total assets is the most commonly used indicator of a bank's overall size and influence.[179] From the list of 5,011 FDIC-insured institutions, I selected a test sample of the ten largest[180] 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.[181] From the six tools in that study, I removed those that did not allow me to limit the compliance review to a specific version of WCAG standards and those that did not give results at a WCAG-guideline

176. *See infra* Subsections IV.B.2.–3 (explaining the relationship between web accessibility and consumer protection laws that aim to ensure fair, equal, and informed access to credit).

177. *See* Wentz et al., *supra* note 1, 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 Dodd-Frank Act, or a revised Equal Credit Opportunity Act. *See infra* Subsection IV.B.2. A bank's inaccessible home mortgage page likely triggers Fair Housing Act protections. *See infra* Subsection IV.B.3.

178. *See Statistics at a Glance*, FDIC (Dec. 31, 2020), https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2020dec/industry.pdf [https://perma.cc/Z2LY-FQFE]; *see also Quarterly Financial Reports*, FDIC (Apr. 12, 2023), https://www.fdic.gov/foia/ris/id-sdi/index.html [https://perma.cc/H557-H2YC].

179. Jan Schildbach, *Large or Small? How to Measure Bank Size*, EU MONITOR 7 (Apr. 25, 2017), https://www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000443314/Large_or_small%3F_How_to_measure_bank_size.PDF?undefined&realload=ZgIdByZvOk4yKksc/TrkzFWaI7I4qWAzvQN8efm~s1BniY6fu6ll0a3GoKIancKT [https://perma.cc/E3ZV-QFBN] ("[T]otal assets remain an indicator that central bankers and financial supervisors are very much in [favor] of.").

180. 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. *See Statistics at a Glance*, *supra* note 178; *see also Quarterly Financial Reports*, *supra* note 178. 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.

181. *See* Marian Padure & Costin Pribeanu, *Comparing Six Free Accessibility Evaluation Tools*, 24 INFORMATICA ECONOMICA 15, 15 (2020).

level.[182] That left three tools for my study.[183] 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 median number of cumulative errors by each of the four categories that the three tools reported: "Perceivable," "Operable," "Understandable," and "Robust." Using the median result across the three tools led to more reliable outcomes than the average because it led to data that was not skewed by a single bad test.

Table 1 shows errors in each accessibility guideline category for every bank credit card page. Notably, 70% of the banks had more than ten errors in the "Perceivable" category. Six of the ten banks had 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	14	0	0	0
Bank # 2	14	7	1	2
Bank # 3	14	0	0	2
Bank # 4	14	0	4	2
Bank # 5	65	0	12	2
Bank # 6	5	1	0	2
Bank # 7	14	4	10	2
Bank # 8	14	4	5	9
Bank # 9	2	12	0	2
Bank # 10	4	3	2	2

182. Two other free accessibility checker cites, Total Validator and WAVE do not provide guideline-level reports. *See WAVE Web Accessibility Evaluation* Tools, WAVE, https://wave.webaim.org/ (last visited Mar. 29, 2024) [https://perma.cc/6YEW-FN5C]; *Check Your Website Today with Total Validator*, TOTAL VALIDATOR, https://www.totalvalidator.com/ (last visited Mar. 29, 2024) [https://perma.cc/35WX-AX47]. Mauve meets the criteria described above, but it is not part of the study because it frequently crashed while attempting to run reports. *See Single Page Evaluation*, MAUVE, https://mauve.isti.cnr.it/singleValidation.jsp (last visited Mar. 29, 2024) [https://perma.cc/SJD8-B8AZ]. Because WAVE is a very useful and reliable tool, however, I used it for more recent scans of the same sites.

183. I used AChecker, CynthiaSays, and TAW. 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. CynthiaSays was shut down in August 2021 after the developer partnered with a company to set up a paid testing service. Brad Henry, *CynthiaSays.com Accessibility Website Scan Announcement*, TPGI (Aug. 25, 2021), https://www.tpgi.com/cynthiasays-com-accessibility-website-scan-announcement/ [https://perma.cc/L7YY-B78T].

The degree of noncompliance errors in the "Perceivable" and "Operable" categories are particularly concerning. The most basic requirement in the "Perceivable" category is that a webpage provides text alternatives for non-text content.[184] Information conveyed in images on these error-ridden pages is likely hidden from consumers with limited vision who rely on screen-reading technology.[185] Pages that are not "Operable" pose barriers to those who may rely on keyboard-only navigation.[186]

The "Robust" and "Understandable" categories represent content requirements that are relatively subjective and concerned with cognitive disabilities, which are difficult to address with adaptive technology tools.[187] Conversely, the "Perceivable" and "Operable" categories have direct and serious consequences for users with limited vision or dexterity, which are relatively objective.[188] The objective nature of these latter categories makes compliance with them a more feasible starting point for implementing web accessibility guidelines and should make them easier for web designers to address. Though these guidelines themselves are not clearly enforceable under any law,[189] they illustrate the scale of inaccessibility issues encountered online.

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

184. *Text Alternatives: Understanding Guideline 1.1*, W3C, https://www.w3.org/TR/UNDERSTANDING-WCAG20/text-equiv.html (last visited Mar. 29, 2024) [https://perma.cc/9L6Q-72JC].

185. *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* Section III.B (explaining how screen-readers make accessing virtual content possible).

186. *See Web Content Accessibility Guidelines (WCAG) 2.0*, W3C (Dec. 11, 2008), https://www.w3.org/TR/WCAG20/ [https://perma.cc/Y4JB-ZLZN] (explaining the "operable" guideline).

187. *See Introduction to Understanding WCAG 2.0*, W3C, https://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html (last visited Mar. 29, 2023) [https://perma.cc/5QFU-W9A7].

188. *See id.*

189. *Id.*

190. 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 "improve access on [its website] for 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. OF JUST. C.R. DIV., https://archive.ada.gov/wells_fargo/wells_fargo_settle.htm (Aug. 2, 2012) [https://perma.cc/ZYP5-NV8E].

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	13	4	2	1
Bank # 2	14	6	10	2
Bank # 3	7	0	0	2
Bank # 4	14	1	1	0
Bank # 5	14	6	2	2
Bank # 6	5	1	0	2
Bank # 7	14	3	5	2
Bank # 8	14	11	1	2
Bank # 9	19	8	10	2
Bank # 10	0	1	2	0

Wave is another popular, publicly available tool for checking accessibility compliance.[191] Instead of identifying errors as they correspond to WCAG guidelines, Wave gives a summary report of WCAG errors and gives direct guidance to content creators about how they can make their pages more accessible.[192] For instance, Wave explains the accessibility challenge each error will present and suggests alternative coding.[193] Because Wave does not report errors by WCAG guideline,[194] its outputs could not be reviewed directly with those above. But its more pragmatic error report made it easy to isolate the type and frequency of different kinds of accessibility errors. Using credit-card-offerings websites from 2022, I ran the same URLs from my earlier data sample through Wave to check for overall errors.[195] Chart 1 illustrates the most common error on each page. Half the pages were missing form labels, meaning that a person reliant on screen-reading technology could not perceive what information a form entry required.[196] Three of the pages had images that lacked alternative text, meaning that a

191. It is frequently cited in similar research. *See, e.g.*, Bayan Abu Shawar, *Evaluating Web Accessibility of Educational Websites*, 10 INT'L J. EMERGING TECH. LEARNING 4, 6–8 (2015). *See generally* Elena Fernández-Díaz, Patricia P. Iglesias-Sánchez & Carmen Jambrino-Maldonado, *Exploring WHO Communication During the COVID 19 Pandemic Through the WHO Website Based on W3C Guidelines: Accessible for All?*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH 5663 (2020).

