COMMENT

FINALITY AND FORECLOSURE: DETERMINING A HOMEOWNER'S ABILITY TO APPEAL IN MORTGAGE FORECLOSURE CASES

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INTRODUCTION

The 2008 Great Recession arose from a massive, wide-scale disruption to the United States housing market.[1] In the years leading up to it, a "bubble" of artificially inflated home prices had grown, leading some homeowners to refinance their debt or take out second mortgages.[2] In addition, financial institutions relied more heavily on subprime mortgages, with which they lent to high-risk consumers who carried greater likelihoods of defaulting on their debt.[3] When the bubble burst, many individuals saw the value of their houses plummet and their mortgages become "underwater," meaning that the amount they owed exceeded the value of their homes.[4] This collapse in the real estate market subjected many people to eviction as a result of foreclosure actions, which in turn further depressed housing values.[5] Lending institutions ultimately foreclosed on the homes of millions of Americans over the course of the Great Recession and in the years that followed.[6] Over the next decade, the crisis abated, and the real estate market largely—but not entirely—rebounded from the chaos of the Great Recession.[7]

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1 *See* Judy Fox, *The Future of Foreclosure Law in the Wake of the Great Housing Crisis of 2007-2014*, 54 WASHBURN L.J. 489, 489-94 (2015) (describing "subprime lending, a housing bubble, lax underwriting standards, dropping home prices, credit default swaps, and the deregulation of the lending industry" as potential causes for the foreclosure crisis).

2 *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS (2010), https://www.huduser.gov/portal/publications/foreclosure_09.pdf [https://perma.cc/6GUC-6CK8].

3 John V. Duca, *Subprime Mortgage Crisis, 2007–2010*, FED. RES. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime_mortgage_crisis [https://perma.cc/5JVJ-NZPX].

4 *Id.*

5 *See* Les Christie, *Foreclosures up a Record 81% in 2008*, CNN MONEY (Jan. 15, 2009, 3:48 AM), https://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/ [https://perma.cc/8XVC-ZH2L] (noting that US foreclosure filings spiked 225% from 2006 to 2008 and that home prices had fallen more than 21% from their peak).

6 By one estimate, almost 7.8 million foreclosures occurred in the decade between 2007 and 2016. *See* CORELOGIC, UNITED STATES RESIDENTIAL FORECLOSURE CRISIS: TEN YEARS LATER 3 (2017), https://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-10-year.pdf [https://perma.cc/K3XJ-YRDP]. Each year from 2008 to 2011 saw at least 950,000 completed foreclosures (meaning that an auction occurred and the home was purchased). *Id.* at 4-5, 7.

7 *See* Menqui Sun, *Another Sign the US is Recovering from the Financial Crisis—Foreclosures Hit a 10-Year Low*, BUS. INSIDER (Jan. 12, 2017, 8:08 PM), https://www.businessinsider.com/us-foreclosures-hit-10-year-low-after-financial-crisis2017-1 [https://perma.cc/XA5U-L9NG] (finding a dramatic decrease since the peak of the housing crisis in the number of annual foreclosures); *U.S. Foreclosure Activity Drops to 13-Year Low in 2018*, ATTOM DATA SOLUTIONS (Jan. 17, 2019) [hereinafter ATTOM DATA SOLUTIONS], https://www.attomdata.com/news/most-recent/2018-year-end-foreclosure-market-report [https://perma.cc/EBD5-FSJG] (calculating that the number of U.S. properties with foreclosure filings has dropped from a high of 2.87 million in 2010 to roughly 625,000 in 2018). Some of the impacts of the Great Recession, however, could still be felt even years later. *See* Robert Hennelly, *America's Foreclosure Crisis Isn't Over*, CBS NEWS (Jan. 26, 2016, 5:00 AM), https://www.cbsnews.com/news/americas-foreclosure-crisis-isnt-over [https://perma.cc/ZP4Q-BSBW] (describing lingering delays in processing foreclosure cases and redefaults by borrowers who received federal relief from their initial mortgage

The COVID-19 pandemic, ongoing as of the writing of this Comment, threatens to upset the recovery and bring new upheaval to the housing market. To help the millions of Americans spending weeks or months out of work due to lockdowns, illness, or unemployment, government authorities across the country have tried to soften the recession's economic blow by temporarily banning foreclosures and evictions.[8] Those efforts may delay but may well be unable to prevent a significant uptick in foreclosures resulting from the pandemic-induced economic downturn, especially as the moratoria begin to expire.[9] And even prior to the crisis, foreclosure posed a significant threat to millions of homeowners struggling to keep up with their mortgage payments.[10]

It is this context that makes the Seventh Circuit's recent jurisprudential shift in the treatment of mortgage foreclosure litigation particularly significant. In 2014, the court in *HSBC Bank USA, N.A. v. Townsend* marked a novel approach to the appeals process in the foreclosure arena.[11] It dismissed an appeal for lack of jurisdiction because the district court's order of foreclosure was not "final."[12] The court did so despite the fact that the judgment determined the amount the homeowner owed the bank and the priority of claims against him, ordered a sale of the property, and indicated how the

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defaults during the Recession). In fact, the Seventh Circuit case at the heart of this Comment is "one of the flood of mortgage foreclosure cases that hit the country after the 2008 economic downturn." HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 773 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 897 (2016).

8 *See* Katy O'Donnell, *HUD, Fannie, Freddie Suspend Foreclosures, Evictions During Outbreak*, POLITICO (Mar. 18, 2020, 4:03 PM), https://www.politico.com/news/2020/03/18/hud-suspends-foreclosures-evictions-coronavirus-135783 [https://perma.cc/53UG-CHKF].

9 *See* Jeff Andrews, *A Foreclosure Crisis Could Still Happen*, CURBED (July 27, 2020, 11:00 AM), https://www.curbed.com/2020/7/27/21335855/coronavirus-foreclosures-housing-crisis [https://perma.cc/39HV-YE25] ("[M]ortgage-delinquency rates are jumping as the pandemic rages on, showing that any lapse in government policy could cause a minor housing crash."); Evan Weinberger, *U.S. Stimulus May Merely Delay Coronavirus Foreclosure Wave*, BLOOMBERG L. (April 17, 2020, 5:30 AM), https://news.bloomberglaw.com/banking-law/u-s-stimulus-may-merely-delay-coronavirus-foreclosure-wave [https://perma.cc/5WYL-U367].

10 *See, e.g.*, Matthew Goldstein, *Goldman Sachs Forecloses on 10,000 Homes for 'Consumer Relief'*, N.Y. TIMES (May 22, 2020), https://www.nytimes.com/2020/05/22/business/goldman-sachs-mortgage-foreclosure.html [https://perma.cc/8WV2-ESKW] (chronicling how investment bank Goldman Sachs has foreclosed on thousands of homes despite promising to help struggling homeowners after the Great Recession); ATTOM DATA SOLUTIONS, *supra* note 7 (observing growth in foreclosure initiations in 2018 in more than one-third of all state and local housing markets and double-digit percentage increases in foreclosures in major markets). The significant risk of foreclosure has also been aggravated by flaws in the process itself and mistakes on the part of lenders. *See* Deon Roberts, *Fresh Outrage for Wells Fargo After Mortgage Error Led to Hundreds of Foreclosures*, CHI. TRIB. (Aug. 7, 2018, 10:15 AM), https://www.chicagotribune.com/business/ct-biz-wells-fargo-foreclosures-20180807-story.html [https://perma.cc/FU3F-TEW2].

11 793 F.3d 771.

12 *Id.* at 773-74. For clarity, when this Comment refers to a "foreclosure order" or "judgment of foreclosure," these terms indicate the district court's judgment finding the mortgagor liable and ordering a foreclosure sale, while a "confirmation order" or similar language refers to the judgment approving the completed sale of the foreclosed property (and, if applicable, entering a deficiency judgment).

proceeds would be paid out.[13] To seek appellate review of a district court's foreclosure order, the Seventh Circuit held, a homeowner who remains unable to cure his debt must wait for his house to go through a foreclosure sale and have the court conclude that the sale was satisfactory.[14] Only the district court's last order confirming the sale would be sufficiently final to allow for appeal.[15]

The practical implications of this approach mean that a homeowner can only file an appeal to challenge the underlying merits of his foreclosure very late in the process. The *Townsend* rule bars a defendant from doing so at any point until the court enters judgment confirming the sale—at which point the homeowner, under Illinois law, only has thirty days before he must turn over his property.[16] It is only at this stage that a homeowner can seek appellate review of the underlying merits of his foreclosure, much less any legal issues arising from the sale and confirmation process.[17] While the defendant can request a stay of the order of sale while he appeals his case, the Seventh Circuit has not yet articulated a clear standard for what he must show in order to obtain one.[18] Absent a stay,

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13 *Id.*

14 *Id.* at 774-75.

15 *Id.* at 776.

16 735 ILL. COMP. STAT. 5/15-1501(d) (2018) (noting that thirty days after the confirmation of the sale, the buyer automatically becomes "entitled to possession of the mortgaged real estate" and may bring eviction proceedings if necessary against those whose interests in the house were terminated by the foreclosure). The Federal Rules of Civil Procedure provide no relief beyond this, at least as of right. Under the Rules, absent an exception or a showing by a litigant, "execution on a judgment and proceedings to enforce it" are only automatically stayed for thirty days after its entry. FED. R. CIV. P. 62(a).

17 *Townsend*, 793 F.3d at 777-79; *see also* Deutsche Bank Nat'l Tr. Co. v. Cornish, 759 F. App'x 503, 508 (7th Cir. 2019) (acknowledging *Townsend*'s "important practical consequences," which mean that a debtor-appellant can "no longer appeal at all, on *any* issue—including the money judgment on the underlying debt . . . —until after the district court approved the sale of her home"). The homeowner can only raise objections to the propriety of the sale or to the absence of notice of the sale before the court at the hearing confirming the sale. *See* 735 ILL. COMP. STAT. 5/15-1508(b) (2018).

18 Up until 2018, under the Federal Rules of Civil Procedure, an appellant could obtain a stay of a monetary judgment pending appeal by posting a "supersedeas bond." FED. R. CIV. P. 62(d) (repealed 2018). The new iteration of the Rule replaced this language to allow an appellant to provide a "bond or other security" to obtain a stay as of right, FED. R. CIV. P. 62(b), raising the issue of what type of security interest would satisfy this standard. The Seventh Circuit tentatively addressed the question in *Cornish*, a nonprecedential opinion. 759 F. App'x at 510. There, the court preliminarily concluded (without argument from the parties) that in a foreclosure case, the bank's interest in the mortgage would be sufficient to entitle a homeowner to a stay while he appeals. *Id.* Even as it framed a final order of foreclosure under *Townsend* as sufficiently analogous to a monetary judgment, however, the court acknowledged that such an order contains some "injunctive aspects," since it instructs the homeowner to turn over his property to the buyer who purchased it in the foreclosure sale. *Id.* at 506.

If the Seventh Circuit, in a precedential opinion, were to view these orders as injunctions and not as monetary judgments, it may need to reevaluate *Cornish*'s holding. The ordinary standard for staying an injunction pending appeal is a different one: it involves weighing the appellant's likelihood of success on the merits; any irreparable harm the appellant will suffer absent a stay; any substantial injury to other parties in the case that would result if the court issues the stay; and the public interest. *See* Nken v. Holder, 556 U.S. 418, 433-34 (2009); Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Picking up on this

nothing prevents the new buyer of the house from taking possession of the defendant's home in the meanwhile.[19]

Meanwhile, several other courts of appeals have disagreed. The Fifth, Sixth, Eighth, and Ninth Circuits have all read the Supreme Court's precedents differently, holding that the district court's order of foreclosure constitutes a final judgment if it finds the defendant liable, specifies the amount of damages owed, designates the property to be sold, and orders a foreclosure sale.[20]

This Comment explores these two competing views on when a homeowner can seek review by an appellate court during the foreclosure process. I begin in Part I by outlining the two bodies of law central to this Comment: state foreclosure statutory law and federal appellate jurisdiction doctrine. Next, Part II presents the Seventh Circuit's and the other courts of appeals' perspectives on when a judgment in the foreclosure process becomes final. I then argue in Part III that the Seventh Circuit incorrectly applies the Supreme Court's finality precedents and advocate in favor of the adoption of the other circuits' approach. Finally, in Part IV, I present potential judicial and legislative solutions for resolving the circuit split.

I. FIRST PRINCIPLES: FORECLOSURE AND FINALITY

The issue this Comment explores is at the heart of the intersection between two distinct bodies of law: foreclosure law and the doctrine of appellate jurisdiction. Foreclosure provides the vehicle through which a lender collects on a debt secured by property when the borrower ceases to pay his debt. As governed by the loan agreement between the parties and applicable law, the lender is generally entitled to sell off the property and apply the proceeds to the borrower's outstanding debt. When the lender brings an action in federal court to obtain a foreclosure order, the case must satisfy various jurisdictional requirements. One of these, which concerns the appellate jurisdiction of the courts of appeals, is the final judgment rule. Under that principle, a party can usually only appeal an order from the district court that is sufficiently "final." This Part sketches the relevant aspects of each of these legal doctrines.

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reasoning, the dissent in *Cornish* argued that the four-factor injunction test should govern grants of stays in mortgage foreclosure appeals. 759 F. App'x at 510-12 (St. Eve, J., dissenting). Given the nonprecedential nature of the opinion, as well as the hesitancy with which the Seventh Circuit announced its approach, *see id.* at 504 n.2 (majority opinion), the standard that would govern stays of foreclosure proceeding while a homeowner appeals a judgment of foreclosure presents an interesting question, albeit one that falls beyond the scope of this Comment.

19 *See, e.g.*, *id.* at 508 (noting that absent a stay, "which would have been essentially automatic in an appeal of the underlying judgment on the debt before *Townsend*," a defendant would likely be "evicted in a matter of days without any meaningful opportunity to present her arguments to this court").

20 *See infra* Section II.B.

A. *The Mortgage Foreclosure Process*

The issue of foreclosure arises when a borrower fails to meet his financial obligations on a secured debt he owes.[21] Most frequently, a homeowner incurs this debt by taking out a mortgage to finance the purchase of his house. As part of a mortgage transaction, in exchange for receiving a loan from his lender, the debtor promises to pay back the debt pursuant to a set schedule—and grants the lender a security interest in their house.[22] The security interest means that if the borrower defaults on the loan and is unable to continue paying his debt, the lending party has the right to initiate foreclosure, selling the property (referred to as collateral) at a public auction and retaining the proceeds to the extent necessary to fulfill the unpaid debt.[23] A creditor may also obtain a security interest (also known as a lien[24]) in a person's home through other means. For example, if a person fails to pay his federal taxes, the IRS can take out a tax lien on his house and foreclose on it to collect the outstanding debt if he still fails to fulfill his obligations.[25] Another common category of security interest, a "mechanic's lien," arises in certain circumstances when a laborer provides construction services on credit; that laborer obtains an interest in the property on which he worked to secure the payment he is owed.[26]

The means through which a lender can effectuate a foreclosure depend on what the relevant body of (typically state) law governing the lien permits, as well as on the terms of the documents that created the security interest.[27] States vary in their approaches to foreclosure. All states have authorized a judicial foreclosure process, in which the lender must bring an action in court to seek

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21 *See Foreclosure*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term as a "legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property").

22 *See* Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 1033 (2019) (describing a mortgage as "a security interest in the property designed to protect the creditor's investment"); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 1.1 (AM. LAW INST. 1996) [hereinafter RESTATEMENT (THIRD) OF PROP.] ("A mortgage is a conveyance or retention of an interest in real property as security for performance of an obligation.").

23 *See* RESTATEMENT (THIRD) OF PROP., *supra* note 22, intro. ("[I]n the United States nearly all states today employ a process of foreclosure by auction sale . . . . [T]he sale serves two functions simultaneously: It establishes a current value for the real estate, and it acts as a marketing device, liquidating the security and transferring title to some new owner."); 2 BAXTER DUNAWAY, LAW OF DISTRESSED REAL ESTATE § 15:1 (2019).

