

# MODIFYING MORTGAGE DISCRIMINATION IN CONSUMER BANKRUPTCY

Abbye Atkinson\*

*The subprime mortgage crisis that helped bring on the Great Recession resulted in the decimation of housing-related wealth among economically disenfranchised groups and communities. These losses were, in significant part, the direct result of the rampant racialized and geographic mortgage discrimination that took place in these communities in the run-up to the financial crisis and persists today. The Bankruptcy Code, however, offers little relief to these and other distressed homeowners because the Code's "anti-modification" provision limits a distressed homeowner from modifying the terms of a mortgage on her primary residence. The anti-modification provision is particularly troubling for economically disenfranchised groups and communities because it operates at the intersection of three social and economic factors: (1) the importance of homeownership to wealth acquisition and retention in the economically disenfranchised communities; (2) the persistence of predatory lending relationships that lead to high loan-to-value ratios on mortgages and, in turn, a greater risk of underwater mortgages; and (3) foreclosure externalities that are borne by segregated communities in which compromised wealth is a common attribute. For communities that are already vulnerable to mortgage discrimination, the lack of a bankruptcy modification option compounds the unique risks of cyclical and historical economic disenfranchisement related to homeownership.*

*This Article contends that by permitting debtors to modify primary residential mortgages, consumer bankruptcy law can address persistent and intractable mortgage discrimination in historically disenfranchised communities and support wealth-building and retention in the process. Reframed in this way as a tool of economic remediation and improvement, and not just a form of temporary relief for*

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\* Thomas C. Grey Fellow and Lecturer in Law at Stanford Law School. For comments, conversations, and feedback that significantly improved this paper, I am grateful to Michelle Wilde Anderson, Richard Craswell, Andrew Dawson, Mechele Dickerson, Andrew Gilden, Cathy Hwang, Daniel Ho, Edward Janger, Melissa Jacoby, Robert Lawless, Daryl Levinson, Angela Littwin, Troy McKenzie, Eric Nguyen, Chrystin Ondersma, Norman Spaulding, George Triantis, Justin Weinstein-Tull, the participants of the Young Bankruptcy Scholars Work-in-Progress Conference at Brooklyn Law School, and the participants of the Culp Colloquium at Duke Law School. I also thank George A. Warner for excellent research assistance and the editorial staff of *Arizona Law Review*. Any errors are mine.

*temporary financial misfortune and crisis, bankruptcy law can address the broader structural forces that produce chronic, racialized, economic subordination, particularly related to homeownership. Accordingly, this Article reconceives consumer bankruptcy as providing not only a “fresh start” but also an appropriate remedy for financially distressed borrowers whose economic hardships are directly related to illegal and discriminatory mortgage lending practices that lead to or exacerbate financial distress.*

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## INTRODUCTION

Homeownership has been touted as an important way for economically disenfranchised groups to build and maintain wealth. While there is doubt about the wisdom of this account of homeownership’s value,<sup>1</sup> the federal government has been committed to encouraging economically disenfranchised groups to invest in homes

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1. See, e.g., A. Mechele Dickerson, *Public Interest, Public Choice, and the Cult of Homeownership*, 2 U.C. IRVINE L. REV. 843 (2012).

as a means of improving relative economic position and general financial health.<sup>2</sup> Yet, for these groups, mortgages and financial products used to finance home purchases are full of risk stemming from historical, persistent, and intractable mortgage discrimination.

This reality is apparent in the aftermath of the Great Recession. One of the most troubling effects of the subprime mortgage crisis that helped to bring on the Great Recession was the decimation of wealth among economically disenfranchised groups and communities.<sup>3</sup> For these groups, the crisis continues more than five years after the official end of the Great Recession,<sup>4</sup> even as the tide of foreclosures ebbs and the focus on housing-related losses decreases. For example, “the core of middle-class” African American families now possess less than 50% of the wealth they had accumulated prior to the subprime mortgage crisis as compared to similar white families whose wealth declined by 14%.<sup>5</sup> Similarly, Latino families saw 66% of their wealth disappear between both 2005 and 2009<sup>6</sup> and 2010 and 2013. While the median net worth for non-Latino white families increased by 2%, it fell by 17% for African American and Latino families combined.<sup>7</sup> By one account:

Black and Latino households had larger wealth losses during the recession mostly because home equity comprises a much larger percentage of their overall wealth. While housing equity makes up about 58% of household wealth for white households, housing

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2. See Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 324 (“[D]ue to dramatic changes in the mortgage credit market and a governmental push for increased rates of homeownership, a record number of people have obtained mortgage credit that would have been unavailable to them several decades ago.”).

3. See, e.g., PETER DREIER ET AL., HAAS INST. FOR A FAIR & INCLUSIVE SOC’Y, UNDERWATER AMERICA: HOW THE SO-CALLED HOUSING “RECOVERY” IS BYPASSING MANY AMERICAN COMMUNITIES 9 (2014), [http://diversity.berkeley.edu/sites/default/files/HaasInsitute\\_UnderwaterAmerica\\_PUBLISH\\_0.pdf](http://diversity.berkeley.edu/sites/default/files/HaasInsitute_UnderwaterAmerica_PUBLISH_0.pdf) (“Banks, private mortgage companies, and mortgage brokers preyed on homeowners in low-income and minority areas. They did not just target low-income African American and Latino families; they also targeted middle-class African American and Latino families who lived in neighborhoods with high proportions of minority families.”).

4. See A. Mechele Dickerson, *The Economic Recovery in Black, White, and Brown*, HUFFINGTON POST (Sept. 18, 2014, 7:25 PM), [http://www.huffingtonpost.com/mechele-dickerson/the-economic-recovery-in-\\_b\\_5837664.html](http://www.huffingtonpost.com/mechele-dickerson/the-economic-recovery-in-_b_5837664.html) (noting that although “[t]he recession has been over for five years,” “[m]inority and lower-income neighborhoods, particularly hard hit by foreclosures during the recession, still have not recovered”).

5. See, e.g., Michael A. Fletcher, *A Shattered Foundation: African Americans Who Bought Homes in Prince George’s Have Watched Their Wealth Vanish*, WASH. POST (Jan. 24, 2015), <http://www.washingtonpost.com/sf/investigative/2015/01/24/the-american-dream-shatters-in-prince-georges-county/> (citing the 2013 Federal Reserve’s Survey of Consumer Finances).

6. See Rakesh Kochhar et al., *Hispanic Household Wealth Fell by 66% from 2005 to 2009: The Toll of the Great Recession*, PEW RESEARCH CTR. (July 26, 2011), <http://www.pewhispanic.org/2011/07/26/the-toll-of-the-great-recession/>.

7. See Jesse Bricker et al., *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, FED. RES. BULL., Sept. 2014, at 1, <http://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf>.

equity is 67% of overall Latino wealth and a staggering 92% of black household wealth. When Latinos and (especially) blacks lost their homes, they also lost their wealth.<sup>8</sup>

These losses were, in significant part, the direct result of the rampant racialized and geographic mortgage discrimination that took place in black and brown communities in the run-up to the financial crisis.<sup>9</sup> Middle-class African American and Latino homebuyers, as well as borrowers from lower-income communities more generally, were disproportionately steered into subprime mortgages even though some qualified for prime mortgages.<sup>10</sup> Mortgage brokers and lenders also targeted African American and Latino homeowners for subprime refinancing products that stripped existing wealth from unsuspecting homeowners in already economically fragile communities.<sup>11</sup> The economic implications of these persistent discriminatory practices, which occurred even at large, mainstream financial entities, are “staggering.”<sup>12</sup> Middle-class-ascendant minorities paid more to keep their homes, diverting money away from retirement savings, college savings, and other uses of income that are understood to increase and maintain wealth.<sup>13</sup> Ultimately, intractable mortgage discrimination made homeownership and wealth-building through homeownership a riskier proposition for middle-class African Americans and Latinos,<sup>14</sup> who were almost twice as likely as non-Hispanic white borrowers to have lost their homes to foreclosure.<sup>15</sup>

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8. See Dickerson, *supra* note 4; see also Dreier et al., *supra* note 3, at 5.

9. See, e.g., *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, U.S. DEP’T OF JUSTICE (June 22, 2015), <http://www.justice.gov/usao/cac/countrywide.html> [hereinafter DEP’T OF JUSTICE SETTLEMENT] (“The complaint alleges that these borrowers were charged higher fees and interest rates because of their race or national origin, and not because of the borrowers’ creditworthiness or other objective criteria related to borrower risk.”); see also André Douglas Pond Cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 180 (“In 2006, 55% of loans to African Americans were subprime, despite the fact that many of those borrowers qualified for prime loans.”).

10. Cummings, *supra* note 9; DEP’T OF JUSTICE SETTLEMENT, *supra* note 9.

11. See, e.g., WILLIAM C. APGAR JR. ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., RISK OR RACE: AN ASSESSMENT OF SUBPRIME LENDING PATTERNS IN NINE METROPOLITAN AREAS 9 (2009), [http://www.huduser.gov/Publications/pdf/risk\\_race\\_2011.pdf](http://www.huduser.gov/Publications/pdf/risk_race_2011.pdf); Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES (June 6, 2009), [http://www.nytimes.com/2009/06/07/us/07baltimore.html?\\_r=0](http://www.nytimes.com/2009/06/07/us/07baltimore.html?_r=0).

12. Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1783 (2004).

13. See, e.g., Fletcher, *supra* note 5 (“[T]he slow-motion crisis operates mostly in private, limiting people’s options, constricting their vision and forcing a seemingly endless series of hard choices. Having your wealth vanish means making pivotal life decisions—about where to send your children to school, saving for college, making home improvements and setting aside something for retirement—knowing you have no financial leeway.”).

14. See Dickerson, *supra* note 1, at 865–66; see also Jacoby, *supra* note 2, at 324 (noting that mortgage debt expands both opportunity and risk).

15. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 18 (2011), <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf>.

During the height of the Great Recession, scholars and legislators argued that bankruptcy could work to stem the deluge of foreclosures brought on by the housing crisis.<sup>16</sup> A change to the Bankruptcy Code (the “Code”) was necessary, however, to achieve this goal because the Code’s home loan “anti-modification”<sup>17</sup> provision limits a distressed homeowner from modifying the terms of a mortgage on her primary residence.<sup>18</sup> For example, a debtor with an “underwater” primary residence—a home whose value has fallen below the amount the debtor owes on the loan—is unable to write down or “cram-down” the principal debt owed to the actual value of the home in a chapter 13 bankruptcy proceeding.<sup>19</sup> This anti-modification policy has meant that bankruptcy was not an option for the millions of underwater households that were foreclosed upon in the wake of the mortgage crisis.<sup>20</sup>

Commentators and legislators argued during the height of the foreclosure crisis that the Code should be amended to permit struggling homeowners in danger of foreclosure to modify the terms of their mortgages in bankruptcy. These commentators largely focused on the benefits of a pro-modification bankruptcy rule as a salve for struggling underwater homeowners and the recovery of the housing market as a whole.<sup>21</sup> In that regard, modification was merely a time-limited response

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16. See Michelle J. White & Ning Zhu, *Saving Your Home in Chapter 13 Bankruptcy*, 39 J. LEGAL STUD. 33, 37 (2010) (noting that “Chapter 13 functions as a ‘save your home’ bankruptcy procedure” and “nearly all debtors who file under Chapter 13 do so to save their homes”).

17. See John Eggum et al., *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 UTAH L. REV. 1123, 1130.

18. 11 U.S.C. § 1322(b)(2) (2012).

19. *Id.*; Nobelman v. Am. Savs. Bank, 508 U.S. 324 (1993). By contrast, a debtor can modify principal debts owed on investment properties, second homes, and vacation homes in a chapter 13 payment plan. 11 U.S.C. §§ 506(a), 1322(b)(2) (2012).

20. Wenli Li et al., *Using Bankruptcy to Reduce Foreclosures: Does Strip-Down of Mortgages Affect the Supply of Mortgage Credit?* 2 (Research Dep’t, Fed. Reserve Bank of Phila., Working Paper No. 14-35, 2014), [http://econweb.ucsd.edu/~miwhite/LTW\\_October\\_14\\_2014.pdf](http://econweb.ucsd.edu/~miwhite/LTW_October_14_2014.pdf).

21. See, e.g., Samuel L. Bufford, *The Chapter 13 Alternative: A Legislative Solution to Undersecured Home Mortgages*, 45 U. RICH. L. REV. 1091, 1109 (2011) (noting that “[a]s the foreclosure crisis continues to deepen, modification of certain underwater mortgages under Chapter 13 of the Bankruptcy Code can make a substantial contribution to the stabilization of the housing market”); Hank Hildebrand, *Let’s Remove Special Bankruptcy Protection for Subprime Mortgages*, 26 AM. BANKR. L.J. 14, 34 (2007) (“The proposed change would also protect the mortgage industry from itself. By providing chapter 13 debtors with the opportunity to restructure a home mortgage, the statute would create a type of loss mitigation where much of the value of the underlying obligation would be preserved.”); Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 576 (arguing that modification “would provide the most effective, fair, immediate, and tax-payer-cost-free tool for resolving the home-mortgage crisis”); Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599, 1603 (2011) (arguing more generally that modification is appropriate in the face of lender misconduct); John Sarto, *The Disproportionate Representation of Women in Subprime Lending: Cause, Effect, and Remedies*, 31 WOMEN’S RTS. L. REP. 337, 354 (2010) (“[B]ased on the foreclosure figures above, and other available information, it would seem logical that borrowers could avail themselves of remedies in bankruptcy that would prevent home loss.”). *But see* Jacoby, *supra*

to the crisis, necessary only to address foreclosures stemming from the crisis. None addressed in any depth the propriety of modification in bankruptcy specifically as a more permanent remedy for persistent and intractable discriminatory mortgage lending practices<sup>22</sup> that were rampant not only during the years leading up to the crisis but that have persisted for decades.

More generally, legal scholars have paid relatively little attention to the degree to which certain facets of consumer bankruptcy law, including the anti-modification provision, operate as a structural restraint on the recovery of economically disenfranchised groups and communities that continually face economic and social discrimination.<sup>23</sup> This Article seeks to fill that gap by explaining how consumer bankruptcy law, by allowing the modification of primary residential mortgages, might address persistent and intractable housing discrimination in historically disenfranchised communities and support wealth-building and retention in the process. More than just a barrier to recovery from the housing crisis, the anti-modification provision constrains the chances for wealth retention and recovery for those economically disenfranchised homebuyers who pay more for mortgages “because of their race . . . and not because of the [their] creditworthiness or other objective criteria related to borrower risk.”<sup>24</sup>

The anti-modification provision is particularly troubling for African Americans, Latinos, and other economically disenfranchised groups and communities. For these groups, the anti-modification provision operates at the intersection of three social and economic factors: (1) the importance of homeownership to wealth acquisition and retention in the African American and Latino communities; (2) the persistence of predatory lending relationships that lead to high loan-to-value ratios on mortgages and, in turn, a greater risk of underwater mortgages; and (3) foreclosure externalities that are borne by segregated communities in which compromised wealth is a common attribute.<sup>25</sup> In this regard, the anti-modification provision functions to further entrench racialized disparities in wealth. For example, African Americans are more likely to have underwater

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note 2, at 338 (“[E]ven if chapter 13 should remain a component of an overall ant foreclosure scheme, some additional sustainability-based sorting would be desirable.”).

22. See William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protections, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 411 (1994).

