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BANKRUPTCY & THE UNDERWATER HOME: A CASE FOR REAL PROPERTY REDEMPTION

David Sheinfeld[*]

ABSTRACT

Chapter 7 of the U.S. Bankruptcy Code exists to satisfy the claims of creditors and preserve an economic "fresh start" for the debtor after bankruptcy. In exchange for surrendering her property to the trustee to have it monetized (i.e., sold), the debtor receives a discharge of her debts and an injunction against future creditor in personam actions to recover them. However, the in personam injunction is insufficient to protect consumer debtors who are in default on mortgages encumbering underwater homes because the creditor's in rem rights remain; after the conclusion of the case, the creditor can continue foreclosure proceedings, which result in eviction and often homelessness. The economic, educational, and health externalities of foreclosure and homelessness are detrimental to individuals and harmful to society at large. The Bankruptcy Code already possesses the tool to prevent these harms without disadvantaging creditors—the right to redeem under § 722—but currently restricts redemption to personal property. This Note argues for a statutory amendment to § 722 that extends the right of redemption to real property.

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INTRODUCTION

The home is the foundation of modern American society. For renters and owners alike, where someone lives represents ties to history and community and determines access to social services. For homeowners—representing around 65% of all occupied housing in 2018[1]—the home is also usually their primary asset.[2] Psychologically, home ownership is a manifestation of the American Dream and provides a mechanism for families to achieve lasting economic security.[3] Home ownership in one generation creates economic and educational benefits for subsequent generations through stability during child-rearing years and a future inheritance.[4]

Beyond the mere absence of positive effects, lack of adequate shelter threatens life and health.[5] Without an address, jobless and homeless individuals have difficulty finding and keeping employment, further contributing to poor health,

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1. Jennifer Ruden, *Homeownership rate in the United States from 1990 to 2018*, STATISTA (Sept. 5, 2019), https://www.statista.com/statistics/184902/homeownership-rate-in-the-us-since-2003/.

2. FEDERAL RESERVE BOARD*, Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, 98 Fed. Reserve Bulletin 1, 48 (2012) (available at https://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf); *see, e.g.*, Maniska Thakor, *Five Expenses That Will Consume 50 Percent Of Your Lifetime Earnings*, FORBES (Aug. 2, 2010), https://www.forbes.com/sites/work-in-progress/2010/08/02/lifetime-earnings-home-car-children-education-retirement/#7596b22b507d.

3. *See, e.g.*, President George W. Bush, *Record of Achievement – Expanding Home Ownership*, THE WHITE HOUSE, https://georgewbush-whitehouse.archives.gov/infocus/achievement/chap7.html (last visited Nov. 10, 2019) (describing the "American Dream Downpayment Act"); *see also* President Barack Obama, *Remarks by the President on Responsible Homeownership*, https://obamawhitehouse.archives.gov/the-press-office/2013/08/06/remarks-president-responsible-homeownership (Aug. 8, 2013) ("[T]he most tangible cornerstone that lies at the heart of the American Dream, at the heart of middle-class life—and that's the chance to own your own home. The chance to own your own home.").

4. Heather Sandstrom & Sandra Huerta, *The Negative Effects of Instability on Child Development: A Research Synthesis*, URBAN INSTITUTE, at 28 (Sept. 2013), https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF.

5. *Health and Homelessness*, AM. PSYCHOLOGICAL ASS'N, https://www.apa.org/pi/ses/resources/publications/homelessness-health (last visited Nov. 10, 2019); *see also* INST. OF MED. (US) COMM. ON HEALTH CARE FOR HOMELESS PEOPLE (1988), HOMELESSNESS, HEALTH, AND HUMAN NEEDS: HEALTH PROBLEMS OF HOMELESS PEOPLE, https://www.ncbi.nlm.nih.gov/books/NBK218236/ (last visited Nov. 10, 2019).

economic, and educational outcomes for them and their families.[6] Furthermore, when a homeowner falls behind on her mortgage payments, she and her family risk losing their home and the safety it provides. Foreclosure proceedings result in eviction and its associated harms.[7] When a home is worth less than the outstanding mortgage, which frequently happens in economic downturns,[8] the debtor will end up with nothing, even after saving up for a down payment and making years of monthly payments.

Even though bankruptcy's debt discharge is robust, the system fails to provide an adequate safety valve for debtors who are in default on their underwater homes. By filing bankruptcy, these debtors get the nominal benefit of the U.S. Bankruptcy Code's protections, including the automatic stay (which enjoins creditor activity to pursue collections or foreclosure) and the opportunity to prevent creditors from seizing their assets. However, due to statutory restrictions or structural impediments, these opportunities fail debtors in underwater homes. As a result, Chapter 7 bankruptcy filers—an average of 725,000 per year since 2005, representing 68% of all consumer filings[9]—gain nothing but the automatic stay's temporary delay before eventual foreclosure and eviction.

This Note argues for a statutory change to the U.S. Bankruptcy Code (the "Code") extending the right to redeem to real property. Part I provides short histories of the U.S. bankruptcy system and redemption, both in equity and in modern statute. Part II analyzes current bankruptcy law and explains how its shortcomings harm debtors. Part III outlines the proposed change and the economic and social benefits it confers on both debtors and creditors and also addresses potential counterarguments.

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6. *See, e.g.*, *Getting a Job Without an Address*, SUV LIVING (Aug. 18, 2012), http://aboutsuvliving.blogspot.com/2012/08/getting-job-without-address.html.

7. Leigh Thompson, *What Happens After Foreclosure & the Property Is Sold?*, SFGATE: HOME GUIDES (last visited Nov. 10, 2019), https://homeguides.sfgate.com/happens-after-foreclosure-property-sold-55824.html; *see also* Amy Loftsgordon, *Foreclosure Timeline: Getting Notice to Leave*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/foreclosure-book/chapter9-5.html (last visited Nov. 10, 2019); *Foreclosure and Eviction for Homeowners* MICH. LEGAL HELP, https://michiganlegalhelp.org/self-help-tools/housing/foreclosure-and-eviction-homeowners.

8. *See* Michele Conlin & Robin Respaut, *Millions of Americans still trapped in debt-logged homes ten years after crisis*, REUTERS (Sept. 14, 2018, 8:21 AM), https://www.reuters.com/article/us-usa-housing-underwater-insight/millions-of-americans-still-trapped-in-debt-logged-homes-ten-years-after-crisis-idUSKCN1LU0EP; *see also* Andrea Riquier, *Has the housing market recovered? Ask the 1.4 million homeowners still underwater*, MARKETWATCH (Dec. 14, 2017, 10:58 AM), https://www.marketwatch.com/story/has-the-housing-market-recovered-ask-the-14-million-underwater-homeowners-2017-12-13.

9. UNITED STATES COURTS, *Just the Facts: Consumer Bankruptcy Filings, 2006-2017* (Mar. 7, 2018), https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017.

I. BACKGROUND

A. *A (Short) Overview of the Bankruptcy System*

At the highest level of abstraction, the U.S. bankruptcy system exists to facilitate individual and business debt restructuring, rehabilitation, and liquidation. The system is broken down into six "chapters" to accommodate the practical needs of a diverse range of debtor attributes, goals, and sizes: 7 (liquidations), 9 (municipal), 11 (reorganization for businesses and individuals with debts above a certain amount), 12 (family farmers and fishermen), 13 (individual reorganization), and 15 (international). Proceedings can be opened "voluntarily" (by the debtor) or "involuntarily" (by creditors under statutory guidance). This distinction refers to how the case begins, *not* the debtor's subjective feelings; though someone filing for bankruptcy to stave off foreclosure or other creditor action may feel as though her back is against the wall, in bankruptcy parlance her filing is voluntary.

Filing under any chapter of the Code does two key things: (1) creates the bankruptcy "estate" and (2) automatically stays a variety of creditor action against the debtor or property of the estate. The bankruptcy estate is, in effect, a trust containing the debtor's property which is held for the benefit of creditors. Notably, "property of the estate" does not simply follow state law property concepts, but rather is its own term of art under federal bankruptcy law and can contain things of value not considered property under state law.[10] However, not all debtor property enters the estate; the bankruptcy system allows property exempted from seizure by judgment creditors under state or federal law to remain outside the estate and therefore unavailable for creditor repayment.[11] Depending on whether the bankruptcy case is a liquidation or a reorganization, either a trustee or the debtor as "debtor-in-possession" administers the estate. The automatic stay is an immediate injunction against creditor action to collect debts from a debtor who has declared bankruptcy or from property of the estate. While subject to exceptions, the automatic stay is powerful and broad. It applies to all entities and a diverse array of potential behavior, including commencement or continuance of a judicial proceeding against the debtor, enforcement of a judgment against the debtor or property of the estate, any act to obtain possession or exercise control over property of the estate, any creation, perfection, or enforcement of a lien, and more.[12] Further, the automatic stay has teeth; "willful" violations (those done deliberately and intentionally with knowledge

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10. *See, e.g.*, *In re* Burgess, 234 B.R. 793, 799 (D. Nev. 1999) (finding a brothel license to be "property of the estate" although the license was not property under Nevada state law).

11. *See generally* 11 U.S.C. § 522.

