XII. New Rules, Different Boss: Assessing the Future of the Valid When Made Doctrine

A. Introduction

In mid-2020, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) issued final rules relating to the permissibility of interest rates on loans after the loan is transferred.[1] These regulations codified the position of the primary American banking regulators that "the valid interest rate for a loan is determined when the loan is made, and will not be affected by a subsequent sale, assignment, or other transfer of the loan."[2] Also known as the "valid when made" doctrine, this principle allows loan originators (i.e. national banks) to transfer or sell loans to others with the interest rate the loan had when the originator created the loan.[3] These regulations came as a response to a 2015 Second Circuit decision in *Madden v. Midland Funding, LLC*,[4] in which the court "called into question the enforceability of the interest rate terms of loan agreements following a bank's assignment of a loan to a non-bank."[5] The OCC/FDIC rules were designed to clarify the "confusion"[6] surrounding the *Madden* decision and address the subsequent "marketplace uncertainty regarding the enforceability of the interest rate terms of a loan agreement following a bank's assignment of a loan to a non-bank."[7]

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[1] Mark P. Franson, *OCC and FDIC Issue Final Rules on "Valid When Made,"* 137 BANKING L.J. 410, 410 (2020).

[2] Press Release, Fed. Deposit Ins. Corp., FDIC Issues Rule to Codify Permissible Interest on Transferred Loans (June 25, 2020), https://www.fdic.gov/news/press-releases/2020/pr20074.html [https://perma.cc/9Y5W-YYCP].

[3] Franson, *supra* note 1, at 412 ("[T]he federal regulations will assist banks and credit markets in feeling comfortable that loans made upon terms at the loan's inception should carry through until payment or maturity, no matter whom the holder of the loan is.").

[4] 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016).

[5] Fed. Deposit Ins. Corp, *supra* note 2.

[6] News Release, Office of the Comptroller of the Currency, OCC Proposes Rule to Clarify "Valid When Made" Doctrine (Nov. 19, 2019), https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-132.html [https://perma.cc/ZZD3-JVDY].

[7] Fed. Deposit Ins. Corp, *supra* note 2.

The issuance of the OCC/FDIC rules has opened up a new front in the struggle between the banking industry and consumer protection advocates. The banking industry has roundly supported the OCC/FDIC rules, on the basis that the rules will reduce uncertainty in the secondary loan market[8] and improve access to credit for small businesses.[9] Consumer protection advocates, on the other hand, have criticized the OCC/FDIC rules on a number of grounds, namely that the rules will allow high-cost lenders to circumnavigate state usury laws, effectively sanctioning "rent-a-bank" schemes.[10] A proxy fight between the banking industry and consumer advocates has developed in the form of litigation filed by several state attorneys general challenging the propriety of the OCC/FDIC rules.[11] The newly inaugurated Biden administration adds a political dimension to this debate, as the next Comptroller of the Currency will influence whether the rules are replaced or amended.[12] This Development Article will discuss the regulatory impact of the OCC/FDIC rules, analyze the debate surrounding the propriety of the rules, and speculate on the future of the "valid when made" doctrine.

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[8] Franson, *supra* note 1, at 412–13.

[9] Scott Stewart, *Why Small Businesses Need Regulators' Proposed 'Madden' Fix*, AM. BANKER (Nov. 19, 2019), https://www.americanbanker.com/opinion/why-small-businesses-need-regulators-proposed-madden-fix.

[10] NAT'L CONSUMER LAW CTR., FDIC/OCC PROPOSAL WOULD ENCOURAGE RENT-A-BANK PREDATORY LENDING (Dec. 2019), https://www.nclc.org/images/pdf/high_cost_small_loans/ib-fdic-rent-a-bank-proposal-dec2019.pdf.

[11] Lauren R. Biddle et al., *Fighting the Fix: Three States Sue the OCC for Codifying the Valid When Made Doctrine*, VENABLE LLP (Aug. 7, 2020), https://www.venable.com/insights/publications/2020/08/fighting-the-fix-three-states-sue-the-occ-for [https://perma.cc/62Y9-PL5R] (describing litigation challenging the OCC rule).

