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Mark S. Scarberry

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* Professor of Law, Pepperdine University School of Law. Conveniently, for purposes of the title, this Reply can be considered to be the fifth "episode" in a series of articles. (Three of the first four were published in the *Pepperdine Law Review*.) The first was 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 (1993). The second, published sixteen years later, was Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WISC. L. REV. 565 (2009). The third was an article from the *Pepperdine Law Review* symposium on the mortgage crisis: Mark S. Scarberry, *A Critique of Congressional Proposals to Permit Modification of Home Mortgages in Chapter 13 Bankruptcy*, 37 PEPP. L. REV. 635 (2010), which included criticism of Professor Levitin's empirical studies. The fourth was Professor Levitin's *Response* to the *Critique*: Adam J. Levitin, *Back to the Future with Chapter 13: A Response to Professor Scarberry*, 37 PEPP. L. REV. 1261 (2010).

I. INTRODUCTION

A. *The Setting*

Professor Adam Levitin has responded[1] to my recent symposium article[2] critiquing proposed congressional legislation[3] that would allow modification (including strip down)[4] of home mortgages in Chapter 13 bankruptcy. A portion of my *Critique*[5] criticized his empirical studies[6] concerning the likely effect of the proposed legislation on mortgage interest rates and availability, and also criticized the arguments he has made in support of the proposed legislation.[7] The *Critique* did note, however, that the insight involved in conceiving of such empirical studies was impressive.[8]

Surprisingly, Professor Levitin's *Response* fails to deal with the substantial case authority discussed in my *Critique*. He treats the *Critique*'s case authority on a critical question as if it consisted only of one relatively recent Ninth Circuit case and supposed dicta from an "old" Second Circuit case.[9] But the *Critique* in fact relies on about twenty cases that deal with the

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1. Adam J. Levitin, *Back to the Future with Chapter 13: A Response to Professor Scarberry*, 37 PEPP. L. REV. 1261 (2010) [hereinafter *Levitin Response* or *Response*]. Note that section citations in this *Reply* are to the Bankruptcy Code, Title 11 of the *United States Code*, unless otherwise stated.

2. Mark S. Scarberry, *A Critique of Congressional Proposals to Permit Modification of Home Mortgages in Chapter 13 Bankruptcy*, 37 PEPP. L. REV. 635 (2010) [hereinafter *Critique*].

3. *See id.* at 637 n.4.

4. "Strip down" is the reduction of the amount of a lien to the value of the collateral. For example, if a debtor owes a $400,000 mortgage secured by a $350,000 home, strip down, if permitted, would reduce the mortgage lien on the home to $350,000.

5. *See Critique*, *supra* note 2, at 643–46, 669–70, 715–16, 720–25, 729 (criticizing empirical studies).

6. *See* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WISC. L. REV. 565 (2009). Other articles and papers in which Professor Levitin and his co-investigator Professor Joshua Goodman report their results are cited in the *Critique*, *supra* note 2, at 643 n.18.

7. *See Critique*, *supra* note 2, at 643–44, 706, 713, 715.

8. *Id.* at 720.

9. *Levitin Response*, *supra* note 1, at 1267–69.

question; the only supposedly contrary case authority he discusses in his *Response* turns out to be one of the cases cited in my *Critique* and not to be contrary at all.[10]

It is also surprising that the entire weight of his defense of the empirical studies rests (A) on a very likely mistaken view of the law—that the law permits Chapter 13 debtors to use a novel, flawed approach (described below)[11] in modifying secured claims under current law[12]—and (B) on two remarkably bold and implausible assertions regarding how the market data he collected supposedly should have reflected the risk that debtors might use that novel, flawed approach,[13] *even though his data was collected before anyone had suggested that debtors might even try to do so.*[14] In addition, one of Professor Levitin's assertions, if accepted, would fatally undermine the design of a key part of his empirical studies.[15]

The rest of this Introduction provides background[16] and then a brief statement of why the main defense Professor Levitin provides in his *Response* must fail.[17] Part II attempts to clear away some underbrush.[18] Part III deals with three other arguments contained in Professor Levitin's *Response*.[19] Part IV suggests, in conclusion, that law professors and others who have taken divergent positions on the wisdom of the congressional proposals might yet be able to agree on a common-sense middle ground;

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10. *See infra* text accompanying notes 25–38. Professor Levitin also treats the supposedly scant case authority cited in the *Critique* as being nearly irrelevant because, he claims, "Bankruptcy courts are courts of the deal . . . ." *Levitin Response*, *supra* note 1, at 1269. The question here, though, is not whether mortgage holders may bargain away, to some extent, rights to which the Bankruptcy Code entitles them; the question is what the entitlements are (or were at the relevant time) and thus the level of protection mortgage holders may insist upon or, to some extent, bargain away in exchange for concessions from debtors.

11. *See infra* text accompanying notes 47–49, 56–63, 108–15.

12. *See Levitin Response*, *supra* note 1, at 1266–67. Professor Levitin's *Response* does not recognize that my *Critique* in fact addressed the novel approach; as the *Critique* shows, the novel approach violates the provisions of the Code and would almost certainly be rejected by the courts were any debtor to try to use it. *See Critique*, *supra* note 2, at 667–68 n.132.

13. *Levitin Response*, *supra* note 1, at 1261, 1264, 1268, 1270.

14. *See infra* text accompanying notes 59, 111–15.

15. *See infra* text accompanying notes 116–21.

16. *See infra* text accompanying notes 21–41.

17. *See infra* text accompanying notes 42–63.

18. *See infra* text accompanying notes 64–95. As Part II.A. explains, there are surprising omissions in the *Response* beyond the ones noted in this Introduction. There also are exaggerations of my positions, as explained in Part II.B., and at least one misunderstanding of an argument that I made in the *Critique*, as noted in Part II.C.

19. *See infra* text accompanying notes 96–146. In keeping with the baseball metaphor included in the title of this *Reply*, I will argue that in each case Professor Levitin swings and misses; thus his *Response* does not effectively strike back but rather strikes out.

there is no need to consider those who disagree with us as having been seduced by the Dark Side.[20]

B. The Background: Professor Levitin's Two Comparisons

Professor Levitin's empirical studies involved, as my *Critique* noted, two kinds of comparisons: a type-of-collateral comparison and a temporal/geographical comparison.[21] He sought to determine whether passage of proposed congressional legislation allowing strip down and other modifications of home mortgages in Chapter 13 bankruptcy would cause home mortgage interest rates to be higher than they otherwise would be or would cause home mortgages to be less available than they otherwise would be.[22]

1. The Type-of-Collateral Comparison

The type-of-collateral comparison attempted to compare interest rates and availability for mortgages that under current law are subject to strip down, with interest rates and availability for mortgages that under current law are not.[23] Under current law, a long term mortgage secured only by the debtor's principal residence may not be stripped down or otherwise modified in a Chapter 13 bankruptcy plan (except to allow curing of defaults); strip down or other modification is prohibited by the "other than" clause in § 1322(b)(2),[24] as interpreted in the Supreme Court's 1993 *Nobelman*[25] decision. But if the collateral is not the debtor's principal residence or if the mortgage is secured by additional collateral beyond the debtor's principal residence, then the "other than" clause will not apply, and the mortgage may be subject, at least in theory, to modification (including strip down) in Chapter 13.[26] Thus, for comparison purposes, Professor Levitin (and his co-investigator Professor Goodman) gathered data from the post-*Nobelman* period for mortgages secured only by debtors' principal residences, and

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20. *See infra* text accompanying notes 146–47.