24 *See Lien*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a lien as "[a] legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied").

25 26 U.S.C. §§ 6321, 7403(c) (2018); *see also* 4 DUNAWAY, *supra* note 23, § 40:47.

26 *See* 4 DUNAWAY, *supra* note 23, § 40:34.

27 *See* RESTATEMENT (THIRD) OF PROP., *supra* note 22, intro. (noting that "the foreclosure process is defined by statute in nearly all American jurisdictions"); 1 DUNAWAY, *supra* note 23, § 13:3 ("If the decision has been made to foreclose it is then necessary to determine (1) what type of security agreement is involved . . . and (2) what type of foreclosure is permitted in the state (or jurisdiction) and what type is normally used in the state.").

foreclosure.[28] Some additionally provide for nonjudicial foreclosure.[29] There, a mortgagee[30] can simply send a notice of default to the borrower and conduct the sale without involving the court system.[31] In addition, a few states allow for "strict" foreclosure, in which the court "determines that the borrower's interest has been terminated but no public sale of the property is required."[32] This Comment, however, focuses solely on judicial foreclosures, because they by their nature necessitate adversarial litigation proceedings before a court.

An individual's ongoing failure to make payments on their mortgage will not always result in foreclosure and eviction. State statutes may provide for a right of redemption. Under such provisions, an individual can pay the full amount he owes under his mortgage, covering the principal, interest, fees, and costs to completely fulfill his total obligations across the entire life of the mortgage and eliminate his debt to the lender.[33] Mortgagors may also have the right to reinstate their mortgages. Reinstatement entails paying back any outstanding principal and interest that is currently owed to the mortgagee; doing so revives the mortgage and allows the homeowner to continue making payments on it as before.[34]

Meanwhile, if a foreclosure sale goes forward, the proceeds may sometimes be insufficient to cover the entirety of the homeowner's outstanding debt on their mortgage. In this case, some state courts will order

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28 *See* Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 1034 (2019) ("Every State provides some form of *judicial* foreclosure: a legal action initiated by a creditor in which a court supervises sale of the property and distribution of the proceeds."); 1 DUNAWAY, *supra* note 23, § 13:3.

29 *See Obduskey*, 139 S. Ct. at 1034 (noting that about half of the states allow for nonjudicial foreclosure, where "notice to the parties and sale of the property occur outside court supervision"); 1 DUNAWAY, *supra* note 23, § 13:3.

30 Generally, the party offering the mortgage and providing the loan, such as a bank or other financial institution, is known as a mortgagee, while the homeowner-borrower is referred to as a mortgagor.

31 *See* Brian D. Feinstein, *Judging Judicial Foreclosure*, 15 J. EMPIRICAL LEGAL STUD. 406, 412-13 (2018). In a nonjudicial foreclosure, the debtor may seek injunctive relief in court by filing a wrongful foreclosure action, but the onus is on him to challenge the foreclosure. *Id.* Absent action on his end, the mortgagee can foreclose without court involvement. *Id.* at 413; *see also Obduskey*, 139 S. Ct. at 1034 (describing one such system in which "the homeowner may contest the creditor's right to sell the property, and a hearing will be held to determine whether the sale should go forward").

32 1 DUNAWAY, *supra* note 23, § 13:3; *see also, e.g.*, CONN. GEN. STAT. § 49-15 (2019).

33 *See, e.g.*, 735 ILL. COMP. STAT. 5/15-1603(f) (2019); OHIO REV. CODE ANN. §§ 2329.071(C), 2329.33 (LexisNexis 2019); WIS. STAT. § 846.13 (2019); *see also* DUNAWAY, *supra* note 23, § 20:1 ("In all states the borrower has the right . . . to redeem the property by paying the full debt prior to the foreclosure sale . . . . In about one-half of the states the borrower also has a *statutory redemption* right after the foreclosure sale."); Matthew J. Baker et al., *An Economic Theory of Mortgage Redemption Laws*, 36 REAL EST. ECON. 31, 33-35 (2008) (discussing the origins of redemption laws in sixteenth-century England as well as their role throughout American history).

34 *See* DUNAWAY, *supra* note 23, § 15:8 (describing state laws barring foreclosure upon the debtor's reinstatement of the loan, which occurs upon "the payment of delinquent payments due or the curing of other defaults"); *see also, e.g.*, ARIZ. REV. STAT. § 33-813(A) (2019); CAL. CIV. CODE § 2924c(a)(1) (2019); 735 ILL. COMP. STAT. 5/15-1602; N.J. REV. STAT. § 2A:50-57 (2019).

a personal judgment against the defendant, known as a deficiency judgment, to cover the balance of the debt.[35] This obligation follows the defendant even after the conclusion of the foreclosure process.

Although foreclosure cases often arise in state court, federal district courts can also hear foreclosure actions through avenues such as diversity[36] or federal question jurisdiction.[37] These cases give rise to the federal issues of appellate jurisdiction and finality of judgments, which this Comment next addresses.

B. *Appealability and the Final Judgment Rule*

The lodestar of federal appellate jurisdiction is the final judgment rule.[38] Under this principle, currently codified at 28 U.S.C. § 1291, the circuit courts of appeals have jurisdiction of appeals from all "final decisions" of the district courts.[39] This requirement has a long history: such a principle first appeared in the first Judiciary Act, which allowed "*final* decrees and judgments in civil actions in a district court . . . [to] be reexamined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error."[40]

Under the Supreme Court's standard formulation, a final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but

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35 *See Obduskey*, 139 S. Ct. at 1034 (explaining that "in the event that the foreclosure sale does not yield the full amount due, a creditor . . . may sometimes obtain a deficiency judgment, that is, a judgment against the homeowner for the unpaid balance of a debt"); DUNAWAY, *supra* note 23, § 16:46 ("With [a deficiency] judgment, the lender can . . . recover directly against the borrower" and his personal assets.). For examples of state laws authorizing deficiency judgments, see 735 ILL. COMP. STAT. 5/15-1508(b)(2) (2019), OHIO REV. CODE ANN. § 2329.08 (LexisNexis 2019), and WIS. STAT. § 846.04(a) (2019).

36 Diversity jurisdiction is proper when the two parties are citizens of different states and the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a) (2018); *see also, e.g.*, Citibank, N.A. v. Data Lease Fin. Corp., 645 F.2d 333, 335 (5th Cir. Unit B May 1981); DUNAWAY, *supra* note 23, § 21:2.

37 Federal question jurisdiction is met in "civil actions arising under . . . the laws . . . of the United States." 28 U.S.C. § 1331; *see also, e.g.*, United States v. Williams, 796 F.3d 815, 816-17 (7th Cir. 2015) (involving a suit by a federal agency, the IRS, to foreclose on a tax lien, as governed by a federal statute).

38 *See, e.g.*, Hall v. Hall, 138 S. Ct. 1118, 1131 (2018) ("The normal rule is that a 'final decision' confers upon the losing party the immediate right to appeal. That rule provides clear guidance to litigants."); Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1691 (2015) (noting that a party "can typically appeal as of right only from [a] final decision"); 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.02 (3d ed. 1999) (describing the final judgment rule as "[t]he centerpiece of the jurisdiction of the circuit courts of appeal"); 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3905 (2d ed. 1987, updated 2020) ("Unless a proceeding can be brought within one of the relatively narrow alternative statutory bases for jurisdiction, jurisdiction depends upon the ability to characterize as 'final' the decision subject to appeal.").

39 28 U.S.C. § 1291 (2018).

40 Judiciary Act of 1789, Pub. L. No. 1-20, § 22, 1 Stat. 73, 84 (emphasis added); *see also* Theodore T. Frank, Comment, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 292 (1966) (noting that this requirement has continued to appear in every revision of the judicial code). The origins of a final judgment principle date even further back to seventeenth-century English practice. *See* WRIGHT & MILLER, *supra* note 38, § 3906 n.2 (citing Metcalfe's Case (1615) 77 Eng. Rep. 1193 (K.B.)).

execute the judgment."[41] Reaching a final judgment does not require completely concluding the litigation in the trial court. Some questions can still remain undecided after a final order on the merits, as long as resolving them "will not alter the order or moot or revise decisions embodied in the order."[42] The requirement of a final judgment "precludes consideration of decisions that are subject to revision, and even of 'fully consummated decisions [that] are steps towards final judgment in which they will merge,'" because the rule is designed to prevent appeal of tentative, informal, or incomplete decisions by a district court.[43] In analyzing the finality of an order, the Court gives the final judgment rule a practical rather than a technical construction.[44]

While the final judgment rule provides the general analytical framework for determining appealability, courts have crafted several doctrines that broaden the notion of what counts as "final."[45] In these areas, the Supreme Court has interpreted the finality requirement to allow for appellate review of certain orders that do not end the course of litigation.[46] For instance, under the collateral order doctrine, courts of appeals can hear appeals of orders that finally determine claims of rights that are separable from, and collateral to, rights asserted in the action, "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[47] This principle allows state entities and governments to appeal a denial of sovereign immunity;[48] government officers to seek review of certain orders denying assertions of absolute or qualified immunity;[49] and a criminal defendant to appeal an order declining to dismiss an indictment on double jeopardy grounds.[50] The Court has also recognized

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41 Catlin v. United States, 324 U.S. 229, 233 (1945); *see also* Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586 (2020) ("A 'final decision" within the meaning of § 1291 is normally limited to an order that resolves the entire case.").

42 Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988).

43 Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)); *see also* Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1691-92 (2015) ("This rule reflects the conclusion that '[p]ermitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation.'" (quoting Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 106 (2009)) (internal quotation marks omitted)).

44 *See Cohen*, 337 U.S. at 546 ("The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete.").

45 MOORE, *supra* note 38, § 202.02.

46 *Id*.

47 *Cohen*, 337 U.S. at 546; *accord* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (requiring that an appealable collateral order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment").

48 P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993).

49 Mitchell v. Forsyth, 472 U.S. 511, 525-27 (1985); Nixon v. Fitzgerald, 457 U.S. 731, 742-43 (1982).

50 Abney v. United States, 431 U.S. 651, 659 (1977).

another extension of the final judgment rule in *Forgay v. Conrad*, authorizing appeals of some rulings as final orders if failing to allow for appellate review would result in "irreparable injury" to the appellant.[51]

Congress, meanwhile, has recognized several exceptions to the final judgment rule, allowing for interlocutory appeals of orders that, while insufficiently final to satisfy § 1291, nonetheless merit receiving appellate review when they are issued rather than at the end of the case. Most prominently, it has granted the courts of appeals jurisdiction over several categories of interlocutory orders in provisions now codified at 28 U.S.C. § 1292.[52] This section establishes appellate jurisdiction over certain interlocutory orders[53] and identifies nonfinal orders reviewable by the Federal Circuit.[54] The provision reflects a congressional purpose to "allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties."[55]

Congress has also authorized other forms of interlocutory appeals in narrower substantive contexts[56] and via the Federal Rules of Civil Procedure.[57] The Rules permit litigants to seek interlocutory appeals of denials or grants of class certification[58] and of petitions for extraordinary writs.[59] Rule 54(b), meanwhile, is a special case. When the district court issues an order as to some, but not all, claims or parties in a case, Rule 54(b) empowers the court to certify the order as a final judgment, allowing a party to appeal the judgment as to the portion of the case that the district court has certified.[60]

Determining what is and is not a judgment over which the courts of appeals have appellate jurisdiction is not an easy task, as the intricacies of these

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51 47 U.S. (6 How.) 201, 204 (1848). As the Seventh Circuit has rightly pointed out, the Supreme Court has not cited the *Forgay* doctrine in some time, and its continued legitimacy as a source of appellate jurisdiction is unclear. *See* HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 779-81 (7th Cir. 2015).

52 Congressional establishment of the right to appeal interlocutory orders goes at least as far back as 1891. *See* Circuit Court of Appeals (Evarts) Act, Pub. L. No. 51-517, § 7, 26 Stat. 826, 828 (1891) (current version at 28 U.S.C. § 1292(a)(1) (2018)); *see also* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1653 (2011) (discussing the early history of federal statutes beginning in 1891 that established appellate jurisdiction over interlocutory orders).

53 28 U.S.C. § 1292(a) (2018) (allowing litigants to appeal interlocutory orders that impact preliminary injunctions, concern receiverships, or arise in admiralty cases); *id.* § 1292(b) (permitting discretionary appeals when the district judge certifies that his order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation).

54 *Id.* § 1292(c).

55 Cohen v. Benefit Indus. Loan Corp., 337 U.S. 541, 545 (1949).

56 These include certain appeals involving arbitration, three-judge district court panels, criminal cases, and remands to state court. For more detail, see *infra* note 250.

57 For a more thorough treatment of the rulemaking process and its utility in resolving the issue presented in this Comment, see *infra* subsection IV.A.2.

58 FED. R. CIV. P. 23(f).

59 FED. R. APP. P. 21.

60 FED. R. CIV. P. 54(b).

doctrines make clear. The final judgment rule initially arose from a historical understanding of a cause of action as a single judicial unit that could not exist at the same time in both a district court and an appellate court.[61] Beyond this structural theory, the requirement of a final judgment is designed to avoid shuttling cases back and forth between district and appellate courts, driven by a respect for the role of district courts and a desire to promote efficient adjudication of cases by preventing the "harassment and cost" of multiple appeals in one case.[62] Drawing the line between appealable and nonappealable orders requires balancing competing considerations:

> On the one hand, we strive to provide adequate opportunities for appellate review from orders . . . if they have a "serious, perhaps irreparable, consequence" that demands immediate appellate review. On the other hand, "[d]isfavoring piecemeal appeals is a long-standing policy of the federal courts"; we want to withhold the right of appeal "when the competing considerations of judicial economy," such as the burden on the appellate courts and the delay of proceedings in the trial courts, "outweigh the need for immediate review."[63]

It is these competing policy grounds that have led to the nuances inherent in both the courts' final judgment jurisprudence and in the variety of federal statutes and rules governing appealability.

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61 *See* Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586 (2020) ("Traditionally, every civil action in a federal court has been viewed as a 'single judicial unit,' from which only one appeal would lie." (quoting *In re* Saco Local Dev. Corp., 711 F.2d 441, 443 (1st Cir. 1983) (Breyer, J.)) (internal quotation marks omitted)); Frank, *supra* note 40, at 292; *cf.* THOMAS E. BAKER, FED. JUDICIAL CTR., A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 35 (2d ed. 2009), https://www.fjc.gov/sites/default/files/2012/PrimJur2.pdf [https://perma.cc/RHW4-FDWB] ("Functionally, the requirement structures the relationship between appellate court and trial court; within this relationship, each court performs its complementary role.").

62 *E.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Cobbledick v. United States, 309 U.S. 323, 325 (1940); *see also* MOORE, *supra* note 38, § 202.03 ("The deference rationale for the final judgment rule appears to have two bases. The first sees interlocutory appeals as an affront to the authority of the trial judge. The second sees interlocutory appeals as causing inefficiency not only at the appellate level, but at the trial level as well."); *cf.* BAKER, *supra* note 61, at 35 ("[T]he final-decision requirement is justified implicitly by an assumption that an even greater inefficiency, or waste of resources, would result if each and every ruling that might be reversed on appeal were immediately and separately appealable."); *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts*, 73 YALE L.J. 515, 515 (1964) ("The final judgment rule is, at its simplest, a rule of administration limiting . . . the number of appeals an appellate court will consider.").

63 Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711, 719 (2013) (alteration in original) (footnotes and citations omitted); *cf.* BAKER, *supra* note 61, at 36 ("Some rulings . . . may work an independent and irreparable harm during trial and may so profoundly affect the trial that the appeal–reversal–retrial routine may be 'too little too late.'").