23. Notable exceptions include: Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEG. STUD. 393 (2012) (noting that bankruptcy law as practiced by bankruptcy professionals is biased against African Americans); A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004) (noting that bankruptcy law is biased in favor of an “ideal debtor,” who, as a statistical matter, is more likely to be white than African American); Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231 (2009) (noting, for example, that trustees are more likely to move to dismiss the bankruptcy petitions of African American filers than those of white filers); and Warren, *supra* note 12.

24. See, e.g., DEP’T OF JUSTICE SETTLEMENT, *supra* note 9.

25. See, e.g., Lea Deutsch, Note, *Collateral Damage: Mitigating the Effects of Foreclosure in Communities*, 22 TEMP. POL. & C.R. L. REV. 203, 207–09 (2012) (describing community problems that follow in the wake of mass foreclosures, including blight, increased crime, depressed property values, and depressed tax base).

mortgages,<sup>26</sup> and African Americans and Latinos are more likely to live in communities with underwater homes.<sup>27</sup> For communities that are already vulnerable to discrimination-related economic risk, the lack of a bankruptcy modification option compounds the unique risks of cyclical and historical economic disenfranchisement related to homeownership.

This is particularly perverse given that, as a normative matter, consumer bankruptcy law concerns itself with the provision of a “fresh start” for the “honest but unfortunate debtor.”<sup>28</sup> By contrast, the anti-modification provision does not concern itself with directly facilitating a fresh start for those whose financial crises and future economic health are tethered to a primary residence. Instead, these debtors and their families may lose their homes to foreclosure, which, in turn, negatively affects the financial fortunes of the debtors’ neighbors.<sup>29</sup> This is particularly unfortunate in light of the failure of direct legislative attempts in consumer protection law to correct persistent housing and mortgage discrimination.<sup>30</sup> Ultimately, the anti-modification provision, in conjunction with the Code’s similarly harsh treatment of student loans as practically nondischargeable,<sup>31</sup> means that debtors may find little hope of relief from debt incurred from activities that are supposed to increase wealth and social mobility, particularly for economically disenfranchised groups. Indeed, it is curious that bankruptcy policy singles out for exceptional treatment debt related to these two pillars of social mobility.

For African Americans and Latinos who, based on historical discrimination and housing limitations, are more likely to live in segregated neighborhoods,<sup>32</sup> these

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26. See, e.g., Fletcher, *supra* note 5 (describing a federal survey, which showed that in 2013, 1 in 7 African Americans had underwater mortgages as compared to 1 in 18 white homeowners. In other words, African Americans are more than twice as likely as whites to have an underwater mortgage).

27. See DREIER ET AL., *supra* note 3, at 6.

28. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); See also, e.g., Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367, 407 (2003) (“From an American perspective, bankruptcy acts as a social safety net in an economic downturn. A robust capitalist economy ensures that such downturns, along with vibrant upturns, will occur. The safety nets provided by broad bankruptcy rights are particularly necessary in the United States, where consumer credit availability outstrips any reasonable ability to repay the amounts owed. Large consumer debts increase a person’s exposure to downturn and crisis.”).

29. See Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2262 (2008).

30. See *infra* Section II.C.

31. See, e.g., Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2107 (2014) (noting that “[a] debt for a student loan is exceptional” because it requires the debtor to show an undue hardship, and “close examination of the structural features of undue hardship litigation reveals that they create access-to-justice barriers for debtors”).

32. See Geoffrey Leonard, Note, *In Our Back Yards: Dismantling Segregation by Incentivizing Regional Collaboration Under the Fair Housing Act’s Affirmatively Furthering Fair Housing Provision*, 22 GEO. J. ON POVERTY L. & POL’Y 165, 165 (2014); see also Haya El Nasser, *Hispanic Segregation Is Dropping, but Not for Mexicans*, USA TODAY (Mar. 20,

structural defects may have a devastating effect, not only on the filer's wealth, but the wealth of the entire community. By contrast, a properly designed consumer bankruptcy modification rule would provide a second-best remedy for the continuing market failures in mortgage discrimination.<sup>33</sup> It would do so by helping to offset existing distortions and imperfections arising from persistent and intractable mortgage discrimination that disproportionately harm economically disenfranchised groups. In addition, a bankruptcy modification rule would create a concrete incentive for lenders to stop discriminating.<sup>34</sup>

More fundamentally, this Article contends that by reframing bankruptcy as a tool of economic remediation and improvement, and not just a form of temporary relief for financial misfortune and crisis, bankruptcy law can address the broader structural forces that produce chronic, racialized, economic subordination, particularly related to homeownership. This Article reconceives bankruptcy as providing not only a "fresh start," but also a singularly appropriate remedy for financially distressed borrowers whose economic hardships are directly related to illegal and discriminatory mortgage lending practices that lead to, or exacerbate, financial distress. By contrast, narrower understandings of consumer bankruptcy law—which regard debtors harshly and with suspicion, or as casualties of isolated financial misfortune—disregard the structural elements of economic subordination and inequality and the ways in which these elements drive individuals into financial distress even when they work hard and try to do all of the right things.<sup>35</sup>

This Article proceeds in four parts. Part I presents a brief overview of consumer bankruptcy and describes § 1322(b)(2) of the Code in which the anti-modification provision prohibiting cram-down of primary residential mortgages is codified. Part II describes the primary justification for the anti-modification provision—namely, that it would have adverse effects on the mortgage market, including increasing the cost of and access to mortgages. It then describes recent studies that challenge this traditional justification by reporting data that suggest that the mortgage market is not particularly sensitive to bankruptcy modification, which in turn casts doubt on bankruptcy policy decisions to limit relief to financially distressed homeowners. It closes with an alternative view of a modification rule, arguing that even if there are attendant costs, these costs are justified because neither lender-friendly legislation, nor direct prohibition of discriminatory lending practices, have deterred lenders from routinely engaging in discriminatory practices. Part III reviews historical and current disparities in wealth as experienced by African Americans and Latinos, particularly related to homeownership and retention. It argues that in light of persistent economic disenfranchisement and mortgage discrimination, bankruptcy's anti-modification provision functions as an unnecessary structural constraint on wealth retention for these economically disenfranchised communities. Part IV then makes a case for why a debtor-favorable modification rule is an appropriate mechanism for addressing mortgage

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2013), <http://www.usatoday.com/story/news/2013/03/20/mexican-segregation-not-dropping/1997655/>.

33. See, e.g., Melissa B. Jacoby, *Bankruptcy Reform and the Financial Crisis*, 13 N.C. BANKING INST. 115, 118–19 (2009).

34. See, e.g., Moringiello, *supra* note 21, at 1603.

35. See *infra* Section III.B.

discrimination that negatively affects wealth acquisition and retention related to homeownership. In principle, it argues that a debtor-favorable modification rule might serve as a remedy against intractable, persistent, and illegal mortgage discrimination, which is especially significant given that direct legislation has not eradicated discriminatory mortgage lending practices, which remain rampant in the mortgage market.<sup>36</sup>

### I. A PRIMER ON CONSUMER BANKRUPTCY LAW

The prevailing debtor-focused principle underpinning consumer bankruptcy law is that the bankruptcy discharge facilitates a “fresh start.”<sup>37</sup> Stated, perhaps most famously, by the Supreme Court, the fresh start provides “the honest but unfortunate debtor” a chance at a clean slate and renewed financial life.<sup>38</sup> This conception of consumer debt relief is notable in its departure from historical perceptions of individuals who could not pay their debts.<sup>39</sup> Insolvent and bankrupt individuals were historically considered to have been moral failures, even deserving of imprisonment, but as American bankruptcy law evolved alongside debt-based commercial markets, the idea that an individual engaging in commerce might experience some misfortune that justified the discharge of debts became more acceptable.<sup>40</sup> Thus, “moral failure [was] transferred into market failure, not just for merchants and traders but for all citizens.”<sup>41</sup> As indebtedness became essential to participation in, and growth of, commercial markets, “the economic risks involved

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36. See, e.g., Rachel L. Swarns, *Biased Lending Evolves, and Blacks Face Trouble Getting Mortgages*, N.Y. TIMES, Oct. 31, 2015, at A1 (“Fallout from the excesses of the subprime era in mortgage lending has, in some ways, set the stage for the discriminatory practices of today. As banks have tightened their credit lending standards to avoid risky loans, the percentage of blacks and Hispanics getting approved for mortgages has plunged.”).

37. See, e.g., TERESA SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 13 (2001) (“[T]he ‘fresh start’ . . . is the traditional objective of American bankruptcy law.”). Equal distribution also animates consumer bankruptcy. See, e.g., THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 227 (1986) (“The fresh-start policy is . . . substantively unrelated to the creditor-oriented distributional rules that give bankruptcy law its general shape and complexity.”). Because I am concerned here with the debtor’s perspective, I do not address that principle in this Article.

38. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); see also JACKSON, *supra* note 37, at 225.

39. See BRUCE MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2002); A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 259–60 (2001) (“Indebtedness, once regarded solely as a sign of extravagance and poor financial management, came to be seen as an appropriate (indeed essential) part of the development of America’s commercial activities.”); John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303, 313 (2004) (“Yet from the beginning, American bankruptcy legislation had a new air about it. Even before the Revolution, petitions to colonial legislatures had begun to emphasize the plight of the honest debtor, caught up in unforeseen accidents or misfortunes not linked to any ‘Negligence or Inattention’ of his own.”).

40. See Charles G. Hallinan, *The “Fresh Start” Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 55–56 (1986); Witt, *supra* note 36, at 322.

41. Witt, *supra* note 39, at 322.

in commercial activity were not inevitably [perceived as] a function of the actor's dishonesty or irresponsibility."<sup>42</sup> In his history of the evolution of American bankruptcy law, Professor Bruce Mann emphasizes "the ambivalent, but nonetheless unmistakable, shift away from the reflexive equation of economic failure with moral failure."<sup>43</sup> In short, the prevailing modern conception of consumer bankruptcy is that it exists largely to provide meaningful relief, in the form of a fresh start, to some subset of appropriately distressed individuals.<sup>44</sup>

A bankruptcy case usually begins when the debtor files a petition for relief.<sup>45</sup> Two important events occur at the moment of the filing. First, the bankruptcy filing triggers an automatic stay on all collection proceedings currently in progress, including a foreclosure.<sup>46</sup> Second, the bankruptcy filing automatically triggers the creation of an estate from which the debtor's creditors will be paid any claims allowed in the proceeding.<sup>47</sup> Property of the estate includes "all legal or equitable interests of the debtor in property" that exist as of the moment of the filing.<sup>48</sup> It excludes "earnings from services performed by an individual debtor" after the moment of the filing.<sup>49</sup> In other words, while non-exempt property and ownership interests of the debtor that exist pre-filing generally become property of the bankruptcy estate, the individual debtor is entitled to keep the post-filing earnings from her own labor.<sup>50</sup> In addition, certain "exempt" property is protected from the creditors' reach.<sup>51</sup>

An individual debtor seeking to discharge her debts in bankruptcy has two primary options.<sup>52</sup> First, subject to a means test, she can file a petition for a chapter

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42. See Hallinan, *supra* note 40, at 56.

43. See MANN, *supra* note 39, at 59.

44. A debate about who should receive a discharge has existed since before the passage of the Code in 1978. While both sides of the debate have appeared to accept that some subset of people experiencing financial hardship is eligible for a "fresh start" that a discharge in bankruptcy purportedly brings, the question of exactly who deserves a discharge remains contested. One camp has taken a very limited view as to who should be able to receive bankruptcy relief. For this contingent, only the most desperate of the desperate should be accorded a discharge and given a fresh start; others who attempt to discharge their debts are opportunistic filers cheating the system. The opposing camp has taken a more expansive view about who is eligible for bankruptcy relief, highlighting the broad importance to middle class well-being of the availability of a fresh start in the form of a discharge of debts in consumer bankruptcy. See, e.g., SULLIVAN ET AL., *supra* note 37, at 2.

45. 11 U.S.C. § 301 (2012).

46. *Id.* § 362.

47. *Id.* § 541.

48. *Id.* § 541(a)(1).

49. *Id.* § 541(a)(6).

50. *Id.* § 541(a)(6); see also JACKSON, *supra* note 37, at 227 ("Our bankruptcy statutes have always taken discharge to mean, essentially, that an individual's human capital (as manifested in future earnings) as well as his future inheritances and gifts are freed of liabilities he incurred in the past.").

51. 11 U.S.C. § 522(b)(1).

52. Individual debtors under certain circumstances may also file for bankruptcy protection under chapter 11.

7 liquidation.<sup>53</sup> In a chapter 7 liquidation proceeding, the debtor agrees to turn over all of her non-exempt assets<sup>54</sup> to a bankruptcy trustee who then liquidates those assets and uses the proceeds from the sale to repay the debtor's creditors.<sup>55</sup> Second, a debtor may choose to restructure her debts by filing in chapter 13.<sup>56</sup> In a chapter 13 proceeding, the debtor is permitted to keep both exempt and non-exempt assets, but she is no longer entitled to keep all of her post-petition earnings.<sup>57</sup> Instead, the debtor must complete a bankruptcy-court-approved chapter 13 plan in which the debtor agrees to pay all of her disposable income to her creditors for a three or five year period.<sup>58</sup> Discharge of applicable debt obligations is granted only if the debtor successfully completes her multi-year chapter 13 plan.<sup>59</sup> This Article focuses on chapter 13 bankruptcy.

#### *A. The Treatment of Secured Claims in a Chapter 13 Bankruptcy*

The Code generally authorizes modification of the rights of a secured creditor—one whose claim is backed by some type of collateral—in a chapter 13 bankruptcy proceeding.<sup>60</sup> Under § 506, the secured creditor is entitled to receive an amount equal to at least the value of the secured asset at the time that the debtor filed her petition.<sup>61</sup> Thus, the amount of recovery of the secured creditor is generally anchored in the valuation of the asset that secures the outstanding debt. If the asset is valued at or above the amount of the allowed secured claim as determined under § 506, the secured creditor is fully secured.<sup>62</sup> If the secured asset is valued below the amount of the secured claim, the secured creditor is only partially secured and receives: (1) a secured claim equal to the value of the secured asset; and (2) an unsecured claim equal to the difference between the value of the asset and the amount the debtor owes on the original loan.<sup>63</sup>

Partially secured creditors, vis-à-vis the unsecured portion of their debt, will generally fare just as poorly as unsecured creditors, who, in practice, are likely

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53. 11 U.S.C. § 707. Under the Code, an individual debtor may also file a petition for relief in chapter 11 if the amount of debt is beyond a certain threshold and may file a petition for relief in chapter 12 if she is a family farmer. Filings in these chapters, however, are not common, so I focus on chapters 7 and 13 here. See Braucher et al., *supra* note 23, at 394.

54. 11 U.S.C. § 522.

55. BARRY E. ADLER ET AL., *BANKRUPTCY: CASES, PROBLEMS, AND MATERIALS* 559 (4th ed. 2007) (“The requirement that those seeking a fresh start give up any non-exempt assets limits the number of opportunists who might take advantage of the system.”); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 116 (2011).

56. 11 U.S.C. §§ 1301–30.

57. *Id.* § 1306.

58. *Id.* § 109(e).

59. *Id.* § 1328(a).

60. See Levitin, *supra* note 21, at 572.

61. 11 U.S.C. § 506.

