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Consumers' Declining Power in the Fintech Auto Loan Market

Pamela Foohey

CONSUMERS' DECLINING POWER IN THE FINTECH AUTO LOAN MARKET

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ABSTRACT

Automobiles have become part of America's infrastructure. For most people, having access to a car is crucial to their livelihoods and they will take on significant amounts of debt to purchase vehicles. Auto debt is unlike any other consumer debt, both in its structure, which allows creditors to easily seize collateral, and in its lack of regulation. The unique and lucrative nature of auto debt has not gone unnoticed by lenders or by companies leveraging fintech to offer people new ways to purchase cars and car loans. This Article assesses the evolving marketplace for auto sales, leasing, and loans to evaluate how Americans access cars, including consumer bankruptcy's place in helping people keep their cars. Based on this assessment, it argues that power imbalances between auto lenders and consumers have widened and likely will continue to widen, to people's detriment. The Article ends by outlining and evaluating a series of ideas to facilitate needed "car security" for Americans.

INTRODUCTION: DRIVING IN AMERICA

America is a country of cars.[1] Having access to an automobile is crucial to getting to work, to the grocery store, to the doctor, to school, and to childcare.[2] In most places in the United States, infrastructure prevents even moderately efficient travel without a car. Buses run sporadically. Bike lanes are nonexistent. Trains and light rails are not accessible. Walking and other non-car travel simply is not prioritized.[3]

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1. In 2015, the United States was the fourth highest among countries based on motor vehicles per 1,000 inhabitants. *See* Joe Myers, *These Are the Countries with the Most Vehicles Per Person*, WORLD ECON. FORUM (Oct. 25, 2015), https://www.weforum.org/agenda/2015/10/these-are-the-countries-with-the-most-vehicles-per-person/.

2. *See* Pamela Foohey, Robert M. Lawless, & Deborah Thorne, *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. 287, 289–90 (2020).

3. *See* Gregory H. Shill, *Unsafe Streets' New Liability*, 2 VISION ZERO CITIES 37 (2017), http://ssrn.com/abstract=2961099 (detailing a case in New York City in which a twelve-year-old was struck and severely injured by a car on what was deemed an unsafe street). *See generally* Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 502 (2020) (overviewing how the United States became car-dependent because of legal and governmental choice to invest in "car-centrism" and "automobile supremacy"); R. J. CROSS ET AL., DRIVING INTO DEBT 4 (2019), https://uspirg.org/sites/pirg/files/reports/WEB_USP_Driving-into-debt_Report_021219-v2.pdf ("Auto dependence is the result of generations of public policy.").

Most people will take on significant amounts of debt to purchase the vehicles they need to survive day-to-day, a reality that has not gone unnoticed by auto dealers and by companies leveraging financial technology (called "fintech") to offer people new ways to purchase cars and obtain car loans.[4] This Article details the evolving fintech market for auto sales, leasing, and loans to argue that unless the government steps in to support people in the new "car economy" that its accumulated policies have shaped, new innovations will continue to widen power imbalances between auto lenders and consumers to consumers' detriment.

Although some people choose to live without a car, most car-free Americans go without an automobile not by choice but because they cannot afford a car.[5] Over 85% of Americans drive to work and over 95% of American households report having access to at least one automobile.[6] The effect of not having access to an automobile is pronounced. Car-less people in America have lower incomes, work fewer hours, and are more likely to live in poverty.[7]

The United States' choice to build infrastructure and enact laws that support private investment in cars means that people themselves must invest in cars, which has led to a robust market for cars and auto loans. Besides a house, a car is the single biggest investment that most people will make.[8] Additionally, two-adult families generally own two cars because most couples need a car each, particularly if both partners are in the workforce.[9]

Cars are expensive, even if people purchase them used. Given that nearly 40% of Americans cannot cover a $400 emergency expense with cash, savings, or a credit card paid off within a month,[10] and that over 75% of

4. *See generally* Christopher Odinet, *Consumer Bitcredit and Fintech Lending*, 69 ALA. L. REV. 781, 784, 787–88 (2018) (defining and discussing "fintech"); Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 238–40 (2018) (same).

5. *See* Anne E. Brown, *Car-Less or Car-Free? Socioeconomic and Mobility Differences Among Zero-Car Households*, 60 TRANSP. POL'Y 152, 154 tbl.1 (2017); Suman K. Mitra & Jean-Daniel M. Saphores, *Carless in California: Green Choice or Misery?*, 65 J. TRANSP. GEOGRAPHY 152, 153 (2017).

6. *See* Adam Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 GEO. L. REV. 1257, 1259 (2020) (reporting data from the United States Census Bureau).

7. *See* Foohey et al., *Driven*, *supra* note 2, at 289–90. *See generally* David A. King, Michael J. Smart & Michael Manville, *The Poverty of the Carless: Toward Universal Auto Access*, J. PLAN. EDUC. & RESEARCH (2019), https://doi.org/10.1177/0739456X18823252; Steven Raphael & Lorien Rice, *Car Ownership, Employment & Earnings*, 52 J. URB. ECON. 109 (2002).

8. *See* Cross et al., *supra* note 3, at 4–5; Foohey et al., *Driven*, *supra* note 2, at 289–290.

9. *See* Foohey et al., *Driven*, *supra* note 2, at 308 tbl.1 (noting that the median number of cars owned by couples, per the Federal Reserve's Survey of Consumer Finances, is two); *see also* Phil LeBeau, *Wave Goodbye To The Two-Car Family*, CNBC (Nov. 18, 2014), https://www.cnbc.com/2014/11/18/two-car-homes-will-become-less-common-kpmg.html (noting that the majority of American households own two cars).

10. BD. OF GOVERNORS OF THE FED. RES. SYSTEM, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 2 (May 2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf; *see also* Pamela Foohey, Dalié Jiménez, & Christopher K. Odinet, *The Folly of Credit as Pandemic Relief*, 68 UCLA L. REV. DISC.

American workers live paycheck-to-paycheck,[11] most people must take out loans to purchase their cars.[12] As income and wealth inequality expands, people's need to finance their cars will only increase.[13] Indeed, auto loans now are the second largest consumer credit market in terms of number of loans[14] and feature prominently on households' "accumulated ledger of economic risk."[15] Over the last decade, Americans' auto loan debt increased nearly 40% and the average auto loan for a new car increased 11%.[16] The subprime auto loan market has significantly expanded as well.[17]

More debt could mean more cars. Yet, a significant rise in passenger vehicles on America's roads has not accompanied this rise in auto debt. The total vehicle count has increased by about 10% since 2005.[18] In contrast, the average age of passenger vehicles has risen. At the end of 2018, the average age of passenger vehicles in operation was 11.8 years; in 2014, it was 11.4 years.[19] These figures suggest that people are taking out more money to finance increasingly old cars.[20]

126, 136 (2020) (noting a study from March 2020 that "found that more than half of all individuals do not have savings to cover three months of expenses").

11. Emmie Martin, *The Government Shutdown Spotlights a Bigger Issue: 78% of US Workers Live Paycheck to Paycheck*, CNBC (Jan. 9, 2019), https://www.cnbc.com/2019/01/09/shutdown-highlights-that-4-in-5-us-workers-livepaycheck-to-paycheck.html.

12. *See Automobile Purchase Decisions and Auto Lending*, FED. RES. BOARD (June 14, 2016), https://www.federalreserve.gov/econresdata/2016-economic-well-being-of-us-households-in-2015-Automobile-Purchase-Decisions-and-Auto-Lending.htm (reporting that in 2015, two-thirds of people who purchased automobiles, new or used, financed their purchase with a loan).

13. *See* Pamela Foohey & Nathalie Martin, *Reducing the Wealth Gap Through Fintech "Advances" in Consumer Banking and Lending*, 2021 U. ILL. L. REV., Part II (forthcoming 2021) (detailing widening income and wealth gaps in the United States).

14. *See* Levitin, *supra* note 6, at n.11 (reporting data from the Federal Reserve Bank of New York).

15. AnnaMaria Andriotis, Ken Brown & Shane Shifflett, *Families Go Deep in Debt to Stay in the Middle Class*, WALL ST. J. (Aug. 1, 2019, 11:35 AM), https://www.wsj.com/articles/families-go-deep-in-debt-to-stay-in-the-middle-class-11564673734.

16. Both figures are inflation adjusted. *See id.*

17. *See* FED. RES. BANK OF NY, QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2018: Q4 (Feb. 2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2018q4.pdf (reporting that in 2018, 31% of new auto loan originations went to borrowers with subprime (below 660) credit scores); *infra* Part II for more details about auto loans outstanding.

18. *Compare* Jerry Hirsch, *Record 278 Million Vehicles on U.S. Roads and They are Old*, TRUCKS (June 27, 2019), https://www.trucks.com/2019/06/27/vehicle-average-age-ihs-markit/ (reporting data from the IHS Markit study of vehicle registrations at the beginning of 2019) *with* Jerry Hirsch, *253 Million Cars and Trucks on U.S. Roads; Average Age Is 11.4 Years*, L.A. TIMES (June 9, 2014, 8:46 AM), https://www.latimes.com/business/autos/la-fi-hy-ihs-automotive-average-age-car-20140609-story.html (reporting data from the IHS Markit study of vehicle registrations from 2004).

19. *See* Hirsch, *Record 278 Million Vehicles*, *supra* note 18 (providing data for "light vehicles" in operation); Hirsch, *253 Million Cars and Trucks, supra* note 18 (same).

20. *Cf.* David Muller, *5 Used-Vehicle Trends in 2020*, AUTO. NEWS (Dec. 30, 2019, 12:00 AM), https://www.autonews.com/used-cars/5-used-vehicle-trends-2020 (commenting that "dealerships big and small increasingly have shifted their focus toward used vehicles").

How people finance their purchase of vehicles sets auto loans apart from most other consumer credit, such as credit cards and home loans, which, in part, may explain increasing loan amounts in relation to the car count. Auto lenders, like home mortgage lenders, almost always require that borrowers give rights to their lenders in the cars—that is, the loans are secured. This security provides lenders the right to repossess and sell vehicles if borrowers default.[21] But unlike home loans, repossessions and sales of automobiles can happen quickly because there are few federal or state regulations that provide people with rights against lenders that may delay sales.[22] The secured nature of auto loans suggests that lenders would have significant power to compel payment because default could immediately threaten a person's livelihood. In addition, auto sellers, which often partner with auto lenders or are one in the same, are not subject to the Consumer Financial Protection Bureau (CFPB)'s rulemaking, supervision, or enforcement authority.[23] This carveout serves to insulate auto loans from regulation by the federal agency designed to address problematic practices that research had identified in the a variety of consumer lending markets, including auto loans.[24]

In accordance with this assumption, research shows that when people face financial struggles, they generally prioritize paying their auto loans and default on other debts first.[25] During the 2008 financial crisis, for instance, people continued to make car payments.[26] In contrast, the COVID-19 pandemic may lead to increased auto loan defaults. More people are working

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21. *See* Foohey et al., *Driven*, *supra* note 2, at 300–03 (discussing repossession and sale); *Vehicle Repossession*, FED. TRADE COMM'N, https://www.consumer.ftc.gov/articles/0144-vehicle-repossession (last visited Sept. 17, 2020) (same).

22. *See* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 569 (explaining that "[f]oreclosure is an undesirable outcome for borrowers *and* lenders" (emphasis in original)); *Vehicle Repossession*, FED. TRADE COMM'N, https://www.consumer.ftc.gov/articles/0144-vehicle-repossession (last visited Mar. 29, 2020) ("In many states, your creditor can seize your vehicle as soon as you default on your loan or lease."); *infra* Part III (discussing repossession). Some states give borrowers a short time period to reinstate after repossession, including for auto loans. *See My Car Has Been Repossessed, and I Was Told It Will Be Sold. What Can I Do?*, CONSUMER FIN. PROT. BUREAU (Sept. 23, 2016), https://www.consumerfinance.gov/ask-cfpb/my-car-has-been-repossessed-and-i-was-told-it-will-be-sold-what-can-i-do-en-865/.

23. *See* Edward J. Balleisen & Melissa B. Jacoby, *Consumer Protection After the Global Financial Crisis*, 107 Geo. L.J. 813, 824–30 (2019) (discussing the lobbying that led to this carveout and the intertwining of car sales and loans); *infra* Part I.A.

24. *See* Balleisen & Jacoby, *supra* note 23, at 818–19 (discussing the creation of the CFPB).

25. *See* Foohey et al., *Driven*, *supra* note 2, at 324 (noting that people who file bankruptcy own cars in the same percentage as American households overall); Laura Bliss, *If the Economy Is So Great, Why Are Car Loan Defaults at a Record High?*, CITYLAB (Feb. 15, 2019), https://www.citylab.com/transportation/2019/02/subprime-car-loans-buy-automobile-lending-debt-trap/582652/.

26. *See* Billy Nauman, *Why America's $1.3tn Car-Loan Market Cannot Avoid A Pile-Up*, FIN. TIMES (Apr. 3, 2020), https://www.ft.com/content/5a8ca5b1-9a1c-4f81-99a5-acecef75b389; Kevin Wack, *How the coronavirus is upending auto lending*, AM. BANKER (Apr. 8, 2020), https://www.americanbanker.com/news/how-the-coronavirus-crisis-is-upending-auto-lending.

from home, which reduces the need for cars to get to work, in turn reducing the urgency of paying auto loans.[27]

In non-pandemic times, one of auto lenders' primary tools to increase profits is repossession. Some lenders repossess and sell the same used car repeatedly.[28] Car dealers encouraging people to default on their loans and allow their lenders to repossess their car before they purchase another vehicle even has a name, "kicking the trade."[29] This practice benefits dealers because third party lenders are on the hook for the auto loan, not the car dealership, and the dealership can often make additional money from selling the customer another car and arranging new financing for that car.[30]

"Kicking the trade" also reflects the consequence of the recent boom in auto loans. With debt comes default. As Americans have financed their car ownership with increasing levels of debt, delinquencies and default have risen.[31] For example, one subprime auto lender stated that, of the cars it lends against, it expects to repossess 35% of them.[32] Even before the COVID-19 pandemic, in 2019, consumers with subprime auto loans were defaulting within the first few months of borrowing at rates rivaling those during the 2008 financial crisis.[33] And yet subprime auto lenders continued to make large profits.[34]

Overall, the structure of auto sales and lending markets allocates more power to dealers and lenders than to consumers, likely more so than in other

27. *See* Nauman, *supra* note 26; Wack, *supra* note 26.

28. *See Dealers' Repeated Sales of the Same Used Car Surprisingly Common*, L.A. TIMES (Aug. 15, 2012, 12:00 AM), https://www.latimes.com/business/la-xpm-2012-aug-15-la-fi-boomerang-cars-20120815-story.html.

29. *See* Sebastian Blanco, *Some Dealers Telling Customers to Stop Paying Auto Loans, Sign for New Ones*, CAR & DRIVER (Mar. 7, 2020), https://www.caranddriver.com/news/a31055930/car-dealers-encouraging-loan-defaults/; AnnaMaria Andriotis & Ben Eisen, *Dealerships Give Car Buyers Some Advice: Just Stop Paying Your Loan*, WALL ST. J. (Feb. 15, 2020, 5:30 AM), https://www.wsj.com/articles/dealerships-give-car-buyers-some-advice-just-stop-paying-your-loan-11581762601.

30. *See* Andriotis & Eisen, *supra* note 29; *infra* Part II.A.

31. *See* Foohey et al., *Driven*, *supra* note 2, at 291–92 (discussing delinquencies); Elisabeth Buchwald, *Outstanding Auto-Loan Balances Just Hit a New Record and Delinquencies Are on the Rise—Should You Be Concerned?*, MARKETWATCH (Feb. 25, 2020, 2:18 PM), https://www.marketwatch.com/story/outstanding-auto-loan-balances-just-hit-a-new-record-and-delinquencies-are-on-the-rise-should-you-be-concerned-2020-02-21 (noting that auto loans delinquent for 90 or more days rose from $57 billion to $66 billion between the fourth quarter of 2018 to the fourth quarter of 2019).

32. Ryan Felton, *This Subprime Auto Lender Repos 35 Percent of the Cars It Finances*, JALOPNIK (Feb. 9, 2018, 3:30 PM), https://jalopnik.com/this-subprime-auto-lender-repos-35-percent-of-the-cars-1822875696.