192. *See WAVE Web Accessibility Tool*, WAVE, https://wave.webaim.org/ (last visited Mar. 29, 2024) [https://perma.cc/2JEV-LC89].

193. *See id.*; *What's Your Aim?*, WAVE, https://wave.webaim.org/aim/ (last visited Mar. 29, 2024) [https://perma.cc/C7P9-MMPH].

194. *See WAVE Web Accessibility Tool*, *supra* note 192; *What's Your Aim?*, *supra* note 193.

195. Each Wave report was run on December 11, 2022.

196. *Label Form Fields*, UNIVERSALUSABILITY, http://universalusability.com/access_by_design/forms/label.html (last visited Mar. 29, 2024) [https://perma.cc/CK39-DNN6]; *Labeling Controls*, W3C, https://www.w3.org/WAI/tutorials/forms/labels/#labeling-buttons (July 27, 2023) [https://perma.cc/M4Q4-P8DQ].

consumer using screen-reading technology would not be able to perceive the message that the image was meant to convey. Only two pages tested error free with the Wave tool.

CHART 1: MOST COMMON ERROR PER PAGE

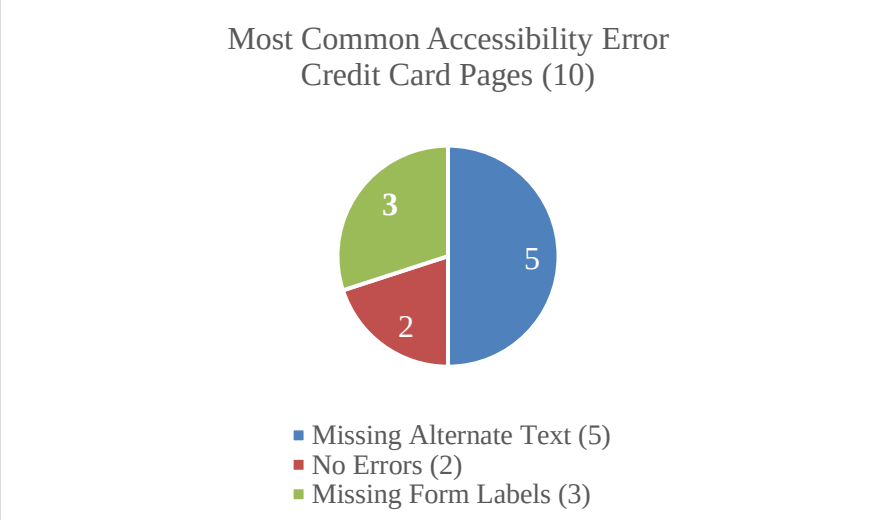

Table 3 lists the actual number of each type of common error for the respective bank page reviewed:

TABLE 3: FREQUENCY OF MOST COMMON ERROR PER PAGE

Identifier	Most Common Error	Error Count
Bank #1	No Errors	0
Bank # 2	Missing Form Label	23
Bank #3	Images Missing Alternate Text	2
Bank # 4	Images Missing Alternate Text	3
Bank #5	Missing Form Label	2
Bank # 6	Missing Alternate Text	21
Bank #7	Empty Headings/Links	4
Bank # 8	No Errors	0
Bank #9	Alt Text Missing	3
Bank # 10	Alt Text Missing	2

The scale of noncompliance documented in the bank-homepages study and corroborated by my research should concern both disability rights advocates and banks, the latter of which are already facing uncertain ADA litigation.[197] As

197. 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/orderofthecourt/19 (last visited Mar. 29, 2024) [https://perma.cc/SGZ6-P8TG] (select Order List corresponding to "10/02/19"). In *Robles*, the Ninth Circuit found that a pizza chain's website was clearly a "place of public

discussed below, the inaccessibility on these particular pages likely exposes banks to consumer-protection liability regardless of whether the Supreme Court, Congress, or the DOJ find that the ADA requires their accessibility.[198]

IV. CREATIVELY ACHIEVING ACCESS FOR CONSUMERS

This Part sets out the consumer-oriented legal framework that arguably requires accessible fintech for consumers with disabilities. It starts by tracing the uncertainty and disagreement over the ADA's applicability online.[199] It then examines four consumer-protection schemes that apply to inaccessible fintech and online banking and suggests that these alternatives offer a more expedient, politically palatable, and narrow path to web accessibility than the ADA and present a regulatory sandbox for broader expansion of digital-access rights in the future.[200] Indeed, disability advocates are actively working to avoid putting the ADA's scope before the current Supreme Court, fearing an unfavorable outcome.[201] Certainly, such unfavorable outcomes could roll back the clock on civil rights in jurisdictions that do recognize a right to digital access. Moreover, the enthusiasm and bipartisan support that spurred the ADA through its enactment and amendments are no longer features of the political environment.[202]

A. The Case for Looking Beyond the ADA-Box

Legal scholars have traditionally argued for web accessibility solely on the basis of the rights enshrined in the ADA.[203] Thus, it is worthwhile to briefly consider why it makes sense to look outside the ADA-box to 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."[204] When Congress passed the ADA in 1990,[205] neither lawmakers nor the

accommodation" to which people with disabilities were entitled to "full and equal enjoyment" under the ADA. *Robles*, 913 F.3d at 904. The Ninth Circuit relied in part upon the DOJ's position that "repeatedly affirmed" that "[T]itle III [applied to] Web sites of public accommodations." *Id.* at 906–07 (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; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,460 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36) (emphasis added).

198. *See* discussion *infra* Section IV.A.

199. *See* discussion *infra* Section IV.A.

200. *See* discussion *infra* Section IV.B.

201. *See supra* note 4 and accompanying text.

202. Samuel R. Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26, 29 (2020) (first citing Laura Rothstein, *Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 271, 272 (2019); and then citing David M. Perry, *Can Disability Rights Stay Bipartisan?*, PAC. STANDARD (Mar. 22, 2017), https://psmag.com/news/can-disability-rights-stay-bipartisan [https://perma.cc/9LQK-QH73]).

203. *See, e.g.*, Areheart & Stein, *supra* note 3, at 449.

204. 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)) (stating the ADA's purpose).

205. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–213.

general public understood how the Internet would transform commerce, communication, and access to the "full and equal enjoyment"[206] of modern life.[207]

The ADA prohibits discrimination against people with disabilities by an employer (Title I), by the federal government and those that receive federal funds (Title II), and by "place[s] of public accommodation" (Title III).[208] Under Title III, the DOJ can bring an agency enforcement action against inaccessible public accommodations, but "private enforcement suits are the primary method of obtaining compliance with the [ADA]."[209] 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."[210]

The biggest hurdle for plaintiffs bringing a Title III discrimination claim against a public entity for its inaccessible website is convincing a court that the website fits within the scope of a Title III "place of public accommodation."[211] Title III does not define the word "place."[212] "Public accommodation," however, is defined by an enumerated list of over fifty examples.[213] The list includes banks;[214] but it does not include websites.[215] Most of the examples in the enumerated list are physical locations rather than amorphous "spaces."[216] And, the Internet as we understand it was completely uncontemplated in 1990.[217] Thus, it

206. 42 U.S.C. § 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.").

207. *See* Reid, *supra* note 14, at 595 ("[T]he 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 3, 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 134, at 62 (explaining the Internet's "robust expansion" soon after Congress passed the ADA).

208. *See* 42 U.S.C. § 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.").

209. 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)).

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

211. *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)).

212. *See generally* 42 U.S.C. § 12181.

213. *Id.* § 12181(7) (including banks as places of public accommodation); *see also* PGA Tour v. Martin, 532 U.S. 661, 662 (2001) (holding that the list in § 12181(7) is not exclusive for determining Title III's coverage).

214. 42 U.S.C. § 12181(7).

215. *Id.*

216. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) ("Title III provides an extensive list of 'public accommodations' in § 12181(7) . . . . All the items on this list, however, have something in common. They are actual, physical places . . . .").

217. *World Wide Web Timeline*, PEW RSCH. CTR. (Mar. 11, 2014), https://www.pewresearch.org/internet/2014/03/11/world-wide-web-timeline/ [https://perma.cc/R8AV-42N3].

is difficult to know if Congress intended Title III to extend to the "places" we now frequent via our smartphones, computers, and tablets.[218]

Circuit courts are split regarding whether and when a commercial website is a "public accommodation" under Title III. The Eleventh, Ninth, Sixth, Fifth, and Third Circuits either limit "public accommodation" to physical places or require a strong "nexus" between a physical place and the goods or services provided through a website.[219] Professor Inazu has neatly summarized the "nexus" test:

> The nexus text requires a website to be operated by a company that also operates a related physical place of public accommodation. The physical facility must be open to the public and not simply a warehouse for goods to be shipped in response to online orders. Under the nexus test, the website can be thought of as an intermediary between a customer and a physical store rather than as its own standalone online business.[220]

These circuits—that either limit the ADA to physical spaces or apply the nexus test—rely heavily on the physical nature of the non-exclusive list of "public accommodations" enumerated in the statute to arrive at their statutory construction.[221] Two circuits—the First and the Seventh—have rejected that public accommodations include only physical locations.[222] The Second Circuit has also

218. The Supreme Court has directed courts to construe Title III's list "liberally." *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.").

219. *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 904–06, 905 n.6 (9th Cir. 2019) (declining to decide whether a Domino's website and app were "place[s] of public accommodation" under the ADA because the website and app had a strong "nexus" to the physical Domino's restaurant); Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (holding that Title III's ADA mandate unambiguously refers only to physical places); 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); Magee v. Coca-Cola Refreshments USA, Inc., 833 F.3d 530, 534 n.23 (5th Cir. 2016) (rejecting the view that a "public accommodation" under the ADA can "extend beyond physical places"); Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1277 (11th Cir. 2021), *opinion vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021) ("[P]ursuant to the plain language of Title III of the ADA, public accommodations are limited to actual, physical places."); Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) ("[T]he plaintiffs' argument that the prohibitions of Title III are not solely limited to "places" of public accommodation contravenes the plain language of the statute.").

220. John Inazu, *Virtual Access: Disability and the Internet*, SUBSTACK (Dec. 9, 2022), https://johninazu.substack.com/p/virtual-access-disability-and-the [https://perma.cc/6EZL-TFT4].

221. *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.").

222. *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 18–19 (1st Cir. 1994) (holding that a "place of public accommodation" under Title III "is not limited to actual physical structures"); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("[T]he core meaning of [the public accommodation] provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space, . . .) that is open to the public cannot exclude disabled persons . . . ."); *see also* Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co., 268 F.3d 456, 459 (7th Cir. 2001) (refusing to interpret "public accommodation" literally, so as to require "a physical site"). Advocates also often point to the inclusion of "travel service" as an indication that the scope extends to the point of access for services and is not just limited to physical locations. *See, e.g.*, *Carparts*, 37 F.3d at 19 ("Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services."); *see also* Access Now, Inc. v. Blue Apron, LLC, No. 17-CV-116-JL, 2017 WL 5186354, at *3 (D.N.H. Nov. 8, 2017).

signaled support, though indirectly, for this position.[223] Decisions in the minority 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.[224] Notably, however, the leading cases cited by district courts in the minority circuits all deal with access in the context of discriminatory insurance benefits, not technology.[225] Nonetheless, plaintiffs at the district court level in these jurisdictions have successfully sued public accommodations for their inaccessible websites and mobile apps.[226]

In the context of access to credit, courts following the nexus text have required plaintiffs to plead that an inaccessible website deterred them from visiting a physical location, even when a bank's website offers full services online to those able to access them.[227] In 2019, the Supreme Court denied certiorari on the question of whether websites and digital applications are public accommodations under the ADA.[228] As fintech expands, many websites and apps for earned wage

223. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32–33 (2d Cir. 1999), *opinion amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000) (holding that an insurance policy is a good or service of a public accommodation and expressly following the First Circuit view of Title III). District courts in the Second Circuit are splintered on this question. *Compare* Winegard v. Newsday LLC, 556 F. Supp. 3d 173, 182 (E.D.N.Y. 2021) (reasoning that Second Circuit precedent did not bind the court to interpret "Public Accommodation" to extend beyond physical locations because the Pallozzi case squarely decided the meaning of a "good" or "service" of a "Public Accommodation," not the meaning of a "Public Accommodation" itself), *with* Romero v. 88 Acres Foods, Inc., 580 F. Supp. 3d 9, 19–21 (S.D.N.Y. 2022) (rejecting the Winegard holding), and Martinez v. Gutsy, No. 22-CV-409, 2022 WL 17303830, at *7 (E.D.N.Y. Nov. 29, 2022) (rejecting the nexus test and holding that the ADA covered websites that lacked a nexus to a physical place).

224. Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 574 (D. Vt. 2015) ("[The ADA's legislative history indicates] that an important area of concern is information exchange."); Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (quoting *Carparts*, 37 F.3d at 19) ("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[.]").

