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The Antidote to Zombie Foreclosures: How Bankruptcy Courts Should Address the Zombie Foreclosure Crisis

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THE ANTIDOTE TO ZOMBIE FORECLOSURES: HOW BANKRUPTCY COURTS SHOULD ADDRESS THE ZOMBIE FORECLOSURE CRISIS

ABSTRACT

Bankrupt homeowners across the United States continue to struggle because of the mortgage foreclosure crisis. Although zombie foreclosures present a significant issue for individuals who filed for bankruptcy during the last few years, there is no satisfactory legal remedy. The Bankruptcy Code and bankruptcy courts may offer an overlooked solution to the problem. Due to flexibility within bankruptcy courts, bankruptcy judges have a greater degree of discretion within certain situations to fulfill their equitable powers. Bankruptcy judges can take the realities of the debtor's circumstances into account in ways that state and federal courts cannot. This Comment's recommendations demonstrate the need for both courts and Congress to reconsider the Bankruptcy Code as a solution to zombie foreclosures. With a few amendments, the Bankruptcy Code should be able to help alleviate the zombie foreclosure problem.

INTRODUCTION

Markets across the United States suffered as a result of the 2008 recession. Perhaps outside the job market, the housing market was the most acutely affected. In the years leading up to the recession, hundreds of thousands of Americans received mortgages despite not meeting the underwriting requirements to receive such loans due to questionable mortgage securities created by a variety of banking institutions.[1] The resultant "housing meltdown" triggered the financial crisis.[2] While this meltdown occurred in 2008, the effects are still felt around the country as properties are foreclosed upon, or remain in limbo.

Those that remain in limbo are often called zombie foreclosures.[3] The term "zombie foreclosure" refers to "when a lender goes through all the motions of foreclosing on a property, but fails to take the final step of recording the foreclosure trustee's deed that transfers legal title from the borrower to the foreclosing lender."[4] Zombie foreclosures damage communities, home sale prices, and the debtor's fresh start.[5] Several news articles describe how zombie fore-

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[1] Forty-nine state attorneys general and the federal government reached a historic settlement for more than $50 billion with the five largest mortgage services providers. *About the Settlement*, JOINT STATE-FED. NAT'L MORTG. SERVICING SETTLEMENTS, http://www.nationalmortgagesettlement.com/about (last visited Feb. 15, 2016). Through significant punitive damages, the United States government and related parties recognize clearly that the public needs relief from the challenges created by financial fraud with mortgages leading up to the financial crisis. *See Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis*, U.S. DEP'T OF JUSTICE (Aug. 21, 2014), http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading. Similarly, a number of States brought actions against the banks based on a similar rationale to address the financial fraud against the American public. *See, e.g.*, *United States v. Bank of Am. Corp.*, No. 3:13-cv-00446-MOC-DSC, 2014 U.S. Dist. LEXIS 83566 (W.D.N.C. June 19, 2014).

[2] Danielle Douglas, *Justice Department, Bank of America Remain at Odds over Mortgage Settlement*, WASH. POST (July 16, 2014), http://www.washingtonpost.com/business/economy/justice-department-bank-of-america-remain-at-odds-over-mortgage-settlement/2014/07/16/8d4b02a0-0d14-11e4-8341-b8072b1e7348_story.html; *see also* Pigg v. BAC Home Loans Servicing, LP (*In re* Pigg), 453 B.R. 728, 734 (Bankr. M.D. Tenn. 2011) (referring to this time period and related events as "[t]he perfect storm of the 'Great Recession'").

[3] Michelle Conlin, *Special Report: The Latest Foreclosure Horror: The Zombie Title*, REUTERS (Jan. 11, 2013, 2:10 PM), http://www.reuters.com/article/2013/01/10/us-usa-foreclosures-zombies-idUSBRE9090G920130110.

[4] Harvey S. Jacobs, *House Lawyer: New Federal Loan Guidelines Ease the Sting of 'Zombie Foreclosures,'* WASH. POST (Sept. 26, 2014), http://www.washingtonpost.com/realestate/house-lawyer-new-federal-loan-guidelines-ease-the-sting-of-zombie-foreclosures/2014/09/25/bd45bec4-4003-11e4-b0ea-8141703bbf6f_story.html.

[5] *See, e.g.*, Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures Are Re-Entering the Market Through Debt Buyers*, 26 LOY. CONSUMER L. REV. 25, 41 n.72 (2013); Allison Fitzgerald, *"Zombie" Homes Haunt Florida Neighborhoods*, TRUTHOUT (Sept. 15, 2014, 10:09 AM), http://www.truth-out.org/news/item/26189-zombie-homes-haunt-florida-neighborhoods.

closures become blights within municipalities and how the numbers of "blights" continue to increase in a number of areas nationwide.[6] Zombie foreclosures not only cause eyesores for communities, but they additionally affect other neighboring property values, are often surrounded by crime, and cause severe fragmentation within already struggling neighborhoods.[7] These difficulties are not isolated incidents, but are pervasive throughout America. The complicated reality of the mortgage foreclosure crisis has been acknowledged in news articles, as well as by Congress.[8]

Zombie foreclosures represent very real challenges and concerns to debtors, creditors, and communities. As case law illustrates, these challenges include continuing liability for properties and assets that debtors believe they are no longer legally responsible for, and vacant, dilapidated houses within neighborhoods throughout a community. These results are unfair to the individual debtors and communities.[9] Attorney General Schneiderman aptly summed up the collective unfairness when he stated "[l]eaving zombie properties to rot is unfair to municipalities and unfair to neighbors, who pay their taxes and maintain their homes . . . ."[10]

Given the serious nature of these challenges, it is necessary for the Bankruptcy Code to be amended or for bankruptcy courts to read the provisions in a broader fashion as they relate to zombie foreclosure. This Comment will ex-

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[6] Fitzgerald, *supra* note 5 (stating that these blights are associated with drug dealers, squatters, and devalued properties); *see* Mark Fahey, *Where Zombie Foreclosures Are Making Comeback*, CNN MONEY (Feb. 6, 2015, 12:44 PM), http://money.cnn.com/2015/02/06/real_estate/zombie-foreclosure/.

[7] *See* James J. Kelly, Jr., *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 120 (2013) (addressing briefly the role zombie foreclosures play in further complicating "who had the authority and responsibility for maintaining [the vacant lots]").

[8] *See generally Strengthening the Housing Market and Minimizing Losses to Taxpayers: Hearing Before the Subcomm. on Hous., Transp. & Cmty. Dev. of the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 1 (2012) ("The hearing . . . will examine actions that can strengthen the mortgage market at no or minimal cost to taxpayers, including mortgage modifications, such as principal reduction or shared appreciation, reducing distressed property sales, and increasing demand and people's ability to buy homes."); *Saving Our Neighborhoods from Foreclosures: Field Hearing Before the Subcomm. on Hous., Transp. & Cmty. Dev. of the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 1 (2012) [hereinafter *Saving Our Neighborhoods*] (statement of Sen. Robert Menendez, Chairman, S. Subcomm. on Hous., Transp. & Cmty. Dev.) (stating that the purpose of the hearing is to determine "how we save our neighborhoods from the problems of foreclosure, how we can help homeowners deal with foreclosure and communities deal with the blight of foreclosed properties").

[9] *See* Press Release, Office of N.Y. Att'y Gen. Eric T. Schneiderman, A.G. Schneiderman to Submit Expanded Legislation to Address Growing Problem of "Zombie Properties" (Feb. 16, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-submit-expanded-legislation-address-growing-problem-%E2%80%9Czombie-properties.

[10] *Id.*

plore a number of sections within the Bankruptcy Code that may offer potential methods to resolve the zombie foreclosure dilemma. This Comment will discuss bankruptcy case law that exists on zombie foreclosures and legislative commentary surrounding the foreclosure crisis.

There are two rationales that serve to justify why the bankruptcy courts need to rethink current interpretations of the Bankruptcy Code. First, the debtor's perspective is a rationale that stems from the main bases for bankruptcy law: the fresh start and fairness to creditors. Second, the community interest presents courts with an alternative rationale to support amending the way bankruptcy courts use their powers to address zombie foreclosures.

Over the years, the tenets underlying the bankruptcy system have been consistently clear despite changes to the Bankruptcy Code.[11] As Justice Stevens acknowledged in a 2006 opinion, "[t]he principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"[12]

Similarly, along with this interest in the debtor's fresh start, bankruptcy laws have demonstrated an identifiable concern for creditors.[13] Specifically, "the Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'"[14] According to a House Committee Report, "preference provisions facilitate the *prime* bankruptcy policy of equality of distribution among creditors of the debtor."[15]

After considering the larger policy ramifications and the ever-increasing hardships of the national mortgage foreclosure crisis, it is time to determine an alternative venue for debtors to address zombie foreclosures. Bankruptcy courts arguably offer a unique venue to identify a resolution to zombie foreclosures and the subsequent vacant lots across the United States. Bankruptcy courts differ from other courts because judges under the Bankruptcy Code are given greater levels of flexibility that allow them more wiggle room within their decision making process than other federal judges. In a recent bankruptcy case out of the Western District of North Carolina, *In re Rose*, the court at-

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[11] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[12] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286–87 (1991)).