II. TWO COMPETING PERSPECTIVES ON APPELLATE JURISDICTION OVER MORTGAGE FORECLOSURE APPEALS

In applying appealability doctrine to cases involving foreclosures, the federal courts of appeals have reached significantly different results. On one side is the Seventh Circuit's view of finality as arising only upon the completion of a foreclosure sale and expiration of any reinstatement or redemption rights. On the other are multiple courts of appeals that find a judgment of foreclosure ordering a sale and determining liability to be final for purposes of appeal.

A. *The Seventh Circuit's Novel View of Appealability*

In 2005, Kirkland Townsend took out a $136,000 promissory note to purchase a house and executed a mortgage that was eventually assigned to the bank HSBC.[64] When he ceased making mortgage payments in 2011, HSBC brought a diversity suit in federal court seeking to foreclose on Townsend's home.[65] The bank then moved for summary judgment, which the court granted, entering: (1) a judgment of foreclosure; (2) an order finding the amount that Townsend owed to the bank in principal, interest, attorney's fees, and costs; and (3) an order providing for judicial sale of the property if Townsend failed to redeem it within the statutory period under Illinois law.[66] The district court concluded that the judgment was final and appealable.[67] The court also noted that it would appoint a special commissioner to conduct the sale, after which it would hold a hearing to confirm the sale and enter a deficiency judgment against Townsend to cover any share of the debt left unsatisfied by the proceeds of the confirmed sale.[68]

The Seventh Circuit dismissed Townsend's appeal for lack of appellate jurisdiction.[69] In considering the judgment's finality, the court concluded that the district court's judgment of foreclosure and order of sale "le[ft] too much up in the air for [it] to regard the action as terminated, with nothing left but the mechanical details of collection or other enforcement measures."[70]

The Seventh Circuit focused on Illinois foreclosure law.[71] First, it held that the existence of reinstatement and redemption options meant that it was

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64 HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 773 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 897 (2016).

65 *Id.* at 773-74.

66 *Id.* at 774.

67 *Id.*

68 *Id.*

69 *Id.* at 773.

70 *Id.* at 775.

71 *See id.* ("Illinois law specifies the various steps that must be taken; it is the governing law in this diversity action, and so we must see how the district court's actions fit into the regime Illinois creates for foreclosures.").

possible "to undo the foreclosure, scuttling the need for the process of executing the judgment."[72] That is, the "entry of the foreclosure judgment marks the beginning of a period in which critical matters remain to be resolved: whether the mortgagor will exercise his statutory redemption and reinstatement rights."[73] Because the defendant could either alter the order or moot or revise the resolution of the case by exercising either of these rights, the court reasoned, the judgment of foreclosure was insufficiently final.

The court also emphasized the ambiguous outcome of the judicial sale and post-sale proceedings. It reasoned that, under its reading of Illinois law, the district court had discretion to determine whether "justice was otherwise not done" by the auction and whether there was proper notice of the sale, the sale was conducted fraudulently, or the sale's terms were unconscionable.[74] If any of these criteria were met, the court could choose to not confirm the sale. Finally, the Seventh Circuit pointed to the discretionary ability of the court to decide whether to order a deficiency judgment and what amount to order.[75]

Ultimately, the court concluded that it did not believe that the "remaining steps are so ministerial, inevitable, or unrelated to the merits of the case that they do not defeat finality" under § 1291.[76] The court also rejected other potential sources of appellate jurisdiction. It held that the district court's Rule 54(b) certification was insufficient because the judgment of foreclosure and the subsequent proceedings were not independent claims;[77] the appeal was not an interlocutory appeal of an order affecting an injunction under § 1292(a);[78] and, even assuming that the *Forgay* doctrine was still good law, there was no imminent threat of irreparable harm to satisfy that exception to the final judgment rule.[79] The court thus dismissed the appeal without reaching its merits.[80]

In a lengthy dissent, Judge Hamilton squarely rejected the majority's analysis.[81] From his perspective, the district court's judgment satisfied "long-established finality principles" because it "settle[d] the merits and the total amount of the debt"; "identifie[d] the property to be sold to satisfy the judgment"; and "order[ed] the priority of competing claims to the sale proceeds."[82] Overall, he argued, the judgment of foreclosure was merely a "specialized application" of the usual process of executing a judgment awarding

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72 *Id.*
73 *Id.* at 776.
74 *Id.*
75 *Id.*
76 *Id.* at 777.
77 *Id.* at 778.
78 *Id.* at 778-79.
79 *Id.* at 779-81.
80 *Id.* at 781.
81 *Id.* (Hamilton, J., dissenting).
82 *Id.*

money damages, and so it should be treated as equally final as a damages order, despite the complex logistics of executing the foreclosure.[83]

Judge Hamilton also emphasized that the majority's rule would have detrimental practical implications:

> [E]ven if we assume that the harshest effects of the majority's approach on borrowers will be mitigated by routine stays pending appeal, I suspect the economic result will be negative for both borrowers and lenders. Consider the bidding behavior of outside buyers at auctions that take place at two different stages: (a) after the merits of the foreclosure have been settled with a final judgment and the conclusion of any appeal; or (b) while the merits of the foreclosure are still subject to appeal. Basic economic principles suggest that, all other things being equal, a buyer should be willing to pay more at stage (a) than at (b). The buyer at stage (b) may need to keep the bid open for months or even years, sharply limiting other uses of the money in the meantime. The result should be lower bid prices in auctions, to the detriment of both lenders and borrowers. And where a foreclosure is set aside on the merits after a court-ordered sale, the expense and effort of the sale and its confirmation will all be for naught.[84]

Despite these objections, the Seventh Circuit has since continued analyzing cases using the approach set out in *Townsend*. In *Bank of America, N.A. v. Martinson*, the court—interestingly, in an opinion authored by Judge Hamilton—examined the appealability of a judgment of foreclosure in a case brought under Wisconsin law.[85] The district court there ruled for the plaintiff-mortgagee, set the amount of damages it was owed, entered a judgment of foreclosure, and ordered sale of the property at a sheriff's auction following the tolling of the redemption period.[86] Relying on Wisconsin statutes governing foreclosures, the Seventh Circuit held that the lower court's judgment was not final under § 1291 because it shared the "principal characteristics" of the one in *Townsend*: the defendants' post-judgment right of redemption, and a court-ordered sale requiring court approval prior to taking effect.[87] Although the court noted that Wisconsin's foreclosure laws, unlike Illinois's, did not satisfy the third *Townsend* factor, which considered whether the judgment of foreclosure provided for the determination of a deficiency judgment, it held that this factor did not play a significant role in the outcome of *Townsend* and accordingly gave its absence in the case at hand

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83 *Id.* at 784.

84 *Id.* at 783 (internal citations omitted).

85 828 F.3d 532, 533 (7th Cir. 2016).

86 *Id.* at 533-34.

87 *Id.* at 533-35.

little weight.[88] The court did not address *Townsend*'s discussion of reinstatement and redemption rights as one joint factor and did not consider in its analysis whether Wisconsin, like Illinois, allowed for reinstatement as well as redemption (which it does).[89]

Meanwhile, in *United States v. Williams*, which involved a foreclosure suit by the Internal Revenue Service (IRS) in order to execute a tax lien, the Seventh Circuit distinguished *Townsend* (while still adhering to its reasoning).[90] In *Williams*, the district court issued a judgment that specified the amount of the defendant's liability and ordered the property to be sold and the proceeds to be distributed among multiple debtors (in this case, different levels of governments to whom the defendant owed taxes).[91] Unlike the Illinois state law in *Townsend*, however, the federal statute under which the IRS brought suit did not provide for a deficiency judgment for the balance owed after the foreclosure sale, did not grant the taxpayer a right of redemption, and did not require court confirmation to effect the sale.[92] As a result, the Seventh Circuit held that the district court's judgment of foreclosure "end[ed] the litigation and [left] nothing but execution of the court's decision," satisfying the final judgment rule.[93]

As these cases make clear, the Seventh Circuit has continued to reaffirm the use of the *Townsend* factors as the appropriate analytical tool to determine when a judgment becomes final and appealable. Even as it has done so, however, the court has recognized the "important practical consequences" of its approach to appealability and the "great potential for irreparable harm" that may result from denying homeowners an appeal until late in the foreclosure process.[94]

B. *The View of Other Courts of Appeals*

The Seventh Circuit's approach to appellate jurisdiction in mortgage foreclosures is novel and notable in large part because of how markedly it diverges from the approaches taken by several other courts of appeals that have also addressed the question.

The Ninth Circuit has held that an order granting summary judgment for a lender and ordering a foreclosure sale of the debtor's property is a final judgment for purposes of appeal.[95] In *Citicorp*, the court dealt with a

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88 *Id.*

89 *See* WIS. STAT. § 846.05 (2019) ("An action for the foreclosure of a mortgage . . . shall be dismissed upon the defendant's bringing into court, before judgment, the principal and interest due, with the costs.").

90 796 F.3d 815, 816-17 (7th Cir. 2015). The IRS sued under 26 U.S.C. § 7403(c) (2018). *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 817.

94 Deutsche Bank Nat'l Tr. Co. v. Cornish, 759 F. App'x 503, 508 (7th Cir. 2019).

95 Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1101 (9th Cir. 1998).

foreclosure in California.[96] Under California law, mortgagors have redemption and reinstatement rights[97] and may be subject to a deficiency judgment if the sale of property fails to satisfy the amount owed to the lender.[98] The Ninth Circuit stressed that the judgment of foreclosure conclusively established the defendant's liability (including a quantified amount of damages) and identified the property to be sold.[99] Therefore, the court concluded that the foreclosure order "conclusively determine[d] the rights of the parties to the litigation" and was thus a final judgment—even though the district court retained jurisdiction for the purpose of assessing any necessary deficiency judgment that would be determined after the sale of the property.[100]

The Fifth Circuit reached a similar conclusion in *Citibank, N.A. v. Data Lease Financial Corp.*[101] In that case, the district court granted the plaintiff-lender's motion for a common law foreclosure sale of the appellant's collateral (in that case, shares of stock).[102] The defendant appealed after the sale had taken place and the court had confirmed it.[103] The Fifth Circuit held that the order confirming the sale constituted a final judgment.[104] The court went further: it reasoned that, based on precedents from the Supreme Court and the Seventh and Eighth Circuits, an order that "directs the immediate sale of specified property is in all respects" a final judgment that the defendant can independently appeal.[105] Since the foreclosure order and sale confirmation were each final and appealable, the Fifth Circuit concluded that the defendant's failure to appeal the order of foreclosure waived his right to contest the merits of the foreclosure.[106] Instead, on appeal from the confirmation order, the mortgagor could only challenge the sale and confirmation process.

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96 *Id.* at 1104-05 n.7.

97 *See* CAL. CIV. CODE §§ 2903–2905, 2924c(e) (2019) (defining redemption and reinstatement rights, respectively).

98 CAL. CIV. PROC. CODE § 726(b) (West 2020); *see also* 6 DUNAWAY, *supra* note 23, § 64:89 ("The amount of the deficiency judgment is for the amount the indebtedness, with interest and cost of levy and sale, exceeds the fair value of the property or interest sold as of the date of the sale."); Mark S. Pécheck & Kelsey M. Lestor, *The ABCs of California Foreclosure Law*, L.A. LAW., Jan. 2012, at 13, 13 (noting that a deficiency judgment is available to lenders who opt for judicial foreclosure).

99 *Citicorp*, 155 F.3d at 1101.

100 *Id.*

101 645 F.2d 333, 337 (5th Cir. Unit B May 1981).

102 *Id.* at 335.

103 *Id.* at 336.

104 *Id.* at 338 (citing cases that have "consistently recognized that review of an order directing a sale of property may be had . . . only upon an appeal taken from the order of sale").

105 *Id.* at 337. The Seventh Circuit precedent on which the *Citibank* court relied, *Central Trust Co. v. Peoria, D. & E. Railway Co.*, 118 F. 30 (7th Cir. 1902), was also cited for the same purpose by Judge Hamilton in his *Townsend* dissent. *See* HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 786 (7th Cir. 2015) (Hamilton, J., dissenting).

106 *Citibank*, 645 F.2d at 338-39.

The Eighth Circuit has also embraced the same rule, which it described as "so indispensable to the protection of the rights of litigants, and of the purchasers at judicial sales, and to a wise and just administration of the law, that it ought not to be questioned."[107] In *Chase*, which dealt with a common law foreclosure action, the court distinguished prior precedents in which the foreclosure judgments on appeal were not final by noting that those orders failed to both definitively determine the mortgagor's liability and order the sale of specific property, two features needed to make an order final.[108] The court emphasized that prohibiting appeals of judgments of foreclosure would cause significant harm: buyers would be reluctant to participate in a foreclosure sale if the merits decision regarding the defendant's liability under the mortgage was not yet final and subject to review and potential reversal.[109]

Other courts that have weighed in on the issue in less binding and definitive ways have favored the view of the Fifth, Eighth, and Ninth Circuits. The Third Circuit, in a footnote mainly focused on whether a notice of appeal was timely filed, found that an order of sale (accompanied by or following an entry of judgment against the homeowner) constituted a final, appealable order.[110] Adopting a similar approach, the Tenth Circuit held in foreclosure actions by the United States government to collect on unpaid federal taxes that a judgment in favor of the government, accompanied by an order of sale, was final.[111] The Eleventh Circuit ruled that an order of summary judgment for the mortgagee is not final until the court orders a

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107 Chase v. Driver, 92 F. 780, 784-85, 787 (8th Cir. 1899). Admittedly, the Eighth Circuit has not cited *Chase* in over eighty years; however, it does not appear to have overturned it or otherwise limited its holding, and the Fifth Circuit in *Citibank* cited *Chase* with approval. 645 F.2d at 338. The Eighth Circuit has heard and decided appeals of judgments of foreclosure more recently (albeit without raising the issue of appealability) in cases such as *United States v. Longo*, 464 F.2d 913, 914 (8th Cir. 1972), and *United States v. Heasley*, 283 F.2d 422, 424 (8th Cir. 1960).

108 *Chase*, 92 F. at 783-86.

109 *See id.* at 784-85 (noting that the effects of such a rule would be "would be impracticable and intolerable").

110 United States v. Bogart, 715 F. App'x 161, 165 n.3 (3d Cir. 2017) (citing, inter alia, *Citibank*, 645 F.2d at 337).

111 *See* United States v. Oyer, 461 F. App'x 760, 761-62 (10th Cir. 2012) ("The order of sale was a final order under 28 U.S.C. § 1291 because it resolved all issues remaining before the district court." (citing *Citibank*, 645 F.2d at 337)); United States v. Simons, 419 F. App'x 852, 856 (10th Cir. 2011) (relying on *Citibank* and Supreme Court precedents discussed *infra* notes 176–181 to conclude that a judgment finding the defendant liable and the government entitled to foreclosure was not final solely because it did not order the sale of the property). Admittedly, these cases do not contradict the view of the Seventh Circuit, which also views such orders as final. *See supra* notes 90–93. The Tenth Circuit's reasoning and the precedents on which it relies, however, fall squarely in line with the Fifth Circuit's analysis. *Cf.* MTGLQ Inv'rs, LP v. Wellington, No. 19-2162, 2019 WL 8331671, at *1 (10th Cir. Nov. 25, 2019) (finding that in a private foreclosure action, the district court's judgment was not final solely because it did not actually order a foreclosure sale), *reh'g denied* (Dec. 20, 2019).

foreclosure sale.[112] In dicta, the D.C. Circuit noted that "a decree for a sale under a mortgage is final."[113] Finally, although the Second Circuit itself has not addressed the issue, the District of Connecticut took the same approach as these courts in a post-*Townsend* decision.[114]

In forging its own finality analysis, the Seventh Circuit in *Townsend* did not grapple with the inconsistency between its rationale and that of these other circuits. Judge Hamilton's dissent, on the other hand, repeatedly pointed to the Fifth and Ninth Circuits' view in criticizing the majority's contrary reasoning.[115] The Fifth, Eighth, and Ninth Circuits have yet to respond to *Townsend*, and the Supreme Court has declined an invitation to wade into the dispute.[116]

A panel of the Sixth Circuit, however, squarely rejected the Seventh Circuit's appealability analysis.[117] In a case involving a corporation's default on some of its debts, the district court entered summary judgment noting the amount that the defendant owed and finding that the mortgagee was entitled to foreclose and sell the defendant's properties covered by the mortgages.[118] The Sixth Circuit took jurisdiction of the appeal, concluding that the judgment was final for the purpose of § 1291 because it "determined the rights and obligations of the parties and lienholders; fixed a certain amount to be paid to [the plaintiff] that would be supplemented with future interest accrued, advances made, and other contractual obligations; and identified the property to be sold in satisfaction of that debt."[119] In justifying this result, the

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112 Bank of N.Y. Mellon for Nationstar Home Equity Tr. 2007-A v. Pedersen, No. 16-16893, 2016 WL 10520765, at *1 (11th Cir. Dec. 22, 2016) (per curiam) (citing *Citibank*, 645 F.2d at 337).