12. 11 U.S.C. § 362(a).

of the automatic stay) allow recovery for actual damages, costs, and attorneys' fees, and, where appropriate, punitive damages.[13]

State law and the Code treat debt differently according to how they were incurred and whether the creditor has any property rights in specific collateral. At a threshold level, creditors are either "secured" or "unsecured" based on their claim. An entire body of law (secured transactions and Article 9 of the Uniform Commercial Code) dictates the creation, attachment, and perfection of security interests in property; relevant for this discussion is simply that in most cases, secured parties gain rights (a lien) in collateral through negotiation in the credit transaction. The effect of becoming a secured party is that upon the debtor's default, the creditor can repossess the collateral and sell it to recover or mitigate its loss. A mortgage lender is the archetypical secured lender. When someone "mortgages" their house, they borrow money from a lender in exchange for a promise to repay (including interest) and a lien, which gives the lender the right to foreclose and sell the house upon default. Automobile financers are another common example. In exchange for lending a debtor money to cover the purchase price of the automobile, the lender receives the right to repossess and sell the car upon default. Unsecured creditors, on the other hand, do not have a security interest in collateral. Think of, for example, a tort victim, credit card company, or supplier.[14] These kinds of creditors cannot simply repossess and sell property to cover their losses; instead, they must sue (either in tort or in contract for breach), receive a monetary judgment, record the judgment to form rights in property, and have the state (typically via a sheriff) seize the property and conduct a sale. Secured status also means that when the collateral is sold, secured lenders are repaid first; unsecured creditors can only be paid out of the surplus, which reduces their likelihood for recovery. These are some of the main reasons why mortgage interest rates are typically much lower than credit card interest rates.

When an individual consumer debtor voluntarily files for bankruptcy, she does so under a specific chapter depending on her attributes and goals. For simplicity's sake, this discussion will focus on chapters 7 and 13, as these two represent nearly all individual filings in the U.S. In a Chapter 7 liquidation, all of a debtor's non-exempt property comprises the estate, which she surrenders to a court appointed trustee in exchange for a discharge of her debts and an injunction against future collections efforts by creditors. The trustee then sells the assets and distributes the proceeds among the creditors depending on their statutorily defined priority. Consumer Chapter 7 cases typically take a few months

13. *Id.* § 362(h); *see, e.g.*, *In re* Green, 2011 WL 5902502, at *3–4 (Bankr. E.D.N.C. Oct. 20, 2011) (finding that routine collections letters sent after the debtor notified one department of the filing of the bankruptcy petition by a different department with no knowledge of the petition constituted a violation of the automatic stay).

14. In certain limited circumstances sellers of goods retain security interests in property under Article 9; for the purpose of this introductory discussion, these suppliers are treated as unsecured creditors.

and creditors usually receive a small fraction of the amount they are owed. In contrast, Chapter 13 is known as the "wage-earner's plan," where a debtor with regular income fashions a three- or five-year plan (under the court's supervision) to keep their assets and repay existing creditors with future earnings.[15] Here, the debtor keeps her property throughout the plan and only receives the discharge upon the plan's successful completion. In order for a plan to be approved by the court, creditors must be projected to receive at least as much as they would in a hypothetical liquidation, including interest to represent the *value* (rather than the *amount*) of their claim.[16]

The statutory provision at issue in this Note applies in Chapter 7. Chapter 7 debtors must state what they plan to do with property that is encumbered by a lien (i.e., property that is not exempt from seizure by unsecured creditors or that the debtor voluntarily pledged as collateral). There are three formal (and one informal) options available to the debtor: redemption, which this Note focuses on; reaffirmation; surrender; and ride-through. The strengths and weaknesses of these options are discussed in depth in Part II(b).

The moral and policy considerations that undergird the bankruptcy system have deep roots. Tracing back to biblical Jubilees and beyond, debt forgiveness is engrained in the Judeo-Christian value system that the American Founders saw themselves codifying in the Constitution.[17] New beginnings have remained deeply connected with the American psyche; from homestead acts to "streets paved with gold," domestic policy has long embodied commitment to economic and social rebirth.[18] Bankruptcy law is no exception to this phenomenon. By preserving the debtor's fresh start after bankruptcy, proponents argue, the bankruptcy system provides an important rehabilitative function to those who need it the most.[19]

Even more, debtor rehabilitation has positive externalities; a system that leaves bankrupt debtors destitute strains welfare services and hamstrings society. As one scholar puts it, "society as a whole also loses when moping bankrupt debtors are distracted from working at their highest and best use level of productivity because they are instead coping with financial ruin."[20] The bank-

15. *See* Steve Nitz, *The Different Chapters of Bankruptcy Explained*, NFCC (Sept. 22, 2017), https://www.nfcc.org/resources/blog/different-chapters-bankruptcy-explained/.

16. 11 U.S.C. § 1325(a)(5)(B)(ii); *see also* Till v. SCS Credit Corp., 541 U.S. 465 (2004).

17. Vincent L. Leibell, Jr., *The Chandler Act-Its Effect Upon the Law of Bankruptcy*, 9 FORDHAM L. REV. 380, 380–81 (1940) (discussing history of bankruptcy, debt relief, and passage of Constitution).

18. *Streets Paved With Gold*, NAT'L PARK SERV., https://www.nps.gov/elis/learn/education/streets-paved-with-gold.htm ("For generations, our ancestors came to this nation filled with endless hopes and dreams. The rumor that American streets were "paved with gold" created anticipation and excitement in the hearts of those seeking a better life.").

19. *See* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1088 (1987).

20. John A.E. Pottow, *Private Liability for Reckless Consumer Lending*, U. ILL. L. REV. 405, 412 (2007).

ruptcy system implements its "fresh start" goal by exempting certain of the debtor's property from seizure by unsecured creditors and making invalid non-possessory, non-purchase money security interests in heirlooms, clothing, furniture, tools of the trade, and health aids.[21] In short, there are some things that are off-limits to creditors, either because of dignitary or leverage concerns (i.e. the creditor cannot seize clothing or heirlooms to satisfy debt or bully the debtor) or to preserve rehabilitative prospects (automobile equity, tools of the trade, etc.).

On the other hand, there is an equally deep tradition in paying back debts. Filing for bankruptcy has powerful moral implications. Taking on debt is fundamentally a promise to repay money—an important legal and moral promise—that should be given solemn weight. Filing bankruptcy is a decision to repudiate these promises made in exchange for goods, services, and other promises.[22] These promises are not empty or symbolic; "[o]f such promises and reciprocity is the fabric of civil society woven."[23] From a structural economic perspective, debt repayment facilitates cheap credit availability and trust in the financial system as loans are repaid. The easier it is for a debtor to renege on their obligations, the thinking goes, the more likely a marginal debtor is to take advantage of the system and shirk debts they otherwise have the financial capacity to pay.[24] Extending the scenario to its logical outcome, lenders will be less certain of repayment and will in fact have fewer loans repaid to completion, reducing the amount of available credit and raising the cost of credit for those that can get it. In this line of thought, debt erasure is not an unqualified moral or economic good as it imposes costs on other system participants and represents broken commitments.[25]

B. *History of the U.S. Bankruptcy System*

The U.S. Constitution provides for federal bankruptcy law and courts in Article I.[26] However, excepting some short periods in the early- and mid-nineteenth century where legislation was enacted and repealed (often within the

21. 11 U.S.C. § 522(f), H.R. REP. NO. 95-595, at 361 (1977).

22. Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 181 (1999).

23. *Id.*

24. *See* President George W. Bush, Remarks at the Signing of [BAPCPA] (April 20, 2005) (transcript available in the White House Archives) ("[T]oo many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them.").

25. The true culprit, though, is not debt erasure specifically but rather nonpayment generally. To a lender, there is little economic difference between formal discharge and the simple inability to draw blood from a stone; either way, the lender bears a loss. This suggests that redemption of underwater homes does not impose additional costs on lenders (or other market participants) as the redemption payment replaces the sale of the foreclosed home to recoup losses (as discussed below in Part III(b)(i)).

26. U.S. CONST. art. I, § 8, cl. 4.

same decade), there was no federal bankruptcy law in the United States.[27] In fact, perhaps due to ebbs and flows of political pressure, no uniform bankruptcy law had any staying power until the very end of the nineteenth century.[28] When these systems were in effect, though, they were notably creditor-friendly, providing for such punitive measures as civil confinement in debtor's prisons for failure to repay debts.[29] In 1898, Congress passed the Bankruptcy Act and enacted the first modern federal bankruptcy law.[30] This new regime was meaningfully different from its predecessors in several ways, establishing both the "referee" position to oversee administration of cases and the office of the trustee, as well as providing for the reorganization (rather than liquidation) of corporations.[31] Even so, the federal bankruptcy law had problems, leading to several amendments over the next half-century.[32]

In this context, Congress overhauled the 1898 Bankruptcy Act in 1978 and created the modern Bankruptcy Code and court system with the Bankruptcy Reform Act (the "Act").[33] In adopting the new Code, Congress aimed to balance the economic "fresh start" and productive rehabilitation of the debtor with the rights of creditors.[34] In addition to effecting structural changes to the court system and endowing bankruptcy judges with substantial power, the Act was notably debtor friendly. Among other changes, the new Code included an expansive list of exemptions which exceeded previously available allotments, protected those exemptions from judicial liens, expanded the types of debts that could be discharged, and introduced the right to redeem personal property in Chapter 7.[35] While the direct effects of these changes on consumer filings are disputed in

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27. David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 323 (1999) ("[T]he standard story of American bankruptcy history is a tale of bust and boom. On this view, we have the Depression of 1793 to thank for the 1800 Bankruptcy Act; and the Panics of 1837, 1857, and 1893 to thank for the 1841, 1867, and 1898 Acts. Once the first three acts had done their initial work and economic conditions improved, Congress repealed the federal legislation and left insolvency law to the states.").