[13] *See* Katchen v. Landy, 382 U.S. 323, 328 (1966).

[14] *Id.* at 328–29 (1966) (quoting *Ex parte* City Bank of New Orleans, 44 U.S. 292, 312 (1845)).

[15] Union Bank v. Wolas, 502 U.S. 151, 161 (1991) (emphasis added) (quoting H.R. REP. NO. 95-595, at 177–78 (1977)).

tempted to address the Debtor's Motion for Authority to Transfer Real Property to Secured Creditor by Quitclaim Deed.[16] The facts of the case are similar to many zombie foreclosure stories across the country, and requests similar to the one at issue "are becoming more and more common."[17] Given the prevalence of similar cases, bankruptcy courts need to be able to offer debtors an alternative path to a resolution.

The community interest basis of analysis highlights the public policy challenges underlying zombie foreclosures. Given the financial and social difficulties posed by vacant lots associated with zombie foreclosures, bankruptcy courts need to find a way to address the issues. For policy reasons in addition to reinforcement of key bankruptcy tenets (the debtor's fresh start and fairness to creditors), bankruptcy courts offer a readily available forum that, with slight changes, could potentially resolve the ever-growing problem of zombie foreclosures.

This Comment will offer real world possibilities for bankruptcy courts to consider when faced with a zombie foreclosure. Beyond pointing out relevant sections and interpretations the bankruptcy courts should employ when making decisions, this Comment will also address potential amendments to the Bankruptcy Code that could settle the debates around the usage of certain sections in the future. This Comment will demonstrate that zombie foreclosures are a problem that needs to be addressed—the time has come.

I. BACKGROUND

Within the Bankruptcy Code, the present definitions of key terms acutely impact the outcome for a debtor faced with a zombie foreclosure. Many of these sections are discussed at length in bankruptcy cases such as *In re Rose*.[18] The specific way each of these terms ties into the Bankruptcy Code will be discussed at length during the Analysis section of this Comment.

A. "Zombie" Foreclosures

Zombie foreclosures occur on all sorts of property. The focus of this Comment, however, is on the zombie foreclosures on residential properties within

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16 512 B.R. 790, 792 (Bankr. W.D.N.C. 2014).
17 *Id.*
18 *Id.*

chapter 13 bankruptcy filings.[19] While zombie foreclosures can occur with commercial real estate, residential zombie foreclosures pose greater issues to communities and individual debtors.

Outlining the usual steps involving a mortgage that is discharged in a confirmed chapter 13 plan aids in understanding the ramifications of zombie foreclosures. Depending on the state, there are judicial and non-judicial foreclosures.[20] Roughly forty percent of states only offer judicial foreclosures and sixty percent are non-judicial foreclosure states.[21] For judicial foreclosure states, "the court governs the foreclosure process from default to final sale."[22] During foreclosure through a confirmed chapter 13 plan, in a judicial foreclosure state, the bankruptcy court agrees to lift the automatic stay so that the creditor can initiate a foreclosure proceeding.[23] Non-judicial foreclosure states do not involve the court in foreclosures.[24]

From the perspective of the debtor, zombie foreclosures are the "plight of people who walked away from their homes not realizing that their names remained on the deed and that they were financially liable for taxes and other bills related to the abandoned property."[25] Zombie foreclosures affect the debtor's ability to move forward after bankruptcy and the landscape of the community surrounding the property at issue.[26]

As a result of the mortgage crisis and subsequent housing crash, zombie foreclosures have become a prevalent problem across America.[27] The foreclosure crisis shows up in Congressional reports and discussions as early as

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19 *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("Chapter 13 authorizes an individual with regular income to obtain a discharge after the successful completion of a payment plan approved by the bankruptcy court. . . . [and] the debtor retains possession of his property."). *See generally* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS (6th ed. 2009).

20 *See* Sarah Trevino, Comment, *Avoiding the Avoid: Re-Securing the Mortgage Lender Post*-BFP, 31 EMORY BANKR. DEV. J. 175, 194–95 (2014).

21 *See id.* at 194 n.130, 195 n.136.

22 *Id.* at 194 (2014).

23 *See* 11 U.S.C. § 362 (2012); *In re* Rose, 512 B.R. 790, 793 (Bankr. W.D.N.C. 2014).

24 *See* Trevino, *supra* note 20, at195–96.

25 Barbara Liston, *More than 300,000 Homes are Foreclosed "Zombies," Study Says*, REUTERS (Mar. 28, 2013, 4:59 PM), http://www.reuters.com/article/2013/03/28/us-usa-housing-zombies-idUSBRE92R0YQ20130328.

26 *Id.*

27 *See id.*

2008,[28] and began to appear frequently in mass media in 2013.[29] From the community perspective, zombie foreclosures lead to a number of problems, including how communities in crisis deal with the very complex realities of vacant homes, including "[s]quatters, crime, declining property values, and ultimately, demolition."[30]

B. Congressional Commentary on the Mortgage Foreclosure Crisis

The Senate Subcommittee on Administrative Oversight and the Courts has acknowledged the difficulties state and federal courts face when addressing zombie foreclosure cases.[31] Some subcommittees have previously considered bankruptcy courts as a possible venue to resolve these difficulties.[32] In particular, the role of bankruptcy courts can be seen in subcommittee hearings that dealt with other challenges that existed as a result of the mortgage foreclosure crisis, rather than zombie foreclosures explicitly.[33] While the Loss Mitigation Program addresses a different aspect of the crisis, it demonstrates the unique role bankruptcy courts could play. The Loss Mitigation Program came up when the subcommittee actively revisited bankruptcy concepts after more than a year had passed since a previous hearing on bankruptcy modifications, which failed to effectively relieve the nationwide foreclosure crisis.[34] During the second hearing, Judge Martin Glenn of the Bankruptcy Court for the Southern District of New York talked about the Loss Mitigation Program created and adopted by his district as of January 2009, which followed the same model as

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[28] *Restoring the American Dream: Solutions to Predatory Lending and the Foreclosure Crisis: Field Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 110th Cong. (2008).

[29] *See* Les Christie, *Zombie Foreclosures: Borrowers Hit with Debts That Won't Die*, CNN MONEY, (Feb. 22, 2013, 1:04 PM), http://money.cnn.com/2013/02/20/real_estate/zombie-foreclosures/; Conlin, *supra* note 3; Scott Gunnerson, *When Owners Walk, 'Zombie' Homes Become Nuisance*, USA TODAY (Sept. 1, 2013, 3:37 PM), http://www.usatoday.com/story/money/personalfinance/2013/09/01/foreclosed-homes-zombie-titles/2753385/; Investopedia, *What Homeowners Need to Know About Zombie Titles*, FORBES (Jan. 29, 2013, 2:42 PM), http://www.forbes.com/sites/investopedia/2013/01/29/what-homeowners-need-to-know-about-zombie-titles/.

[30] Catherine Curan, *Crumbling Foreclosed Houses Haunting Metro Area*, N.Y. POST (Sept. 20, 2014, 11:39 PM), http://nypost.com/2014/09/20/crumbling-foreclosed-houses-haunting-metro-area/.

[31] *Mandatory Mediation Programs: Can Bankruptcy Courts Help End the Foreclosure Crisis?: Hearing Before the Subcomm. on Admin. Oversight & the Courts of theS. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *Mandatory Mediation Programs*].

[32] *See id.* at 2 (statement of Sen. Sheldon Whitehouse, Chairman, Subcomm. on Admin. Oversight & the Courts).

[33] *See id*.

[34] *See id.* at 1 (statement of Sen. Sheldon Whitehouse, Chairman, Subcomm. on Admin. Oversight & the Courts).

other mediation programs offered by bankruptcy courts.[35] The Loss Mitigation Program typically involved "the following general types of agreements, or a combination of them: loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction."[36]

C. Relevant Sections of the Bankruptcy Code

Bankruptcy courts have failed to identify a section of the Bankruptcy Code that can alleviate the consequences of zombie foreclosures. Bankruptcy courts need to identify a currently existing power, or Congress needs to amend the Bankruptcy Code to create a power that provides the debtor and public with security in bankruptcy plans created under the Bankruptcy Code. A variety of cases have considered different combinations of the Bankruptcy Code sections addressed below. Bankruptcy courts need to modify their perspectives and reach a consensus as to how the Bankruptcy Code does or does not address zombie foreclosures.

