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Tackling the Perplexing Sound of Statutory Silence: Why Courts Should Imply a Private Right of Action Under Section 10(a) of RESPA

Seth M. Mott

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Tackling the Perplexing Sound of Statutory Silence: Why Courts Should Imply a Private Right of Action Under Section 10(a) of RESPA

Seth M. Mott*

Table of Contents

I. Introduction	1160
II. Demonstrating the Need for Implying a Private Right of Action Under Section 10(a).....	1164
A. The Purposes of RESPA and Section 10(a).....	1165
B. Violations of Section 10(a) Thwart RESPA’s Purposes and Contribute to the Problem of Predatory Lending	1166
III. Establishing the Standard of Interpretation That Applies to Section 10(a)’s Silence	1169
A. General Approaches to Statutory Construction.....	1169
1. Textualist	1170
2. Intentionalist.....	1172
3. Totality of the Circumstances.....	1174
4. Equity of the Statute.....	1175
B. Supreme Court Jurisprudence: Implying Private Rights of Action.....	1176
1. The Court’s Digression from the Permissive Implication Doctrine of the Past.....	1176
2. The Permissibility of Implying a Private Right of Action Under Limited Circumstances.....	1180

* Candidate for J.D., Washington and Lee University School of Law, May 2008; B.S., Brigham Young University, 2005. I would like to thank Professor Amanda Quester, Professor Monré Carodine, Professor Denis Brion, Houston Stokes, Rory Gray, and Meredith Abernathy for their invaluable feedback and enthusiasm. More importantly, I would like to thank my wonderful wife, Lindsay, and our daughter, Ava, for their tremendous patience and encouragement.

C.	The Obligation of Courts to Save and Not To Destroy.....	1184
IV.	Specific Application to Section 10(a).....	1185
A.	Cases Deciding Whether a Private Right of Action Exists Under Section 10 Generally.....	1186
1.	Cases Deciding For Implying a Private Right of Action	1186
2.	Cases Deciding Against Implying a Private Right of Action	1188
B.	Why Courts Should Imply a Private Right of Action Under Section 10(a).....	1190
1.	Members of the Class for Whose Special Benefit the Statute was Enacted.....	1191
2.	Explicit and Implicit Indications of Congressional Intent	1191
3.	Private Right of Action Consistent with Purposes of Statutory Scheme	1196
4.	Private Remedy Not Traditionally Relegated to State Law	1197
C.	Addressing Counter-Arguments	1197
D.	Other Pertinent Considerations.....	1202
V.	Conclusion.....	1204

And in the naked light I saw, ten thousand people, maybe more, people talking without speaking, people hearing without listening, people writing songs that voices never share, and no one dared disturb the sound of silence.¹

I. Introduction

"Homeownership is the American dream. It is the opportunity for all Americans to put down roots and start creating equity for themselves and their families."² To realize this dream, most Americans go through the sometimes

1. SIMON & GARFUNKEL, *The Sound of Silence*, on SOUNDS OF SILENCE (Columbia Records 1965).

2. *Predatory Mortgage Lending: The Problem, Impact, and Response: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Affairs*, 107th Cong. 1-2 (2001) [hereinafter *Predatory Mortgage Lending*] (opening statement of Senator Paul S. Sarbanes, Chairman, S. Comm. on Banking, Housing, and Urban Affairs); see also Anne-Marie Motto, Note, *Skirting the Law: How Predatory Mortgage Lenders are Destroying the American Dream*, 18 GA. ST.

gut-wrenching experience of signing their lives away in exchange for a mortgage loan. They contract with mortgage lenders to pay back a huge amount of principal plus hundreds of thousands of dollars in interest typically over ten, fifteen, twenty, or thirty years.³ Unfortunately, predatory mortgage lenders often make financing a home even more expensive by employing unscrupulous tactics⁴ in order to profit at their borrowers' expense.⁵

In one such case of predatory lending, a mortgage borrower's lender⁶ notified him, without explanation, that the amount of money he had to send on top of his monthly mortgage payment to cover property taxes and home owner's insurance was increasing by over \$60 per month.⁷ It turns out that his lender had been "overcharging his escrow account,⁸ building up a fat cushion of [his and other] borrowers' money, and investing the 'float' to [make] some profit."⁹ In another case nearby, a similarly situated borrower had to fight with

U. L. REV. 859, 859–63 (2002) (examining abusive practices of predatory lenders and concluding that "current federal and state law provides insufficient protection against predatory lending, and that . . . state and local efforts to halt abusive lending practices have fallen short when met with resistance from a wealthy and powerful mortgage lobby").

3. See, e.g., All Business, *Choosing a Mortgage Loan*, <http://www.allbusiness.com/personal-finance/real-estate-mortgage-loans/3379-1.html> (last visited Sept. 20, 2007) (discussing various mortgage loan options) (on file with the Washington and Lee Law Review).

4. See Jessica Fogel, Comment, *State Consumer Protection Statutes: An Alternative Approach to Solving the Problem of Predatory Mortgage Lending*, 28 SEATTLE U. L. REV. 435, 435 (2005) ("[T]here are a number of predatory . . . lenders who abuse their positions of trust and superior bargaining position.").

5. See *Predatory Mortgage Lending*, *supra* note 2, at 1–2 ("Predatory lenders play on [American] hopes and dreams to cynically cheat people of their wealth.").

6. Importantly, this Note does not distinguish between lenders and loan servicers. It uses the generic term "lender" to refer to any financial institution that creates or services mortgage loans.

7. See Iver Peterson, *Padding in the Escrow Cushion*, N.Y. TIMES, Feb. 24, 1991, § 10, at 1 ("A letter familiar to many home mortgage borrowers came to James Cunningham . . . notifying him that the amount of his monthly mortgage payment his lender put aside to pay taxes and insurance was being increased, from \$292 to \$354 a month.").

8. See BLACK'S LAW DICTIONARY 19 (8th ed. 2004) (defining an escrow account as "[a] bank account, generally held in the name of the depositor and an escrow agent, that is returnable to the depositor or paid to a third person on the fulfillment of specified conditions"); see also Edwin C. Mills, *The Functioning and Regulation of Escrow Accounts*, in 5 HOUSING POLICY DEBATE 204 (Fannie Mae ed., 1994) ("An escrow account consists of funds held by a third party, who collects, holds, and disburses the funds pursuant to a contract or an obligation between two parties. An escrow account for a home mortgage is held by the organization that services the mortgage."); Thomas H. Broadt, Comment, *The Attack Upon the Tax and Insurance Escrow Accounts in Mortgages*, 47 TEMP. L.Q. 352, 352 (1974) (explaining that escrow accounts first appeared in the 1930s at a time when widespread poverty and insolvency led thousands of American banks to adopt similar protections).