113 Lynham v. Hufty, 44 App. D.C. 589, 594 (1915) (citing Ray v. Law, 7 U.S. (3 Cranch) 179, 180 (1805)). Admittedly, this opinion is over a century old, but the court does not appear to have repudiated its reasoning.

114 *See* Gallaher v. US Bank Nat'l Ass'n, No. 14-1877, 2016 U.S. Dist. LEXIS 36615, at *28 n.7 (D. Conn. Mar. 22, 2016) (concluding that a foreclosure judgment was final because it "necessarily resolved the issues of whether US Bank could properly foreclose on the property, that Plaintiffs did in fact owe the amounts stated in the affidavit of debt," and that by the conclusion of the redemption period, the bank had the right to possess the property).

115 *See* HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 786, 789, 791 (7th Cir. 2015) (Hamilton, J., dissenting) ("We have not been alone in . . . find[ing] that a foreclosure order is final so long as it conclusively establishes the extent of the defendant's liability for the defaulted loan and identifies the property to be sold. Both the Ninth and Fifth Circuits have read [precedents] to establish exactly this rule." (citing Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1101 (9th Cir. 1998); Citibank, N.A. v. Data Lease Fin. Corp., 645 F.2d 333, 337-38 (5th Cir. Unit B May 1981))).

116 The Supreme Court denied Townsend's petition for writ of certiorari without comment. Townsend v. HSBC Bank USA, N.A., 136 S. Ct. 897, 897 (2016). The Court did so even though Townsend explicitly highlighted the inconsistency between the Seventh Circuit's decision and those of the Fifth, Eighth, and Ninth Circuits in his cert petition. *See* Brief for Petitioner at 16-19, *Townsend*, 136 S. Ct. 897 (No. 15-505), 2015 WL 6153097, at *16-19.

117 MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corp., 660 F. App'x 459, 460 (6th Cir. 2016).

118 *See id.*

119 *Id.*

court explicitly cited *Citicorp* and *Citibank*—along with Judge Hamilton's dissent in *Townsend*.[120] And as if to further emphasize its disagreement with the Seventh Circuit's view, the court also cited—with a negative "but see" signal—the *Townsend* majority's opinion.[121]

If the circuit split were not sufficiently established after *Townsend*, the Sixth Circuit in *MSCI* laid bare the fundamental disagreement between the federal courts of appeals as to when a defendant can seek appellate review in the foreclosure process: the initial order finding a defendant liable for a set amount of damage and instructing their property to be sold, or the later judicial confirmation once the sale has taken place.

C. *Appealability in State Courts*

The federal courts are not the only ones to grapple with the problem of appealability in foreclosure cases. State courts are not bound by the federal final judgment requirement, which only governs federal district courts.[122] On the flip side, state law "does not control the resolution of issues governed by federal statute."[123] Nonetheless, a brief foray into the approaches that state courts have taken in analyzing when a homeowner can appeal a judgment of foreclosure can provide a reference point in examining the circuit split fleshed out in the two prior Sections. It is particularly worthwhile to do so given the emphasis placed in both *Townsend* and *Martinson* on state statutory schemes, as well as the fact that both opinions acknowledge the view of the relevant state courts on when a judgment becomes final for purposes of appeal.[124] Because many states have

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120 *Id.* (citing *Townsend*, 793 F.3d at 781-97 (Hamilton, J., dissenting); *Citicorp*, 155 F.3d at 1101; *Citibank*, 645 F.2d at 337-38).

121 *Id.* (citing *Townsend*, 793 F.3d at 773-81 (majority opinion)).

122 28 U.S.C. § 1291 (2018) (discussing jurisdiction over "appeals from all final decisions *of the district courts*" (emphasis added)). Under a separate provision, the Supreme Court also has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court[s]" of the states. *Id.* § 1257(a). Although this type of Supreme Court review requires a state court to render a final judgment, a judgment that would not be considered final under the Court's finality doctrine could nonetheless be appealed within a state's own court system, which is governed solely by that state's procedural rules. *Cf.* Marcus A. Rowden, *Constitutional Law—Appellate Jurisdiction over State Court Decisions—When Is a State Court Decision "Final*," 51 MICH. L. REV. 1070, 1071 (1953) ("The designation given a judgment by state practice is not controlling in determining whether [a judgment] is 'final' for purposes of federal review, but resort to local law may be had to determine what effect the judgment has under state rules of practice.").

123 Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-99 (1988) (noting that "Congress obviously did not mean to borrow or incorporate state law" into federal judicial applications of § 1291).

124 In *Townsend*, the state courts' view of finality supported the court's own, matching rule. 793 F.3d at 779. In *Martinson*, the court reached its conclusions while rejecting the state courts' position and justified doing so by stating that finality in federal courts was a uniquely federal law principle. Bank of Am., N.A. v. Martinson, 828 F.3d 532, 534-35 (7th Cir. 2016).

some form of a final judgment rule,[125] their views on the issue are analogous enough to merit exploration, even though they are not bound to interpret their own finality rules in the same way that the federal courts apply § 1291.

A significant number of states with a final judgment requirement have fallen in line with the view articulated by the majority of the federal courts of appeals. These include Florida, Indiana, Kansas, Nebraska, New Jersey, Ohio, Oklahoma, Vermont, Wisconsin, and Wyoming.[126] Courts in these states have determined that orders that determine the rights of the parties and the amount owed and that order a sale of the mortgaged property are final and can be appealed. Ohio

125 *See* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 552 (1932) ("The basic principle, then, in practically all jurisdictions in this country is that only final judgments are appealable."); *The Requirement of a Final Judgment or Decree*, *supra* note 62, at 519 (noting that "within the appellate structure of the state court systems[] . . . there is a general requirement of finality as a condition to review," subject to "an elaborate system" of exceptions). States have established this principle through statutes, court rules, and case law. *E.g.*, ALA. CODE § 12-22-2 (2019); ARIZ. REV. STAT. ANN. § 12-2101 (2019); CAL. CIV. PROC. CODE § 904.1 (West 2020); CONN. GEN. STAT. § 4-184 (2019); MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (West 2020); MASS. GEN. LAWS ch. 231, § 115 (2019); MISS. CODE ANN. § 11-51-3 (2019); N.Y. C.P.L.R. 5501 (McKinney 2019); OKLA. STAT. tit. 12, §§ 951, 953 (2019); 210 PA. CODE § 341 (2020); UTAH CODE ANN. § 78A-4-103(2)(a) (West 2020); *see also infra* note 126.

126 *See, e.g.*, Fla. Fertilizer Mfg. Co. v. Hodge, 60 So. 127, 127 (Fla. 1912) ("In judicial proceedings to foreclose a mortgage, the decree adjudging the equities and directing a sale of the property on default of payment is the final decree in the cause. Orders confirming sales made under a foreclosure decree are merely steps taken in the enforcement of the final decree."); Symon-Ryals Grp., Inc. v. Citizens & S. Mortg. Co., 334 So. 2d 144, 145 (Fla. Dist. Ct. App. 1976); Bahar v. Tadros, 123 N.E.2d 189, 190-91 (Ind. 1954); Stauth v. Brown, 734 P.2d 1063, 1067 (Kan. 1987); L.P.P. Mortg., Ltd. v. Hayse, 87 P.3d 976 (Kan. Ct. App. 2004) ("An entry of judgment of foreclosure is considered final for purposes of appeal when it determines the rights of the parties, the amounts to be paid, and the priority of the claims." (internal quotation marks and citation omitted)); Schuyler Bldg. & Loan Ass'n v. Fulmer, 84 N.W. 609, 610 (Neb. 1900) ("It is too clear to need the citation of authorities that a decree in foreclosure cases is a final judgment."); Echo Fin. v. Peachtree Props., L.L.C., 864 N.W.2d 695, 700 (Neb. Ct. App. 2015) (holding that a trial court opinion entering summary judgment for the lender, determining the priority of liens, and ordering the property to be sold is "a final order for purposes of appeal"); Wells Fargo Bank, NA v. Garner, 6 A.3d 481, 483 (N.J. Super. Ct. App. Div. 2010) ("In real estate foreclosure actions, 'the final judgment . . . fixes the amount due under the mortgage and directs the sale of the real estate to raise funds to satisfy the amount due.'" (citation omitted)); CitiMortgage, Inc. v. Roznowski, 11 N.E.3d 1140, 1145-46 (Ohio 2014) ("[A] judgment decree in foreclosure that includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance but does not include specific itemization of those amounts in the judgment is a final, appealable order."); Jones v. England, 782 P.2d 119, 121 (Okla. 1989) ("An order of foreclosure that determines the amount due is the final order for the purpose of an appeal."); TBF Fin., LLC v. Gregoire, 118 A.3d 511, 518 (Vt. 2015) ("[A] foreclosure decree is a final judgment even if a right to redeem exists, and even if further proceedings ancillary to the foreclosure itself are contemplated."); Anchor Sav. & Loan Ass'n v. Coyle, 435 N.W.2d 727, 729-30 (Wis. 1989) ("[T]he judgment of foreclosure and sale disposes of the entire matter in litigation and is a final judgment appealable as a matter of right . . . ." (citation omitted)); Grieve v. Huber, 283 P. 1105, 1108 (Wyo. 1930) ("It has been held a number of times that a decree directing the sale of mortgaged or other premises is a final decree from which an appeal may be taken.").

has gone slightly further: its courts have held that both the foreclosure order and the ultimate confirmation of sale are final, appealable judgments.[127]

On the other hand, Illinois's courts have taken an alternative approach, concluding (just like the Seventh Circuit did in *Townsend*) that "a foreclosure judgment (and order of sale) is not a final and appealable judgment because it does not dispose of all of the issues between the parties and does not terminate the litigation."[128]

Hawaii's resolution of the issue, meanwhile, falls into neither of these camps: its courts allow immediate appeals of foreclosure orders but assert jurisdiction over them under the collateral order doctrine,[129] rather than under the classical formulation of the final judgment rule.[130]

Therefore, state courts, just like the federal courts of appeals, have split on the issue of whether an order of foreclosure constitutes a final order for purposes of appeal. Nonetheless, the heavily prevailing rule appears to be the same one as in the federal appellate courts: a judgment finding liability, setting the amount owed, and ordering a foreclosure sale is final and appealable.

III. DIMENSIONS OF DISAGREEMENT: EVALUATING THE APPROACHES TO FINALITY FOR PURPOSES OF APPEAL IN FORECLOSURE CASES

The view of the majority of the courts of appeals better comports with the nature of the foreclosure process and more faithfully adheres to Supreme Court precedent than does that of the Seventh Circuit. Under the prevailing rule among the courts of appeals, a foreclosure order determining that the defendant is liable, setting the amount of damages, and ordering the sale of a specific piece

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127 *See* Farmers State Bank v. Sponaugle, 133 N.E.3d 470, 476 (Ohio 2019) (noting that for judgments of foreclosure and sale, "[i]f a dispute as to the final amounts due does arise, then parties may challenge those amounts by appealing the confirmation of sale"); *Roznowski*, 11 N.E.3d at 1145-46 (holding that a judgment decree in foreclosure is a final order).

128 CitiMortgage, Inc. v. Sharlow, 4 N.E.3d 580, 587 (Ill. App. Ct. 2014); *accord* EMC Mortg. Corp. v. Kemp, 982 N.E.2d 152, 154 (Ill. 2012) ("[A] judgment ordering the foreclosure of mortgage is not final and appealable until the trial court enters an order approving the sale and directing the distribution."). *But cf.* FDIC v. Barrick, No. 13-50221, 2014 U.S. Dist. LEXIS 150447, at *7 n.4 (N.D. Ill. Oct. 22, 2014) (acknowledging that Illinois state courts nonetheless allow an appeal of a foreclosure judgment when the trial court makes a finding under ILL. SUP. CT. R. 304(a) that there is no just reason to delay an appeal of the order).

129 *See supra* notes 47–50 and accompanying text.

130 *See* Beneficial Haw., Inc. v. Casey, 45 P.3d 359, 365 (Haw. 2002) (permitting an appeal of a foreclosure decree and its accompanying orders "even though there may be additional proceedings remaining in the circuit court" because it is considered a collateral order). Hawaii state courts, in addition to adopting the collateral order doctrine from federal precedents, follow a final judgment rule, HAW. REV. STAT. § 641-1(a) (2019), and appear to follow Supreme Court precedents on this issue such as *Whiting v. Bank of the United States*, 38 U.S. (13 Pet.) 6, 15 (1839), discussed *infra* note 135 and text accompanying notes 177–179. *See* Int'l Sav. & Loan Ass'n v. Woods, 731 P.2d 151, 154-55 (Haw. 1987) (relying on and applying the holdings in both *Whiting* and Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

of property is a final judgment that can be appealed. If the defendant has a reinstatement right under applicable law, the judgment becomes final either on the date that he disclaims his intent to reinstate the mortgage or at the end of the reinstatement period, but his appeal of the foreclosure order is still proper.

A. *Foreclosure as a Complicated Route to Damages*

The function of foreclosure is quite similar in important ways to the process of executing on a damages award.[131] The majority approach among the courts of appeals more faithfully incorporates this nature of foreclosure orders.

It is clear that in a suit for monetary relief, an order by the court finding the defendant liable and ordering him to pay the plaintiff a fixed amount of damages is generally a final judgment.[132] If the defendant is unable or unwilling to provide the money, the court can issue a writ of execution, which requires a government official (such as a sheriff) to take possession of the defendant's property and sell as much of it as needed to cover the amount owed to the plaintiff.[133] Despite the complexity that this process may entail, the Supreme Court in *Bell v. New Jersey* held that even if a judgment "is not self-executing and [the plaintiff] may have to undertake further proceedings

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131 *Cf.* HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 784 (7th Cir. 2015) (Hamilton, J., dissenting) (describing finality in foreclosure as a "specialized application" of the analysis involved in the "simpler case of a suit on an unsecured debt"); *In re* Sorenson, 77 F.2d 166, 167 (7th Cir. 1935) ("[M]atters incident to the execution of the decree—the sale, report of sale, deficiency decree, redemption . . . and the like—are to the decree of foreclosure what at law the execution, sale, redemption, and the like are to the final judgment to which they are incidental."); United States v. Birdsong, No. 17-0072, 2019 U.S. Dist. LEXIS 34082, at *3 (D. Mont. Mar. 4, 2019) (describing foreclosure as "merely a mechanism to enforce the money judgment"); Shuput v. Lauer, 325 N.W.2d 321, 326 (Wis. 1982) (characterizing foreclosure sale and confirmation proceedings as "more logically . . . an execution of judgment"). In fleshing out this analogy, Judge Hamilton in his dissent makes the following argument:

> Suppose P sues D for breach of a promissory note. P wins a judgment ordering D to pay X dollars to P. That judgment is final and appealable. It is final and appealable even though D may choose simply to pay the judgment, and even though, if D does not pay, P may need the court's help to identify D's property and then to seize and sell it to satisfy the judgment. The judgment is final even if we do not yet know exactly how the judgment will be executed . . . . With a secured loan, the fact that the property available for execution has already been identified does not prevent the underlying judgment on the merits ("D shall pay P the sum of X Dollars") from being final and appealable.