[12] Rey Mashayekhi, *Biden's Pick for Top Bank Regulator Reignites Tensions Between Progressives, Moderates*, FORTUNE (Jan. 28, 2021), https://fortune.com/2021/01/28/biden-occ-bank-regulator-michael-barr-mehrsa-baradaran-progressives-moderates/.

B. OCC/FDIC Rule

1. History of Federal Preemption of State Banking Laws

The American banking regulation system is, in part, a product of federalism and the doctrine of preemption.[13] Under the doctrine of preemption, federal law preempts state law when the two come into conflict.[14] In the United States, regulation of banking entities is divided between federal and state governments, resulting in a "dual banking system."[15] Under this system, a bank "may obtain a national charter and fall under the regulatory aegis of the Comptroller of the Currency, or they may obtain a state charter from the chartering state's primary banking regulator."[16] The OCC is the primary regulator of the banks that it grants charters to (i.e. "national banks").[17] National banks are also required to be insured by the FDIC.[18] National banks are generally subject to both federal law and the law of the state(s) in which they do business.[19] Preemption issues arise when state and federal banking laws conflict, which generally occurs when a state banking law or regulation "interfere[s] with the powers granted to national banks."[20] In a 1996 decision, *Barnett Bank of Marion County,*

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[13] JAY B. SYKES, CONG. RESEARCH SERV., R45081, BANKING LAW: AN OVERVIEW OF FEDERAL PREEMPTION IN THE DUAL BANKING SYSTEM 8 (2018).

[14] *Id.* at 3 ("The Supreme Court has explained that 'under the Supremacy Clause … any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'").

[15] Henry N. Butler & Jonathan R. Macey, *Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 677 (1988).

[16] *Id.*

[17] Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1392–93 (2018).

[18] SYKES, *supra* note 13, at 5 ("Federal law also requires national banks to obtain deposit insurance from the Federal Deposit Insurance Corporation (the FDIC), and the FDIC examines all insured institutions.").

[19] *Id.* at 6 ("[T]he Court has explained that national banks 'are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation,' because their contracts, ability to acquire and transfer property, rights to collect debts, and liability to be sued for debts 'are all based on State law'" (quoting Nat'l Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869)).

[20] *Id.* at 10.

N.A. v. Nelson, the U.S. Supreme Court held that federal preemption applies when a state's laws "significantly interfere with [a] national bank's exercise of its powers."[21] As a practical matter, federal banking regulators have generally taken a broad view of what characterizes "significant interference" and is thus subject to federal preemption.[22]

Congress has attempted to clarify the issues surrounding federal preemption of state banking laws. Passed in the aftermath of the 2008 Financial Crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank) contained a measure (Section 1044) which "articulat[es] a general standard to govern the preemption of 'state consumer financial laws,' and additional provisions addressing a number of discrete preemption issues."[23] In the OCC's view, Section 1044 simply codified the preemption standard articulated in *Barnett Bank* and that "all future preemption determinations would be subject to Section 1044's requirement concerning 'case by case' determinations."[24] Courts have generally accepted the OCC's interpretation of Section 1044's preemption standard.[25]

2. The Madden Shift

In 2015, the Second Circuit's decision in *Madden v. Midland Funding, LLC* brought about a sea change in the conventional wisdom surrounding federal preemption of state banking laws and the effect of preemption on the secondary loan market.[26] *Madden* involved "a New York resident whose debt to a national bank had been sold to debt purchasers brought a putative class action against the debt purchasers alleging violations of New York usury law."[27] Rejecting the argument that the interest rate was permissible because it was attached to a loan

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[21] 517 U.S. 25, 33 (1996); *see also* SYKES, *supra* note 13, at 10 (discussing Barnett Bank).

[22] Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 234 (2004).

[23] SYKES, *supra* note 13, at 18 (quoting 12 U.S.C. § 25b).

[24] *Id.* at 22 (quoting Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011)).

[25] *Id.* (describing Baptista v. JP Morgan Chase Bank, N.A. 640 F.3d 1194, 1197 (11th Cir. 2011), and several district court decisions which supported the OCC's interpretation).