28. *Id.* at 322 ("Under ordinary circumstances, there was not enough political support to keep a permanent bankruptcy law in place. But the nation was periodically thrown into turmoil by deep economic depressions. These depressions provoked loud cries for bankruptcy legislation. Congress responded to this pressure by passing bankruptcy laws, but it then repealed the laws when the depression passed and support for federal bankruptcy regulation receded.").

29. Debtors' Prison Relief Act of 1792, Ch. 29, 1 Stat. 265; Debt Imprisonment Abolishment Act of 1839, Ch. 35, 5 Stat. 321; *see* 28 U.S.C. § 2007.

30. *See* Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544.

31. *The Evolution of U.S. Bankruptcy Law: A Time Line*, FED. JUD. CTR., https://www.rib.uscourts.gov/newhome/docs/the_evelution_of_bankruptcy_law.pdf; Bradley Hanson, *Bankruptcy Law in the United States,* https://eh.net/encyclopedia/bankruptcy-law-in-the-united-states/.

32. Leibell, *supra* note 17, at 385–86.

33. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549.

34. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY CODE 91 (Yale Univ. Press 1997).

35. Ian Domowitz & Thomas L. Eovaldi, *The Impact of the Bankruptcy Reform Act of 1978 on Consumer Bankruptcy*, 36 J. L. & ECON. 803, 807–08 (1993).

light of changing economic conditions, between 1980 and 2004, consumer bankruptcy filings grew at an average rate of 7.6% per year.[36] As of 2005, the filing rate was 5.4 per 1,000 people, more than four times the 1980 rate and nearly 80 times the 1920 rate.[37]

Determining (perhaps incorrectly) that consumers were "abusing" the system and filing bankruptcy too easily, Congress substantially amended the Code in 2005 with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[38] BAPCPA came down hard on consumer filers by curtailing a debtor's flexibility in choosing under which chapter of bankruptcy to file and removing key debtor-friendly attributes of the system. Specifically, BAPCPA introduced the "means test" to push more debtors into Chapter 13, reduced the scope of the Chapter 13 "super discharge," and mandated that consumer filers receive credit counseling and financial management training *before* filing.[39] While scholars debate the effect of these changes on filing behavior considering macroeconomic forces, normative sentiment against "being a bank-

36. Thomas A. Garrett, *The Rise in Personal Bankruptcies: The Eighth Federal Reserve District and Beyond*, FED. RESERVE BANK OF ST. LOUIS REV. (2007), https://files.stlouisfed.org/files/htdocs/publications/review/07/01/Garrett.pdf [hereinafter *Rise in Personal Bankruptcies*] (examining potential explanations for the rise in consumer bankruptcy filings); Thomas A. Garrett & Lesli S. Ott, *Up, Up and Away: Personal Bankruptcies Soar!* REGIONAL ECONOMIST, at 10, 11 (Oct. 2005), https://www.stlouisfed.org/publications/regional-economist/october-2005/up-up-and-away-personal-bankruptcies-soar [hereinafter *Up, Up and Away*].

37. *Rise in Personal Bankruptcies*, *supra* note 36, at 15; *Up, Up and Away*, *supra* note 36.

38. Pub. L. No. 109–8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

39. The "means test" is a rigid process which requires the bankruptcy court to presume abuse for certain Chapter 7 filings, which results in either their dismissal or conversion to Chapter 13. First, the means test requires calculating a debtor's "current monthly income" (actually, a six-month *retrospective* calculation) and comparing it to the median income in the debtor's region. If the debtor is below-median, she may proceed to Chapter 7. If she is above-median, the means test proscribes a budget to apply to the debtor's expenses based on her region and family size, but without consideration of her actual assets, liabilities, family situation, or need. For example, the means test may assume that a debtor spends $50.00 per month for gasoline or transportation expenses. That determination applies both to a debtor who walks to work and one who must commute an hour by car. After applying the budget to the debtor's expenses, the court calculates a debtor's "disposable income"—namely, any income beyond those statutorily allocated amounts. Because Chapter 13 plans require that all of a debtor's disposable income be used to repay creditors if it exceeds a certain dollar amount per month (on paper), any gap between a debtor's actual expenses and the statutory count hurts her. The debtor who walks to work and spends less than $50.00 per month on transportation cannot reallocate the "saved" money in the budget to an item on which she exceeds the statutory cap, like her food expense. As a result, the money spent on food above the statutory count will be considered disposable income, regardless of its necessity. Similarly, the debtor who exceeds $50.00 per month in transportation costs receives no flexibility; the money she spends commuting above the $50.00 threshold will be considered disposable income. As of publication, those who end up with a monthly disposable income above $166.67 are deemed ineligible for Chapter 7. ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 253–80 (Wolters Kluwer, 7th ed. 2014); 11 U.S.C. §§ 707(b)(2), 109(h), 1325(b); William D. Weber, *Chapter 13 "Super" Discharge Shrinks*, WEBER LAW FIRM, P.C., https://weberlaw.com/bankruptcy-reform-index/chapter-13-super-discharge-shrinks/ (last visited Oct. 12, 2020).

rupt," and recognition that most filings follow a traumatic financial event (job loss, marital status change, or medical bills),[40] BAPCPA's passage coincided with a sharp drop in consumer filings.[41]

C. *The Equity of Redemption and the Statutory Right to Redeem*

The principle behind redemption (one of the Chapter 7 debtor's three options for encumbered property) dates back to the English Courts of Equity.[42] Before the modern statutory scheme governing security interests developed, land owners who wanted to grant a mortgage on their property executed a conveyance of legal title to the lender as security for the loan.[43] Upon successful repayment of the loan, the mortgagor (land owner) could petition the courts to compel the mortgagee to transfer the property back to the mortgagor.[44] But if the mortgagor was unsuccessful in repaying the loan, the land vested in the lender and the mortgagor's claim to title was terminated.[45] Because the mortgage debt was typically lower than the value of the property, usurious lenders would dispossess debtors upon simple defaults, resulting in windfalls.[46] To illustrate, imagine you own a farm worth $10,000, encumbered by a $8,000 mortgage. One month, you are a few days late paying because you forgot, or you committed another simple default. Because the mortgagee holds title to the land, your default would vest ownership of the $10,000 farm to the lender, even though you had only borrowed $8,000. The equity of redemption allowed debtors to combat forfeiture upon simple default by bringing past payments up to date.[47] To prevent the debtor's continued possession of the land during a true default, the lender could foreclose the debtor's right of redemption through a judicial process, fully extinguishing the debtor's claims to the land.[48] Upon

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40. *See* David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study,* 122 AM. J. MED. 741, 741–46 (2009), https://www.amjmed.com/article/S0002-9343(09)00404-5/fulltext; *see generally* WARREN ET AL., *supra* note 38, at 305–22.

41. WARREN ET AL., *supra* note 39, at 321.

42. Thomas W. Bigley, *Property Law—The Equity of Redemption: Who Decides When it Ends?*, 21 WILLIAM MITCHELL L. REV. 315, 317 n.11 (1995) ("Equitable redemption rights arose from English Courts of Equity and reflect the court's desire to balance power between the mortgagor and mortgagee.").

43. *Id.* at 318–19.

44. *Id.*

45. *Id.*

46. *Id.* at 319–20.

47. *Id.*; *see also id.* at 319 n.19 ("'After Edward the First, the English Courts of Equity introduced equitable redemption to weaken the mortgagee's usurious control over the debtor.' This balancing of power between the mortgagee and the debtor gave the debtor the ability to redeem his property despite a payment default.").

48. *Id*. at 320–21. Extinguishing the debtor's claims to the land allowed the creditor to sell the land with a clean (uncontested) title to recoup its losses.

foreclosure, the debtor could no longer petition the court for the equity of redemption.[49] These are the origins of today's vocabulary.

In the modern context, statutes prescribe how security interests are formed, granted, and managed. As a result, the traditional equity of redemption morphed as states codified versions of it into their property law.[50] The statutory right to redeem differs from the equity of redemption in several respects, but the two most important are: (1) it can provide an opportunity for a debtor to redeem the property *after* foreclosure, and (2) the debtor can only redeem by paying the *full amount* of the debt (or sometimes the foreclosure sale price), not just by curing the arrearage.[51] These attributes afford the debtor more time to save her home (statutory rights to redeem can, in some states, be exercised up to a year after the foreclosure sale) and can avoid forfeiture of the debtor's equity due to the severe market imperfections surrounding foreclosure sales, which artificially deflate home values.[52] Today, roughly half of the states have statutory rights to redeem on the books.[53]

II. THE LAW TODAY

Part II begins by explaining how residential homes are treated under the Bankruptcy Code, describing how state and federal exemptions prevent certain lien creditors (e.g., a successful tort plaintiff) from seizing and selling particular property to satisfy their debt. These protections, however, do not enjoin mortgagees, as the debtor voluntarily granted the lien. Part II(b) discusses the four options a Chapter 7 debtor has to address debts secured by property—redemption, reaffirmation, surrender, and ride through—and why each fails to protect underwater homeowners.