62. *Id.*

63. *Id.*

to receive only a fraction of the outstanding debt.<sup>64</sup> The end result is that a secured creditor may be forced to accept less than the full amount that the creditor may be owed by the debtor per the terms of the original contract.<sup>65</sup> The Code thus allows debtors to modify most secured debts by writing down, or “cramming down,” the value of the outstanding debt to the actual value of the asset, thus altering the extra-bankruptcy rights of the secured creditor.<sup>66</sup> The Code also allows other types of modification, including adjustment of interest rates and alteration of payment schedules.<sup>67</sup>

***B. Section 1322(b)(2): Anti-Modification of Home Mortgages in Chapter 13 Bankruptcy***

Mortgage loans on primary residences are an exception to the general rule that secured debts can be modified in chapter 13. Specifically, § 1322(b)(2) of the Code prohibits a bankruptcy judge from confirming a chapter 13 plan that calls for the modification of the contractual rights of a secured creditor whose claim is based on a mortgage on the debtor’s primary residence.<sup>68</sup> By contrast, § 1322(b) permits the court to confirm a chapter 13 plan that modifies the rights of holders of other secured claims.<sup>69</sup> For example, if the debtor has a vacation property that secures a loan with an outstanding balance of \$50,000, but the vacation property is valued at \$35,000, the court may approve a plan that pays the secured creditor \$35,000, while the remaining \$15,000 is paid on a pro rata basis in accordance with any payments to be made to unsecured creditors.<sup>70</sup> Upon successful completion of the chapter 13 plan, any unpaid remainder of the \$15,000 would be discharged.<sup>71</sup>

Section 1322(b)(2)’s treatment of primary residential mortgages appears to be in tension with the cram-down provisions in § 506. After Congress enacted the Code in 1978, bankruptcy courts split as to whether § 1322(b)(2) prohibited a debtor from modifying the terms of a mortgage on her primary residence.<sup>72</sup> Several lower courts concluded that debtors could cram-down primary residential mortgage loans in a chapter 13 plan under § 506 of the Code.<sup>73</sup> Those bankruptcy courts that

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64. See Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 805–06 (2009) (noting that only 11% of allowed general unsecured creditors received any payout in chapter 7 bankruptcy cases).

65. 11 U.S.C. § 506.

66. *Id.*

67. See, e.g., Eggum et al., *supra* note 17, at 1129 (“Some of the ways that secured claims may be modified include altering the payment schedule, reducing the contract interest rate, or ‘stripping down’ the amount of the claim to the value of the collateral.”).

68. 11 U.S.C. § 1322(b)(2) (“Subject to subsections (a) and (c) of this section, the plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.”).

69. *Id.*

70. 11 U.S.C. § 506.

71. *Id.* § 1328.

72. See Eggum et al., *supra* note 17, at 1163 n.159 (listing cases).

73. See Joshua Goodman & Adam Levitin, *Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates*, 57 J.L. & ECON. 139, 143 (2014).

permitted cram-down generally did so under the rationale that the court was merely determining the extent of the mortgage creditor's allowed secured claim as authorized under § 506, rather than modifying the rights of the secured creditor, as apparently proscribed by § 1322(b)(2).<sup>74</sup>

In 1993, the Supreme Court rejected the latter interpretation in *Nobelman v. American Savings Bank* and adopted an anti-modification provision.<sup>75</sup> The Court reasoned that assigning a primary-residential-mortgage-loan creditor a secured claim based on the value of the house, instead of on the terms of the pre-filing agreement, modified the rights of the primary residential mortgage loan creditor in violation of § 1322(b)(2).<sup>76</sup> After *Nobelman*, debtors may not modify the terms of a primary residential mortgage, which includes cramming down the amount owed to reflect the actual value of the home. The anti-modification provision prevents debtors from holding on to their primary residences in chapter 13 unless the debtor proposes a plan that pays the mortgage loan according to its pre-filing terms,<sup>77</sup> even if the market value of the home has fallen far below the amount owed on the original loan contract. This treatment limits the bankruptcy options for distressed debtors who file for bankruptcy in an attempt to save their homes.<sup>78</sup>

## II. THE JUSTIFICATION FOR AND CHALLENGE TO THE ANTI-MODIFICATION LIMITATION

### *A. Justifying Anti-Modification: The Home Mortgage Market Requires Special Protections in Bankruptcy*

The anti-modification provision rests on the traditional economic assumption that borrower-friendly legal rules result in higher overall lending costs to borrowers because lenders will pass increased costs on to borrowers. For example, borrowers in states that require borrower-friendly<sup>79</sup> judicial foreclosure proceedings have less access to credit, which “suggests that defaulter-friendly laws impose material costs on borrowers at the time of loan origination.”<sup>80</sup> Thus, in a bankruptcy-sensitive mortgage market, home mortgage lenders would respond to primary residential loan modification rights in bankruptcy by increasing the cost of borrowing and limiting the availability of credit.<sup>81</sup> If lenders are made to bear the risks related to home buying, including, for example, a negative change in value that results in underwater collateral, they will pass the risk along to prospective

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74. *Id.*

75. 508 U.S. 324 (1993).

76. *Id.*; see also Mark S. Scarberry & Scott M. Reddie, *Home Mortgage Strip Down in Chapter 13 Bankruptcy: A Contextual Approach to Sections 1322(b)(2) and (b)(5)*, 20 PEPP. L. REV. 425, 448–53 (1993).

77. See Levitin, *supra* note 21, at 571.

78. See Mark R. Lindblad et al., *Bankruptcy During Foreclosure: Home Preservation Through Chapters 7 and 13*, 25 HOUS. POL'Y DEBATE 41 (2015) (reporting findings that homeowners in foreclosure file chapter 13 in order to hold on to their homes).

79. *Id.* at 52 (noting that judicial foreclosure requirements are borrower-friendly because “the hazard of foreclosure auction is significantly reduced”).

80. Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88 REV. OF ECON. & STATS. 177, 177 (2006).

81. See Levitin, *supra* note 21, at 572.

borrowers resulting in higher mortgage credit costs and decreased availability of mortgage credit.<sup>82</sup> In other words, if bankruptcy law serves as a backdrop against which contracts are made, then imposing a limit on bankruptcy modification of primary-residence loans under a chapter 13 plan is important for the contracting prospects of the general pool of potential mortgage-seekers.

The legislative history of § 1322 indicates that creditors were strong supporters of the inclusion of § 1322(b)(2).<sup>83</sup> For example, during congressional hearings considering the passage of the Code in 1978, a representative from the National Consumer Finance Association testified that:

The objective of the Commission [on Bankruptcy Laws to expand debtor access to a fresh start] is admirable, but it must be legislatively balanced to insure the continued availability of home financing and consumer credit upon which our economy is so dependent, and it must be structured so as to preserve and protect the rights of creditors to their collateral and against those who would abuse the bankruptcy process through fraud, deception, or dishonesty. Further, it should be structured to encourage sound money management practices by consumers. It is our opinion that the proposals of the Bankruptcy Commission, and to the extent embodied in the legislation before this Committee, if enacted into law, would seriously undermine the availability of credit to those who most need it, and indirectly affect the ability of the manufacturers of goods and consumer products to sell their wares in the market place.<sup>84</sup>

Some scholars have embraced this perspective. By one account:

Chapter 13 offers the debtor breathing space and a last chance to sort things out. This breathing space does not come without its cost to lenders, who in turn can be expected to pass on the cost to new borrowers. The treatment of home mortgages in Chapter 13 has the potential to affect the important home purchase market.<sup>85</sup>

When Congress was asked to amend the Code in the wake of the subprime mortgage crisis, one supporter of the anti-modification provision stated:

Permitting home mortgage strip down would likely cause difficulties in the secondary mortgage market that is so important to the availability and affordability of home mortgages. In

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82. *Id.* at 572–73.

83. *See, e.g.*, *Grubbs v. Houston First Am. Savs. Assoc.*, 730 F.2d 236, 244 (5th Cir. 1984).

84. *Hearings Before the Subcommittee on Improvements of the Judicial Machinery of the Senate Committee on Judiciary*, 94th Cong. 140 (1975) (statements of Walter Vaughan, American Bankers Association, pp. 127–28, 130, 132–34, 137–38, Alvin Wiese, National Consumer Finance Association, pp. 141–42, 167–68, 176–80); *see also* DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 191 (2001).

85. *See* ADLER ET AL. *supra* note 55, at 645.

addition, permitting home mortgage strip down would cause unjustified harm to the holders of home mortgages and home mortgage related securities, with a negative effect on investors, including investors of modest means.<sup>86</sup>

Lawmakers made similar arguments in response to the proposed Helping Families Save Their Homes in Bankruptcy Act, which was designed to amend the Code to permit modification of residential mortgages in order to stem the deluge of foreclosures.<sup>87</sup> During congressional debate in 2009, former Senator Jon Kyl of Arizona, in opposition to the legislation, stated:

First, it would result in higher interest rates for all home mortgages, exactly what we do not want while we are trying to entice people back into the market. Interest rates on home loans are substantially lower now than other types of consumer loans because of the guarantees current law provides to lenders. If all else fails, the lender always has the right to take back the house for which it lent the money. If we eliminate this security for lenders and increase the risk inherent in making a home loan, then lenders will have to charge higher rates on interest for home loans to cover the risk. The net result of the amendment, in other words, will be higher interest rates for home loans and fewer Americans who will be able to afford to buy a house—not what we need to end the housing crisis.<sup>88</sup>

A representative of the Mortgage Bankers Association took a similar position in 2008 when testifying before the House of Representatives regarding<sup>89</sup> proposals to amend the Code to permit modification of certain primary residential mortgages:

If bankruptcy judges are allowed to independently change the terms of a signed mortgage contract, lenders will face new uncertainty as to the value of the collateral, the home. To account for the new risk, lenders will be forced to require higher down payments, higher costs at closing and higher interest rates, pushing the dream of homeownership beyond the reach of millions of families . . . . It is a myth that this legislation will actually be positive for the mortgage industry. . . . This will have an immediate

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86. *Hearings Before the Senate Committee on the Judiciary Hearing*, 110th Cong. (2007) (Statement of Professor Mark S. Scarberry), <http://www.judiciary.senate.gov/imo/media/doc/Scarberry%20Testimony%20120507.pdf>.

87. Senator Dick Durbin of Illinois introduced the legislation containing the following proposed amendment to § 1322(b)(2): “Section 1322(b) of title 11, United States Code, is amended . . . with respect to a claim for a loan secured by a security interest in the debtor’s principal residence that is the subject of a notice that a foreclosure may be commenced, modify the rights of the holder of such claim— ‘(A) by providing for payment of the amount of the allowed secured claim as determined under section 506(a)(1).’” See 111 Cong. Rec. S61 (2009).

88. 155 CONG. REC. S4924 (daily ed., Apr. 30, 2009) (statement of Sen. Jon Kyl).

89. See the Emergency Home Ownership and Mortgage Equity Protection Act, H.R. 3609, 110th Cong. (2007), <https://www.govtrack.us/congress/bills/110/hr3609/text>.

and severe impact on the mortgage market, as companies book the diminished value of their loans and servicing rights. Rates will certainly have to rise to offset the anticipated losses. Some companies will not survive the [cram] downs, and the market will go through another period of severe instability.<sup>90</sup>

Ultimately, these positions won the day and the Helping Families Saving Their Homes in Bankruptcy Act evolved into the Helping Families Save Their Homes Act of 2009,<sup>91</sup> from which the proposed amendment to § 1322(b) was removed. Consequently, in the throes of the foreclosure crisis, debtors experiencing housing-related financial distress, including those with underwater loans, were prohibited from modifying their home loans in bankruptcy.

***B. Challenges to the Justification: Limited Mortgage Market Sensitivity to Bankruptcy Modification***

According to proponents of anti-modification, a world without anti-modification would be one in which credit costs are high and access to good, non-usurious credit is limited. And yet, recent studies suggest that while the home mortgage market may be sensitive to debtor-friendly protections more generally, it is not particularly sensitive to the bankruptcy modification provisions, in part because the alternative, a lengthy and expensive foreclosure proceeding, would similarly result in a limited recovery for the lender.<sup>92</sup>

Economists Wenli Li, Ishani Tewari, and Michelle White recently tested the assumption that the modification of home loans in bankruptcy would have adverse effects on the home mortgage market.<sup>93</sup> Testing changes to interest rates and the availability of credit in the wake of *Dewsnup v. Timm*<sup>94</sup> (in which the Supreme Court prohibited cram-downs on home mortgages in a chapter 7 proceeding)<sup>95</sup> and *Nobelman* (prohibiting cram-down in chapter 13), Li, Tewari, and White observed that after the Supreme Court prohibited the cram-down of mortgage loans in a chapter 7 bankruptcy proceeding, lenders responded by (1) offering less credit rather

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90. *Growing Mortgage Foreclosure Crisis: Identifying Solutions and Dispelling Myths Before Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary 110th Cong. (2009)* (statement of David G. Kittle, Chairman-elect, Mortgage Bankers Association). *But see* Goodman and Levitin, *supra* note 73, at 140 (noting that “The [Mortgage Bankers Association] admitted, however, that ‘[t]he number is an approximation, as there is no market parallel from which we can make exact comparisons.’ In other words, at that point, no rigorous empirical evidence existed with which to forecast the impact of cramdown legislation on credit markets.”).

91. Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22 (2009).

92. *See* White & Zhu, *supra* note 16, at 34 (“Foreclosures are very costly to both borrowers and lenders . . . . Lenders lose because the transactions costs of foreclosure are high and homes decrease in value while waiting to be resold.”).

93. Li et al., *supra* note 20, at 2.

94. 502 U.S. 410 (1992).

95. This past term, the Supreme Court has extended its reasoning in *Dewsnup* to limit the stripping off of junior liens in a chapter 7, even when those liens are entirely unsecured. *See Bank of Am. v. Caulkett*, 135 S. Ct. 1995 (2015).

than offering more credit, and (2) lowering interest rates at an insignificant level.<sup>96</sup> This outcome was inconsistent with the assumption that the anti-modification of loans in bankruptcy would cause creditors to increase credit offerings, but consistent with the assumption that interest rates would fall as a result.

Li, Tewari, and White observed that lenders responded to *Nobelman*'s limitation on modification in chapter 13 by offering slightly more credit and reducing interest rates.<sup>97</sup> The authors noted, however, that although statistically significant, the positive change in the loan approval rates was quantitatively small, at just 1.1%.<sup>98</sup> Interest rates declined by 3.4%.<sup>99</sup> While both findings were consistent with the assumption that the anti-modification provision results in better credit offerings, the authors noted that "markets responded little to [pre-*Nobelman*] decisions by lower-level federal courts to introduce mortgage [cram-down],"<sup>100</sup> indeed, "a small fraction of the 1.5 percentage point increase predicted by the advocacy group, the Mortgage Bankers' Association."<sup>101</sup> Thus, Li, Tewari, and White concluded that their findings "suggest that introducing mortgage [cram-down] under either [chapter 7 or chapter 13] would not have a strong adverse impact on the terms of mortgage loans and could be a useful new policy tool to reduce foreclosures."<sup>102</sup>

Law professor Adam Levitin and economist Joshua Goodman also recently studied the effects of the Supreme Court's *Nobelman* ruling on mortgage costs, testing the differences in mortgage interest rates during the period of judicial uncertainty regarding cram-down of mortgages, 1978–1993, and the period following the *Nobelman* decision in June 1993.<sup>103</sup> The authors observed an increase in the cost of credit before *Nobelman* settled the law in favor of anti-modification of primary residential mortgages.<sup>104</sup> The authors observed a change that amounted to a premium of approximately 1% in monthly mortgage payments over the life of the loan.<sup>105</sup> Levitin and Goodman reasoned that the observed impact was relatively small for three reasons. First, cram-down costs have reduced effects on lender risk as compared to the lender's likely non-bankruptcy alternative, namely a costly foreclosure.<sup>106</sup> Second, during the 1978–1993 period, chapter 13 filings were uncommon and, as a practical matter, there was little risk of loss to lenders from a bankruptcy-authorized cram-down.<sup>107</sup> Third, most chapter 13 filers do not complete their repayment plans (and thus do not receive discharges), and consequently lenders' rights per the original loan contract are reinstated.<sup>108</sup> Levitin and Goodman

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96. Li et al., *supra* note 20, at 2.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 4.