[26] *See* JAY B. SYKES, CONG. RESEARCH SERV., LSB10512, FEDERAL BANKING REGULATOR FINALIZES RULE ON STATE USURY LAWS 2 (2020).

[27] SYKES, *supra* note 13, at 25.

that a national bank originated, the Second Circuit held that federal preemption applies "only when application of the state law would 'significantly interfere' with a national bank's exercise of its powers under the [National Bank Act]."[28]

Madden quickly became controversial, as the bedrock principles that underpinned the secondary loan market in the Second Circuit suddenly appeared to dissolve.[29] Banks and non-bank lenders adopted a variety of new business practices in the aftermath of *Madden*, such as capping interest rates in New York, Connecticut, and Vermont or otherwise excluding those states entirely from their lending programs.[30] Congress twice attempted to legislate a "*Madden*-fix" during the 115th Congress (2017–2019), while Republicans held a majority in the Senate and House of Representatives, but neither bill ultimately became law.[31]

3. New Rules

In response to the "uncertainty" caused by the decision in *Madden*, the OCC and FDIC issued proposed rules in late 2019 designed to "codify each agency's interpretation that a bank loan assignee can charge the same interest rate that the bank is authorized to charge under federal law."[32] The OCC rule states that "[i]nterest on a loan that is permissible under 12 U.S.C. 1463(g)(1) shall not be

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[28] Marc P. Franson, Michael S. Himmel, Peter C. Manbeck & Kenneth P. Marin, *Federal Court Decision Creates Uncertainty for Non-Bank Loan Assignees Regarding the Scope of Federal Preemption of State Usury Laws*, 132 BANKING L.J. 413, 414 (2015).

[29] SYKES, *supra* note 26, at 2 (describing efforts by banking industry groups to overturn *Madden* in the immediate wake of the decision); *see also* Charles M. Horn & Melissa R. Hall, *The Curious Case of Madden v. Midland Funding and the Survival of the Valid-When-Made Doctrine*, 21 N.C. BANKING INST. 1, 22 (2017) ("At the outset, Madden caused a good deal of anxiety and disruption").

[30] Horn & Hall, *supra* note 29, at 22 (discussing new business practices for lending organizations).

[31] SYKES, *supra* note 26, at 3 (describing the "congressional interest" in *Madden*).

[32] Jeremy T. Rosemblum, *OCC and FDIC Issue Proposed Rules to Undo Madden*, BALLARD SPAHR LLP CONSUMER FINANCE MONITOR (Nov. 21, 2019), https://www.consumerfinancemonitor.com/2019/11/21/occ-and-fdic-issue-proposed-rules-to-undo-madden/ [https://perma.cc/V59Y-89KJ].

affected by the sale, assignment, or other transfer of the loan."[33] The FDIC rule likewise states that "interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act is determined as of the date the loan was made."[34] The banking and lending industries praised the rules when they were initially proposed, arguing that the rules would improve liquidity in lending markets and provide greater access to credit for small businesses.[35]

Opposition to the rules quickly coalesced following their proposal, with the National Consumer Law Center arguing that the rules would "eviscerate the ability of states around the country to limit interest rates to protect their residents."[36] Consumer protection advocates rejected the argument that the OCC/FDIC rules would merely codify long-held principles of lending law, contending that "the 'valid when made' theory is a modern invention that misinterprets older cases."[37] Opposition to the rules was not limited to consumer protection organizations. Notably, FDIC Board Member Martin Gruenberg voted against the issuance of the FDIC rule, explaining that "the practical import of [the FDIC Rule] is to further insulate high-cost loans made through these very partnerships between non-banks and bank relationships from legal challenge."[38] These arguments, along with comments provided during the rulemaking process, presaged a more expansive struggle over the propriety of the OCC/FDIC rules in federal court.[39]

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[33] Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33,530, 33,536 (June 2, 2020) (to be codified at 12 C.F.R. pts. 7 & 160) [hereinafter OCC Rule].

[34] Federal Interest Rate Authority, 85. Fed. Reg. 44,146 (July 22, 2020) (to be codified at 12 C.F.R. pt. 331) [hereinafter FDIC Rule].

[35] Stewart, *supra* note 9 (describing the purported benefits of a "*Madden* fix").