225. *See Carparts*, 37 F.3d at 12–13 (holding that "place of public accommodation" under Title III "is not limited to actual physical structures"); *Mut. of Omaha Ins. Co.*, 179 F.3d at 559 ("The core meaning of [the public accommodation] provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space, . . .) that is open to the public cannot exclude disabled persons . . . ."); *see also Morgan*, 268 F.3d at 459 (refusing to interpret "public accommodation" literally, so as to require "a physical site").

226. *See, e.g.*, *Netflix, Inc.*, 869 F. Supp. 2d at 199–202 (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"); *Scribd*, 97 F. Supp. 3d at 567, 576 (quoting *Netflix*, 869 F. Supp 2d at 200) (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'").

227. *See* Jones v. Ft. McPherson Credit Union, 347 F. Supp. 3d 1351, 1354–55 (N.D. Ga. 2018); Jones v. Lanier Fed. Credit Union, 335 F. Supp. 3d 1273, 1278 (N.D. Ga. 2018); Gniewkowski v. Lettuce Entertain You Enters., Inc., 251 F. Supp. 3d 908, 919 (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 . . . .").

228. 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 (last visted Mar. 29, 2024) [https://perma.cc/SGZ6-P8TG] (select Order List corresponding to "10/02/19"). In *Robles*, the Ninth Circuit found that a pizza chain's website was

access, consumer or peer lending, and—increasingly—banking are online-only.[229] No nexus to a physical location exists. Those websites thus lie outside the grasp of Title III even in jurisdictions using the broader nexus test.

Most recently, in *Gil v. Winn-Dixie Stores, Inc*, the Eleventh Circuit held that "public accommodations are limited to actual, physical places" and rejected the nexus standard used by sister circuits as having "no basis . . . in the statute or [the court's] precedent."[230] The court made clear that until Congress amends the ADA to make Title III's scope clearly applicable online, no websites in its Circuit are subject to the law's accessibility mandate.[231] Though the case was later vacated on procedural grounds,[232] it struck a hard symbolic blow to the web accessibility movement and did not bode well for plaintiffs litigating at the district courts in the Eleventh Circuit.

The 2008 ADAAA gave Congress the chance to update Title III and provide clear guidance to the courts.[233] In response to judicial narrowing of ADA protection, Congress passed the ADAAA to ease the threshold burden for showing a disability by expanding the definition of "substantially limit[ing] a major life activity" and clarifying that an individual'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.[234] Despite significant pressure and public discourse on the topic of web accessibility at that time, Congress declined to extend the meaning of a "place of public accommodation" to websites—or otherwise address website and disability accommodations.[235]

clearly a "place of public accommodation" to which people with disabilities were entitled to "full and equal enjoyment" under the ADA. *Robles*, 913 F.3d at 904. The Ninth Circuit relied in part upon the DOJ's position that "repeatedly affirmed" that "[T]itle III [applied to] Web sites of public accommodations." *Id.* at 906–07 (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; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,460 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36).

229. Julian Alcazar & Terri Bradford, *In the Nick of Time: The Rise of Earned Wage Access*, FED. RSRV. BANK OF KAN. CITY (Sept. 23, 2020), https://www.kansascityfed.org/research/payments-system-research-briefings/rise-earned-wage-access/ [https://perma.cc/LA8E-Q9E6].

230. 993 F.3d 1266, 1277, 1281 (11th Cir. 2021), *vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021). Notably, the Eleventh Circuit had held just three years prior in an 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 F. App'x 752, 753–54 (11th Cir. 2018).

231. *Gil*, 993 F.3d at 1284.

232. *Gil*, 21 F.4th at 776.

233. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553.

234. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553.

235. Areheart & Stein, *supra* note 3, 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."); *see also Americans with Disabilities Act: Sixteen Years Later*: *Hearing Before the House Subcommittee on the Constitution of the Committee on the Judiciary*, 109th Cong. 34 (2006) (statement of the Honorable Tony Coelho, Chair of the Epilepsy Foundation); *id.* at 112 (statement of prepared statement of Day Al-Mohamed, Director of Advocacy and Governmental Affairs, American Council of the Blind).

The DOJ, the agency charged with enforcing the ADA,[236] has also failed to provide enforceable regulations that extend Title III's protections to online spaces.[237] The latest published rule on public accommodations uses the same enumerated list of physical spaces used in the 1990 Act text;[238] the rule's explanatory text elaborates on accommodations of only brick-and-mortar facilities.[239] 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."[240] 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*."[241] Since 2017, the DOJ has not published any proposed regulations related to web accessibility.[242]

Though some likely hoped a Democratic administration would reignite the DOJ's interest in extending ADA protections to websites, after more than three years in office, the Biden Administration has not pursued implementing web-accessibility guidelines under the ADA's mandate.[243] The past decade of vacillation and inaction does not inspire much hope for change by agency action. Moreover, it seems unlikely that courts would defer to the DOJ even if it interpreted "public accommodation[s]" to include websites because Congress declined to extend the ADA to online "places" in the ADAAA, making it difficult to argue that Congress meant for the Act's protection to extend that far.[244]

236. Americans with Disabilities Act, Pub. L. No. 101–336, 104 Stat. 327, 364 (1990) (codified as amended in 42 U.S.C. § 12188(b)).

237. Areheart & Stein, *supra* note 3, at 473.

238. *Id.* at 473–74.

239. 28 C.F.R. § 36.104 (2016); *see also* 28 C.F.R. pt. 36, app. B (1997).

240. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36).

241. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932, 60,932 (Dec. 26, 2017) (emphasis added); Reid, *supra* note 14, at 600–01 ("[The] 2010 DOJ rulemaking to implement Title III website regulations languished and then was formally withdrawn in 2017 . . . .").

242. *Document Search*, FED. REG., https://www.federalregister.gov/documents/search#advanced (last visited Mar. 29, 2024) [https://perma.cc/ZD57-JY3M] (filter "publication date" from "12/27/2017" to "12/23/2023"; then filter "Affected CFR Part" by 28 C.F.R. 36; then filter "Agency" by "Justice Department"; then click "search"; then click "Enter a search term or citation" and search "disability"). This search rendered a single, unrelated document: "Civil Monetary Penalties Inflation Adjustment." *See id.* Notably, the DOJ has published a notice of intent to publish a notice of proposed rulemaking for Title II's application online, but this would have no effect on public accommodations like banks. *View Rule*, OFF. OF INFO. & REGUL. AFF.'S (2022), https://www.reginfo.gov/public/do/eAgendaViewRule?RIN=1190-AA79&pubId=202204&utm_medium=email&utm_source=govdelivery [https://perma.cc/7BFH-BWV4].

243. *See supra* note 242 and accompanying text.

