University of Michigan Journal of Law Reform Caveat

Volume 54 | Issue 1

2020

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Recommended Citation
Matthew J. Razzano, *A Better Madden Fix: Holistic Reform, Not Band-Aids, to Modernize Banking Law*, 54 U. Mich. J. L. Reform Caveat 1 (2020).
Available at: https://repository.law.umich.edu/mjlr_caveat/vol54/iss1/1

https://doi.org/10.36646/mjlr.caveat.54.better

A BETTER *MADDEN* FIX: HOLISTIC REFORM, NOT BAND-AIDS, TO MODERNIZE BANKING LAW

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INTRODUCTION

Historically, state usury laws prohibited lending above certain interest rates, but in 1978 the Supreme Court interpreted the National Bank Act (NBA) to allow chartered banks to issue loans at rates based on where they were headquartered rather than where the loan originated.[1] States like South Dakota virtually eliminated interest rate ceilings to attract business, incentivizing national banks to base credit operations there and avoid local usury laws.[2] In 2015, however, the Second Circuit decided *Madden v. Midland Funding, LLC* and reversed long-standing banking practices, ruling that non-chartered financial institutions were not covered by the NBA and were therefore subject to state usury laws where the loan originated.[3] The underlying reasoning for the court's decision was well-intentioned and based on (a) an unwillingness to allow non-chartered institutions to function as pseudo-banks[4] and (b) a desire to protect consumers.[5] The court's radical decision received widespread criticism,[6] and empirical studies have demonstrated a noteworthy decrease in credit availability in the Second Circuit[7]—negating the court's own policy rationales. Since *Madden*, Congress and federal agencies have attempted an outright reversal, but none of their solutions address the *Madden* court's fundamental concerns. This

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1. Marquette Nat'l Bank of Minneapolis v. First Omaha Serv. Corp., 439 U.S. 299 (1978) (holding that the National Bank Act preempted state usury laws, which allowed interest rates to be based on the state where the bank was headquartered and not where the loans were issued); *see also* Sean H. Vanatta, *Citibank, Credit Cards, and the Local Politics of National Consumer Finance, 1968–1991*, 90 BUS. HIST. REV. 57, 64–68 (2015), https://www.cambridge.org/core/journals/business-history-review/article/citibank-credit-cards-and-the-local-politics-of-national-consumer-finance-19681991-/680B71265464A22A9-B83108EEE33-6547.
2. *See* Vanatta, *supra* note 1, at 72–77.
3. Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015).
4. *Id.* at 251–52.
5. *Id.* at 250–51.
6. *See, e.g.*, Raj Date, Madden *Ruling was a Step Backward. Congress Should Fix It*, Am. Banker (Dec. 4, 2017), https://www.americanbanker.com/opinion/madden-ruling-was-a-step-backward-congress-should-fix-it; Peter Rudegeair & Telis Demos, *LendingClub to Change its Fee Model*, WALL ST. J. (Feb. 26, 2016), https://www.wsj.com/articles/fast-growing-lending-club-to-change-its-fee-model-1456488393.
7. *See, e.g.*, Peter Conti-Brown, *Can Fintech Increase Lending? How Courts are Undermining Financial Inclusion*, BROOKINGS INST. (Apr. 16, 2019), https://www.brookings.edu/research/can-fintech-increase-lending-how-courts-are-undermining-financial-inclusion/ (summarizing the primary critiques of the *Madden* decision and discussing two empirical studies about the case's impact on credit availability in the Second Circuit).

Essay argues that a *Madden* fix is needed, but the most effective solution must incorporate and address the Second Circuit's underlying concerns.

I. ATTEMPTED *MADDEN* FIXES AND THEIR FAILURES

Before *Madden*, large banks strategically shifted lending risk by securitizing and selling high-risk loans to third-party financial institutions. The *Madden* decision hindered this tactic by subjecting these non-chartered financial institutions to usury laws of the state where the loan originated, as opposed to the lender's headquarter state.[8] The non-headquarter state usury laws tend to have lower interest rate caps, making securitization and lending by non-chartered financial institutions less profitable. Without this strategic business option, these institutions had less incentive to lend. In *Madden*'s immediate aftermath, empirical studies demonstrated decreased lending rates in Connecticut, New York, and Vermont. Legal scholar Colleen Honigsberg and others took data from three large lending platforms and found that post-*Madden*, creditors started offering "less credit to borrowers . . . . Not only did lenders make smaller loans in these states post-*Madden*, but they also declined to issue loans to the higher-risk borrowers most likely to borrow above usury rates."[9] Meanwhile, lending "increased after *Madden* outside the Second Circuit," further illustrating the impact of the decision.[10] These findings conform with basic economic assumptions. A study conducted by economists showed similar results: "Consistent with classical price theory, the interest rate controls imposed by *Madden* result in credit rationing. Lending Club and Prosper, the two largest U.S. marketplace lenders, significantly reduce[d] lending in [Connecticut and New York] . . . . by 10% and 13.4% respectively."[11]