A. *Homesteads Under the Bankruptcy Code*

Every state exempts certain property from involuntary seizure by creditors, but the breadth and depth of the exemption varies from state to state. This means that judgment lien creditors cannot look to certain property for repayment by the debtor. However, a debtor can waive the exemption by granting a *voluntary* security interest in otherwise exempt property.[54] While every state exempts homesteads (primary residential homes) to some extent from seizure by judgment creditors, this exemption does not prevent foreclosure and sale by

49. *Id*. at 318.

50. *See id*.

51. U.C.C. § 9-623 (AM. LAW INST. & UNIF. LAW COMM'N 2000); AllLaw, *The Right of Redemption*, https://www.alllaw.com/articles/nolo/foreclosure/right-of-redemption.html.

52. *See generally* Christopher J. Mayer, *Assessing the Performance of Real Estate Auctions* (Fed. Reserve Bank of Bos., Working Paper No. 93-1, 1993).

53. AllLaw, *supra* note 51.

54. 11 U.S.C. § 522(f) (2020).

the mortgage lender. The Code incorporates state law exemptions and provides an alternate set of exemptions in § 522 that the debtor can sometimes elect in lieu of their state law rights.[55] However, these laws only determine what kinds of property can be seized and sold by a judicial creditor—because a homeowner grants a voluntary mortgage to the lender, these rules do not apply.[56]

As a result, a debtor who is underwater on her mortgage receives little protection from a foreclosing lender under state or federal exemptions. Chapter 7's debt discharge only prohibits *in personam* actions against the debtor to collect the defaulted debt; the lien and in rem rights survive. Bankruptcy's automatic stay pauses a foreclosure but nothing stops the mortgage lender from continuing the *in rem* process after case resolution because the lender's rights to repossess the collateral survive. After bankruptcy, an underwater homeowner cannot be sued and made to pay the full amount of the mortgage but also cannot prevent the lender from repossessing and selling her home. Bankruptcy for this debtor only provides a delay of the inevitable.

B. *Redemption, Reaffirmation, Surrender, and Ride Through*

When a debtor files for Chapter 7 bankruptcy, she must file a Statement of Intent with respect to all debts secured by property within thirty days of the first mandatory meeting with creditors.[57] This form provides three options: the debtor can surrender the property to the creditor in full satisfaction of the debt, reaffirm the debt and waive the discharge of the debt, or redeem the property and keep the collateral by paying the lower of the balance of the loan or the value of the collateral.[58] With the creditor's cooperation, the debtor can also informally "ride through" a debt by continuing to make scheduled payments and perform the pre-bankruptcy contract.[59]

Each of these options fails the Chapter 7 debtor looking to save her home. Surrender is precisely the opposite outcome that many debtors desire. Reaffirmation nominally provides the debtor an opportunity to negotiate with her lender to reduce monthly payments, extend payment timelines, or even reduce the balance of the debt. In practice, however, reaffirmation is rarely so debtor friendly. Knowing that the debtor will emerge from bankruptcy with reduced overall debt service (due to her other debts being discharged), the lender has little incentive to make accommodations in negotiations. In fact, the lender has the leverage (threat of repossession) to demand new concessions in the reaf-

55. 11 U.S.C. § 522(b) (2020).

56. *See* 11 U.S.C. § 522(f) (2020).

57. 11 U.S.C. § 521(a)(2) (2020).

58. *Id.*; *id.* § 722.

59. Samuel J. Turco, Jr., *Riding Through the Chapter 7 Backdoor: A Story of Car Loans in Bankruptcy*, NEB. DEBT & BANKRUPTCY BLOG (Aug. 19, 2016), https://www.nebraskadebtbankruptcyblog.com/2016/08/riding-through-the-chapter-7-backdoor-a-story-of-car-loans-in-bankruptcy/.

firmed agreement, tacking on otherwise non-collectable attorney's and other fees.[60] Reaffirmation also includes procedural hurdles, such as court approval and heightened disclosure requirements.[61] The Commission on the Bankruptcy Laws in the United States (the "Commission"), formed in the early 1970s to report on U.S. bankruptcy law in anticipation of legislative change, recognized reaffirmation's key deficiency in its reform recommendations to the House of Representatives: because collateral is often lower in value than the debt, the discharge relieving the debtor from the unsecured portion of the debt is "neutralized" by the secured creditor's ability to obtain reaffirmation of the entire debt under threat of repossession.[62]

Ride through is similarly unavailable to these debtors because of the home's importance. Maslow's hierarchy of needs[63] is proven out by a debtor with her back against the wall; debtors prioritize mortgage payments over certain other consumer debt, like credit cards, precisely because mortgage lenders have the ability to foreclose.[64] As a result, failure to pay the mortgage is not simply a question of resource prioritization but rather a recognition of insufficient resources. A debtor trying to save her home from foreclosure has already defaulted and the bank has lost confidence in the prospect of repayment.

On paper, though, redemption offers clear value to a rehabilitating debtor by empowering her to unilaterally reduce her debt payment on an asset. Beginning with the adoption of the Code in 1978, Congress intended that this "new" § 722 be "broader" than the rights of redemption under the Uniform Commercial Code, authorizing "an individual debtor to redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a nonpurchase money dischargeable consumer debt."[65] The Commission recommended to the House of Representatives that a consumer debtor be allowed to redeem collateral securing a dischargeable consumer debt by paying the lesser of the claim or the appraised value. This change would "result in the secured creditor's realizing what he is entitled to, but it will avoid the improper leverage a secured creditor now enjoys by being able to deprive the debtor of his property unless payment is made."[66] The House adopted the right to redeem in part

60. *See, e.g.*, *In re* Pendlebury, 94 B.R. 120, 124–25 (Bankr. E.D. Tenn. 1988) (explaining that the reaffirmation process does not prohibit lenders from negotiating a provision for the payment of attorney's fees).

61. 11 U.S.C. § 524(c), (k) (2020).

62. FRANK R. KENNEDY, COMM'N ON THE BANKRUPTCY LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 10 (1973).

63. *See* A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370 (1943).

64. Jacob Conway & Matthew Plosser, *When Debts Compete, Which Wins?*, FED. RESERVE BANK OF N.Y.: LIBERTY ST ECON. (Mar. 1, 2017), https://libertystreeteconomics.newyorkfed.org/2017/03/when-debts-compete-which-wins.html.

65. S. REP. NO. 95-989, at 95 (1978).

66. Letter of Submittal from Commission on the Bankruptcy Laws of the United States, Pub. L. No. 95-598 (1973).

due to the failures of existing state exemption laws to protect debtors from a secured creditor's foreclosure action after discharge. Discussing the Commission's recommendation, the House recognized the shortcomings of exemptions without a concomitant method to remove the secured creditor's lien:

> it does little good to allow the debtor an exemption of wearing apparel, household goods, or health aids subject to an indefeasible security interest . . . if the debtor must pay more than the property is worth for the privilege of continuing to use the property. The fair market value of such property is often substantially less than the amount owed and little anything can be realized upon forced disposition of the property. What the creditor really has is leverage to force payment under the present act, since continued use is conditioned on forebearance [sic] by the creditor and forebearance [sic] is exacted at a high price.[67]

The right to redeem solved this problem by allowing a debtor to redeem "property that would be exempt in the absence of the security interest" upon payment of the amount of the allowed secured claim.[68] As a result, the right to redeem furthers the key policy goal of debtor rehabilitation by allowing her to "retain [her] necessary property and avoid high replacement costs" while still allowing the creditor to obtain "what [she] is entitled to under the terms of [her] contract."[69]

A niche finance industry exists to provide bankrupt debtors the lump sum required to redeem their property.[70] While traditional lenders perceive bankrupt debtors as financially irresponsible—an assumption undercut by the fact that 62% of consumer filers file bankruptcy as a result of discrete financial trauma[71]—redemption financers recognize that these debtors, after the bankruptcy discharge, will have few liabilities.[72] Instead of trying to balance unmanageable debt service, the newly-discharged debtor is a blank slate. Even more, the debt associated with the redeemed asset has been accordingly reduced to reflect its true value. The debtor is no longer making too-large monthly car loan payments on a rapidly depreciating vehicle, but rather payments in line with the car's then-current value.[73] Though interest rates will likely be higher, the reduction in the principal amount of the loan (reflecting the decrease in collateral value) means that the debtor's monthly payments will go down. That reduction

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67. H.R. REP. NO. 95-595, at 128 (1977).

68. *Id.* at 127.

69. *Id.*

70. Without outside intervention, redemption is effectively unavailable to bankrupt debtors because they must pay off the lender in a lump sum and bankrupt debtors do not typically have piles of cash sitting around. Redemption financers operate in this gap, lending the redemption payment to bankrupt debtors.

71. *See* Himmelstein et al., *supra* note 40.

72. *See* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 87 (2006) (showing that creditors aggressively market to debtors who recently filed for bankruptcy).