244. *See, e.g.*, Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1284 (11th Cir. 2021):

> We . . . recognize that for many Americans . . . inaccessibility online can be a significant inconvenience. But constitutional separation of powers principles demand that the details concerning whether and how these difficulties should be resolved is a project best left to Congress . . . . Absent congressional action that broadens the definition of "places of public accommodation" to include websites, we cannot extend ADA

Until recently,[245] scholars have not made policy recommendations regarding the types of websites that regulators and lawmakers should target for implementing web accessibility guidelines.[246] One of 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.[247] The resulting ambiguity leaves lawmakers and regulators with the thorny task of sorting "the web" into categories that warrant regulation and categories that may warrant exceptions from regulatory burden and oversight. This type of broad mandate also fails to appreciate the differences in design and access in app-based platforms, like smartphones and tablets, and web-based platforms, like laptops.[248]

Smith and Professor Inazu were the first to propose guidelines for ADA application based on website type, as well as other guidance for policymakers, in their article, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*.[249] Smith and Professor Inazu'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 providers with service users, and relationship seekers with one another."[250] The authors explain how these online spaces track most closely to those physical spaces that require access under the ADA.[251] Though a promising step forward in the academic discourse, this framework would still require significant political will to combat the wide range of stakeholders that would be affected by such broad-reaching regulation. Regulating major banks or fintech companies through consumer protection laws is a more palatable, incremental strategy for legislators and regulators to gain public and industry buy-in through narrow, tailored regulation before imposing broad, sweeping accessibility mandates online.

Because courts, regulators, and Congress are reluctant to categorically extend the ADA's Title III mandate to all commercial websites, advocates must consider supplemental or incremental legal strategies to achieve web accessibility. Due perhaps to the uncertainty of Title III's scope, or to the desire to avoid bad caselaw, many banks have opted to settle with ADA plaintiffs, promising to

liability to the facts presented to us here, where [the plaintiff could access the store's goods in a physical location but not online].

245. *See* Smith & Inazu, *supra* note 3, at 722.

246. *See id.* at 722–23 (calling Areheart & Stein, *supra* note 3, "[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").

247. *See generally* H.R. 8478, 116th Cong. § 601(a), 601(b)(2), 601(c)(3) (2d Sess. 2020); *see also* Smith & Inazu, *supra* note 3, at 765 (discussing the bill's weaknesses).

248. *See* Smith & Inazu, *supra* note 3, at 765.

249. *See generally id.*

250. *Id.* at 743, 774.

251. *Id.* at 744.

follow web accessibility guidelines before the courts can weigh in.[252] Unfortunately, as the data in the previous Part illustrated,[253] settlements may relieve an individual plaintiff but have not led to meaningful progress in web accessibility at large.[254] That is why it is time to look outside the ADA-box.

B. Consumer Protections

The ADA has failed to make banking accessible despite years of lawsuits, settlements, amendments, and agency actions considering web accessibility.[255] Though arguably not required by law, some of these non-compliant banks have promised as a condition of settlement to voluntarily implement WCAG standards on their websites.[256] Still, these institutions' sites are not fully compliant.[257]

The ADA is a "targeted" framework because it requires membership in a protected class for its protections to attach.[258] By contrast, a so called "universalist" law is one that applies irrespective of class membership.[259] Consumer law offers both universalist and targeted approaches to addressing web inaccessibility for consumers with disabilities.[260] Like the ADA, the Fair Housing Act ("FHA") and ECOA are targeted approaches to civil rights because their protections reach only members of specific classes.[261] TILA's requirement for "clear[] and conspicuous" disclosure of the cost of credit[262] and the Dodd-Frank Act's prohibition against unfair, deceptive, or abusive acts or practices[263] are universalist approaches because they do not premise consumer protection on class membership.[264] The tactical, substantive, and expressive appeal of either approach—targeted or universalist—is disputed.[265] This Article aligns with Professor Bagenstos's view that some mix of both targeted, discrimination-based and

252. *See* Wentz et al., *supra* note 1, 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).

253. *See* discussion *supra* Part III.

254. *See supra* note 175 and accompanying text.

255. *See* discussion *supra* Section IV.A (explaining the litigation, congressional action (or lack thereof), and agency vacillation on the applicability of the ADA's Title III to publicly operated websites).

256. Wentz et al., *supra* note 1, at 872.

257. *See supra* Subsections III.C.1–2.

258. Bagenstos, *supra* note 21, at 2843.

259. *Id.* at 2842.

260. *See* discussion *infra* Section IV.B (discussing the potential solutions that consumer law offers).

261. *See* discussion *infra* Subsection IV.B.3.

262. *See* 12 C.F.R. § 1026.16(b)(1) (2011) (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)).

263. 12 U.S.C. § 5531.

264. Bagenstos, *supra* note 21, at 2842–43.

265. *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 21, at 2852–55 (summarizing the literature critiquing the supposed tactical advantages of "universalist" approaches).

universalist approaches is ideal for addressing civil rights.[266] Accordingly, both targeted and universalist consumer protection laws can complement the ongoing effort to extend Title III to online spaces.

Compared to the ADA, consumer law offers Congress and regulators a more politically appealing tool for implementing web accessibility guidelines because it targets and limits the regulatory burden.[267] Years of vacillation without change indicates that regulators are reluctant to require compliance for *all* websites.[268] Even the category-limiting proposals discussed above by Smith and Professor Inazu[269] would require a significant showing of public support and political will. Meanwhile, many courts prefer to limit regulatory imposition based on a website's nexus to a physical place of business.[270]

Consumer law offers lawmakers and judges a relatively narrow way to begin addressing web accessibility in the fintech context, particularly in the credit and banking space. Though surely an unsatisfyingly incremental recommendation to some disability rights advocates, this limited approach represents an important step toward full web accessibility.[271] And fintech accessibility is increasingly important as brick-and-mortar banks and financial institutions disappear.[272]

1. Normative Considerations

Stepping outside the ADA-box means embracing so called "universalist" approaches to civil rights. Disability rights advocates and antidiscrimination laws more commonly adopt "targeted" approaches like the one illustrated in the ADA.[273] Thus, it is worth considering the normative benefits and trade-offs of the different approaches that follow.

Consumer laws like the FHA and ECOA are "targeted" antidiscrimination laws because their protections only reach members of specific classes.[274] Other consumer laws, like TILA[275] and the Dodd-Frank Act's prohibition against

266. Bagenstos, *supra* note 21, at 2855 (emphasis added):

> [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 . . . . [W]here 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.

267. *See infra* notes 268–72 and accompanying text.

268. *See supra* Section IV.A.

269. *See* Smith & Inazu, *supra* note 3, at 743, 774–75.

270. *Id.* at 721–22.

271. *See* Areheart & Stein, *supra* note 3, at 452–53 (arguing that Title III should apply to the entire Internet without limitation). *But see* Smith & Inazu, *supra* note 3, at 723 (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).

272. *See supra* note 229 and accompanying text.

273. *See* Bagenstos, *supra* note 21, at 2857.

274. *See supra* note 261 and accompanying text.