Townsend, 793 F.3d at 784.

132 *See, e.g.*, United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 233 (1958) (noting that "it is obvious that a final judgment for money must, at least, determine, or specify the means for determining, the amount").

133 *See* FED. R. CIV. P. 69(a)(1) ("A money judgment is enforced by a writ of execution, unless the court directs otherwise."); *see also* DUNAWAY, *supra* note 23, § 21:10 (describing how, in an execution sale, "(1) the plaintiff obtains a general judgment against the defendant; (2) if the defendant does not pay the judgment, the plaintiff may request a writ of execution from the clerk of the court, and (3) a public official sells enough of the defendant's property to satisfy the judgment").

to collect the damages awarded, that possibility does not prevent appellate review of the decision, which is final."[134]

Foreclosure can be viewed as a simplified version of the execution process.[135] Although an order of foreclosure may seem to be an injunctive remedy because it results in actions being taken rather than money being paid, it is at its heart monetary in nature.[136] In fact, an order directing a foreclosure sale under a mortgage does not count as an injunction for the purposes of interlocutory appeal under 28 U.S.C. § 1292(a)(1).[137] In these lawsuits, the lending institution is not interested in the sale of the property per se; it simply seeks to do so because it wants to obtain the monetary proceeds of that sale (and of any deficiency judgment) to satisfy the debt that it is owed. The amount of damages it seeks to recover is set ahead of time by the loan agreement, and the foreclosure process is merely an efficient way for it to obtain that money.[138] As a result, as in a suit for damages, a judgment finding the defendant liable and ordering him to pay a set amount to the plaintiff (here, through the vehicle of a foreclosure sale to obtain that amount) is final under § 1291.

There may actually be less left to be determined following an order of foreclosure than there is after a standard judgment that necessitates execution proceedings.[139] In a foreclosure sale, the parties have already stipulated in advance what property would be sold to satisfy the debt should the homeowner default on the loan through the terms of their contract. As a result, the court does not have to consider whether a sale of property is necessary to obtain the money owed, nor does the sheriff have to make any decisions about what land or property to sell. Otherwise, the process is the same.

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134 461 U.S. 773, 779 (1983); *cf.* WRIGHT & MILLER, *supra* note 38, § 3909 (pointing to many Supreme Court cases that find the finality requirement satisfied as long as all that remains to do after the order is to "execute the judgment or perform other ministerial tasks").

135 The Supreme Court has endorsed this view in passing. *See* N.C. R.R. Co. v. Swasey, 90 U.S. (23 Wall.) 405, 409 (1874) ("The sale in [a foreclosure] case is the execution of the decree."); Whiting v. Bank of the U.S., 38 U.S. (13 Pet.) 6, 15 (1839) (noting that "ulterior proceedings" following a judgment of foreclosure "are but a mode of executing the original decree, like the award of an execution at law").

136 Deutsche Bank Nat'l Tr. Co. v. Cornish, 759 F. App'x 503, 507 (7th Cir. 2019) ("At the core of a foreclosure judgment is a judgment simply ordering the borrower to repay a money debt."); *cf. id.* at 508 (concluding that only the final order confirming the sale and directing turnover of the property to the buyer "introduce[s] the injunctive elements into the judgment").

137 16 WRIGHT & MILLER, *supra* note 38, § 3922 (citing HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771 (7th Cir. 2015)).

138 In all of the key foreclosure finality cases discussed in this Comment, the district courts' foreclosure orders set out the amount of money that the defendants owe. *Cf. id.* § 3915.2 (noting that a failure by the court to determine the amount of damages owed can prevent an order from being final).

139 *See id.* § 3915.4 ("The steps required for execution [of a foreclosure judgment] may be more nearly routine than the steps involved in successfully executing a simple money judgment."); *cf. Cornish*, 759 F. App'x at 507 (noting that for mortgage foreclosures, "the execution to put money in the lender's pocket should actually be simpler than with a general money judgment. The difference is that the lender already has its security interest in the mortgaged property").

The normal execution process may actually be baked into a statutory foreclosure scheme. A deficiency judgment, when awarded after the foreclosure sale, reflects a recognition that the sale did not yield enough money to satisfy the judgment and seeks to recover the remainder from the defendant personally. As a result, much like other money judgments, if the defendant fails to pay the deficiency judgment, a court may order an execution sale of other property owned by the defendant to secure the amount that the lender is owed.[140] The execution of the deficiency judgment is thus just a second step in securing the damages award at the heart of a foreclosure case: if selling off the mortgaged property fails to raise the full amount that the defendant owes, the court may then order a sale of other property to make up for the difference (if necessary, through a standard execution sale).

Despite these similarities, the *Townsend* majority based its conclusion in part on a concern that after an order of foreclosure, the homeowner could reinstate or redeem the mortgage, rendering the order meaningless.[141] The potential exercise of these rights, however, does not defeat the finality of the judgment. The Federal Rules of Civil Procedure provide a useful analogue (in particular, to redemption): Rule 60 allows a court to relieve a party from a final judgment that has been "satisfied, released, or discharged."[142] This condition may be met in certain cases where a party has paid the amount of damages it owes.[143] The express language of this Rule explicitly contemplates a court reaching a final judgment and later setting it aside. In addition, Rule 68(c) allows a party to make an "offer of judgment" even after the court has determined liability.[144]

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140 *See Townsend*, 793 F.3d at 781 (Hamilton, J., dissenting) (comparing the process of resolving any need for a deficiency judgment as analogous to disputes in other execution proceedings and noting that "[t]he routine arithmetic needed to calculate the amount of a deficiency judgment or post-judgment interest also does not undermine finality when those calculations follow mechanically from a judgment that determines the total amount owed and the priorities of creditors"); *cf.* DUNAWAY, *supra* note 23, § 16:46 (noting that when a court orders a deficiency judgment, the lender "is entitled to obtain a writ of execution and cause the borrower's property to be sold at an execution sale").

141 *Townsend*, 793 F.3d at 775 (noting that these rights have "the potential to undo the foreclosure, scuttling the need for the process of executing the judgment"). *But see id.* at 787 (Hamilton, J., dissenting) (arguing that these open issues affect the execution, not the merits, of the district court's judgment).

142 FED. R. CIV. P. 60(b)(5).

143 *See, e.g.*, Payne v. Tri-State Careflight, LLC, No. 14-1044, 2019 U.S. Dist. LEXIS 43374, at *95 (D.N.M. Mar. 16, 2019) ("Courts grant rule 60(b)(5) motions to relieve an owing party of its obligations under the judgment when the party has contributed to or fully satisfied the judgment."); John W. Johnson, Inc. v. J. A. Jones Constr. Co., 369 F. Supp. 484, 498 (E.D. Va. 1973) (granting a Rule 60(b)(5) motion because the third-party defendant had paid the amount in damages it owed to the third-party plaintiff); *see also* 11 WRIGHT & MILLER, *supra* note 38, § 2863 (compiling cases).

144 FED. R. CIV. P. 68(c). In a different context, the Supreme Court has suggested, but has not definitively held, that a defendant may be able to moot ongoing litigation by depositing the full amount of the plaintiff's individual claim in an account payable to the plaintiff. *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016); *see also id.* at 680, 683 (Roberts, J., dissenting). If this were permissible, it would occur prior to any final judgment, but it nonetheless suggests that a plaintiff's claim can be fully satisfied in ways beyond the sought-after process.

This principle is at odds with the Seventh Circuit's rationale. The court in *Townsend* found that the order of foreclosure was not final *precisely because* it could later be set aside if the homeowner exercised his right of reinstatement or redemption.[145] Given the ultimate monetary nature of the remedy sought in a foreclosure case, however, reinstatement and redemption can be seen as an alternative method of providing the plaintiff with that remedy. Once the court conclusively holds the defendant liable and determines how much he owes, redemption of the mortgage merely serves as another way to satisfy that judgment. While the lender is entitled to utilize the foreclosure method to obtain the amount it is owed, the defendant can provide that amount in cash to redeem the loan and equally meet its obligation under the judgment.

Reinstatement may be a little less easy to square within this framework. Admittedly, reinstatement deprives the lender of his right under the loan agreement to collect the full amount of the debt up front upon default. The real "harm" that the lender-plaintiff in a foreclosure case has suffered, however, is the homeowner-defendant's failure to make the required payment; curing that default still undoes the harm to some extent by returning both parties to the circumstances that existed prior to the default.[146] But even if reinstatement cannot be placed within the analogy between the foreclosure process and the execution of a money judgment, a foreclosure order allowing for reinstatement of the mortgage can still be reconciled with existing finality doctrine.

A number of cases have allowed for the appeal of a decision contingent on some future event by relating the notice of appeal forward to the time when the condition is either fulfilled or not met.[147] That is, when a district court issues a decision conditioned on the occurrence or nonoccurrence of some future event, an appeal filed from that decision is proper. To make this possible, the court of appeals simply treats the notice of appeal as if it was filed on the date when the appellant either failed to fulfill the condition or disclaimed his intent to fulfill it—which is the time when the district court's order became final.[148]

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145 *Townsend*, 793 F.3d at 775.

146 *See id.* at 781 (Hamilton, J., dissenting) ("[W]e see that the statutory provisions for redemption and reinstatement are merely specialized instances of the right any defendant has to satisfy a judgment voluntarily before it is executed."); *id.* at 788 ("Having more than one choice for how to satisfy a judgment is commonplace. It does not undermine the finality of that judgment.").

147 *See* 16A WRIGHT & MILLER, *supra* note 38, § 3950.5 & nn.23-27 ("[N]otice of appeal filed after the contingent decision but before the expiration of the contingency period should relate forward to the time when the plaintiff has failed (or, in some instances, has disclaimed intent) to fulfil [sic] the relevant condition.").

148 *Id.*; *see also, e.g.*, Anicich v. Home Depot U.S.A., Inc., 852 F.3d 643, 648 n.3 (7th Cir. 2017) (holding that a plaintiff properly appealed a dismissal with leave to amend the complaint because the notice of appeal related forward to the subsequent order dismissing with prejudice after the plaintiff failed to seek leave to amend within the allotted time period); Slayton v. Am. Express Co.,

Extending that logic to the foreclosure context, a foreclosure order in a case where the defendant has a right of reinstatement ripens into a final judgment when the right of reinstatement expires or the defendant disclaims his intent to exercise the right. Appealing the foreclosure order would still be proper, as the notice of appeal would relate forward to the date when the defendant fails to fulfill the condition on which the order depends (the exercise of the reinstatement right). And if the defendant is able to reinstate the mortgage, of course, he then retains possession of his home and the mortgage remains operational. Thus, even if reinstatement cannot be squared with the analogy to the execution of a standard money judgment, it is still possible to reconcile it with standard final judgment principles. The judgment of foreclosure remains appealable under this view even if the defendant has a right of reinstatement. It ripens into a final judgment at the time when either the defendant's window for reinstatement expires or the defendant disclaims his right to reinstate, rather than doing so instantaneously. Nonetheless, the defendant's ability to seek appellate review of the foreclosure order remains unaffected. If courts adopt this approach, one way to facilitate the logistics of the process is to have the court clerk hold the appeal in abeyance[149] and suspend its progress until either the end of the reinstatement period or the defendant's disclaimer of intent to reinstate.

But other than reinstatement, all of the other potential events that may follow a foreclosure order—the execution of the foreclosure sale, the court's confirmation of the sale, the issuance of a deficiency judgment, and the defendant's ability to redeem the mortgage—can be understood as together comprising an elaborate means of executing the final judgment. Thus, a judgment of foreclosure is ultimately a more nuanced version of a standard final judgment of liability in a case seeking damages. It sets out precisely how those damages will be collected and allows for several alternative ways of satisfying the liability and remedying the monetary harm that the lender has endured.[150] The Seventh Circuit, in failing to recognize the analogy, instead overemphasizes the complexity of the process of execution that awaits parties after the foreclosure judgment, an issue to which I turn in the next Section.

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460 F.3d 215, 222-25 (2d Cir. 2006) (finding that a judgment dismissing a case with leave to amend became final when the plaintiffs disclaimed their intent to amend their complaint and concluding that filing the notice of appeal after the initial judgment was proper).

149 The federal courts of appeals have the power to hold an appeal in abeyance, a tactic that suspends the litigation for a certain period of time. *See* United States v. Outen, 286 F.3d 622, 631 & n.6 (2d Cir. 2002) (arguing that courts have the authority to do so as part of their power under Federal Rule of Appellate Procedure 26(b) to extend the time for an appeal); *Abeyance*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term as a "[t]emporary inactivity" or "suspension"); *cf.* 16AA WRIGHT & MILLER, *supra* note 38, § 3968.1 (referencing the power of a court of appeals to hold an appeal in abeyance until the appellant files a certificate of appealability).

150 *Cf. Townsend*, 793 F.3d at 781 (Hamilton, J., dissenting) (referring to the foreclosure process as involving a "specialized application" of usual principles).

B. *Bright-Line Rules and the Nuances of State Law*

A significant portion of the Seventh Circuit's *Townsend* analysis is grounded in principles of Illinois state law governing foreclosure and in particular the statutory provisions allowing for deficiency judgments and redemption and reinstatement rights.[151] In fact, HSBC Bank, in its brief in opposition to Townsend's petition for Supreme Court review, argued that no circuit split exists on the issue.[152] In doing so, it distinguished cases such as *Citibank* and *Citicorp* by contending that they dealt with foreclosure schemes different from Illinois's or only discussed finality in dicta.[153] However, the Seventh Circuit's reliance on the intricacies of state law, without fully accounting for how federal finality doctrine applies to them,[154] is misplaced and ultimately results in a rule that is inconsistent with the need for bright-line tests in determining appealability.

The final judgment rule is a distinctly federal concept, designed only to govern cases in the federal judicial system.[155] The Seventh Circuit acknowledged this in both *Townsend* and *Martinson* when it indicated that it intended to establish a federal standard of finality.[156] The particular federal concerns inherent in the final judgment requirement of § 1291 weigh against placing too much weight on state law in deciding questions of finality, as state law "does not control the resolution of issues governed by federal statute."[157]

Admittedly, there is a somewhat compelling argument to be made for the role of state law here. Foreclosure involves the ownership and sale of real property, an area of law that traditionally has been left up to local and state governance.[158] In addition, the Federal Rules of Civil Procedure explicitly require that the execution of a judgment comport with applicable state

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151 *See id.* at 775-78 (majority opinion) ("Illinois law specifies the various steps that must be taken; it is the governing law in this diversity action, and so we must see how the district court's actions fit into the regime Illinois creates for foreclosures.").

152 *See* Brief in Opposition to Petition for a Writ of Certiorari at 11-14, Townsend v. HSBC Bank USA, N.A., 136 S. Ct. 897 (2016) (No. 15-505), 2015 WL 9252237, at *11-14 ("[T]he Petitioner, HSBC, and the Seventh Circuit have all failed to cite or find a single court that has issued a conflicting decision involving a statutory judicial foreclosure scheme similar to the IMFL.").

153 *Id.*

154 For a discussion of how *Townsend* fails to comport with Supreme Court and Seventh Circuit precedents, see *infra* Section III.C.

155 *See* 28 U.S.C. § 1291 (2018) (governing only "final decisions of the district courts of the United States"); *see also* Bank of Am., N.A. v. Martinson, 828 F.3d 532, 534 (7th Cir. 2016) (noting that finality is "a procedural issue governed by federal law").

156 *Martinson*, 828 F.3d at 534-35; *Townsend*, 793 F.3d at 777 (noting that "the state's view of finality for state-law purposes does not dictate the result for federal appellate jurisdiction").