73. *See Redemption Program*, 722 REDEMPTION FUNDING, INC., https://www.722redemption.com/debtor/redemptionprogram/ (last visited Nov. 8, 2020).

of, for example, $300 per month means a world of difference to a debtor in financial distress. Perhaps it even means the difference between insolvency and solvency.

Unfortunately, the benefits of redemption do not accrue to homeowners because of the statute's restrictive language.[74] The Code allows debtors to redeem and keep personal property (e.g., a car) by paying off the lesser of the value of the collateral or the outstanding debt, but the Code does not extend this protection to real property.[75] For a debtor looking to save her underwater home, this opportunity to reduce her debt payments to accord with the property's value is not even an option.

So why is redemption expressly limited to "tangible personal property intended primarily for personal, family, or household use?" This restriction developed, as mentioned above, because of the failures of the law to protect exemptible assets from post-bankruptcy foreclosure action. Congress' recognition that the right to redeem was a "very substantial change" from then-current law informed their decision to restrict its applicability only to situations where the secured creditor may have "improper leverage" over exemptible property.[76] While Congress chose not to extend this lifeline to all the debtor's property, perhaps Congress viewed foreclosure as "proper" leverage or had an idiosyncratic desire to help debtors save their cars from repossession. Perhaps Congress was concerned about debtor opportunism in cyclical markets; while most debtors' redeemable personal property steadily depreciates over time, real estate's value is more cyclical. This concern is discussed in depth in Part III(c).

III. EXTEND REDEMPTION TO REAL PROPERTY IN CHAPTER 7

Part III(a) begins by outlining the proposed statutory change and presents a new, revised § 722. The section continues with a discussion of how the new § 722 seamlessly interacts with other aspects of bankruptcy law and avoids potential abusive opportunism. Part III(b) outlines the rationales in support of the proposed change, including the economic benefits to creditors and the economic, health, educational, and social benefits to debtors and society. Part III(c) addresses counterarguments regarding opportunistic debtors, political opposition to debtor-friendly legislative changes, judicial implementation, and market development.

A. *The Change*

This Note proposes a simple change to § 722 of the Code: eliminate the provision's qualification that redeemable property be "personal." Section 722 currently reads:

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74. 11 U.S.C. § 722.

75. *Id.*

76. S REP. NO. 95-989, at 95 (1978).

> An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption.[77]

The revised statute reads:

> An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal or real property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such personal property is exempted under section 522 of this title or such real property is exempted under section 522(d)(1), or such property has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption.

The proposed reform to § 722 permits debtors to redeem real property if it meets two primary conditions: (1) it must be intended primarily for personal, family, or household use, and (2) it must be exempted under § 522(d)(1) (the Code's exemption for interests in real property used as a residence).[78] A debtor's underwater home meets these requirements—a family/personal dwelling satisfies the first requirement and its use as a residence satisfies the second.

This change extends the right to redeem to real property without overexpansion and remains consistent with state and federal policy. Importantly, the requirement that the property be exempt under § 522(d)(1) prevents overexpansion. First, non-exempt property under the Code (or applicable state law) will remain unredeemable. Second, by restricting real property redemption's availability to § 522(d)(1), opportunistic filers cannot take advantage of the "wild card" exemption in (d)(5). Without restriction to (d)(1), a debtor could take advantage of the system by using the (d)(5) wild card exemption for "any property" on, for example, a vacation home. Because the property is "exempted under section 522," it would then be redeemable. Since the aim of this statutory change is to prevent the harms of foreclosure and homelessness, the change restricts itself to redeeming primary residences. Third, because homesteads are at least partially exempt under the Code and all state law, they would become eligible for redemption under the new § 722. This change is thus limited to the kinds of property that Congress and the states have deemed uniquely worthy of protection, precluding this change from thwarting expressed federal or state policy. Because no state permits exemptions for other kinds of real property and the Code only provides an exemption for real property used as a residence, the expansion of § 722 will be limited to protecting homesteads.

77. 11 U.S.C. § 722.
78. 11 U.S.C. § 522(d)(1).

B. *Rationales in Support*

Extending the redemption right to real property confers economic benefits on all parties and furthers the normative and policy undercurrents supporting the bankruptcy system. As an economic matter, this change maximizes value for debtors and creditors by reducing expensive transaction costs and resolving cases more quickly. Importantly, allowing homestead redemption does not come at the creditor's expense, as it vindicates the Code's objective that a secured lender in Chapter 7 be paid the full value of its allowed secured claim.[79] The change also saves the debtor and her family from the negative economic and social externalities of foreclosure-induced homelessness, which furthers the bankruptcy system's desire to provide debtors a "fresh start."[80] These benefits accelerate the debtor on her path to financial rehabilitation while ensuring that she does not receive a free pass, as she will continue to pay off her home after leaving bankruptcy.

1. Economic Benefits for the Creditor

Under current law, filing Chapter 7 bankruptcy is at best an inconvenience to a foreclosing creditor and at worst value destructive. Because the exempt status of the home does not apply to voluntarily granted security interests, the bankruptcy process does not substantively affect the relative rights of the defaulted debtor and the creditor. While filing a bankruptcy petition affords the debtor the benefit of the automatic stay, which pauses the foreclosure action, that reprieve is only temporary. Where the debt is greater than the value of the home, the trustee will "abandon" the property (removing it from the estate and the protection of the automatic stay) and allow the lender to continue the foreclosure process.[81]

However, just because a delay is temporary does not mean it is cheap. Foreclosure destroys value because it exists in a disjointed and inefficient market. First, the foreclosure process takes a long time.[82] Upon initiating a fore-

79. 11 U.S.C. § 506(a).

80. *See supra* Part I(a).

81. Kathleen Michon, *When Will the Trustee Abandon Property in Chapter 7 Bankruptcy?*, NOLO, https://www.nolo.com/legal-encyclopedia/trustee-abandon-property-chapter-7-bankruptcy.html (last visited Nov. 8, 2020).

82. There are two kinds of foreclosure proceedings in the United States: judicial and nonjudicial. All states allow judicial foreclosure, where the creditor sues and obtains a judgment. Delays between initiation of judicial foreclosure and the eventual sale of the property can take months or even years. *See, e.g.*, Amy Loftsgarden, *States With Long Foreclosure Timelines*, NOLO, https://www.nolo.com/legal-encyclopedia/states-with-long-foreclosure-timelines.html (last visited Nov. 8, 2020) (stating that the fastest states having average foreclosure timelines between 6–9 months and the "longest" timelines as up to 4 years). Many states, but not all, permit nonjudicial foreclosure through contract, where the lender initiates foreclosure by sending a notice to the borrower. While faster than judicial foreclosure, nonjudicial foreclosure is far from automatic as statutory restrictions delay the initiation of proceedings for 120 days after default and anti-eviction laws protect residents even after foreclosure sale. 12 C.F.R. §§ 1024.41(f)(1)–(2), (g); CFPB, 2013 REAL

closure process, statutory guardrails protect debtors from immediate eviction.[83] These delays can take months, generating additional carrying costs (including property taxes and maintenance) that the lender will have to bear or try to recoup in an eventual sale.[84] Though foreclosure sales must be publicized, those advertisements need not and often do not portray a property in its most attractive light.[85]

When the foreclosure auction finally occurs, structural forces guarantee an inefficient outcome. Requirements that non-creditor bidders bring cash or a cashier's check to the auction disincentivize third party participation while statutory rights permitting the creditor to "credit bid" the value of their debt before committing cash provide an engrained advantage to the foreclosing lender.[86] For an underwater home, the outstanding debt is greater than the home's value, thereby higher than what any rational third party would pay. Even where state law permits deficiency judgments[87] after mortgage foreclosure sales, lenders will still take full advantage of their credit-bidding limit because foreclosed-against debtors are likely to be judgment proof (or at least not worth the cost of suit). Lack of property-level information exacerbates these advantages because potential bidders do not know the condition of the house. Even if bidding appears to be a good investment on paper, hidden property damage or deferred maintenance loom.[88] And if the debtor wants to exercise her state law right of

ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X) AND TRUTH IN LENDING ACT (REGULATION Z) MORTGAGE SERVICING FINAL RULES 98 (2013), https://files.consumerfinance.gov/f/201311_cfpb_servicing-implementation-guide.pdf.

83. *Id.* 12 C.F.R. §§ 1024.41(f)(1)–(2), (g); CFPB, *supra* note 83, at 98–99 (discussing timelines for the foreclosure process); *see, e.g.*, MICHIGAN LEGAL HELP, *supra* note 7 (stating that in Michigan, after foreclosure sale, the six-month redemption period must lapse before a homeowner can be evicted from the property).

84. *See* Tony Guerra, *Do I Pay Property Taxes on My Foreclosed House?*, SFGATE, https://homeguides.sfgate.com/pay-property-taxes-foreclosed-house-45525.html (last updated June 23, 2018).

85. *See generally* State of Mich., *Home Foreclosure,* REINVENTING MI RETIREMENT: TOOLS AND RESOURCES TO ACHIEVE FINANCIAL SECURITY, https://www.michigan.gov/documents/reinventretirement/Home_Foreclosure_469522_7.pdf (noting that publication is just address, foreclosure sale, and time in a qualifying periodical).