After *Madden*, various interest groups sought to reverse the Second Circuit's decision. Several government actors and institutions attempted to overturn it, or at least temper its effects. Representative Patrick McHenry (R-NC) introduced the Protecting Consumers' Access to Credit Act of 2016, which would amend the National Bank

8. *See, e.g.*, DAVID W. PERKINS, CONG. RESEARCH SERV., R4461, MARKETPLACE LENDING: FINTECH IN CONSUMER AND SMALL-BUSINESS LENDING (2018), https://fas.org/sgp/crs/misc/R44614.pdf (describing the marketplace lending business and how *Madden* has impacted it).

9. Colleen Honigsberg et al., *How Does Legal Enforceability Affect Consumer Lending? Evidence from a Natural Experiment*, 60 J.L. & ECON. 673, 674–75 (2017).

10. *Id.* at 694.

11. Piotr Danisewicz & Ilaf Elard, The Real Effects of Financial Technology: Marketplace Lending and Personal Bankruptcy 4 (July 5, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3208908.

Act to make loans originating from chartered financial institutions *valid when made*, regardless of whether the loan was subsequently transferred or sold.[12] Having made little headway, Representative McHenry reintroduced the bill in 2017 with bipartisan signatories,[13] and Senator Mark Warner (D-VA) simultaneously introduced it in the Senate.[14] These legislative efforts, however, were nothing more than single-page reversals of *Madden* without considering the *Madden* court's underlying policy concerns. Neither of these bills made significant progress in Congress.[15]

Given Congress's difficulties addressing the problem through legislative action, banking regulators attempted to leverage their rulemaking powers to blunt *Madden*'s impact. First, the Office of the Comptroller of the Currency (OCC), the principal banking regulator under the NBA[16] and agency responsible for issuing bank charters,[17] explored granting special purpose charters for FinTech firms.[18] FinTech firms are not normally covered by the NBA.[19] These special purpose charters offered protection from state usury laws that cap interest rates.[20]

The FinTech charters quickly faced legal roadblocks, and the Southern District of New York questioned the OCC's authority to grant the charters to FinTech firms in the first place.[21] The NBA allows the OCC to grant charters to institutions in the "business of banking."[22] The OCC defines special purpose charter "businesses" as including "at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money."[23] The Southern

12. Protecting Consumers' Access to Credit Act of 2016, H.R. 5724, 114th Cong. (2016) ("A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party.'').

13. *See* Protecting Consumers' Access to Credit Act of 2017, H.R. 3299, 115th Cong. (2017).

14. *See* Protecting Consumers' Access to Credit Act of 2017, S. 1642, 115th Cong. (2017).

15. While the Protecting Consumers' Access to Credit Act made its way through the House and was introduced in the Senate, the Senate has taken no action. Given the subsequent OCC and FDIC rules, it is unlikely that Congress will reintroduce these bills.

16. *See* 12 U.S.C. § 1 (2012).

17. *See* 12 C.F.R. § 5.20 (2017).

18. OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 4 (2016), https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf [hereinafter OCC FINTECH CHARTER REPORT]. "FinTech" refers to firms that aim to solve financial services problems through technological solutions.

19. *See id.*

20. *See id.*

21. *See* Vullo v. Office of the Comptroller of the Currency, 378 F. Supp. 3d 271 (S.D.N.Y. 2019), *judgment entered sub nom*. Lacewell v. Office of the Comptroller of the Currency, [insert docket number], 2019 U.S. Dist. LEXIS 182934 (S.D.N.Y. Oct. 21, 2019).

22. 12 U.S.C. § 27(a) (1982).

23. 12 C.F.R. § 5.20(e)(1)(i) (2017).