33. *See* Adam Tempkin, *Subprime Auto Giant's Loans Souring at Fastest Clip Since 2008*, BLOOMBERG (Oct. 25, 2019, 6:00 AM), https://www.bloomberg.com/news/articles/2019-10-25/subprime-auto-giant-s-loans-souring-at-fastest-clip-since-2008; *infra* note 157 (noting rises in delinquencies on subprime auto loans).

34. *See* Anjali Kamat, *The Big Business of Subprime Auto Loans*, NPR (Dec. 12, 2019, 5:00 AM), https://www.npr.org/2019/12/12/787337997/the-big-business-of-subprime-auto-loans.

consumer credit contexts.[35] Indeed, as Adam Levitin recently concluded after a detailed discussion of auto lending, "the car loan market is rife with consumer abuses."[36]

The car loan market also is rife with new ways to get cars to people. People's need for automobiles, coupled with the rise of a lucrative auto loan market, has spurred innovation in the delivery of auto loans to consumers and innovation, beyond traditional leases, in how people access cars without purchasing them.[37] Fintech consumer loan platforms and smartphone apps have gained traction in the past couple years.[38] Auto loan platforms and apps promise to immediately deliver auto loans to customers with reduced fees and better terms.[39]

At the same time, ride-sharing services, such as Uber and Lyft, have transformed how people travel shorter distances, creating gig economy employment opportunities[40] People who drive for these services necessarily need cars, which, for some, require the purchase or lease of vehicles. Uber and other companies have tried to capitalize on drivers' need for financing for those vehicle purchases.[41] Some of these programs have failed rather epically, such as Uber's Xchange Uber Car Financing, which ended in a $20 million settlement with the Federal Trade Commission (FTC) based on the FTC's assertions of deceptive advertising.[42]

Also trying to capitalize on people's shorter-term need for vehicles are new peer-to-peer car rentals and car-sharing services. These companies offer an alternative to people who frequently use ride-sharing and also complement

35. A similar consumer credit market is for payday loans and high-cost credit products. Research shows that people will accept whatever terms they are given because they need money desperately. *See infra* Part II.A; Foohey & Martin, *supra* note 13, at Part III.C (discussing alternative financing).

36. *See generally* Levitin, *supra* note 6.

37. Auto leasing, while on the rise, remains a small percentage of the market for how people finance cars. *See* Aaron M. Kessler, *Auto Leasing Gains Popularity Among American Consumers*, N.Y. TIMES (Jan. 8, 2015), https://www.nytimes.com/2015/01/09/business/auto-leasing-gains-popularity-among-american-consumers.html (reporting that about 25% of new vehicles were leased in 2015).

38. *See* Kristin Johnson et al., *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Lending*, 88 FORDHAM L. REV. 499, 499-502 (2019) (detailing fintech and finance).

39. *See* Foohey & Martin, *supra* note 13, at 38 (discussing fintech auto lending platforms).

40. *See* Miriam A. Cherry, *Are Uber and Transportation Network Companies The Future of Transportation (Law) and Employment (Law)?*, 4 TEX. A&M L. REV. 173, 174–77 (2016) (overviewing the emergence of vehicle sharing); Shui-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 990–91, 999, 1003 (2016) (noting the sharing economy "enable[s] owners of homes, apartments, or vehicles, . . . to monetize those assets").

41. *See* Veena Dubal, Opinion, *Uber's New Loan Program Could Trap Drivers in Cycles of Crushing Debt*, THE GUARDIAN (Dec. 5, 2019), https://www.theguardian.com/commentisfree/2019/dec/05/uber-loan-program-debt; Brett Helling, *Vehicle Financing Options for Rideshare Drivers*, RIDESTER (Aug. 19, 2020), https://www.ridester.com/vehicle-financing-options-rideshare-drivers/ (listing ways that ride-sharing drivers can acquire SUVs and luxury cars).

42. *See* Foohey & Martin, *supra* note 13, at 39–40 (discussing Uber's failed auto loan program); *infra* Part III (detailing more about auto loan defaults and lending program failures).

already existing vehicle-sharing options, such as ZipCar.[43] Piggybacking on the rise of vehicle sharing services, platforms also have emerged to help users choose between these services.[44] In aggregate, vehicle-sharing services seem to have increased rather than decreased America's perceived need for and consumption of vehicles.[45]

The introduction of these fintech innovations has the power to disrupt the existing market structure that allocates power to auto dealers and lenders at the expense of consumers or to strengthen providers' hold over consumers. As the economic fallout from the COVID-19 pandemic continues, people may gravitate to these innovations as ways to buy the cars they need to get to work and for other necessary travel. Auto dealers and lenders likewise might gravitate to these innovations because they allow easier adaptation to marketplace changes as the crisis evolves.[46] These dynamics hold the potential to shift the balance of power even more in favor of auto dealers and lenders if fintech innovations tend to strengthen providers' hold over consumers.

Part I of this Article provides more details about auto loans' growth in recent decades and then focuses on the newest innovations in auto lending, paying particular attention to emerging fintech auto loan platforms and lending programs. This Part shows how the market structure for auto loans strongly favors lenders to the detriment of consumers' welfare. Part II bolsters that conclusion by detailing how the outsized power of auto lenders continues through delinquency and default.

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43. *See* Oei & Ring, *supra* note 40, at 1004–05 (discussing peer-to-peer car rentals); *What is Fair and How Does It Work*, FAIR, https://fairapp.force.com/s/article/fair-explained (last visited Aug. 27, 2020) (offering financing for vehicles without long-term commitment or paperwork); *Car Sharing: An Alternative to Car Rental with ZipCar*, ZIPCAR, https://www.zipcar.com/ (last visited Mar. 8, 2020).

44. *See About Us*, RIDECELL, https://ridecell.com/about/ (last visited Mar. 8, 2020); *Shared Mobility Services*, LAUNCH MOBILITY, https://www.launchmobility.com/ (last visited Mar. 8, 2020).

45. *See* SAIF BENJAAFAR ET AL., DRIVERS, RIDERS AND SERVICE PROVIDERS: THE IMPACT OF THE SHARING ECONOMY ON MOBILITY (June 22, 2020), https://ssrn.com/abstract=3035478 (concluding that the sharing economy may lead to increased vehicle ownership and vehicle operation costs); Cherry, *supra* note 40, at 179–80 (noting that Uber and Lyft have transformed from a "green alternative" to "aggressively" for-profit businesses). *But see First-ever Zipcar Impact Report Shows Car Sharing's Significant Social and Environmental Benefits, and Its Essential Role in Creating Better Cities*, ZIPCAR (Jan. 15, 2019), https://www.zipcar.com/press/releases/impactreport2018 (last visited Mar. 8, 2020).

46. Early reports suggest that auto dealers are adapting to the COVID-19 economy by offering customers greater ability to buy online and a more "flexible" purchase process. *See* Todd C. Frankel, *No Handshakes. A Bad Economy. These Car Salesmen Shifted Tactics — and Succeeded*, WASH. POST (Aug. 12, 2020 6:00AM), https://www.washingtonpost.com/road-to-recovery/2020/08/12/no-handshakes-bad-economy-these-car-salesmen-shifted-tactics-succeeded/; Michael Wayland, *The Coronavirus Pandemic Has Upended Auto Sales and Buying a Car Will Never Be the Same*, CNBC (May 21, 2020, 10:55 AM), https://www.cnbc.com/2020/05/21/the-coronavirus-pandemic-has-upended-auto-sales-and-buying-a-car-will-never-be-the-same.html.

Part III then considers people's current leading method to deal with burdensome auto loans—filing bankruptcy. It argues that although consumer bankruptcy's ability to help people keep their cars indicates that filing is useful for some people, it is a sub-par solution.[47] This Part also predicts how the Supreme Court's recent decision in *City of Chicago v. Fulton* will make filing bankruptcy even less useful for people, further enhancing auto dealers' and lenders' market power.[48]

Overall, Parts I through III argue that power imbalances between auto lenders and consumers have widened and likely will continue to widen, to the detriment of Americans for whom cars are necessities. Drawing on regulations and reforms suggested with regard to other consumer credit products, Part IV outlines and evaluates a series of ideas to facilitate needed "car security" for Americans. These ideas range from tailored disclosures to forgiving auto loans to subsidizing car ownership. As Part V concludes, this Article's discussion underscores that the progression of transportation in America is such that cars have become necessities. Their necessity, coupled with the continued evolution of the auto finance market, may render many of these reform ideas ineffective. Ultimately, what is required at this crossroads is a more encompassing and nuanced consideration of how to facilitate transportation in America.

I. THE BOOMING AUTO LOAN MARKETPLACE

Auto loans are the fastest growing entry on American households' financial ledgers. Over the past decade, the total balance of auto loans outstanding increased 75%.[49] As of the end of 2019, Americans owe $1.33 trillion in auto loan debt.[50] Subprime borrowers account for about one-quarter of that outstanding debt.[51] Loan terms are also increasing. The seven-year auto loan has featured prominently in the news recently. In the first half of 2019, one-third of auto loans financing the purchase of new vehicles came with terms longer than six years, as compared to 10% in 2009.[52]

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47. This Part relies heavily on insights from Foohey et al., *Driven*, *supra* note 2, in which my co-authors and I provide evidence of consumer bankruptcy filings motivated by keeping cars.

48. 592 U.S. ___ (2021), No. 19−357 (Jan. 14, 2021), https://www.supremecourt.gov/opinions/20pdf/19-357_6k47.pdf; *see also* SCOTUSblog Outline of City of Chicago, Illinois v. Fulton Case, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/city-of-chicago-illinois-v-fulton/ (last visited Mar. 8, 2020) [hereinafter SCOTUSblog *Chicago v. Fulton* docket].

49. *See* Cross et al., *supra* note 3, at 4; Levitin, *supra* note 6, at 1261, fig.1 (detailing outstanding auto loan balances from 2003 to 2019).

50. *See* Buchwald, *supra* note 31.

51. *See id.*; Cross et al., *supra* note 3, at 7.

52. *See* Ben Eisen & Adrienne Roberts, *The Seven-Year Auto Loan: America's Middle Class Can't Afford Its Cars*, WALL ST. J. (Oct. 1, 2019, 10:46 AM), https://www.wsj.com/articles/the-seven-year-auto-loan-americas-middle-class-cant-afford-their-cars-11569941215; Phil LeBeau, *Subprime Loans for Autos Show A Big Decline As Term Length Hits A Record High*, CNBC (Dec. 7, 2017, 8:20 AM), https://www.cnbc.com/2017/12/07/subprime-auto-loans-show-big-decline-as-

This Part begins with an overview of the mechanics of "traditional" auto sales and loans to detail the baseline power dynamics of the marketplace. It then sets forth a typology of innovations in the purchase, lease, and delivery of cars. This typology shows that the innovations in the auto marketplace likely will reinforce and enhance dealers' and lenders' ability to control the terms of car leasing, sales, and financing to consumers' detriment.

A. POWER DYNAMICS IN "TRADITIONAL" AUTO LOAN DEALS

The structure of "traditional" auto loans inherently gives the upper hand to lenders, creating an environment in which lenders may take advantage of consumers. That Americans often need cars to survive day-to-day life only exacerbates the power disparity between lenders and consumers.[53] Car purchases, new or used, are predominately tied up with the loan: after negotiating an already relatively complicated and atypical purchase, involving the car, upgrades, trade-ins, warranties, and service contracts, the consumer must then negotiate financing through the dealer unless she has somehow managed to line up third party financing in advance.[54] At present, almost nine out of ten buyers finance their cars through the dealership.[55] Making the transaction "bundle" even more confusing for buyers, the auto loan pricing may be linked with other purchase terms, such as warranties, insurance, and trade-in of old vehicles.[56]

Buyers also generally have little knowledge of the behind-the-scenes aspect of auto lending, which involves immediate loan assignment and indirect lending. In brief, the dealer agrees to make a loan only after it has already lined up the customer's actual lender, "a financial institution such as a bank, credit union, or captive finance company," to which the loan is assigned.[57] For example, though some subprime auto dealers provide financing directly to consumers, the majority of people who purchase vehicles at "Buy Here Pay Here" lots or similar outfits enter into indirect lending deals.[58] As Levitin discusses, the business relationship in the indirect

term-length-hits-record-high.html (noting that in 2017, "Experian says the average term for a new vehicle auto loan hit an all-time high of 69 months").

53. *See generally* Levitin, *supra* note 6 (detailing how the auto loan market is set up to disadvantage consumers).

54. *See id.* at 1261–64.

55. *See id.* at 1262. Levitin also details "yo-yo" scams in which customers drive off with a vehicle only to be told a couple days later that they were not approved for the financing and must agree to a higher interest rate if they want to keep the vehicle. *See id.* at 1304–06.

56. *See id.* at 1261–62.

57. *See id.* at 1262–63.

58. *See* CONSUMER FIN. PROT. BUREAU, EXAMINATION PROCEDURES: AUTO FINANCE 2–3 (2015), https://files.consumerfinance.gov/f/201506_cfpb_automobile-finance-examination-procedures.pdf (overviewing indirect and direct lending); James A. Wilson Jr. & Sandra L. DiChiara, *The Changing Landscape in Indirect Automobile Lending*, 2 SUPERVISORY INSIGHTS 29, 34 (2005) (noting indirect lending deals with subprime borrowers); STACY-ANN ELVY, THE INTERNET OF THINGS: THE FUTURE OF COMMERCIAL LAW AND PRIVACY chapter 4 (Cambridge

auto lending market is between the lender and dealer, not the lender and the actual borrower, which exacerbates a market structure that already disadvantages consumers.[59] This dynamic remains key when considering new innovations in lending, detailed in the next subpart.

What people pay for their vehicles shows the disadvantageous market structure. Per the Outside Financial Auto Loan Markup Index, a typical car buyer in 2018 paid an extra $1,791 in "marked up financing," which includes loan markup and related fees.[60] That amount increased to $1,850 in 2019, greater than an inflation-adjusted predicted increase.[61] As calculated by Levitin based on a prior study of auto loan overcharges, this markup amounted to over $54 billion in extra financing charges in 2018.[62]

The disadvantageous market structure also means that auto sales and lending is ready-made for discriminatory behavior. Studies have found discrimination in auto sales on the basis of gender and race.[63] There likewise exists robust evidence of historical discrimination in auto insurance based on ZIP code, resulting in communities of color paying more for auto insurance absent legitimate reason for the price difference, such as driving history.[64]

Recent studies focused on discrimination in auto lending similarly found evidence of discrimination on the basis of gender and race. For instance, Alexander Butler, Erik Mayer, and James Weston utilized credit bureau

University Press, forthcoming 2021) (draft manuscript on file with author) (discussing "Buy Here Pay Here" dealers).

59. *See* Levitin, *supra* note 6, at 1263–65, 1276–79.

60. *Id.* at 1292–93 n.141 (citing *Outside Financial Auto Loan Markup Index*, OUTSIDE FINANCIAL, https://www.outsidefinancial.com/auto-loan-markup-index (last visited Mar. 12, 2020)). A loan markup is an additional 1-2% that a dealer adds to the financial institution's interest rate as commission for arranging the auto financing with no obligation to disclose this to the consumer. *Outside Financial Auto Loan Markup Index*, OUTSIDE FIN., https://www.outsidefinancial.com/auto-loan-markup-index (last visited Mar. 12, 2020).

61. *Outside Financial Auto Loan Markup Index*, *supra* note 60. The all items Consumer Price Index rose 2.5% between 2018 and 2019, equaling a predicted $1,836 in marked up financing in 2019 if all else remained constant. *Consumer Price Index – February 2020*, U.S. BUREAU OF LABOR STATS., https://www.bls.gov/news.release/pdf/cpi.pdf (Mar. 11, 2020) (reporting data on a 12-month rolling basis). Marked up financing seems to be increasing at a greater rate than the average consumer purchases. *Id.*

62. Levitin, *supra* note 6, at 1292.

63. *See, e.g.*, Fiona Scott Morton et al., *Consumer Information and Price Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?*, 1 QUANTITATIVE MARKETING & ECON. 65, 65–69 (2003) (finding that "offline" in-person Black and Latinx car buyers paid 2% more than other buyers, but no statistical evidence of race discrimination); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995) (finding discrimination on the basis of gender or race); Pinelopi Koujianoi Goldberg, *Dealer Price Discrimination in New Car Purchases: Evidence from the Consumer Expenditure Survey*, 104 J. POL. ECON. 622 (1996) (finding no evidence of discrimination on the basis of gender and race); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 109–110 (1995) (finding discrimination on the basis of gender and race); Levitin, *supra* note 6, at 1297–98.