21. *See Critique*, *supra* note 2, at 720–25.

22. *Id.*

23. *See Critique*, *supra* note 2, at 720–21; Levitin, *supra* note 6, at 586.

24. Section 1322(b)(2) allows the debtor's Chapter 13 plan to "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*." 11 U.S.C. § 1322(b)(2) (emphasis added).

25. Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993).

26. *See Critique*, *supra* note 2, at 670–71. Note that short term mortgages (mortgages on which the contract schedule would call for the final payment, typically a balloon payment, to be made on a date that falls before the end of the Chapter 13 plan) are also subject to modification, at least in theory. *See id.* at 671 n.150 (explaining § 1322(c)(2)).

similar data for mortgages not secured by (or not secured solely by) debtors' principal residences.[27]

Courts in these post-*Nobelman* cases (in which the type of collateral makes the mortgage theoretically subject to strip down and other modification under a Chapter 13 plan) have not agreed on how the plan must treat the mortgage. Some courts (applying the *Enewally/Rash* approach described in the *Critique*)[28] require that the entire stripped down amount of the mortgage be paid off with interest during the three-to-five year life of the plan.[29] Other courts (applying the *Bellamy* approach described in the *Critique*)[30] permit the plan to use § 1322(b)(5) to provide for payment of the stripped down mortgage over a longer period, but without any reduction in the contractually required monthly mortgage payment or the contractual interest rate.[31] Because the principal amount of the mortgage is stripped down but payments are not reduced, this *Bellamy* approach causes the mortgage to be paid off earlier than originally anticipated,[32] assuming the debtor follows through and actually makes the payments.

2. The Temporal/Geographical Comparison

Professor Levitin's temporal/geographical comparison considered interest rates and loan-to-value ratios at different times and places for mortgages secured only by debtors' principal residences.[33] Prior to the Supreme Court's 1993 *Nobelman* decision, some courts permitted a form of Chapter 13 home mortgage strip down of such mortgages under a narrow

27. The other mortgages were on multi-unit properties where only one of the units would be the debtor's principal residence, on vacation homes, on second homes, and on rental/investment homes. The data gathered included mortgage interest rates, loan-to-value ratios, cost of private mortgage insurance, and secondary market discounting on sale of the mortgages. *See* Levitin, *supra* note 6, at 578, 586–98; *Critique, supra* note 2, at 720–21. In fairness, it should be noted again, as it was noted in the *Critique, supra* note 2, at 710 n.346 and 715 n.361, that Professor Levitin disclaimed reliance on the data he gathered for his type-of-collateral comparison, to the extent it involved vacation homes and investment homes. *See* Levitin, *supra* note 6, at 589–90. That disclaimer speaks well for the integrity of his research method, though whether it leaves him with sufficient data for reliable conclusions may be questioned. *See Critique, supra* note 2, at 715 n.361. The disclaimer also does little to correct for the design flaws inherent in his experimental design. *See infra* text accompanying notes 48–49, 53–60.

28. *See Critique, supra* note 2, at 661–62.

29. *Id.*

30. *See Critique, supra* note 2, at 662–64.

31. *Id.* at 662–64, 675–78.

32. *Id.* at 677–78.

33. *See* Levitin, *supra* note 6, at 578, 598–99; *Critique, supra* note 2, at 721.

interpretation of the "other than" clause in § 1322(b)(2).[34] Thus Professors Levitin and Goodman gathered data on the prevailing mortgage interest rates and the permitted loan-to-value ratios at different times and places in the United States, all relating to the period of uncertainty in the law that preceded the *Nobelman* decision.[35] They then analyzed the data to see whether the difference in debtors' ability to strip down their home mortgages in Chapter 13 cases at different times and places seemed to have an effect on mortgage interest rates and mortgage availability.[36]

The narrow pre-*Nobelman* interpretation of the "other than" clause—an interpretation rejected by the Supreme Court in *Nobelman*—treated the "other than" clause's prohibition on modification as applying only to the portion of the mortgage debt that was considered, under § 506(a), to be an allowed secured claim.[37] For an undersecured first mortgage holder, the amount of the allowed secured claim was simply the value of the home,[38] and to the extent of that value these courts prohibited modification.[39] By contrast, the unsecured portion could be treated like any other unsecured claim, typically with little being paid on it in the plan, and with the unpaid amount being discharged on completion of the plan.[40] But the courts that accepted this narrow interpretation of the "other than" clause nearly unanimously used the *Bellamy* approach—they held that the debtor's plan could not change the contractually required monthly mortgage payment and could not change the contractual interest rate.[41]

3. The Apples to Apples Problem: Why Professor Levitin's Main Defense of his Empirical Studies Must Fail

Unfortunately, Professor Levitin's empirical studies were doomed to failure, because they did not compare apples to apples.[42] His data might allow him to measure the effect of the kind of strip down or other modification that was permitted by some courts pre-*Nobelman* and of the kind of strip down or other modification currently permitted in limited

34. *See Critique*, *supra* note 2, at 671–72; Levitin, *supra* note 6, at 598–99.

35. *See* Levitin, *supra* note 6, at 598–99.

36. *Id.* Note that only the uncertainty in the law during this time period—the disagreement among different courts at various times about the meaning of § 1322(b)(2)'s protection of the rights of home mortgage holders—makes this comparison possible. But Professor Levitin's own *Response* suggests that such uncertainty would render the comparison useless. *See infra* text accompanying notes 71–74, 118–22.

37. *See Critique*, *supra* note 2, at 671–72.

38. *See Critique*, *supra* note 2, at 671 n.150.

39. *See Critique*, *supra* note 2, at 671–78 (and particularly 676 n.176).

40. *See Critique*, *supra* note 2, at 672 (and particularly 672 n.154).

41. *See Critique*, *supra* note 2, at 676 (and particularly 676 n.176).

42. *See Critique*, *supra* note 2, at 644–45, 720.

circumstances. But that would tell us little about the effect of the proposed congressional legislation, because the proposed legislation would permit much more severe modification of home mortgages,[43] would make such modifications much more widely available,[44] and would permit such modifications to be attempted by debtors whose financial characteristics would make them more likely to redefault.[45]

Professor Levitin's *Response* is limited largely to the first problem—the severity of the permitted modification—and apparently limited to the type-of-collateral comparison. His *Response* promises that it will show that "the differences . . . are quite minimal" between the kind of home mortgage modification currently permitted in limited circumstances (based on the type of collateral) and the kind that would be permitted under the proposed legislation.[46]

His argument is that courts should accept a novel approach to how a plan may satisfy § 1325(a)(5)(B)'s requirements for treatment of a secured claim that is modified by the plan; he argues that debtors may satisfy those requirements by giving the mortgage holder a new long-term mortgage—including a stripped down principal amount, a changed interest rate, a changed monthly payment amount, and a changed time to maturity—with the new mortgage being treated as the property that must be distributed during the plan period under § 1325(a)(5)(B).[47]

Note that this argument is irrelevant to the temporal/geographical comparison, because it is irrelevant to the analysis used by the courts that allowed home mortgage strip down in the pre-*Nobelman* period. Even under their narrow view of § 1322(b)(2)'s "other than" clause, they could not allow the mortgage holder's secured claim to be modified. They allowed strip down on the view that it did not modify the mortgage holder's secured claim but only the mortgage holder's unsecured claim.[48] The granting of a new mortgage as suggested by Professor Levitin would certainly have modified the mortgage holder's secured claim, and that was prohibited by the "other

43. *See Critique*, *supra* note 2, at 721–25; *infra* text accompanying notes 46–64.