9. Peterson, *supra* note 7, at 1.

his bank for the same reason.¹⁰ His escrow account was supposed to dip to a little over \$1,300 each year, but his lender never let it drop below \$2,600.¹¹ Although this borrower did care about the money, he fought mostly as "a matter of principle."¹² Elsewhere, another borrower assumed that his lender would reimburse him at the end of the year for paying an overage of \$800 into his escrow account.¹³ To his surprise, his lender instead required him "to pump" another \$900 into his escrow account.¹⁴ Baffled, he phoned his lender for an explanation.¹⁵ When this borrower continued to "balk[] at paying the surcharge," his lender threatened him with foreclosure.¹⁶

The lenders in each of these factual scenarios allegedly violated Section 10(a)¹⁷ of the Real Estate Settlement Procedures Act (RESPA)¹⁸ by overcharging their borrowers' escrow accounts to cover taxes and insurance. Lenders that violate Section 10(a) often take advantage of this illegal escrow "cushion" by using it for their own investment purposes.¹⁹ One might assume, and justifiably so, that victims such as those in the three examples above could sue for damages. RESPA, however, says nothing about enforcement of Section

10. *Id.*

11. *See id.* (reporting that "the balance of [Mr. Comins'] escrow account should dip to at least \$1,383.33 for one month of the year," but it never drops below "\$2,600").

12. *Id.*

13. *See* David W. Myers, *Impounding Accounts: Convenience or Curse?*, L.A. TIMES, Nov. 15, 1992, Real Estate Section, at 1 (reporting that even though David Brown paid \$4,800 annually for taxes and insurance, when only \$4,000 would actually come due, his lender "had determined that he needed to pump nearly \$900 extra into [his escrow] accounts").

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* 12 U.S.C. § 2609(a) (2000) (limiting the amount lenders may hold in escrow accounts to cover taxes and insurance premiums). This Note refers to § 2609, generally, as Section 10. It refers to § 2609(a), specifically, as Section 10(a). In 1990, when Congress amended Section 10, it designated the existing text as Section 10(a) and added subsections (b) through (d). *See infra* note 20 (referring to the 1990 amendments).

18. *See id.* §§ 2601–10, 2614–17 (establishing protective measures against predatory lending).

19. *See infra* notes 42–62 and accompanying text (discussing the unfairness of investing borrowers' escrow funds). Lenders have long taken advantage of escrow accounts for investment purposes. *See, e.g.,* Broadt, *supra* note 8, at 352 (stating that lending associations "invest the [escrow funds] in short-term loans," and "do not pay the depositor interest for the use of the funds"); Charles A. Pillsbury, Note, *Lender Accountability and the Problem of Noninterest-Bearing Mortgage Escrow Accounts*, 54 B.U. L. REV. 516, 516 (1974) (referring to allegations that escrow accounts "provide lenders with additional income that does not rightfully belong to them").

10(a),²⁰ and most federal courts refuse to imply a private right of action under this provision.²¹

Courts that refuse to find an implied private right of action under Section 10(a) typically do so because Congress has not expressly created one.²² This common conclusion is suspect because Congress designed RESPA to protect mortgage consumers and stifle predatory mortgage lending.²³ Without a private right of action under Section 10(a), this provision fails to protect borrowers and, in fact, invites lenders to employ predatory lending practices by allowing them to continue to overcharge their borrowers' escrow accounts.

This Note attempts to refute the prevailing argument that no private right of action exists under Section 10(a) of RESPA by "disturb[ing] the sound of silence"²⁴ and asserting that Congress intended to create an implied private right of action for violations of Section 10(a). Part II introduces RESPA generally, introduces Section 10(a) of RESPA in particular, and establishes that violations of Section 10(a) thwart RESPA's purposes and contribute greatly to the problem of predatory lending.²⁵ Part III lays the groundwork for determining whether courts should imply a private right of action under Section

20. See 12 U.S.C. at § 2609(d) (providing penalties for violations of subsection (c), which regulates escrow account statements, but not for violations of subsections (a) or (b)). Prior to the 1990 amendments, Section 10 did not have subsections (b) through (d). See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (Nov. 28, 1990) (amending Section 10 of RESPA by designating the existing text as subsection (a) and adding subsections (b) through (d)).

21. See, e.g., *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359–60 (11th Cir. 2006) (holding that no private right of action exists for violations of Section 10); *Clayton v. Raleigh Fed. Sav. Bank*, 107 F.3d 865, 1997 WL 82624, at *1 (4th Cir. 1997) (affirming, without opinion, a district court holding that no private right of action exists under Section 10); *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301–02 (5th Cir. 1995) (holding that no private right of action exists under Section 10); *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091 (7th Cir. 1982) (same); *McAnaney v. Astoria Fin. Corp.*, 357 F. Supp. 2d 578, 591 (E.D.N.Y. 2005) (same); *Byrd v. Homecomings Fin. Network*, 407 F. Supp. 2d 937, 945 (N.D. Ill. 2005) (same); see also Michael G. Walsh, Annotation, *Construction and Application of Real Estate Settlement Procedures Act of 1974*, 142 A.L.R. FED. 511, § 8 (a)–(b) (1997) (comparing cases that held that a private right of action exists under Section 10 with cases that held the opposite through 1997).

22. See *infra* notes 189–203 and accompanying text (discussing cases that have refused to find an implied private right of action under Section 10).

23. See *infra* notes 36–41 and accompanying text (discussing the purposes of RESPA's enactment).

24. SIMON & GARFUNKEL, *supra* note 1 and accompanying text (citing Simon and Garfunkel's "The Sound of Silence").

25. See *infra* Part II (demonstrating the need for implying a private right of action under Section 10(a) of RESPA).

10(a).²⁶ It details general approaches to statutory construction, delves into Supreme Court jurisprudence regarding implied private rights of action, and emphasizes that courts have an obligation to save and not to destroy statutory text.²⁷ Part IV analyzes and critiques cases that have decided the issue of whether a private right of action exists under Section 10 generally.²⁸ It then applies the proper standard of construction to Section 10(a) and argues that Congress intended to create an implied private right of action under this provision.²⁹ Finally, Part V concludes that, under the law currently in effect, federal courts should imply a private right of action under Section 10(a) because this provision falls within the limited category of cases in which courts may find such an implied right.

II. Demonstrating the Need for Implying a Private Right of Action Under Section 10(a)

Chief Justice Marshall once declared that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."³⁰ The Supreme Court has since rejected a permissive implication doctrine that would imply whatever rights are necessary to make effective congressional purposes³¹ for a doctrine of statutory construction that focuses on legislative intent.³² Nevertheless, congressional purposes remain highly relevant and are, in fact, essential to the question of intent.³³ In other words, congressional purposes do not control the analysis, but

26. See *infra* Part III (establishing the standard of interpretation that applies to Section 10(a)'s silence).

27. See *infra* Part III (focusing on general approaches to statutory constitution, Supreme Court jurisprudence, and the obligation of courts to save and not destroy statutory text).

28. See *infra* Part IV.A (discussing cases that have decided for and against implying a private right of action under Section 10(a) of RESPA).

29. See *infra* Part IV.B (applying the appropriate test to the question of whether a private right of action exists under Section 10(a) of RESPA).

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

31. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (rejecting the Supreme Court's long-standing permissive implication doctrine).

32. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (reaffirming *Cort*'s rejection of the "*ancien regime*" which provided whatever remedies were necessary to effectuate the purposes of a statute); *Cort*, 422 U.S. at 78 (abandoning the understanding that the courts have a duty to provide whatever remedies are necessary to effectuate the purposes of a statute).