[36] NAT'L CONSUMER LAW CTR., *supra* note 10, at 1.

[37] *Id.* at 4.

[38] Press Release, Martin J. Gruenberg, Member, FDIC Bd. of Dir., Statement Regarding Final Rule on Federal Interest Rate Authority (June 25, 2020).

[39] Richard E. Gottlieb et al., *Opponents of OCC's "Madden Fix" Proposal Preview Their Litigation Strategy*, MANATT, PHELPS & PHILLIPS, LLP (Feb. 5, 2020), https://www.manatt.com/insights/newsletters/financial-services-law/opponents-of-occs-madden-fix-proposal-preview [https://perma.cc/DGM5-TBBU] ("The comment process confirms that states and others are hell-bent on continuing the fight in court.").

C. Litigation and New Administration

1. People of the State of California et al. v. Office of the Comptroller of the Currency et al.

On July 29, 2020, the attorneys general of the states of California, Illinois, and New York (state AGs) filed a lawsuit in the Northern District of California against the OCC and the then-acting Comptroller of the Currency, Brian Brooks, asking the court to declare that the OCC rule is unlawful and that the rulemaking process was in violation of the Administrative Procedures Act.[40] The state AGs' arguments, while based on formalist administrative law principles, generally echo the claims made by consumer protection advocates during the rulemaking process.[41] The OCC, as a defendant in the litigation, has argued that the rule was a "valid interpretation of the National Bank Act" and that the rulemaking process was administratively sound.[42] Currently, both sides have filed cross-motions for summary judgment, and oral arguments are scheduled for May 7, 2021.[43]

Various industry trade groups have filed *amici* briefs advancing policy arguments defending the OCC rule. An *amici* group of banking industry advocacy associations, including the Chamber of Commerce, have filed arguments stating that the valid-when-made doctrine has been a pillar of the lending industry for over 150 years and that *Madden* had a negative impact on both banks and consu-

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[40] *See generally* Complaint, People of the State of California et al. v. Office of the Comptroller of the Currency et al., No. 4:20-cv-05200-JSW (N.D. Cal. July 29, 2020), ECF. No. 1.

[41] *See* Biddle, *supra* note 11 ("The States are not fundamentally opposed to banks selling and assigning loans, but they are, however, worried about the expansion of the bank partnership origination model for consumer lending.").

[42] Defendants' Notice of Motion for Summary Judgment, Memorandum of Points and Authorities in Support Thereof, and Opposition to Plaintiffs' Motion for Summary Judgment at 16–34, People of the State of California et al. v. Office of the Comptroller of the Currency et al., No. 4:20-cv-05200-JSW, (N.D. Cal. Jan. 14, 2021), ECF. No. 44.

[43] Docket Sheet, People of the State of California et al. v. Office of the Comptroller of the Currency et al., No. 4:20-cv-05200-JSW (N.D. Cal. July 29, 2020).

mers.[44] Specifically, the trade associations argue that the U.S. Supreme Court has consistently upheld the valid-when-made doctrine in a variety of contexts, characterizing the doctrine as "a 'cardinal rule' of usury [law]."[45] According to this group of *amici*, a successful legal argument had never been made, pre-*Madden*, "based on the notion that the borrower was entitled to pay a lower rate of interest on a loan once the originating lender had sold or assigned the loan to a third party."[46] Moreover, according to the *amici*, the dire economic consequences of *Madden* required the OCC to intervene to prevent "to prevent the market harm stemming from [*Madden*] from spreading to the rest of the United States."[47]

The Marketplace Lending Association (MLA), another lending industry trade group, has also filed an *amicus* brief supporting the OCC.[48] In its brief, MLA, whose members include a number of fintech companies,[49] focuses on the negative impact *Madden* had on access to credit "that fintech companies, among others, can offer to consumers and small businesses."[50] Citing the increasing market share of fintech companies in the past decade, MLA argues that expanded access to credit "depends on clarity in the law," and that any expansion of the *Madden* rule would result in a situation where "fintech companies and investors 'leave the field.'"[51] Rejecting the contention that the OCC rule abrogates the OCC's duty to monitor national banks' lending programs, MLA contends that the OCC has and will continue to take

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[44] Brief of Amici Curiae The Bank Policy Institute et al. in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment at 6, People of the State of California et al. v. Office of the Comptroller of the Currency et al., No. 4:20-cv-05200-JSW (N.D. Cal. Jan. 22, 2021), ECF. No. 65.