64. *See* DEVIN FERGUS, LAND OF THE FEE: HIDDEN COSTS AND THE DECLINE OF THE AMERICAN MIDDLE CLASS 97–122 (2018) (recounting the "insurance wars" of the 1980s and 1990s).

records from 2005 to 2017 to find that Black and Latinx individuals' auto loan approval rate was 1.5% lower than other borrowers after controlling for creditworthiness.[65] Another study noted that "the top 5% of customers account for over 40% of dealer markup from auto lending" and that the Black and Latinx customers systematically have been charged higher markups.[66]

Consumer protection organizations have raised concerns about discrimination in auto buying, including an inability of minorities to negotiate the terms of auto financing to the same degree or effectiveness as other borrowers.[67] Their worries are warranted. Recently, in May 2020, one of the largest subprime auto lenders, Santander, agreed to a $550 million settlement after being accused by thirty-three states and the District of Columbia of targeting low-income communities for loans too large for their incomes to service and for charging excessive fees, among other predatory practices.[68]

Overall, Americans face significant barriers to negotiating their "traditional" auto loans productively. That people are so car-dependent likely only exacerbates their inability and disincentive to negotiate, particularly if they are cash-strapped.[69] In important ways, these consumers are akin to low-

65. Alexander W. Butler et al., *Discrimination in the Auto Loan Market* (June 25, 2020), https://ssrn.com/abstract=3301009 (finding other evidence consistent with racial discrimination).

66. Mark A. Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation*, 8 REV. L. & ECON. 21 (2012); *see also* Kerwin Kofi Charles et al., *Rates for Vehicle Loans: Race and Loan Source*, 98 AM. ECON. REV. PAPERS & PROCEEDINGS 315 (2008) (finding racial discrimination in auto financing in interest rates from finance companies); Creola Johnson, *The Magic of Groups Identity: How Predatory Lenders Use Minorities to Target Communities of Colo*r, 17 GEO. J. POVERTY L. & POL'Y 165, 182-84 (2010) (discussing how interest rate markups disproportionately affect Black and Latinx borrowers). Native Americans also are more likely to be sold subprime auto loans. *See* Megan Horning, *Border Town Bullies: The Bad Auto Deal and Subprime Lending Problem Among Navajo Nation Car Buyers*, 73 NAT. LAWS. GUILD J. 193 (Winter 2016), https://www.nlg.org/nlg-review/article/border-town-bullies-the-bad-auto-deal-and-subprime-lending-problem-among-navajo-nation-car-buyers/.

67. *See* Delvin Davis, *Non-Negotiable: Negotiation Doesn't Help African Americans and Latinos on Dealer-Financed Car Loans*, CTR. FOR RESPONSIBLE LENDING 2–3 (Jan. 23, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386005; LISA RICE & ERICH SCHWARTZ JR., NAT. FAIR HOUSING ALLIANCE, DISCRIMINATION WHEN BUYING A CAR: HOW THE COLOR OF YOUR SKIN CAN AFFECT YOUR CAR-SHOPPING EXPERIENCE (Jan. 2018), https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf.; NAT. CONS. L. CTR., RACIAL DISPARITIES IN AUTO LOAN MARKUPS: STATE-BY-STATE DATA (June 2015), https://www.nclc.org/images/pdf/car_sales/ib-auto-dealers-racial_disparites.pdf. Class action suits alleging discriminatory markups have resulted in substantial settlements; the Consumer Financial Protection Bureau and the Department of Justice also have brought enforcement actions for discriminatory markups. *See* Levitin, *supra* note 6, at 1297–98.

68. *See* David Tracy, *Subprime Auto Loan Giant Pays $550 Million After Charges of Predatory Practices*, JALPONIK (May 20, 2020, 9:55 AM), https://jalopnik.com/subprime-auto-loan-giant-pays-550-million-after-charge-1843561031; David Shepardson, *Santander Agrees to $550 Million U.S. Settlement Over Subprime Auto Loans*, REUTERS (May 19, 2020), https://www.reuters.com/article/us-usa-autos-lending/santander-agrees-to-550-million-settlement-over-subprime-auto-loans-idUSKBN22V2GS.

69. *See* Levitin, *supra* note 6, at 1285–89 (highlighting that, especially given the auto sale and loan market structures, negotiating auto loans is uniquely stressful for consumers).

income and cash-strapped Americans who turn to payday lenders and other alternative finance outlets in time of need and who often will accept almost any loan terms.[70] Typical solutions to reducing the power disparity between providers and consumers, such as disclosures and determining ability-to-pay, may not adequately address the potential for abuse and discrimination inherent in the market structure.[71] Indeed, as detailed in the following subpart, although new innovations in the auto leasing and lending are marketed as benefitting consumers and gig economy entrepreneurs, they come with the potential to widen the power gap between lenders and consumers.

B. POWER DYNAMICS IN CUTTING-EDGE AUTO LOAN DEALS

Fintech innovations in auto buying and lending are chipping away at the "traditional" auto buying and lending arrangement in which people travel to new and used auto dealers to look at cars in person and apply for a loan at the dealership. This subpart details three categories of innovations: websites and smartphone applications that market cars and auto loans to consumers, often aggregating available options; platforms, usually delivered via smartphone, that provide subscription programs to facilitate shorter-term leases of vehicles; and lending programs marketed specifically to ride-sharing entrepreneurs. The discussion of each type of innovation evaluates whether these products will enhance consumers' well-being, as providers often contend, or whether these products will maintain lenders' advantages in the negotiation and provision of auto loans.

1. Auto Loan Websites and Platforms

America, as a country, is increasingly moving online and onto smartphones. Many lower-income Americans, in particular, use their phones to access the Internet and banking and lending products.[72] This has not gone

70. *See* Foohey & Martin, *supra* note 13, at 24–30 (overviewing payday loans and other alternative financing); Ernesto A. Longa & Nathalie Martin, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?*, 24 LOY CONS. L. REV. 524, 560–61 (2012) (overviewing findings about the demographics of people who use high-cost loan); *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, PEW CHARITABLE TRUSTS (July 18, 2012), https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2012/payday-lending-in-america (finding that 69% of payday loan customers use the loan to cover recurring expenses).

71. *See* Levitin, *supra* note 6, at 1306–18 (explaining why typical policy recommendations are incomplete in the context of auto lending); Cross et al., *supra* note 3, at 7 (listing ideas for protections for consumers in auto sale and lending deals).

72. *See* Kurt Bauman, *New Survey Questions Do a Better Job Capturing Mobile Use*, U.S. CENSUS BUREAU (Aug. 8, 2018), https://www.census.gov/library/stories/2018/08/internet-access.html (detailing how Americans report accessing the Internet); Ellen A. Merry, *Mobile Banking: A Closer Look at Survey Measures*, BD. OF GOVERNORS OF FED. RES. SYS. (Mar. 27, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/mobile-banking-a-closer-look-at-survey-measures-20180327.htm (noting an upward trend in mobile banking and that "[i]n 2017,

unnoticed by banking and consumer credit providers and the range of auto loan providers now offer online options.

Traditional banks and credit unions allow customers to apply for a car loan via their websites.[73] Some of these providers promise same-day decision and funding of auto purchases.[74] These websites open up opportunities for people to pre-shop for an auto loan, which could disrupt the typical auto purchase and lending bundle that puts consumers at a disadvantage—provided they have knowledge and incentive to shop for a loan before looking for a new or used vehicle.[75] At the same time, auto dealers also have moved their loans online, which perpetuates the current purchase and financing power dynamic while possibly further cementing the coupling of purchase and financing.[76]

In addition to traditional lenders and auto dealers moving online, new websites and platforms aggregating vehicles for sale and potential financing for those vehicles have rolled out over the past several years. Cars.com, CarMax, and TrueCar are some of the initial and better-known entrants in the online vehicle sales marketplace.[77] CarMax, which started as a brick-and-mortar, in-person used-car retailer, has added a financing pre-approval option on its website, through which customers are linked with traditional banks and credit unions for a loan for the particular vehicle the customer has selected.[78]

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about half of U.S. adults with bank accounts had used a mobile phone to access a bank account in the past year").

73. *See, e.g.*, *Auto Loans & Car Financing*, BANK OF AMERICA, https://www.bankofamerica.com/auto-loans/ (last visited Mar. 13, 2020); *Auto Loan Calculator*, CHASE AUTO, https://autofinance.chase.com/auto-finance/home (last visited Mar. 13, 2020); *Auto Loan Rates for New & Used Cars*, NAVY FED. CREDIT UNION, https://www.navyfederal.org/loans-cards/auto-loans/auto-rates.php (last visited Mar. 13, 2020); *Auto Loans*, PEN FED CREDIT UNION, https://www.penfed.org/auto (last visited Mar. 13, 2020); Jennifer Brozic, *4 Reasons To Consider A Car Loan From A Credit Union*, CREDIT KARMA (July 16, 2019), https://www.creditkarma.com/auto/i/credit-union-car-loan/ (claiming that "[c]redit unions often have lower interest rates and fewer minimum loan requirements than banks").

74. *See Auto Loans*, LIGHTSTEAM, https://www.lightstream.com/auto-loans (last visited Mar. 13, 2020) (noting that it is a division of SunTrust Bank); Anna Baluch, *How to Get an Instant Auto Loan*, LENDINGTREE (June 17, 2019), https://www.lendingtree.com/auto/how-to-get-an-instant-auto-loan/ (noting that traditional banks and credit unions often offer instant loans).

75. *See* Levitin, *supra* note 6, at 1323 (proposing a mandatory vehicle delivery waiting period unless the purchaser obtains independent third-party financing and noting that "automated underwriting [] allows for near real time decision-making" on consumer loans).

76. *See, e.g.*, *Apply for Credit and Auto Financing*, GM FIN., https://www.gmfinancial.com/en-us/apply.html (last visited Mar. 13, 2020); *Honda New and Honda Certified Pre-Owned Vehicles Financing*, HONDA FIN. SERVS., https://www.hondafinancialservices.com/finance (last visited Mar. 13, 2020); *Toyota Financial*, TOYOTA FIN. SERVS., https://www.toyotafinancial.com/us/en.html (last visited Mar. 13, 2020).

77. *New Cars, Used Cars, Car Dealers, Prices & Reviews*, CARS.COM, https://www.cars.com/ (last visited Mar. 13, 2020); *CarMax – Browse Used Cars and New Cars Online*, CARMAX, https://www.carmax.com/ (last visited Mar. 13, 2020); *Car Prices, Owner Reviews & Inventory*, TRUECAR, https://www.truecar.com/ (last visited Mar. 13, 2020).

78. *Financing at CarMax*, CARMAX, https://www.carmax.com/car-financing (last visited Mar. 13, 2020).

Newer entrants in the auto retailer and lending marketplace have taken cues from other business inspired by technological innovations, including fintech financers.[79] Carvana, for instance, is best known for its multi-story car vending machines.[80] It also allows customers to finance their auto purchases with cash or money they find from their own financial institution (that is, the traditional banks and credit union already discussed), or to get financing directly from Carvana.[81] On its frequently asked questions page, Carvana explains that as long as a customer is eighteen years or older, makes at least $4,000 per year, and has no "active bankruptcies," they will be able to obtain financing, which may only be used to purchase vehicles from Carvana.[82]

Carvana's promise to provide financing for those customers with bad credit follows in the footsteps of other online options that people with tarnished credit can turn to for auto loans. Car.Loan.com, an early entrant, specializes in loans for people in bankruptcy and otherwise in need of subprime financing.[83] Similarly, myAutoloan.com sources a national network of lenders to offer customers an auto loan within minutes.[84] Auto Credit Expense, self-billed as "helping people with any-credit auto financing since 1999!," likewise offers fast pre-qualification[85] and discloses that it partners with lenders and dealers in customers' areas to provide financing options.[86]

Understanding that partner networks underlie the operations of the finance divisions of Auto Credit Expense and other online networks is crucial to assessing how these online and other financing options may affect power dynamics between consumers and lenders. The business connection between these aggregation sites and lenders bring concerns that these platforms are working for the lenders, not their customers. The consumer's overall welfare could be diminished in a marketplace where most people do not know about, and perhaps do not have a reason to question, the underlying business

79. *See* Odinet, *supra* note 4, at 793 (discussing a range of fintech lenders).

80. CARVANA, https://www.carvana.com/how-it-works (last visited Mar. 13, 2020); *see also* Sven Gustafson, *Carvana Opens 2 More Used-Car Vending Machines in U.S.*, AUTOBLOG (June 8, 2019), https://www.autoblog.com/2018/06/08/carvana-used-car-vending-machines/.

81. CARVANA, *supra* note 80.

82. *Frequently Asked Financing Questions*, CARVANA, https://www.carvana.com/learn-financing (last visited Mar. 13, 2020).

83. *Quick and Simple Auto Credit*, CAR.LOAN.COM, https://car.loan.com/ (last visited Mar. 13, 2020).

84. *New or Used Auto Loan & Refinancing*, MYAUTOLOAN.COM, https://www.myautoloan.com (last visited Mar. 13, 2020).

85. *About Auto Credit Express*, AUTO CREDIT EXPRESS, https://www.autocreditexpress.com/about/ (last visited Mar. 13, 2020).

86. *Id.*; *see also* Brittney Mayer, *8 Providers of Bad-Credit Auto Financing in 2020*, BADCREDIT.ORG (Feb. 17, 2020), https://www.badcredit.org/how-to/bad-credit-auto-financing/ (describing Auto Credit Express as "network of dealer partners has closed $1 billion in bad credit auto loans").

relationships that facilitate it. This concern about consumer welfare seems to intensify with even newer companies.

The most recent entrants in the auto lending marketplace—those that have come onto the scene within the last two years—fall directly within the fintech lending umbrella. These companies seek to leverage people's use of mobile devices and also rely heavily on similar partner networks. For example, AutoGravity initially was a finance platform designed to be used on a smartphone or tablet.[87] It included a "credit apps" screen, which promised customers that they would be connected with no less than four lenders. These lenders were the traditional banks, credit unions, and dealers' finance arms detailed above, including Santander, the subprime lender that agreed to a $550 million settlement over their predatory practices.[88] When it launched, AutoGravity's two lead investors were Daimler and Volkswagon Credit.[89] AutoGravity also provided its technology to Volkswagon, Kia, and Audi for their own financing apps.[90] As of summer 2020, AutoGravity transitioned its business model to "Car Subscriptions – the new wave of car ownership." The next subpart details auto subscriptions programs.[91]

AutoFi is perhaps the freshest entrant into the market as its rollout is ongoing.[92] It similarly describes itself as an "e-commerce software platform that allows car buyers, for the first time, to purchase and finance a car entirely online. AutoFi's platform connects an auto dealer's customers to a network of lenders, providing a fast, mobile-first checkout experience."[93] Its network includes the same banks, credit unions, and, most importantly, dealer financing as AutoGravity did when it was launched. For instance, Ford Motor Credit Company was among its initial investors.[94] Chase Auto Finance joined the platform about a year later.[95] Unlike AutoGravity, AutoFi is upfront that

87. AUTOGRAVITY, https://www.autogravity.com/ (last visited Mar. 4, 2020); Brian Pascus, *Mercedes' Parent Company is Betting on a Startup That's Trying to Fix One of the Most Annoying Things About Buying A Car*, BUS. INSIDER (Oct. 8, 2018, 2:21 PM), https://www.businessinsider.com/daimler-autogravity-startup-aims-to-change-car-buying-2018-9 (discussing AutoGravity).

88. *See* Pascus, *supra* note 87 (noting that AutoGravity has "lending partnerships with banks including U.S. Bank, TD Bank, and Santander"); *supra* note 68.

89. *See* Pascus, *supra* note 87.

90. *See id.*

91. *See* AUTOGRAVITY, https://www.autogravity.com/ (last visited Sept. 17, 2020).

92. *See AutoAlert and AutoFi Collaborate to Boost and Simplify Customer Vehicle Purchases Online*, AUTOALERT (May 14, 2020), https://www.autoalert.com/autoalert-autofi-collaborate-boost-simplify-customer-vehicle-purchases-online/ (referring to new AutoFi collaboration); *Online Auto Financing*, AUTOFI, https://www.autofi.com/ (last visited Mar. 4, 2020).

93. *About Us,* AUTOFI, https://www.autofi.com/about-us (last visited Mar. 13, 2020).

94. *See* Lauren Debter, *AutoFi Raises $10 Million Series A To Make It Easier To Get A Car Loan*, FORBES (Aug. 24, 2017, 1:00 AM), https://www.forbes.com/sites/laurengensler/2017/08/24/autofi-series-a-ford-motor-credit/#6f246f626fd8.