District of New York disagreed with this definition. In *Vullo v. Office of the Comptroller of the Currency*, the court provided three reasons for narrowing the definition to deposit activities alone.[24] First, it interpreted Civil War-era dictionaries to determine what "business of banking" meant in the 1860s when the NBA passed.[25] Most definitions suggested that "banking" requires deposit-taking activities—something absent from the typical FinTech firm model.[26] Next, the court noted that the OCC had never before issued non-depository charters absent a congressional amendment to the NBA.[27] Lastly, it found that as part of the broader banking regulatory scheme, national institutions in the "business of banking" (a) join the Federal Reserve System ("the Fed" or "the System") through the Federal Deposit Insurance Act and (b) only acquire competitor banks in accordance with the Bank Holding Company Act—both of which define banks as "deposit-receiving" entities.[28] The *Vullo* decision suggests that the Second Circuit is resolute in closing off any regulatory loopholes left by *Madden*.

Second, the Federal Deposit Insurance Corporation (FDIC) proposed a rule to reinforce the *valid when made* doctrine.[29] The proposed rule cites federal law that "authorizes State banks to charge interest at the maximum rate permitted to any State-chartered or licensed lending institution in the State where the bank is located."[30] The proposed rule claims that the "power to make loans implicitly carries with it the power to assign loans, and thus, a State bank's statutory authority . . . to make loans at particular rates necessarily includes the power to assign the loans at those rates."[31] The OCC simultaneously proposed a companion rule, which stated that "interest on a loan that is permissible under [the NBA] shall not be affected by the sale, assignment, or other transfer of the loan."[32] The OCC rule was adopted in June 2020 and is scheduled to go into effect in August 2020.[33] The new regulation will provide helpful guidance,[34]

24. *See Vullo*, 378 F. Supp. 3d at 292–98.
25. *Vullo*, 378 F. Supp. 3d at 293–94.
26. *See id.* at 294.
27. *Id.* at 295.
28. *Id.* at 296–97.
29. Federal Interest Rate Authority, 84 Fed. Reg. 66,845 (proposed Dec. 6, 2019) (to be codified at 12 C.F.R. pt. 331).
30. *Id*. at 66,845.
31. *Id.* at 66,848.
32. Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 84 Fed. Reg. 64,229, 64,231 (proposed Nov. 21, 2019) (to be codified at 12 C.F.R. pt. 7).
33. Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530 (June 2, 2020) (to be codified at 12 C.F.R. pt. 7, 160). In adopting this rule, the OCC noted that "it intends that its rule will function in the same way as the FDIC's proposed regulatory text would [in its December 6, 2019 proposed rule]." *Id.* at 33,535.
34. *See* Randall D. Guynn et al., *Federal Banking Regulators Can and Should Resolve* Madden *and True Lender Developments*, DAVIS POLK (Aug. 14, 2018),

but the interaction between this rule and the *Madden* decision remains to be seen. The result may be a dual-governance banking system, with the Second Circuit attempting to accommodate both *Madden* and the new rule while others maintain traditional NBA preemption. Considering that most financial services firms maintain some presence in New York,[35] the consequences of the Second Circuit's decision have outsized effects. This might prompt the Second Circuit to reevaluate *Madden*, but given the Supreme Court's recent denial of certiorari, it is unlikely that the Second Circuit will reverse course on the specific issues presented in *Madden* in the near future.[36]

II. ADDRESSING THE SECOND CIRCUIT'S CONCERNS

The solutions above focus on (a) increasing lending in the circuit and (b) decreasing the regulatory burden on financial institutions. None of the proposed *Madden* fixes thus far, however, address the Second Circuit's underlying concerns about non-chartered entities operating outside of the NBA and the court's desire to protect consumers. A proper *Madden* fix should not simply return the financial system to its status quo, but rather take head-on the issues prompting the court's decision in the first place.

A. *Fixing Non-Charter Involvement*

Before *Madden*, the banking industry operated under the assumption that 12 C.F.R. § 5.20 gave the OCC authority to determine which financial institutions received charters under the NBA.[37] The *Madden* and *Vullo* decisions challenged that assumption. *Madden*'s primary concern was that lax exceptions to the NBA would result in non-chartered financial firms operating without the proper regulatory backstop.[38] The court recognized that precedent had granted affiliated firms and subsidiaries NBA coverage, though "[i]n most cases in which NBA preemption has been applied to a non-national bank entity, the entity has exercised the powers of a national bank—i.e., has acted on behalf of a national bank in carrying out the

https://www.davispolk.com/publications/federal-banking-regulators-can-and-should-resolve-madden-and-true-lender-developments.