275. *See* 12 C.F.R. § 1026.16(b)(1) (2011) (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)).

unfair, deceptive, or abusive acts or practices (colloquially known as UDAAP laws)[276] are universalist approaches to combatting bank website inaccessibility because they do not premise consumer protection on class membership.[277] In some contexts, scholars criticize this disregard of class status as "a post racial, colorblind perception."[278] But, universalist consumer laws are a desirable supplement for combatting economic discrimination against people with disabilities.[279]

There are unique advantages for litigants pursuing relief under universalist consumer laws. First, consumer protection may offer more expansive and inclusive protection to those 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.[280] For instance, universalist 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 universalist approaches "more inclusive and flexible" than targeted antidiscrimination laws.[281] 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.[282] 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 that TILA protects.[283] Thus, though not without normative tradeoffs or criticisms, universalist consumer laws can successfully supplement antidiscrimination claims by consumers with disabilities who face exclusion from online banking specifically, and fintech more generally. The next Section considers how universalist and targeted antidiscrimination consumer laws should be applied or modified to remedy the exclusion people with disabilities face online.

276. 12 U.S.C. § 5531.

277. *See infra* Subsection IV.B (analyzing the normative differences between targeted and universalist approaches); *see also* Bagenstos, *supra* note 21, 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.").

278. Sablosky Elengold, *supra* note 117, at 632.

279. *See id.* at 591 ("[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.").

280. *See* Areheart & Stein, *supra* note 3, at 475 ("Internet accessibility helps . . . those with impairments not rising to a statutorily prescribed level of 'disability' status[.]"); Yoshino, *supra* note 265, at 793 (asserting that universalistic appeals are inclusive than class-based appeals). The FHA is the only consumer protection law that prohibits discrimination on the basis of disability. *See supra* Subsection IV.B.1 (discussing the FHA).

281. Sablosky Elengold, *supra* note 117, at 613–14.

282. *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 618 ("[B]y choosing not to assert discrimination, [a plaintiff] may escape the bias and unfair treatment that many discrimination plaintiffs face from judges and juries.").

283. *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 Equal Credit Opportunity Act].").

2. Universalist Approaches to Consumer Rights

This Section considers the universalist consumer protection laws that may offer relief to people with disabilities who encounter inaccessible digital banks. The first Subsection considers two requirements under TILA.[284] The second Subsection considers the Dodd-Frank Act's general UDAAP prohibition.[285]

a. The Truth in Lending Act

First passed in 1968,[286] TILA established the first mandatory, uniform disclosure requirement imposed nationally on the U.S. consumer credit market.[287] Driven by the belief that informed consumers make the best choices,[288] Congress passed TILA to "guarantee the accurate and meaningful disclosure of the costs of consumer credit."[289]

TILA's most important disclosures are those explicitly tied to the cost of credit: the finance charge[290] and the annual percentage rate ("APR").[291] During the numerous revisions to TILA over the past five decades,[292] 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.[293] The CFPB sets forth TILA's many protections and prohibitions in 12 C.F.R. § 1026 ("Regulation Z").[294]

Two of TILA's requirements—those related to open-end credit advertising and online-credit-agreement posting—could help 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

284. *See* discussion *infra* Subsection IV.B.2.

285. *See id.*

286. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968).

287. *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).

288. *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 . . . . To 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.'").

289. Edwards, *supra* note 287, 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").

290. *See* 12 C.F.R. § 226.4(a) (defining finance charge); *see also* Edwards, *supra* note 287, at 213–14 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, Alvin C. Harrell, Elizabeth Huber eds., 2000)).

291. *See* Edwards, *supra* note 287, at 214 (providing a simple definition of APR as, "relative or percentage cost of credit on a yearly basis") (internal quotation marks omitted).

292. *See* Shepard, *supra* note 288, at 187–88 (summarizing the most significant TILA amendments over its long history).

293. *See* Edwards, *supra* note 287, at 215–16; *see also* Shepard, *supra* note 288, at 185–86.

294. *Compliance Guide to Small Entities*, FED. RSRV., https://www.federalreserve.gov/supervisionreg/regzcg.htm (Sept. 11, 2019) [https://perma.cc/9EJK-4ZEY].

website) disclose transaction terms "clearly and conspicuously."[295] 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."[296]

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 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. For instance, if some of the card's terms are featured in images that lack alternative text, those terms would be imperceivable to some people with disabilities. The sparse caselaw developed around the open-ended credit advertisement disclosure requirements makes it difficult to predict how courts would respond to TILA in this context.[297]

A credit agreement posted on an inaccessible bank website is likely meaningless to the consumer who is unable to perceive the agreement's contents.[298] There is not much caselaw on TILA's requirement that creditors post the written credit card agreement online for consumers to access.[299] 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.[300]

In *Billings*, a consumer applied for and received a bank-issued credit card from TD Bank.[301] 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.[302] During the ensuing back-and-forth over the validity of fees, credit-report threats, and subsequent payment, the consumer

295. *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 § 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").

296. 15 U.S.C. § 1632(d)(1).

297. Using Westlaw Edge's "citing references" function, I found only one case that cites 12 C.F.R. § 1026.16. *See generally* 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).

298. *See* Billings v. TD Bank, NA, No. 13–2969, 2013 WL 3989572, at *6 (D.N.J. 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).

299. On January 10, 2023, 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").

300. *See id.*

301. *Id.* at *1.

302. *Id.*

attempted to review his credit card agreement online but "[the bank's] computerized www.program *denied* [the consumer] access."[303] The consumer sued the bank claiming, in part, violation of 15 U.S.C. § 1632(d)(5), the requirement that creditors post credit agreements online for consumers to access.[304] The bank moved to dismiss under FED. R. CIV. P. 12(b)(6).[305]

The *Billings* court agreed that TILA "essentially mandate[s] that creditors must maintain a website *providing access* to the credit card agreement."[306] 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."[307] 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.

b. Unfair, Deceptive, or Abusive Acts or Practices

Another potentially applicable universalist consumer law is the Dodd-Frank Act and its UDAAP prohibitions and protections. Passed in 2010, the Dodd-Frank Act granted the CFPB regulatory and enforcement authority to prevent UDAAPs.[308] The CFPB can enforce violations through litigation in federal court or through agency adjudication, but it cannot create a private right of action.[309] Many states have similar consumer protection laws that allow for private enforcement.[310] Because each state statute varies considerably,[311] this Article considers only whether the CFPB could act within its statutory authority under the federal version of UDAAP to protect consumers with disabilities from encountering inaccessible bank websites.

303. *Id.* at *1–2 (emphasis added).

304. *Id.* at *2.

305. *Id.*

306. *Id.* at *5 (emphasis added).

307. *Id.* at *6.

308. 12 U.S.C. § 5531.

309. 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. BANKING & FIN. L. 321, 355 (2013).

310. 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-ag consumer-2010.pdf [https://perma.cc/9W4B-5MKN]; Levitin, *supra* note 309, at 357–58.