1. Section 1325(a)(5)—Confirmation of Plan

The major debate in case law surrounding § 1325(a)(5)(A)'s use in conjunction with § 1325(a)(5)(C) relates to the definition of "surrender" within the language of the § 1325(a)(5)(C) and its subsequent effect on the interpretation of the confirmation of a chapter 13 plan.[37] Section 1325(a)(5)(A) states the following: "Except as provided in subsection (b), the court shall confirm a plan if . . . with respect to each allowed secured claim provided for by the plan[] the holder of such claim has accepted the plan . . . ."[38] Section 1325(a)(5)(C) states: "the court shall confirm a plan if . . . with respect to each allowed secured claim provided for by the plan . . . the debtor *surrenders* the property securing such claim to such holder . . . ."[39]

The language in this section lays the groundwork for confirmation of the plan. This is a key place where bankruptcy courts may rectify zombie foreclo-

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[35] *See id.* at 13–17 (statement of Hon. Martin Glenn, United States Bankruptcy J., Southern District of New York).

[36] *Id.* at 14 (statement of Hon. Martin Glenn, United States Bankruptcy J., Southern District of New York) (quotation marks omitted).

[37] *See In re* Rose, 512 B.R. 790, 793–94 (Bankr. W.D.N.C. 2014); Arsenault v. JP Morgan Chase Bank, N.A. (*In re* Arsenault), 456 B.R. 627, 629 (Bankr. S.D. Ga. 2011), *aff'd*, Arsenault v. JP Morgan Chase Bank, N.A., No. CV 311-106, 2012 U.S. Dist. LEXIS 128412 (S.D. Ga. Aug. 30, 2012).

[38] 11 U.S.C. § 1325(a)(5)(A) (2012).

[39] 11 U.S.C. § 1325(a)(5)(C) (emphasis added).

sure issues. Section 1325(a)(5)(C) augments § 1325(a)(5)(A) and addresses the surrender of all allowed secured claims provided for by the plan because it provides that "the debtor surrenders the property securing such claim to such holder."[40] The Analysis section of this Comment will recommend ways for bankruptcy courts to interpret §§ 1325(a)(5)(A) and (C) and for Congress to amend the Bankruptcy Code.

2. Section 362(d)—Automatic Stay

This section of the Comment outlines the relevant conditions under which creditors can ask the bankruptcy court for relief from the automatic stay provision. This provision is applicable given the relationship of the automatic stay to the steps involved in the foreclosure process. As discussed above, only when the bankruptcy court grants a bank relief from the automatic stay (also discussed as agreeing to lift the stay) can the institution begin to foreclose on the property at issue. These relevant conditions include the lack of adequate protection of an interest in property under § 362(d)(1)[41] and issues arising with the debtor's equity in the property and the property's use in reorganization.[42]

Additionally subsection (3) of § 362(d) addresses circumstances related to real property that are grounds for bankruptcy courts to lift the automatic stay.[43] Specifically, § 362(d)(3) addresses what a debtor must do in order for the stay to be lifted for "an act against single asset real estate under subsection (a)," by a secured creditor with an interest in the property.[44] This subsection (3) lays out a timeline for certain actions relating to the lifting of the automatic stay.[45] For the stay to be lifted, the debtor must meet one of two requirements: "(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or (B) the debtor has commenced monthly payments."[46]

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[40] *Id.*

[41] 11 U.S.C. § 362(d)(1).

[42] *See* 11 U.S.C. § 362(d)(2)(A)–(B). Section 362(d)(4) addresses the applicability of the automatic stay if the petition in the case was filed to defraud or avoid a creditor. Section 362(d)(4) specifically outlines the scenarios that would trigger the clause, "(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filing affecting such real property." This Comment makes the reader aware of subsection 4 to demonstrate that the debtors involved in zombie foreclosures did not try to defraud the system; they are bona fide, honest debtors. *See* 11 U.S.C. § 362(d)(4).

[43] *See* 11 U.S.C. § 362(d)(3)–(4).

[44] 11 U.S.C. § 362(d)(3).

[45] *Id.*

[46] 11 U.S.C. § 362(d)(3)(A)–(B).

3. Section 1322(b)(9)—Contents of the Plan

Section 1322 contains information about the specifics of the confirmation plan discussed previously in § 1325(a)(5).[47] Section 1322 helps determine what a plan could require of the creditor after the debtor receives confirmation of a chapter 13 plan. Specifically, in *In re Rose,* discussed *infra,* the court considered subsection (b)(9) and investigated the question of whether vesting under this section could require a creditor to accept title to the property.[48] The language being analyzed states that a "plan may provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity . . . ."[49] Subsection (b)(9) is the only part of the Bankruptcy Code the court used in its analysis.[50]

4. Section 105—Power of the Court

Section 105 addresses the powers awarded to bankruptcy courts and clarifies things courts can and cannot do.[51] Section 105 is particularly important when examining the challenges created by zombie foreclosures. When considering possible amendments to the Bankruptcy Code or sections that could potentially be read more broadly, bankruptcy courts must remain within the powers specified in this section. In *In re Rose* and a number of other cases (that do not necessarily consider § 105 as it relates to zombie foreclosures in particular), § 105 is a broadly interpreted catch-all power.[52] The real issues, however, arise around interpretation of exactly how broad that power should be for bankruptcy courts.[53]

When considering zombie foreclosures in bankruptcy, and the need to determine a more equitable resolution for the debtor involved, it is helpful to step back and consider the role of bankruptcy courts more generally. Bankruptcy "courts are courts in law and equity"[54] and are granted "equitable power"

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47 11 U.S.C. § 1322; *see* 11 U.S.C § 1325(a)(5).

48 *See* 512 B.R. 790, 794–95 (Bankr. W.D.N.C. 2014).

49 11 U.S.C. § 1322(b)(9).

50 *Rose*, 512 B.R. at 794–95.

51 11 U.S.C. § 105.

52 *See* 512 B.R. at 795.

53 *See id*.

54 Pigg v. BAC Home Loans Servicing, LP (*In re* Pigg), 453 B.R. 728, 734 (Bankr. M.D. Tenn. 2011) ("Federal courts are courts in law and equity . . . ." (quoting Carter-Jones Lumber Co. v. Dixie Distrib. Co., 166 F.3d 840 (6th Cir. 1999)) (quotation marks omitted)).

through § 105(a) of the Bankruptcy Code.[55] This equitable power underlies the bankruptcy courts and stems from "[t]he nature of equity."[56] Equity is meant to be a "correction of the law where, by reason of its universality, it is deficient."[57] Thus, "equity is obliged to acknowledge rights not recognized at law."[58] As zombie foreclosures appear in increasing numbers, bankruptcy courts need to keep their equitable powers in mind.

D. In re Rose

In re Rose is a typical zombie foreclosure case. The debtors in *Rose* filed a chapter 13 petition in December 2012.[59] The property at issue was a residence valued at $30,000, subject to a mortgage of over $78,000 held by the Small Business Association (the "SBA").[60] As part of their confirmed chapter 13 plan, the Roses surrendered the residence to the SBA, and the court lifted the automatic stay to enable the SBA to foreclose.[61] Over a year later, the SBA still failed to foreclose.[62] In the interim, the property continued to accrue expenses, making the Roses subject to post-petition penalties, including ad valorem taxes and maintenance costs.[63] Despite having a confirmed chapter 13 bankruptcy plan that no longer accounted for expenses associated with the property at issue, the Roses remained liable for the property and related expenses from December 2012 onward because the SBA continuously failed to initiate the foreclosure process on the Roses' residence after the court lifted the automatic stay.[64] At this point, to resolve this issue, the Roses asked the court to allow them to quitclaim the residence to the SBA.[65] Despite proper notice,

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55 *Id.* at 735 (quoting Childress v. Middleton Arms, L.P. (*In re* Middleton Arms, Ltd.), 934 F.2d 723, 724 (6th Cir. 1991)) (quotation marks omitted).

56 *See id.* (quoting Aristotle, Nicomachean Ethics bk. V, at (c. 384 B.C.E.) (citing *In re* Middleton Arms, Ltd.), 934 F.2d at 724).

57 *Id*. (quoting Aristotle 384–322 B.C.E.) (quotation marks omitted).

58 *Id*. (quoting May v. Carlton, 245 S.W.3d 340 (Tenn. 2008)).

59 512 B.R. 790, 792 (Bankr. W.D.N.C. 2014).

60 *Id.* at 792–93.

61 *Id.* at 793.

62 *Id*.

63 *Id.* Ad valorem taxes are based on the assessed value of real estate or personal property and are a significant source of income for state and municipal governments. *See Definition of 'Ad Valorem Tax,'* INVESTOPEDIA, http://www.investopedia.com/terms/a/advaloremtax.asp; Jeffrey S. Adams, Comment, *Rewriting 11 U.S.C. § 523(A)(16): The Problems of Delayed Foreclosure and Judicial Activism*, 30 EMORY BANKR. DEV. J. 347 (2014) (discussing challenges with home owners association fees, another post-petition penalty associated with zombie foreclosures).