[45] *Id.* at 12 (quoting Nichols v. Fearson, 32 U.S. 103, 109 (1833)).

[46] *Id.* at 15.

[47] *Id.* at 23.

[48] *See generally* Brief of Amicus Curiae Marketplace Lending Association in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Motion For Summary Judgment, People of the State of California et al. v. Office of the Comptroller of the Currency et al., No. 4:20-cv-05200-JSW, (N.D. Cal. Jan. 22, 2021), ECF. No. 66.

[49] *Id.* at 8.

[50] *Id.* at 25.

[51] *Id.* (citing 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-howcourts-are-undermining-financial-inclusion).

aggressive enforcement actions against predatory lending practices operating under the patina of legitimacy afforded by rent-a-bank schemes.[52]

A group of non-profit consumer advocates, including the National Consumer Law Center, filed an *amicus* brief supporting the state AGs.[53] The consumer advocate *amici* advance several compelling policy arguments, namely that the OCC rule effectively acts as a license for "rent-a-bank" schemes that encourage predatory lending and that the OCC has failed in the past to properly regulate predatory lending.[54] Rent-a-bank schemes essentially involve high-cost lenders laundering otherwise usurious loans through national banks, allowing high-cost lenders to "claim that the loans are bank loans immune from state rate caps."[55] These schemes, particularly when partnered with the emerging fintech industry, allow high-cost lenders to market their financial products to marginalized communities experiencing financial distress.[56] In less-affluent communities of color, where systemic discrimination has led to subprime indicators of credit, high-cost loans often have the effect of "driv[ing] borrowers out of the banking system and exacerbat[ing] existing disparities" rather than expanding access to credit, as advocates of the OCC rule claim.[57]

2. New Administration

While litigation challenging the OCC/FDIC *Madden*-fix rules languishes in federal court, executive action likely represents the quickest way for consumer protection advocates to realize the repeal of the rules. Immediately after President Biden's inauguration on January

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[52] *Id.* at 26–27 ("The extensive federal regulatory environment provides ample opportunities to make predatory lenders lives' very difficult.").
[53] *See generally* Brief of Amici Curiae Center for Responsible Lending et al. Supporting Plaintiffs' Motion for Summary Judgment, People of the State of California et al. v. Office of the Comptroller of the Currency et al., No. 4:20-cv-05200-JSW, (N.D. Cal. Dec. 17, 2021), ECF. No. 38-1.
[54] *Id.* at 10 ("[T]he primary impact of this rule will be to protect high-cost, non-bank lenders that are increasingly and brazenly evading state usury laws.").
[55] *Id.* at 13.
[56] *Id.* at 15–16 ("High-cost lending is a debt trap by design, exploiting the financially distressed, and leaving them unable to pay other bills and facing high checking account fees, closed bank accounts, and bankruptcy. These toxic products inflict turmoil pervading every aspect of a person's life.").
[57] *Id.* at 18–19.

20, 2021, White House Chief of Staff Ronald Klain issued a memorandum outlining a broad regulatory freeze that halted the issuance of new rules by executive agencies.[58] While the OCC/FDIC rules were not affected by the regulatory freeze, the Biden administration is expected to pursue a relatively aggressive financial regulatory and enforcement agenda, including a reexamination of "certain Trump-era regulations."[59] House Democratic lawmakers have already requested that the Biden administration rescind the OCC/FDIC rules as part of a broader consumer protection reform package.[60] The Biden administration has several potential avenues to "reexamine" the OCC/FDIC rules, including "reaching a settlement with the states to revise these rules, if the state attorneys general do not insist on complete withdrawals of them."[61]

President Biden's choice to lead the OCC will likely play a large role in determining the fate of the *Madden*-fix rules, and the selection process has become a proxy fight between the centrist and progressive wings of the Democratic Party.[62] In the extreme early days of the Biden administration, Michael Barr, a former Clinton and Obama Treasury Department official who has previously called for stronger consumer protections,[63] was the presumptive pick to lead the

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[58] Richard J. Andreano, Jr. et al., *Biden Administration Regulatory Freeze Will Impact CFPB Final Rules*, BALLARD SPAHR LLP (Jan. 26, 2021), https://www.jdsupra.com/legalnews/biden-administration-regulatory-freeze-7048907/ [https://perma.cc/S3WH-NKCM].