101. *Id.* at 20.

102. *Id.*

103. Goodman & Levitin, *supra* note 73, at 144.

104. *Id.* at 156.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

suggested, however, that while “cramdown ha[d] little impact on the credit market for those at low risk of ending up both underwater and in bankruptcy,” the riskiest borrowers—e.g., those who buy with lower down payments—might be likely to bear the cost of a change to the anti-modification provision.<sup>109</sup> The authors ultimately suggest that, notwithstanding this increase in mortgage costs, modification might be beneficial as a form of insurance for borrowers.<sup>110</sup>

Levitin has previously tested the assumption that the anti-modification provision causes lenders to offer more credit at lower interest rates, which in turn encourages homeownership.<sup>111</sup> In some contrast to his work with Goodman, described above, Levitin concluded that then-current mortgage rates “evinced a marked indifference to bankruptcy-modification risk,<sup>112</sup> at least among conforming loans,”<sup>113</sup> and “that the mortgage-lending market is indifferent to bankruptcy-modification risk.”<sup>114</sup>

Ultimately, these studies of the effects and significance of anti-modification, by their own terms, appear to undermine the rationale underpinning the existence of § 1322(b)(2). Yet, significant scholarly pushback,<sup>115</sup> in addition to research that suggests borrower-friendly regulation tends to negatively affect the mortgage market,<sup>116</sup> means that it is perhaps at best unclear what detrimental effect a bankruptcy modification right would have on the mortgage market.

### *C. Justifying Modification Even with Costs*

Even if allowing cram-downs of primary residential mortgages would impose some costs on the mortgage market, a modification rule is justifiable as a cost of remediating an untenable and intractable situation.<sup>117</sup> In this sense, the increased costs associated with a modification rule are similar to the increased costs

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109. *Id.* at 157.

110. *Id.*; see also Hildebrand, *supra* note 21, at 35 (noting potential benefits to lenders, including that “[t]he proposed change would also protect the mortgage industry from itself. By providing chapter 13 debtors with the opportunity to restructure a home mortgage, the statute would create a type of loss mitigation where much of the value of the underlying obligation would be preserved.”).

111. Levitin, *supra* note 21, at 571–72.

112. *Id.* at 592.

113. A conforming loan is a loan whose terms conform to limits set by federal law. A conforming loan is eligible for purchase by a government-sponsored enterprise, like Fannie Mae and Freddie Mac, that purchases previously originated loans. See 12 U.S.C. § 1454 (2012).

114. Levitin, *supra* note 21, at 593.

115. See Mark S. Scarberry, *A Critique of Congressional Proposals to Permit Modification of Home Mortgages in Chapter 13 Bankruptcy*, 37 PEPP. L. REV. 635, 643–44 (2010) (critiquing Levitin’s methodology and the premise that allowing the modification of primary residential mortgages would work in chapter 13 bankruptcy).

116. See, e.g., Pence, *supra* note 80.

117. See, e.g., Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 155–60 (2012) (“We must ensure that each person has the realistic opportunity to participate in social and economic life, and that all of us are able to expect that market and property transactions will accord with minimum standards compatible with our justified expectations and deepest values.”).

associated with other housing regulations, such as building codes and Truth in Lending Act (“TILA”) disclosure requirements, which are generally beneficial. Although these regulations may raise the cost of borrowing, they are viewed as justifiable based on the social benefits that they provide.<sup>118</sup> Moreover, any increased costs associated with a bankruptcy modification rule are warranted because existing direct regulation has not succeeded in preventing predatory mortgage lending and discrimination. As a positive matter, the supposed benefits of the current anti-modification provision, namely increased access to prime credit and lower interest rates, have not reached the most vulnerable borrowers. Instead, favorable credit terms appear to be more responsive to the racial identity of the borrower or the borrower’s zip code rather than creditworthiness. In other words, instead of encouraging more and cheaper credit, anti-modification more likely insulates predatory lenders from bearing the risk inherent in their own reckless and opportunistic behavior.

The lack of prime credit for prime-credit-worthy African Americans and Latinos during the subprime crisis is testament to this reality. For example, in 2011, the Department of Justice (“DOJ”) settled with Countrywide Financial Corporation over the company’s alleged widespread discrimination against qualified African American and Latino borrowers.<sup>119</sup> In that case, the government alleged that Countrywide steered over 200,000 African American and Latino mortgage borrowers into subprime loans, and/or charged them higher fees, while steering white borrowers with similar credit profiles into prime loans.<sup>120</sup> Similarly, the DOJ settled in 2012 with SunTrust Mortgage over claims that SunTrust routinely charged higher discretionary broker fees and retail loan markups to African American and Latino borrowers than to similarly-situated white borrowers.<sup>121</sup> In 2012, Wells Fargo agreed to a \$175 million settlement to resolve the DOJ’s claims that Wells Fargo steered African American and Latino homebuyers into expensive mortgages and charged these borrowers excessive fees.<sup>122</sup> Similarly, the Consumer Financial Protection Bureau (“CFPB”) and the DOJ settled with PNC Bank, successor-in-

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118. *Id.* at 160.

119. See DEP’T OF JUSTICE SETTLEMENT, *supra* note 9; A. Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 642 (2012).

120. DEP’T OF JUSTICE SETTLEMENT, *supra* note 9 (“The United States’ complaint alleges that African American and Hispanic borrowers paid more than non-Hispanic white borrowers, not based on borrower risk, but because of their race or national origin. Countrywide’s business practice allowed its loan officers and mortgage brokers to vary a loan’s interest rate and other fees from the price it set based on the borrower’s objective credit-related factors. This subjective and unguided pricing discretion resulted in African American and Hispanic borrowers paying more. The complaint further alleges that Countrywide was aware the fees and interest rates it was charging discriminated against African American and Hispanic borrowers, but failed to impose meaningful limits or guidelines to stop it.”).

121. See *United States v. SunTrust Mortg., Inc.*, No. 12-CV-397 (E.D. Va. May 31, 2012); *Recent Accomplishments of the Housing & Civil Enforcement Section*, U.S. DEP’T OF JUSTICE (Oct. 27, 2015), <http://www.justice.gov/crt/about/hce/whatnew.php>.

122. See Yan Q. Mui, *Wells Fargo, Justice Department Settle Discrimination Case for \$175 Million*, WASH. POST (July 12, 2012), [http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for-175-million/2012/07/12/gJQAX66ZgW\\_story.html](http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for-175-million/2012/07/12/gJQAX66ZgW_story.html).

interest to National City Bank, to resolve the government's claims that National City Bank charged African American and Latino homebuyers higher prices for mortgage loans than similarly-situated white homebuyers.<sup>123</sup>

These settlement agreements demonstrate that lenders have routinely excluded economically disenfranchised groups from access to prime rate mortgage products even when those borrowers qualified for prime rates.<sup>124</sup> Lenders committed these transgressions even though federal legislation has prohibited this behavior since the Johnson Administration. For example, the Fair Housing Act ("FHA"), enacted in 1968, prohibits discrimination in the sale or rental of housing on the basis of certain characteristics, including race, gender, national origin, and religion.<sup>125</sup> Similarly, the Equal Credit Opportunity Act ("ECOA"), passed in 1974, prohibits discrimination in credit terms on the basis of gender, race, and marital status, among other characteristics.<sup>126</sup> There has been some success in combatting discriminatory practices, perhaps attributable to both the FHA and the ECOA, as reflected in what appears to be decreased redlining practices,<sup>127</sup> but the financial crisis confirms that racial minorities and women continue to experience discrimination in the credit markets and in housing transactions, even though this type of discrimination has been illegal under federal law for over 40 years.<sup>128</sup>

The recent spate of DOJ and CFPB actions brought against mortgage lenders pursuant to the ECOA and the FHA, and the subsequent settlements reached in those cases, have positive and negative implications for the efficacy of legislative attempts to hem in racial discrimination in credit markets. On one hand, the government has been successful in recovering settlement funds to compensate individuals wrongfully subjected to discriminatory and onerous credit terms.<sup>129</sup> On

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123. See, e.g., *Justice Department and Consumer Financial Protection Bureau Reach \$35 Million Settlement to Resolve Allegations of Lending Discrimination by National City Bank*, U.S. DEP'T OF JUSTICE (December 23, 2013), <http://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-35-million-settlement>; Consent Order *Consumer Fin. Prot. Bureau and United States v. Nat'l City Bank*, 2:13-cv-01817-CB (W.D. Pa. Jan. 9, 2014), <http://www.justice.gov/sites/default/files/crt/legacy/2014/04/08/nationalcitybanksettle.pdf>.

124. See, e.g., *United States v. SunTrust Mortg., Inc.*, No. 12-CV-397 (E.D. Va. May 31, 2012); Mui, *supra* note 122.

125. See Fair Housing Act, Pub. L. No. 90-284 as amended.

126. See Equal Credit Opportunity Act, Pub. L. No. 93-495 (1974) as amended; see also John H. Matheson, *The Equal Credit Opportunity Act: A Functional Failure*, 21 HARV. J. ON LEGIS. 371, 371 (1984).

127. See David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1695, 1720–21 (2004). *But see* Swarms, *supra* note 36; Brian Collins, *DOJ, CFPB Officials Warn More 'Redlining' Cases on Way*, NAT'L MORTG. NEWS (Sept. 7, 2015), <http://www.nationalmortgagenews.com/news/compliance/doj-cfpb-officials-warn-more-redlining-cases-on-way-1060564-1.html> (noting that redlining is making a "comeback").

128. See, e.g., Amy Schmitz, *Sex Matters: Considering Gender in Consumer Contracts*, 19 CARDOZO J.L. & GENDER 437, 464 (2013) (noting that "the existing laws are narrow and difficult to use").

129. See, e.g., Consent Order, *United States v. Luther Burbank Sav.*, No. 12-cv-07809-JAK-FMO (C.D. Cal. Oct. 12, 2012) (requiring the defendant, who was alleged to have enforced a \$400,000 minimum loan amount policy for its wholesale single-family

the other hand, the number of mainstream institutional actors who, notwithstanding the laws proscribing such behavior, allegedly freely engaged in such discrimination during the subprime crisis does not bode well for the deterrent effect of the laws in place. Nor does the settlement of claims, which largely includes no admission of wrongdoing by the defendants, provide much hope in terms of deterrence.<sup>130</sup>

In this light, a change in the bankruptcy law, notwithstanding additional costs, is justifiable because neither lender-friendly legislation nor a direct prohibition of discriminatory lending practices have deterred lenders from routinely engaging in these practices. While a bankruptcy modification rule poses some risk to lenders, and by extension to the general pool of borrowers, of nonpayment of the contract price of primary residential loans, there is also social risk in not disrupting, where possible, the cycle of economic disenfranchisement and homeowner-related disparities in wealth. Sustained homeownership is a key means of accomplishing this goal, particularly because African Americans and Latinos are more likely to carry wealth in their home.<sup>131</sup>

### III. CHALLENGE AND COMPLEXITY IN THE AFRICAN AMERICAN AND LATINO ECONOMIC EXPERIENCE

The exceptional treatment of primary residential mortgages in bankruptcy presents a structural limit on the ability of distressed homebuyers to find relief in bankruptcy. What positive effect might modification in bankruptcy have on African Americans, Latinos, and other similarly-situated economically disenfranchised groups, particularly in terms of wealth acquisition and retention in the face of persistent discrimination? Before addressing that question, it is worth first describing the uniquely precarious economic position that African Americans and Latinos have occupied in terms of the acquisition and retention of wealth.

African Americans and Latinos are disenfranchised economically. These groups regularly experience discrimination and bias in the marketplace and face

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residential mortgage loan program which had a disparate impact on the basis of race and national origin, to invest \$1.1 million in a special financing program to increase the residential mortgage credit that the bank extends to qualified borrowers seeking loans of \$400,000 or less in California); Consent Order, *United States v. GFI Mortg. Bankers, Inc.*, No. 12-cv-2502-KBF (S.D.N.Y. Aug. 27, 2012) (requiring the defendant to pay \$3.5 million in compensation to approximately 600 African American and Hispanic GFI borrowers identified by the United States as paying more for a loan based on their race or national origin, and it requires GFI to pay the maximum \$55,000 civil penalty); Consent Order, *United States v. Wells Fargo Bank*, No. 12-cv-00361-RMC (D.D.C., Apr. 4, 2012) (requiring the defendant to provide \$59.3 million in compensation to African American and Hispanic retail subprime borrowers who might have qualified for prime loans from the retail channel but were nonetheless steered into subprime loans).

130. See, e.g., Consent Order, *United States v. SunTrust Mortg., Inc.*, No. 12-cv-00397-REP (E.D. Va. Sept. 14, 2012) (“Defendant denies all the allegations and claims of a pattern or practice of discrimination in violation of the FHA and the ECOA as set forth in the United States’ Complaint. Defendant asserts that at all times it conducted its lending in compliance with the letter and spirit of the fair lending laws and in a nondiscriminatory manner. Defendant maintains that any differences in pricing were attributable to legitimate, nondiscriminatory factors.”).

131. See Levitin, *supra* note 21, at 570.

uniquely challenging and persistent obstacles in their financial lives.<sup>132</sup> Specifically, persistent disparities in both income and wealth, factors significant in determining whether families will be able to manage economic hardship successfully, continue to plague African Americans and Latinos.<sup>133</sup> Income is important to manage debt burdens in real time, and wealth is important to both provide a buffer when income is interrupted and ensure the economic stability and well-being of future generations. Quite unsurprisingly, African Americans and Latinos must work harder to maintain financial health and to improve upon financial status.<sup>134</sup>

### A. *Income and Wealth Disparities*

#### 1. *Income*

Income plays a significant role in economic health, and yet disparities in income between whites and minorities and between men and women remain a constant. For example, Census data from 2010 showed that the median income was \$32,068 for African American households and \$37,759 for Latino households as compared to \$54,620 for non-Latino whites.<sup>135</sup> In 2013, the median income for each group rose to \$34,598, \$40,963, and \$58,270, respectively.<sup>136</sup> In other words, this income gap persists. The median household income for African Americans has remained at approximately 60% of the median household income for whites over the last 40 years.<sup>137</sup> Moreover, African Americans, Latinos, and other minorities suffered greater shocks in income during the economic recovery period of the Great

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132. See, e.g., Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods> (“Experts cite many reasons why blacks might face more [debt collection] lawsuits, foremost among them the immense gap in wealth between blacks and whites in the U.S. It’s a gap that extends back to the institution of slavery and, more recently, to twentieth century policies that promoted white homeownership while restricting it for blacks.”).