157 Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-99 (1988) ("In using the phrase 'final decisions' Congress obviously did not mean to borrow or incorporate state law.").

158 *See* Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1945) ("Concepts of real property are deeply rooted in state traditions, customs, habits, and laws."); 19 WRIGHT & MILLER, *supra* note 38, § 4520 (noting that in cases involving property interests, state law often has a role to play in formulating the rule of decision even when there are significant federal interests).

procedures—one of the few areas where the Rules mention state law.[159] As a result, one might contend that accounting for state foreclosure law fairly reflects the states' roles in this space. In fact, there is a strong argument for determining the final judgment rule's application to foreclosures in a way that accounts for state statutory reinstatement provisions, as previously discussed.[160]

The Seventh Circuit in *Townsend* (and the cases that followed it), however, relied too heavily on the precise details of state law in developing what it deemed to be a federal standard, without fully wrestling with how to treat those state-law features under federal finality doctrine. The *Townsend* opinion, in its § 1291 analysis, focused almost exclusively on Illinois foreclosure law, relying heavily on narrow provisions in the statutory framework, and devoted relatively little space to discussing federal precedents governing final judgments.[161] The court's decision in *Martinson* took a similar tack.[162] In fact, the *Townsend* court's ultimate rule for determining finality in a foreclosure case hinged entirely on evaluating the relevant state law provisions and the processes they set out governing the defendant's rights and the foreclosure sale and confirmation process.[163] In fashioning such a rule, the court did not extensively strive to justify why, under federal finality doctrine, those provisions prevented the foreclosure order from being final. The *Townsend* line of cases thus emphasized certain features of state law but did not fully analyze whether those components rendered the foreclosure order nonfinal under the federal standard.

In placing such significant weight on the particularities of state law, the *Townsend* approach also presents cause for concern in light of the preference in federal appealability jurisprudence for straightforward, easily applicable rules. The Supreme Court has stated that "[t]he time of appealability, having jurisdictional consequences, should above all be clear."[164] In its view, both courts and litigants are best served by bright-line rules.[165] The Seventh Circuit itself has rightly and repeatedly acknowledged that the final judgment rule

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159 FED. R. CIV. P. 69(a)(1).

160 *See supra* notes 147–149 and accompanying text.

161 *Townsend*, 793 F.3d at 775-78.

162 Bank of Am., N.A. v. Martinson, 828 F.3d 532, 534-35 (7th Cir. 2016).

163 *Townsend*, 793 F.3d at 775-77; *see also Martinson*, 828 F.3d at 533 (summarizing *Townsend*'s holding as relying on three factors: the presence of statutory rights to redemption and reinstatement; the need for judicial confirmation of the foreclosure sale; and the determination of a deficiency judgment, all of which were based on Illinois statutory law).

164 Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202 (1988).

165 *Id.*; *cf.* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 201-02 (2001) (arguing, in response to *Budinich*, that even the exceptions to the final judgment rule that the Court has recognized have been made "relatively clear and easy" for courts and parties to apply and understand).

falls within "an area of procedure and practice where there should be a premium on clarity."[166]

As Judge Hamilton's dissent makes clear, the *Townsend* approach fails to adhere to these principles.[167] The majority opinion set out a three-factor balancing test based on the particularities of Illinois's statutory scheme without clarifying the significance of each factor or addressing whether courts can consider other factors in assessing finality under other foreclosure schemes.

Even in the few cases that have followed it, implementing the test has proven unwieldy. For instance, in *Martinson*, the Seventh Circuit struggled to apply *Townsend*'s rule to Wisconsin foreclosure law when only two of the three factors were present and ultimately decided that the absence of one of those features, the statutory provision allowing for deficiency judgments, should not be dispositive.[168] The court also did not address the relevance of the right of reinstatement in Wisconsin's statutory scheme to its determination even though it found that right important in its analysis of Illinois's foreclosure system in *Townsend*. As a result, litigants in Indiana (the third state in the Seventh Circuit) or in any other jurisdiction that adopts the *Townsend* approach lack a clear framework around which they can structure their affairs.[169] They cannot predict ex ante when they will be able to appeal a judgment in the foreclosure process (and potentially obtain a stay pending that appeal), which can have significant ramifications for them.[170] For instance, California's foreclosure process, the statutory scheme at issue in *Citicorp*, meets two of the *Townsend* factors (redemption and reinstatement rights and the possibility of a

166 *Martinson*, 828 F.3d at 534; *see also, e.g.*, *In re* Kilgus, 811 F.2d 1112, 1117 (7th Cir. 1987) ("The more mechanical the application of a jurisdictional rule, the better. The chief and often the only virtue of a jurisdictional rule is clarity." (internal citations omitted)); Exch. Nat'l Bank of Chi. v. Daniels, 763 F.2d 286, 292 (7th Cir. 1985) ("The first characteristic of a good jurisdictional rule is predictability and uniform application.").

167 *See Townsend*, 793 F.3d at 782-83 (Hamilton, J., dissenting) ("The majority opinion does not tell us what to do in a case presenting only one or two of the three issues it thinks defeat finality.").

168 *Martinson*, 828 F.3d at 534 (noting that the "*Townsend* majority opinion was not specific about how its holding might have been affected by a change in any of the factors it relied upon" and subsequently striving to determine "[w]hat seems to have concerned the *Townsend* court most"). *But cf.* United States v. Williams, 796 F.3d 815, 817 (7th Cir. 2015) (noting that the applicable federal statute does not provide for deficiency judgments, in finding that the IRS tax lien foreclosure scheme yields a final judgment upon the entry of a judgment of foreclosure).

169 *Cf.* Republic Nat. Gas Co. v. Oklahoma, 334 U.S. 62, 69 (1948) ("The considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but more particularly, those that pertain to the smooth functioning of our judicial system.").

170 For instance, if, as in *Williams*, the judgment of foreclosure is final under a certain scheme, waiting until the confirmation order to challenge that judgment may lead the appellant to inadvertently waive his right to contest the merits of the judgment. *See* Citibank, N.A. v. Data Lease Fin. Corp., 645 F.2d 333, 338 (5th Cir. Unit B May 1981) (listing cases that "have consistently recognized that review of an order directing a sale of property may be had only upon an appeal taken from the order of sale and not upon an appeal from the subsequent confirmation").

deficiency judgment[171]). These are not the same two factors that were present in *Martinson*, so it is far from obvious, absent further analysis by the Seventh Circuit, how the facts of *Citicorp* would fare under the *Townsend* analysis.

By contrast, the approach of the other courts of appeals provides a clear dividing line between final and nonfinal orders in line with the Supreme Court's guidance. As long as the foreclosure order indicates the amount of the defendant's liability and specifies the property to be sold (both of which can easily be identified from the face of the judgment), the defendant can appeal it.[172] Even a slightly more complex rule, in which such a judgment is final and appealable unless the defendant has a right of reinstatement that he can exercise after the foreclosure order (but ripens into a final judgment upon the lapse or waiver of the right[173]) still provides clarity to litigants. Parties can determine with relative ease whether they can appeal a court order or whether they must instead wait until later in the process to seek review of the judgment. The rule minimizes the risk that a litigant loses his chance of obtaining appellate review by erroneously waiting to file an appeal until the issuance of a later order.

This difference between the two approaches to finality is particularly significant given that state foreclosure law remains in flux. Some states are considering requiring the use of judicial foreclosure; others are exploring modifying the statutory frameworks that govern foreclosures.[174] Any significant shifts in a state's foreclosure statutes could create even greater uncertainty for homeowners facing default, as a *Townsend*-like standard would require courts to reevaluate finality anytime that the underlying foreclosure process changes. As a result, and especially given the significant implications that a foreclosure proceeding has on a defendant homeowner,[175] it is particularly crucial to establish a consistent, bright-line rule of finality in foreclosure cases to provide certainty to litigants, rather than relying on a principle of finality that is overly encumbered with the particularities of state law.

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171 *See supra* text accompanying notes 97–98.

172 MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corp., 660 F. App'x 459, 460 (6th Cir. 2016); Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097, 1101 (9th Cir. 1998); *Citibank*, 645 F.2d at 338.

173 *See supra* text accompanying notes 147–149.

174 *See, e.g.*, Colleen O'Dea, *Trenton Tackles NJ's Foreclosure Rate, Down but Still Highest in the Nation*, NJ SPOTLIGHT (Mar. 27, 2019), https://www.njspotlight.com/stories/19/03/26/trenton-tackles-njs-stubborn-foreclosure-rate-down-but-still-highest-in-nation/ [https://perma.cc/E2ZU-EZG7] (discussing a package of bills recently passed by the New Jersey legislature that would reform the state's foreclosure process in order to make it more efficient and homeowner-friendly); Bob Sanders, *NH House Votes to Require Court Involvement in Foreclosure Process*, N.H. BUS. REV. (Feb. 20, 2019), https://www.nhbr.com/nh-house-votes-to-require-court-involvement-in-foreclosure-process/ [https://perma.cc/UTZ2-ZQTV] (discussing a recently passed bill in the New Hampshire House of Representatives that would require mortgagees to seek judicial foreclosure in the state).

175 *See supra* notes 16–19 and accompanying text.

C. Townsend *in Light of Prior Precedent*

Finally, the other circuits more faithfully conform their views of appealability with the standards articulated by the Supreme Court (and by prior Seventh Circuit opinions) than does the *Townsend* decision. Beyond setting out general principles of what makes a judgment final or not final, the majority opinion in *Townsend* did not devote significant energy to squaring its conclusion with any prior rulings on the issue. By contrast, the Fifth, Sixth, and Ninth Circuits firmly grounded their reasoning in the Court's precedents.

From very early on in its history, the Supreme Court has held that "a decree for a sale under a mortgage, is such a final decree as may be appealed from."[176] Most prominently, in *Whiting v. Bank of the United States*, the Court dealt with the question of whether a decree of foreclosure and sale was final and appealable, or whether the judgment only became final when the court confirmed the sale.[177] The Court firmly held that it was the former order that was final.[178] The judgment of foreclosure decided the merits of the case, while the sale process and what came after it were merely "ulterior proceedings" to execute on the initial judgment—just like the "the award of an execution at law" of money damages.[179] The Court continued to apply this approach in other cases throughout the nineteenth century,[180] although it has not revisited the issue in some time. These prior opinions did not establish a rule that a foreclosure order is always final. Rather, they made clear that such a judgment satisfies the finality requirement as long as the amount of liability and the property to be foreclosed are set out in the opinion and the court orders that a sale take place.[181]

In fact, the Seventh Circuit's own precedents have taken the same position. In several twentieth-century decisions, the court addressed finality in foreclosure litigation. The court in *In re Sorenson* concluded that "a decree which definitely fixes and adjudicates, as between the parties to the litigation, all issues relating to their mutual rights and obligations" is final, and it determined that

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176 Ray v. Law, 7 U.S. (3 Cranch) 179, 180 (1805).

177 38 U.S. (13 Pet.) 6, 15 (1839).

178 *Id.*

179 *Id.*

180 *See, e.g.*, McGourkey v. Toledo & Ohio Cent. Ry. Co., 146 U.S. 536, 545 (1892); Grant v. Phx. Mut. Life Ins. Co., 106 U.S. 429, 431 (1882) ("It has also been many times decided that a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal."); Bronson v. La Crosse & M.R. Co., 67 U.S. 524, 531 (1862) (noting that "this Court has decided that a decree for the sale of mortgaged premises is a final decree from which an appeal lies").

181 *E.g.*, *McGourkey*, 146 U.S. at 545-46, 550; Burlington, Cedar Rapids & N. Ry. Co. v. Simmons, 123 U.S. 52, 54 (1887); N.C. R.R. Co. v. Swasey, 90 U.S. (23 Wall.) 405, 409-10 (1874); *cf.* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 742 (1976) (noting in another context that a lack of a specified damages amount can defeat finality).

the "usual decree of foreclosure" satisfies this test.[182] Even though the foreclosure scheme may have been different at the time, it bore many similarities to the present Illinois system. The *Sorenson* court acknowledged that a deficiency decree and redemption (two of the factors that defeated the finality of the foreclosure order in *Townsend*) may follow the judgment of foreclosure, but it held that they are merely incident to the execution of the order.[183]

The Seventh Circuit's decisions in *Townsend* and its progeny unfortunately do not seek to distinguish or even acknowledge these cases. On the other hand, Judge Hamilton's dissent in *Townsend* and the *Citibank*, *Citicorp*, and *MSCI* opinions all rely heavily on them.[184] As a result, the latter approach is more in line with longstanding finality doctrine, as well as with the true nature of foreclosure as a method of executing a judgment and the need for bright-line rules to govern appellate jurisdiction.

IV. TOWARD A UNIFORM VIEW OF FINALITY: RESOLVING THE DISCORD AMONG THE COURTS OF APPEALS

The inconsistency between the Seventh Circuit's approach to finality in foreclosure cases following *Townsend* and that of the other courts of appeals requires resolution, especially given the severe consequences that jurisdictional rules in this setting can have on litigants.[185] In this Part, I propose several avenues that can be used to remedy this situation. The first solution is through a traditional judicial resolution of the circuit split in the courts. The second involves the powers bestowed on the Supreme Court by the Rules Enabling Act to "prescribe general rules of practice and procedure" in the district and appellate courts.[186] The third entails congressional intervention. I address each of these in turn.

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182 *In re* Sorenson, 77 F.2d 166, 167 (7th Cir. 1935); *see also In re* Lowmon, 79 F.2d 887, 890 (7th Cir. 1935) (reaffirming that "a decree of foreclosure constitute[s a] final decree, and that it adjudicate[s], as between the parties to the litigation, all issues relating to their mutual rights and obligations"); Cent. Tr. Co. of N.Y. v. Peoria, D. & E. Ry. Co., 118 F. 30, 30 (7th Cir. 1902) (holding that the validity of a decree of foreclosure cannot be challenged on an appeal from the order confirming the sale and implying that a mortgagor must do so by appealing the foreclosure order).

183 *Sorenson*, 77 F.2d at 167.

184 HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771, 784-87 (7th Cir. 2015) (Hamilton, J., dissenting); *see also* MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corp., 660 F. App'x 459, 460 (6th Cir. 2016); Citicorp Real Estate v. Smith, 155 F.3d 1097, 1101 (9th Cir. 1998); Citibank, N.A. v. Data Lease Fin. Corp., 645 F.2d 333, 337-38 (5th Cir. Unit B May 1981).

185 *See supra* notes 16–19 and accompanying text.

186 28 U.S.C. § 2072(a) (2018).

A. *Judicial Branch*

Given that this case involves the question of what cases federal courts can hear, it seems only natural that the courts can resolve the circuit split.

1. Judicial Decisionmaking

The simplest route to handle the circuit split is through a court ruling. This can come about in two different ways. The Seventh Circuit could choose to reexamine *Townsend* of its own accord and bring its opinions in line with those of the other circuits.[187] The more likely, and much more logical, mechanism to resolve the issue is through the Supreme Court. A ruling by the Court would not only resolve the disagreement among the courts of appeals but also do so in a way that lays down a nationwide standard. One of the factors that the Court considers in deciding whether to grant a petition for a writ of certiorari, after all, is the presence of a circuit split.[188]

The Court has previously declined to declare which of the competing views on this issue is correct.[189] Since then, however, the Sixth Circuit explicitly rejected the *Townsend* approach, making the split even more apparent,[190] which may make the Court more likely now to intervene. Admittedly, the Sixth Circuit's decision made the split even more lopsided, with four circuits firmly on one side and only one on the other. So it is possible that the Seventh Circuit would be more inclined, in light of *MSCI*, to reconsider its view and overturn *Townsend* without any intervention from the Supreme Court. While this is certainly possible, the court may be unenthusiastic about walking back a standard that it laid out only four years ago and has since applied repeatedly, and any reconsideration on its part may take some time.