[59] Michael D. Bopp et al., *The Biden Administration: New Priorities in the Banking, Fintech and Derivatives Sectors*, GIBSON DUNN (Feb. 16, 2021), https://www.gibsondunn.com/the-biden-administration-new-priorities-in-the-banking-fintech-and-derivatives-sectors/ [https://perma.cc/HDM5-JMQG].

[60] Letter from Maxine Waters, Chairwoman, U.S. House of Representatives Comm. on Fin. Servs. to President-Elect Joseph Biden, at 9 (Dec. 4, 2020) ("Deregulation under the guise of innovation is a bad policy that hurts consumers and must be rejected.").

[61] Michael S. Kraut et al., *Key Financial Regulatory Issues for Biden Administration's Early Days*, MORGAN LEWIS (Feb. 11, 2021), https://www.morganlewis.com/pubs/2021/02/key-financial-regulatory-issues-for-biden-administrations-early-days-first100 [https://perma.cc/WYU2-63SR].

[62] *See* Mashayekhi, *supra* note 12 ("Biden's choice to fill another, less visible—yet considerably influential—administrative role has reignited tensions between progressives and moderates.").

[63] Victoria Guida et al., *Consumer Advocates Baradaran, Barr Are Leading Contenders for Top Bank Cop*, POLITICO (Jan. 17, 2021), https://www.politico.com/news/2021/01/17/mehrsa-baradaran-michael-barr-occ-460130 [https://perma.cc/EA5G-ZYER] ("Barr … has been critical of financial rule

OCC.[64] Barr has been roundly criticized by progressives for being "too cozy with, and accommodating to, the financial industry that he'll be charged with regulating" due to his previous board membership with several fintech companies.[65] As of publication, reports have indicated that Barr is no longer in contention for the OCC job, in part due to resistance from the progressive wing of the Democratic Party.[66]

Progressives, including the Senate Banking Committee chair Sherrod Brown, have advocated for law professor Mehrsa Baradaran to be the OCC nominee, citing her extensive work documenting "the racial wealth gap, and the systemic barriers that have perpetuated economic inequality among Black and minority communities."[67] Thirty-four members of the Congressional Black Caucus have also endorsed Baradaran's appointment, explaining that Baradaran would be a "transformative" nominee "who is prepared to aggressively undo the harms of the past."[68] Given her experience examining the effects predatory lending has on marginalized communities,[69] Baradaran would likely be more receptive to the arguments made by consumer protection advocates in litigating the repeal of the OCC rule. Notably, Baradaran has criticized the "access to credit" arguments similar to those made by banking industry *amici* in the state AG's current

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rollbacks under the Trump administration and has called for strengthening consumer protection.").

[64] *Id.*

[65] Mashayekhi, *supra* note 12.

[66] Saleha Mohsin & Jennifer Epstein, *Ex-Treasury Official Barr All but Ruled Out for OCC Post*, BLOOMBERG (Mar. 8, 2021), https://www.bloomberg.com/news/articles/2021-03-08/ex-treasury-official-barr-all-but-ruled-out-for-occ-nomination ("President Joe Biden had homed in on Barr as his likely pick to run the Office of Comptroller of the Currency, but his candidacy faced a torrent of opposition from liberal Democrats").

[67] Mashayekhi, *supra* note 12.

[68] Letter from Jamaal Bowman et al., Members of Congress, to President Joseph R. Biden, at 1 (Mar. 25, 2021); *see also* Kadia Goba, *Racial Wealth Gap Becomes an Issue for Biden Bank Regulator Pick*, AXIOS (Mar. 26, 2021), https://www.axios.com/biden-treasury-pick-racial-wealth-gap-d501f10d-4e45-4388-aa8d-bc79b05c4b86.html.