35. *See California's Fintech Startups Are Invading New York*, AM. BANKER (Dec. 3, 2019), https://www.americanbanker.com/articles/californias-fintech-startups-are-invading-new-york.

36. *See* Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016).

37. *See, e.g.*, Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271, 278–80 (S.D.N.Y. 2019).

38. *Madden*, 786 F.3d at 251–52.

national bank's business."[39] In *Madden*, however, the third-party debt purchasers were independent. Passing along NBA protection in that instance "would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank."[40] In *Vullo*, the court was similarly concerned about FinTech firms acting as non-traditional banks. The court set aside the OCC's interpretation of "business of banking" and struck down the FinTech special charters.[41] These decisions make clear that the OCC's authority to grant special purpose charters is more limited than previously understood—at least according to the Second Circuit.

The Second Circuit in *Madden* was reacting in part to the growing complexities of Wall Street. Traditional brick and mortar banks are not the only institutions in the "business of banking" today.[42] FinTech firms are taking novel approaches to financial services and operating on the margins of a regulatory system designed for traditional banks.[43] Moreover, the "business of banking" itself has become more complicated, as loans are no longer quaint lender-to-borrower relationships that last for thirty years.[44] Instead, loans are repackaged and securitized to such an extent that it becomes nearly impossible to determine who actually holds a loan.[45] Congress formed several agencies to monitor these developments, but the resulting web of institutions only provided piecemeal oversight and could not comprehensively address the system's nuances.[46] Dodd-Frank's Financial Stability Oversight Council was an effort to bring these agencies together to solve systemic risks, but the pre-existing relationships between these different bodies has resulted in turf wars and regulatory overlap.[47] In addition to Washington watchdogs, state

39. *Id.* at 251.
40. *Id.* at 252.
41. *See Vullo*, 378 F. Supp. 3d at 293–94.
42. *See generally* MIKLOS DIETZ ET AL., MCKINSEY & CO., FINTECHNICOLOR: THE NEW PICTURE IN FINANCE (2016) (describing how FinTech firms have disrupted the traditional banking model).
43. *See generally* William Magnuson, *Regulating Fintech*, 71 VANDERBILT L. REV. 1167 (2018) (explaining that the rise of FinTech firms calls for a reconceptualization of financial regulation).
44. *See generally* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 38–51 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (describing the growth of structured finance securities and derivatives).
45. *See id.*
46. *See* Larry D. Wall, *Large, Complex Financial Regulation*, FED. RES. BANK OF ATLANTA (Aug. 2015), https://www.frbatlanta.org/cenfis/publications/notesfromthevault/1508.aspx.
47. *See, e.g.*, Gregg Gelzinis, *Strengthening the Regulation and Oversight of Shadow Banks*, CTR. AM. PROGRESS (July 18, 2019, 12:01 AM), https://www.americanprogress.org/issues/economy/reports/2019/07/18/471564/.

regulators wield significant authority over the banking industry.[48] National banks might be able to navigate this multifaceted regulatory environment, but smaller firms and FinTech companies struggle to pay such high regulatory costs.[49]

Considering these challenges, it is time for lawmakers to rethink the bank charter regime. The agency rulemaking process provides greater flexibility to adapt to the rapidly-changing financial industry landscape, but agency authority is confined by the parameters of their statutory mandate(s).[50] *Vullo* exemplified this, exposing gaps in the OCC's charter process since not all financial services companies are in the traditional "business of banking." Today there are charters for national banks, state banks, savings associations, and non-bank credit unions, among others.[51] The OCC's special purpose charters attempted to bring non-traditional institutions into this banking community but was unsuccessful. If the OCC continues issuing these special purpose charters,[52] they run the risk of additional judicial intervention, burdening firms with prolonged, costly litigation. At some point, new legal authority becomes necessary to remedy this issue.

What the OCC attempted to achieve with the special purpose charters represents one avenue of reform. Congress could bolster these efforts by expanding the types of charters available to financial services institutions.[53] This would enhance clarity and increase diversity in regulation, continuing to afford large national banks every protection under the NBA while offering a limited version to smaller non-traditional banks. This lawmaking process would take place publicly, instead of in bureaucratic backrooms. Despite these advantages, the full legislative process would open the door to additional interest group involvement. Furthermore, an increase in charter types would make monitoring this system even more onerous for regulators.