95. *See* William Hoffman, *AutoFi Adds Lenders to Network Amid Expansion to Used Dealers*, AUTO FIN. NEWS (Aug. 15, 2018), https://www.autofinancenews.net/allposts/operations/risk-management/autofi-adds-lenders-to-network-amid-expansion-to-used-dealers/.

one of its main goals is to assist auto dealers by providing financing solutions to help them win back customers who have gone to banks and credit unions for auto loans.[96]

Both AutoGravity and AutoFi, as well as the older lending websites that rely on aggregation, promise to reduce transaction fees, enable access to credit for some people at more competitive terms, and provide credit for others in the first instance.[97] For the newest entrants, a key part of this promise stems from these lenders' use of artificial intelligence and big data to make lending decisions, which fintech lenders claim will allow them to upend the consumer credit industry.[98] Their use of big data and their ability to make fast decisions, however, brings a couple core concerns.

The first concern is that the rapidity with which customers receive a decision will impact customers' decision making. These platforms quickly display an offer or a handful of offers. In turn, customers may make an even quicker, less scrutinized decision about accepting a loan than they would if offered the loan in person at an auto dealership.[99] In addition, these platforms may exacerbate people's disincentive to shop around because they may think that the fintech platforms are not affiliated with the auto lender they are purchasing from and assume the platform's business depends on giving their customers the best deal. In reality, initial research shows that online lenders are considering dealers their true customers and are "offering the dealers a

96. *See* Jeff Gitlin, *What is AutoFi? How it Works and Potential Benefits*, LENDEDU (Sept. 9, 2017), https://lendedu.com/blog/what-is-autofi (discussing AutoFi). Note that lendedu is a website that receives compensation from partners. *See id.*

97. *See* Foohey & Martin, *supra* note 13, at 38 (detailing the marketing claims of these websites and platforms); Lauren Sanders, *Fintech and Consumer Protection: A Snapshot*, NAT. CONSUMER L. CTR. 13 (March 2019), https://www.nclc.org/images/pdf/cons-protection/rpt-fintech-and-consumer-protection-a-snapshot-march2019.pdf (listing fintech products).

98. *See Fintech: Auto Loan Software's Place in the Industry*, DEFI SOLUTIONS, https://defisolutions.com/answers/fintech-auto-loan-softwares-place-industry/ (last visited Mar. 15, 2020) (discussing big data); Manisha Patel, *Auto Finance May be the Next Sector to Watch in Fintech*, FINTECH TIMES (Sept. 26, 2018), https://thefintechtimes.com/auto-finance-may-be-the-next-sector-to-watch-in-fintech/ (noting that auto finance "hasn't seen much in the way of innovation over the last 40 or so years"). Other fintech lenders are expanding their operations to include auto loans. *See Blend Expands From Mortgages and Consumer Loans Into Auto Financing*, AUTO REMARKETING (Oct. 29, 2019), https://www.autoremarketing.com/autofinjournal/blend-expands-mortgages-and-consumer-loans-auto-financing (discussing a fintech company, Blend, that processes $2 billion in mortgage and consumer loans daily that recently decided to enter the auto loan market).

99. *See* Christopher G. Bradley, *Fintech's Double Edges*, 93 CHI.-KENT L. REV. 61, 76–77 (2018) (discussing how speed may encourage bad decision making); MARCO DI MAGGIO & VINCENT W. YAO, FINTECH BORROWERS: LAX-SCREENING OR CREAM-SKIMMING? 25–6 (May 30, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3224957 (finding that fintech lenders enable people with a desire for immediate credit to obtain loans allowing them to borrow beyond their means); Elizabeth Harris, *Warning: Your Smartphone Could Lead to Dumb Money Mistakes*, FORBES (Sept. 28, 2016), forbes.com/sites/elizabethharris/2016/09/28/warning-your-smartphone-could-lead-to-dumb-money-mistakes/ (discussing a study finding that people are less financially literate on smartphones and computers); Levitin, *supra* note 6, at 1284–87 (discussing how "traditional" auto lending facilitates through the dealership in-person also encourages people to make fast decisions).

higher penetration of add-on products that pad and disguise the price of financing."[100] Instead of enhancing competition, this model likely will retard competition and enhance dealers' and lenders' power.

Additionally, the rapidity of receiving an auto loan and the delivery of documents to consumers via computers and tablets may induce people to sign agreements they have not seen or had a chance to understand. This environment brings the potential to entice lenders to include fees and terms in these agreements to which customers have not agreed.[101] Although lenders and sellers may do the same in other circumstances, the set-up of transactions on computers, tablets, and smartphones has the potential to further impair people's recognition that they should scrutinize delivered agreements.[102] Studies show that people read text differently on paper than on a screen. Screens, smartphones, and tablets inhibit people's ability to navigate long and complex text, which decreases reading comprehension.[103]

The second major concern relates to the reliance on big data, algorithms, and machine learning to make lending decisions. This concern applies both to aggregation websites and platforms and to banks and dealer-lenders who use fintech software.[104] Research about similar algorithms in the realms of marketing, policing, and education have brought worries about privacy and fairness.[105] Recent discussion about algorithmic fairness highlight that the

100. Sanders, *supra* note 97, at 13; *see also* Bradley, *supra* note 99, at 63-70 (detailing how LendingTree similarly aggregates loans from providers, which brings worries that LendingTree is working for providers and not its end customers and could have anticompetitive consequences).

101. *See* Sanders, *supra* note 97, at 13.

102. *See* Shankar Vedantam, *Do You Read Terms Of Service Contracts? Not Many Do, Research Shows*, NPR (Aug. 23, 2016, 5:06 AM), https://www.npr.org/2016/08/23/491024846/do-you-read-terms-of-service-contracts-not-many-do-research-shows (discussing how people share information and do not read agreements online). For example, in the past, rent-to-own transactions raised these concerns. *See generally* Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. The Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385, 387 (1996) (overviewing concerns about customer-seller interactions with rent-to-own transactions); *see also* James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751 (1991).

103. *See* Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper versus Screens*, Scientific American (Apr. 11, 2013), https://www.scientificamerican.com/article/reading-paper-screens/ (discussing studies).

104. *See* Niccolo Mejia, *AI Startups in Auto Lending – 2 Well-Funded Examples*, EMERJ (Dec. 30, 2019), https://emerj.com/ai-sector-overviews/ai-startups-auto-lending/ (discussing Zest AI, whose product "could allow auto lenders to approve more car loan applicants without added risk").

105. *See generally* Johnson et al., *supra* note 38, at 504 (discussing fintech finance's use of artificial intelligence and machine learning); MICHAEL KEARNS & AARON ROTH, THE ETHICAL ALGORITHM: THE SCIENCE OF SOCIALLY AWARE ALGORITHM DESIGN 1–14 (2020) (introducing concerns about big data and algorithms); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2017) (detailing data discrimination by search engines); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016) (overviewing instances of algorithmic discrimination); Nicol Turner Lee, *Algorithmic Bias Detection And Mitigation: Best Practices And Policies To Reduce Consumer Harms*, BROOKINGS (May 22, 2019), https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/ ("Algorithms are harnessing volumes of macro- and micro-data to influence

primary problem stems from the difficulty, near impossibility of determining how algorithms make decisions once they have been active and learning.[106] That the programs are privately owned and heavily guarded as trade secrets only add questions about how lending algorithms are designed, at the outset, to leverage underwriting data.[107]

Applied to auto loans, overly automated underwriting processes could result in discrimination in the provision of credit based on gender, race, and ethnicity, replicating or exacerbating the discrimination already found in the auto sale and loan markets.[108] This fear, again, is not ungrounded based on initial research. The issue was taken up by the most recent study of fintech lending, which focused on interest-rate decisions in the mortgage market. Its authors found that fintech platforms decreased discrimination against Black and Latinx borrowers by 40%.[109] Note that fintech platforms still discriminated against borrowers on the basis of race, just less than what occurs as a result of face-to-face lending decisions.[110] Applied to auto loans, given their unique and evolving market dynamics, combined with the relationship between platforms and lenders, the potential for heightened discrimination relative to traditional auto loans should remain worrisome.[111]

2. Auto Subscription Programs

Taking Americans' need to access automobiles a step further, a handful of other new fintech companies have created platforms to facilitate short- and long-term leases of vehicles. These platforms provide alternatives to services

decisions affecting people in a range of tasks, from making movie recommendations to helping banks determine the creditworthiness of individuals.").

106. *See* Alexandra Chouldechova & Aaron Roth, *The Frontiers of Fairness in Machine Learning*, working paper (2019), https://www.arxiv-vanity.com/papers/1810.08810/ (detailing causes of unfairness, including "bias encoded in data"); Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 25–29 (2018) (discussing concerns about fintech innovations in lending).

107. *See* Odinet, *supra* note 4, at 809 (noting that proprietary algorithms limit a purchasing financial institution's ability to review underwriting quality, credit quality, and adequacy of loan pricing); FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 101–39 (2015) (detailing data's role in finance).

108. *See* Odinet, *supra* note 4, at 808–812 (discussing federal agencies' responses to concerns about big data and discrimination in the provision of consumer credit); Talia B. Gillis, *False Dreams of Algorithmic Fairness: The Case of Credit Pricing* (Feb. 18, 2020), https://ssrn.com/abstract=3571266 (discussing how lenders use big data to make credit decisions and how that could increase prices for minorities and other protected groups); Andrew L. Sandler et al., *Using Disparate Impact Analysis to Establish Discrimination in Lending*, 9 J.L. ECON. & POL'Y 417, 420 (2013).

109. Robert Bartless et al., *Consumer-Lending Discrimination in the FinTech Era* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25943, 2019), https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf.

110. *Id.*

111. *See* Talia B. Gillis & Jann L. Spiess, *Big Data and Discrimination*, 86 U. CHI. L. REV. 459, 466–86 (2019) (creating a simulation experiment based on real-world mortgage data to demonstrate that allocating mortgage decision making to algorithms and big data may exacerbate pricing gaps).

such as ZipCar[112] and add the option of keeping cars for a longer period. The uniting feature of these platforms is that customers do not work toward ownership of vehicles; payments are not credited toward the ultimate purchase of a vehicle.

Fair and Flexdrive, for instance, are both primarily app-based and provide access to cars without long-term commitment and without the need to register vehicles, pay for insurance, and maintain the car.[113] Media reports described Fair as a "car subscription service."[114] It allows people to lease vehicles for as long as they want: "no loan or long-term commitment. Just pay as you go and turn your car in any time."[115] As it entered the market, Fair specifically targeted ride-sharing drivers and had pre-purchased Uber's car leasing business, Xchange Leasing. Since growing rapidly post-launch, Fair has experienced profit shortfalls and has cut back significantly on investment and personnel to scale-down its operations.[116]

Flexdrive offers a similar service. Once people download the app, they can choose a car and how long they want to keep the car. When the subscription ends, the "leaser" can renew their subscription to the same vehicle or pick a new one.[117] Media reviews of the app calculate monthly payments at between $400 and $1,000.[118] Similar to Fair, Flexdrive partners with Lyft to give "qualified" drivers "an easy way . . . to get a vehicle they can use to give rides."[119] To qualify, customers must be at least twenty-five

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112. *See supra* note 43.

113. *What is Fair and How Does It Work*, *supra* note 43; *Home*, FLEXDRIVE, https://www.flexdrive.com/ (Mar. 16, 2020). There also are a few other apps that offer or offered services for particular types of vehicles or in particular locations. *See, e.g.*, *Better Than A Short Term Car Lease*, CANVAS CAR SUBSCRIPTION, https://drivecanvas.com/ (last visited Mar. 16, 2020) (offering low mileage options in San Francisco); Emily Delbridge, *Flexdrive Car Subscription Service Review*, THE BALANCE (June 25, 2019), https://www.thebalance.com/flexdrive-car-subscription-service-review-4588165 (discussing Book by Cadillac, a subscription service that allowed customers to rent a Cadillac for $1,500 per month and Canvas); *Short Term Electric Subscriptions Made Simple*, BORROW, https://joinborrow.com/ (last visited Mar. 16, 2020) (renting electric vehicles for a term of 3, 6, or 9 months in Los Angeles).

114. Jack Nerad, *5 Things You Need to Know About the Fair Car Subscription Service*, AUTOBYTEL, https://www.autobytel.com/car-buying-guides/features/5-things-you-need-to-know-about-the-fair-car-subscription-service-132817/ (last visited Mar. 13, 2020); *see also* Trent Gillies, *How Car Subscription App Fair Wants To Disrupt The Market For Car Loans Using Subscriptions*, CNBC (Oct. 21, 2018), https://www.cnbc.com/2018/10/19/fair-app-uses-subscription-model-to-promote-car-ownership.html.

115. *What is Fair and How Does It Work*, *supra* note 43.

116. *See* Lucinda Shen & Alyssa Newcomb, *This SoftBank-Backed Startup Sought to Disrupt the Car Market. Instead, It Became a Poster Child for Disruption Gone Awry*, FORTUNE (Dec. 19, 2019), https://fortune.com/2019/12/19/softbank-fair-car-market-disruption/ (detailing Fair's investment strategy); Ingrid Lunden, *Fair, the Softbank-Backed Car Subscription Startup Lays Off 40% of Staff, Sacks CEO*, TECHCRUNCH (Oct. 24, 2019), https://techcrunch.com/2019/10/24/fair-the-softbank-backed-car-subscription-startup-lays-off-40-of-staff-sacks-cfo/.

117. *See Home*, *supra* note 113; *Help*, FLEXDRIVE, https://www.flexdrive.com/help/ (last visited Sept. 17, 2020).

118. *See* Delbridge, *supra* note 113.

119. *Dealers*, FLEXDRIVE, https://www.flexdrive.com/dealers/ (last visited Mar. 16, 2020).

years old, meet Lyft driver requirements, and pay a refundable security deposit.[120]

Flexdrive's requirements may price out and otherwise prohibit those most in need of cars from using the service. This outcome, however, may not be undesirable. The primary concern with these subscription services is that they replicate auto leasing and financing without allowing customers to work toward owning the vehicles.[121] Renting a vehicle month after month without moving toward buying represents a dramatic shift in how Americans access automobiles. As with the newer fintech platforms offering auto loan aggregation services, the extent to which vehicle subscription services will gain traction across America—and thereby alter the auto market structure—is difficult to estimate. But all these new platforms offer services that, when considered in detail, lead to worries that people will pay more for cars over the long term.

3. Auto Financing for Ride-Sharing Entrepreneurs

Auto subscription platforms like Fair and Flexdrive are attempting to capitalize on the now established ride-sharing industry and gig economy. The growth of ride-sharing itself also created a need for vehicles, from which Uber and Lyft have tried to profit. Ride-sharing entrepreneurs necessarily need vehicles. Some of these entrepreneurs may not have access to a car or may want to upgrade their vehicles to attract higher-paying clientele.[122] For example, Uber Select and Black drivers make more per trip, but must drive a luxury vehicle.[123] Lyft Lux imposes similar vehicle make and model requirements, and also requires more recent model years for the cars.[124]

In light of drivers' apparent need for help paying for vehicles, in 2015, Uber established a now-defunct program, which it named its Vehicle Solutions Program. The program offered auto leasing as well as auto financing.[125] Fair purchased the auto leasing division of that program, called

120. *See Lyft Express Drive FAQ*, LYFT, https://www.lyft.com/expressdrive (last visited Sept. 1, 2020).

121. *See* Sanders, *supra* note 97, at 13 (noting this dynamic).

122. *See* Ezra Wolfgang, *Financing A Car For Uber*, FINDER (Dec. 10, 2019), https://www.finder.com/uber-car-finance (last visited Mar. 17, 2019) (providing options for people thinking about driving for a ride-sharing service to lease or finance a car); Nicole Arata, *5 Ways to Get a Car to Drive for Uber or Lyft*, NERDWALLET (Sept. 27, 2017), https://www.nerdwallet.com/blog/loans/5-ways-car-uber-lyft/ (same).

123. *See* Don M., *Uber Select: Your Complete Driver Guide*, RIDE SHARE CENTRAL (Aug. 28, 2018), https://ridesharecentral.com/uber-select-driver.

124. *Compare id.* with *Lyft Lux, Lux Black, and Lux Black XL Rides for Drivers*, LYFT, https://help.lyft.com/hc/en-us/articles/115012923147-Lyft-Lux-Lux-Black-and-Lux-Black-XL-rides-for-drivers (last visited Sept. 1, 2020).