86. Amy Loftsgarden, *What's a Credit Bid in a Foreclosure?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-s-a-credit-bid-in-a-foreclosure.html (last visited Nov. 8, 2020).

87. A deficiency judgment allows a creditor to sue the debtor for the difference ("deficiency") between the amount of the outstanding debt and the amount realized through sale. The ability to recover a deficiency provides an incentive against overbidding; where a mortgage is $200,000 and the house is worth $160,000, a lender's $200,000 credit bid extinguishes the possibility of a recovery above the value of the home, while a $160,000 bid preserves the possibility of collecting some of the remaining $40,000. *See, e.g.*, CAL. CIV. PROC. § 580b(3) (West 2015).

88. Studies suggest that properties sold in foreclosure sales lose value that they would not have if they had been traded in another circumstance, perhaps due to foregone maintenance and upgrades. Michael K. Hollar, *Regulatory Impact Analysis: Emergency Homeowners' Loan Program,* 13 CITYSCAPE 185, 188 (2011); *see also* Asia Simone Burns, *Woman Charged After 11 dead animals Found in Foreclosed Lawrenceville Home,* ATLANTA J. CONST. (July 24, 2019),

redemption, she must pay off the full debt, an amount that is greater than the value of the home and inclusive of the accrued costs and fees.[89]

As a result, most foreclosure auctions end with the mortgage lender credit bidding the amount of the debt and winning the home at auction. The lender then must sell the house, either directly to an end buyer by sprucing it up and hiring a realtor (incurring additional costs) or to an intermediary. This process is expensive; real estate brokers typically charge sellers up to 6% of the sale price, legal fees suck up another 2% of the loan balance, the lender is responsible for property taxes in the interim, and the lender loses the time value of its money.[90] In 2011, the U.S. Department of Housing and Urban Development estimated these transaction costs (dead weight losses not attributable to a drop in home value) on a ~$150,000 outstanding principal balance to be just over $10,000, or nearly 7% of the outstanding balance.[91] At the end of this headache, the lender will sell the home *for its value* (the allowed secured claim!), all the while incurring costs, and the debtor will end up evicted.

The proposed change provides an opportunity to short-circuit this process and cash out the secured lender's allowed secured claim for the price it will fetch after foreclosure, auction, and resale, *without* actually incurring those transaction costs. Upon the Chapter 7 petition, the automatic stay pauses any ongoing foreclosure proceedings.[92] The stay is powerful, affording the debtor the opportunity to redeem the property by paying the value of the home, not the greater debt amount. This difference is dramatic. Recalibrating the debt to accord with the home's value makes redemption an attractive (or at least plausible) investment for financers. In 2018, the average mortgage combined loan-to-value (CLTV) at origination was 86% (if the average house cost $100,000, the borrower would pay a $14,000 down payment and borrow the remaining 86%).[93] Even for borrowers in the 90th percentile for FICO score, some of the most traditionally creditworthy borrowers, the typical CLTV was 97%.[94] Lenders simply do not lend more than what the collateral is worth. Thus, reducing the refinancing payment to accord with the home's value via redemption creates the opportunity for a transaction.

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https://www.ajc.com/news/crime—law/woman-charged-after-dead-animals-found-foreclosed-lawrenceville-home/dmmEO7SWQ6AThjK6PSyMVM/#.

89. U.C.C. § 9-623 (AM. L. INST. & UNIF. L. COMM'N. 2010).

90. *See* Daniel Bortz, *The Real Estate Commission: A Guide to Who Pays, How Much, and More,* https://www.realtor.com/advice/sell/real-estate-commission-explained/ (Apr. 15, 2019); RedFin, *How Real Estate Commission Works*, https://www.redfin.com/resources/how-much-is-real-estate-agent-commission-buyer-seller (last visited Nov. 8, 2020).

91. *See* Hollar, *supra* note 88, at 187.

92. *See* 11 U.S.C. § 362(a)(1), (4), (5) (2020).

93. HOUS. FIN. POL'Y CTR., HOUSING FINANCE AT A GLANCE: A MONTHLY CHARTBOOK, at 17 (Oct. 2018), https://www.urban.org/sites/default/files/publication/99256/october_chartbook_2018_0.pdf.

94. *Id.*

Under the current system, bankruptcy is a pit stop on the way to an eventual sale and eviction of the debtor. Assuming a niche market for home redemption financing emerges like it has for personal property redemption, the debtor will have access to the requisite funds, effectively refinancing their mortgage at the actual value of the home and reducing their monthly obligation accordingly.[95] In the end, the secured creditor is better off. It has received the value of its allowed secured claim without absorbing the cost and delay of foreclosure and resale.

2. Economic and Social Benefits for the Debtor and Society

The biggest benefit to the debtor under the proposed change is that she can remain in her home. This benefit cannot be overstated. Depending on where a given year falls in the economic cycle, between 625,000 and 2.87 million foreclosure proceedings occur each year.[96] A substantial portion of this displaced population experiences some form of homelessness, with untold others making do in partial or temporary accommodations (e.g., sleeping on a friend's couch, placing children in friends' homes). According to a 2009 report by the National Coalition for the Homeless, at least 1 in 10 homeless people had lost their homes to foreclosure.[97] Keeping debtors in their homes prevents the harms of foreclosure and homelessness, which aligns with the core normative and policy judgments underpinning the bankruptcy system and gives further substance to the debtor's "fresh start." The "fresh start" is important along three related dimensions: (1) it rehabilitates the debtor, turning them into a productive member of the economy, (2) it minimizes negative health, economic, and educational externalities, and (3) it reflects a normative judgment about societal forgiveness.

Individuals that declare bankruptcy are already at a financial disadvantage compared to their peers. In the short term, these economic pains are felt in a variety of ways, as debtors incur moving, administrative, and legal costs.[98] Adjusted for inflation to 2010 dollars, the average cost to homeowners of foreclosure can be over $10,000.[99] In the medium and long term, additional losses

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95. *See supra* Part II(b) note 69.

96. *See* ATTOM DATA SOLUTIONS, *U.S. Foreclosure Activity Drops to 13-Year Low in 2018* (Jan. 15, 2019), https://www.attomdata.com/news/most-recent/2018-year-end-foreclosure-market-report/.

97. NAT'L COAL. FOR THE HOMELESS ET AL., FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS 5 (2009), https://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf; Peter S. Goodman, *Foreclosures Force Ex-Homeowners to Turn to Shelters*, N.Y. TIMES, at 1 (Oct. 18, 2009), https://www.nytimes.com/2009/10/19/business/economy/19foreclosed.html. *See also* HOUS. FIN. POL'Y CTR, *supra* note 93, at 9.

98. *See* Hollar, *supra* note 88, at 187.

99. *See id.* (citing ANA MORENO, COST EFFECTIVENESS OF MORTGAGE FORECLOSURE PREVENTION 19–20 (1995)) (studying the outcomes of over 800 low- and moderate-income distressed homeowners who were assisted by the Mortgage Foreclosure Prevention Program in Minneapolis & St. Paul, Minnesota between 1991–1995). A portion of this loss may reflect accrued equity,

make themselves apparent. For example, without a mortgage, the debtor receives less favorable tax treatment that can cost thousands of dollars per year.[100] Those who file for bankruptcy continue to experience debt payment difficulties and accumulate less wealth relative to comparative nonfilers.[101]

Homelessness, caused by foreclosure, exacerbates these struggles. Those experiencing homelessness face substantial hurdles to finding and maintaining employment, including bias from potential employers and the effects of trauma.[102] Emerging from bankruptcy, a newly discharged debtor without a home is financially unstable and faces diminished future wealth accumulation prospects.

In addition to individual economic benefits, preventing foreclosure and homelessness have large public economic benefits as well. Foreclosures followed by long-term vacancies harms neighboring property values by reducing the physical appearance of the neighborhood, attracting crime, and depressing the local economy.[103] Pre-financial crisis studies estimated the costs of a single foreclosure on neighboring properties to be a decline in value of $1,508.[104] These value drops compound as the stigma of a foreclosed property in the neighborhood prompts other homeowners to lower their sales prices or make their homes available for sale in anticipation of decreased neighborhood quality.[105]

If the debtors are made homeless as a result of foreclosure, additional social costs come into play. As explained below, homeless populations have an increased risk of exposure to communicable diseases and, without adequate health insurance or non-profit healthcare, homeless populations must use publicly funded emergency rooms.[106] Further, state and municipal "interactions" (e.g., treatment, police, sanitation) with the homeless strain budgets. For example, in a single year, Los Angeles spent tens of millions of dollars interacting with the homeless.[107] By allowing the debtor the opportunity to redeem her homestead,

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which would not be present in the case of an underwater home, reducing the cost figure in these instances.

100. *See, e.g.*, *Tax Policy Center Briefing Book: What are the tax benefits of homeownership?,* TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-are-tax-benefits-homeownership.

101. *See generally* Song Han & Geng Li, *Household Borrowing after Personal Bankruptcy*, 43 J. MONEY, CREDIT & BANKING 491 (2011).

102. *Overcoming Employment Barriers,* NAT'L ALL. TO END HOMELESSNESS (Aug. 21, 2013), https://endhomelessness.org/resource/overcoming-employment-barriers/.

103. Hollar, *supra* note 88.

104. *Id.* (citing Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POLICY DEBATE 57 (2006)).