133. See Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL’Y 53, 57 (2006) (“Wealth is seen first as a personal safety net, or an unspecified amount of money that is stored away to cushion against the unexpected health crisis, job termination, legal difficulty, or repair of the family car.”).

134. See, e.g., THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 2* (2004) (“[F]amily inheritance and continuing racial discrimination in crucial areas like homeownership are reversing gains earned in schools and on jobs and making racial inequality worse . . . . [I]t is virtually impossible for people of color to earn their way to equal wealth through wages.”); Warren, *supra* note 12, at 1791 (“The disaggregated [bankruptcy] data reveal a disturbing trend for Hispanic and black families: as they work to make it into the middle class, as they stretch and struggle to buy their homes, they are not building up wealth and security at the same rate as their white counterparts. For Hispanics and for blacks, the data show that making it to the middle class is not enough to make them economically more stable.”).

135. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010*, at 8 (2011), <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

136. See *id.* at 5 (noting that only Hispanics saw an increase in real income between 2012 and 2013).

137. *A Widening of the Black–White Income Gap*, J. BLACKS HIGHER EDUC. (Sept. 28, 2011), <http://www.jbhe.com/2011/09/a-widening-of-the-black-white-income-gap/>.

Recession. In the three-year period between 2010 and 2013, the median income for nonwhite minority households dropped 9%, while the median income for non-Hispanic white households fell just 1%.<sup>138</sup> Moreover, comparable gains in income do not yield equal gains in wealth as between whites and minorities.<sup>139</sup> For example, based on a study of families at the respective wealth medians that took place over a 25-year period ending in 2009, whites realized an increase in wealth of \$5.19 for every \$1 increase to average income as compared to an increase of just 69 cents for every \$1 increase to average income for African Americans.<sup>140</sup>

## 2. Wealth

The story is grimmer yet with respect to wealth. Wealth plays an important role in providing a safety net in times of financial hardship that result from income interruption—whether from job loss, illness, or other unforeseeable circumstances<sup>141</sup>—and is arguably a better measure of financial well-being than income alone. But, the harsh reality is that African Americans and Latino Americans have had a hard time building and retaining wealth.<sup>142</sup> For African Americans specifically, this has been true since the antebellum days of being counted as a wealth-significant asset<sup>143</sup> to modern-day attempts to move into the ranks of the middle class.

For example, Thomas Shapiro has extensively studied the wealth gap between African Americans and whites. He has focused, in part, on the different starting points that the inheritance, or lack of inheritance, of familial wealth provides, in order to explain why the wealth gap has persisted along racial lines.<sup>144</sup> Using data from the Panel Study of Income Dynamics, adjusted for 1999 dollars, Shapiro reported that net parental wealth for the typical African American family was \$46,700, as compared to \$200,000 for the typical white family.<sup>145</sup> These “head-start assets,” Shapiro concluded, are significant in the persistence of the wealth gap

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138. See Kochhar et al., *supra* note 6 (analyzing Federal Reserve data).

139. See Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black–White Economic Divide*, BRANDEIS U. INST. ON ASSETS & SOC. POL’Y (2013), <http://iasp.brandeis.edu/pdfs/Author/Shapiro-thomas-m/racialwealthgapbrief.pdf>.

140. *Id.* at 4 (“The dramatic difference in wealth accumulation from similar income gains has its roots in long-standing patterns of discrimination in hiring, training, promoting, and access to benefits that have made it much harder for African Americans to save and build assets.”).

141. See MARIKO LIN CHANG, *SHORTCHANGED: WHY WOMEN HAVE LESS WEALTH AND WHAT CAN BE DONE ABOUT IT* 26 (2010); see generally Shapiro, *supra* note 133, at 57 (“Wealth is seen first as a personal safety net, or an unspecified amount of money that is stored away to cushion against the unexpected health crisis, job termination, legal difficulty, or repair of the family car.”).

142. See, e.g., Tami Luhby, *Hispanics’ Massive Wealth Gap*, CNN MONEY (July 10, 2014, 11:26 AM), <http://money.cnn.com/2014/07/10/news/economy/hispanics-wealth/>.

143. See EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 246 tbl.7.1 (2014) (noting that at one point in the mid-nineteenth century, slaves accounted for approximately 20% of the wealth held by Americans).

144. Shapiro, *supra* note 133, at 61.

145. *Id.* at 62–63.

because families generally pass this wealth down to their offspring.<sup>146</sup> This means that the starting point for African Americans is far behind the starting point of whites. Thus, Shapiro describes a “handing down of racial inequality” that continues to plague African American families as they attempt to find and maintain financial equilibrium and to enter and remain in the middle class.<sup>147</sup> More recently, Shapiro has observed that the total wealth gap between white families and African American families increased from \$85,000 in 1984 to \$236,500 by 2009.<sup>148</sup>

Moreover, recent accounts of the state of the wealth gap between marginalized groups and whites in the post-Great Recession economic recovery are far from encouraging.<sup>149</sup> In 2013, the median white household held \$141,900 in net worth, a figure approximately 13 times the median wealth of African American households, which held \$11,000 in net worth, and approximately 10 times that of Latino households, which held \$13,700 in net worth.<sup>150</sup> This difference represents the highest point in the wealth gap between whites and African Americans in almost 25 years.<sup>151</sup> Moreover, between 2005 and 2009, Latino Americans and African Americans lost more than half of their household wealth, 66% and 53% respectively, as compared to whites, who lost 16% of their net worth in the same time period.<sup>152</sup>

### ***B. Good Debt Gone Bad***

The nature of the debt that one carries is significant in terms of overall financial health, and debt is often characterized as falling into two basic, if overly simplified, categories: “good” debt and “bad” debt. Good debt is debt that tends to promote an increase in overall wealth and financial health over time. For example, mortgage debt and student loan debt are often considered good debts because both are “investment[s] that pay[] off over the whole life cycle,”<sup>153</sup> but credit card debt is often characterized as bad debt because it is associated with consumption of goods

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146. *Id.* at 63.

147. *Id.* at 67.

148. See Shapiro, *supra* note 139, at 1 (noting that the racial wealth gap appeared to be fueled by disparities in duration of homeownership, household income, unemployment rates, college degree attainment and inheritance, the availability of financial support from families or friends, and preexisting family wealth).

149. Tanzina Vega, *Minorities Fall Further Behind Whites in Wealth During Economic Recovery*, N.Y. TIMES, Dec. 12, 2014, at A11.

150. See Kochhar et al., *supra* note 6 (analyzing Federal Reserve data).

151. *Id.* at 3.

152. JAMES H. CARR ET AL., NAT'L ASS'N OF REAL ESTATE BROKERS, THE STATE OF BLACK HOUSING IN AMERICA 2013, at 4 (2013), [https://www.chapa.org/sites/default/files/State%20of%20Black%20Housing%20in%20American%20NAREB\\_final\\_080413.pdf](https://www.chapa.org/sites/default/files/State%20of%20Black%20Housing%20in%20American%20NAREB_final_080413.pdf).

153. See, e.g., CHANG, *supra* note 141, at 52 (“[M]ortgage debt is ‘good,’ or constructive, debt because it helps to build wealth over the long run” and “investing in one’s education could be considered a form of good debt because the investment is likely to pay off in terms of higher lifetime wages.”); Katherine Porter, *College Lessons: The Financial Risks of Dropping Out*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 85, 89 (2012) (“A person with a four-year degree is projected to earn one-third more over his or her life than a person without such a degree.”); Tamar Lewin, *Burden of College Loans on Graduates Grows*, N.Y. TIMES, Apr. 11, 2011, at A1.

without any resultant increase in wealth or income. For African Americans and Latinos, there is a significant challenge and risk in attempting to build wealth by incurring purportedly good debt. This good debt may go bad for reasons that are beyond the control of the borrower. Indeed, for African Americans, Latinos, and other similarly economically disenfranchised groups, the characterization of certain debts as good and others as bad may be too much of a simplification because even traditionally “good” debts may in fact be “bad” debts to the extent that those groups—in part for reasons beyond their control—do not end up realizing the supposed benefits of the good debt.<sup>154</sup>

For example, as noted earlier, African Americans and Latinos routinely pay more for their homes and for the mortgages secured by those homes.<sup>155</sup> Moreover, it is well documented that African Americans and women were disproportionately subjected to subprime mortgage products during the subprime crisis.<sup>156</sup> One study from the height of the subprime lending days revealed that African American women were 5.7% more likely to receive a subprime mortgage than African American men and 256% more likely to receive a subprime mortgage than white men.<sup>157</sup> Similarly, Latino women were 12.7% more likely to receive a subprime mortgage than Latino men and 177% more likely to receive a subprime mortgage than white men.<sup>158</sup>

Civil actions also suggest the extent to which discriminatory practices might convert an otherwise “good” debt into a “bad” debt from the outset. This evidence from the subprime mortgage crisis—in which even major banks were, at worst, bold enough to support and encourage discriminatory practices amongst rank and file representatives and, at best, indifferent to those practices<sup>159</sup>—shows the degree to which the nation’s economic system is rife with practices that impose economic hardship on members of minority communities. These practices have a

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154. Cf. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 795 (2007) (noting that in the context of government assistance programs, “[r]ace and gender influence potential claimants’ ability to be considered ‘deserving’ because they are victims of events beyond their control”).

155. See Dickerson, *supra* note 119, at 641; see also Shapiro, *supra* note 133, at 67.

156. See, e.g., ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED’N OF AM., WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET (2006), <http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf>; Skeel, *supra* note 127, at 1722 (“[A] disproportionate number of black borrowers wind up with subprime loans, even when they would seem to qualify for more attractive mortgages.”); Warren, *supra* note 12, at 1798 (“The data from the bankruptcy courts support the inference that subprime lending robs middle class Hispanic and black families of their financial security. Unlike white homeowners who build up equity and make themselves more financially secure, a disproportionate number of nonwhite homeowners are collapsing financially.”); John Leland, *Baltimore Finds Subprime Crisis Snags Women*, N.Y. TIMES (Jan. 15, 2008), <http://www.nytimes.com/2008/01/15/us/15mortgage.html?pagewanted=all>.

157. FISHBEIN & WOODALL, *supra* note 156, at 4.

158. *Id.* White women were 25.8% more likely to receive a subprime mortgage than white men. *Id.*

159. See Mui, *supra* note 122 (“Federal investigators said senior Wells Fargo officials knew about those practices but did little to stop them.”).

palpable and painful economic impact. Then-Professor Elizabeth Warren described the actual costs associated with subprime mortgage lending as “staggering,”<sup>160</sup> writing:

For example, in 2001, when standard mortgage loans were in the 6.5 percent range, Citibank’s average mortgage rate (which included both subprime and traditional mortgages) was 15.6 percent. To put that in perspective, a family buying a \$175,000 home with a subprime loan at 15.6 percent would pay an extra \$420,000 during the 30-year life of the mortgage—that is, over and above the payments due on a prime mortgage. Had the family gotten a traditional mortgage instead, it would have been able to put two children through college, purchase half a dozen new cars, and put aside money for retirement.<sup>161</sup>

Indeed, the use of the term “staggering” as a descriptor of the aftermath is not hyperbole. The foreclosure crisis hit predominantly African American and Latino communities particularly hard.<sup>162</sup> One study of underwater mortgages revealed that 71 of the top 100 cities with the most underwater mortgages had populations comprised of more than 40% African American and Latino residents.<sup>163</sup> Another study concluded that with respect to foreclosures completed between 2007 and 2009, African American and Latino borrowers were more than 70% more likely to lose their home in foreclosure than were white borrowers.<sup>164</sup> Moreover, higher-income African Americans were more than 80% more likely to lose their homes to foreclosure than similarly situated whites,<sup>165</sup> which suggests that upwardly mobile middle-class African Americans with perhaps some wealth to protect were economically devastated by the mortgage crisis. Thus, to the extent that African Americans and Latinos have been subjected to mortgage-related predatory lending, they have experienced significant disadvantages in terms of their overall economic health and advancement.

Economically disenfranchised groups have been subjected to discrimination in other types of secured credit.<sup>166</sup> For example, Ian Ayres and Peter Siegelman famously studied price biases in car sales and reported that African Americans and women were routinely charged higher prices for cars than white

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160. *Id.*

161. Warren, *supra* note 12, at 1792.

162. See Levitin, *supra* note 21, at 570 (“[F]oreclosures have a racially disparate impact because African Americans invest a higher portion of their wealth in their homes and are also more likely than financially similar whites to have subprime loans.”); Renae Merle, *Minorities Hit Harder by Foreclosure Crisis*, WASH. POST (June 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/18/AR2010061802885.html>.

163. DREIER ET AL., *supra* note 3, at 6.

164. *Id.* at 9; CARR ET AL., *supra* note 152, at 2.

165. See Merle, *supra* note 162.

166. See, e.g., Dickerson, *supra* note 119, at 638 (“[B]lacks are often unfavorably steered when they participate in routine commercial transactions.”).

men.<sup>167</sup> Another study of more than 300,000 car loans revealed that, across 33 states, African Americans paid more for cars than whites, regardless of their creditworthiness.<sup>168</sup> Furthermore, African Americans were also twice as likely as white buyers to be charged a dealer markup.<sup>169</sup> The CFPB reported that these types of race-based disparities in interest rates and pricing persist in the present day notwithstanding comparable creditworthiness as between African American, Asian American, and Latino American borrowers on the one hand and white borrowers on the other.<sup>170</sup> Indeed, in 2013, the CFPB and the DOJ entered into the largest auto loan discrimination settlement with Ally Bank to settle claims that the lender charged more than 235,000 minority borrowers higher interest rates.<sup>171</sup> Similarly, the DOJ and the CFPB entered into an auto loan discrimination settlement with American Honda Finance Corporation to settle claims that the lender “permitted dealers to charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin.”<sup>172</sup>

In a separate study, the Center for Responsible Lending further noted that attempts to negotiate and comparison shop did not result in better interest rates for African American and Latino borrowers, who were subject to higher interest rates than similarly situated white buyers who did not attempt to negotiate at all.<sup>173</sup> Instead, dealers were more likely to misrepresent to African American and Latino car buyers that the offered rate was the best available rate and that added options were mandatory add-ons.<sup>174</sup> There was also a correlation between this type of dealer misconduct and car loan delinquency.<sup>175</sup> In simple terms, auto loan discrimination has resulted in higher economic burdens on minority borrowers, rendering auto loan debt a particularly bad type of debt for these borrowers.

Educational debt is another type of purportedly good debt because getting an education is often perceived as an investment in the future. Once upon a time,

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167. Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 319 (1995).

168. See Diana B. Henriques, *Review of Nissan Car Loans Finds That Blacks Pay More*, N.Y. TIMES (July 4, 2001), <http://www.nytimes.com/2001/07/04/us/review-of-nissan-car-loans-finds-that-blacks-pay-more.html?pagewanted=1>.

169. *Id.*

170. See Rachel Abrams, *Dealer Fees for Arranging Car Loans Are Drawing Scrutiny from U.S.*, N.Y. TIMES (Nov. 22, 2013, 11:08 AM), <http://dealbook.nytimes.com/2013/11/22/scrutiny-over-disparity-in-loan-fees-at-auto-dealerships/>.

171. See Press Release, CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing (Dec. 20, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/>.