64 *See In re Rose*, 512 B.R. at 793.

65 *Id*.

the SBA failed to respond to the Motion or to appear at the March 2014 hearing.[66]

Specifically the court considered whether the Bankruptcy Code or a Florida state law allowed the bankruptcy court to compel the lender, or any other secured creditor, "to foreclose on a debtor's property or accept a quitclaim deed to the same."[67] The court examined a number of suggestions of possible sources of the power to compel a secured creditor to complete the foreclosure process.[68] The court explored §§ 1325(a)(5)(C), 1322(b)(9), and 105 of the Bankruptcy Code at length.[69] The court concluded that it did not have the authority under the Bankruptcy Code to transfer the real property; the court held, however, that state law in Florida created an opportunity for the transfer if the creditor continued to fail to respond or take action.[70]

II. ANALYSIS

A. Solutions Within the Existing Bankruptcy Code

While the *Rose* court and others attempted to answer the question of zombie foreclosures based on traditional interpretations of the Bankruptcy Code, zombie foreclosures offer a new kind of issue within bankruptcy. After considering the approach the court took in *Rose*, this Comment argues how the *Rose* court and a few others misinterpreted the Bankruptcy Code as it applies to zombie foreclosures. Courts have used different Bankruptcy Code sections to analyze the zombie foreclosure issue.[71]

The Bankruptcy Code has the potential to resolve zombie foreclosures and mitigate a portion of the public nuisance challenge facing communities across the United States. Therefore, it is critical that bankruptcy courts recognize the bigger picture surrounding zombie foreclosures and readjust their analyses.

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66 *See id.* at 792.

67 *Id.* at 793.

68 *See id*.

69 *See id.* at 793–95.

70 *See id.* at 798.

71 *See, e.g.*, *id.* at 793–94; Canning v. Beneficial Me., Inc. (*In re* Canning), 442 B.R. 165 (Bankr. D. Me. 2011), *aff'd*, 462 B.R. 258 (B.A.P. 1st Cir. 2011), *aff'd*, 706 F.3d 64 (1st Cir. 2013); Arsenault v. JP Morgan Chase Bank, N.A. (*In re* Arsenault), 456 B.R. 627, 631–32 (Bankr. S.D. Ga. 2011), *aff'd*, Arsenault v. JP Morgan Chase Bank, N.A., No. CV 311-106, 2012 U.S. Dist. LEXIS 128412 (S.D. Ga. Aug. 30, 2012); Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 18–19 (1st Cir. 2006).

1. Section 1325(a)(5)(C)

A number of cases have explored the limitations of surrender under § 1325(a)(5)(C).[72] Unfortunately, the manner in which courts currently interpret surrender leads to a difficult reality for most debtors in bankruptcy. The debtor follows the bankruptcy plan and often gives up all rights to the property but continues to be responsible for a number of liabilities associated with the property.

The court in *Rose* explored § 1325(a)(5)(C) as a possible code provision that could be used to allow the Roses to quitclaim the title to their property to the SBA.[73] The automatic stay needs to be lifted for a creditor to foreclose.[74] However, the debtors in *Rose* argued that once the stay is lifted, the creditor is *compelled* to take control of the property.[75] It is important to determine the definition and scope of "surrender" under § 1325(a)(5)(C) for such a proposition. If the act of surrender does compel a creditor to foreclose, the creditor would violate the automatic stay if it failed to follow through with foreclosure proceedings.[76] The court determined, based on the opinions of *In re Arsenault* and other previous case law, that "surrender" under § 1325(a)(5)(C) does not create a requirement for the creditor to do something with the surrendered property.[77] Before addressing the way the case law has treated the ramifications of surrender for creditors, the opinion in *Rose* cited to circuit case law that directly addressed the definition of "surrender."[78] "Surrender" is not defined in the Bankruptcy Code, and therefore courts look to case law to determine its interpretation.[79] The court in *Rose* accurately stated that "'[s]urrender' has been described as the relinquishment of all rights in property, including the right to possess the collateral."[80] Despite this relinquishment, other case law has held that "there is no corresponding requirement that the lender . . . do any-

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[72] *See, e.g.*, *In re Rose*, 512 B.R. at 793–94.

[73] *See id*.

[74] *Id.* at 793.

[75] *See id*.

[76] *See* 456 B.R. at 631–32; *see also* Brown v. Branch Banking & Tr. Co. (*In re* Brown), 477 B.R. 915, 917–18 (Bankr. S.D. Ga. 2012).

[77] *In re Rose*, 512 B.R. at 794 (citing 456 B.R. 627).

[78] *See id.* at 793 (citing IRS v. White (*In re* White), 487 F.3d 199, 205 (4th Cir. 2007); 8 COLLIER ON BANKRUPTCY ¶ 1325.06[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2005)).

[79] *See In re Rose*, 512 B.R. at 793 (citing *In re White*, 487 F.3d at 205; 8 COLLIER ON BANKRUPTCY, *supra* note 78.

[80] 512 B.R. at 793 (citing *In re White*, 487 F.3d at 205 (4th Cir. 2007); 8 Collier on Bankruptcy, *supra* note 78.

thing with the property."[81] The *Rose* opinion relied on a number of cases to reach this conclusion.[82]

When considering each case the *Rose* opinion relied on, there are significant differences between the cases and the behaviors of the creditors in each case compared to *Rose* that arguably warrant different treatment under the Bankruptcy Code. In each case, these key differences appear to have been overlooked or discounted by the bankruptcy court judge. For the proposition that there is no corresponding requirement on the lender to do anything with the surrendered property, *Rose* cited a First Circuit opinion of a bankruptcy court case, *Pratt v. General Motors Acceptance Corp. (In re Pratt)*.[83] *Pratt* presented a significantly different set of facts surrounding the surrender of the asset in question.[84] In this chapter 7 case, converted from a previous chapter 13 case, the Pratts notified the creditor under § 521(a)(2)(A) that they would "surrender" a car "by ceding possession in lieu of reaffirming their prepetition loan obligation to GMAC."[85] After the court lifted the automatic stay, unlike the SBA in *Rose*, over the course of the chapter 7 proceeding GMAC was in contact with the Pratts and made it clear that they would not repossess or "release its lien unless and until the outstanding loan balance was paid in full."[86] On appeal, the Pratts argued that GMAC "effectively negated their right to 'surrender,'" by failing to repossess or release the lien.[87] However, the court disagreed.[88]

Pratt interpreted surrender to signify the debtor making the collateral available to the creditor, but in no way interpreted § 521 to "remotely suggest[]" that there is any action required on the part of the creditor.[89] Under § 521(a)(2), the Bankruptcy Code allows a debtor three distinct options to address lien avoidance or modification.[90] The specific option that most directly relates to

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[81] *In re Rose*, 512 B.R. at 793–94 (citing Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 18–19 (1st Cir. 2006); *In re Arsenault*, 456 B.R. 627; Canning v. Beneficial Me., Inc. (*In re* Canning), 442 B.R. 165 (Bankr. D. Me. 2011), *aff'd*, 462 B.R. 258 (B.A.P. 1st Cir. 2011), *aff'd*, 706 F.3d 64 (1st Cir. 2013)).

[82] *See* 512 B.R. at 793–94 (citing *In re Pratt*, 462 F.3d 14, 18–19 (1st Cir. 2006); *In re Arsenault*, 456 B.R. 627; *In re Canning*, 442 B.R. 165.

[83] *See In re Rose*, 512 B.R. at 793 (citing *In re Pratt*, 462 F.3d at 18–19).

[84] *Compare* 462 F.3d at 16–17, *with In re Rose*, 512 B.R. 790 .

[85] *In re Pratt*, 462 F.3d at 16; *see* 11 U.S.C. § 521(a)(2)(A) (2012).

[86] *In re Pratt*, 462 F.3d at 16.

[87] *Id*. at 17.

[88] *See id.* at 19.

[89] *See id*. ("[S]uch a reading would be at odds with well-established law that a creditor's decision whether to foreclose on and/or repossess collateral is purely voluntary and discretionary.").