44. *See Critique*, *supra* note 2, at 721–25; *infra* text accompanying notes 46–64.

45. *See Critique*, *supra* note 2, at 724–25; *infra* note 104 and text accompanying note 99.

46. *Levitin Response*, *supra* note 1, at 1264.

47. *Levitin Response*, *supra* note 1, at X6–7; Levitin, *supra* note 6, at 580 n.40. As an aside, I should note that the relevant question for purposes of the empirical studies is not whether, under a novel reading of the Code, debtors currently might have the right to modify their mortgages in a way similar to the way they could under the proposed legislation. Rather the question is whether mortgage originators would have thought, at the relevant times for which data was collected, that debtors could do so.

48. *See supra* text accompanying notes 37–40.

than" clause.[49] As a result, Professor Levitin's argument can do nothing to help show the validity of his temporal/geographical comparison.

His argument also fails with respect to the post-*Nobelman* type-of-collateral comparison. The discussion above[50] and in the *Critique*[51] establishes two propositions. First, debtors who seek to pay off their stripped down mortgages over a period longer than the three-to-five year duration of the plan are completely prohibited by some courts—courts that apply the *Enewally/Rash* approach—from doing so. Second, the courts that permit them to do so apply the *Bellamy* approach and permit it only on condition that the Chapter 13 plan modify neither the monthly payment amount nor the mortgage interest rate.[52]

Thus, neither of Professor Levitin's comparisons involves modifications that are similar to those that would be permitted under the proposed congressional legislation. The permitted modifications pre-*Nobelman* (in those times and places where courts interpreted the "other than" clause narrowly) and currently (where the type of collateral may allow mortgage strip down at least in theory) were and are relatively mild. By contrast, the proposed congressional legislation would permit a Chapter 13 plan to modify an undersecured mortgage severely by stripping it down, reducing the monthly payment, changing the interest rate, and extending the amortization period.[53] Professor Levitin's assertion that "the differences" in the kinds of permitted modifications "are quite minimal"[54] is simply incorrect.

It is telling that in his *Response* Professor Levitin could not provide a single example of an actual Chapter 13 mortgage modification, either from the pre-*Nobelman* period or under current law, that is like the mortgage modification that would be widely available under the proposed legislation.[55]

49. *See supra* text accompanying notes 37–38.

50. *See supra* text accompanying notes 28–32.

51. *See Critique*, *supra* note 2, at 661–64, 675–78.

52. *See supra* text accompanying notes 28–32; *Critique*, *supra* note 2, at 661–64, 675–78.

53. *See Critique*, *supra* note 2, at 686–88, 710.

54. *Levitin Response*, *supra* note 1, at 1264.

55. That is, he provides no example with principal amount stripped down, with monthly payments reduced, with interest rate modified to a court-determined rate, and with the debtor being permitted to pay off the modified mortgage over a period longer than the three-to-five-year term of the Chapter 13 plan.

These kinds of modifications are characteristic of the modification of real property secured claims under Chapter 11, but have never been characteristic in Chapter 13. Thus it makes perfect sense to read statements made in two places in a Congressional Oversight Panel report as I did in the *Critique*, namely as an admission that the proposed legislation would allow debtors a longer period to pay off their modified mortgages than the three-to-five-year period permitted under Chapter 13. *See Critique* at 669, 716, 719. If the Panel did not intend to suggest that the proposed legislation would allow debtors more time to pay off their modified mortgages than is permitted currently in Chapter 13 cases, it is not clear what the statements might mean. Professor Levitin's *Response* notes that he drafted the Panel's report and that he did not intend it to express that view, *Response*, *supra*

His *Response* provides us with neither a reported decision allowing such a modification, nor a description of an actual though unreported decision allowing such a modification, nor even a practitioner's anecdote of the accomplishment of such a modification. He could not even cite a suggestion from a treatise or a practitioner's guide that such a Chapter 13 modification might be attempted under current law (or could have been accomplished in the pre-*Nobelman* period).

Instead he makes an *argument* that courts *should* permit such Chapter 13 modifications of mortgages under current law where the collateral is not (or is not solely) the debtor's principal residence.[56] He argues that Chapter 13 debtors should be able to use the novel approach (distribution of a new long-term mortgage as property under § 1325(a)(5)(B))[57] even though, by his own admission, no court has apparently ever considered it,[58] and even though no one apparently ever suggested it prior to his suggestion of it in a footnote in his 2009 Wisconsin Law Review article.[59] His approach certainly would have been rejected during the pre-*Nobelman* period by courts considering

note 1, at 8–9, but the report says what it says.

Professor Levitin also accuses me of attempting to "disguise the [supposed] weakness" of the authority cited in the *Critique* by "appealing to the prestige" of certain academics who were authors of some of the authority. *Response*, *supra* note 1, at 1269. That charge hardly seems worth dignifying. It is enough to say that it is worth noting when thoughtful and prominent supporters of a position (in this case of home mortgage strip down) recognize facts that seem to cut against their position.

In addition, Professor Levitin misunderstands the point (two points, actually) of my noting in the *Critique* that I had previously communicated to him my concerns about flaws in his empirical studies. *See Critique*, *supra* note 2, at 641 n.13, 643–44; *Response*, *supra* note 1, at 1269 n.30. Of course my prior communication of these concerns does not establish their validity; that was not the point of mentioning it. To the extent readers agree that my criticisms have merit, they may appropriately be concerned about academic support being given for public policy initiatives by way of congressional testimony without criticisms being taken into account, and without the criticisms being noted and dealt with in the testimony. It might also be thought discourteous to criticize another academic's work so strongly in print without first trying to persuade the other academic to reconsider his approach; it seemed worth noting that my *Critique* did not "sandbag" Professor Levitin.

56. *Levitin Response*, *supra* note 1, at 1266-67.

57. *Id.*; *see infra* text accompanying notes 108–22.

58. Levitin, *supra* note 6, at 580 n.40.

59. *See infra* text accompanying notes 111–17. Here I may owe Professor Levitin an apology for an oversight in the *Critique*. The *Critique* discussed the novel approach but did not note that a footnote in his 2009 Wisconsin Law Review article had suggested it. *See Critique*, *supra* note 2, at 667 n.132; Levitin, *supra* note 6, at 580 n.40. Instead, the *Critique* cited only to a conversation with Professor Robert Lawless (that I think occurred prior to publication of Professor Levitin's article) and a possible suggestion of this approach in a different 2009 article. *Critique*, *supra* note 2, at 667 n.132 (citing conversation and Robert M. Zinman & Novica Petrovski, *The Home Mortgage and Chapter 13: An Essay on Unintended Consequences*, 17 AM. BANKR. INST. L. REV. 133, 154–55 (2009)).

whether to allow strip down of mortgages secured only by debtors' principal residences.[60] My *Critique* shows that courts should and very likely would reject this novel approach under current law if any Chapter 13 debtor ever actually tried to use it to strip down a mortgage that is not secured only by the debtor's principal residence.[61] But in any event Professor Levitin provides no evidence that any Chapter 13 debtor ever used it during the time periods relevant to his data or at any other time. His assertion that the market data he gathered for his "type of collateral" comparison nevertheless reflected the risk that debtors would use his novel approach[62] is thus bold and implausible. That assertion is discussed further below.[63]

II. CLEARING AWAY SOME UNDERBRUSH

A. *Surprising Omissions*

The omissions in Professor Levitin's *Response* go beyond those noted above. For example, his *Response* provides no serious defense of his position with regard to the supposed guarantees given to undersecured creditors in Chapter 13.[64] His argument in favor of the proposed legislation depends heavily on assumptions about those supposed guarantees,[65] assumptions that are simply incorrect.[66] Where Chapter 13 currently permits strip down, it does not effectively guarantee that the undersecured creditor will receive the value of the collateral.[67] Neither would any such guarantee be provided by the proposed legislation in the much wider set of circumstances in which it would permit strip down (and other modifications).[68] Because there is no such guarantee, the proposed legislation would create an imbalance that would substantially affect the risk characteristics of home mortgages,[69] with resulting likely substantial effects on mortgage interest rates and mortgage availability.[70]

60. *See supra* text accompanying notes 47–49.