172. See Consent Order, *In re Am. Honda Fin. Corp.*, No. 2015-CFPB-0014 (July 14, 2015), [http://files.consumerfinance.gov/f/201507\\_cfpb\\_consent\\_order\\_honda.pdf](http://files.consumerfinance.gov/f/201507_cfpb_consent_order_honda.pdf).

173. See DELVIN DAVIS, CTR. FOR RESPONSIBLE LENDING, *NON-NEGOTIABLE: NEGOTIATION DOESN'T HELP AFRICAN AMERICANS AND LATINOS ON DEALER-FINANCED CAR LOANS* (2014), <http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/CRL-Auto-Non-Neg-Report.pdf>.

174. *Id.* at 11.

175. *Id.* at 13.

earning a college degree was thought to place an individual borrower in a better position in terms of future financial outlook in the form of increased earning potential. Yet, the current student loan debt crisis threatens the validity of this paradigm. For African Americans and Latinos, debt incurred in the course of earning a college degree is even less likely to be good debt due to disparities in economic experiences. A recent study by the Federal Reserve Bank of St. Louis concluded that “education does not . . . protect the wealth of all racial and ethnic groups equally.”<sup>176</sup> Instead:

Hispanic and black families headed by someone with a four-year college degree . . . typically fared significantly worse than Hispanic and black families without college degrees [unlike white and Asian families]. This was true both during the recent turbulent period (2007-2013) as well as during a two-decade span ending in 2013 (the most recent data available).<sup>177</sup>

In addition, among college graduates, African Americans are more likely to carry student loan debt than whites and tend to borrow more money to finance their educations.<sup>178</sup> Eighty-one percent of African American college graduates borrowed money to finance their degree, as compared to 63% of white and Latino college graduates.<sup>179</sup> Because African Americans make less money after receiving a college degree than whites and must contend with greater amounts of student debt, they bear a heavier debt burden.<sup>180</sup> From this perspective, the student loan debt becomes less “good” and more “bad.”

For African Americans, bankruptcy data reveals a college degree may not bring the financial protection for which it has been lauded.<sup>181</sup> Data from the 2007 Consumer Bankruptcy Project (“CBP”) has shown that although as a general matter college graduates are less likely to file for bankruptcy than their counterparts in the general population without a college degree, African Americans in the 2007 sample were just as likely to have a college degree as African Americans in the general population.<sup>182</sup> In light of this data, attaining a bachelor’s degree may not afford the

176. William R. Emmons & Bryan J. Noeth, *Why Didn’t Higher Education Protect Hispanic and Black Wealth?*, IN THE BALANCE, August 2015, at 1, 1, [https://www.stlouisfed.org/~media/Publications/In%20the%20Balance/Images/Issue\\_12/ITB\\_August\\_2015.pdf](https://www.stlouisfed.org/~media/Publications/In%20the%20Balance/Images/Issue_12/ITB_August_2015.pdf).

177. *Id.*

178. See Mark Huelsman, *The Debt Divide: The Racial and Class Bias Behind the “New Normal” of Student Borrowing*, DEMOS (May 19, 2015), <http://www.demos.org/publication/debt-divide-racial-and-class-bias-behind-new-normal-student-borrowing>.

179. *Id.*

180. CHANG, *supra* note 141, at 54; see also FISHBEIN & WOODALL, *supra* note 156, at 5 (“[S]ubprime and high-cost subprime loans make monthly payments more costly and increase the lifetime interest payments for borrowers.”); Abbye Atkinson, *Race, Educational Loans and Bankruptcy*, 16 MICH. J. RACE & L. 1, 10–12 (2010).

181. See, e.g., Porter, *supra* note 153, at 88, 97 (noting that people who have earned a college degree are underrepresented in bankruptcy and that college debt is “good” debt “only if the borrower obtains a four-year degree”).

182. See *id.* at 87.

same financial protections for African Americans.<sup>183</sup> This is because African Americans must contend with certain documented social inequalities, including income disparities, nontraditional familial composition, and disparities in familial wealth, which tend to neutralize the positive financial effects of the degree.<sup>184</sup> For African Americans then, student loan debt incurred in the course of earning a bachelor's degree may be "bad" debt to the extent that the borrower does not realize the financial benefits traditionally associated with increased education, especially in hard financial times. Indeed, a recent study suggests that African Americans with college degrees are worse off financially during a financial crisis.<sup>185</sup> Notwithstanding these facts, and even though education stands as one of the primary pillars of upward mobility, the Code singles education debt out for exceptionally limited and harsh treatment, similar to homeownership.<sup>186</sup> Student loans are practically nondischargeable insofar as they may not be discharged absent a finding of undue hardship—a standard which is hard to meet.<sup>187</sup>

Ultimately, even when African Americans, Latinos, and other similarly disenfranchised groups invest in debt designed to build and maintain wealth ("good debt"), these groups struggle to do so. Challenges in homeownership specifically play a large role in their struggle to build and maintain wealth. The ongoing financial crisis amongst these groups highlights the reality that housing-related barriers to wealth-building remain long after *de jure* housing discrimination.

#### IV. MODIFYING MORTGAGE DISCRIMINATION

African Americans, Latinos, and other economically disenfranchised groups continue to face unique challenges in acquiring and retaining wealth specifically in the context of homeownership, given persistent mortgage discrimination. This Part explains why modification in consumer bankruptcy is an appropriate second-best means of addressing persistent mortgage discrimination and supporting wealth retention and acquisition amongst economically disenfranchised communities.<sup>188</sup>

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183. See Atkinson, *supra* note 180.

184. *Id.* at 27.

185. See Patricia Cohen, *Racial Wealth Gap Persists Despite Degree, Study Says*, N.Y. TIMES, Aug. 16, 2015, at B1 ("From 1992 to 2013, the median net worth of blacks who finished college dropped nearly 56% (adjusted for inflation). By comparison, the median net worth of whites with college degrees rose about 86% over the same period, which included three recessions—including the severe downturn of 2007 through 2009, with its devastating effect on home prices in many parts of the country. Asian graduates did even better, gaining nearly 90 percent.").

186. See 11 U.S.C. § 523(a)(8) (2012) (limiting the discharge of student loans).

187. See generally Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 428 (2005).

188. *But see* Whitford, *supra* note 22, at 403 (suggesting that debtors can address consumer claims in bankruptcy but noting that "reliance on bankruptcy as a consumer protection device does not send the same message to merchants as does effective relief obtained outside bankruptcy").

### A. *The Affirmative Case for Modification*

#### 1. *Promoting Risk*

Homeownership is generally idealized as the primary means by which these communities might build and maintain wealth,<sup>189</sup> and it certainly has been of singular significance for African Americans and Latinos,<sup>190</sup> who are more likely to carry wealth in their home.<sup>191</sup> Yet, as a historical matter, both African Americans and Latinos have suffered at the hands of federal housing policies that supported the growth in white homeownership and wealth-building during the mid-twentieth century, while stunting similar growth amongst minorities in segregated communities.<sup>192</sup>

For example, the FHA played an active role in facilitating homeownership among middle class white Americans. Established in 1934 in the midst of the Great Depression, the FHA made home buying a reality for millions of white families by insuring lenders against losses previously associated with home purchase lending. The FHA also revolutionized home lending by establishing manageable down payments and extending the standard term of home mortgage loans from 5 years to 15 or more years.<sup>193</sup> These changes allowed many middle-class white Americans to buy homes, and white homeownership soared during the twentieth century.<sup>194</sup>

However, the FHA also imposed race-based strict lending standards, which resulted in the practice of “redlining,” in which areas that were deemed hazardous for lending purposes were marked in red. Redlining effectively cut minority

189. Dickerson, *supra* note 1, at 844.

190. *But see id.* (questioning whether homeownership is a beneficial goal for minorities).

191. See DALTON CONLEY, BEING BLACK, LIVING IN THE RED 57–60 (1999); ATIF MIAN & AMIR SUFI, HOUSE OF DEBT: HOW THEY (AND YOU) CAUSED THE GREAT RECESSION, AND HOW WE CAN PREVENT IT FROM HAPPENING AGAIN (2014); Levitin, *supra* note 21, at 570; Shapiro et al., *supra* note 139, at 3.

192. See Dickerson, *supra* note 1, at 854 (“The road to homeownership has never been smooth for blacks and Latinos and the U.S. government itself is responsible for placing obstacles in their way.”); Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 813 (1995) (“The question of whether lending discrimination exists today must also be put in the broader context of pervasive historical discrimination and information about continuing discrimination in related areas.”); see also Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 551 (2014) (“As homeownership became the principal way for Americans to build wealth, the Federal Housing Administration systematically worked to deny this opportunity to African Americans, resulting in a lasting wealth gap between African Americans and whites, which persists today.”).

193. Dickerson, *supra* note 1, at 854–55.

194. See *id.*; see also *Historical Census of Housing Tables*, U. S. CENSUS BUREAU (last modified Oct. 31, 2011), <https://www.census.gov/hhes/www/housing/census/historic/owner.html>.

communities off from access to FHA-backed loans,<sup>195</sup> leaving them vulnerable to predatory lenders who took advantage of their limited borrowing capability.<sup>196</sup> Federally supported redlining “legitimized housing discrimination” and functioned to entrench segregation in inner-city neighborhoods, concentrating poverty within minority neighborhoods in the process.<sup>197</sup> FHA policies, along with racially restrictive covenants and other forms of state-supported housing discrimination, worked to limit the home purchasing options of African Americans, Latinos, and other minorities, and in turn limited the wealth acquisition and retention in those communities.<sup>198</sup> By the time that civil rights legislation formally prohibited discriminatory home-buying policies,<sup>199</sup> the damage was done. In other words, “[t]he myriad obstacles blacks and Latinos faced in housing and lending markets resulted in their homeownership rates in the 1950s and 1960s significantly lagging behind white homeownership rates.”<sup>200</sup>

In stark contrast to its mid-twentieth century posture, current federal housing policy recognizes homeownership as a primary goal for all Americans, and, for at least the last 20 years, has encouraged homeownership—attendant risks notwithstanding—among economically disenfranchised communities as a means of wealth-building.<sup>201</sup> Accordingly, Democratic and Republican administrations alike have sought to make entry into the mortgage market feasible for all types of

195. Dickerson, *supra* note 1, at 854 (“The road to homeownership has never been smooth for blacks and Latinos and the U.S. government itself is responsible for placing obstacles in their way.”).

196. See Swire, *supra* note 192, at 801. Swire describes the “installment land contract” in which “the purchaser typically made monthly payments for a long term but did not build up any equity with these payments and did not receive title until all payments were complete.” Swire notes that this practice was common in black neighborhoods and characterizes this “different lending pattern” as “helpful” to black purchasers who were shut out of participating in the conventional mortgage market. *But see* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>. Coates describes the same practice in Chicago and points out its predatory nature: “In a contract sale, the seller kept the deed until the contract was paid in full—and, unlike with a normal mortgage, [the borrower] would acquire no equity in the meantime. If he missed a single payment, he would immediately forfeit his [] down payment, all his monthly payments, and the property itself.” *Id.*

197. Dickerson, *supra* note 1, at 855.

198. *Id.* (“In addition to increasing the costs to buy a home in a nonwhite neighborhood, the United States imposed or supported policies that kept blacks out of white neighborhoods. White homeowners used restrictive housing covenants to maintain racially homogeneous neighborhoods.”); Janelle Bouie, *The Crisis in Black Homeownership*, SLATE (July 24, 2014, 6:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/07/black\\_homeownership\\_how\\_the\\_recession\\_turned\\_owners\\_into\\_renters\\_and\\_obliterated.html](http://www.slate.com/articles/news_and_politics/politics/2014/07/black_homeownership_how_the_recession_turned_owners_into_renters_and_obliterated.html).

199. For example, the Fair Housing Act of 1968 prohibited housing market discrimination on the basis of race. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 83 (codified as amended at 42 U.S.C. § 3604 (2012)).

200. Dickerson, *supra* note 1, at 857; see also Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101 (2006).

201. Dickerson, *supra* note 1, at 850–51.

borrowers by stamping out mortgage discrimination, but often allowing entry on unjustifiably unfavorable terms.<sup>202</sup>

For example, the Clinton Administration promulgated its National Homeownership Strategy, one aspect of which was to encourage increased minority homeownership.<sup>203</sup> Then-Secretary of Housing and Urban Development, Henry Cisneros, opined that “[t]he stark polarization of urban communities—isolating the poor from the well-off, the unemployed from those who work, and minorities from whites—frays the very fabric of our civic culture. It threatens our democratic traditions. It threatens the nation’s long-term prosperity.”<sup>204</sup> The Bush Administration similarly promoted an “ownership society” and specifically supported expanded homeownership for historically disenfranchised communities through the American Dream Downpayment Act of 2003.<sup>205</sup> This legislation created subsidies for low-income families and endorsed policies such as the “zero-down-payment-initiative.”<sup>206</sup> Under the Obama Administration, the Department of Housing and Urban Development (“HUD”) has declared that it “is an avid supporter of increased minority homeownership,” and that it “continues to promote efforts to increase the number of minority and low to moderate-income families working to achieve homeownership.”<sup>207</sup>

This focus on homeownership among economically disenfranchised groups implicitly encourages risk-taking given some of the harsh realities that these groups face, including the ever-present threat of costly discrimination. These groups must also bear other risks inherent in federally-supported pro-homeownership policies. For example, FHA-insured loans require a minimum 3.5% down payment, which is helpful for prospective borrowers for whom the more traditional 20% down payment is challenging.<sup>208</sup> Yet, this benefit is accompanied by significant risk to the borrower in the form of increased costs directed toward mitigating lenders’ risks. Borrowers of FHA-backed loans must pay an upfront mortgage premium that goes into the FHA’s mortgage insurance fund.<sup>209</sup> In addition to mortgage payments,

202. *Id.* at 859 (“[B]lack and Latinos received a disproportionate share of the nontraditional, high-cost loans the mortgage industry innovated to make home buying more affordable.”).

203. *Id.* at 857 (noting that between 1994 and 2000, 2.4 million African Americans and Latinos became new homeowners).

204. Henry G. Cisneros, *The State of American Cities*, 16 ST. LOUIS U. PUB. L. REV. 251, 252 (1997).

205. See, e.g., Press Release, White House, President Bush Signs American Dream Downpayment Act of 2003 (Dec. 16, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031216-9.html>.

206. Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 30 (2009).

207. See *Minority Homeownership*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/library/minorityhome](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/library/minorityhome) (last visited Nov. 20, 2015).

208. See Jason R. Gold, *Race Gap on Conventional Loans*, N.Y. TIMES, Jan. 30, 2014, at RE8 (“Higher down-payment requirements have had the biggest impact on minority applicants for conventional mortgages . . . [Minority groups] just don’t have the savings nonminority groups have.”).

209. See *Single Family Upfront Mortgage Insurance Premium (MIP)*, HUD.GOV,

homeowners must also pay monthly mortgage insurance premiums that insure the lender against the risk of default.<sup>210</sup> These payments last the life of the FHA loan, regardless of whether the loan-to-value ratio improves to less than the traditional 80%.<sup>211</sup>

However, while FHA lenders' risks are mitigated by the borrowers themselves,<sup>212</sup> the FHA lending programs do not similarly insure FHA borrowers against the risk of default. Thus, while providing greater opportunity to economically disenfranchised groups who were previously excluded from ownership, FHA lending also requires these borrowers to insure the lender against loss, leaving borrowers who put down only 3.5% to bear the risk of the loan falling underwater.<sup>213</sup> But, absent taking this type of arguably irrational risk, many African Americans, Latinos, and similarly situated groups, cannot step into homeownership. Yet, the alternative is a tacit endorsement of the existing systemic economic disparity with little prospect for sustained and progressive improvements.