125. *See* Andrew J. Hawkins, *Uber is Phasing Out Its Subprime Car-Leasing Division After Massive Losses*, THE VERGE (Aug. 8, 2017 12:02 PM), https://www.theverge.com/2017/8/8/16112498/uber-phase-out-xchange-car-leasing-losses (detailing the Vehicles Solutions Program). Lyft has an auto-lending program, but it seems to be more of a short-term rental option.

Uber Xchange Leasing, in early 2018.[126] At the time of the sale, Uber reported losing $9,000 per car, which was eighteen times as much as it projected it might lose via the leasing program.[127] When purchased, Fair indicated that it would offer weekly leases of cars at a rate totaling $740 per month.[128]

The Vehicle Solutions Program, as a whole, became the subject of intense scrutiny and ended in a $20 million settlement with the FTC.[129] The program, in addition to offering drivers what later were described as subprime leases,[130] linked drivers with auto dealers and lenders. Uber automatically deducted loan payments from drivers' income. If a driver's income was insufficient or if a driver stopped working for Uber, the driver was required to pay the lender directly.[131]

Like other loan aggregation platforms, some of these loans came from subprime lenders.[132] The most notable story told in reports about the program is that of Richard Brunelle, a fifty-eight year old man, who received credit to purchase a Kia Optima through Uber. The loan had a 22.75% interest rate and his monthly payments were about $1,000.[133] These terms, both the interest rate and the connection of the loans to driving for Uber, led Brunelle to comment: "I feel like Uber not only tossed us to these wolves, but they

See Lyft Express Drive, LYFT, https://www.lyft.com/expressdrive (last visited Mar. 17, 2020); *supra* note 113 and accompanying text.

126. *See* William Hoffman, *Fair Finalizes Deal to Buy Uber Xchange Leasing*, AUTO FINANCE NEWS (Jan. 30, 2018), https://www.autofinancenews.net/allposts/finance/loss-mitigation/exclusive-fair-finalizes-deal-to-buy-uber-xchange-leasing/; Kirsten Korosec, *Uber Closes Xchange Leasing After Losing $9,000 Per Car*, FORTUNE (Sept. 27, 2017), https://fortune.com/2017/09/27/uber-closes-xchange-leasing-after-losing-9000-per-car/.

127. *See* Hoffman, *supra* note 126; Korosec, *supra* note 126.

128. *See* Julie Walmsley, *Uber Drivers Without Credit Can Now Lease Used Cars For $0 Down And $185 A Week*, FORBES (May 29, 2019), https://www.forbes.com/sites/juliewalmsley/2019/05/29/uber-drivers-without-credit-can-now-lease-used-cars-for-0-down-and-185-a-week/#5c0adc131b40.

129. *See Uber Agrees to Pay $20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims*, FED. TRADE COMM'N (Jan. 19, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited (noting that part of the settlement related to Uber's inflated claims about how much drivers could make).

130. *See* Hawkins, *supra* note 125 ("Xchange offered subprime leases to people who have been cleared to drive for Uber, but have poor or nonexistent credit scores . . . ."); Paris Marx, *Uber's Auto-Loan Program Is Basically Indentured Servitude*, BOLD ITALIC (Feb. 22, 2017), https://thebolditalic.com/ubers-auto-loan-program-is-basically-indentured-servitude-78011b8ea9b2 (noting that "[a]uto-finance experts who spoke to Bloomberg called Xchange's subprime loans predatory").

131. *See* Molly Wood, *Uber Drivers Struggle to Pay Subprime Auto Loans*, MARKETPLACE (May 13, 2015), https://www.marketplace.org/2015/05/13/uber-drivers-struggle-pay-subprime-auto-loans/ (discussing the auto loan part of Uber's Vehicle Solutions Program).

132. *See id.*

133. *See id.*

intentionally did it and they are making bank [on] it."[134] Drivers like Brunelle felt stuck—either drive for Uber or have their vehicles repossessed.

Concerns about high interest rates played a key role in the FTC's complaint against Uber. The FTC complaint alleged that Uber connected its drivers with lenders that charged drivers sometimes more than double the industry average interest rate: "Uber's marketing material to dealers has acknowledged that the lease-to-own option was a 'one size fits all' product with an 'implied APR of 19.5%,' significantly higher than even the industry average interest rates for consumers with deep subprime credit scores."[135] Both the actual financial outcomes in the auto loan and auto lease programs contradicted Ubers' promise that the program would allow drivers to "own a car for as little as $20/day."[136]

Note that owning a vehicle for as little as $20 per day amounts to yearly payments of over $7,000. Although the math may seem obvious, the monthly and yearly totals likely were shocks to drivers. The CFPB's complaint database provides additional anecdotes from entrepreneurs to explore the potential misperceptions and issues with Uber's program.[137] The database is searchable by company name and product and sub-product type.[138] As of September 2020, a search for Uber Technologies, Inc. returned 38 results with complaint narratives.[139] Of those results, 12 (32%) noted Uber's vehicle leasing program. The product and sub-product at issue in the complaints about leases were credit reporting, consumer loan (vehicle lease), and vehicle loan or lease (lease).

Five of the complainants discussed issues with credit reporting.[140] One in particular complained that Uber did not update the driver's credit report with information about timely payment. The complaint calculated that the driver paid a total of about $13,000 under the lease via $150 weekly payments over

134. *Id.*

135. Complaint for Permanent Injunction and Other Equitable Relief at 10, Fed. Trade Comm'n v. Uber Techs. Inc., No. 3:17-cv-00261 (N.D. Cal. Jan. 19, 2017), https://www.ftc.gov/system/files/documents/cases/1523082ubercmplt.pdf.

136. *Id.* at 9, 10–11.

137. *See Submit a Complaint*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/complaint/ (last visited Mar. 18, 2020); Pamela Foohey, *Calling on the CFPB for Help: Telling Stories and Consumer Protection*, 80 LAW & CONTEMP. PROBS. 177, 181–86 (2017) (overviewing the complaint database and the reasons why complaints may not be representative of consumers' issues with financial and credit products).

138. *See Search the Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/search/?from=0&searchField=all&searchText=&size=25&sort=created_date_desc (last visited Mar. 18, 2020).

139. Author also searched all complaint data for "uber," which returned an additional 30 results. These additional results relate to consumers' issues with Uber's branded credit and debit cards and with consumers claiming that they never had an Uber account. All complaint data on file with author.

140. Four complained that Uber ran credit checks without the customers' permission and even after the customers were assured by Uber representatives that hard credit inquiries were not part of the leasing process.

one year and eight months: "It's a huge money and I hope, that I deserved fair report about this lease in my credit history/credit report."[141]

The "huge money" detailed in that complaint was the subject of the majority of the other complaints about Uber's leasing program.[142] One driver wrote that the lease started at $160 per week for a period of 36 months and then increased to $200 per week for a period of 36 months.[143] At the same time, the driver "had difficulty driving the Uber to have my earnings cover the new price fluctuation of $ 800 monthly."[144] Ultimately the driver turned the vehicle back to Uber, as discussed with Xchange Leasing, only to find that "I will be responsible for the repossession charges."[145] Somewhat similarly, another driver complained that a $170 per week lease resulted in an extra $150 of charges when Uber insisted that the leasing contract was for more than $170 per week.[146]

Another complaint focuses on the weekly lease payments: "[T]he monthly equivalent of {$610.00} to lease a Toyota Corolla (156 payments at {$140.00} per week)? Seriously? This is absolutely predatory!"[147] This complaint sums up a key part of the action against Uber. Weekly lease payments did not calculate out to $20 per day.[148] Ultimately, Uber induced people to lease cars through their program that the drivers could have leased even with subprime credit for significantly less per month.[149]

By the time that Uber shuttered its program, commentators called the program a "financial and ethical disaster."[150] The financial disaster ran both ways—to Uber and to drivers. The ethical part of the disaster references two perceived problems. The first is unique to this program because it tied car loan payments to driving for Uber. This led drivers to feel trapped in an uneven relationship with Uber. Indeed, the relationship seemed so uneven that some have likened the auto finance program to indentured servitude.[151]

The second problem connects with concerns about fintech auto lending platforms, especially those that aggregate loans.[152] Uber was not in business for drivers, but for the auto dealerships and loan providers with which it

141. Complaint ID 2592467, CONSUMER FIN. PROT. BUREAU (Aug 2, 2017), https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2592467.

142. Three complaints were about allegedly wrongful repossession of leased vehicles.

143. Complaint ID 2200059 (Nov. 9, 2016).

144. *Id.*

145. *Id.*

146. Complaint ID 2542505 (June 25, 2017).

147. Complaint ID 2095206 (Sept. 5, 2016).

148. *See supra* note 136.

149. *See generally* Foohey, *supra* note 137.

150. Ryan Felton, *Uber Plans to Significantly Alters Its Reportedly Disastrous Subprime Lending Program*, JALOPNIK (Aug. 8, 2017, 2:05 PM), https://jalopnik.com/uber-plans-to-significantly-alter-its-reportedly-disast-1797636285.

151. In thinking about relative lease price and terms, consider that the cars that drivers leased through Uber's Xchange program were less expensive four-door sedans, not necessarily luxury sedans and SUVs. *See supra* text accompanying note 146.

152. *See supra* Part II.B.i.

partnered. Its marketing materials read to present a different story about Xchange to dealers and lenders as compared to the story told to drivers. And its lending practices and loan agreements seemed to result in drivers being saddled with unexpected terms and fees, as shown in complaints to the CFPB. Although this concern cuts across all auto loan deals,[153] the rapidity with which Uber's program and other newer programs deliver loan quotes and final documents to borrowers heightens the worry that people will not consider the benefits and costs to them of taking out the auto loan.[154]

Overall, at present, the auto loan origination market prioritizes the interests of loan providers and auto companies over the interests of consumers. The prioritization has the strong potential to lead people to take out auto loans with disadvantageous interest rates, fees, and terms. Recent fintech innovations in the auto lending market seem to exacerbate and reinforce the disparities, further shifting market power to auto suppliers and lenders. The next Part details how this power differential continues during the life of auto loans, particularly when consumers default or fear they might default on their loans.

II. THE BOOMING AUTO REPOSSESSION INDUSTRY

Although research shows that Americans generally continue paying their auto loans as long as possible when faced with financial issues,[155] high-priced, marked-up loans necessarily will lead to delinquencies and defaults. As auto loan originations have increased and auto loan terms have lengthened,[156] so too have delinquencies. Auto loan deficiencies hit an all-time high in 2018, with seven million Americans ninety or more days behind on their auto loan payments.[157] The subprime auto loan delinquency rate now is higher than it was before the Great Recession.[158] Among subprime loans, nationwide, the delinquency rate is three times higher than among borrowers with "prime" credit scores.[159] Similarly, a 2018 study found that after

153. *See supra* Part II.A (discussing the complex and atypical nature of auto sale and loan deals).
154. *See supra* text accompanying notes 99–103.
155. *See supra* note 25 and accompanying text.
156. *See supra* text accompanying notes 49–52.
157. *See* Natasha Bach, *A Record 7 Million Americans Are 90 Days Behind on Their Auto Loan Payments*, FORTUNE (Feb. 12, 2019), https://fortune.com/2019/02/12/americans-late-on-car-payments/ (reporting on a study from the Federal Reserve Bank of New York).
158. *See* Wolf Richter, *Auto Loan Delinquency Rates are Worse Now Than During the Financial Crisis*, BUS. INSIDER (Apr. 9, 2018, 5:16 PM), https://www.businessinsider.com/auto-loan-delinquency-rates-worse-now-than-during-the-financial-crisis-2018-4; *Repos Remain Stable While Subprime Delinquencies Hit 10-Year High*, COX AUTO. (May 16, 2019), https://www.coxautoinc.com/market-insights/repos-remain-stable-while-subprime-delinquencies-hit-10-year-high/ ("At the end of 2018, the severe delinquency unit rate on subprime auto loans was at the highest level in a decade.").
159. *See* Signe-Mary McKernan et al., *What Regions Have More Delinquent Auto Loan Debt?*, URBAN WIRE (Dec. 19, 2018), https://www.urban.org/urban-wire/what-regions-have-more-delinquent-auto-loan-debt.

controlling for risk factors, auto loans with maturity lengths longer than five years have higher delinquency rates.[160]

Delinquencies and defaults lead to repossessions. In 2017, a total of 1.7 million motor vehicles were projected to be repossessed, rivaling vehicle repossession figures during the Great Recession.[161] Even before the COVID-19 crisis, the auto industry projected that repossessions would rise in coming years, particularly for vehicles financed with subprime loans.[162] As detailed in the Introduction, the market structure of auto sales and lending incentivizes the repeated repossession and sale of used vehicles, seemingly to the detriment of consumers as they pay more for less valuable vehicles.[163] And as with car sales and auto loans, communities of color experience higher auto repossession rates, adding to their automobile ownership costs.[164]

Technological innovations that allow cars to connect to the Internet increasingly have aided auto lenders' repossession efforts, fueling the repeated repossessions and sales of used vehicles. The most noteworthy tool is a starter interruption device (SID), also termed a remote vehicle disabler.[165] SIDs entered the passenger vehicle repossession scene in the late 1990s.[166] They allow the lender or dealer that controls the device to disable the ignition switch of a vehicle, preventing it from starting.[167] To turn the switch off, the vehicle also must be off. This prevents vehicles from becoming stranded while driving down the road. But it has not stopped people's cars from being

160. *See* Zhengfeng Guo et al., *Risks of Long-Term Auto Loans* (June 2018), https://ssrn.com/abstract=3290841. Subprime auto loan bonds likewise have experienced increased delinquencies. *See* Matt Scully, *Subprime Auto Bond Delinquencies Highest in 20 Years, Says Fitch*, BLOOMBERG (Mar. 14, 2016), https://www.bloomberg.com/news/articles/2016-03-14/subprime-auto-bond-delinquencies-highest-in-20-years-says-fitch.

161. *See* Nick Zulovich, *Forecast Has 2017 Repo Total Approaching 1.8M*, AUTO REMARKETING (Feb. 21, 2017), https://www.autoremarketing.com/financial-services/forecast-has-2017-repo-total-approaching-1-point-8-million; David LaGesse, *Secrets of the Modern Repo Man*, U.S. NEWS (Apr. 28, 2009), https://money.usnews.com/money/business-economy/technology/articles/2009/04/28/secrets-of-the-modern-repo-man (noting that in 2008, "lenders took back more than 1.6 million autos, a jump of 12 percent over 2007").

162. *See* Muller, *supra* note 20.

163. *See* text accompanying *supra* notes 29–30.

164. *See The Color of Debt: Credit Card Debt by Race and Ethnicity*, DEMOS, https://www.demos.org/sites/default/files/publications/FACTSHEET_TheColorofDebt_Demos.pdf (reporting based on 2008 data that Black and Latinx individuals are more likely to have their car repossessed).

165. *See* ELVY, *supra* note 58, at chapter 4 (discussing "asset collection systems and technology"); Jim Henry, *Words Matter: Starter Interrupt Or Kill Switch*, FORBES (Feb. 28, 2017), https://www.forbes.com/sites/jimhenry/2017/02/28/words-matter-starter-interrupt-or-kill-switch/#1aa1495e76a2 (discussing SIDs).

166. *See* LaGesse, *supra* note 160, at 1–2 (detailing four vehicle tracking innovations); Thomas B. Hudson & Daniel J. Laudicina, *The Emerging Law of Starter Interrupt Devices*, 61 BUS. LAW. 843 (Feb. 2020); Jaeah Lee, *Wait, Banks Can Shut Off My Car?*, MOTHER JONES (Mar. 2016), https://www.motherjones.com/politics/2016/04/subprime-car-loans-starter-interrupt/ (noting that SIDs became more useful in the early 2000s, when GPS tracking allowed for easier repossession).