[90] *See* 11 U.S.C. § 521(a)(2); *In re Pratt*, 462 F.3d at 17.

the discussion in *Rose* and other zombie foreclosures is the right to surrender. The court in *Pratt* expressly acknowledged treating the options given to the debtor carefully with an eye to fairness "[d]ue to the importance of the Code's 'fresh start' policy."[91] The court agreed with GMAC's argument, however, that the "surrender did not require that it repossess the vehicle if GMAC deemed such repossession cost ineffective."[92]

The facts in *Pratt* surrounding the foreclosure process differ significantly from the foreclosure process in *Rose*. Due to GMAC's responses to the surrender by the Pratts, the case did not account for the silent acceptance that the SBA appears to offer to the surrender of the property in *Rose*. Given this prominent difference in the facts, bankruptcy courts should not apply *Pratt* in zombie foreclosure cases. The behavior by the SBA and GMAC is distinguishable because debtors are often unaware that creditors failed to initiate foreclosure after the court lifted the automatic stay for zombie foreclosures.[93]

Similarly, there are important differences between the typical zombie foreclosure, illustrated in *Rose*, and another case that the court cited in support for its interpretation of "surrender" under § 1325(a)(5)(C), *Canning v. Beneficial Maine, Inc. (In re Canning)*.[94] Similar to *Pratt*, this case involved a fact pattern that addresses a possible violation of the discharge injunction in chapter 7 (later converted to a chapter 13) bankruptcy case.[95] However, the bankruptcy court distinguished *Canning* from *Pratt*.[96] *Canning* is a case involving real property, as opposed to the "worthless" car in *Pratt*.[97] Similar to the *Pratt* decision, the court in *Canning* concluded that § 521(a)(2) does not require a creditor to take action with respect to surrendered property.[98] Again, however, this case had a significant amount of communication between the creditor and the debtor.[99]

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[91] *In re Pratt*, 462 F.3d at 18 (citing Jamo v. Katahdin Fed. Credit Union (*In re* Jamo), 283 F.3d 392, 398 (1st Cir. 2002); Whitehouse v. LaRoche, 277 F.3d 568, 574 (1st Cir. 2002)).

[92] *In re Pratt*, 462 F.3d at 19–20 (finding nevertheless that GMAC's "refusal to release its valueless lien so that the vehicle could be junked—though presumably not made in bad faith—was 'coercive' in its effect, and thus willfully violated the discharge injunction").

[93] *See* Fitzgerald, *supra* note 5 (demonstrating how an individual in bankruptcy is often blind-sided by a zombie foreclosure and the ways that the zombie foreclosure has significant repercussions on an individual's livelihood); *see also* Christie, *supra* note 29.

[94] 442 B.R. 165 (Bankr. D. Me. 2011), *aff'd*, 462 B.R. 258 (B.A.P. 1st Cir. 2011), *aff'd*, 706 F.3d 64 (1st Cir. 2013).

[95] *See id.* at 169.

[96] *See id.* at 171–72.

[97] *See id*.

[98] *See id.* at 172.

[99] *See id.* at 167–69.

Unlike debtors in many zombie foreclosure cases, the debtors in *Canning* were aware that the creditor never began the foreclosure process on the property.[100]

While the court in *Rose* relies on *Pratt* and *Canning* because they analyzed the term "surrender," the court acknowledged that the cases did not deal with zombie foreclosures.[101] Neither *Pratt* nor *Canning* address the use of the term "surrender" in § 1325(a)(5)(C). Although their analysis illustrates the way many bankruptcy courts interpret the term "surrender," bankruptcy courts should rely on cases that deal with similar facts to zombie foreclosure cases, like *Rose*.

The final case that the *Rose* opinion relied on was *Arsenault v. JP Morgan Chase Bank, N.A. (In re Arsenault)*.[102] Specifically, the bankruptcy court in *Arsenault* explored the limitations of § 1325(a)(5)(C) in relation to a set of facts similar to many other zombie foreclosure properties across the United States.[103] In *Arsenault*, the debtors filed a chapter 13 plan that provided for real property in Florida to "be surrendered 'in full satisfaction' of Chase's claim."[104] The court granted JP Morgan Chase Bank, N.A.'s motion to dismiss the complaint filed by Mr. and Mrs. Arsenault.[105] The Arsenaults argued Chase's failure to transfer the property out of the Arsenaults' name, pursuant to their chapter 13 confirmed plan, was "a veiled attempt to collect a debt in violation of the automatic stay and a violation of the confirmation order."[106] However, the court disagreed.[107]

The court in *Arsenault* found that while the debtors surrendered the property under § 1325(a)(5)(C), the surrender did not trigger an action by the creditor.[108] Specifically, the court stated that "surrender does not obligate" the credi-

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[100] *See id.* at 167–68, 172 (holding overall that the creditor violated the discharge injunction by attempting to collect payment from the Cannings, but not by the creditor's failure to foreclose).

[101] *Compare* 462 F.3d 14, 17–20 (1st Cir. 2006), *and In re Canning*, 442 B.R. 165, *with In re* Rose, 512 B.R. 790 (Bankr. W.D.N.C. 2014).

[102] 456 B.R. 627 (Bankr. S.D. Ga. 2011), *aff'd*, Arsenault v. JP Morgan Chase Bank, N.A., No. CV 311-106, 2012 U.S. Dist. LEXIS 128412 (S.D. Ga. Aug. 30, 2012); *see In re* Rose, 512 B.R. 790, 793–94 (Bankr. W.D.N.C. 2014).

[103] *See id.* at 630 (stating that "surrender" does not obligate the creditor to transfer title out of the debtor's name, specifically "surrender of encumbered property leaves the secured creditor in control of the exercise of its remedies, a plan cannot require a secured creditor to accept a surrender of property").

[104] *Id.* at 628.

[105] *Id.* at 627–28.

[106] *Id.* at 628.

[107] *Id.* at 630.

[108] *See id.* (discussing the obligations of § 1325(a)(5)(C) for debtors and creditors at length).

tor to take any sort of action under the property.[109] This holding is the same as the holdings of other cases; this is the first time, however, that such a holding expressly refused to use the powers under § 105.[110] While it is true that confirmation of a plan by surrender of the property does not obligate a creditor to affirmatively act, the plan was confirmed and accepted by all parties including the creditor.[111] It is an accepted premise that confirmation makes the plan binding on all parties. Therefore, a simple amendment to the language of § 1325(a) should be considered to clarify that such confirmation requires creditors to follow through on any obligations a debtor's plan assigned to the creditor regarding any real property.

Importantly, while *Arsenault* and *Rose* seem to suggest to the public that a court has never held that a surrender under § 1325(a)(5)(C) can be used to allow the lender to be responsible for the collateral without its consent, this is not actually the case.[112] In the opinion in *Rose*, the court dismissed an unpublished case in the Eastern District of North Carolina bankruptcy court, *In re Perry*, as "pragmatic . . . [but] of limited precedential value."[113] This case "permitted Chapter 13 debtors to surrender property by quitclaim deed to a mortgage lender absent consent."[114] While *Perry* is an unpublished case and therefore the legal basis for the judges' conclusions are not specified, this case appears to be similar to a typical zombie foreclosure case, unlike some of the case law relied on by *Rose* and *Arsenault*. In particular, *Perry* involved a chapter 13 debtor, and the lender did not respond or defend itself against the motion by the debtor to "surrender property by quitclaim deed."[115] Given the similarities, it may have been beneficial for the court in *Rose* to acknowledge the possibility of two different approaches to the ability of debtors to surrender by quitclaim deed under § 1325(a)(5)(C) of the Bankruptcy Code, as suggested by the unpublished case law.

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109 *Id.* at 629.

110 *See id.* at 631; *see also* Brown v. Branch Banking & Tr. Co. (*In re* Brown), 477 B.R. 915, 917–18 (Bankr. S.D. Ga. 2012).

111 *See generally* 11 U.S.C. § 1325(a) (2012).

112 *See* 512 B.R. 790, 794 (Bankr. W.D.N.C. 2014).

113 *Id.*

114 *Id.* (citing *In re* Perry, No. 12-01633-8-RDD, 2012 Bankr. LEXIS 4731, at *2 (Bankr. E.D.N.C. Oct. 9, 2012)).

115 *Id.*

2. Section 1322(b)(9)

In *Rose*, the court specifically addressed the theory that § 1322(b)(9) required a lender to accept title to a property.[116] The court declined to follow the holding from *In re Rosa* based on the arguments that such required acceptance "could impair a lender's rights in the collateral . . . and contravene state property law."[117] *Rosa* was a typical zombie foreclosure case, in which the debtor suffered continuing responsibility for Home Owners Association (HOA) dues for a property after it had been surrendered.[118] Within her confirmed chapter 13 bankruptcy plan, Rosa surrendered the real property in question under the plan confirmation requirements outlined in § 1325(a)(5)(C).[119] Similar to the other case law, the court in *Rosa* acknowledged, "surrender does not transfer ownership of the surrendered property," and thus, surrender was not enough to "cut off" liability for HOA dues.[120] However, the court in *Rosa* ruled in favor of the debtor that under § 1322(b)(9), title to the property in question vested in the creditor.[121] Ms. Rosa included a "nonstandard provision" within her plan under chapter 13 that stated the following:

> All collateral surrendered for Class 3 claims is surrendered in full satisfaction of the underlying claim. Pursuant to §§ 1322(b)(8) and (9), title to the property . . . shall vest in City National Bank/OCWEN Loan Service upon confirmation, and the Confirmation Order shall constitute a deed of conveyance of the property when recorded at the Bureau of Conveyances. All secured claims secured by the Debtor's property in Ewa Beach will be paid by surrender of the collateral and foreclosure of the security interests.[122]