## 2. Activating the Safety Net

Access to bankruptcy's safety net is appropriate as a second-best solution given the challenges that direct legislation has faced in hemming in lending discrimination. In this regard, bankruptcy law should serve as a safety net for those buyers for whom direct regulation fails. Moreover, asymmetries in information mean that it is difficult to protect consumers because consumers might not know their rights or be able to afford the costs of enforcing those rights. Indeed, the latter is even more likely when the victims are in financial distress. In these circumstances, consumer bankruptcy provides a means by which debtor homeowners can vindicate their rights as against a discriminatory lender with relatively low costs.<sup>214</sup> Given pervasive discrimination and bias that makes mortgages more expensive, and so, less manageable for these buyers, a remedy, or safety net, in bankruptcy is consistent with these goals.

Bankruptcy scholars have taken note of the potential for bankruptcy law to assist minority groups with the unique economic challenges they face. Bankruptcy has been described as "a place of escape" for the middle class, including for African

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[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/comp/premiums/ufmain](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/comp/premiums/ufmain) (last visited Nov. 7, 2015).

210. *Id.* (noting that FHA loans are costly because mortgage insurance premiums are higher than premiums on conventional loans).

211. See Letter from Carol J. Galante, Fed. Hous. Comm'r, U.S. Dep't of Hous. & Urban Dev., to All Approved Mortgagees (Jan. 31, 2013), <http://portal.hud.gov/hudportal/documents/huddoc?id=13-04ml.pdf>.

212. The FHA proudly identifies itself as "the only government agency that operates entirely from its self-generated income and costs the taxpayers nothing." *The Federal Housing Administration (FHA)*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/fhahistory](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory) (last visited Sept. 23, 2015).

213. See MIAN & SUFI, *supra* note 191, at 17–30 (noting the particular harshness of secured debt in part because "[t]he fundamental feature of debt is that the borrower must bear the first losses associated with a decline in asset prices").

214. See, e.g., Whitford, *supra* note 22, at 403.

American and Latino members of the middle class.<sup>215</sup> Recognizing the more tenuous economic position that African American members of the middle class tend to occupy, then-Professor Elizabeth Warren noted that “black homeowners face sharply increased risks of filing for bankruptcy,” and that African American families in bankruptcy are disproportionately middle class.<sup>216</sup> She further noted that the problems that send families into consumer bankruptcy are experienced more acutely by African Americans and Latinos, which in turn sends them into bankruptcy in disproportionate numbers.<sup>217</sup> While consumer bankruptcy may be a second-best means of addressing systemic wealth disparities related to abusive lending practices, discrimination, and bias in home buying—that is, as compared to direct regulation that targets abusive lending practices, discrimination, and bias in home buying—it can provide a platform to help financially distressed homeowners save their homes and salvage their hopes for building wealth through homeownership.

Bankruptcy modification as a remedy against discrimination is also consistent with Professor William C. Whitford’s suggestion that consumer bankruptcy is “an efficient forum” for debtors to challenge secured claims on the basis of “contract or consumer protection legislation.”<sup>218</sup> Professor Whitford also argues that there are other advantages in debtors seeking remedies to consumer-protection-based claims in bankruptcy, including that bankruptcy courts are less likely to be subject to a backlog of cases, and so, debtors may have their rights adjudicated sooner.<sup>219</sup> Professors John Eggum, Katherine Porter, and Tara Twomey similarly suggest that modification of home mortgages might be achieved more efficiently in consumer bankruptcy.<sup>220</sup> For example, they note that bankruptcy provides a settled legal means to force a modification, whereas any legislatively forced modification would likely be subject to many legal challenges.<sup>221</sup>

Bankruptcy provides an opportunity to reach a population that, as a practical matter, relies disproportionately on bankruptcy to address financial distress. For example, bankruptcy data reveals that African American and Latinos in financial distress disproportionately turn to bankruptcy to deal with their economic struggles.<sup>222</sup> Data for the CBP shows that Latinos are nearly twice as likely to file for bankruptcy as whites, and African Americans are three times more likely to file than whites.<sup>223</sup> Moreover, although as a general matter bankruptcy filers are less likely to be homeowners than the general population, African American filers

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215. See Warren, *supra* note 12, at 1779.

216. *Id.*

217. *Id.* at 1786–87 (“[T]he bankruptcy filing data tell a tale about an American middle class in which financial risks are disproportionately borne by different subgroups.”).

218. Whitford, *supra* note 22, at 402.

219. *Id.*

220. See Eggum et al., *supra* note 17, at 1164–67.

221. *Id.* at 1166–67.

222. See Melissa B. Jacoby et al., *In or Out of Mortgage Trouble? A Study of Bankrupt Homeowners*, 85 AM. BANKR. L.J. 291, 296 (2011).

223. See Warren, *supra* note 12, at 1779.

are more likely to be homeowners than African Americans in the general population.<sup>224</sup>

Bankruptcy law also has expressive qualities. Bankruptcy rights and duties lurk in the shadows of every commercial and consumer contract and may have real effects in the aggregate on contracting in the country. From this perspective, even though the vast majority of commercial actors and consumers never file for bankruptcy, the set of rights and duties accorded to bankruptcy petitioners and creditors alike has the potential to impact on a large scale what happens outside of bankruptcy law.<sup>225</sup> In that regard, debtor-friendly laws express support not only for the proposition that we value a middle class that is not mired in debt, but that we acknowledge the unique risks that economically disenfranchised groups have to take in order to ascend into the ranks of the middle class.<sup>226</sup>

From this perspective, the existing anti-modification provision has an expressive quality that is inconsistent with the inherently risky behavior that federal homeownership policy promotes in the name of wealth building and closing the racially defined wealth gap. While the latter encourages, and indeed sponsors, economically disenfranchised and vulnerable groups into homeownership, signaling that homeownership is a worthy pursuit, bankruptcy anti-modification “concentrates the risks [of secured debt] on those least able to bear it,” even when ordinary risks related to homeownership, such as asset decline, are exacerbated by illegal lender and broker activity.<sup>227</sup> Thus, anti-modification signals that there will be no relief for economically disenfranchised Americans in bankruptcy even when lender behavior leads already-vulnerable groups down the path to wealth decimation. Indeed, it bears repeating that African American and Latino families lost more than 50% of their wealth as a result of the rampant discrimination that preceded, and continued

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224. See, e.g., Jacoby et al., *supra* note 222, at 296–97; Warren, *supra* note 12, at 1791 (noting that homeownership did not appear to provide economic stability for Hispanic bankruptcy filers, who were just as likely to be homeowners as to be renters); Robert Lawless, *The Stark Facts of Race and Bankruptcy*, CREDIT SLIPS BLOG (May 3, 2011, 9:36 AM), <http://www.creditslips.org/creditslips/2011/05/the-stark-facts-of-race-and-bankruptcy.html> (“An African American homeowner in a place with a high chapter 13 rate like Georgia or a low chapter 13 rate like Iowa is still twice as likely to file chapter 13 than a white homeowner in the same locale.”).

225. See, e.g., Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 141–42 (2005) (“Debtors who do not actually file for bankruptcy may still get indirect benefits from bankruptcy law, especially if they want to negotiate with their creditors and seek forbearance from them . . . . It may be in a creditor’s interest to adjust or even write off a debtor’s obligations regardless of bankruptcy rules; a creditor’s inclination to do so is partially a product of the debtor’s ability to have his or her obligations discharged in bankruptcy.”).

226. Cf. Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 253–54 (2002) (noting that one perverse consequence of a bright-line means tests—ultimately added as a part of the 2005 amendments—was the sending of a “message” that debtors whose financial troubles were borne of honest yet unfortunate behavior might be forced to repay their debts in a chapter 13 while “irresponsible spend[ers] and borrow[ers]” might be eligible for better treatment under chapter 7).

227. See MIAN & SUFI, *supra* note 191, at 30.

throughout, the mortgage crisis.<sup>228</sup> Many also lost their home, a value separate and apart from the pure financial benefit associated with the home.<sup>229</sup> Given the extreme nature of these outcomes, modification may be appropriate as a remedy against the discriminatory lending practices that helped to bring about these outcomes.

### *B. Managing Risk and Incentives*

The debtor's right to a bankruptcy discharge is non-negotiable,<sup>230</sup> and courts will not enforce contractual provisions in which the debtor agrees to forego her right to a discharge.<sup>231</sup> In that regard, bankruptcy law serves as mandatory social insurance against unmanageable debt arising from future financial crisis,<sup>232</sup> and provides a publicly-subsidized "set of mandatory rules designed to reallocate at least some of the risk of financial distress from debtors to their unsecured creditors."<sup>233</sup> In this light, concerns about moral hazard have often animated the debate about the contours of bankruptcy law more generally.<sup>234</sup> Those who have advocated for limited debtor bankruptcy rights worry that debtor-favorable bankruptcy will incentivize consumers to make risky financial decisions—the consequences of which are borne by others.<sup>235</sup>

With respect to anti-modification, there are concerns that allowing a debtor to modify her home mortgage in bankruptcy engenders the threat of increased moral hazard on the borrower's side.<sup>236</sup> In other words, some borrowers might be tempted to take risks that they might otherwise not take if they had to bear the costs of

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228. See Kochhar et al., *supra* note 6.

229. See, e.g., Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 441 (2008) ("While home-owners may be less mobile, generally they enjoy greater self-esteem, personal satisfaction, and improved health. Additionally, homes are thought to provide a better overall environment for child-rearing, greater neighborhood and community stability, and more political involvement and participation in local voluntary organizations by owners.").

230. See, e.g., Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 587 (2000).

231. *Id.* (suggesting that bankruptcy laws should be just a default set of rules that debtors might contract out of to maximize *ex ante* surplus).

232. See Feibelman, *supra* note 225, at 141–42 (noting that bankruptcy law "roughly satisfies the conventional definition of social insurance"); see also Adler et al., *supra* note 230, at 587 (noting that "consumer bankruptcy is best justified as partial wage insurance" because individuals may not otherwise contract for this sort of insurance).

233. Feibelman, *supra* note 225, at 142.

234. See, e.g., ADLER ET AL., *supra* note 55, at 560–61; Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1466 (2005) ("[T]he option of bankruptcy creates a moral hazard problem and increases the risk associated with consumer lending, leading creditors to charge higher interest rates, demand collateral or a larger down payment, increase monitoring to prevent default, or increase penalties for risky behavior such as late payments. At least some of the costs of the consumer bankruptcy system thus are borne by all borrowers as a group; other costs are borne by lenders, and still other costs are social deadweight loss.").

235. See, e.g., Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 226 ("Contrary to the mantra of those who oppose bankruptcy reform, we all really do pay for the large number of bankruptcies.").

236. See Feibelman, *supra* note 225, at 166–67.

potential failure themselves.<sup>237</sup> Section 1322(b)(2) might be understood then as a means of addressing this moral hazard problem because it reallocates the risk of asset depreciation in the home-buying market squarely on the borrower.

For economically disenfranchised borrowers, however, anti-modification also places on their shoulders the significant risk that discriminatory lending practices and other structural inequities will lead to an underwater mortgage or other mortgage-related financial hardships. Given their relative economic positions, members of these groups have to take greater risks to make gains. Indeed, just as all poverty is not of the same kind,<sup>238</sup> optimal risk-taking is relative, and one person's gamble is another person's necessity.<sup>239</sup> For example, the African American existence has been fraught with risk such that simple endeavors, such as learning to read<sup>240</sup> or falling in love,<sup>241</sup> have historically involved a level of risk, even risk of death, that some might deem to be irrational. Yet, this risk-taking has been essential to engaging in a full life that is free from undue limitation. Even though African Americans and similarly disenfranchised groups have undoubtedly made some progress, seemingly sub-optimal risk-taking is inherent in the African American experience and the Latino experience alike, vis-à-vis wealth acquisition and retention. As explained above, acts such as going to college, buying a car, and buying a home are all risky economic undertakings in light of the expected premium charged for racial identity and the differences in benefits that disenfranchised

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237. See, e.g., Feibelman, *supra* note 225, at 143 (“[T]he availability of a bankruptcy discharge may reduce individuals’ incentives to restrain consumption in advance of financial misfortune or their incentives to be disciplined in absorbing losses in the wake of such misfortunes.”); Jeffrey S. Lehman, *Social Irresponsibility, Actuarial Assumptions, and Wealth Redistribution: Lessons About Public Policy from a Prepaid Tuition Program*, 88 MICH. L. REV. 1035, 1037–38 (1990) (“[T]o the extent individuals are psychologically estranged from those who must ultimately bear the costs of their actions, they may do things they would not do if they had to bear the costs themselves.”).

238. See Coates, *supra* note 196 (“Negro poverty is a special, and particularly destructive, form of American poverty.”).

239. See ADLER ET AL., *supra* note 55, at 560 (describing the moral hazard problem in terms of gambling in Las Vegas, and noting that “[o]nce you have such a policy, you will gamble more recklessly than you would otherwise”); see also Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 249 (2006) (speculating that sub-optimal borrowing might result from a lack of cost information or from “cognitive or motivational problem[s], such as impulsiveness”).

240. See, e.g., *South Carolina Act of 1740*, in THE STATUTES AT LARGE OF SOUTH CAROLINA 397 (David J. McCord ed., 1840), <http://archive.org/details/statutesatlarge07edit> (prohibiting slave education).

241. See Darlene Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307 (2006) (“As personalty, slaves lacked the capacity to enter into any form of marital union recognized necessarily or legally by the plantation masters, the government, or the judiciary.”); see also WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, & ILLUSTRATIVE FACTS 90 (1853) (“The slave has no rights. Of course, he or she cannot have the rights of a husband, a wife. The slave is a chattel, and chattels do not marry. ‘The slave is not ranked among sentient beings, but among things;’ and things are not married.”); *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (listing states with then-current anti-miscegenation laws).

minorities can expect. Yet, these groups continue to “gamble” because a community without increased educational achievement, cars to transport families to jobs and schools, and homes to stabilize communities and families only entrenches the current disparities perceptible along racial and gender lines and supports the social inertia pervasive in American society.

Moreover, modern conceptions of the social mobility of minorities implicitly recognize and encourage arguably sub-optimal risk-taking. For example, in *Grutter v. Bollinger*, Justice O’Connor famously opined that she expected that within a space of 25 years there would be no need for affirmative action programs to assist marginalized communities to realize greater educational opportunities.<sup>242</sup> Implicit in Justice O’Connor’s statements in *Grutter* is an expectation that African Americans should be able to overcome the marginalization and disenfranchisement engendered by 250-plus years of slavery and legalized discrimination in a fraction of that time.<sup>243</sup> These sorts of gains, however, are not realized without significant risk-taking.