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187 Admittedly, this might be a bit tricky, since almost all courts of appeals adhere to the doctrine of stare decisis and have adopted rules preventing three-judge panels from overturning a precedential opinion by a prior panel. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 796-97 (2012). The Seventh Circuit, however, takes a more flexible approach, allowing panels to overrule each other as long as the overturning opinion is circulated among all of the judges of the circuit in advance of publication and a majority of them do not vote to rehear the case en banc. 7TH CIR. R. 40(e); Mead, *supra*, at 794 n.54 (describing the Seventh Circuit's approach to stare decisis); *see also, e.g.*, United States v. Reyes-Hernandez, 624 F.3d 405, 412-13 (7th Cir. 2010) (overturning a prior circuit precedent in a decision by a three-judge panel and explaining the court's power to do so).

188 *See* SUP. CT. R. 10(a) (noting that one of the considerations governing review on certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

189 The Court, without comment, denied Townsend's petition for writ of certiorari, which squarely presented the question this Comment addresses. Townsend v. HSBC Bank USA, N.A., 136 S. Ct. 897, 897 (2016).

190 *See* MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corp., 660 F. App'x 459, 460 (6th Cir. 2016) (concluding that a judgment of foreclosure was a final judgment over which the court of appeals had jurisdiction).

Absent a change of heart from the Seventh Circuit, resolution by the Supreme Court will obviously require litigants to present the Court with the issue. This means a case that raises the question of appellate jurisdiction on similar facts needs to present itself (or a court needs to address it of its own accord[191]). If the Court receives a cert petition on such a case and grants it, the Court should resolve the circuit split by adopting the judgment-of-foreclosure-as-final-judgment approach taken by the majority of the courts of appeals.[192]

The Court has shown an interest in addressing issues of finality. For instance, this Term alone, the Court has issued an opinion refining the meaning of a final judgment in the bankruptcy court context[193] and granted a petition for writ of certiorari in a case addressing what constitutes a final order of the Railroad Retirement Board.[194] If the Court took up the issue, it could declare, in line with its own precedents and those of the courts of appeals, that a district court order finding the defendant liable, declaring the amount of debt he owes to the plaintiff and other parties with interests in the property, ordering a foreclosure sale, and indicating how the proceeds of the sale should be paid out constitutes a final judgment over which an appellate court has jurisdiction under § 1291 (with any necessary adjustment for reinstatement rights[195]).

2. Resolution via Rulemaking

Although the Court could easily resolve the final judgment problem by fashioning new doctrine when presented with the issue, the Rules Enabling Act[196] provides a unique alternative solution in this case. That statute empowers the Court to craft a new rule of civil procedure to resolve the issue and declare when, in the foreclosure setting, a judgment becomes final for purposes of appeal. Given that the Act includes language that authorizes the use of the rulemaking process to resolve the question at the heart of this Comment, and in light of the Court's deference to that process, an interesting potential way to resolve the circuit split here is through the creation of a new rule.

The Rules Enabling Act, when it was passed, "represented the conclusion of a campaign, conducted for more than twenty years . . . for a uniform federal

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191 *E.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998) (noting that the courts of appeals have a "special obligation" to satisfy themselves of their own jurisdiction "even though the parties are prepared to concede it").

192 *See generally supra* Part II.

193 Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 583 (2020). The Court has also discussed finality of judgments in passing in other opinions from this Term. *E.g.*, Atl. Richfield Co. v. Christian, No. 17-1498, 2020 WL 1906542, at *6 (U.S. Apr. 20, 2020) (addressing what makes a state supreme court's order final for purposes of U.S. Supreme Court review).

194 Salinas v. U.S. R.R. Ret. Bd., 140 S. Ct. 813, 813 (2020) (granting cert petition); *see also* Petition for a Writ of Certiorari at 2-5, *Salinas*, 140 S. Ct. 813 (No. 19-199), 2019 WL 3930590, at *2-5.

195 *See supra* notes 147–149 and accompanying text.

196 28 U.S.C. § 2072 (2018).

procedure bill authorizing the Supreme Court to promulgate rules of procedure in civil actions at law."[197] The Act bestowed upon the Supreme Court "the power to prescribe, by general rules, . . . the practice and procedure in civil actions at law" in the federal district courts.[198] The statute bolstered the power of the rules that it authorized by preempting any laws that conflicted with them.[199] At the same time, however, it cabined the Court's rulemaking power by requiring that the rules neither "abridge, enlarge, nor modify the substantive rights of any litigant."[200]

Over time, Congress expanded this initial grant of authority to also allow for the promulgation of rules governing criminal cases and the appeals process.[201] In its current form, 28 U.S.C. § 2072(a) gives the Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."[202] This law, along with several supporting statutes,[203] has created a system in which advisory committees consisting of judges and legal scholars develop proposals for new or revised rules and submit them to the Standing Committee.[204] The Standing Committee passes any rules that it approves over to the Judicial Conference of the United States and ultimately to the Supreme Court.[205] The Court approves the rules, transmits them to Congress, and officially promulgates them, unless Congress enacts legislation rejecting or modifying the rules.[206]

In 1990, Congress expanded § 2072 as part of a larger overhaul of the federal judiciary.[207] The new § 2072(c) allows the Supreme Court to prescribe general rules of practice and procedure that "may define when a ruling of a

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197 Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1024 (1982); *see also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888 (1999) (describing the rules formulation process as "the cornerstone of civil rulemaking in the federal courts").

198 Rules Enabling Act, Pub. L. No. 73-415, § 1, 48 Stat. 1064, 1064 (1934).

199 *Id.* (codified as amended at 28 U.S.C. § 2072(b) (2018)).

200 *Id.*

201 16A WRIGHT & MILLER, *supra* note 38, § 3947.1 n.3; *see also id.* § 3950.8 & nn.38-44.

202 28 U.S.C. § 2072(a) (2018).

203 *See generally id.* §§ 2072–2077.

204 *See How the Rulemaking Process Works*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://perma.cc/6NFX-SXA9] (last visited Apr. 15, 2020).

205 *Id.* The Judicial Conference, the national policymaking body of the federal courts, is presided over by the Chief Justice of the Supreme Court and is comprised of the chief circuit judges, the chief judge of the Court of International Trade, and one district judge from each judicial circuit. *About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/EDU7-9QD3] (last visited Apr. 15, 2020).

206 *How the Rulemaking Process Works*, *supra* note 204.

207 Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 2072(c)).

district court is final for the purposes of appeal" under § 1291.[208] In a similar vein, Congress later added a provision to § 1292 allowing the Court to prescribe rules, in accordance with § 2072, "to provide for an appeal of an interlocutory decision to the courts of appeals" beyond those appeals authorized by the other subsections of § 1292.[209]

Following the creation of § 2072(c), the Supreme Court has expressed a preference to handle questions of finality for purposes of appeal through the rulemaking process. The Court has repeatedly acknowledged Congress's express grant of authority to the rulemaking system when it has decided cases involving appellate jurisdiction.[210] It has viewed Congress's creation of § 2072(c) as a conscious decision to designate the rulemaking process as the mechanism for defining what district court rulings can be appealed, one which "warrants the Judiciary's full respect."[211] As a result, the Court has demonstrated a marked hesitancy to resolve questions of appealability on its own and, in particular, to expand the power of litigants to appeal lower court rulings, holding that any "changes are to come from rulemaking . . . not judicial decisions in particular controversies or inventive litigation ploys."[212] This preference for the promulgation of rules as the main avenue for expanding appealability is heightened due to the Court's belief in the process's "important virtues," which

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208 *Id*. *But see* Carolina Power & Light Co. v. Dynegy Mktg. & Trade, 415 F.3d 354, 358 (4th Cir. 2005) (suggesting that this provision simply dispelled "any doubt that the Court had the authority" to promulgate such rules even before it was passed).

209 Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified at 28 U.S.C. § 1292(e) (2018)).

210 *See, e.g.*, Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 113-14 (2009) (speaking for a unanimous Court in referring to the use of rulemaking as the "preferred means" of determining whether district court orders are appealable and noting that "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides"); Johnson v. Jones, 515 U.S. 304, 310 (1995) (acknowledging Congress's authorization of rulemaking as a vehicle for evaluating the merits of allowing certain interlocutory appeals); *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 691-92 (2010) (Ginsburg, J., dissenting) (in determining whether a district court order was final, looking to whether Congress provided for its immediate review and acknowledging congressional establishment of exceptions to the final judgment rule such as § 2072(c)); *cf.* United States v. Wampler, 624 F.3d 1330, 1338 (10th Cir. 2010) (declining to define finality for purposes of appeal more broadly than defined under existing case law "[o]ut of deference to the rubric Congress has created" in § 2072(c)).

211 Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 48 (1995).

212 Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1714 (2017); *see also id*. at 1712 (rejecting a tactic by litigants designed to enable them to appeal earlier in the litigation process than they otherwise could because it "subverts the final-judgment rule and the process Congress has established for refining that rule"); *Swint*, 514 U.S. at 48 (in discussing the Court's ability to fashion which decisions and orders can be appealed, noting that "[t]he procedure Congress ordered for such changes, however, is not expansion by court decision, but by rulemaking under § 2072").

arise because rulemaking "draws on the collective experience of bench and bar" and "facilitates the adoption of measured, practical solutions."[213]

As recently as 2018, the Court in *Hall v. Hall* continued to defer to the power of the rulemaking process to revise or expand the categories of orders that can be appealed.[214] There, the Court, in interpreting a provision of the Federal Rules of Civil Procedure, relied on the proceedings of the Rules Advisory Committee and gave significant weight to the "laborious drafting process" and "many layers of careful review" that went into formulating the Rule.[215] It reiterated that changes to the meaning of the phrase "final decision" in § 1291 should come from rulemaking, not judicial decisions.[216] The Court resolved the interpretive question in the case, but it emphasized that if its conclusion gave rise to practical problems for district courts and litigants, "the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly."[217]

The rulemakers have already taken up Congress's invitation to craft rules defining the scope of appellate jurisdiction in the class-action context. Under Federal Rule of Civil Procedure 23(f), a court of appeals can choose to permit an appeal from an order granting or denying class-action certification.[218] In formulating this rule, the Advisory Committee expressly relied on the authority granted to the rulemakers by § 1291(e) to promulgate it.[219] The Supreme Court subsequently held in *Microsoft Corp. v. Baker* that the promulgation of Rule 23(f) had, in effect, decided the line-drawing issue of when a litigant could appeal in this context, and it therefore declined to expand appealability any further through judicial decisionmaking.[220] In doing so, the Court refused to substitute its own views on the propriety of appellate jurisdiction in this arena for those of the Advisory Committee, noting that

> [i]n this case, the rulemaking process has dealt with the matter, yielding a measured, practical solutio[n] to the questions whether and when adverse

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213 *Mohawk Indus.*, 558 U.S. at 114; *see also Swint*, 514 U.S. at 48 (emphasizing that the rulemaking process requires submission of rules to Congress before they take effect, as well as transparency and accountability to the public).

214 138 S. Ct. 1118, 1131 (2018).

215 *Id.* at 1122, 1129-31.

216 *Id.* at 1131.

217 *Id.*

218 FED. R. CIV. P. 23(f).

219 FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.

220 137 S. Ct. 1702, 1709-10, 1712-1714 (2017). The plaintiffs in *Baker* were denied permission by the Ninth Circuit under Rule 23(f) to appeal the district court's denial of class certification. *Id.* at 1706. As a result, they stipulated to a voluntary dismissal of their claims with prejudice, reserving the right to revive their claims if the appellate court reversed the denial of class certification. *Id.* at 1706-07. They subsequently appealed the district court's grant of the motion to dismiss, challenging only the court's interlocutory order striking their class allegations. *Id.* at 1711. While the Ninth Circuit reviewed the judgment below as a final order under § 1291, the Supreme Court reversed. *Id.* at 1711-12.

> certification orders may be immediately appealed. Over years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note. Rule 23(f) reflects the rulemakers' informed assessment . . . . That assessment warrants the Judiciary's full respect.[221]

The Court has thus strongly endorsed the appropriateness of the rulemaking process as a means of resolving difficult questions of appealability.[222] This "full respect,"[223] along with the will of Congress in twice endowing the Court with authority to more frequently utilize the rulemaking process as a problem-solving tool in this space, makes the prescription of a new procedural rule to resolve the question of finality in mortgage foreclosures an attractive remedy.

The Court and the rulemakers have not yet taken advantage of the power under § 2072(c) to develop a rule defining when a district court's order constitutes a final judgment.[224] Given the practical significance of the resolution of the question presented here and the growing disagreement among the courts of appeals, this issue provides an appealing opportunity to utilize the rulemaking authority that Congress laid out in the statute.

One difficulty in doing so may be that, with quite a few notable exceptions,[225] the Federal Rules of Civil Procedure tend to apply broadly to

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221 *Id.* at 1714 (alteration in original) (internal quotation marks and citations omitted).

222 Even before Congress's development of § 1292(e) and § 2072(c), the Court of its own accord had already used the rulemaking process to set out situations in which litigants could appeal district court orders by creating Federal Rule of Civil Procedure Rule 54(b). *See* FED. R. CIV. P. 54(b) (allowing a district court to direct entry of final judgment as to some, but not all, of the claims in cases involving multiple claims or parties); Pollis, *supra* note 63, at 719-22 (examining the origins of the Rule in the first iteration of the Federal Rules of Civil Procedure); *see also* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 357-58 (1961) (noting that the motivation behind Rule 54(b) was to prevent hardship for litigants whose rights were determined prior to the conclusion of the entire action); *cf.* Carolina Power & Light Co. v. Dynegy Mktg. & Trade, 415 F.3d 354, 358 (4th Cir. 2005) (arguing that § 2072(c) merely clarified a power that the Court already possessed).

223 *Baker*, 137 S. Ct. at 1714.

224 *See* McClendon v. City of Albuquerque, 630 F.3d 1288, 1296 (10th Cir. 2011) (emphasizing that "congressionally prescribed means" now exist under § 2072(c) that should be used to define which orders are "sufficiently or 'practically' final" for purposes of appeal). *But see* Blair v. Equifax Check Servs., 181 F.3d 832, 833 (7th Cir. 1999) (claiming that the Court has not yet used § 2072(c) "in part because it invites the question whether a particular rule truly 'defines' or instead expands appellate jurisdiction," as compared to § 1292(e), which "expressly authorizes expansions").

225 *See, e.g.*, FED. R. CIV. P. 5.2(c) (governing actions for Social Security benefits and certain immigration cases); FED. R. CIV. P. 9(b) (addressing claims alleging fraud or mistake); FED. R. CIV. P. 23.1 (governing shareholder derivative actions); FED. R. CIV. P. 23.2 (concerning actions brought by or against members of an unincorporated association); FED. R. APP. P. 44 (governing appeals of cases raising a question of the constitutionality of a statute); FED. R. CIV. P. A–G (Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions); U.S. COURTS, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (2019) (dictating procedures in cases involving petitions for writs of habeas corpus).

all cases, rather than affecting cases concerning particular subject matters. A rule that is particularly specific in its application, such as the one this Comment proposes, could raise concerns regarding the Rules Enabling Act's requirement that the rules promulgated through the rulemaking process be "general rules,"[226] a phrase that has been broadly understood to require transsubstantive rulemaking.[227] Furthermore, § 2072(b) prohibits rules that "abridge, enlarge or modify any substantive right."[228] In light of this, the Supreme Court has required that a rule must "really regulate[] procedure" to satisfy the Rules Enabling Act.[229]

It is noteworthy, however, that the Supreme Court has never invalidated a rule promulgated under the Rules Enabling Act in the eighty-five years since the Act's passage.[230] Instead, the Court has opted to avoid Rules Enabling Act issues by narrowly interpreting rules in a manner that conforms with the Act's jurisdictional limitation.[231] There is thus some reason to think that a rule governing finality in foreclosure cases would be consistent with the dictates of the Act. In addition, Congress expressly added a provision to the Rules Enabling Act allowing the Court to establish rules that define when a district court's ruling is a final judgment for the purposes of appeal.[232] A new rule to resolve the issue of finality in the foreclosure context, then, may well satisfy the Rules Enabling Act, especially in light of the Supreme Court's past unwillingness to invalidate properly promulgated rules. Any such rule would be no more substance-specific than a decent number of the existing rules.[233]

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226 28 U.S.C. § 2072(a) (2018).