33. See *infra* Part II.A (providing the purposes of RESPA and Section 10(a)); Part II.B (asserting that violations of Section 10(a) thwart RESPA's purposes); Part III.A (emphasizing the relevance of statutory purposes when interpreting a statute).

they continue to offer strong evidence of legislative intent. The purposes of RESPA strongly indicate that denying mortgage consumers a private right of action under Section 10(a) cuts contrary to congressional intent in passing this provision.³⁴ Furthermore, failure to recognize a private right of action under Section 10(a) of RESPA renders the language of this provision superfluous—a result which the Supreme Court seeks to avoid at all costs.³⁵

A. The Purposes of RESPA and Section 10(a)

Congress passed RESPA in response to the 1970s consumer protection movement to regulate mortgage lending.³⁶ The statute "respon[ded] to . . . abuses in the real estate settlement process" and aimed to "protect consumers from . . . unnecessarily high settlement charges."³⁷ Congress, in short, created RESPA to protect mortgage consumers and stifle predatory mortgage lending. By its own terms, RESPA purports to effectuate "changes in the settlement process for residential real estate that will result . . . in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance . . ."³⁸ Congress, therefore, designed Section 10—now Section 10(a)³⁹—for the purpose of limiting the amount lenders may require borrowers to deposit in escrow accounts.⁴⁰ Congress, in this way, "attacked" and "outlawed . . . maintaining an

34. See *infra* Part II.A (providing statutory purposes that are inconsistent with a congressional intent not to imply a private right of action under Section 10(a) of RESPA).

35. See *infra* notes 286–93 and accompanying text (arguing that to find no private right of action under Section 10(a) renders the provision unnecessary).

36. See 12 U.S.C. § 2601(a) (2000) ("Significant reforms in the real estate settlement process are needed."); Real Estate Settlement Procedures Act of 1974, Pub. L. No. 95-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601–17) (creating RESPA); Dale A. Whitman, *The Real Estate Settlement Procedures Act: How to Comply—Problems and Prospects*, 4 REAL EST. L.J. 223, 223–25 (1976) (explaining that Congress's first response to consumer rights advocates was to direct the Department of Housing and Urban Development (HUD) and the Veterans' Administration (VA) to study the problem of excess settlement costs); *id.* at 224–25 (reporting that Congress enacted RESPA on the basis of findings from the VA study); see also The Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 461 (aiming to increase the availability of mortgage credit to finance "urgently needed housing").

37. See 12 U.S.C. § 2601(a) (stating that one of RESPA's purposes is to "insure that consumers throughout the [n]ation . . . are protected from unnecessarily high settlement charges"); see also Charles G. Field, *RESPA in a Nutshell*, 11 REAL PROP., PROB. & TR. L.J. 447, 448–49 (1976) (stating that by passing RESPA Congress intended to eliminate mortgage lenders' abusive practices).

38. 12 U.S.C. § 2601(b)(1)–(4).

39. See *supra* note 17 and accompanying text (introducing Section 10(a) of RESPA).

40. Subsection (a) of Section 10 limits the size of escrow accounts lenders may establish

overlarge 'cushion' of borrowers' tax and insurance premiums to profit from the interest gained by investing it."⁴¹

B. Violations of Section 10(a) Thwart RESPA's Purposes and Contribute to the Problem of Predatory Lending

Despite RESPA's supposedly "extensive" protections⁴² and the ability of mortgage borrowers to fall back on state consumer protection statutes,⁴³ the law currently fails to protect mortgage consumers.⁴⁴ Violations of Section 10(a), in particular, contribute to a rampant predatory lending problem that has a tremendously adverse effect on consumers. Lenders that overcharge their borrowers' escrow accounts in violation of Section 10(a) profit illicitly at their

to pay taxes and insurance premiums. 12 U.S.C. § 2609(a). Subsection (b) requires lenders to provide timely notice to borrowers of shortages in escrow accounts. *Id.* § 2609(b). Subsection (c) requires lenders to provide borrowers with a statement that outlines the estimated taxes, insurance premiums, and other charges that will come due during the first twelve months after establishing the escrow account. *Id.* § 2609(c). Subsection (d) authorizes the Secretary of HUD to assess penalties for violations of subsection (c). *Id.* § 2609(d).

41. Peterson, *supra* note 7, at 1.

42. See Mary S. Robertson, *The "New and Improved" Real Estate Settlement Procedures Act and Regulation X*, 47 CONSUMER FIN. L.Q. REP. 273, 273 (1993) (highlighting the evolution of RESPA "into what is today a comprehensive law that covers virtually every loan secured by residential real property"). RESPA provides at least some general protection through administrative enforcement. See 24 C.F.R. § 3500.17(m), (n) (2000) (detailing administrative remedies for violations of Section 10(c)). State attorneys general similarly provide some general protection. See *infra* note 192 and accompanying text (discussing the authority of the state to sue on behalf of its citizens).

43. See *Birkholm v. Wash. Mut. Bank*, 447 F. Supp. 2d 1158, 1163 (W.D. Wash. 2006) (stating that "a plaintiff may plead state claims related to misapplication of funds allegedly held in an escrow account"). Federal courts also recognize that RESPA violations amount to unfair and deceptive practices for purposes of meeting the "unfair and deceptive act or practice" element of certain state consumer protection statutes. See, e.g., *Brazier v. Sec. Pac. Mortgage*, 245 F. Supp. 2d 1136, 1142 (W.D. Wash. 2003) (stating that the "failure to make timely disclosures under . . . RESPA constitutes an unfair or deceptive act or practice in violation of the Washington Consumer Protection Act").

44. See Fogel, *supra* note 4, at 436 ("[F]ederal and state regulations have consistently failed to adequately protect borrowers from predatory lenders."); see also Marsha L. Williams, *Update on RESPA Issues and Developments*, 56 CONSUMER FIN. L.Q. REP. 4, 9-15 (2002) (reviewing recent litigation stemming from "improper disclosures . . . deceptive trade practices . . . [and] the maintenance of escrow accounts"); Kevin J. Skehan, Note, *Enforcement of the Federal Limitation Requirement on Advance Deposits in Escrow Accounts and the Potential Impact on Mortgage Lenders in Connecticut*, 12 BRIDGEPORT L. REV. 789, 790 (1992) (stating that federal and state regulations limiting escrow account requirements have not "resulted in the protection of consumers in the mortgage lending industry" because of "federal loopholes" and an "increase in predatory lending practices").

borrowers' expense by investing the excess funds.⁴⁵ Due to the failure of many courts to recognize an implied right of action under Section 10(a), RESPA offers virtually no protection to individual borrowers against this practice.⁴⁶ Considering this lack of protection, it is no surprise that predatory lenders continue to require borrowers to deposit more into escrow accounts than Section 10(a) allows.⁴⁷

With unrestricted access to mass stores of escrow funds, lenders have billions of virtually free dollars at their fingertips.⁴⁸ In fact, in the mid-nineties, an estimated \$5–\$10 billion were illegally held in escrow accounts.⁴⁹ By way of example, a mortgage lender that services 500,000 loans with an average escrow balance of \$750 will earn well over \$22 million annually at a conservative 6% rate of return.⁵⁰ Clearly, by overcharging and investing unsuspecting borrowers' escrow funds, lenders can profit considerably.