311. *See generally* CAROLYN CARTER, CONSUMER PROTECTION IN THE STATES; A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS, NAT'L CONSUMER L. CTR. (2018), https://www.nclc.org/images/pdf/udap/udap-report.pdf [https://perma.cc/5KKC-B7RD] (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 each state's respective UDAP statute. *Id.* at 19.

Unique standards apply to whether a practice is unfair, deceptive, or abusive.[312] First, a practice is "unfair" if (1) it is likely to cause (or actually causes) consumers substantial injury, (2) consumers cannot reasonably avoid the injury, and (3) the countervailing benefits to consumers or to competition do not outweigh the injury.[313]

The first requirement of an "unfair" action—substantial injury—usually encompasses monetary harm like fees and costs, but the CFPB has sometimes interpreted it more broadly.[314] For instance, injury sometimes also extends to severe emotional distress.[315] Courts do not require actual injury as long as plaintiffs can show a "significant risk" of impending, concrete harm.[316]

The second aspect of an unfair practice is that it is "not reasonably avoidable."[317] The "not reasonably avoidable" element encompasses a practice that makes it difficult for a consumer to make informed decisions regarding a credit transaction.[318] Though consumers with disabilities could perhaps overcome an inaccessible website's barriers by asking a friend or relative to convey information to them, that request would likely force them to divulge sensitive financial information.[319] It is doubtful that the broadly interpreted "not reasonably avoidable" standard would ask consumers with disabilities to suffer this risk.[320]

Finally, the CFPB balances the allegedly unfair practice against the corresponding benefits to consumers and competition.[321] Accessible design drives innovation and enhances overall user experience, so accessible design would benefit all bank customers.[322] Additionally, the cost to make a website accessible is

312. *See* 12 U.S.C. § 5531.

313. *See* Sarin, *supra* note 309, at 582 (summarizing 12 U.S.C. § 5531(c)(1)(A)–(B)) (internal quotations omitted).

314. *See id.* at 582–83 ("[A] 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* Elengold, *supra* note 117, at 617.

315. 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).

316. *Id.*

317. *See* 12 U.S.C. § 5531.

318. Areheart & Stein, *supra* note 3, at 487.

319. *See* Wentz et al., *supra* note 14 ("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.").

320. *See* Sarin, *supra* note 309, 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 315, 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.").

321. *See supra* note 313 and accompanying text.

322. *See* Areheart & Stein, *supra* note 3, at 475 (citations omitted):

> 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 . . . .

relatively insignificant, especially if adapted into cyclical updates.[323] The CFPB could also use metrics similar to the employment antidiscrimination section of the ADA (Title I), which does not impose the statutory burden on small employers,[324] to weigh the burden in comparison to a lender's overall market share or profitability. Therefore, banks—especially the stalwarts in the financial sector measured in this Article—will have a hard time arguing that the benefits to consumers and competition outweigh the cost of website 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 information about credit to potential borrowers.[325] This is analogous to a lender failing to portray information on its credit-application website in a way that an individual using adaptive technology, such as a screen-reader, can perceive.

UDAAP's second category covers "deceptive" acts or practices.[326] An act or omission is deceptive if it is likely to mislead consumers, the consumer's interpretation of the act or omission is reasonable under the circumstances, and the act or omission is material.[327] False advertising, failing to deliver on a product or price promised to a consumer, is the most common form of unfair or deceptive practice.[328]

Because web inaccessibility often 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.[329]

The final UDAAP prong protects against "abusive" acts or practices.[330] 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, costs, or conditions" of a

323. *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).

324. 42 U.S.C. § 12111(5)(A).

325. *See* Sarin, *supra* note 309, at 583.

326. *Id.* at 585.

327. CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2013-07: PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 3 (2013), https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf [https://perma.cc/KWB5-HX6F].

328. *See* Sablosky Elengold, *supra* note 117, at 615.

329. 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. *See id.* at 614.

330. 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, 131 (2015); Joshua L. Roquemore, *The CFPB's Ambiguous "Abusive" Standard*, 22 N.C. BANKING INST. 191, 194 (2018).

product or service.[331] This prong also contains an estoppel provision, protecting consumers who reasonably rely on "a covered person to act in his or her interests."[332]

The "abusive" UDAAP prong is the most open-ended and undefined of the three.[333] 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.[334] But the CFPB would most reasonably interpret the challenges that inaccessible bank websites pose as "unfair."[335]

In sum, there are at least two ways that inaccessible bank websites may fall under TILA's protections: the "clear and conspicuous" requirement for disclosures in credit card advertising[336] and the requirement to post the written credit agreement online.[337] 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.[338] Additionally, comparing each available UDAAP prong, the CFPB could most reasonably interpret inaccessible bank websites as "unfair."

3. Targeted Anti-Discrimination Consumer Laws

Most consumer laws are generally applicable, but two important targeted antidiscrimination laws could aid consumers with disabilities.[339] The FHA prohibits discrimination on the basis of disability.[340] The ECOA does not.[341] As a consequence, though consumers with disabilities are theoretically protected from discrimination in pursuing home ownership, one of the most critical precursors to securing access to home ownership—reasonably priced credit—is often out of reach for people with disabilities.[342]

331. 12 U.S.C. § 5531.

332. CONSUMER FIN. PROT. BUREAU, *supra* note 327, at 4.

333. Stephen J. Canzona, Note, "*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, 65–67 (2018).

334. *See supra* note 331 and accompanying text (quoting the CFPB's description of an "abusive" act).

335. *See supra* notes 313–325 (analyzing inaccessible websites under the "unfair" prong).

336. *See* 12 C.F.R. § 1026.16(b)(1) (explaining that the "clearly and conspicuously" standard applies to disclosures required under § 1026.6(a)(1) and (a)(2) and § 1026.6(b)(3)).

337. 15 U.S.C. § 1632(d)(5).

338. *See supra* notes 298–307 and accompanying text.

339. *See infra* notes 347–50 and accompanying text (explaining that the Fair Housing Act is the only anti-discrimination consumer law that protects on the basis of disability).

340. 42 U.S.C. § 3604(f)(1).

341. 15 U.S.C. § 1691(a)(1).

342. *See supra* notes 340–41 and accompanying text.

a. The Fair Housing Act

In the 1970s, Congress passed a host of consumer laws that included anti-discrimination provisions.[343] Of them all, only the FHA expressly protected people with disabilities.[344] The FHA may extend to the discriminatory treatment that people with disabilities face in navigating a bank website's home mortgage application.[345] Importantly, the Supreme Court has found that "testers" or those "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices" have standing to sue under the FHA when they experience an implied preference against a protected class.[346]

In *Freedman v. Suntrust Banks, Inc.*, a federal court recognized a consumer's FHA discrimination claim 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.[347] 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 consumer with a disability.[348] 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. An automated, programmed deficiency in a lender's website that prohibits a person with a disability from 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

343. *See* BUREAU OF CONSUMER FIN. PROT., *supra* note 20, at 60 (discussing the ECOA, FHA, Community Reinvestment Act, and Home Mortgage Disclosure Act as part of a "push for civil rights in financial markets").