227 *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules*,*"* 2009 WIS. L. REV. 535, 541 ("One of the foundational assumptions of modern American procedure is that the Rules Enabling Act's reference to 'general rules' forecloses the promulgation of different prospective rules for cases that involve different bodies of substantive law.").

228 28 U.S.C. § 2072(b).

229 Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

230 Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1183 (2011); *see also* Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 ("The generalized Rules Enabling Act argument is inherently unresolvable. Neither the Supreme Court in a series of cases nor academic exegesis over five decades has cogently illuminated how best to determine whether a rule is 'substantive' or 'procedural.'").

231 *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102, 1147 (2002) ("[T]he Court . . . has never enforced [§ 2072(b)'s] restriction directly by invalidating a Rule. Instead, the Court gives the Rules a presumption of validity, but construes them so as to avoid some of the resulting Enabling Act problems."); *cf.* Stephen B. Burbank, Semtek*, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1039, 1042 (2002) (describing the Court's narrow reading of Federal Rule of Civil Procedure 41(b) as "strained, indeed opaque").

232 *See* 28 U.S.C. § 2072(c) ("Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.").

233 *See supra* note 225.

Of course, that the rulemakers have the power to resolve this issue does not mean that they will choose to do so. They may wait to see if the circuit split resolves itself, but as discussed above, the Seventh Circuit may prove unwilling (at least for some time) to reverse its own precedents, and it may take some time before the Supreme Court agrees to address the issue.

However, the Advisory Committee has in recent years shown interest in addressing appealability through the rulemaking process. The Committee explored doing so after the Supreme Court's decisions in *Mohawk Industries* and *Swint* emphasized the value of the rulemaking process as a tool to resolve issues in this area.[234] In 2013, then-Chief Counsel to the Rules Committee Andrea Kuperman sent a memo to the Advisory Committee on Appellate Rules to aid its evaluation of whether to address the appealability of certain prejudgment orders.[235] She identified areas of disagreement among lower courts as to the finality of certain rulings and flagged other issues involving appealability that she believed were worthy of exploration.[236] Even then, several members of the Committee expressed hesitation about the prospect of undertaking widescale reform of appealability doctrine through rulemaking. Judge Steven M. Colloton of the Eighth Circuit suggested that the Committee instead "consider the appealability of particular types of interlocutory orders as and when a suggestion brings that specific type of order to the Committee's attention."[237]

The Committee, in fact, considered addressing the appealability of orders compelling disclosure of records over an assertion of attorney-client privilege. It did so in light of the Supreme Court's decision in *Mohawk Industries*, which held that such orders do not satisfy the collateral order doctrine but suggested that rulemaking under § 1292(e) would be a suitable method for making these kinds of rulings appealable as interlocutory orders.[238] In 2014, the Committee held discussions as to the merits of crafting a rule to address the issue in *Mohawk Industries* but ultimately declined to do so.[239]

In addition, the rulemakers are currently exploring addressing the finality of orders in cases consolidated under Federal Rule of Civil Procedure 42,

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234 *See supra* notes 210–213.

235 Memorandum from Andrea L. Kuperman, Chief Counsel, Rules Committee, to Judge Steven M. Colloton and Professor Catherine T. Struve (Sept. 20, 2013), *in* ADVISORY COMM. ON APPELLATE RULES, AGENDA FOR SPRING 2014 MEETING OF ADVISORY COMMITTEE ON APPELLATE RULES 367 (2014), https://www.uscourts.gov/sites/default/files/fr_import/2014-04-Appeals-Agenda-Book.pdf [https://perma.cc/GR4M-MCBV].

236 *Id.* at 367-81.

237 ADVISORY COMM. ON APPELLATE RULES, MINUTES OF SPRING 2014 MEETING OF ADVISORY COMMITTEE ON APPELLATE RULES 15-16 (2014), https://www.uscourts.gov/sites/default/files/fr_import/appellate-minutes-04-2014.pdf [https://perma.cc/296S-6YDN].

238 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 112-14 (2009).

239 ADVISORY COMM. ON APPELLATE RULES, MINUTES OF FALL 2014 MEETING OF ADVISORY COMMITTEE ON APPELLATE RULES 7-9 (2014), https://www.uscourts.gov/sites/default/files/appellate-minutes-10-2014_0.pdf [https://perma.cc/2WYU-JCJF].

following the Supreme Court's invitation in *Hall v. Hall*.[240] That opinion expressly indicated that the rulemakers "remain[ed] free to take the matter up and recommend provisions accordingly" if the rule that it set created practical problems.[241] Shortly after that decision, the Appellate Rules and Civil Rules Committees launched an effort to explore the potential of exercising the authority granted in § 2072(c) and crafting a rule defining when a district court ruling is final in consolidated cases.[242] This initiative is ongoing and is currently focused on analyzing the findings of a research project by the Federal Judicial Center examining Rule 42 consolidations in the district courts.[243]

These episodes show that the rulemakers are certainly open to addressing discrete issues of appealability and has acknowledged the Supreme Court's advocacy for the use of rulemaking to handle such questions. In light of the Court's continued line of decisions emphasizing the utility of this avenue as a vehicle for reforming appealability doctrine, it is quite possible that the Committee would be willing to at least explore reforming the issue of the finality and appealability of foreclosure orders through rulemaking.

As a result, the Advisory Committee should consider crafting a rule indicating that when a plaintiff possesses a security interest in the defendant's property and seeks to foreclose on that property, a district court judgment finding the defendant liable for failure to pay his debt and ordering the collection of the debt by enforcing the security interest is a final judgment for purposes of appeal. It may make sense for the rule to leave to the courts the resolution of any issues arising in jurisdictions that provide a right of reinstatement (much as courts have handled comparable scenarios involving contingent decisions[244]), as that issue is a quite narrow one and relatively easy to address under existing doctrine if it comes up.

B. *Congressional Intervention*

Considering the Court's deference to the role of Congress in shaping which judgments are appealable,[245] the legislative branch can also play a role in

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240 138 S. Ct. 1118 (2018); *see also supra* notes 214–217 and accompanying text.

241 138 S. Ct. at 1131.

242 COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA FOR JANUARY 2019 MEETING 193-98 (2019), https://www.uscourts.gov/sites/default/files/2019-01-standing_agenda_book.pdf [https://perma.cc/K5K5-V73X].

243 *See* ADVISORY COMM. ON CIVIL RULES, AGENDA FOR APRIL 2020 MEETING 187-92 (2020), https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf [https://perma.cc/NR6Z-WWU4].

244 *See supra* notes 147–149 and accompanying text.

245 *E.g.*, Carroll v. United States, 354 U.S. 394, 399 (1957) ("It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute."); *see also* WRIGHT & MILLER, *supra* note 38 ("The jurisdictional nature of the final judgment rule depends entirely upon statutory choice.").

addressing the competing approaches to finality in mortgage foreclosure cases. After all, the power granted to the Court to create rules governing finality discussed in the prior Section originated from congressional authorizations.[246] Congress should consider intervening directly to establish a rule of finality to govern foreclosure cases brought in or removed to federal court.[247]

While the Supreme Court has driven a significant share of the development of appellate jurisdiction and the finality doctrine in the federal court system,[248] Congress has also played a substantial role. Most prominently, it established the categories of appealable interlocutory decisions recognized in § 1292.[249] Beyond the broad grants in § 1292, Congress has also declared certain rulings appealable in a variety of more substance-specific contexts.[250] As a result, the legislative branch has experience in making the difficult balancing decisions inherent in determining when a party can appeal in the litigation process.[251]

Congress should consider intervening to resolve the question of when a litigant can appeal in mortgage foreclosure cases, especially if the Supreme Court is not presented with the issue (or refrains from deciding it[252]) and the Advisory Committee fails to take it up. Given the potential for significant harm

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246 28 U.S.C. §§ 1292(e), 2072 (2018).

247 Congress's authority to regulate federal court procedure comes from its power to "ordain and establish" lower federal courts under Article III. U.S. CONST. art. III, § 1; Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988) (noting that "enactments 'rationally capable of classification' as procedural rules are necessary and proper for carrying into execution the power to establish federal courts vested in Congress" and thus are lawful as an exercise of that power (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965))); Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) (concluding that "Congress has undoubted power to regulate the practice and procedure of federal courts"). Congress has also exercised this power by authorizing the rulemaking process. *See id.*; Mistretta v. United States, 488 U.S. 361, 388-89 (1989) (acknowledging Congress's power to establish the Rules Enabling Act and to delegate some of its authority in this space to the courts).

248 *See generally supra* Section I.B and subsection IV.A.1.

249 28 U.S.C. § 1292; *see also supra* notes 52–55 and accompanying text.

250 *See, e.g.*, 9 U.S.C. § 16(a) (allowing for appeals of certain orders, interlocutory orders, and final judgments in the arbitration context); 18 U.S.C. § 3731 (enabling the United States to appeal certain district court orders in criminal cases); 28 U.S.C. § 1253 (providing for direct Supreme Court review of orders by statutory three-judge district courts granting or denying injunctions); *id.* § 1447(d) (allowing appellate review of orders remanding a case to state court following removal to federal court in civil rights cases); *see also* Comment, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. CHI. L. REV. 558, 566 (1966) (summarizing Congress's involvement in this space). Congress has also not hesitated to change its mind and revoke a grant of appealability, further illustrating its openness to legislation as a means of regulating appealability. *See, e.g.*, 28 U.S.C. § 1252 (1982) (repealed 1988) (providing for direct Supreme Court review of an interlocutory decree or final judgment holding an Act of Congress unconstitutional); 11 U.S.C. § 47 (repealed, as noted in Heller v. Montgomery, 699 F.2d 399, 400 (7th Cir. 1983)) (allowing for interlocutory appeals in certain bankruptcy proceedings).

251 *Cf. supra* notes 52–60 and accompanying text.

252 *Cf.* Townsend v. HSBC Bank USA, N.A., 136 S. Ct. 897, 897 (2016) (denying Townsend's petition for writ of certiorari without comment).

that defendants would face when their homes may be foreclosed,[253] as well as Congress's willingness in the past to address appealability even in relatively narrowly defined legal fields,[254] the issue is ripe for congressional resolution.

Just because Congress has the competence and experience to address an issue, however, does not mean that it is the best or most feasible avenue for reform. In the decades since the passage of the judicial reform statutes of the early 1990s, Congress has grown increasingly gridlocked and polarized, making any legislative solution far less likely to succeed in the current political climate.[255] On top of this environment, the issue this Comment addresses is a relatively narrow one that may not inspire interest from lawmakers on its own. It is thus possible that Congress may only be willing to address this issue as part of a larger reform effort of either the housing market or the federal judiciary.[256]

Any such bill may face opposition from groups such as the credit industry, who will likely be quite unhappy with the prospect of legislation that makes it harder for lenders to foreclose on homes and recover on their mortgages. Some of their concerns may nonetheless be alleviated, since the law would make the foreclosure process more straightforward and predictable for them as well as for homeowners by removing the risk of different courts taking different approaches to appealability.

Ultimately, it may be quite probable that Congress will simply be unable or unwilling to act to resolve this issue unless confronted with its effects on homeowners—for instance, if another downturn in the housing market occurs.[257] Even then, achieving satisfactory reform in the area may be elusive. The ongoing coronavirus pandemic unfortunately seems to present such a crisis, providing slight hope that Congress will refocus its attention on the foreclosure process.[258]

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253 *See supra* notes 16–19 and accompanying text.

254 *See, e.g.*, 28 U.S.C. § 1253 (three-judge statutory district courts); *id.* § 1292(a)(3) (admiralty); *id.* 1447(d) (remanded federal civil rights cases).

255 *See, e.g.*, Molly E. Reynolds, *How to Measure a Dysfunctional, Gridlocked Congress*, BROOKINGS INST. (June 28, 2016), https://www.brookings.edu/blog/fixgov/2016/06/28/how-to-measure-a-dysfunctional-gridlocked-congress [https://perma.cc/85NX-WW23] (quantifying the growing breakdown in bipartisan efforts in Congress and failure to accomplish significant legislative goals).

256 For examples of recent, large-scale congressional acts reforming the federal judicial system, see generally Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, and Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

257 *See supra* note 9 and accompanying text. Congress last took significant action to regulate the housing market in the wake of the subprime mortgage crisis. *See generally* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654; N. ERIC WEISS ET AL., CONG. RESEARCH SERV., RL34623, HOUSING AND ECONOMIC RECOVERY ACT OF 2008 (2008).

258 As of the writing of this Comment, the pandemic threatens to disrupt the housing market, potentially inviting widescale action by Congress. *See* Nicole Friedman, *Coronavirus Looms Over Crucial Spring Season for Housing Market*, WALL ST. J. (Mar. 12, 2020, 7:00 AM), https://www.wsj.com/articles/coronavirus-seen-slowing-crucial-spring-season-for-housing-market-coronavirus-looms-over-crucial-spring-season-for-housing-market-coronavirus-threatens-crucial-spring-season-for-housing-market-11583963949 [https://perma.cc/K85T-73VA]. In fact, government bodies at all levels have sought to

If Congress does act, it should implement a statute that grants the federal courts of appeals appellate jurisdiction over a judgment ordering foreclosures of property in satisfaction of a security interest following default on a loan, as long as the judgment finds liability on the defendant's part, sets the amount of damages, and orders the sale of specific property to satisfy the judgment.

CONCLUSION

In light of the stark disagreement among the courts of appeals on the issue of finality in mortgage foreclosures, along with the impact that foreclosures can have on those affected by them, it is essential to resolve the dispute. Under the *Townsend* approach, a homeowner who lives outside of Illinois or Wisconsin lacks a clear way of knowing when exactly he should appeal if he loses in a foreclosure action. If he moves too soon, he could see his appeal dismissed for lack of jurisdiction, yielding him nothing but wasted time and resources. If he waits too long and it turns out that the foreclosure order was final, he could surrender his opportunity to overturn an erroneous ruling by the district court that would force him out of his home. But even if he challenges the judgment on time, he may not be able to obtain a stay to stop the loss of his home, which sits at most thirty days away from the confirmation of sale. Beyond this potential for significant harm to homeowners, the *Townsend* rule threatens broader markets, as buyers in a foreclosure sale may be hesitant to actively involve themselves, knowing that the underlying merits of the foreclosure have not yet undergone appellate review. Should this risk lead to lower purchase prices on the foreclosed homes, that might result in higher deficiency judgments entered personally against defendants, presenting even greater potential for ruin.

Looking beyond these practical ramifications, the *Townsend* rule fails to justify the harm that it threatens to cause, as it diverges from the views of at least four other circuit courts of appeals without providing a strong rationale for doing so. That competing view squarely holds that a judgment of foreclosure that definitively establishes liability and identifies the property to be sold is final and appealable. This rule falls much more squarely in line with Supreme Court and Seventh Circuit finality precedents, the pecuniary remedy that underlies the goal of foreclosure proceedings, and the need for bright-line rules to govern issues of federal civil procedure. As a result, it is essential to establish a singular rule across the country in line with that perspective, and there are multiple tools available for the courts, the Federal Rules Standing Committee, or Congress to effectuate this crucial undertaking.

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prevent foreclosures and evictions during the pandemic in order to try to head off a housing crisis. *See* Conor Dougherty et al., *Racing to Head Off Evictions and Foreclosures*, N.Y. TIMES (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/business/economy/coronavirus-evictions.html [https://perma.cc/6ZK9-HQ9F]; O'Donnell, *supra* note 8.