61. *See Critique*, *supra* note 2, at 677 n.132.

62. *Levitin Response*, *supra* note 1, at 4, 8, 10 (arguing that uncertainty concerning whether the novel approach could be used would be reflected in market data).

63. *See infra* text accompanying notes 111–17.

64. The closest he seems to come is his argument that the feasibility requirement of § 1325(a)(6) protects against redefault. *See Response*, *supra* note 1, at 1273; *see infra* note 104.

65. *See Critique*, *supra* note 2, at 670 n.144, 706–08.

66. *See Critique*, *supra* note 2, at 705–09.

67. *Id.*

68. *Id.*

69. *See Critique*, *supra* note 2, at 641, 708, 726–27, 729.

70. *See Critique*, *supra* note 2, at 641, 724–29.

In addition, Professor Levitin's *Response* omits any explicit defense of the research design for his temporal/geographical comparison.[71] As noted above, that component of his research was based on mortgage data from the time of uncertainty about Chapter 13 home mortgage strip down—that is, from the time before the Supreme Court's definitive rejection of home mortgage strip down in its 1993 *Nobelman* decision, with respect to mortgages secured only by a debtor's principal residence.[72] In fact, as is discussed below, the defense he attempts to provide for the other component of his empirical research—the type-of-collateral comparison[73]—practically requires him to abandon any defense of the validity of the temporal/geographical comparison.[74]

B. *A Plea to Avoid Exaggeration*

Turning to matters of exaggeration, my *Critique* made a very tentative attempt to extrapolate from Professor Levitin's own temporal/geographical findings to provide some sense of the likely effect of the proposed congressional legislation.[75] That very tentative attempt was accompanied by

71. *See infra* text accompanying notes 33–36 (describing temporal/geographical comparison).

72. *Id.*

73. *See infra* text accompanying notes 23–32 (describing type-of-collateral comparison).

74. *See infra* text accompanying notes 116–22. Surprisingly, his *Response* does not even mention the temporal/geographical comparison. There actually was a somewhat serious strip down risk faced by home mortgage holders before the Supreme Court's 1993 *Nobelman* decision. It was not nearly as severe a risk as the risk that would be created by the proposed congressional legislation, but it was real. It is possible that Professor Levitin's temporal/geographical comparison succeeded in measuring that risk or some portion of it. But a reader of Professor Levitin's *Response* would not learn about his temporal/geographical comparison that found statistically significant correlations between availability of strip down, on the one hand, and both higher mortgage interest rates and reduced mortgage availability, on the other hand. It seems, according to his data, that mortgage interest rates were somewhat higher, both for median risk borrowers and for high risk borrowers, at times and in places where the courts permitted Chapter 13 debtors to strip down their home mortgages; it also seems that loan to value ratio requirements were stricter for all borrowers where strip down was permitted, which would make home mortgages somewhat less available. *See Critique*, *supra* note 2, at 725-26.

75. *Critique*, *supra* note 2, at 725–26. Professor Levitin claims that my tentative extrapolation of the effect of the proposed legislation on median risk borrowers and on high risk borrowers, an extrapolation based on his own findings, is "ludicrous" and "not in the realm of possibility." *Response*, *supra* note 1, at 1272. He states that the average total risk premium for thirty year mortgages originated in the last twenty years is approximately 166 basis points (1.66%) and ridicules the notion that enactment of the proposed legislation might increase that risk by 30% (50 basis points) or more for median risk borrowers. *Id.*

He calculates the average 1.66% risk premium by subtracting the average rate for ten year treasury bonds from the average rate for thirty year mortgages for the past twenty years. *Response*, *supra* note 1, at 1272. It appears that the 1.66% risk premium is for relatively low risk borrowers multiple express cautions that it might not be accurate.[76] Yet, in his *Response*, Professor Levitin failed to reference those cautions, failed to note that the extrapolation was based on his own findings, and felt it necessary to describe this very tentative analysis as "a wild reverie of speculation."[77]

Professor Levitin also substantially exaggerates the positions taken in my *Critique*. Nowhere in the *Critique* (or anywhere else) do I take the positions he ascribes to me that "almost no mortgages can functionally be modified in bankruptcy,"[78] "that under existing law, there is functionally no

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rather than for median risk borrowers. Average mortgage rates published by Freddie Mac for the last twenty years are roughly 166 basis points higher than the average interest rate on ten year treasury bonds over the same period. *See* Freddie Mac, 30-Year Fixed-Rate Mortgages Since 1971, http://www.freddiemac.com/pmms/pmms30.htm (last visited Mar. 5, 2010); http://www.federalreserve.gov/releases/h15/data/Annual/H15_TCMNOM_Y10.txt (last visited Mar. 5, 2010). And Freddie Mac's reported rates appear to reflect rates offered to qualifying borrowers with no more than an 80% loan to value ratio. *See, e.g.*, Freddie Mac, 30-Year Fixed-Rate Mortgage Dips Below 5 Percent Again, http://www.freddiemac.com/pmms/release.html?week=6&year=2010 (last visited Mar. 5, 2010) (giving definition of "Commitment Rate"). Such borrowers would appear to be relatively low risk borrowers rather than median risk borrowers.

The recent massive decrease in home values will cure market participants of any belief they may have had in the past that home prices cannot decline substantially. The proposed legislation would allow mortgage debtors to strip down their mortgages to the value of their homes and would then give the mortgage debtors a free option on future appreciation. Mortgage holders then would bear the risk of further decline in home values but would obtain little benefit from recovery of home values. In light of recent history, that imbalance could add substantially to the perceived risks borne by mortgage holders. The notion that the added risk might amount to 30% of the preexisting risk does not seem "ludicrous."

Note also that Professor Levitin's own study suggests that interest rates for high risk borrowers were increased by 32 to 62 basis points due to availability of home mortgage strip down where it was permitted prior to the Supreme Court's 1993 *Nobelman* decision. *See Critique*, *supra* note 2, at 726. Professor Levitin did not label his own finding "ludicrous." My *Critique* makes very plain that the risks that would be imposed by the proposed congressional legislation would be substantially greater than the risks created by the availability of home mortgage strip down where it was permitted pre-*Nobelman*. Thus, the rough magnitudes of possible interest rate effects suggested by my tentative extrapolation do not seem to deserve Professor Levitin's ridicule.

In any event, as noted immediately below in this *Reply*, the tentative extrapolation suggested in my *Critique* was hedged with multiple explicit cautions; it is surprising that Professor Levitin's *Response* mentions none of them.

76. The *Critique* noted that Professor Levitin's findings (on which the extrapolation was based) might not be accurate, advised the reader to consider for himself or herself whether I was right that the proposed congressional legislation would create a risk for mortgage holders roughly five times as great as the risk they bore under the pre-*Nobelman* type of strip down, and warned (with citation to an academic statistics book and to *The Complete Idiot's Guide to Business Statistics*) that extrapolation is a dangerous form of statistical inference. *Critique*, *supra* note 2, at 726.