Consumer protection groups have long expressed concern over this practice.⁵¹ They continue to insist that by investing escrow funds, "[b]anks are

45. See *infra* notes 48–54 and accompanying text (discussing the unfair practice of investing effectively stolen funds).

46. See, e.g., Scott A. Meacham, Comment, *Consumer Credit Legislation and the Banking Industry*, 40 OKLA. L. REV. 645, 667–68 (1987) (commenting that despite imposing "certain requirements with respect to residential acquisition lending," RESPA "does not [expressly] impose liability for anything other than kickbacks and referral fees").

47. See, e.g., *Johnson v. Wash. Mut. Bank*, 216 Fed. App'x 64, 65 (2d Cir. 2007) (avoiding the issue of whether a private right of action exists under Section 10(a) in a suit alleging escrow account overcharges); *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359–60 (11th Cir. 2006) (refusing to find a private right of action in a suit alleging escrow account overcharges); Skehan, *supra* note 44, at 789–90 (reporting on findings that federal and state regulations fail to protect borrowers from predatory lenders requiring advance payments to escrow accounts in excess of RESPA's legal limit (citing ATTORNEYS GENERAL OF CALIFORNIA, FLORIDA, IOWA, MASSACHUSETTS, MINNESOTA, NEW YORK, TEXAS, OVERCHARGING ON MORTGAGES: VIOLATIONS OF ESCROW ACCOUNT LIMITS BY THE MORTGAGE LENDING INDUSTRY (Apr. 24, 1990))).

48. See Mills, *supra* note 8, at 203 (stating that "[e]scrow accounts are the stepchildren of the mortgage business," and "billions of dollars are invested in escrow balances"); see also *id.* (stating that as of 1994, "[a]bout 40 million Americans [had] mortgages serviced by escrow accounts").

49. See Denene Miller, *Mortgage Firm Settles with 26 States for \$150 Million*, ALBUQUERQUE J., Feb. 8, 1993, at C5 (reporting that New York Attorney General Robert Abrams "estimated that between \$5 billion and \$10 billion in illegal escrow fund[s] are paid to mortgage lenders nationwide").

50. See *Convenience or Curse*, *supra* note 13, at 1 ("A large company that processes 500,000 loans with an average impound balance of \$750 each could easily earn more than \$10 million a year by investing the money that its borrowers have deposited in their escrow accounts."). This example reflects a mere 2.6% return. The example cited in the text reflects a more likely return.

51. See Broadt, *supra* note 8, at 352 (acknowledging a "growing concern among

taking interest that rightfully belongs to their borrowers."⁵² The efforts of these consumer protection groups, however, seem to accomplish little. The common practice of profiting by overcharging and investing escrow funds stretches back to RESPA's beginning⁵³ and it continues to flourish.⁵⁴

Overcharging escrow accounts contributes to the soaring foreclosure rates that result from predatory mortgage lending.⁵⁵ Lenders can threaten borrowers with foreclosure if they balk at paying escrow surcharges.⁵⁶ To make matters worse, the homeowners who have "billions of dollars socked away in these [escrow] accounts" seem to have nowhere to turn for redress.⁵⁷ According to former New York Attorney General, Robert Abrams, "[t]his is a conscious, concerted action taken by an entire industry to rip off the public and get free loans at its expense."⁵⁸

Notably, coalitions of state attorneys general have successfully won settlements worth hundreds of millions of dollars against lenders for violations of Section 10(a),⁵⁹ but they lack the necessary time and resources "to battle several [lending] institutions at once."⁶⁰ Consequently, lenders can get away with stealing their borrowers' money with little risk. Some states do require

consumer protection groups" regarding lenders' investment of escrow account funds).

52. See Myers, *supra* note 13, at 1 ("Consumer groups say that it's unfair for lenders to use their borrowers' money to earn interest for themselves.").

53. See Pillsbury, *supra* note 19, at 518 (examining "borrowers' suits to compel lenders to account . . . for profits earned through the investment of escrow funds").

54. See *supra* note 47 and accompanying text (illustrating the current extent of escrow overcharging); see also James T. Walter & Grace Sterrett, *Housing Finance: Major Developments in 1991*, 47 BUS. LAW. 1219, 1226 (1992) (reporting that the maintenance of unreasonably large escrow account balances, one of RESPA's targeted abuses, continues to flourish).

55. See Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1257 (2002) ("[P]redatory lending—exploitative high-cost loans to naïve borrowers— . . . has sent foreclosure rates soaring.").

56. See *supra* note 16 and accompanying text (providing an example of a case in which the borrower's lender threatened him with foreclosure for balking at paying surcharges). Notably, government authorities may threaten homeowners with foreclosure where "their lender fail[s] to tap their [escrow] accounts to pay their annual property-tax bill." *Convenience or Curse*, *supra* note 13, at 1.

57. Myers, *supra* note 13, at 1.

58. See Barry Meier, *Lenders Accused on Escrow*, N.Y. TIMES, April 25, 1990, at D1 (quoting former New York Attorney General Robert Abrams).

59. See, e.g., Myers, *supra* note 13, at 1 (reporting on a \$100 million settlement against GMAC Mortgage Corporation for "systematically forcing borrowers to keep more cash in their escrow accounts than the federal law allows"); see also *infra* note 192 and accompanying text (discussing where state attorneys general derive their authority to sue lenders for violations of Section 10).

60. Myers, *supra* note 13, at 1.

lenders to pay interest to borrowers on escrow funds, but the rates are extremely low, and other states allow lenders to pay nothing.⁶¹ Shortcomings like these have forced the American public to seek more effective legislation to combat predatory lending.⁶²

III. Establishing the Standard of Interpretation That Applies to Section 10(a)'s Silence

A. General Approaches to Statutory Construction

As a general matter, courts use "statutory construction" to resolve the question of whether a statute creates a private right of action, either expressly or by implication.⁶³ Its exercise, however, provokes some controversy. Courts apply different approaches to statutory construction in order to determine the meaning of a statute.⁶⁴ This Section details the approaches and principles that are crucial to the determination of whether a private right of action exists under Section 10(a) of RESPA. It focuses on four main approaches: the textualist,⁶⁵ intentionalist,⁶⁶ totality of the circumstances,⁶⁷ and equity of the statute⁶⁸ theories of construction.

61. See, e.g., David W. Myers, *Inspect Your Impound Account for Overcharge Financing: A Survey of the "Impound" Accounts Found Many Lenders Overestimate the Amount of Money that Must Go Into the Accounts on a Monthly Basis*, L.A. TIMES, May 6, 1990, Real Estate Section, at 6 ("California lenders are required to pay a paltry 2% annual interest on [escrow] accounts, even though they can sometimes have more than \$1,000 of your money in them. Lenders in some other states don't have to pay anything.").

62. See, e.g., Fogel, *supra* note 4, at 435–66 (describing the extent of predatory lending in America and the need for a solution).

63. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15–17 (1979) (discussing whether a statute creates a private right of action).

64. See, e.g., *Morton Int'l v. A.E. Staley Mfg.*, 106 F.Supp.2d 737, 753 (examining Section 127 of CERCLA "under rules of statutory construction for evidence of Congress's intent").