In addition to their concerns that a modification rule may promote moral hazard and unbridled risk-taking, proponents of anti-modification also worry about the potential for bankruptcy abuse, a longstanding concern that has animated past debates about debtor rights and the scope of discharge in bankruptcy. To that end, during the 2009 debate of the Saving Homes in Bankruptcy Act, one opponent of bankruptcy modification posed the following hypothetical to support his concern that home modification rights in chapter 13 would engender abuse.<sup>244</sup> He imagined an instance in which a homeowner with equity in her home might be encouraged by the safety-net of home modification rights in bankruptcy to cash out the equity in her home, stretching the limits of the existing loan-to-value ratio.<sup>245</sup> This fictional debtor would use the proceeds “to buy a big-screen and expensive vacations,” and then, when the value of her home fell, submerging her loan, the debtor could simply cram-down the principle balance in a chapter 13, gaining a windfall when the value inevitably rises and leaves the lender to spread its losses across the pool of future borrowers.<sup>246</sup>

This concern is perhaps justified to the extent that debtors *en masse* would truly act in this wanton fashion. Yet, there are at least two reasons why this concern for abuse is unlikely to materialize. First, there is empirical support for the proposition that this type of abuse is not common. The CBP has revealed that the people who file for bankruptcy are largely middle-class persons, many of whom have run into serious financial hardship as a result of so-called “exogenous shock” in the form of unavoidable and unexpected circumstances, including serious illness, income interruption, and marriage dissolution.<sup>247</sup> Thus, more common is that bankruptcy filers are in the midst of a confluence of awful circumstances, perhaps have reached rock bottom, and so turn to bankruptcy as a one-time solution through

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242. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

243. *Id.* at 327–28.

244. Zywicki, *supra* note 234.

245. *Id.*

246. *Id.*

247. *See SULLIVAN ET AL.*, *supra* note 37, at 2.

which they can find relief and the hope of renewed financial life. Through this lens, consumer bankruptcy is less a vehicle for abuse and more a one-time safety valve to provide relief to the middle class.<sup>248</sup> And, it seems doubtful that a change in modification rules would disrupt the incentives and pressures that currently cause people to file.

Moreover, the specter of failure, in the form of a dismissal prior to discharge, looms large in a chapter 13 proceeding.<sup>249</sup> Just 30% of debtors who file a chapter 13 petition complete their payment plan and receive a discharge.<sup>250</sup> African American debtors fare even worse than white debtors in this regard. By one account, African Americans were 40% less likely than whites to receive a discharge at the close of a chapter 13 proceeding, and trustees were more likely to file to dismiss the proceedings of African American debtors than white debtors.<sup>251</sup> Thus the hypothetical African American bankruptcy abuser would put at risk much-needed future income and accumulated wealth in a bankruptcy proceeding with limited access to a discharge as a statistical matter. While the majority of chapter 7 filings are so-called “no asset” filings, in which the debtor has no non-exempt assets that may be devoted to the repayment of creditors,<sup>252</sup> chapter 13 filings often involve assets indicative of some wealth. Thus, a chapter 13 filing arguably imperils both income and wealth, with a low chance of the benefit of a discharge at the end of the plan period.<sup>253</sup>

Finally, there are significant consequences for a chapter 13 filer who fails to obtain a discharge. These filers often find themselves in the same or worse financial condition than before they filed. Katherine Porter studied the outcomes for chapter 13 filers who did not complete their chapter 13 plan and consequently did not receive a discharge.<sup>254</sup> She found that most of the so-called “dropout debtors” still owed all of their outstanding debts at the time of their decision to drop out of their chapter 13 plan.<sup>255</sup> Those dropout debtors indicated that their decision to dropout was not made because they had accomplished their initial goals in filing bankruptcy or because they had found a better solution to the financial problems that prompted the filing.<sup>256</sup> In fact, 28% of dropout debtors who owned homes going into their chapter 13 filing faced foreclosure proceedings within weeks of the dismissal

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248. *Id.* (describing bankruptcy as a “middle class phenomenon” and noting that “we found, to our surprise, that Americans in bankruptcy looked a lot like the rest of us”).

249. *See, e.g.,* Jacoby, *supra* note 226, at 243–44 (noting that most chapter 13 plans do not result in a discharge, and describing the way in which those whose cases are left in a worse financial position).

250. *Id.* at 244.

251. *See* Van Loo, *supra* note 23, at 234–35 (“In other words, merely being black lowers the odds of getting a discharge by 40%, and being Hispanic lowers the odds by 43%.”).

252. *See* Jiménez, *supra* note 64, at 797.

253. *See* Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, in *BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 177 (2012) (“Compared with other debtors, African Americans are more likely to have to earn their discharge by making payments into a Chapter 13 plan to repay their debt. Thus, African Americans end up less forgiven than debtors of other races.”).

254. *See* Porter, *supra* note 55.

255. *Id.* at 145.

256. *Id.* at 146.

of their cases.<sup>257</sup> Matters may be even worse for African Americans who tend to have more financial dependents; tend to be in single head of household family settings; make cents on the dollar compared to whites; and already suffer from significant disparities in wealth. A bankruptcy filing in chapter 13 that does not result in a discharge may serve only to exacerbate financial problems and hardship, rather than help to fix them.<sup>258</sup>

Thus, in a world where debtors could modify their home loans in bankruptcy, a debtor who would consider filing for bankruptcy in order to abuse that privilege would be playing with the proverbial fire. Indeed, by many accounts, a bankruptcy filing is a traumatic proceeding that requires the debtor to make public the most intimate details of her life. It is a declaration of failure that follows the debtor for a significant portion of her life. Even if the hypothetical bankruptcy abuser defied the odds and completed her five-year payment plan, she would be marked as bankrupt, which, in turn, would likely affect her ability to participate fully in credit markets. The more likely outcome is that genuinely distressed homeowners would seek rehabilitation under a modification rule.

### C. Managing Lender Incentives

Because bankruptcy rights are non-negotiable, lenders must always police their lending policies according to the risks engendered by a debtor's right to modify in bankruptcy the terms of agreement. For this reason, bankruptcy has the potential to address the behaviors of lenders who continue to violate federal discrimination law to the detriment of the financial health of marginalized communities in a way that existing direct legislation has not.<sup>259</sup> The right of debtors to modify their underwater home loans in bankruptcy might work to incentivize lenders to curtail and police discriminatory lending practices that 50 years of anti-discrimination legislation and policy have failed to stamp out. Recent agreements between mortgage lenders and the DOJ and CFPB to settle charges of unlawful discriminatory lending practices support this reality.<sup>260</sup> Perhaps then, bankruptcy modification policy should focus on policing lender behavior rather than borrower behavior.<sup>261</sup>

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257. *Id.* at 147. Porter notes that dismissal of the case is not the same as when the dropout debtors stopped making monthly payments to the trustee. She reports that 86% of the debtors in the sample were interviewed within six months from the time that they stopped making payments. *Id.* at 124.

258. *Id.* at 149 (“On top of their past debts, these families continue to have the problems with income instability and uneven or high expenses that often led to their financial distress in the first place. . . . Chapter 13 filers face a double whammy. Ongoing bills continue to challenge debtors’ financial resources after bankruptcy.”).

259. *See* Whitford, *supra* note 22, at 411.

260. *See* Warren, *supra* note 12, at 1793 (“Subprime lending has an even more pernicious effect . . . [because the] lenders’ own data show that many of the families that end up in the subprime market are middle class families that would typically qualify for a traditional mortgage.”).

261. *See* Susan E. Hauser, *Cutting the Gordian Knot: The Case for Allowing Modification of Home Mortgages in Bankruptcy*, 5 J. BUS. & TECH. L. 207, 228 (2010) (“[A]llowing residential mortgages to be modified in bankruptcy forces lenders, servicers,

#### *D. Managing Political Costs*

Using modification of home loans in bankruptcy as a tool to assist advancement of economically disenfranchised homeowners is certainly not without probable political costs. Opponents are certain to take the view that modification justified along these lines would amount to little more than another ill-conceived social welfare program.<sup>262</sup> This representation of consumer bankruptcy plays directly into the hands of those critics of the current state of bankruptcy law who opine that consumer bankruptcy is a threat to our collective moral well-being, “fit[ting] comfortably within the larger wealth redistribution and the advancement of a particular social and economic agenda.”<sup>263</sup> One of the leading proponents of limited bankruptcy access and rights has supported his stance, in part, by noting the negative implications of the “link between bankruptcy and the larger social policy agenda.”<sup>264</sup> This perspective views the bankruptcy system as “increasingly tak[ing] on the role of a wealth redistribution mechanism, advancing causes that would be politically infeasible if advanced directly,”<sup>265</sup> describing consumer bankruptcy as “a vast system of wealth redistribution to the poor and downtrodden in society from banks and other easily-demagogued parties.”<sup>266</sup>

Modification as a tool to support wealth building and retention in economically disenfranchised communities would certainly lack political appeal as compared with the well-known, generic, middle-class safety net narrative that came

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and investors to bear some of the costs of the irresponsible loan-underwriting decisions that allowed disaster to strike when home prices fell.”)

262. See, e.g., Ezra Klein, *Race and the 2012 Election*, WASH. POST (Aug. 27, 2012), <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/08/27/race-and-the-2012-election/>. In this article, Klein describes ads run by the Romney campaign attacking President Obama’s alleged plan to eliminate the work requirement from the federal TANF program. Although Klein characterizes the issue of welfare in a political campaign as being “anachronistic” because the number of poor Americans receiving welfare has decreased, he notes that the Romney campaign nonetheless double-downed on these ads because they appeared to be working amongst voters with racial resentments for whom welfare was synonymous with race. See also Jonathan Chait, *Class War and Romney’s Welfare Counterattack*, N.Y. MAG. (Aug. 7, 2012), <http://www.nymag.com/daily/intelligencer/2012/08/class-war-and-romneys-welfare-counterattack.html#> (“It is, however, empirically hard to deny that the political punch of this messaging derives from the fact that white middle-class Americans understand messages about redistribution from the hard-working middle-class to the lazy underclass in highly racialized terms. Programs like Social Security, Medicare, farm subsidies, and the like, which middle-class Americans see as benefiting deserving folks like themselves, are popular; transfer programs only become unpopular if voters see them as accruing to the undeserving poor.”).

263. See Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL’Y 393, 420 (2001).

264. *Id.* at 419.

265. *Id.* at 420.

266. *Id.* But see Warren, *supra* note 12, at 1781 (“While that may mean that income in the year of the bankruptcy filing is at or near the poverty level, many of these families have been solidly middle class.”).

out of the CBP data.<sup>267</sup> The middle class safety net story—which is linked to the idea of a single financial misfortune—is powerful because it is readily accepted that the financial fate of the country is tied up in the financial health of the middle class.<sup>268</sup> It is also inclusive in nature because most Americans consider themselves to be members of the middle class or aspire to join it. Indeed, in the present political environment, there is little support for a program perceived to confer a benefit onto marginalized groups, particularly if those groups are defined by race and gender.<sup>269</sup> To that end, the moral ambivalence and general lack of political support directed toward traditional welfare programs is indicative of the degree to which characterizing bankruptcy in this manner, whether intentionally or unintentionally, might harm the prospect of political support for modification rights in consumer bankruptcy.

But bankruptcy modification as a tool to remediate mortgage discrimination and to support wealth building and retention in economically disenfranchised communities is also a middle-class concern important to national economic health. For example, given the significant incidence of higher income, home-owning, college-educated African Americans in bankruptcy, expanded bankruptcy debtor's rights are not about the maintenance of low-income individuals,

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267. See, e.g., Matthew D. Lassiter, *Who Speaks for the Silent Majority*, N.Y. TIMES, Nov. 3, 2011, at A31 (“Mr. Obama’s challenge in 2012 is not the ideological fervor of Tea Party conservatives, but rather the recognition by many working-class and middle-class voters that both parties favor Wall Street over Main Street. While activist groups on the right and left compete to portray big government or big business as the enemy, the silent majority is still out there in the volatile political center, up for grabs.”); Dana Farrington, *Stuck in the Middle (Class) With You*, NPR (Nov. 12, 2012), <http://www.npr.org/sections/itsallpolitics/2012/11/04/164139114/stuck-in-the-middle-class-with-you> (noting that the term “middle class” is useful for political purposes); see also Mitt Romney GOP Presidential Candidate Address at Norfolk, VA (Aug. 11, 2012) (transcript available at <http://www.npr.org/2012/08/11/158620127/transcript-romney-names-ryan-as-running-mate>) (“Paul [Ryan] and I are beginning a journey that will take us to every corner of America. We are offering a positive, governing agenda that will lead to economic growth, to widespread and shared prosperity, and that will improve the lives of our fellow citizens. Our Plan to Strengthen the Middle Class will get America back to work and get our country back on track.”); Paul Ryan GOP Vice Presidential Candidate Address at Norfolk, VA (Aug. 11, 2012) (transcript available at <http://www.npr.org/2012/08/11/158618943/transcript-ryan-makes-first-remarks-as-vp-choice>) (“High unemployment, declining incomes and crushing debt is not a new normal. It’s the result of misguided policies. And next January, our economy will begin a comeback with the Romney Plan for a Stronger Middle Class that will lead to more jobs and more take home pay for working Americans.”).

268. See, e.g., Kenneth L. Karst, *Participation and Hope*, 45 UCLA L. REV. 1761, 1774 n.47 (1998) (“If . . . it takes a stable middle class, along with stable working-class jobs, to provide a sound foundation for democracy, then might it not be expected that a sharp decline in the fortunes of people in those middle-to-lower economic brackets would tend to destabilize the polity?”); Vice President Joe Biden, comments regarding Middle Class Task Force, <http://www.whitehouse.gov/StrongMiddleClass/> (“A strong middle class equals a strong America. We can’t have one without the other.”).

269. See, e.g., Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 15, 16 (1997) (“However well-intentioned they might have been in the beginning, remedies based on racial class considerations can never be productive of racial harmony.”).

but instead are about supporting the ascendance of minorities into the middle class and helping to prevent backsliding. In addition, as the demographic of the American population evolves, homeownership, wealth, and economic well-being more generally among these communities will matter more explicitly to our national well-being. Professor Mechele Dickerson notes that federal policies encouraging stable homeownership among historically marginalized buyers is motivated in part by the stark reality that given expected changes to the U.S. population—in which African Americans and Latino Americans will increase in number relative to white Americans—if these communities do not buy homes, “overall homeownership rates in the future will plummet,” resulting in negative effects in the market.<sup>270</sup>

Modification of troubled mortgage loans in chapter 13 would help economically disenfranchised and financially distressed homeowners, many of whom are subject to discriminatory lending practices, hang on to their homes through financial crises, and may help to address the perverse incentives of lenders who continue to target these vulnerable borrowers and vulnerable communities for predatory and unlawful loan products.

### CONCLUSION

Policymakers should consider the virtues of a bankruptcy modification policy, especially in reference to questions of ongoing economic disenfranchisement related to homeownership and the ever-growing wealth gap within economically vulnerable communities. Understanding bankruptcy as a remedy that can contribute to positive economic changes and improvement is especially significant given the history of economic degradation that continues to inform the economic experience of African Americans, Latinos, and other similarly disenfranchised groups. Current federal housing policy now seeks to encourage wealth building through homeownership. It is appropriate then to bring bankruptcy anti-modification policy in line with these larger housing and social justice objectives by allowing it to address those risks. In this regard, consumer bankruptcy law, as presently codified, misses the opportunity to provide a structural remedy for the sort of persistent housing discrimination that the Great Recession merely exposed.

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270. Dickerson, *supra* note 1, at 865–66 (“In addition to increasing the costs to buy a home in a nonwhite neighborhood, the United States imposed or supported policies that kept blacks out of white neighborhoods. White homeowners used restrictive housing covenants to maintain racially homogeneous neighborhoods.”).