105. *Id.*

106. *See The Impact of Homelessness on Economic Competitiveness,* AM. SEC. PROJECT (May 1, 2018), https://www.americansecurityproject.org/impact-homelessness-economic-competitiveness/.

107. *See id.*

the Code could prevent the additional economic harms of foreclosure and homelessness without prejudicing the creditor's rights.

Continuing, homelessness also contributes to poor health outcomes. Homeless populations are more susceptible to communicable diseases, such as hepatitis, and suffer from reduced access to medical care services in general.[108] "Chronic health problems and inaccessibility to medical and dental care can increase school absences and limit employment opportunities . . . . People without homes have higher rates of hospitalizations for physical illnesses, mental illness and substance abuse than other populations."[109] By preventing foreclosure-induced homelessness at the outset, my proposed statutory change would shield bankrupt debtors from these negative health effects.

The negative externalities of foreclosure-induced homelessness are not limited to the individual filer or debtor but also extend to their families. Unsurprisingly, experiencing homelessness has a negative impact on a child's educational outcomes.[110] This added instability results in a 14% lower high school graduation rate compared to other low-income students and 20% compared to the 84.1% national average.[111] This gap affects the child's job opportunities and economic circumstances throughout the rest of the child's working life.[112] Redemption during bankruptcy would neutralize these harms at their source, preventing childhood eviction and the attendant negative externalities.

Last, allowing the debtor to redeem her home expresses the social norms of forgiveness and responsibility embodied in the Code. As discussed above in Part I, the bankruptcy system has deep roots in American culture and embodies American values. The robust discharge—more powerful than in other jurisdictions around the world[113]—stands in stark contrast to the debtor's prisons of the past. Allowing home redemption balances the desire to forgive against the equally powerful desire to ensure people repay their obligations. The debtor gets a second chance under more favorable circumstances, not complete relief.

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108. *Id.*

109. *Health and Homelessness,* AM PSYCHOLOGY ASS'N (2011), https://www.apa.org/pi/ses/resources/publications/homelessness-health.

110. *See* Stephanie Dickrell, *Child Homelessness Can Have Long-Term Consequences*, SC TIMES (June 4, 2016, 9:45 AM), https://www.sctimes.com/story/news/local/homelesskids/2016/06/04/child-homelessness-can-have-long-term-consequences/84902750/.

111. *See* Mark Keierleber, *1.3 Million Homeless Students: New Federal Data Show a 70 Percent Jump in K-12 Homelessness Over Past Decade, with Big Implications for Academic Performance*, THE 74 (Feb. 19, 2019), https://www.the74million.org/1-3-million-homeless-students-new-federal-data-show-a-70-percent-jump-in-k-12-homelessness-over-past-decade-with-big-implications-for-academic-performance/.

112. *See* Clive R. Belfield, *The Economic Burden of High School Dropouts and School Suspensions in Florida*, CIV. RIGHTS PROJECT, at 1 (Nov. 2014) ("Over their lifetimes, these dropouts will have lower incomes, contribute less in taxes, rely more heavily on government health and welfare programs, and impose higher costs on the criminal justice system.").

113. *See* WARREN ET AL., *supra* note 39, at 319.

In short, keeping a debtor in her home through and after bankruptcy prevents a potential parade of economic, health, and educational horrors that could afflict her, her family, and society for years to come. Even more, my proposed change upholds the bankruptcy system's core mission—to appropriately balance the rights of debtors and creditors—by benefitting both parties.

C. *Counterarguments*

As with any proposed statutory change, extending the right of redemption to real property in bankruptcy faces challenges to its enactment and risks of its adoption. In particular, the proposed change must combat concerns about opportunistic debtors taking advantage of cyclicality in the real estate market, political opposition to debtor-friendly legislative changes, judicial implementation, and market development. Fortunately, solutions for these concerns can already be found in the Code, our political process, and our jurisprudence.

1. The "Abusive Debtor" Risk

The primary argument against adopting this change follows much of the anti-debtor discourse that animated BAPCPA's passage in 2005. Proponents of the bill argued that the bankruptcy system and its powerful discharge was being abused by debtors who did not need to file bankruptcy, but rather opportunistically chose to do so.[114] Extending the right of redemption to real property is subject to criticism from the same animating concern. Most personal property that a person could redeem, such as a car, depreciates over time, removing any concern that the debtor would receive a windfall upon post-discharge asset appreciation. However, because real estate is a cyclical market, it is possible that a redeemed home will later appreciate, accruing a benefit to the debtor while the lender's claim will be unfairly reduced. An opportunistic (or lucky) debtor could declare bankruptcy during a market trough when the home is worth its least, redeem the property, and recalibrate her debt at that lower level, thereby reaping the benefit of the rising market at the mortgage lender's expense.

While the "opportunistic debtor" conjures up a vivid picture of abuse, this characterization does not reflect reality. Consumer debtors are loath to file bankruptcy because of social stigma against bankruptcy. As discussed above, the moral treatment of obligation and debt has deep roots in Western tradition. Even today, with heightened recognition that economic and social forces outside a debtor's control can wreak havoc on her financial security, many Americans still attribute fault to the individual—enough that filers overwhelmingly feel stigma.[115] This idea of individual responsibility is "based on a presumption

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114. *See* Press Release, The White House, *supra* note 24.

115. *See* Teresa A. Sullivan, Elizabeth Warren & Jay L. Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 236–39 (2006); Nicola Howell & Rosalind F. Mason, *Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce*, 38 UNIV. OF NEW

of fundamental autonomy and individual agency that not only runs through the Bankruptcy Code . . . but also through the American legal system as a whole."[116] Coupled with the fact that most debtors file bankruptcy as a result of health, marital, or economic trauma,[117] a countervailing and more accurate picture of the typical debtor emerges: a debtor that files as a last resort because she knows society will view her as a financial failure no matter what. This reluctancy suggests that debtors will not flock to bankruptcy simply to redeem their real property when they think the market is low.

Finally, the "'overfiling' as a proxy for abuse" criticism is not supported by data. Though critics point to a rising number of bankruptcy filings as evidence of declining stigma,[118] increased filings follow broader economic trends and credit default rates,[119] suggesting the picture is not so clear.

To the extent that redemption of real property actually incentivizes the marginal debtor to file a bankruptcy proceeding that they otherwise would not, the aberration should not define the rule. As it stands, the Code already tolerates a certain amount of debtor opportunism and manipulation. This is the tradeoff of a debt-discharge system. First, the Code allows a debtor to choose whether she wants to use the exemptions afforded to her under state law *or* the federal exemptions provided in the Code.[120] Here, the Code specifically permits the debtor to choose the exemptions that allow her to shield more of her assets from creditors. That the Code already entrusts bankruptcy judges with discretion to detect and punish abuse throughout the debtor's proceeding, including her initial chapter choice,[121] demonstrates a legislative willingness for ad hoc policing. This judicial determination of bad faith could be used as a tool to guard against those marginal, egregious abuses while allowing the good faith majority of filers to benefit from my statutory change.

2. Political Opposition & Lawmaking Process

As with any statutory change, extending the right of redemption to real property faces the challenges inherent in the political and lawmaking processes.

SOUTH WALES L. J. 1529, 1530–31 (2015); Leon Anderson & Deborah J. Thorne, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77, 83 (2006).

116. *See* Yvana L.B.H. Mols, Comment, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEV. J. 289, 290–91 (2012).

117. *See* WARREN ET AL., *supra* note 39.

118. *See* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 210, 215–22 (1999).

119. *See* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 236–39 (2006); *see also* Nicola Howell & Rosalind Mason, *Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce*, 38 UNIV OF NEW S. WALES L. J. 1529, 1530–31 (2015).

120. 11 U.S.C. § 522(b)(3)(A).

121. *See* 11 U.S.C. § 707(b)(1).

Passing substantive legislative change is difficult, especially in today's fractured political environment.[122] Even more, because the Code reflects and embodies charged moral and policy values, small changes can be magnified. Congress' recent aversion to helping debtors is embodied in BAPCPA's passage in 2005. Down to the very name—"Bankruptcy Abuse Prevention"—BAPCPA presumed unscrupulous filers and made it harder for debtors to file Chapter 7, removing much of their agency. When the most recent substantive bankruptcy legislation conceived of debtors as abusers, any pro-debtor change is subject to scrutiny, even if it does not prejudice the creditor.

However, the world in 2005 was different than the world today. In 2005, the housing market was in the middle of an unprecedented boom.[123] Though wages were stagnant and the cost of living rising, easy credit and rising home values disguised the financial precariousness of many American families.[124] This veneer of prosperity made it easy to believe that those who did not prosper were partially responsible or even blameworthy. This misconception of why people file bankruptcy fed the argument that the bankruptcy system was being abused. In 2007, the global financial markets crashed, sending the United States into the Great Recession.[125] The failure of the U.S. housing market precipitated this collapse.[126] In its wake, substantial financial reforms have been passed to protect consumers, including Dodd-Frank and its creation of the Consumer Financial Protection Bureau (CFPB).[127] Though these changes still face powerful opposition,[128] their enactment represents pro-consumer legislative de-

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122. *Cf. Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (showing fewer passed resolutions and enacted laws than in any other period presented).