344. *Id.*; *see also* 42 U.S.C. § 3604(c) (making it unlawful "[t]o 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).

345. As of January 2022, *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.D.C. 2015) (dismissing for lack of personal jurisdiction).

346. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982). The Second Circuit has found that testers' standing extends to FHA-violating advertisements. *See* Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 904 (2d Cir. 1993). Circuits are split over whether ADA testers have the same standing scope. *Compare* Laufer v. Looper, 22 F.4th 871, 882–83 (10th Cir. 2022), *and* Harty v. W. Point Realty, Inc., 28 F.4th 435, 443–44 (2d Cir. 2022), *with* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 271–76 (1st Cir. 2022). Curiously, even though people with disabilities are protected under the FHA, the plaintiffs in *Looper* chose to analogize to *Havens* while relying on the ADA—instead of simply relying on their protections in the FHA. *See Looper*, 22 F.4th at 878–80 (10th Cir. 2022). The Supreme Court was expected to resolve this circuit split in *Acheson Hotels LLC v. Laufer*, a case decided during the Court's 2023–2024 term, but the court dismissed the case on mootness grounds after the Plaintiff dismissed her claims with prejudice. Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 4–5 (2023).

347. 139 F. Supp. 3d at 274–75.

348. *Id.*

conciliation procedure . . . followed by litigation should conciliation efforts fail."[349] Thus, whether through agency action or private litigation,[350] 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.

b. The Equal Credit Opportunity Act

The ECOA is the main law that protects consumers against discrimination by banks and financial institutions.[351] In 1974, Congress passed the ECOA to protect certain groups from discrimination in access to credit and transactions related to credit.[352] Specifically, 15 U.S.C. § 1691(a)(1) prohibits discrimination "on the basis of race, color, religion, national origin, sex,[353] marital status, or age" by creditors "against any applicant, with respect to any aspect of a credit transaction."[354] Plaintiffs can recover actual and punitive damages,[355] equitable relief, and attorney's fees against creditors who fail to comply with the ECOA.[356] The ECOA does not protect consumers with disabilities.[357]

The CFPB administers the ECOA through Regulation B.[358] 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."[359]

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."[360] If Congress amended the ECOA to add "disabled" as a

349. Access Living of Metro. Chi. v. Prewitt, 111 F. Supp. 3d 890, 896 (N.D. Ill. 2015) (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)).

350. 42 U.S.C. § 3610.

351. 15 U.S.C. § 1691.

352. *Id.* § 1691(a). When initially passed in 1974, the ECOA targeted only sex-discrimination. *See* Corbin, *supra* note 315, at 433–34. Congress updated the Act two years later to add other protected classes. *Id.*

353. 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. 14,363, 14,363 (Mar. 16, 2021) (amending 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. *Id.*

354. 15 U.S.C. § 1691(a)(1).

355. *Id.* § 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").

356. *Id.* § 1691e(a)–(d).

357. *See id.* § 1691(a)(1).

358. *See* 12 C.F.R. § 1002.1(a); *see also Interactive Bureau Regulations*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/rules-policy/regulations/ (last visited Mar. 29, 2024) [https://perma.cc/FAV3-VQCB]; Corbin, *supra* note 315, at 436.

359. 12 C.F.R. § 1002.4(b) (emphasis added).

360. *See* 12 C.F.R. pt. 1002, supp. I, § 1002(4)(b)(ii).

protected class, the CFPB could reasonably conclude that an inaccessible bank website uses "symbols," "words," and "forms of communication" that discriminate against people with disabilities.[361]

In January 2021, a CFPB task force issued a report calling for research on whether it should advise Congress to add disability as a protected class to the ECOA.[362] The stage of deliberations is early, requiring more research, a recommendation by the CFPB, and a congressional response.[363] But the inquiry offers hope that the CFPB may recommend that Congress expand the ECOA to cover consumers with disabilities. And the research set forth in this Article helps build the case that it should.

Congress has not expanded the ECOA's protections for almost half a century.[364] It is time to revise the ECOA to guarantee consumers with disabilities the full protections of economic citizenship.[365]

V. CONCLUSION

Disability exists on a spectrum.[366] The lucky among us who live long enough will all ultimately experience it to some degree.[367] And many of us may experience temporary disabilities throughout our life due to accidents or illnesses. Between 2020 and 2022, many Americans—with or without disabilities—had no choice but to interact with the world through the web: the

361. *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. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); 12 C.F.R. pt. 1002, supp I, 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) (quoting Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986)) ("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, 1369 n.39 (N.D. Ga. 2016).

362. *See* BUREAU OF CONSUMER FIN. PROT., *supra* note 20, at 60–61:

> 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.

363. *Id.*

364. *See supra* note 352 (noting that the most recent ECOA revision to protected classes occurred in 1976).

365. *See* Sablosky Elengold, *supra* note 117, at 620 ("[E]conomic citizenship is inextricable from political and social citizenship.").

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

367. *Id.*; *see also* Ani B. Satz, *Overcoming Fragmentation in Disability and Health Law*, 60 EMORY L.J. 277, 311–14 (2010) (first citing Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 11–14 (2008); and then citing Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2011)) (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).

coronavirus pandemic prompted mandatory stay-home orders; people with high-risk family members voluntarily withdrew; and Zoom calls replaced public gatherings.[368] People without disabilities experienced the confinement and restrictions that people with disabilities faced long before 2020.[369] Like never before, consumers needed virtual access to financial goods and services.[370] Unfortunately, many bank websites that are inaccessible and incompatible with navigation aids subtly, though structurally, excluded consumers with disabilities.[371] 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 ADA's protections to the Internet, consumer law offers a comparatively immediate, tailored, and politically appealing mechanism for relief. Lawmakers, advocates, and judges should interpret TILA, the Dodd-Frank Act's prohibition against unfair practices, and the FHA as currently drafted to require equal access to financial products offered on digital media. Congress should amend the ECOA to ensure that people with disabilities have nondiscriminatory access to credit. Such a modification provides the most straightforward way to create a regulatory sandbox and incremental solution for web accessibility. In contrast to the ADA, which would presumedly impose accessibility requirements on every nook and cranny of the digital landscape, the ECOA would target a relatively small and sophisticated subset of commercial websites. Ensuring equal access to online banking and financial technologies is an important step in ending the financial discrimination that people with disabilities face. In light of our irreversibly and ever-expanding mobile economy, fintech is an apt first step in moving the needle for web accessibility forward.

368. *See* Reis Thebault, Tim Meko & Junne Alcantara, *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/ [https://perma.cc/8QZJ-SVJ7].

369. *See id.*

370. 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 [https://perma.cc/7SZJ-ZNBP].

371. *See* discussion *supra* Section III.C.