The Court in *Rosa* disagreed with the Trustee's objection that such a provision does not conform to the requirements of the Bankruptcy Code.[123] The court's analysis focused on § 1322(b)(9) and the fact that the creditor did not object to Ms. Rosa's plan.[124] In § 1322(b)(9) "vesting" does not have the same meaning as "surrender," and "[t]he plain meaning of 'vesting' includes a present trans-

116 *See id.* at 794–95.
117 *Id.* at 795.
118 *See* 495 B.R. 522, 523 (Bankr. D. Haw. 2013).
119 *See id*.
120 *Id*.
121 *See id.* at 524.
122 *Id.* at 523.
123 *See id*. at 523–24.
124 *Id.* at 524.

fer of ownership."[125] Given this significant difference in the terms, § 1322(b)(9) allows the plan to include the nonstandard provision.[126] Such a provision is confirmable under § 1325(a)(5)(A), and therefore, according to a strong precedent in the courts, the creditor's failure to object to the confirmation plan can be construed as acceptance of the plan.[127]

The *Rose* court rejected the argument in *Rosa*, explaining that the debtor and creditor would not be subject to the same requirements under "vesting of property of the estate."[128] The exact language of the provision, however, states in relevant part that the vesting of the property is provided for, "on confirmation of the plan or at a later time, in the debtor *or in any other entity*."[129] "Entity" is defined under § 101(15) as "person, estate, trust, governmental unit, and United States trustee."[130] Given this definition, it is clear that the vesting was meant to apply to others besides the debtor, and therefore it should be similarly applied to the creditor. While the court's concerns in *Rose* are valid, given § 1322(b)(2), the court should have given *Rosa*'s holding more consideration.[131]

Since *Rose* a number of bankruptcy courts have addressed the meaning of "vesting" under § 1322(b)(9) and how it applies to zombie foreclosures. Similar to the different approaches illustrated by *Rose* and *Rosa,* bankruptcy courts have followed two different schools of thought. All of the courts have dealt with whether or not "vesting" can occur over the objection of a creditor. One body of case law has held that even with the option of vesting under

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125 *Id.* (focusing on the fact that Congress chose to use the term "vesting" as opposed to "surrender" in § 1322(b)(9)).

126 *See id*.

127 *See id*. ("In most instances, failure to object translates into acceptance of the plan by the secured creditor." (quoting Andrews v. Loheit (*In re* Andrews), 49 F.3d 1404, 1409 (9th Cir. 1995))) ("The general rule is that the acceptance of the plan by a secured creditor can be inferred by the absence of a timely objection." (quoting *In re* Szostek, 886 F.2d 1405, 1413 (3d Cir. 1989))) ("The case law makes clear that if the holder of an allowed secured claim provided for by a plan fails to object to confirmation of the plan, Section 1325(a)(5)(A) is satisfied . . . ." (quoting *In re* James, 260 B.R. 498, 503 (Bankr. D. Idaho 2001))). The court additionally qualified that the creditor needed appropriate notice of the potential plan to have ample opportunity to object. *Id.* at 524–25; *see also* 8 COLLIER ON BANKRUPTCY, *supra* note 78, at ¶ 1327.02 ("A secured creditor may be bound by a plan provision that vests title to property in that creditor, which may be useful when the creditor refuses to foreclose, subjecting the debtor to ongoing expenses for a property the debtor does not wish to own." (citing *In re Rosa*, 495 B.R. 522)).

128 *See In re* Rose, 512 B.R. 790, 795 (Bankr. W.D.N.C. 2014).

129 11 U.S.C. § 1322(b)(9) (2012) (emphasis added).

130 11 U.S.C. § 101(15).

131 *Compare In re Rose*, 512 B.R. at 795, *with In re Rosa*, 495 B.R. 522.

§ 1322(b)(9) "forced vesting . . . over the [that] lender's objection is inconsistent with the mandatory provisions of § 1325(a)(5).[132]

Other decisions in bankruptcy courts have held the opposite. *In re Sagendorph* held "'vesting of property' in § 1322(b)(9) and 'surrender the property' in § 1325(a)(5)(C) are different and mean different things. . . . These provisions are not in conflict."[133] The court stated surrender "is a preliminary step in the process of transferring title."[134] The court goes on to hold that even in light of state law that does not support forced vesting, "[t]he paramount federal interest" of "the fresh start policy of the Bankruptcy Code" out weighs state law.[135] The court allowed the property to vest over a creditor's objection. Other bankruptcy courts have also held that property can vest over the creditor's objection.[136]

The courts need to work together to clarify the inconsistencies within the case law. Arguably, bankruptcy courts that have held forced vesting is not allowable are aware and not entirely comfortable with the position that debtors are left in as a result of such decision.[137] In *Weller*, Judge Boroff acknowledged that "[t]he Court is troubled by the result for these Debtors, for similarly situated debtors and for the communities that have suffered, and continue to suffer, as a result of abandoned properties in the aftermath of the real estate downturn. . . ." and that "the Debtors have been left in limbo by [the Creditor's] failure to act." In this case, while the court acknowledged the hardship of the debtor, it was concerned that a policy of forced vesting would cause lenders to make home mortgage loans less frequently or with more costs associated with them.[138] Other case law recognized the inherent unfairness to the debtor through the current interpretation of the provision.[139] However, the court in *Weller* stated that "such competing considerations is the province of legislative

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[132] *In re* Weller, No. 12-40418, 2016 WL 164645, at *4 (Bankr. D. Mass. 2016); *see also In re* Watt, 520 B.R. 834, 840 (Bankr. D. Or. 2014), *vacated*, Bank of N.Y. Mellon v. Watt (*In re Watt)*, No. 3:14-cv-02051-AA, 2015 WL 1879680 (D. Or. 2015); *In re Williams*, 542 B.R. 514 (Bankr. D. Kan. 2015); *In re* Sherwood, No. 15-10637 (JLG), 2016 WL 355520 (Bankr. S.D.N.Y. 2016); *In re* Tosi, No. 13-14017-FJB, 2016 WL 859034 (Bankr. D. Mass. 2016).

[133] No. 14-41675-MSH, 2015 WL 3867955, at *4 (Bankr. D. Mass. 2015).

[134] *Id*.

[135] *Id.* at *4–5.

[136] *See In re* Stewart, No. 13-40709, 2015 WL 5138196 (Bankr. D. Minn. 2015); *In re* Zair, 535 B.R. 15 (Bankr. E.D.N.Y 2015).

[137] *In re Weller*, 2016 WL 164645, at *4.

[138] *Id*.

[139] *See In re Watt*, 520 B.R. at 840.

and not judicial bodies . . . ."[140] Therefore, this inconsistency demonstrates the need for clarification to the provisions of the Bankruptcy Code to give debtor's and bankruptcy courts clear guidance on how §1322(b)(9) interacts with § 1325(a)(5)(C).

3. Section 105

Rose held that § 105(a) does not allow the court "to alter the substantive rights of the parties."[141] The opinion acknowledged that although this provisional "catch-all" power has been used to fashion "relief . . . in a wide variety of situations" the court cannot allow it to be used "to permit a debtor to transfer property to its mortgage lender by fiat."[142] Specifically, the court in *Rose* focused on the fact that no previous case law has construed § 105 powers to allow such a transfer to occur, and the court stated it would "not be the first."[143] The court in *Rose* should have explored § 105 powers in more detail with respect to zombie foreclosures based on a number of factors including that zombie foreclosures represent a fairly new concept, and zombie foreclosure cases are just beginning to represent a notable portion of the bankruptcy court case docket.

In *Arsenault*, the court further held that the confirmation order for the debtors' chapter 13 plan did not create a binding contract between the parties because the act of "surrender" did not compel Chase Bank to affirmatively take title on the property.[144] While § 105 grants the bankruptcy court considerable powers, the bankruptcy court declined to exercise any of those powers based on the facts of the case, and thus based on the facts of zombie foreclosures.[145]

While the court in *Arsenault* declined to use § 105 powers, the court offered the following analysis:

> Debtors argue Chase's inactions impede Debtors' ability to a fresh start thereby violating the fresh start concept of the Bankruptcy Code.

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[140] *In re Weller*, 2016 WL 164645, at *4.

[141] 512 B.R. 790, 795 (Bankr. W.D.N.C. 2014) (citing Internal Revenue Serv. v. Levy (*In re* Landbank Equity Corp.), 973 F.2d 265, 271 (4th Cir. 1992)).

[142] *Id.*

[143] *Id.*

[144] 456 B.R. 627, 629 (Bankr. S.D. Ga. 2011), *aff'd*, Arsenault v. JP Morgan Chase Bank, N.A., No. CV 311-106, 2012 U.S. Dist. LEXIS 128412 (S.D. Ga. Aug. 30, 2012).