77. *Levitin Response*, *supra* note 1, at 1271.

78. *Id.* at 1265.

ability to cramdown any property in bankruptcy,"[79] and that all mortgages are "functionally" "inviolable."[80]

The position I actually take in the *Critique* is quite different. Under the correct and seemingly ascendant *Enewally/Rash* approach,[81] where strip down is not prohibited and where the debtor thus seeks to strip down a secured claim, the debtor must pay off the stripped down secured claim with interest during the three-to-five-year plan.[82] Almost no Chapter 13 debtor could afford to strip down and pay off, over no more than five years, a *first mortgage* secured by a home of *substantial value*.[83] (And the rare debtor who could afford to do so would usually be found to have violated the Code's good faith requirement by diverting so much money to paying off the mortgage quickly instead of paying other creditors.)[84] The *Critique* notes that under the other approach courts have used—the *Bellamy* approach, named after a Second Circuit case but currently used mostly in the First

79. *Id.* at 1263. To the extent liens on personal property are at issue (due to Professor Levitin's use of the phrase "any property"), the *Critique* recognizes that the strip down generally is permitted (with an exception for relatively new car loans). *See Critique*, *supra* note 2, at 684, 717. The *Critique* also notes that the *Dewsnup* Court's prohibition on Chapter 7 strip down should not be extended to strip downs accomplished under Chapter 13 plans. *Id.* at 659–60.

80. *Levitin Response*, *supra* note 1, at 1274. Professor Levitin similarly engages in exaggeration when he suggests that I believe in the "sanctity" and "inviolability" of secured credit, which supposedly also is considered by me to be "sacrosanct." *Id.* at 1261, 1265. He goes so far as to say that "[o]pposing mortgage modification is tantamount to expressing a belief in the inviolability of secured credit." *Id.* at 1274. On the contrary, opposition to mortgage modification of the kind supported by Professor Levitin may be based on sound reasoning with regard to law and public policy rather than on ideological commitment or belief. Similarly, I would extend to Professor Levitin and other strip down proponents the courtesy of engaging their arguments rather than accusing them of engaging in advocacy scholarship based on ideological commitment. I would not in any event make such an accusation against Professor Levitin or other scholars who support home mortgage strip down, because I do not believe it to be true. A person committed to the sanctity of secured credit would not set out a new argument, as I did in the *Critique*, that could allow strip down of undersecured nonrecourse mortgages, even in Chapter 7; though the *Critique* suggests that the argument will likely fail, it would seem to be blasphemy for me to set it out, if Professor Levition's claims about my views are correct. *See Critique*, *supra* note 2, at 658 n.93.

81. *See Critique*, *supra* note 2, at 661–64, 718, 723.

82. *See Critique*, *supra* note 2, at 660 n.108, 661–62; *see also supra* text accompanying notes 29, 50–52.

83. *See Critique*, *supra* note 2, at 665 (stating that "the five year limit under current law should make it nearly impossible, as a practical matter, for Chapter 13 debtors to strip down first mortgages on homes of substantial value . . . if the *Enewally/Rash* approach is followed; in any event it is also the case under the *Bellamy* approach if the plan modifies the contractually-set interest rate or the contractually-set monthly payment"); *id.* at 666–67 (noting possibility that first mortgage on home of modest value could be stripped down); *id.* at 669–70 (stating that "first mortgages on second homes and multiple unit properties of substantial value enjoy substantial protection against Chapter 13 strip down because of the five year limit on plan payments").

84. *Id.* at 665–67.

Circuit[85]—debtors who can afford to pay their regular monthly mortgage payment (and something each month toward arrearages, if any), may strip down their mortgages, even first mortgages on homes of substantial value, where the Code does not prohibit strip down.[86]

Of course, even under the *Enewally/Rash* approach, debtors often can afford to strip down *junior* mortgages even on homes of substantial value, because the amount of the allowed secured claim—which is the amount that must be paid off with interest during the three-to-five year plan—could be quite modest. For example, a mortgage holder with a $100,000 second mortgage, junior to a $400,000 first mortgage, on a $420,000 home, would have an allowed secured claim of only $20,000.[87] Many debtors could afford to pay $20,000 with interest during a plan, and many could do so in perfect good faith, thus not running afoul of any provision of the Code.[88]

With regard to personal property, nothing in the *Critique* rejects modification of security interests. To the contrary, the *Critique* supports the courts' refusal to extend the Supreme Court's *Dewnsup* anti-modification rule to the context of lien modification under Chapter 13 plans (a context that generally involves personal property).[89] The claim that the principles reflected in my views would lead us back to the bad old days of consumer abuses by personal property secured creditors[90] thus is a complete non-sequitur, and perhaps more than a mere exaggeration.[91]

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85. *See Critique, supra* note 2, at 662–64.

86. *See Critique, supra* note 2, at 662–64, 670, 672–73, 679–80, 722, 723. Under *Nobelman*, strip down of a long term mortgage is prohibited if the collateral securing the mortgage debt is the debtor's principal residence and nothing else. Strip down is not prohibited, and thus is possible at least in theory, if the collateral is not the debtor's principal residence (or not solely the debtor's principal residence, but instead is, for example, a multi-unit property, only one unit of which is the debtor's principal residence), or if the mortgage is a "short-term" mortgage. *See Critique, supra* note 2, at 659–60, 671–72 (and particularly 671 n.150).

87. *See Critique, supra* note 2, at 671 n.150.

88. Again this can only be done under current law if the collateral for the mortgage is not the debtor's principal residence (or not solely the debtor's principal residence), or if the mortgage is a "short term mortgage"—typically one calling for a balloon payment—with the final payment due under its original contractual schedule before the end of the Chapter 13 plan. *See supra* note 86. Most courts also allow a wholly underwater second mortgage on a home—a second mortgage backed up by no collateral value because the amount of the first mortgage on the property equals or exceeds the value of the home—to be completely stripped off in Chapter 13. I was happy to note that point in a letter to the Senate Judiciary Committee following my December 2007 testimony. *See The Looming Foreclosure Crisis: How to Help Families Save Their Homes: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 74, 75 n.1.

89. *See Critique, supra* note 2, at 659–60. The *Critique*'s support for the *Dewsnup* rule as applied in its Chapter 7 context indeed is based largely on the need to give continued meaning to § 722, a Code provision that specifically allows debtors in many instances to strip down and pay off liens on personal property. *See id.* at 652–55.

90. *Levitin Response, supra* note 1, at 1, 5, 16.

91. In fact, the major grounds put forward in the *Critique* for opposing the proposed home mortgage strip down legislation have no application to the kinds of secured consumer credit that were involved in the past abuses or in general to personal property security interests in non-

C. Correcting a Misunderstanding

Professor Levitin admits that my *Critique* does not reject the idea that home mortgage strip down should be permitted under certain conditions and with certain limitations.[92] But he appears to misunderstand one of the subsidiary arguments I give for supporting those conditions and limitations: the matter of resentment. Contrary to what he seems to think,[93] my argument is not that the conditions and limitations are necessary to protect particular debtors from the effect of their neighbors' resentment. My point instead is that public support is needed if consumer bankruptcy laws are to be maintained in a form that provides genuine relief for consumer debtors in need.[94] Even stronger public support will be needed if the excesses of the 2005 amendments to the Bankruptcy Code are to be corrected. In the current political climate of resentment of "bailouts," there is a serious risk that the proposed home mortgage strip down legislation would be perceived by the public as providing an unfair benefit—a bailout—to certain undeserving debtors.[95] It is important to avoid provoking this resentment against effective consumer bankruptcy laws.