123. *See* Les Christie, *Real Estate: Busts Don't Follow Booms*, CNN Money (May 4, 2005, 3:29 PM) https://money.cnn.com/2005/05/03/real_estate/financing/boom_bust/index.htm ("The number of U.S. metropolitan areas experiencing booms in real estate prices spiked 72 percent in 2004, according to a report from the Federal Deposit Insurance Corporation (FDIC).").

124. *See How Does the Current Cost of Living Compare to 20 Years Ago?* INVESTOPEDIA (Aug. 11, 2019), https://www.investopedia.com/ask/answers/101314/what-does-current-cost-living-compare-20-years-ago.asp; *see also* Kelsey Ramíirez, *Mortgage Credit Availability Reaches Post-Crisis High Among GSEs, Government Lenders*, HOUSING WIRE (Oct. 25, 2018, 2:01 PM) https://www.housingwire.com/articles/47227-mortgage-credit-availability-reaches-post-crisis-high-among-gses-government-lenders/; *see also* Jean Folger, *Financial Crisis + 10: Where Are Home Prices Now?*, INVESTOPEDIA (June 25, 2019), https://www.investopedia.com/investing/financial-crisis-10-where-are-home-prices-now/.

125. Robert Rich, *The Great Recession*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_recession_of_200709.

126. Kimberley Amadeo, *2007 Financial Crisis Explanation, Causes, and Timeline*, BALANCE (Nov. 20, 2019), https://www.thebalance.com/2007-financial-crisis-overview-3306138.

127. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

128. *See* Aaron Klein, *No, Dodd-Frank Was Neither Repealed Nor Gutted. Here's What Really Happened*, BROOKINGS (May 25, 2018), https://www.brookings.edu/research/no-dodd-frank-was-neither-repealed-nor-gutted-heres-what-really-happened/; *see also* Kelsey Ramíirez, *Payday Lender Challenges CFPB Constitutionality in Supreme Court Petition*, HOUSING WIRE (Oct. 3, 2019, 5:37

velopments since BAPCPA's passage. Today, the populist rhetoric of presidential candidates proves the popularity of anti-establishment impulses, both in the financial system and beyond.[129]

3. Judicial Implementation

Critics may challenge the notion that bankruptcy judges can accurately determine value and instead propose that the auction and sale foreclosure process is a better measure, but bankruptcy judges are well-equipped to execute this change. The Code already empowers bankruptcy judges to determine value in several areas, including the value of the secured lender's allowed secured claim, which definitionally includes a valuation of the collateral.[130] In addition, as discussed above, judges are already empowered to penalize abusive filers with dismissal or denial of discharge when necessary. Lastly, statutory restrictions on repeat filing allay concerns that debtors will quickly refile if they face foreclosure proceedings again.[131]

4. Market Development

Perhaps the most daunting obstacle facing my proposed change is that its success is predicated on the development of a functional home redemption financing market. However, a functioning home redemption financing market is likely to develop. First, the very existence of the personal property redemption financing industry suggests that lenders do not automatically disqualify recently bankrupt debtors. In addition, anecdotal evidence of recent filers receiving credit card offers via the mail also suggests that the belief in the creditworthiness of recently bankrupt debtors is less idiosyncratic and more broadly accepted. Indeed, some lenders offer and advertise financial products specifically designed for debtors who recently went through bankruptcy.[132]

PM), https://www.housingwire.com/articles/payday-lender-challenges-cfpb-constitutionality-in-supreme-court-petition/.

129. *See* Benjamin Wallace-Wells, *The Expert Efficiency of Elizabeth Warren's Populist Campaign*, NEW YORKER (Jan. 10, 2019), https://www.newyorker.com/news/the-political-scene/what-kind-of-populist-is-elizabeth-warren; *see also* John Cassidy, *Bernie Sanders and the New Populism*, NEW YORKER (Feb. 4, 2016), https://www.newyorker.com/news/john-cassidy/bernie-sanders-and-the-new-populism; Charles Postel, *If Trump and Sanders Are Both Populists, What Does Populist Mean?*, ORG. OF AM. HISTORIANS (Oct. 14, 2019), https://www.oah.org/tah/issues/2016/february/if-trump-and-sanders-are-both-populists-what-does-populist-mean/.

130. *See* 11 U.S.C. § 506(a).

131. *See Repeat Filings*, JUSTIA (Nov. 2018), https://www.justia.com/bankruptcy/repeat-filings/ (discussing restrictions on refiling bankruptcy).

132. *See* Song Han et al., *Information, Contract Design, and Unsecured Credit Supply: Evidence from Credit Card Mailings*, FIN. & ECON. DISCUSSION SERIES 2015-103 (describing how lenders tailor advertising and financial products around a borrower's bankruptcy); *see, e.g.*, *Fresh Start Loan*, FREESTAR FINANCIAL CREDIT UNION, https://www.freestarfinancial.com/fresh-start-loan (last visited Nov. 30, 2020) (advertising "Fresh Start Loans" to help recently bankrupt borrowers "re-establish [their] credit"); Brandon A. Dorfman, *Bankruptcy Promised Me a Fresh Start.*

Homes also have an entirely different loan collateral profile than do cars, and the lending markets differ in material ways. All cars depreciate, no matter what, all the time. While this may not apply to "classic" or other cars bought for investment purposes, such cars are not common or widespread enough to merit extended discussion. As a result, as soon as the auto lender issues funds, the value of their collateral decreases. Home values, as noted above, are more cyclical. The prospect that the collateral will appreciate, which animates those obsessed with the "abusive debtor," is a tally in favor of the creditworthiness of the loan. If the home appreciates, the lender's collateral coverage improves automatically. These differences can cut against real property redemption as well: larger loan sizes make diversification more difficult for lenders, longer repayment terms increase exposure to risk of default, and heavier regulation increases compliance costs.[133] Perhaps most salient are the differences related to foreclosure—repossession of cars is far cheaper and faster than repossession of homes.[134]

While little information is publicly available on redemption financers' approval rates, required loan-to-value ratios, or other underwriting criteria, down payment requirements make redemption financing more attractive to the lender. Though required down payments reduce the number of people who are able to redeem their homes by raising a threshold obstacle, they build an equity cushion into the redeemed home's new capital structure, benefitting the lender. For debtors able to clear this hurdle, the price of staying in their home would drop substantially.[135]

Finally, few Chapter 7 debtors actually elect to redeem their cars.[136] While detailed information is not available on the reasons, this phenomenon is partially explained by the down payment hurdle, the debtor's lack of effective coun-

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Predatory Lenders Are Trying to Ruin It, Talk Poverty (Dec. 10, 2019), https://talkpoverty.org/2019/12/10/bankruptcy-debt-predatory-lenders/ (describing how the author, a recent bankruptcy filer and recipient of a discharge, receives roughly "10 credit card offers per month, not including solicitations for auto loans, payday loans, and mortgage refinances").

133. *Compare* CHERYL R. COOPER, CONG. RSCH SERV, IF 11192, THE AUTOMOBILE LENDING MARKET AND POLICY ISSUES (2019), https://fas.org/sgp/crs/misc/IF11192.pdf (noting that auto lenders are subject to regulation by the CFPB and must comply with other fair lending legislation like the Equal Credit Opportunity Act) *with* CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK (2020), https://fas.org/sgp/crs/misc/R44918.pdf (highlighting the regulators covering bank and non-bank mortgage originators and purchasers, including the CFPB, Office of the Comptroller of the Currency (OCC), FDIC, Federal Housing Finance Agency (FHFA)).

134. Home foreclosure incurs the time, maintenance, tax and other costs. *See supra* Part III(b)(i). Repossessing a car, on the other hand, only requires finding a vendor with a tow truck or activating a pre-installed remote "kill switch". *See, e.g.*, Elaine S. Povich, *Late Payment? A 'Kill Switch' Can Strand You and Your Car,* STATELINE (Nov. 27, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/11/27/late-payment-a-kill-switch-can-strand-you-and-your-car.

135. *See supra* Part II(b); *see also supra* Part II(b) note 69.

136. Pamela Foohey et al., *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. (forthcoming 2020) (manuscript at 23) (available at https://ssrn.com/abstract=3451565).

selling or information about redemption's availability, and the superficial attractiveness of ride through or reaffirmation. Whatever the reason, this suggests that the structures preventing debtors from redeeming their cars may similarly prevent debtors in a potential home redemption market. To the extent this phenomenon is due to ineffective information or counselling of consumers, those problems exist elsewhere in the legal system and are not solved by forgoing progressive incremental change simply because it may not be widely used. Inasmuch as low redemption rates are attributable to market conditions, those conditions should not defeat a cheap and straightforward change that will improve the lives of the consumer debtors who can use it.

CONCLUSION

The simple statutory change outlined in this Note would extend the well-trodden right of redemption to real property in bankruptcy, effectively allowing the debtor to refinance her mortgage to reflect the actual value of her home. By empowering debtors to remain in their homes, extending the right to redeem to real property in Chapter 7 bankruptcy would protect debtors from homelessness and its negative economic, health, and educational outcomes. Though critics may allege real property is not appropriate for redemption in bankruptcy, these criticisms are misguided. Admittedly, this change will not keep *every* debtor in her home, but the Bankruptcy Code is littered with tradeoffs. For the families it would help, real property redemption may make all the difference.