167. *See* Michael Corkery & Jessica Silver-Greenberg, *Miss a Payment? Good Luck Moving That Car*, N.Y. TIMES (Sept. 24, 2014), https://dealbook.nytimes.com/2014/09/24/miss-a-payment-good-luck-moving-that-car/ (detailing how SIDs work).

turned off while they are at work or away from their homes, or even while idling at stoplights, stranding them wherever they happen to be.[168] Additionally, people have reported their cars being disabled at inopportune times, such as when they need to take their kids to the emergency room.[169]

Recent advances in technology also allow lenders to send payment reminders by setting the device to beep "incessantly" when the loan's due date draws near,[170] to require that people input a code every month to operate their vehicles,[171] to receive reports about the customers' driving habits,[172] and to control vehicles through the SID.[173] For example, PassTime's TRAX program, which is marketed to auto lenders and Buy Here Pay Here auto dealers includes pinpointed GPS tracking, geo-fencing, and starter interrupters, all "designed to mitigate the risk of financing, help keep assets secure, and make repossession simple."[174]

SIDs increase the effectiveness of repossessions and afford creditors increased control over customers' mobility. Given this, it makes sense that subprime auto lenders and Buy Here Pay Here auto dealers were the first wide-spread adopters of SIDs.[175] In 2014, reports stated that two million vehicles had SIDs installed in them.[176] And in 2016, PassTime's CEO estimated that 70% of vehicles sold via subprime financing come with SIDs.[177]

In reaction to consumers' experiences with SIDs, a handful of states have enacted regulations that require lenders and dealers to notify customers that SIDs are installed in the purchased vehicles and, in some instances, prohibit the stopping of a vehicle if doing so will pose a danger to its occupants.[178]

168. *See id*. (recounting the story of a car being disabled while idling at a stop light).

169. *See id.* (recounting the story of the disabling of Chrysler van when a customer's daughter needed to get to the emergency room); Robert Szypko, *Your Car Won't Start. Did You Make The Loan Payment?,* NPR (Oct. 16, 2014), https://www.npr.org/sections/alltechconsidered/2014/10/16/356693782/your-car-wont-start-did-you-make-the-loan-payment (discussing experiences with SIDs).

170. Lee, *supra* note 166; *see also* Szypko, *supra* note 168.

171. *See* Corkery & Silver-Greenberg, *supra* note 167, at 4.

172. *See* Chris Woodyard & Jayne O'Donnell, *Your Car May Be Invading Your Privacy*, USA TODAY (Mar. 25, 2013), https://www.usatoday.com/story/money/cars/2013/03/24/car-spying-edr-data-privacy/1991751/ (discussing "connected cars" as they emerged more on the scene).

173. *See* Dr Swati Subodh, *Internet of Things — Leap Towards A Hyper-Connected World*, MEDIUM (May 10, 2019), https://towardsdatascience.com/internet-of-things-leap-towards-a-hyper-connected-world-6b6a90960a06 (discussing advances in connected technology generally); ELVY, *supra* note 58, at chapter 4 (overviewing SIDs).

174. *TRAX GPS Vehicle Tracking System*, PASSTIME, https://passtimegps.com/solutions/trax/ (last visited Mar. 26, 2020). Geo-fencing allows a lender or dealer to set a geographic area for a vehicle. If the vehicle exits this area, the lender or dealer receives a notification and potentially can disable it. *See* ELVY, *supra* note 58, at chapter 4 (overviewing geo-tracking).

175. *See* Szypko, *supra* note 169 (noting industry adoption of SIDs).

176. *See* Corkery & Silver-Greenberg, *supra* note 167.

177. *See* Lee, *supra* note 166 (noting PassTime's CEO representations).

178. *See* Elaine S. Povich, *Late Payment? A 'Kill Switch' Can Strand You and Your Car*, PEW TRUSTS (Nov. 27, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/

Even with these regulations in place, Buy Here Pay Here dealers and subprime auto lenders praise SIDs as enabling people to purchase cars when they otherwise could not get an auto loan with their credit score and history.[179] They also contend that SIDs allow them to extend loans with lower interest rates because of their increased ability to successfully repossess cars while reducing repossessions by enabling negotiations between delinquent consumers and lenders.[180]

Nonetheless, the subprime auto loan industry is growing, and interest rates are not declining. The purported benefits from SIDs and easier repossessions seemingly have not accrued to borrowers. The opposite appears to have occurred. Easy repossession of vehicles has encouraged auto lenders to engage in "repossession remarketing," in which lenders sell repossessed cars as quickly as possible without reconditioning the vehicles.[181] The lack of robust laws and regulations protecting consumers has allowed lenders to streamline the repossession and sale process, making it profitable.[182]

Once the lender sells the repossessed vehicle, if the sale price was less than the amount the consumer owed on the vehicle, in most states, the lender can also bring a lawsuit to collect the deficiency.[183] Deficiency judgments often accompany these sales even if the repossessed and sold vehicle was worth more than loan amount outstanding because repossession and sale can bring over $1,000 in fees added to the amount due from the consumer.[184] If a consumer does not pay the deficiency award, the auto lender can sue the consumer again for payment or sell the deficiency award debt to a collection agency.[185] Studies estimate that debt collectors prevail in more than 95% of

2018/11/27/late-payment-a-kill-switch-can-strand-you-and-your-car (overviewing states' legislation). Lenders and dealers have responded to this legislation by providing customers with disclosures and requiring them to sign agreements that waive lenders' and dealers' responsibility due to interruptions (and similar) caused by SIDs. *See* ELVY, *supra* note 58, at chapter 4 (overviewing how lenders and dealers have responded to state legislation).

179. *See* Povich, *supra* note 177 (discussing the comments of an attorney at a "law firm that specializes in advising companies on how to comply with consumer law").

180. *See id.*

181. *Repos Remain Stable*, *supra* note 158.

182. *See id.*; *supra* text accompanying notes 21–22.

183. *See* Jessica Silver-Greenberg & Michael Corkery, *The Car Was Repossessed, but the Debt Remains*, N.Y. TIMES (June 18, 2017), https://www.nytimes.com/2017/06/18/business/dealbook/car-loan-subprime.html. A few states prohibit or limit deficiency lawsuits for auto loans. Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 586 (2012) (discussing state statutes).

184. *See* Paul Kiel & Annie Waldman, *The Burden of Debt on Black America*, ATLANTIC (Oct. 9, 2015), https://www.theatlantic.com/business/archive/2015/10/debt-black-families/409756/ (telling the story of someone charged $1,100 in fees for the repossession and sale of her vehicle).

185. *See* Silver-Greenberg & Corkery, *supra* note 182 (describing how "Portfolio Recovery Associates, one of the nation's largest debt buyers, purchased about $30.2 million of auto deficiencies in the first quarter of [2017], up from $411,000 just a year earlier").

suits against consumers.[186] Deficiency and debt collection suits thus further increase lenders' return on repossession and incentive to repossess.

Lenders generally sell repossessed vehicles to wholesale buyers—used auto dealers—who mark-up and quickly resell the cars to consumers after "light cosmetic work," similarly making their sales profitable.[187] Increases in repossessions also have fostered a side-industry in flipping used cars, evidencing the fruitfulness of reselling used automobiles.[188] Given these dynamics, of the parties involved in the auto sale and lending industry, the consumer is the only one who regularly loses.

For some, local governments add a layer of worry about auto repossession. Many cities depend on revenue from parking tickets and other fees to fund their budgets.[189] If people do not pay those tickets and other fees, the city has the option to tow their vehicles to an impound lot.[190] Local governments can also suspend drivers' licenses if people do not pay fees and fines, such as traffic tickets.[191] If the impounded vehicles are not claimed, the city can sell them at an auction.[192] Because of economic and racial and ethnic disparities in where people live and their ability to purchase parking insulated from ticketing and towing, this practice of impounding and selling vehicles disproportionately has affected people with lower incomes and communities of color.[193]

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186. *See* A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT, AM. CIVIL LIBERTIES UNION 5 (2018), https://www.aclu.org/report/pound-flesh-criminalization-private-debt; *How Debt Collectors Are Transforming the Business of State Courts*, PEW CHARITABLE TRUSTS 15-17 (May 2020), https://www.pewtrusts.org/-/media/assets/2020/05/debt_collectors_to_consumers.pdf.

187. *Repos Remain Stable*, *supra* note 158.

188. *See Flipping Cars - How It's Done*, AUTOLIST (Apr. 3, 2019), https://www.autolist.com/guides/flipping-cars (noting that cars found at auctions can include lender repossessed cars).

189. *See* Michael Maciag, *Special Report: How Autonomous Vehicles Could Constrain City Budgets*, GOVERNING (July 31, 2017), https://www.governing.com/gov-data/gov-how-autonomous-vehicles-could-effect-city-budgets.html (noting that "New York and Chicago derive more revenue from parking fines than from parking fee collections").

190. *See, e.g.*, John Bryne, Lawsuit: *Chicago's Practice of Selling Impounded Cars Is Unconstitutional*, CHI. TRIBUNE (Feb. 27, 2020), https://www.chicagotribune.com/politics/ct-chicago-towed-cars-sold-lawsuit-20200226-vlg7bpqk6ve23drftwqaj2ensi-story.html; Dorian Hargrove et al., *City Has Towed Thousands of Vehicles, Some Considered People's Homes, Because of Unpaid Parking Tickets*, NBC SAN DIEGO (Aug. 26, 2019), https://www.nbcsandiego.com/news/local/city-towed-vehicles-unpaid-parking-tickets/128445/; C.J. Ciaramella, *Chicago Is Trying to Pay Down Its Debt by Impounding Innocent People's Cars*, REASON (Apr. 25, 2018), https://reason.com/2018/04/25/chicago-debt-impound-cars-innocent/.

191. *See generally* William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585 (2020) (empirically investigating the suspension of drivers' licenses because of failure to pay fees and fines).

192. *See Flipping Cars – How It's Done*, *supra* note 187 (noting who sells vehicles at public auctions).

193. *See Towed into Debt: How Towing Practices in California Punish Poor People*, W. CTR. ON L. & POL'Y 29 (Mar. 18, 2019), https://wclp.org/wp-content/uploads/2019/03/TowedIntoDebt.Report.pdf (noting that towing "disproportionately impact[s] unhoused people, immigrants, and people of color"). Communities of color also face higher rates of debt collection. *See* Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-

In sum, technological advances in auto monitoring and repossession have made people's car ownership more precarious, regardless of whether they used a traditional or cutting-edge vehicle loan to buy the car. There are few options for consumers who fear defaulting or who have defaulted on their auto loans, and the threat of repossession and sale of their cars is real. The next Part details how the consumer bankruptcy system can help people stop repossessions and try to keep their cars during financially precarious times.

III. FILING BANKRUPTCY TO KEEP VEHICLES

For people worried that their lenders are about to repossess their cars or whose cars have been repossessed or impounded, filing bankruptcy offers people a way to stop repossessions, deal with their car loans, and get their cars back. Given the limited options for consumers to negotiate with lenders once they have purchased vehicles, filing bankruptcy may be people's leading option to keep their cars. In some circumstances, filing bankruptcy may be people's only option to keep their cars if auto dealers are intent that they "kick the trade."[194] Yet "kicking the trade" will be undesirable for some people because they may not want to swap vehicles, particularly if doing so will result in higher loan payments for a vehicle that is worth less than their current car.

All bankruptcy proceedings come with the automatic stay, which prevents creditors from collecting amounts owed from the debtor or the debtor's property.[195] The automatic stay thus stops collection of auto debt, including repossession of vehicles and sales of already repossessed vehicles. With the automatic stay in place, bankruptcy provides ways for people to get current on their auto loans. After detailing how people can use bankruptcy to deal with issues with their cars, this Part discusses *City of Chicago v. Fulton*, a case involving the automatic stay that the Supreme Court decided in January 2021.[196] This case's outcome decreases the usefulness of the automatic stay with regards to auto loans, which could further shift the balance of power from consumers to lenders.

A. STAYING CURRENT ON AUTO LOANS

In addition to the automatic stay, bankruptcy can help people keep cars by providing options to make auto loan payments manageable. People generally file under one of two bankruptcy chapters, chapter 7 or chapter 13.[197] In chapter 7, consumer debtors with cars encumbered by loans have

black-neighborhoods. Black and Latinx individuals also are overrepresented among people with suspended licenses for failure to pay traffic tickets or to appear in court. Crozier & Garrett, *supra* note 190, at 1589–90.

194. *See supra* note 29 and accompanying text.

195. *See* Foohey et al., *Driven*, *supra* note 2, at 303–04 (discussing the automatic stay).

196. *See supra* note 48.

197. *See* Foohey et al., *Driven*, *supra* note 2, at 299.

four options. First, they can surrender the car and discharge unsecured debt that remains after the car value is offset against the auto loan amount due.[198] Data from the Consumer Bankruptcy Project (CBP), a long-term project studying people who file bankruptcy, on which I am a co-investigator,[199] show that chapter 7 debtors who come to bankruptcy with two or more cars often surrender their least valuable vehicle, and keep more valuable, likely newer, more reliable cars that they use every day.[200]

The remaining options allow people to keep cars they need. People can redeem their vehicle by paying the value of the car to the auto lender, as opposed to the entire remainder of the loan, as is required outside of bankruptcy.[201] Redemption thus allows that debtor to discharge the amount an auto loan is outstanding above their vehicle's value. Data from the CBP show that very few consumer debtors redeem their cars—less than 2% of chapter 7 debtors who come to bankruptcy with cars.[202]

People also can reaffirm the auto debt, whereby they essentially waive the discharge as to that secured debt and enter into a new agreement with the lender to pay the debt going forward, post-bankruptcy.[203] This means that the auto loan continues according to the new agreement outside bankruptcy. CBP data show that two-thirds of people who enter bankruptcy with cars indicate that they intend to reaffirm their auto loan as to their most valuable vehicle. That percentage drops to 58% for people's second most valuable vehicle.[204]

Finally, debtors can choose to deal with their cars and car loans through a supposedly legally prohibited fourth choice—ride-through.[205] Ride-through refers to the practice of consumer and auto lenders continuing to pay and enforce pre-bankruptcy loans after chapter 7 proceedings conclude.[206] Creditors seemingly are willing to accept continued payment post-bankruptcy, as long as debtors keep current on the auto loan. People, in turn, are more likely to keep current on their auto loans because chapter 7 allows them to discharge most of their unsecured debts, freeing up money post-bankruptcy.[207]

In general, for individuals and couples who want to save one or two essential cars, the benefit of filing chapter 7 primarily is the discharge of most unsecured debts and, to a lesser extent, the ability to abandon other unneeded

198. *See id.* at 300–01.

199. *Id.* at 304–06 (detailing the CBP). For more details about the CBP, *see Consumer Bankruptcy Project*, http://www.consumerbankruptcyproject.org/ (last visited Apr. 6, 2020).

200. Foohey et al., *Driven*, *supra* note 2, at 312–13 (reporting intentions to surrender).

201. 11 U.S.C. § 722 (allowing the redemption of "tangible personal property intended primarily for personal, family, or household use" by paying the "secured claim").

202. Foohey et al., *Driven*, *supra* note 2, at 313 fig.1 (reporting intentions to redeem vehicles).

203. 11 U.S.C. § 524 (2019); *see also* Foohey et al., *Driven*, *supra* note 2, at 301.

204. Foohey et al., *Driven*, *supra* note 2, at 313 fig.1 (reporting intentions to reaffirm).

205. *See id.* at 301–02 (discussing how ride-through is prohibited by the Bankruptcy Code, but that debtors and their creditors still use this tactic to keep vehicles).

206. *See id.* (discussing the mechanics of ride-through).

207. *See id.* at 324–25 (discussing the benefits of filing bankruptcy to keep cars).

vehicles. As my co-authors and I discuss in *Driven to Bankruptcy*, people who are worried about defaulting on car loans may find that paying an attorney to help them file a chapter 7 case costs less and brings less uncertainty about whether they will have a car when they need it than "kicking the trade."[208] This is true even though consumer debtor attorneys' charge $1,200 or more to file a chapter 7 case.[209]

When it comes to keeping cars, chapter 13, in contrast, seems like a less desirable deal. In chapter 13, the debtor must propose a three- to five-year repayment plan that pays their secured debts on an ongoing basis, which includes interest payments, and also pays accrued past-due amounts and related fees.[210] The "secured claim" people must pay generally is the value of the collateral, which allows debtors to "strip down" underwater property, breaking the creditor's claim into a secured claim and an unsecured claim.