65. See *infra* notes 69–86 and accompanying text (discussing the textualist school of statutory construction).

66. See *infra* notes 87–94 and accompanying text (describing the intentionalist school of statutory construction).

67. See *infra* notes 95–104 and accompanying text (exploring the totality of the circumstances school of statutory construction).

68. See *infra* notes 105–13 and accompanying text (summarizing the equity of the statute school of statutory construction).

1. Textualist

Statutory construction begins with the statutory language and the "assumption that the ordinary meaning of the language accurately expresses the legislative purpose."⁶⁹ Accordingly, when a court interprets a statute, it must look to the language first.⁷⁰ If the statute's language "speaks with clarity to [the] issue," the inquiry ends there.⁷¹ Under this plain meaning rule, if the clear language does not lead to absurd consequences, the words represent "the final expression of the meaning intended."⁷² If the statute's language is not clear, courts look to other subjective factors such as legislative intent to help determine the meaning of the statute.

Justice Holmes articulated a stricter textualist position: "[W]e do not inquire what the legislature meant; we ask only what the statute means."⁷³ Under this approach, courts interpret statutes based on objective, rather than subjective, criteria.⁷⁴ In Justice Scalia's words, "the text is the law and it is the text that must be observed."⁷⁵ Some contend that the Supreme Court has

69. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004).

70. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (stating that the language of a statute is "the beginning point" to its interpretation).

71. *Id.* ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished."); *see id.* at 476 ("[C]ourts must give effect to the clear meaning of statutes as written."); *see also Duncan v. Walker*, 533 U.S. 167, 172 (2001) ("Our task is to construe what Congress has enacted . . . [beginning] with the language of the statute."); *Carter v. United States*, 530 U.S. 255, 257 (2000) ("[T]his Court's approach to statutory construction . . . begins by examining the text, not by psychoanalyzing those who enacted it.").

72. *United States v. Mo. Pac. R.R.*, 278 U.S. 269, 269 (1929) ("Where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."); *see also Lamie v. United States*, 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.").

73. OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 207 (1920).

74. *See* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995) (comparing textualist and intentionalist rules of statutory construction); *see also* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994) ("The critical assumption is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were.").

75. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 22 (1997); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (stating that "[j]udges interpret laws rather than reconstruct legislators' intentions").

started to discard other canons of interpretation for this hypertextualist approach.⁷⁶ In fact, a five-to-four majority of the Court recently refused to look beyond statutory text to resolve the disputed meaning of 28 U.S.C. § 1367, asserting instead that the statute's plain meaning was clear.⁷⁷ Despite Justice Ginsburg's strong alternative interpretation—supported by three other Justices and the statute's legislative history⁷⁸—the majority insisted that the statute "simply . . . [was] not ambiguous."⁷⁹

Along the same lines, a strict textualist would insist that if Congress wishes to create a new private right of action, it must do so clearly and unambiguously.⁸⁰ Section 10(a)'s utter silence regarding private enforcement makes the question of whether a private right of action exists under this provision neither clear nor unambiguous. A truly textualist judge, therefore, might never imply a private right of action under Section 10(a), nor under any other similarly silent provision—for "implied" rights of action and "clear and unambiguous terms" are oxymorons.⁸¹ This strict approach could theoretically wipe out implied rights of action from American jurisprudence altogether. The Supreme Court, however, has never foreclosed the existence of judicially implied private rights of action. In fact, the Court has specifically created frameworks for the purpose of determining whether an implied private right of

76. See Merrill, *supra* note 74, at 351–52 (indicating that the Supreme Court has gone through a historical transformation into a "hypertextualist" approach to statutory construction); *id.* (stating that textualism functions as "a sophisticated theory of interpretation which readily acknowledges that the meaning of the words depends on the context in which they are used").

77. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (refusing to "look to other interpretive tools, including the legislative history . . . simply because § 1367 is not ambiguous").

78. See *id.* at 572 (Stevens, J., dissenting) ("The legislative history . . . provides powerful confirmation of Justice Ginsburg's interpretation of the statute."); see also *id.* ("[Justice Ginsburg] has demonstrated that 'ambiguity' is a term that may have different meanings for different judges, for the Court has made the remarkable declaration that its reading of the statute is so obviously correct—and Justice Ginsburg's so obviously wrong—that the text does not even qualify as 'ambiguous.'"). But see *id.* at 569–70 (indicating that the legislative history of § 1367 was a matter of some dispute).

79. See *id.* at 567 (concluding that § 1367 was unambiguous).

80. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) ("[I]f Congress wishes to create new [enforceable] rights . . . it must do so in clear and unambiguous terms . . ."). Notably, *Exxon* and *Gonzaga* represent two different, but closely related, textualist propositions. Whereas *Exxon* forbids looking beyond the text of an unambiguous statute, *Gonzaga* obligates Congress to create all rights of action in clear and unambiguous terms.

81. *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005) ("[H]ow can an implied right of action be phrased in clear and unambiguous terms, when statutory silence is what poses the question whether a right may be implied?").

action exists under a statute and, in some contexts, the Court has implied such a private right of action.⁸²

In other cases, the Supreme Court has recognized that "the silence of Congress is ambiguous."⁸³ Section 10(a), in particular, does not "speak with clarity to the issue" of enforcement.⁸⁴ In fact, it says nothing about enforcement.⁸⁵ This silence has led to contradictory interpretations among lower courts.⁸⁶ Due to Section 10(a)'s silence regarding enforcement, the question of whether a private right of action exists under this provision cannot end with the statute's language. To be sure, congressional silence may be unambiguous in some instances. In Section 10(a)'s case, however, Congress has allowed courts to decide for and against implying a private right of action without saying anything about it. Neither Congress nor the Supreme Court has foreclosed the possibility of implying a private right of action under Section 10(a), and the courts remain split over the issue. Because of this lack of clarity, courts must look beyond the language of Section 10(a)—to legislative intent.

2. *Intentionalist*

Choosing between the textualist and intentionalist approaches to statutory construction is thought by some to "represent[] a fundamental issue which pervades the law of statutory interpretation."⁸⁷ Some Supreme Court justices have endorsed a "preference for the meaning of the statute over legislative intent as a criterion of interpretation."⁸⁸ Yet among the varying schools of thought regarding statutory construction and judicial interpretation, courts

82. See cases cited *infra* note 135 (citing cases in which the Supreme Court has found an implied private right of action).

83. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000); see also *id.* at 388 (rejecting an argument that Congress's failure "to preempt [a] state Act demonstrates implicit permission" because "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict"). But see *id.* at 389 (Scalia, J., concurring) (criticizing the Court's recognition that "the silence of Congress [may be] ambiguous").

84. See *supra* note 71 and accompanying text (noting that statutory interpretation ends at the point where the statute's language speaks with clarity to the issue).

85. See *supra* notes 39–41 and accompanying text (introducing Section 10(a)).

86. See *infra* notes 174–77 and accompanying text (highlighting the controversy over the issue of whether a private right of action exists under Section 10(a)).

87. NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:05 (6th ed. 2000) (addressing "the problem of choice between these alternative criteria of decision"—"intent of the legislature" versus "meaning of the statute").