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appreciating property. *See Critique*, *supra* note 2, at 641–43. Used "bed sheets" and "sofas"—the examples put forward by Professor Levitin, *see Response*, *supra* note 1, at 1276—do not appreciate in value, and there is no reason to be concerned that the debtor who strips down a security interest on them (to the extent the law still allows such security interests to exist at all) will obtain a free option on future appreciation.

Professor Levitin's invocation of the personal property secured credit abuses of the *Williams v. Walker Thomas* era, *see Response*, *supra* note 1, at 1261, 1265, 1276, is a rhetorical device, not a serious argument. Professor Levitin would be welcome to sit in my bankruptcy classes and hear my explanation of why §§ 522(f)(2) and 722 (along with provisions of nonbankruptcy law) rightly provide protection against such abuses; support for such consumer protection is quite consistent with opposition to the congressional proposals to allow home mortgage strip down.

92. *Levitin Response*, *supra* note 1, at 1273.

93. *Id.* at 1274 ("Protecting debtors from generalized, intangible resentment is not a compelling reason for limiting their relief from real monetary obligations.").

94. *See Critique*, *supra* note 2, at 646–47, 729–30.

95. Note that even an American Bar Association CLE program referred to home mortgage strip down as a "bankruptcy bailout." *See* http://www.abanet.org/cle/podcast/j09tbbpod-reg.html (last visited Mar. 5, 2010) (providing access to podcast of CLE program entitled "The Bankruptcy Bailout"). The program panelists (including me) would have preferred a different title, but it had already been set for marketing purposes.

III. THREE SWINGS AND THREE MISSES: WHY PROFESSOR LEVITIN'S THREE ADDITIONAL ARGUMENTS FAIL

A. *Strike One: Professor Levitin's Two Bold and Implausible Assertions Fail to Support his "Type-of-Collateral" Study and Are Fatal to his "Temporal/Geographical" Study*

We now can turn to the first of three additional arguments contained in Professor Levitin's *Response*: his attempt to meet the *Critique*'s fundamental criticism of the design of his empirical studies by showing that "the differences between existing and proposed Chapter 13 modification are quite minimal."[96] As the *Critique* shows,[97] and as is further explained above,[98] his empirical studies attempt to compare phenomena that in several ways simply are not comparable; that is a serious design flaw. Professor Levitin's data pertain to use of a very different kind of strip down from the modification (including strip down) that which would be permitted under the proposed legislation; thus the nature of the phenomena are quite different. His data pertain to current and past strip downs that are or were much less widely available than modification (including strip down) would be under the proposed legislation; thus the frequency of each of the phenomena is (or would be) quite different. And his data pertain to use of strip down by debtors with substantially greater financial resources as a rule than the financial resources of the debtors who would strip down and otherwise modify their mortgages under the proposed legislation, with the result that debtors using the modification/strip down provisions of the proposed legislation would be more likely to redefault; thus the risks created by the phenomena are (or would be) quite different.[99] In short, neither the nature of the phenomena under comparison, nor their frequency of occurrence, nor the risks created by them are similar. His studies do not attempt to adjust for these differences and thus suffer from a severe "omitted variable" problem.

It is not clear that anything can be done to include those variables or adjust for them, so as to make the data collected by Professor Levitin useful for his purposes. My tentative attempt in the *Critique* to adjust for them[100]

96. *Levitin Response*, *supra* note 1, at 1264.

97. *See Critique*, *supra* note 2, at 720–25.

98. *See supra* text accompanying notes 42–63.

99. *See infra* note 99. Note also that under the proposed home mortgage strip down legislation, debtors would have an incentive to claim a low value for their homes, which is the opposite of their current incentive. *See Critique*, *supra* note 2, at 645 & 645 n.28. Thus Professor Levitin's data dealing with potential losses and based on debtors' self-reporting of their homes' values in their bankruptcy forms would not accurately measure strip down losses under the proposed legislation. *See id.*

100. *See Critique*, *supra* note 2, at 725–26.

was derided by Professor Levitin in his *Response* as a "wild reverie of speculation."[101] In any event, it is clear that Professor Levitin has not taken these differences, or variables, into account. Until he (or someone else) does so, his studies cannot provide a reliable basis for formation of public policy.

Professor Levitin argues in his *Response* that my *Critique* overstates the differences.[102] And he argues that the actual differences either are too small to be relevant[103] or cut in favor[104] of his conclusion that the proposed legislation would not affect mortgage interest rates and mortgage availability. That basic argument fails, as we have already seen.[105] But in the course of that argument he makes remarkably bold (and implausible) claims that appear to be necessary to the defense of his empirical studies.[106] One of the bold claims in fact is self-defeating, in that it would fatally undermine the design of the temporal/geographical portion of his empirical study.[107]

Rejecting the *Enewally/Rash* and *Bellamy* approaches, Professor Levitin argues that where the "other than" clause does not apply, the Bankruptcy

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101. *Levitin Response*, *supra* note 1, at 1271.

102. *Id.* at 1264-70.

103. *Id.* at 1264.

104. *Id.* at 1271. Professor Levitin argues that losses would be less if debtors who are unable to afford their regular mortgage payments are allowed to use a kind of strip down modification that reduces their monthly payments (because otherwise there would be foreclosures with larger losses) than if debtors who are able to make them are permitted to use the current form of strip down, in which monthly payments ordinarily cannot be reduced. He raises an important point, but the risk analysis is more complex. Debtors with high ability to pay are not likely to redefault after strip down, but if they could not obtain strip down they might still choose keep their homes by making the payments called for under the mortgage agreement (thus engaging in a "self-cure"). Debtors with low ability to pay are likely to redefault even after their mortgage is stripped down and modified to reduce their payments, but in the absence of such modification they would be unlikely to "self-cure" by making their payments. A full analysis would require us to determine the relative importance of redefault risk versus self-cure risk. (We also would need to consider the degree to which mortgage holders can minimize these risks through choosing when to allow modification, as they currently may do but would be unable to do if the proposed home mortgage strip down legislation were enacted.) The analysis in my *Critique* implicitly assumes that redefault risk is the more important; Professor Levitin assumes that self-cure risk is the more important. For a discussion of these risks and how they are used in net present value tests, see the *Critique*, *supra* note 2, at 638 nn.7 & 8, 727, 730, 732–33. For a suggestion that most of the benefits of modification are obtained consensually, such that little more would be gained by adoption of the proposed legislation (but much might be lost), see the authorities cited in the *Critique* at 638 n.7. Professor Levitin believes the redefault risk under the proposed home mortgage strip down legislation would be minimal, because of the feasibility requirement for plan confirmation. *See Levitin Response*, *supra* note 1, at 1272, 1273. That is not at all persuasive; many confirmed Chapter 13 plans fail, even though feasibility is a requirement for confirmation. *See* § 1325(a)(6); *Critique* at 638 n.7.

105. *See supra* text accompanying notes 42–63.

106. *See infra* text accompanying notes 111–17.

107. *See infra* text accompanying notes 118–22.