For cars, however, the Bankruptcy Code (the Code) includes a special provision that applies to purchase-money security interests in motor vehicles bought within 910 days (i.e., two and a half years) before the bankruptcy filing. This provision requires that the plan payments account for the full amount of the auto debt, not just the value of the collateral, thereby disallowing strip down.[211] Because the secured debt on cars that people have owned for a longer time generally will have amortized to at or below the value of the car, chapter 13 plans require people to pay the total amount due on their auto loans.[212] But, importantly for debtors, they can use their cars during the pendency of their chapter 13 cases.[213]

Chapter 13 debtors must complete their plans to get a debt discharge.[214] Yet, two-thirds of filers either request that case be dismissed or be converted to chapter 7 before their plans end.[215] Because few debtors request to convert their cases to chapter 7, more than half of people who file chapter 13 do not receive a discharge.[216]

The inability to strip down auto loans, combined with the low plan completion and discharge rate makes chapter 13 seem like a less desirable deal for people who want to use bankruptcy to help with auto loans. In addition, consumer bankruptcy attorneys charge their debtor clients

208. *See id.*

209. Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 229 (2018) (reporting that chapter 7 attorneys' fees averaged $1,224 in 2017); Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1058 (finding that chapter 7 attorneys' fees averaged $1,229 in 2015).

210. *See* Foohey et al., *Driven*, *supra* note 2, at 302–03 (discussing secured claims in chapter 13).

211. 11 U.S.C. § 1325(a) (2020); *see* Foohey et al., *Driven*, *supra* note 2, at 302–03 (discussing this provision, termed the "hanging paragraph," and defining purchase money security interests).

212. *See* Foohey et al., *Driven*, *supra* note 2, at 302–03 (discussing amortization of auto loans).

213. *See id.* (discussing chapter 13).

214. 11 U.S.C. § 1328 (2018).

215. *See* Foohey et al., *Life in the Sweatbox*, *supra* note 208, at 227 (detailing studies).

216. Foohey et al., *"No Money Down"*, *supra* note 208, at 1093 tbl.5 (reporting on CBP data).

significantly more to help with a chapter 13 case—an average of about $3,450.[217] The difference in attorneys' fees between chapters 7 and 13 may make filing chapter 13 to keep a car rather than finding another vehicle economically inefficient.[218]

Nonetheless, in *Driven to Bankruptcy*, my co-authors and I found that a significant group of people file chapter 13 owning cars and little else.[219] These people have unique characteristics other than their lack of homeownership. They make less income than other debtors, their cars are worth more than other debtors' vehicles, and they owe more on those cars than other debtors.[220] Black households are also more likely to be among debtors who file chapter 13 owning little other than cars.[221] The lower income, higher car value, and lower car equity aligns with research showing that minorities pay more for cars and auto loans.[222]

In discussing these results, we highlight that Black Americans bring to bankruptcy the discrimination that they experience outside of bankruptcy. To the extent that they file chapter 13 to hold onto cars, they likewise pay more trying to do that and probably are less likely to succeed in doing so as compared to other Americans. Given racial disparities in auto repossession and the incurrence of parking tickets and other government fees and fines, Black households are also presumably more likely to file bankruptcy to get back booted, repossessed, or impounded vehicles.[223]

B. GETTING BACK REPOSSESSED CARS

Although chapter 7 overall seems like the better deal for people to keep their cars, chapter 13 is particularly useful to deal with already repossessed and impounded vehicles. The automatic stay that activates upon filing prevents creditors from continuing with car repossessions and sales.[224] The stay is useful to people who file chapter 7 or chapter 13. In chapter 7, debtors can get cars back if they agree to redeem or reaffirm the auto debts.[225] But filing chapter 13, and only chapter 13, brings additional benefits for getting

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217. Foohey et al., *Life in the Sweatbox*, *supra* note 208, at 229 (reporting attorneys' fees in 2017).

218. The difference in cost as compared to attorneys' fees to file a chapter 7 case relates to chapter 13's relative complexity. *See id.* at n.54.

219. Foohey et al., *Driven*, *supra* note 2, at 316–20 (detailing the results of a cluster analysis of people who file bankruptcy owning cars).

220. *Id.* at 318, tbl.3.

221. *Id.* at 318, tbl.3, 316–20.

222. *See id.* at 323; *supra* notes 63–67 and accompanying text.

223. *See supra* notes 163 and 192 and accompanying text; Melissa Sanchez & Sandhya Kambhampati, *Driven into Debt: How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/ (discussing how governmental fees lead people in Chicago to file chapter 13).

224. *See supra* note 194 and accompanying text.

225. *See* Foohey et al., *Driven*, *supra* note 2, at 303–04 (discussing how bankruptcy can help debtors combat repossessions).

vehicles back and dealing with government fees and fines and suspended drivers' licenses.

The additional benefits in chapter 13 for getting vehicle back relate to the automatic stay and other provisions regarding property of the estate. Prior to the Supreme Court's decision in January 2021 in *City of Chicago v. Fulton*, a case coming out of Chicago's practice of impounding vehicles for unpaid parking tickets and other fees,[226] courts were split on whether the automatic stay required immediate return of repossessed but not yet sold collateral upon commencement of a bankruptcy. A majority of courts had held that a specific sub-provision of the automatic stay which referenced "exercis[ing] control over property of the estate"[227] required creditors, debt collectors, and government units to return repossessed but not yet sold vehicles to debtors. Importantly, these courts read this return as automatic and immediate upon commencement of a chapter 13 case. The debtor did not need to file a motion to compel the return of the vehicle.[228] In contrast, a minority of courts had held that to get back repossessed collateral, such as a car, the debtor was required to file a motion seeking that the bankruptcy court compel turnover *and* possibly also require the debtor to pay the creditor "adequate protection" to guard against the collateral's decline in value.[229]

In light of this circuit split, at the end of 2019, the Supreme Court granted certiorari on *Fulton*.[230] The issues in the case transcended how the automatic stay applies to debtors getting their cars back from debt collectors and the impound lot post-petition.[231] As such, the Court focused on a textual reading

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226. *See* SCOTUSblog *Chicago v. Fulton* docket, *supra* note 48.

227. 11 U.S.C. § 362(a)(3).

228. *See, e.g.*, Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773 (8th Cir. 1989) (holding that creditors must turn over property upon commencement of a bankruptcy case); Cal. Emp't Dev. Dep't v. Taxel (*In re* Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996) (holding that retention of estate property violates the automatic stay); Weber v. SEFCU (*In re* Weber), 719 F.3d 72 (2d Cir. 2013) (holding that a secured creditor violated the automatic stay when it did not return a repossessed vehicle to a chapter 13 debtor); City of Chic. v. Fulton (*In re* Fulton), 926 F.3d 916 (7th Cir. 2019) (holding that once a debtor files bankruptcy, a city (here, Chicago) cannot "continue to hold a debtor's vehicle until the debtor pays her outstanding parking tickets").

229. *See, e.g.*, WD Equip. v. Cowen (*In re* Cowen), 849 F.3d 943 (10th Cir. 2017) (holding that a secured creditor only must return a vehicle to a chapter 13 debtor if the court grants the debtor's motion for turnover); *In re* Denby-Peterson, 941 F.3d 115, 130 (3d Cir. 2019) ("[T]he turnover provision is effectuated by virtue of judicial action."). In those jurisdictions that require return of a seized vehicle, the secured auto lender can ask the bankruptcy court to order the debtor to pay adequate protection prior to when the debtor begins making payments in advance of or under the repayment plan. 11 U.S.C. §§ 365(d), 1326(a) (2018).

230. *See* SCOTUSblog *Chicago v. Fulton* docket, *supra* note 48.

231. For a summary of the issues and different analyses, *compare* Brief of Amici Curiae Professors John A. E. Pottow and Jay Lawrence Westbrook In Support of Respondents (Mar. 11, 2020), https://www.supremecourt.gov/DocketPDF/19/19-357/137871/20200311160642592_19-357_Brief%20of%20Amici%20Curiae.pdf (arguing that the Supreme Court should reject arguments about distinctions embedded in the language of § 362(a)(3) regarding control versus possession of collateral and also consider the "background context of bankruptcy practice") *and* Brief of Bankruptcy Law Professors As Amici Curiae In Support of Respondents (Mar. 10, 2020), https://www.supremecourt.gov/DocketPDF/19/19-357/137609/20200310092833691_19-

of the Code to decide the issue. It unanimously sided with the minority of courts in holding that this specific sub-provision on the automatic stay does not require creditors to return property to the estate (to be returned to the debtor by the trustee) merely because they had possession of the property when the debtor filed bankruptcy. If a creditor takes affirmative action to disturb the status quo of who holds property of the estate post-petition, such may constitute a violation of the automatic stay.[232]

Given that *Fulton* involved impounding of vehicles, Justice Sonia Sotomayor wrote a concurrence to comment on how debtors can get vehicles out of the impound lot or back from their creditors in chapter 13. The solution is for the debtor to file a motion seeking a court order for the vehicle's return under the Code's turnover provision.[233] In addition to the turnover motion, bankruptcy courts may require the debtor to prove that the secured creditor is "adequately protected," which may require paying on the car loan as part of the turnover.[234]

As Justice Sotomayor notes, needing to file a turnover motion significantly decreases the usefulness of filing chapter 13 to get back repossessed vehicles. Requesting turnover requires initiating a separate proceeding within the bankruptcy case that "can be quite slow" and adds cost.[235] Even if a debtor files the motion at the same time as the petition and asks for an expedited hearing, a month or more likely will pass before the judge issues an order for the vehicle's turnover.[236] Justice Sotomayor estimates that without an expedited hearing, turnover could take 100 days.[237]

People need their cars immediately. Waiting even a week, let alone three months, to get back their car back could mean losing a job or having to forego important medical care. Even if debtors can wait a month or more to get cars back, they may not be able to pay their attorneys the additional money required to draft, submit, and defend turnover motions.[238] Or they may not

357%20Amicus%20Brief%20of%20Bankruptcy%20Law%20Professors.pdf (similar), *with* Brief for Amici Curiae Professors Ralph Brubaker, Ronald J. Mann, Charles W. Mooney, Jr., Thomas E. Plank and Charles J. Tabb In Support of Petitioners (Feb. 7, 2020), https://www.supremecourt.gov/DocketPDF/19/19-357/132348/20200207142219207_19-357%20City%20of%20Chicago%20v%20Fulton%20Brief%20for%20Amici%20Curiae%20Professors%20in%20Support%20of%20Petitioner.pdf (arguing that requiring turnover without a motion from the debtor is inconsistent with the Code).

232. *See generally* City of Chi., Ill. v. Fulton, *supra* note 48.

233. *Id.* at pp. 3−5 (Sotomayor, J., concurring); *see also* 11 U.S.C. § 542(a).

234. City of Chi., Ill. v. Fulton, *supra* note 48, at p. 4 (Sotomayor, J., concurring).

235. *Id.* at pp. 4−5 (Sotomayor, J., concurring).

236. A relevant comparison for timing is "first-day" motions in business bankruptcy cases, which are among the fastest-heard motions by bankruptcy courts and still can take a week or more from filing to hearing to issued order. *See* ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 413–17 (7th ed. 2014) (discussing "first day orders").

237. City of Chi., Ill. v. Fulton, *supra* note 48, at p. 4 (Sotomayor, J., concurring).

238. In chapter 13, attorneys' fees can be paid through the repayment plan, which may reduce the *immediate* cost concern. *See* Foohey et al., *"No Money Down"*, *supra* note 208, at 1066–70 (discussing the timing of payment of attorneys' fees).

have enough money to pay adequate protection between the time that the car is returned and when the Code requires repayment plan payments to begin.[239] Regardless, the motion that *Fulton* now requires will increase the relatively high costs associated with a chapter 13 case. For some people, abandoning a repossessed vehicle and purchasing another, despite the cost, may be less expensive than filing chapter 13 to save the vehicle.

At the same time, based on the above discussions, people may experience increased repossession of their cars because of fintech advances in vehicle tracking, combined with changes in the auto loan market brought by other fintech advances. Prior to *Fulton*, filing chapter 13 may have been people's leading option if lenders already had repossessed their cars. In the wake of *Fulton*, what little leverage consumers had via the bankruptcy system diminished, which could change the dynamics of repossession even further in favor of dealers and lenders.

C. DEALING WITH FEES AND LICENSE SUSPENSIONS

For some people, filing chapter 13 brings even more benefits related to vehicles. It presents a viable option to deal with traffic tickets and other governmental fees and fines that can lead to booting of vehicles and suspension of licenses, debts which are not dischargeable in chapter 7. In chapter 7, nondischargeable debts include "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit."[240] In contrast, chapter 13 provides what is termed the "superdischarge," which includes amounts due to government units, except those that provide for restitution or are a criminal fine.[241] Chapter 13's discharge, and again only chapter 13's discharge, gets rid of parking and other tickets. This allows debtors to reinstate their drivers' licenses.[242]

This alone may push some people to file chapter 13. Because communities of color are subject to heightened policing, including traffic and parking tickets, if they turn to bankruptcy for help, they will find that filing chapter 13 is their only actual option.[243] If these debtors also need to get their vehicles back, post-*Fulton*, they will pay even more to file a motion seeking return.[244] *Fulton* has the potential to shift the power balance between people and state and local governments that rely on driving to make money. The

239. 11 U.S.C. § 1326(a) (providing that payments must start 30 days after filing of the petition or when the repayment plan is confirmed, whichever is earlier).

240. *Id.* § 523(a)(7) (providing for the discharge of debt owed to a governmental unit if it is for compensation of "actual pecuniary loss").

241. *Id.* § 1328(a)(3).

242. *See* Pamela Foohey, *Fines, Fees, And Filing Bankruptcy*, 98 N.C. L. REV. 419, 421–23 (2020) (discussing discharge in chapter 7 and chapter 13); Stephen G. Murphy & Allen Rosenberg, *Driver's License Suspensions for Delinquent Taxes and Bankruptcy*, AM. BANKR. INST. J., July 2013, at 18, 19.

243. *See supra* note 222.

244. *See supra* Part III.B.

costs of this shift will fall disproportionately on communities of color, either in increased bankruptcy fees or the need to allocate money to pay fines and fees. Given that it is federal, state, and local governments' cumulative and continued decisions to elevate driving as *the* form of transportation people must use to reliably get to work, school, and elsewhere, it seems ironic that the government may profit even more from its decisions under *Fulton*.

As Justice Sotomayor ended her concurrence by noting, the solution as to bankruptcy is for Congress to pass a statutory fix "either by ensuring that expedited review is available for [turnover] of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner."[245] More broadly, that the consumer bankruptcy system offers a leading—perhaps the leading—way for people to deal with the power imbalance they face in obtaining automobiles is a symptom of the larger problem developing in the auto buying and lending market. That *Fulton* may have reverberating effects on people's car ownership almost certainly was not anticipated by the Code's drafters. Bankruptcy is not the place to deal with the ongoing shifting of power from consumers in favor of auto dealers and lenders. More comprehensive, non-bankruptcy solutions are needed to give consumers some control over purchasing and otherwise accessing cars, particularly if the government continues to prioritize driving as America's primary mode of transportation.

IV. ALIGNING POWER DYNAMICS IN AUTO LOANS

Accumulating changes in the auto buying and lending market seem to be on a path to continue to decrease consumer power and welfare. If driving remains the dominant form of transportation for most Americans, changes in the market for cars and auto loans will become increasingly problematic for people. There is no indication, at present, that federal, state, and local governments will take meaningful steps to shift focus from prioritizing and subsidizing driving to other forms of transportation. People will continue to need access to automobiles. Indeed, with the social distancing that will likely be part of American life for many months, a lasting effect of COVID-19 may make people more comfortable with driving and even more dependent on cars.[246] In turn, regulators and policy makers will have even less incentive to allocate resources to supporting mass transit options or to urban planning designed so that people will not need to be so car dependent.

Although there always will be people who make the difficult decision not to purchase or lease vehicles because of the cost, which may lead to assertions that other people who get in over their heads financially with auto loans do

245. City of Chi., Ill. v. Fulton, *supra* note 48, at pp. 5−6 (Sotomayor, J., concurring).

246. As cities began to reopen in June 2020, officials worried that people would avoid public transportation in favor of driving cars. *See* Christina Goldbaum, *Can 8 Million Daily Riders Be Lured Back To N.Y. Mass Transit?*, N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/06/01/nyregion/coronavirus-commute-nyc-subway-cars.html.

not deserve sympathy or help, there are at least a couple key reasons to advocate for some sort of government intervention in the market. First, how people purchase and lease automobiles, at present, sets this type of debt apart from almost every other consumer debt.[247] Adopting regulations that parallel those already in place for other consumer credit products would put people on similar footing with lenders as they are now in similar credit transactions. Second, the government's creation and maintenance of a transportation structure that forces most people to rely heavily on cars arguably is a sufficient reason to re-allocate some power away from auto lenders. There are a variety of ways to do so, including direct intervention in the form of public-backed loans or direct subsidies for automobiles. The remainder of this Part discusses the merits and potential problems of these interventions.