88. *Id.* (referring to Justice Holmes, Justice Jackson, and Justice Frankfurter).

continue to weigh the "intent of the legislature" most heavily.⁸⁹ Courts simply use different factors to determine that intent. The separation of powers doctrine obligates the judiciary to "construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of government."⁹⁰

The Supreme Court consistently endorses this approach.⁹¹ Thus, legislative intent controls when the court can reasonably discover that intent from the statute's language and underlying purpose.⁹² One can hardly debate the principle.⁹³ Where Congress has made its intent clear, courts "must give effect to that intent."⁹⁴

89. See *id.* (stating that when interpreting statutes, "the intent of the legislature is the criterion most often cited"); see also William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 631-40 (2001) (referring to legislative intent as the "traditional approach to interpreting statutes").

90. SINGER, *supra* note 87, § 45:05 (discussing the intent of legislature as a standard of judgment for the interpretation of statutes); see also Richard J. Scislowski, Note, *Jenkins v. James B. Day & Co.: A New Defense of State Tort Law Against Federal Pre-emption—Is It Legitimate?*, 28 AKRON L. REV. 373, 386 (1995) ("[I]n reviewing a statute, a court must interpret it in such a way as to promote, not defeat, the purposes of the Legislature in enacting the statute in the first place."); cf. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (stating that the Court has "abandoned [the] understanding" that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose expressed by a statute"); *id.* ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink.").

91. See *Califano v. Wescott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring) (stating that a court cannot "use its remedial powers to circumvent the intent of the legislature"); see also *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (reaffirming Justice Powell's assertion in *Califano*); *id.* at 321 ("The touchstone for any decision about remedy is legislative intent."). Although *Califano* and *Ayotte* each dealt with the constitutionality, as opposed to the enforceability, of statutory provisions, these general principles of statutory construction assertedly also apply to facially unenforceable statutes such as Section 10(a) of RESPA.

92. See SINGER, *supra* note 87, § 45:05 (stating that "all rules of statutory construction are subservient" to legislative intent where that intent "can be reasonably discovered in the language used").

93. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (stating that "[t]he judicial task is to interpret the statute Congress has passed to determine whether" Congress intended to create a private right of action); *Suter v. Artist*, 503 U.S. 347, 364 (1992) ("The most important inquiry here . . . is whether Congress intended to create the private remedy sought."); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) ("The key to the inquiry is the intent of the legislature."); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted.").

94. *Miller v. French*, 530 U.S. 327, 336 (2000) (rejecting an interpretation that "would subvert" the clear intent of Congress).

3. Totality of the Circumstances

"Ascertain[ing] congressional intent" often requires that courts comprehend the "totality of the circumstances surrounding the statute's enactment."⁹⁵ Courts use the language, structure, background, and history of the statute to determine that intent.⁹⁶ Speaking for a majority of the Court, Justice Stevens stated that when Congress leaves "the matter at large for judicial determination, [the Court's] function is to decide what remedies are appropriate in the light of the statutory language and purpose of the traditional modes by which courts compel performance of legal obligations."⁹⁷

As Lord Blackburn⁹⁸ stated over a century ago:

In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what our intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of the word varies according to the circumstances with respect to which they were used.⁹⁹

Still today, courts must construe statutes "as a whole with reference to the system of which it is a part."¹⁰⁰ Justice Powell advocated something similar when he said that "a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole."¹⁰¹ The Supreme Court has consistently adopted this approach to statutory

95. Cynthia Reed, Note, *Time Limits for Federal Employees under Title III: Jurisdictional Prerequisites or Statutes of Limitation?*, 74 MINN. L. REV. 1371, 1394–95 (1990).

96. See *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091 (7th Cir. 1982) (Posner, J., dissenting) ("[A] court may not create a private right of action unless it has evidence—whether based on the language, structure, background, or history of the statute . . .").

97. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 376 (1982).

98. See Editorial, *Lord Blackburn*, 9 HARV. L. REV. 420, 420–21 (1896) (referring to Lord Blackburn as "the greatest English common law judge of recent years").

99. SINGER, *supra* note 87, § 45:05 (citing *River Wear Comm'rs v. Adamson, LR.*, 2 AC 743 (1877)).

100. *Id.* § 45:05.

101. *Califano v. Wescott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring); see *id.* (asserting that the Court should not "frustrate the clear intent of Congress"); see also *Welsh v. United States*, 398 U.S. 333, 365–66 n.18 (1970) (stating that one must necessarily "consider the degree of potential disruption of the statutory scheme" in choosing between two remedial alternatives). Both *Califano* and *Welsh* dealt with the constitutionality, as opposed to the enforceability, of statutory provisions. As general rules of statutory construction, however, these principles assertedly apply to facially unenforceable statutes such as Section 10(a) of RESPA as well.

construction.¹⁰² Courts look to the statutory language and policy, the legislative scheme, the legislative history, and "concepts of reasonableness" in interpreting a statute.¹⁰³ They also "consider the history of the subject matter involved" and the underlying purposes of the statute.¹⁰⁴

4. Equity of the Statute

Courts may also apply the lesser-known "equity of the statute" doctrine¹⁰⁵ which is also known as the doctrine of "equitable construction."¹⁰⁶ This doctrine asserts that "courts should apply a statute to situations outside its express provisions when doing so is consistent with the equity or spirit of the statute."¹⁰⁷ "Equity," in this context, takes on a different meaning than the traditional definition of the term.¹⁰⁸ Under this equitable construction doctrine, "equity is synonymous with the 'spirit' or guiding 'principle' of the legislation in question."¹⁰⁹

The "equity of the statute" doctrine seems to mimic the no longer viable permissive implication doctrine which supported courts interpreting statutes in

102. See, e.g., *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); see also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

103. SINGER, *supra* note 87, § 45:05 (stating that "[o]ne reviews the policy behind the statute, the legislative scheme of which the statute is a part, the legislative history, and concepts of reasonableness along with the language of the statute in order to determine legislative intent").

104. *Id.* (stating that "courts must consider the history of the subject matter involved, the end to be attained, the mischief to be remedied and the purpose to be accomplished").

105. See SINGER, *supra* note 87, § 45:05 (stating that some court opinions "have sought evidence of intent in the equity of the statute"); Mintz, *infra* note 106, at 308–15 (discussing the "Equity of the Statute" doctrine); *id.* at 308 ("Most U.S. lawyers are unfamiliar with the doctrine of equity of the statute."); see also *Ford Motor Credit Co. v. Cenace*, 452 U.S. 155, 157 (1981) (applying equitable principles to an interpretation of the Truth-in-Lending Act).

106. See Joel A. Mintz, *Can You Reach New Greens If You Swing Old Clubs? Underutilized Principles of Statutory Interpretation and Their Potential Applicability in Environmental Cases*, 7 ENVTL. LAW. 295, 308 (2001) (stating that the equity of the statute doctrine is "sometimes called the doctrine of equitable construction").

107. *Id.*

108. See *id.* ("In this context, the term 'equity' has a meaning distinct from 'basic fairness' between or among the parties and also from what Blackstone referred to as the 'correction of that wherein the law, by reason of its universality, is deficient.'").