[69] Ayanna Pressley & Jamaal Bowman, *This Biden Nomination Is Extremely Important for Everyday People*, THE APPEAL (Jan. 28, 2021), https://theappeal.org/bowman-pressley-office-of-the-comptroller-of-currency-baradaran/ [https://perma.cc/AYZ5-UPPW] ("Baradaran understands the inextricable link between the history of racism and banking in the United States and will protect historically marginalized communities from predatory financial practices and products.").

litigation against the OCC.[70] According to Baradaran, "access to credit" arguments often fail to "discern between the quality of credit available, usually focusing primarily on the quantity available."[71] This discrepancy is emblematic in the fintech industry, which, while breathlessly touting the financially inclusive nature of fintechs, has consistently "failed to increase access for lower income consumers."[72]

Critics of Baradaran have cited her relative lack of experience outside academia.[73] This criticism is unfounded; the "revolving door" regulatory personnel structure which dominated the past four years of the Trump administration demonstrates precisely why an outsider perspective is necessary to enact progressive change in the banking and lending industry.[74] The COVID-19 pandemic has both laid bare and exacerbated the systemic inequalities present in American society. Baradaran's experience with and sensitivity toward historically disadvantaged communities will help transform the OCC into an institution that works for the many, not just the few.[75] Given the fact that the Biden-Harris campaign regularly touted its commitment to

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[70] Mehrsa Baradaran, *Banking on Democracy*, 98 WASH. U. L. REV. 353, 398 (2020) ("Even well-meaning financial inclusion programs, including robust anti-redlining measures like the CRA, remain firmly rooted in neoliberal logic that centers the private banking market in remedying the historic exclusion of Black communities.").

[71] *Id.* at 365–66.

[72] *Id.* at 371–72.

[73] Brendan Pedersen & Kate Berry, *Outsider Emerges as Top Contender to Lead OCC*, AM. BANKER (Mar. 10, 2021), https://www.americanbanker.com/news/outsider-emerges-as-top-contender-to-lead-occ (quoting Tom Vartanian, a law professor at George Mason University, "When I needed to get a hip replacement, I went to a surgeon who had replaced a thousand hips, not someone who had just read about it.").

[74] *See* Derek Kravitz, Al Shaw & Isaac Arnsdorf, *What We Found in Trump's Drained Swamp: Hundreds of Ex-Lobbyists and D.C. Insiders*, PROPUBLICA (Mar. 7, 2018), https://www.propublica.org/article/what-we-found-in-trump-administration-drained-swamp-hundreds-of-ex-lobbyists-and-washington-dc-insiders [https://perma.cc/XX9Q-V342] ("At least 187 Trump political appointees have been federal lobbyists, and despite President Trump's campaign pledge to 'drain the swamp,' many are now overseeing the industries they once lobbied on behalf of.").

[75] *See* Pressley & Bowman, *supra* note 69 ("At a time of alarmingly high unemployment rates, President Biden's choice to lead the OCC can help ensure families have the financial options and support necessary to weather this storm and thrive long after. Professor Baradaran is simply the best person for the job.").

racial justice and equity during election season, [76] curbing the excesses of predatory lending and protecting marginalized communities through a repeal of the OCC/FDIC rules ought to remain a priority for this administration.

D. Conclusion

Consumer protection advocates have advanced compelling policy arguments arguing for a repeal of the *Madden*-fix rules which were promulgated in the waning days of the Trump administration. The Biden administration has been posturing for a more aggressive financial regulatory agenda, but it remains to be seen whether it has the political will to actually enact consumer-friendly policies. Both consumer protection advocates and practitioners in the lending industry should pay close attention to the OCC's next moves in the early days of the Biden administration to get a sense of whether the *Madden*-fix rules will remain in effect.

Connor W. Harding[77]

[76] *See generally The Biden Plan to Build Back Better by Advancing Racial Equity Across the American Economy*, BIDEN-HARRIS CAMPAIGN, https://joebiden.com/racial-economic-equity/ [https://perma.cc/6GMD-H8XE].
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