As noted, other than homes, auto loans are the only other type of secured debt that most people will incur. Student loans, credit cards, medical debt, and other leading types of consumer debt are unsecured. Lenders cannot reach people's assets without going through at least some court proceedings.[248] The security that accompanies auto loans allows lenders or debt collectors to immediately seize people's vehicles, distinguishing the timing of auto repossession from that of home foreclosure, which can take weeks or months.[249] Additionally, the recent integration of fintech advances in auto loans largely gives lenders a greater ability to set the terms of auto loans.

Ideas for how to put people on similar footing with auto lenders as they have in comparable credit transactions can be drawn from already implemented consumer protections for other consumer credit products, such as home loans and credit cards. As an added benefit, these protections will be easier-to-implement given that they already have been rolled out with these other credit products. Protections provided for other consumer credit products generally require lenders to assess people's ability to pay, to provide understandable disclosures, to limit fees and other charges that accompany the loan, including upon default, and to allow rescission under particular circumstances.[250] Ability to pay standards would respond to the argument

247. *See supra* notes 21–24 and accompanying text.

248. These primarily are state court debt collection actions that can end with seizure of non-exempt assets (to the extent that a debtor has any non-exempt assets), with garnishment of a bank account, or with wage garnishment. The debt collection market currently has serious power imbalances that are beyond the scope of this article. *See generally* Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Debt Collection Pandemic*, 11 CAL. L. REV. ONLINE 222, 224–25 (2020) (discussing how COVID-19 could increase debt collection); *How Debt Collectors Are Transforming the Business of State Courts*, PEW CHARITABLE TRUSTS (May 6, 2020), https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts (discussing debt collection proceedings).

249. *See supra* text accompanying notes 21–22; Parts III and IV.

250. For instance, the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) imposed pricing controls, limits on marketing, and other necessary disclosures on credit card issuers. *See* Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and*

that auto lenders should not sell people loans if they should have been concerned about people's financial outlooks. Other regulations would put the burden on people to recognize that a deal is financially infeasible, but would try to make it easier for them to do so. For instance, a couple of states have adopted or proposed disclosures specific to auto lending, such as Texas's motor vehicle installment sale form which includes language about the possibility of markup.[251]

Other potential protections include enhancements to federal and state laws regarding debt collection and credit reporting that would apply specifically to auto loans. As with houses, and as already provided in a handful of states, auto repossession could be subject to a time period during which people could reinstate their loans.[252] And, as recently mentioned by Levitin, another set of reforms could target auto lending specific practices, such as outlawing certain loan packages, "yo-yo" schemes, and some transaction fees.[253]

As Levitin and others have pointed out, however, these purported consumer protections are unlikely to operate as actual protections in the auto market. Beyond the unique linking of auto sales and lending that may make it more difficult for people to separate the terms of the financing from the terms of the sale,[254] people's need for cars often will transcend such disclosures and regulations. As research in high-cost lending has demonstrated, people who need money for necessities operate under conditions of little choice, whether that be actual or perceived.[255] The same likely is true for people desperate to buy or lease cars. To the extent that people read disclosures, they may disregard them, not because they do not understand the potentially problematic terms they are agreeing to, but because they live in a country where they have few other reliable transportation options. With the addition of fintech platforms that aggregate auto loans, to the extent that people can shop around for loans, they may be less likely to do so particularly if the app shows them variations in loan pricing.[256] Even if people try to shop around for auto loans, they will find

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Beyond, 97 CORNELL L. REV. 967, 974, 977–78 (2012) (discussing pricing controls); Jim Hawkins, *The CARD Act on Campus*, 69 WASH. & LEE L. REV. 1471, 1473, 1476, 1498 (2012) (discussing marketing and other disclosures); *see also* Levitin, *supra* note 6, at 1297 n.164 (proposing and discussing a right of rescission for auto finance transactions and noting that this exists for mortgage loans).

251. *See* Levitin, *supra* note 6, at 1297 n.164 (discussing using disclosures to provide consumers with more power in auto buying and lending transactions).

252. *See supra* note 22.

253. *See* Levitin, *supra* note 6, at Part IV; *supra* note 55 (discussing "yo-yo" scams).

254. *See* Levitin, *supra* note 6, at 1307 and see accompanying text at Part IV (opining that proposals need to address "the root cause of the problems in the auto lending market—the market structure in which vehicle purchases are effectively tied with vehicle financing").

255. *See* text accompanying notes 99–103.

256. *See* text accompanying note 65.

lenders coalescing around offering products with high interest rates and long loan lengths.[257]

Less scrupulous auto lenders may be incentivized to operate in the grayer areas of regulations or disregard them entirely, such as ability to pay requirements, because customers are likely to agree to unbalanced terms. Given that state attorneys general and the FTC have brought actions against and raised concerns about auto lenders, this unfortunate outcome should be anticipated.[258] Overall, the United States' decisions to elevate driving over other forms of transportation will likely render programs, policies, and laws that seek to foster competition in the auto market ineffective.[259]

At this point, it is worth reiterating that there always will be people who find a way to live "car free" while others take out and then default on auto loans. But the core of this Article suggests that there are two forces at work in the auto sale and loan market. One is the increasing intertwining of car sales and loans in light of fintech advances, leading to greater concerns that lenders work for their dealer-customers rather than for end-user consumers. This alone may support additional interventions or regulation of the auto loan market.

The other dynamic is public policies that, across the board, continue to make America a country of cars, which is the dynamic that is likely to render regulations ineffective. Cars have become essential goods that operate as part of America's infrastructure. That is, they are necessities. But people have been left to privately fund their purchases. The solution may be more direct public intervention in the marketplace, as is done with other necessities.

Taking America's chosen transportation infrastructure as a given,[260] with people continuing to have to purchase cars in the private market, direct intervention may take two primary forms: public-backed loans and direct subsidies. Public-backed loans would allow people to purchase automobiles.

257. *See* text accompanying notes 51–52.

258. *See supra* Part II.B.3 (discussing the FTC's action against Uber); *supra* note 68 (discussing action against subprime lender Santander).

259. Levitin proposes de-linking vehicle purchasing from vehicle financing because "[t]he linked nature of the financing transaction means that it is not subject to normal competitive pressures. Instead of lenders competing for the consumer's business, they are competing for the dealer's business." Levitin, *supra* note 6, at Part V. Although, as Levitin suggests, this might create "more robust competition for consumers' financing business," *id.*, if people continue to need vehicles above almost all other consumer goods, the incremental benefit from this greater competition may not be sufficient to offset lenders' ability and incentive to extract expensive and problematic concessions from consumers. That is, the power imbalances in the auto marketplace go beyond changes in how dealers and lenders interact to the detriment of consumers.

260. Discussing how governments could reallocate funds to provide transportation and other infrastructure that would decrease people's need for automobiles is beyond the scope of this Article. Instead, this Article largely presumes that driving will remain people's primary mode of transportation. For more detailed discussion about the benefits of providing people with true alternatives to driving automobiles, *see generally* Shill, *Should Law Subsidize Driving?*, *supra* note 3 and Pamela Foohey, *Bursting the Auto Loan Bubble In the Wake of COVID-19*, 106 IOWA L. REV. __ (forthcoming 2021), https://ssrn.com/abstract=3737513.

This loan program could also include an income-based repayment option for auto loans for people who cannot meet loans' current terms, similar to the current income-based repayment program offered for federal student loans.[261] The public-loan market may be marginally subsidized, offering people lower-than-market interest rates and fees. In concept, even without subsidization, a public loan option may provide the needed disaggregation from auto selling and auto lending, as well as entry of a large, business-like market participant (the government), that will give consumers more power in auto buying and lending.

Similar government programs, however, tell a cautionary tale about the potential effectiveness of this solution in shifting market power toward consumers. The student loan market has already test-driven a public-backed loan structure, to increasingly costly consequences. Rather than decrease the cost of education and provide Americans with a path toward personal advancement, the availability of subsidized and unsubsidized federal student loans has ballooned into a $1.5 trillion market that threatens the economy and contributes to the widening racial wealth gap.[262] The Department of Education's student loan income-based repayment and loan forgiveness programs likewise have largely been deemed failures by scholars and consumer advocates.[263]

There are, of course, differences between auto loans and student loans. Student loans are less likely to be underwritten. Yet, basic underwriting for auto loans has led to a proliferation of subprime loans and rising delinquencies, an eventual result that may transfer to a public-backed market. Also, the failure of the student loan income-based repayment and loan forgiveness payments in part may be attributable to inept administration.[264]

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261. *Income-Driven Repayment Plans*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans/income-driven (last visited June 2, 2020).

262. *See, e.g.*, Jillian Berman, *How Wiping Out $1.5 Trillion In Student Debt Would Boost The Economy*, MARKETWATCH (Oct. 24, 2019), https://www.marketwatch.com/story/how-wiping-out-15-trillion-in-student-debt-would-boost-the-economy-2019-09-09; Foohey & Martin, *supra* note 13, at Part III.B (discussing how student loan debt is linked with income and wealth inequality); Dalié Jiménez & Jonathan D. Glater, *Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV.132, 140–61 (2020) (detailing the history of higher education finance and how the increased costs of student loans for communities of color intersects with the racial wealth gap).

263. *See, e.g.*, Frank A. Pasquale, *Democratizing Higher Education: Defending and Extending Income-Based Repayment Programs*, 28 LOY. CONSUMER L. REV. 1 (2015) (critiquing income-based repayment plans for student loans); Tyler Curtis & Alan White, *What's Wrong with Public Service Loan Forgiveness and How to Fix It*, working paper (draft dated Nov. 18, 2019), https://ssrn.com/abstract=3478855 (detailing the Public Service Loan Forgiveness program); Tara Siegel Bernard, *The Should-Be Solution to the Student-Debt Problem*, THE N.Y. TIMES (Oct. 13, 2019), https://www.nytimes.com/2019/10/13/your-money/student-loans-income-repayment.html (discussing the unmet potential of the income-based repayment plans for student loans).

264. *See* Gregory S. Crespi, *Why Are Over 98% of the Applications for Debt Discharge Under the Public Service Loan Forgiveness Program Being Denied?*, 65 ST. LOUIS UNIV. L.J. (forthcoming 2021), https://ssrn.com/abstract=3614123 (overviewing high denial rates and concluding that the programs' failures are due to inattention by the Department of Education).

The success of any public-backed loan program will depend on administrative buy-in and attention.

The United States' home mortgage market provides another story of caution in creating government-backed auto loan options. For decades, Congress prioritized people's purchases of houses, creating a federally-backed mortgage market through the establishment of Fannie Mae in the 1930s and Freddie Mac and in the 1970s.[265] Initially, this federal intervention led to a more stable and consumer-friendly mortgage market as compared to the 1920s. Eventually, though, the benefits of federal intervention did not inure to prospective homeowners. Instead, the mortgage meltdown, fueled by subprime loans disproportionately sold to communities of color, contributed to the 2008 financial collapse.[266]

Part of the growth in the student loan market is the increasing importance of higher education.[267] The home mortgage market likewise grew because of the public perception that owning a home is an integral part of the American dream. Having an automobile is even more imperative than pursuing higher education or owning a home. One cannot drive their home to work. But one can live in their car. There are reasons to be skeptical that once implemented, a government-backed auto loan market will benefit consumers. The benefits of government intervention of this nature may inure to private lenders, potentially further catalyzing subprime auto loans. Other ideas for interventions should be considered with a healthy cynicism about a public-backed auto loan market in mind.

Alternatively, the government could subsidize the purchase of automobiles directly by providing people with cash or a cash equivalent. This intervention also takes as a given that the United States will continue to elevate driving as the most reliable, by far, means of transportation and that people will still purchase vehicles themselves. If so, providing people with some money to purchase automobiles will relieve some from the pressure of saving for vehicles and will decrease the portion of vehicles' value they need to fund with private loans. In a way, this alternative is similar to a public

265. *See Fannie Mae and Freddie Mac*, FED. HOUSING FIN. AGENCY, https://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae—-Freddie-Mac.aspx (last visited May 23, 2020).

266. *See* Foohey & Martin, *supra* note 13, at Part III.A (discussing racial inequality in the mortgage market); CHRISTOPHER K. ODINET, FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA 21 (2009) (discussing how Black communities were targeted for subprime loans and how the mortgage market collapsed).

267. *See* Jiménez & Glater, *supra* note 256, at 140–41; Frank Newport & Brandon Busteed, *Americans Still See College Education As Very Important*, GALLUP (Dec. 17, 2013), https://news.gallup.com/poll/166490/americans-college-education-important.aspx (reporting that 70% of people surveyed indicated a college education is very important); *but see* Stephanie Marken, *Half in U.S. Now Consider College Education Very Important*, GALLUP (Dec. 30, 2019), https://www.gallup.com/education/272228/half-consider-college-education-important.aspx (reporting a decrease in perceptions about the importance of college, possibly in reaction to the increasing costs of higher education).

health insurance option.[268] The government would subsidize automobiles on the reasoning that affordable driving is essential, like affordable healthcare is essential. People should not be driven to filing bankruptcy to keep their cars, just as they should not have to use the bankruptcy system as their medical insurer of last resort.[269] The specifics of the scale and implementation of such a program is beyond the scope of this Article. Indeed, instead of money, the program could provide people with cars themselves, effectively turning the government into a long-term car rental outfit.

At this juncture, it is more important to reflect on the core characteristics of America's current "car economy" and how its workings should inform the auto loan market. The conclusion of this consideration may be that drastically changing transportation in America is a more cost-expedient and socially effective solution to problems with the car economy, even if such changes seem so radical as to be impossible. Subsidizing cars likely would put more cars on the road, which would affect the environment,[270] and could backfire by allowing lenders' power to coalesce even more. It also goes against current notions of safety and urban planning.[271] Instead, the past decade's rapid increase in auto debt outstanding and delinquencies presents a moment to rethink public transportation across America. That moment is even more urgent now as the United States recovers from the COVID-19 pandemic's economic effects.

CONCLUSION

America is both a country of cars and a country that embraces technological innovation. The auto industry understands that people need cars and the promise of fintech to deliver cars and loans for those vehicles. Although auto dealers and lenders will argue that fintech innovations benefit consumers, an analysis of the auto market warns that people will continue to lose ground against dealers and lenders. The essential nature of cars feeds, in

268. *See* Margot Sanger-Katz, *The Difference Between a 'Public Option' and 'Medicare for All'? Let's Define Our Terms*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/upshot/medicare-for-all-health-terms-sanders.html (discussing federally subsidized health care options).

269. *See* David U. Himmelstein, Robert M. Lawless, Deborah Thorne, Pamela Foohey, & Steffie Woolhandler, *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 AJPH 431 (2019) (reporting that almost two-thirds of people who file bankruptcy list a "medical contributor" to their filings); Foohey et al., *Life in the Sweatbox*, *supra* note 208, at 242–43 (reporting that a majority of people report going without healthcare and health insurance in the years prior to filing bankruptcy).

270. *See History of Reducing Air Pollution from Transportation in the United States*, U.S. ENVIR. PROT. AGENCY, https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-success-air-pollution-transportation (last visited Sept. 17, 2020) (discussing the history of poor air quality from vehicle emissions).

271. *See* Kea Wilson, *Ten Simple Policies to Subtract Cars From Our Streets*, STREETSBLOG USA (Feb. 24, 2020), https://usa.streetsblog.org/2020/02/24/ten-simple-policies-to-subtract-cars-from-our-streets/ (noting how deaths in the United States are tied to motor vehicles); *supra* note 3.

significant part, people's increasing powerlessness in the auto loan market, and must inform policies for restoring the balance of power in the market.

Many people now must take on a significant amount of debt to purchase something that is critical to their lives and livelihoods. That debt is unlike any other consumer debt in its structure, which allows creditors to easily seize collateral, and in its lack of regulation. Given that automobiles have transformed into part of America's infrastructure, it almost certainly is too late to implement marginal changes to the existing private auto loan market to create a more level playing field. Instead, it may be the time to decide that people should not have to take on excessive debt for something that governments' accumulated decisions have forced most of them to purchase, and to enact programs that bring automobiles more squarely within America's public infrastructure.

Alternatively, federal, state, and local governments could allocate funds to building a different public infrastructure whereby cars are not as essential. These changes speak to even larger decisions about the nature of shorter-distance travel, environmental sustainability, and overall quality of life in America. Given that the auto market continues to shift power away from people in favor of companies and banks, now may be the time to turn more intently to that larger discussion.