Code entitles a Chapter 13 debtor to give the mortgage holder a new long term mortgage—with a lower monthly payment, a different interest rate, a stripped down principal amount, and a different maturity date.[108] The new mortgage, according to Professor Levitin, can be the "property" required to be distributed under § 1325(a)(5)(B).[109] If he is correct, then the kind of strip down that would be widely permitted under the congressional proposals would be very similar to the kind that should be currently permitted (in the limited circumstances where strip down is not currently explicitly prohibited). But for reasons discussed in my *Critique*, it is highly likely that the courts would reject Professor Levitin's view.[110]

Professor Levitin goes on to make the first of his remarkably bold claims, the claim that the data he collected reflects the mortgage market's reaction (in terms of interest rates and availability) to the risk that debtors might use this novel approach of distributing a new mortgage under § 1325(a)(5)(B).[111] Thus, according to Professor Levitin, the data he collected reflects the market's reaction to a kind of strip down that is very similar to the kind of strip down that would be permitted by the proposed legislation; as a result, it seems he is arguing, his study compares apples to apples. Consider though that the approach he suggests debtors may use—the approach that he claims the market would have taken into account with regard to pricing and availability of home mortgages—apparently has never been considered by a court, as he concedes.[112] It apparently was never even suggested as a possibility, even by very experienced debtors' lawyers,[113] prior to its mention in one footnote in Professor Levitin's 2009 Wisconsin Law Review article,[114] by which time of course the data on which the article was based had already been collected. Thus, whether or not courts *should* allow debtors to use such an approach, the claim that the possibility of the use of this approach would have been reflected in the data is quite bold and implausible.[115]

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108. *Levitin Response*, *supra* note 1, at 1266-67.

109. *Id.* at 1267.

110. *See Critique*, *supra* note 2, at 667 n.132.

111. *Levitin Response*, *supra* note 1, at 1261, 1264, 1268, 1270.

112. *See Levitin*, *supra* note 6, at 580 n.40.

113. For example, there is no hint of the possibility of this approach in the relevant discussion in the Collier treatise, *see infra* note 138, nor does Professor Levitin cite any such source in support of this novel approach. *See infra* text accompanying notes 55–56.

114. *See Levitin*, *supra* note 6, at 580 n.40. Professor Robert Lawless orally suggested the same novel approach in conversation in 2009, probably before publication of Professor Levitin's Wisconsin Law Review Article, and another 2009 article may have suggested the approach as well. *See supra* note 59.

115. Professor Levitin does note that at least some mortgage securitization agreements have provisions dealing with bankruptcy strip down losses. *Levitin Response*, *supra* note 1, at 1270 n.33. The agreement he cites appears to be available through a free online site at http://www.secinfo.com/d13f21.u73.htm#1stPage. It is not clear that inclusion of such a provision

But Professor Levitin makes a second claim that is even bolder, that is even more implausible, and that is in fact self-defeating. He claims that all that is necessary for his study design to be vindicated is uncertainty about whether his view is correct.[116] He thus seems to claim that if there is uncertainty about whether debtors could have used the novel approach that he suggests they can use, then the mortgage market would have reacted to that uncertainty *and would have reacted to it to roughly the same degree that the market would have reacted to explicit congressional legislation allowing use of the approach*, such as the proposed home mortgage strip down legislation.[117] Such a claim is extraordinarily implausible, particularly with respect to the possible use of an approach that does not seem to have been considered by anyone at the times relevant to his data; it does not seem that any real uncertainty would have been perceived.

The difficulties for Professor Levitin's studies go even deeper. Acceptance of this second bold and implausible claim would invalidate the design of the temporal/geographical portion of his empirical studies. At least from the date of the first decision by a circuit court (in 1989) to allow strip down of a mortgage secured only by a lien on a debtor's principal residence,[118] up to the very day in 1993 that the Supreme Court decisively held in *Nobelman* that such strip down was not permitted, there was real nationwide uncertainty as to availability of such strip down. Professor Levitin's second bold and implausible claim would be, if anything, more

in a very complex agreement reflects anything more than an excess of caution. Note also that the "Bankruptcy Loss Coverage Amount" provided for in the agreement is no more than $100,000, out of more than a billion dollars in total certificates being offered. Professor Levitin himself opined, as reported in a Forbes article he himself cites, that bankruptcy losses would be "a very rare occurrence" under current law, with respect to the securitized mortgages. *See* Maurna Desmond & Daniel Fisher, *The Mortgage Investors Protection Act of 2009*, FORBES.COM, Mar. 19, 2009, http://www.forbes.com/2009/03/17/congress-foreclosures-bankruptcy-cramdowns-business-wall-street-cramdowns.html (cited in Levitin, *supra* note 6, at 649 n.302). Thus, inclusion of the provision in such a securitization agreement does not suggest that the market recognizes a substantial strip down risk under current law.

116. *See Levitin Response*, *supra* note 1, at 1261, 1264, 1268, 1270.

117. He must make this claim in order to argue that his empirical studies could accurately assess the magnitude of the effect of strip down on mortgage interest rates and mortgage availability. But he may simply be claiming that there would have been *some* effect if the market thought that debtors might be able to use the novel approach, which then might cause net losses; thus he may be claiming that the absence of any such effect in his type-of-property comparison suggests that the market does not fear use of the novel approach, because it would not cause net losses. This claim would not result in an apples-to-apples comparison but could be suggestive. However, as noted above, the claim that the possibility of the use of this approach would have been reflected in the data is quite bold. *See* text *supra* notes 112–15.

118. *See Critique*, *supra* note 2, at 671; Hougland v. Lomas & Nettleton Co. (*In re* Hougland), 886 F.2d 1182 (9th Cir. 1989).

plausible in this setting. Lenders setting prices and availability in a district where up to that time the courts had not allowed strip down could have no assurance at all that a long term mortgage would not be stripped down; bankruptcy court or district court decision prohibiting strip down could easily be overruled. In fact, the first four circuit court decisions on this issue, decided in successive years from 1989 to 1992, each allowed strip down of home mortgages secured solely by debtors' principal residences,[119] thus creating greater and greater doubt that any bankruptcy court or district court decisions rejecting strip down would stand.

Consider how the market would have reacted to this real uncertainty if Professor Levitin's bold and implausible claim were true. Lenders making long-term mortgage loans in districts or circuits in which courts had allowed strip down would of course have reacted to whatever risks strip down might create. But lenders making long-term loans in districts or circuits that had not allowed strip down would have reacted in roughly the same way, because of the uncertainty as to whether the courts might in the future allow strip down. Note that for much of this period of uncertainty there was circuit authority allowing strip down but no circuit authority rejecting it; the Fifth Circuit's August 13, 1992 decision rejecting strip down was the first and only circuit court decision to reject it,[120] and the Supreme Court brought the uncertainty to an end less than a year later, on June 1, 1993, when the Court issued its *Nobelman* decision affirming the Fifth Circuit.[121] Thus, if Professor Levitin's second bold and implausible claim were correct, we would not expect there to have been any significant difference across districts in mortgage pricing and mortgage availability, even if the risk of strip down had been considered by the market to be a severe risk. Lenders in districts in which strip down had not (yet) been permitted would have considered the uncertainty and would have made decisions roughly the same as those of lenders in districts in which strip down had been permitted. His claim, if true, would render useless any analysis of the data he collected regarding mortgage interest rates and mortgage availability at different times and places during the uncertain times that preceded the Supreme Court's *Nobelman* decision.[122]

119. *See Critique*, *supra* note 2, at 671.

120. *See Critique*, *supra* note 2, at 678; Nobleman [sic] v. Am. Sav. Bank (*In re* Nobleman [sic]), 968 F.2d 483 (5th Cir. 1992), *aff'd*, Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993).

121. Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993).

122. This data pertained to Professor Levitin's temporal/geographical comparison. *See supra* text accompanying notes 33–41.