48. *See* Jay B. Sykes, CONG. RESEARCH SERV., R45726, FEDERAL PREEMPTION IN THE DUAL BANKING SYSTEM: AN OVERVIEW AND ISSUES FOR THE 116TH CONGRESS (May 17, 2019), https://fas.org/sgp/crs/misc/R45726.pdf.

49. *Cf.* Abhishek Srivastav et al., Is There a Benefit from Reduced Regulation on Small Banks? (May 17, 2019) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389946) (articulating concerns about the cost of a strict regulatory framework on small banks).

50. *See generally* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003 (2015) (discussing the predominance of agencies in the legislative process).

51. *See* Robert Klinger, *2019 Banking Landscape—Charter Types*, JD SUPRA (Oct. 1, 2019), https://www.jdsupra.com/legalnews/2019-banking-landscape-charter-types-62914/.

52. OCC FINTECH CHARTER REPORT, *supra* note 18.

53. *See* Klinger, *supra* note 51.

Alternatively, Congress could address non-charter involvement by amending the NBA to place more expansive guardrails around the OCC charter issuance process. This could take the form of specific rules and limitations regarding the types of institutions under the OCC's control—in essence codifying a lengthier version of 12 C.F.R. § 5.20. Congress could also amend the NBA to better define what the "business of banking" means today, pushing back on the narrow definition announced in *Vullo*. Creating a straightforward definition would help the OCC determine which organizations ought to receive charters and NBA preemption and which organizations fall outside the NBA's scope of banking regulation. Redefining the "business of banking," however, would provide only a temporary fix. The same problems with today's definition would likely reappear in the next twenty years as the financial industry continues to evolve.[54] A specific definition would require periodic, if not constant, revision.

These and other legislative options certainly exist and could provide much-needed clarity. Reforming the preexisting charter system framework, however, is only a band-aid to the deeper systemic issues at the heart of the *Madden* decision. To address *Madden*'s concerns, rebuilding the charter system from scratch through congressional action is the best method to avoid constant litigation and uncertainty.

B. *Building Consumer Protections*

Madden's other primary concern was ensuring that states maintain the authority to protect consumers. Though *Madden* makes no explicit mention of consumer protection, it implied that institutions not bound by the NBA might exploit consumers and engage in questionable lending practices with little oversight.[55] The court feared that non-chartered lenders, free of the state regulatory constraints, would prey on vulnerable consumers through payday lending and alternative financial solutions.[56] Thus, any solution aimed at addressing the *Madden* decision should also consider the court's consumer protection concerns.

54. *See* Sam Stewart et al., *Retail Banking Distribution 2025: Up Close and Personal*, BOS. CONSULTING GRP. (Sept. 26, 2019), https://image-src.bcg.com/Images/BCG-Retail-Banking-Distribution-2025-Up-Close-and-Personal-September-2019_tcm9-230136.pdf.

55. *See* Madden v. Midland Funding, LLC, 786 F.3d 246, 250–51 (2d Cir. 2015).

56. *Id.* at 251 (discussing the ability of third parties to avoid federal banking law); *Cf.* GARY RIVLIN, BROKE USA: FROM PAWNSHOPS TO POVERTY, INC.—HOW THE WORKING POOR BECAME BIG BUSINESS (2010) (examining the impact of certain lending institutions on the poor).

Consumer protection laws for the modern financial system first appeared in the mid-twentieth century. The Truth in Lending Act of 1968 (TILA) helped consumers understand the costs of credit, especially with the implementation of a standardized annual percentage rate to ensure consumers are provided with consistent figures.[57] Regulation Z, a Federal Reserve rule implementing TILA, requires certain disclosures that provide consumers with a clear and consistent picture of the financial commitment they are about to make before signing a loan contract.[58] Unfortunately, these protections have not prevented predatory lending, and lenders have found multiple ways to take advantage of consumers.[59] The Financial Crisis of 2008 was in part driven by these incomplete consumer protections, as widespread loan transfers and securitization incentivized financial institutions to churn out more loans and bring more consumers into the borrowing pool.[60]