[145] *See id.* at 631 (declining to use the powers because the Bankruptcy Code "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity")

> However, "[]in enacting the Bankruptcy Code, Congress sought to strike a balance among the competing interests of debtors, creditors and the government." Debtors' fresh start is not the only interest addressed in the Bankruptcy Code. Under the Code's structure, debtors are not absolved of all incidents of ownership. Chase is prevented from pursuing Debtors *in personam* for this debt, but given these facts, Chase is not required to absolve Debtors of truly third party obligations that are incidents of property ownership. Nothing in the Bankruptcy Code requires Chase to transfer title.[146]

Specifically, the court cited the *Canning* case that was discussed in *Rose* when considering § 1325(a)(5)(C) and the definition of surrender.[147] *Arsenault* focused on the portion of the *Canning* opinion that explained the Bankruptcy Code does not require a creditor "to assume ownership or take possession of collateral," even if in the Cannings' case the creditor's "chosen course of action, or inaction, did not make things easy for the Cannings."[148] The court in *Arsenault* used the *Canning* court's analysis of § 1325(a)(5)(C) as the basis for the court in *Arsenault* declining "to exercise any § 105 power."[149]

Bankruptcy courts need to consider a way to use § 105 powers in a way that balances all of the interests involved in the unique situations that have led to the proliferation of zombie foreclosures. Despite the analysis offered to support the court's conclusions in *Arsenault*, the court got the "balance among the competing interests of debtors, creditors and the government" wrong.[150] The cases the court relied on, such as *Canning*, were about significantly different sets of facts and circumstances. In *Canning*, the creditor and debtor were in contact, and the court wanted to protect the creditor's interest to allow the property to increase in value with the passage of time.[151] On these facts, the court in *Canning* balanced the factors based on a fairness question that dealt with significantly different concerns than those being balanced in *Arsenault* and other zombie foreclosures. The decision in *Arsenault* spoke about balancing interests, but it failed to offer any consideration of the broad effects these situations have on communities and individuals nationwide. Bankruptcy courts should consider the broad effects these situations have on communities and in-

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146 *Id.* at 631 (citing United States v. Sutton, 786 F.2d 1305, 1306 (5th Cir. 1986); Canning v. Beneficial Me., Inc. (*In re* Canning), 442 B.R. 165, 172 (Bankr. D. Me. 2011), *aff'd*, 462 B.R. 258 (B.A.P. 1st Cir. 2011), *aff'd*, 706 F.3d 64 (1st Cir. 2013)).

147 *See* 442 B.R. at 171–72.

148 *Id.* at 172.

149 456 B.R. at 631.

150 *Id.*

151 *See* 442 B.R. at 171–72.

dividuals when addressing zombie foreclosures. The community interest is not implicated in the cases that the *Arsenault* court considered when determining its rationale for choosing not to use § 105 powers.

Specifically, there is little in the legislative history that addresses zombie foreclosures because legislatures did not anticipate it when the Bankruptcy Code was created.[152] There have been discussions considering the possibility of amending the Bankruptcy Code within congressional committee and subcommittee hearings that addressed the effects of the mortgage foreclosure crisis.[153] Specifically, the hearings considered amendments to § 105 to more clearly allow bankruptcy court judges the flexibility that they need to alleviate the negative results of the foreclosure crisis.[154] These suggestions have been raised by individuals testifying in front of such committees and members of the committees and subcommittees. The Chairman of the Senate Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary acknowledged that there was discussion to "generate such a provision on a bipartisan basis" being explored by the Senate Committee on the Judiciary.[155]

4. The Last Resort

If all of the above arguments do not apply in a certain case, there is one remaining option that bankruptcy courts should consider suggesting to debtors. As *Rose* illustrates, bankruptcy courts are not necessarily comfortable leaving debtors in the trying positions created in association with zombie foreclosures.[156] This discomfort is recognizable when the court acknowledged that the debtors had done everything required of them under their bankruptcy plan.[157] In *Rose*, the court granted part of the debtors' claim to allow the debtors a chance to succeed outside the bankruptcy court within state law.[158] Unfortunately, being uncomfortable with an outcome does not change the way a judge interprets the Bankruptcy Code in most situations.

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152 *See* Conlin, *supra* note 3 ("Banks used to almost always follow through with foreclosures, either repossessing a house outright . . . or putting it up for auction at a sheriff's sale. . . . That has changed since the housing crash.").

153 *See Mandatory Mediation Programs*, *supra* note 31, at 20 (statement of John Rao, Attorney, National Consumer Law Center).

154 *See id*.

155 *Id.* (statement of Sen. Sheldon Whitehouse, Chairman, Subcomm. on Admin. Oversight & the Courts).

156 *See, e.g.*, 512 B.R. 790, 793 (Bankr. W.D.N.C. 2014).

157 *See id*.

158 *See id.* at 797–98.

In a scenario where the court offers no relief to the debtor, the debtor can re-file for bankruptcy. However, this is not an ideal scenario, given that many zombie foreclosures involve significant lag times from when bankruptcy plans are completed to when formal adversarial actions are commenced in court. Many chapter 13 debtors would likely approach the end of the limitations for re-filing. Under § 1328(f)(2), a debtor will be able to file another chapter 13 petition after two years have passed since the completion of the previous case.[159] While re-filing for bankruptcy is burdensome, it may be the only method available to find a way through a zombie foreclosure.

B. Other Resolutions to the Zombie Foreclosure Crisis

The quickest and most direct route to addressing zombie foreclosures in bankruptcy is to follow the holding in *Rosa*. By accepting *Rosa*'s holding, courts should require debtors to include the "nonstandard provision" language in every bankruptcy plan to avoid zombie foreclosures in the future.[160] This possible solution to address zombie foreclosure cases is particularly promising because it does not require an actual amendment to the Bankruptcy Code. Therefore, legislative action will not be required. This new approach would only require an alteration in practice for bankruptcy attorneys when there is a concern that a property being surrendered within a plan will be left "in limbo" by the creditor.

Similarly, while amending the Bankruptcy Code may sound like a more radical step, the possibility of amending the Bankruptcy Code in light of the foreclosure crisis is not an entirely new suggestion. Since the Bankruptcy Code was last amended in 2005, there have been Congressional hearings debating whether the foreclosure crisis would require amendments to the Bankruptcy Code.[161] While this particular movement for Bankruptcy Code reform stemmed from a rejected portion of the federal Troubled Asset Relief Program ("TARP"),[162] it represents an acknowledgment that amending the Code to ad-

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159 11 U.S.C. § 1328(f)(2) (2012).

160 *See* 495 B.R. 522, 523 (Bankr. D. Haw. 2013).

161 *See The Worsening Foreclosure Crisis: Is It Time to Reconsider Bankruptcy Reform?: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 111th Cong. 2 (2009) [hereinafter *The Worsening Foreclosure Crisis*].

162 The federal TARP was created in 2008 to "combat" the recent recession and subsequently related consequences. The Obama administration through the Treasury created two key programs under the TARP legislation, including Making Home Affordable and the Hardest Hit Fund, in an attempt to address the housing crisis that accompanied the financial crisis. *See Financial Stability*, U.S. DEP'T OF TREASURY (last visited Feb. 19, 2016), http://www.treasury.gov/initiatives/financial-stability/Pages/default.aspx. There are more Congressional

dress the issue of the 2008 recession is something Congress has and should consider.[163]

The Bankruptcy Code needs changes to the specific language within the sections discussed above to codify the new approach courts should take to address zombie foreclosures. The most straightforward way to clarify issues that arise with zombie foreclosures could be to define "surrender" within the definitional section of the Bankruptcy Code, § 101.[164] The current failure to provide a definition for the term is a gap in the Bankruptcy Code that needs to be addressed. Leaving it to individual courts to interpret such a significant term allows for the possibility of conflicting interpretation and unclear guidance for debtors in future bankruptcy proceedings. Debtors deserve to have clearer guidance on what their "surrender" associated with § 1325(a)(5)(C) and other Bankruptcy Code sections represents. By adding a definition for the term "surrender," the Bankruptcy Code can clearly recognize the parameters of "surrender" for both the debtor and a secured creditor during plan confirmation.

Additionally, Congress needs to consider the requirements of the plan confirmation, § 1325(a)(5)(C). This Comment suggests that there is a way to include language within confirmation plans that clarifies requirements to ensure that secured creditors do not continue to sit on various properties without foreclosing. For example, § 1325(a)(5)(A)[165] in connection with § 1327[166] clarifies that confirmed plans are binding on debtors and creditors alike.[167] If additional language was added to the Bankruptcy Code that clarified the obligations secured creditors had toward surrendered properties, it could keep an equitable balance of interests between creditors and debtors. Such additional language would place all of the parties on notice that confirmation of a plan including the surrender of collateral to the creditor has a binding effect on both parties. Therefore, secured creditors would plan accordingly and be prepared to ques-

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complaints about the effectiveness of the TARP programs and other related programs that were meant to address the housing foreclosure crisis. *See* CONG. OVERSIGHT PANEL, 55-737, EVALUATING PROGRESS ON TARP FORECLOSURE MITIGATION PROGRAMS (2010). This report specifically articulates issues surrounding bankruptcy in connection with the Panel's discussion of foreclosure mitigation and recent changes to previously announced programs. CONG. OVERSIGHT PANEL, 55-737, EVALUATING PROGRESS ON TARP FORECLOSURE MITIGATION PROGRAMS 13–14 (2010) (applauding the U.S. Treasury's new guidance for outreach requiring program servicers to consider bankrupt individuals for the programs).