B. *Strike Two: Professor Levitin's Claim that the Critique Presents Insufficient Case Authority and Insufficient Other Evidence Ignores the Substantial Authority Provided by the Critique and Is Ironic in Light of his own Failure to Provide Authority*

The *Critique* cites and analyzes very substantial case authority that supports its arguments. A reader of Professor Levitin's *Response* would think that the *Critique*'s case authority and other authority was limited largely to the Ninth Circuit's *Enewally* decision and (supposed) dicta in the Second Circuit's *Bellamy* decision.[123] In fact, the *Critique* cites eight cases in addition to *Enewally* and *Rash* that support the *Enewally/Rash* approach as a matter of current law.[124] The *Critique* cites six cases in addition to *Bellamy* in support of the *Bellamy* approach in the pre-*Nobelman* context,[125] and four additional illustrative cases in support of the *Bellamy* approach under current law.[126] By contrast there simply is little or no case authority for the proposition that a Chapter 13 debtor may change the mortgage's contractual monthly payment amount or the mortgage's contractual interest rate and pay off the mortgage over a longer period than the three-to-five year period of the plan.[127]

Professor Levitin confidently argues that there is authority contrary to both the *Enewally/Rash* approach and the *Bellamy* approach.[128] In fact, the only supposedly contrary authority he cites,[129] *In re McGregor*,[130] followed the *Bellamy* approach, as was noted in my *Critique*.[131] Citing Bankruptcy Judge Keith Lundin's respected treatise, the *McGregor* court explicitly held that if the contractual monthly payment amount were changed, then the debtor would have to complete its payments in five years: "If the payments are changed, sections 1322(c) and 1325(a)(5) both require that they be completed over the life of the plan, which cannot exceed five years. See Lundin, supra, § 4.49."[132] Thus the court, in dealing with a mortgage on a

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123. *See Levitin Response*, *supra* note 1, at 1267-69.

124. *See Critique*, *supra* note 2, at 661 n.117, 664 n.123.

125. *Id.* at 672 n.156, 676 n.176, 677 n.181.

126. *Id.* at 662 n.122, 664 n.124.

127. *Id.* at 676 n.176 (noting that only one case, a 1990 Bankruptcy Court decision, had been found that even implied that monthly payments could be reduced below the contractually agreed amount).

128. *See Levitin Response*, *supra* note 1, at 8.

129. *Id.*

130. 172 B.R. 718 (Bankr. D. Mass. 1994).

131. *See Critique*, *supra* note 2, at 664 n.124.

132. *McGregor*, 172 B.R. at 721.

four unit apartment building, refused to confirm a Chapter 13 plan that would have allowed the debtor to change the contractual monthly mortgage payment, to change the contractual interest rate, and to pay off the stripped down mortgage over a period exceeding five years.[133] The court held that the debtor would have to use § 1322(b)(5) in order to be able to make payments over a longer period than five years;[134] the court then held that to use § 1322(b)(5), the debtor would have to amend the plan so that no change would be made in the contractual amount of the monthly payment and no change would be made in the contractual interest rate.[135] That is precisely the *Bellamy* approach.[136]

Judge Lundin's treatise supports the *Bellamy* approach, as the *McGregor* court (and my *Critique*) noted.[137] *Collier on Bankruptcy*, in a section written by or at least with the assistance of one of the most experienced and respected debtors' lawyers in the country, Mr. Henry J. Sommer, agrees that debtors may have to use § 1322(b)(5) and simply maintain their payments if they cannot afford to pay off the entire secured claim during the term of the Chapter 13 plan.[138] Case authority similarly reflects the difficulty that debtors are likely to have if they attempt to modify large secured claims and meet the requirements of § 1325(a)(5)(B); they are not likely to be able to afford the payments.[139]

C. *Strike Three: Professor Levitin's Shift from Empirical Claims to Supposedly Self-Evident Claims Reveals the Weakness of his Position*

In the end, it seems that Professor Levitin shifts from his empirical claims to a confident view that Chapter 13 mortgage modification could not increase the risks for mortgage holders, because the losses from foreclosure self-evidently exceed those from modification.[140] Other scholars disagree,[141]

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133. *Id.* at 721–22.

134. *Id.* at 721.

135. *Id.* at 721–22.

136. *See supra* text accompanying notes 30–32.

137. *McGregor*, 172 B.R. at 721; *Critique*, *supra* note 2, at 665 n.128.

138. 8 COLLIER ON BANKRUPTCY ¶ 1322.09[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2007). The treatise states:

> Section 1322(b)(5) is concerned with relatively long-term debt, such as a security interest or mortgage debt on the residence of the debtor. It permits the debtor to take advantage of a contract repayment period which is longer than the chapter 13 extension period, which may not exceed five years under any circumstances, and may be essential if the debtor cannot pay the full allowed secured claim over the term of the plan.

Id.

139. *See Critique*, *supra* note 2, at 665 n.128.

140. *See Levitin Response*, *supra* note 1, at 1270-71.

141. *See, e.g.*, Christopher Mayer, Edward Morrison & Tomasz Piskorski, *Essay: A New Proposal for Loan Modifications*, 26 YALE J. ON REG. 417, 426–27 (2009); *see also Critique*, *supra* note 2, at

and the Obama administration seems to disagree; thus it put in place a net present value test that would need to be met before a mortgage debtor would be entitled to an HAMP modification from a participating financial institution (and a multi-billion dollar fund to protect mortgage holders against losses from modification).[142] Unless the test was intended to be superfluous, the administration seems to think that modifications are not always beneficial. Professor Levitin's view that the present value requirement of § 1325(a)(5)(B) is a net present value test[143] that would continue to protect mortgage holders under the proposed congressional legislation is simply incorrect. Many Chapter 13 cases fail;[144] mortgage holders simply are not guaranteed to receive the payments provided for in a Chapter 13 plan.[145] And as the *Critique* points out, the proposed congressional legislation would leave mortgage holders with all the risk of loss from a continuing decline in the real property market but very little prospect of gain from a market recovery.[146] The proposed legislation would change the risk characteristics of home mortgages in a substantial way,[147] and no one can know what the effect on mortgage interest rates and mortgage availability might be.

IV. CONCLUSION

As this *Reply* shows, Professor Levitin's empirical research cannot provide a sound basis for the making of public policy, nor has Professor Levitin made the case for the proposed home mortgage strip down legislation. All signs point to more political difficulties ahead for enactment of such legislation.[148] Perhaps if the academics, at least, who are involved in these contentious matters will grant that each is acting in good faith—that none of us has been seduced by the Dark Side—we could reach something of a consensus, a consensus that could provide substantial support for more

638 n.7.

142. *See Critique*, *supra* note 2, at 638–40, 699–700, 727 (discussing net present value test); *id.* at 708–09 (discussing multi-billion dollar fund).

143. *See Levitin Response*, *supra* note 1, at 1267.

144. *See Critique*, *supra* note 2, at 707 n.336.

145. *See id.* at 707–08.

146. *See id.* at 641, 681–85, 702–09.

147. *See id.* at 641, 708, 726–27, 729.

148. *See, e.g.*, Theresa Poulson, *Cook: Health Care Is Obama's Iraq*, NATIONAL JOURNAL INSIDER INTERVIEWS, Feb. 18, 2010, http://insiderinterviews.nationaljournal.com/2010/02/cook-health-care-is-obamas-ira.php (quoting renowned political observer Charlie Cook saying that "it's very hard to come up with a scenario where Democrats don't lose the House. It's very hard.").

moderate legislation permitting some forms of Chapter 13 home mortgage modification. Perhaps the analysis in the *Critique* of the home mortgage strip down legislation currently under consideration in Congress[149] could help us to reach that consensus.

149. *See Critique*, *supra* note 2, at 685–720.