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) improved credit card rate clarity, but it did not solve all problems.[61] In 2013, the Consumer Financial Protection Bureau (CFPB) found that questionable lending practices still existed and card policies still confused many customers.[62] Specifically, the CFPB stated that the CARD Act did not address deferred-interest products that promise no-interest financing if quickly paid in full and trigger exorbitant rates if that date is missed.[63] Moreover, the CFPB found that credit card companies incentivize customers to join rewards programs with obscure terms, requiring customers to accept agreements that are up to 8,000 words long.[64] The CFPB has reported problems with other loan providers as well. For instance, it found that student loan services often did not "provide the basic level of service

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

58. *See Compliance Guide to Small Entities: Regulation Z,* FED. RES. SYS., https://www.federalreserve.gov/supervisionreg/regzcg.htm (last updated Sept. 11, 2019); *see also* Regulation Z, 12 C.F.R. § 226 (2020).

59. *See generally* LISA SERVON, THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES (2017) (describing certain predatory lending practices that detrimentally impact consumers).

60. *See generally* Victoria V. Corder, *When Securitization Complicates the Issue: What Are the Homeowner's Defenses to Foreclosure?*, 16 WASH. & LEE J. C.R. & SOC. JUST. 299 (2009) (expounding upon the loan securitization and transfer practices of banks during the 2008 financial crisis).

61. *See* Credit CARD Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2010).

62. *See* CONSUMER FIN. PROTECTION BUREAU, CARD ACT REPORT 76–84 (2013), https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf [hereinafter CFPB REPORT].

63. *Id.*; *see also* Press Release, Consumer Fin. Protection Bureau, CFPB Finds CARD Act Helped Consumers Avoid More than $16 Billion in Gotcha Credit Card Fees (Dec. 3, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-helped-consumers-avoid-more-than-16-billion-in-gotcha-credit-card-fees/.

64. *See* CFPB REPORT, *supra* note 62, at 62–84.

necessary to meet borrowers' needs," did not provide the proper paperwork, and did not offer "affordable repayment options."[65]

Against this backdrop, the *Madden* court attempted to reign in non-traditional, non-chartered lenders by subjecting them to the usury laws of the state where the loan originated. Despite the court's good intentions, this decision prompted non-traditional lenders to leave the jurisdiction, limiting the banking market and thus limiting credit availability to consumers within the circuit.[66] Ironically, the court's consumer protection concerns were upended by their own decision. A spate of consumer protection proposals exist that other articles and books discuss in far greater detail.[67] These proposals advance fundamental themes that bear repeating. First, any solution should standardize interest rates so that they are digestible to the general public. Despite TILA, it is still possible to advertise rates that are accurate but misleading.[68] Second, loan agreements and supporting documentation should not be so cumbersome that consumers do not take the time to read and understand them. Lenders should avoid fifty-page tomes for simple loans. Finally, any solution should build on the progress of laws like the Equal Credit Opportunity Act that make it illegal to discriminate when issuing credit.[69] It is becoming increasingly clear that any *Madden* fix will require a legislative solution. In order to adequately address the *Madden* court's concerns, lawmakers should take care to include consumer protection provisions in any proposed amendments to the charter system.

CONCLUSION

The *Madden* court aimed to restrict NBA protections to chartered institutions and advance consumer protection, but its decision resulted in decreased credit and lending opportunities within the circuit. Though *Madden* has been fairly criticized, prompting multiple attempts to reverse its impact, policymakers should not allow the decision's unintended effects to obfuscate the court's underlying

65. Press Release, Consumer Fin. Protection Bureau, CFPB Concerned About Widespread Servicing Failures Reported by Student Loan Borrowers (Sept. 29, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-concerned-about-widespread-servicing-failures-reported-by-student-loan-borrowers/.

66. Honigsberg, *supra* note 9.

67. *See, e.g.*, Martha Coakley & Alicia Daniel, *Improving Consumer Protection: Lessons from the 2008 Recession*, 103 MINN. L. REV. 2477 (2019); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PENN. L. REV. 1 (2008); Michael J. Pyle, *A "Flip" Look at Predatory Lending: Will the Fed's Revised Regulation Z End Abusive Refinancing Practices?*, 112 YALE L.J. 1919 (2003).

68. *See* CFPB REPORT, *supra* note 62, at 78–79 (discussing deferred interest products).

69. *See* Equal Credit Opportunity Act (codified at 15 U.S.C. § 1691) (2012).

rationales. Proposed reform efforts must be holistic and should not only seek to promote credit access, but also consider *Madden*'s reasoning before proceeding.