163 *See The Worsening Foreclosure Crisis*, *supra* note 161.

164 *See generally* 11 U.S.C. § 101.

165 11 U.S.C. § 1325(a)(5)(A).

166 11 U.S.C. § 1327.

167 *See* 11 U.S.C. § 1327(a).

tion the plan if such creditors have no bona fide interest in ever initiating foreclosure or taking action with property.

One recommendation for such language to amend the Bankruptcy Code calls for the addition of a clause into § 1325, to further clarify the binding nature of plan confirmation, and demonstrate that interpreting § 1325 as binding, does not go against other provisions of the Bankruptcy Code such as § 1322(b)(2).[168] The suggested change to the language of § 1325(a) adds a subsection (10) that would firmly require creditors to fulfill obligations they accepted by failing to object to confirmation of a plan.[169]

In particular, clarifying the requirements under § 1325 includes obligations that come due in the aftermath of the lifting of the automatic stay such as to commence foreclosure proceedings. The language could be written in a similar manner to that of some of the other provisions within § 1325(a). The amendment, so as not to alter a party's rights under the provisions,[170] would include "the acceptance of the plan by the creditor by failing to object to the plan as proposed by the debtor."

Additionally, the Bankruptcy Code may be able to incentivize a secured creditor to foreclose in a timely fashion by including time-sensitive lien stripping clauses in confirmation plans. Such clauses would apply if creditors fail to act in a timely fashion to transfer title once a debtor has discharged his or her interest in a property or, in the alternative, made it clear to the debtor that they will not act on the property. Such language puts creditors and debtors on notice of the situation, balances differing party interests, and protects the community from zombie foreclosures.

C. Public Policy Considerations

Public policy, as the term suggests, is meant to look at the broader picture of the community in which the law would be enacted and consider the value the new law presents for the community.[171] Public policy concerns arise when considering how bankruptcy courts currently approach zombie foreclosures. There is a strong public policy rationale for finding a way to utilize § 105 pow-

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168 *See* 11 U.S.C. § 1322(b)(2).

169 *See* 11 U.S.C. §§ 1325(a), 1327.

170 *See* 11 U.S.C. § 1322(b)(2).

171 *See* WEST'S ENCYCLOPEDIA OF AMERICAN LAW 8 (Shirelle Phelps & Jeffrey Lehman eds., 2d ed. 2005) (defining "policy"); WEST'S ENCYCLOPEDIA OF AMERICAN LAW 8 (Shirelle Phelps & Jeffrey Lehman eds., 2d ed. 2005) (defining "public policy").

ers to remove zombie foreclosures from the landscape of communities throughout the country.[172]

The number of Congressional subcommittees that have directly and indirectly addressed the concerns for communities nationwide suffering from "the blight of foreclosed properties," illustrates the importance of the discussion that is ongoing around the mortgage financial crisis.[173] Additionally, in some of these hearing reports, there is a real emphasis on holding banks accountable.[174] Through accountability and transparency efforts, Congress hopes to "begin to fix those unscrupulous lending practices that took place and wrongful foreclosures with the public interest as our core principle."[175] Bankruptcy courts would be able to use the Bankruptcy Code to create a more robust level of accountability and to alleviate the effects of the foreclosure crisis because of legislators' efforts to amend the Bankruptcy Code.

New legislation proposed by New York Attorney General Eric Schneiderman, originally in fall 2014, followed by a revised version in 2015 through 2016, illustrates the current and significant public policy concerns relating to zombie properties.[176] The title of the proposed program bill, the Abandoned Property Neighborhood Relief Act, suggests the significant public policy underpinnings of the bill.[177] The bill proposes to introduce a number of provisions to "address the growing statewide problem of so-called 'zombie properties.'"[178] Specifically, the Abandoned Property Neighborhood Relief Act will introduce a number of provisions to help debtors and their communities to deal with zombie foreclosure properties. The provisions will serve to clarify homeowner's rights in their property, as well as the obligations required of banks to avoid zombie foreclosures. While the bill is meant to help homeowners, it is

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172 *See generally* 11 U.S.C. § 105.

173 *Saving Our Neighborhoods*, *supra* note 8.

174 *See Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews: Hearing Before the Hous., Transp. & Cmty. Dev. of the S. Comm. on Banking, Hous. & Urban Affairs*, 113th Cong. 2 (2013).

175 *Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews: Hearing Before the Hous., Transp. & Cmty. Dev. of the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 2 (2011) (statement of Sen. Robert Menendez, Chairman, S. Subcomm. on Hous., Transp. & Cmty. Dev.).

176 *See* Press Release, Office of N.Y. Att'y Gen. Eric T. Schneiderman, *supra* note 9; *see also* Fahey, *supra* note 6.

177 *See* Press Release, Office of N.Y. Att'y Gen. Eric T. Schneiderman, *supra* note 9.

178 *Id.*; *see also* Ben Lane, *New York Doubling Down in Fight Against Zombie Foreclosures: Attorney General Announces New Legislation to Address 'Growing Problems*,*'* HOUSINGWIRE (Feb. 17, 2015), http://www.housingwire.com/articles/print/32962-new-york-doubling-down-in-fight-against-zombie-foreclosures.

limited by the current scope of the definition of individuals and homes that contribute to zombie foreclosures.[179] The bill is a strong first step by New York to address the zombie foreclosure crisis, but still has a long way to go before it can impact debtors and communities.

CONCLUSION

Bankruptcy courts need to reconsider their stance on zombie foreclosures. The case law is still developing on this front, and courts need to consciously decide how zombie foreclosure cases should be addressed under the Bankruptcy Code. Over time, zombie foreclosures will likely become a more developed portion of bankruptcy case law. If bankruptcy courts act soon, then they can avoid further inconsistent case law around zombie foreclosures, like the inconsistent holdings concerning § 1322(b)(9).[180]

This Comment suggests that there are a number of possible ways to address zombie foreclosures with slight additions to the language of the Bankruptcy Code. Section 1325(a)(5)(A) needs to be modified to create plans with binding time limits on secured creditors. Or, in lieu of binding time limits, amendments should clarify that there are corresponding obligations that fall to a creditor depending on the details of the plan and the actions associated with the case. This slight change would allow the Bankruptcy Code to allow for the courts and debtors to have recourse when dealing with potential zombie foreclosures.

Changing the way bankruptcy courts interpret and apply the Bankruptcy Code to certain cases is consistent with the tenets of bankruptcy law. Creditors would still be able to receive fair, equitable treatment in bankruptcy cases. A secured creditor could agree to a debtor's plan; if the creditor rejects the debtor's plan, then it could become an unsecured creditor.[181] By giving the creditors a choice to become an unsecured creditor with no priority, the creditor still receives the same funds as if they had remained a secured creditor with no intention to actually foreclose. Also, even if the court considers such a change to be detrimental to the secured creditor with first priority, the court needs to think beyond the first priority position. For many homes there are potentially

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179 *See id*.

180 *See, e.g.*, *In re* Watt, 520 B.R. 834, 840 (Bankr. D. Or. 2014), *vacated*, Bank of N.Y. Mellon v. Watt (*In re Watt)*, No. 3:14-cv-02051-AA, 2015 WL 1879680 (D. Or. 2015); *In re* Zair, 535 B.R. 15 (Bankr. E.D.N.Y. 2015).

181 If this were considered as a possible solution, there are also a number of other Bankruptcy Code provisions that need to be considered that deal with a creditor's right to appear in front of the court and be heard on an issue, such as 11 U.S.C. § 1109.

multiple mortgages and secured creditors in play. Therefore, such a policy would allow other secured creditors to receive a more equitable remedy (at the expense of the secured creditor who lost priority). Bankruptcy courts have broad discretion and in many ways present the possible resolution to challenges currently facing debtors, creditors, and communities across the country.

By using the rationale offered in this Comment, bankruptcy courts will be able to offer debtors relief. Additionally, not all of the methods above necessarily require any legislative action, so courts could immediately grant debtors relief as more zombie foreclosure cases arise. The methods discussed are not meant to present radical change. However, they are meant to encourage the bankruptcy courts to appropriately adapt to the present realities of the mortgage foreclosure crisis to better help American communities and individuals finally recover and start anew.

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