109. *Id.*

whatever way was necessary to effectuate congressional purposes.¹¹⁰ The Supreme Court does not apply this equity doctrine in most contexts.¹¹¹ That is not to say that the court has rejected the doctrine completely; for instance, the Court often applies equitable tolling principles to limitations periods under federal statutes.¹¹² Thus, application of the doctrine might yield favorable results in some cases,¹¹³ but the Court has not settled the question of when and where it applies. The doctrine cannot, therefore, definitively answer the question of whether a private right of action exists under Section 10(a). It does, nevertheless, bear consideration when pondering the dispositive question of legislative intent. Applying equitable principles might actually help courts determine Congress's true intent where Congress has not made its intent clear.

B. Supreme Court Jurisprudence: Implying Private Rights of Action

1. The Court's Digression from the Permissive Implication Doctrine of the Past

"When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights."¹¹⁴ The Supreme Court, however, "has long recognized that under certain limited circumstances, the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation."¹¹⁵ Congress, therefore, may express its intent to create a private right of action implicitly.¹¹⁶ Courts

110. See *supra* note 31–32 and accompanying text (showing that the Supreme Court has rejected the permissive implication doctrine that would imply whatever rights necessary to effectuate the purposes of the statute).

111. See Mintz, *supra* note 106, at 313 (indicating that if the Supreme Court had applied the equity of the statute doctrine, which it did not, "the result in the Sea Clammers case might well have been different" (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981))).

112. See, e.g., *Young v. United States*, 535 U.S. 43, 44 (2002) ("Congress is presumed to draft limitations periods in light of the principle that such periods are subject to equitable tolling unless tolling would be inconsistent with statutory text").

113. See Mintz, *supra* note 106, at 313 (noting that "in certain environmental cases" brought under the Clean Water Act or the Marine Protection, Research, and Sanctuaries Act "application of the equity of the statute doctrine might yield a more favorable result to advocates of environmental protection and environmental justice").

114. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374 (1982) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979)).

115. *Id.*

116. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15–18 (1979)

cannot avoid the unenviable task of determining whether Congress intended to create a private right of action under a statute that does not explicitly provide one.¹¹⁷

In 1975, the Supreme Court decided *Cort v. Ash*,¹¹⁸ marking the beginning of the Court's move away from the long-standing permissive implication doctrine under which courts would imply whatever rights or remedies were necessary to effectuate the purposes of a statute.¹¹⁹ In *Cort*, a unanimous Supreme Court applied a four-step inquiry to guide the analysis of implied causes of action.¹²⁰ The Court asserted that "several factors are relevant" to the question of "whether a private remedy is implicit in a statute not expressly creating one."¹²¹ "First, is the plaintiff" a member "of the class for whose . . . benefit" Congress enacted the statute, or, "does the statute create a federal right in favor of the plaintiff?"¹²² "Second, is there any indication of legislative intent, explicit or implicit, either to create" or "deny" an implied right of action in favor of the plaintiff?¹²³ "Third, is it consistent with the underlying purposes

(indicating the intent of Congress to create a private right of action "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment"); see also SINGER, *supra* note 87, § 45:05 ("It should be noted that intent can be expressed by omission as well as by inclusion of language.").

117. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

118. See *Cort v. Ash*, 422 U.S. 66, 80–85 (1975) (holding that Congress did not intend to vest corporate shareholders with a federal right of action for violations under the Federal Election Campaigns Act).

119. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (stating that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916) ("A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute is enacted, the right to recover the damages from the party in default is implied."); see also Robert H.A. Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to Borak*, 79 NW. U. L. REV. 227, 240–70 (1984) (arguing that the Supreme Court should return to the more permissive implication doctrine).

120. See *Cort*, 422 U.S. at 78 (setting forth a four-part framework for implied cause of action analysis); see also John A. Maher, *Implied Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 WASH. & LEE L. REV. 783, 796 (1980) (stating that *Cort* "reflects a great effort to restrain over-enthusiasm in inferring causes of action"); Christopher L. Sagers, Note, *An Implied Cause of Action Under the Real Estate Settlement Procedures Act*, 95 MICH. L. REV. 1381, 1387 (1997) (stating that although these factors purported to merely "distill the Court's existing jurisprudence," they mark a "clear break" from "the more permissive past").

121. *Cort*, 422 U.S. at 78.

122. *Id.*

123. *Id.*

of the legislative scheme" to vest the plaintiff with that right?¹²⁴ Finally, "is the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law?"¹²⁵ Thus, under *Cort*, a private right of action exists where the plaintiff has standing and the legislature intended to give him or her a right, so long as the right is consistent with the underlying purposes of the statute and is not traditionally relegated to state law.

In 1979, the Court held that "the central inquiry is whether Congress intended to create, either expressly or by implication, a private right of action."¹²⁶ Three other Supreme Court decisions in 1979 reaffirmed this understanding.¹²⁷ These cases arguably modified the *Cort* test by focusing the inquiry on legislative intent,¹²⁸ but the Court has never disclaimed the other *Cort* factors. In fact, the Supreme Court has reaffirmed the *Cort* analysis as recently as 2001,¹²⁹ and federal courts continue to apply the *Cort* test today.¹³⁰

124. *Id.*

125. *Id.*

126. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).

127. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89 (1979) (holding that a female who was allegedly denied admission to the medical schools of two private universities on the basis of her sex had an implied private right of action against those universities under Title IX); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 9–21 (1979) (holding that the existence of elaborate expressed causes of action compels the conclusion that Congress did not intend the implication of additional private claims under the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979) (stating that although the Court sometimes emphasizes "the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute," the ultimate determination rests on congressional intent); *id.* at 4–5 (finding a limited private remedy under the Investment Advisers Act of 1940 to void an investment advisers contract, but "no other private causes of action, legal or equitable").

128. *See* Nancy Eisenhauer, Comment, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183, 1195–1203 (1992) (contending that "the Court effectively overruled the use of the *Cort* test in *Transamerica*" by simplifying the inquiry to legislative intent).

129. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (highlighting *Cort v. Ash* as the case in which the Supreme Court "abandoned" the permissive implication doctrine that would imply whatever rights or remedies are necessary to effectuate the purposes of a statute). Westlaw indicates that *Cort v. Ash* has been cited thousands of times and red flags the case as no longer good for at least one point of law. *See* Westlaw, <http://web2.westlaw.com> (search for "422 U.S. 66" under "Find this document by citation"; then follow "Citing References" hyperlink) (last visited Oct. 1, 2007) (on file with the Washington and Lee Law Review). Remarkably, however, despite all the negative treatment it has received, *Cort* has never been overruled and lower courts continue to apply it today. *See infra* note 130 (illustrating the viability of *Cort*).

130. *See, e.g., Birkholm v. Wash. Mut. Bank*, 447 F. Supp. 2d 1158, 1161–63 (W.D.

Clearly, the Supreme Court's willingness to imply private rights of action has decreased.¹³¹ During the last fifteen years, in particular, the Court shied away from implying such rights on several different occasions.¹³² For the most part, lower courts have adopted the same reluctant approach.¹³³

Wash. 2006) (applying the *Cort v. Ash* analysis to determine whether a private right of action exists under Section 10); see also Walsh, *supra* note 21, at § 2(a) (stating that "[i]n deciding the issue" of whether to imply a private right of action under a statute not expressly providing one, "courts generally have applied the 4-part test established by the Supreme Court" in *Cort v. Ash*).

131. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."); *Middlesex*, 453 U.S. at 11–19 (finding that the existence of elaborate expressed rights of action meant that Congress did not intend to imply additional private actions); Maher, *supra* note 120, at 783–86 (highlighting the Court's digression from implying private rights of action under federal statutes). Compare *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (stating that "it is the duty of the courts to be alert to provide such remedies as are necessary" to effectuate remedial purposes of legislation), with *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (stating that the Court had "abandoned [the *Borak*] understanding," under which courts interpreted statutes to effectuate statutory purposes, and now would look no further than legislative intent).

132. See, e.g., *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2136–37 (2006) (finding no private right of action under a provision of the Federal Employees Health Benefit Act of 1959); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287–90 (2002) (concluding that provisions of the Family Educational Rights and Privacy Act that prohibit federal funding of educational institutions with a policy or practice of releasing education records to unauthorized persons create no personal rights to enforce under Section 1983); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001) (holding that no implied private right of action exists for damages against private entities that engage in alleged constitutional deprivations while acting under color of federal law); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280–92 (1998) (finding that no implied private right of action exists for a student to recover monetary damages for sexual harassment from one of the school district's teachers under Title IX unless an official of the district has actual notice of misconduct and remains deliberately indifferent); *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483–88 (1996) (holding that the citizen suit provision of the Resource Conservation and Recovery Act did not authorize a private cause of action to recover the prior cost of cleaning up toxic waste that would not continue to pose danger to health or the environment at the time of the suit); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 190–91 (1994) (refusing to recognize a right of action for aiding and abetting under Section 10(b) of the Securities Exchange Act of 1934); *Suter v. Artist*, 503 U.S. 347, 355–60 (1992) (holding that the Adoption Assistance and Child Welfare Act of 1980, Section 671(a)(15), did not confer on its beneficiaries a private right enforceable in a Section 1983 action). But see *Morse v. Republican Party of Va.*, 517 U.S. 186, 231–35 (1996) (finding that an implied private right of action exists to enforce a section of the Voting Rights Act that prohibited poll taxes).

133. See, e.g., *Labickas v. Ark. State Univ.*, 78 F.3d 333, 334 (8th Cir. 1996) (noting that the "critical inquiry . . . is whether Congress intended to create a private right of action"); *Coosewon v. Meridian Oil*, 25 F.3d 920, 929 (10th Cir. 1994) ("Absent an express grant of a private cause of action, a mere proscription of behavior does not justify an inference of a private cause of action for its violation; instead, there must be some evidence that Congress intended one.").

2. *The Permissibility of Implying a Private Right of Action Under Limited Circumstances*

Although the Court prefers not to imply private rights of action,¹³⁴ it has not ruled out implying private rights of action absolutely. "Most cases" or even "the great majority of cases," does not encompass all cases. Private rights of action, therefore, exist by implication in a limited number of cases. Accordingly, the Supreme Court and other federal courts sometimes imply private rights of action under federal statutes.¹³⁵

Some might insist that cases under different statutes offer little help.¹³⁶ This Note's position, nevertheless, draws significant support from the Supreme Court's 1982 decision, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*,¹³⁷ in which the Court held that an implied private right of action existed under the Commodity Exchange Act (CEA).¹³⁸ The Supreme Court has never overruled this holding and Congress has, in fact, subsequently amended the CEA now to include an express private cause of action.¹³⁹ The plaintiffs in

134. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."); *see also Alexander v. Sandoval*, 532 U.S. 275, 285–87, 293 (2001) (determining that a private right of action to enforce Section 601 of Title VI of the Civil Rights Act of 1964, prohibiting intentional discrimination in covered programs and activities, did not include a private right of action to enforce disparate-impact regulations promulgated under Title VI).

135. *See, e.g., Morse v. Republican Party of Va.*, 517 U.S. 186, 231–35 (1996) (finding that an implied private right of action exists to enforce a section of the Voting Rights Act that prohibited poll taxes); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 388 (1982) (locating an implied private right of action under the Commodity Exchange Act); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89 (1979) (establishing an implied private right of action under Title IX of the Education Amendments); *see also Rolland v. Romney*, 318 F.3d 42, 52 (1st Cir. 2003) (finding that the Nursing Home Reform Amendments to the Medicaid law contained sufficient "rights-creating" language to imply a private right of action, in contrast to *Alexander v. Sandoval*, in which the Supreme Court did not find such language); *J.L., K.P. v. Soc. Sec. Admin.*, 971 F.2d 260, 269–72 (9th Cir. 1992) (holding that a private right of action against the federal government existed under the Rehabilitation Act where "the government's action . . . discriminate[d] on the basis of handicap").

136. *See Allison v. Liberty Sav.* 695 F.2d 1086, 1092 (7th Cir. 1982) (Posner, J., dissenting) ("We can get little help from cases under different statutes.")

137. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

138. *Id.* at 373–95; *see also* 7 U.S.C. §§ 1–27f (2000) (providing the Commodity Exchange Act).

139. *See* 7 U.S.C. § 25 (2000) (providing an express private cause of action for violations of the CEA). Congress has yet to provide an express private right of action under Section 10(a). This makes little difference. The Supreme Court in *Curran* held that an implied private right of action existed under the CEA before Congress finally got around to providing an express private cause of action. The fact that Congress has not amended Section 10(a) to provide an express

Curran brought an action against their futures commission broker to recover for alleged fraud, deceptive practices, price manipulation, and failure to enforce exchange rules.¹⁴⁰ Likewise, plaintiffs that seek recourse for violations of Section 10(a) allege deceptive practices, overcharging of escrow accounts, and failure to comply with RESPA's statutory provisions.

The CEA had "been aptly characterized as 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.'"¹⁴¹ RESPA has been characterized in remarkably similar terms.¹⁴² Moreover, the Court found that an implied private right of action existed under the CEA despite the fact that its amendments created the Commodity Futures Trading Commission to enforce its provisions.¹⁴³ Similarly, RESPA's amendments provide administrative enforcement over subsection (c) of Section 10.¹⁴⁴ The Supreme Court held that futures traders who could prove injury from CEA violations had an implied private right of action to redress those injuries.¹⁴⁵ Arguably, mortgage borrowers that can prove injury from violations of Section 10(a) of RESPA have an implied private right of action as well.

The Court stated that the "key" to its decision in *Curran* was the Court's "understanding of the intent of Congress in 1974 when it comprehensively re-examined and strengthened the federal regulation of futures trading."¹⁴⁶ The Court found that an implied cause of action under the CEA was clearly a part of the "contemporary legal context" in which Congress undertook a comprehensive reexamination and amendment of the CEA in 1974.¹⁴⁷ Since its inception, federal courts had "routinely and consistently recognized" an implied

private right of action does not necessarily imply that Congress did not intend to create an implied private right of action under this provision.

140. See *Curran*, 456 U.S. at 367-73 (presenting the facts and procedural history of the case).

141. *Id.* at 355-56.

142. See Robertson, *supra* note 42, at 273 (stating that RESPA has "transformed from a seemingly benign consumer protection statute to an extensive piece of legislation that regulates virtually all residential mortgage transactions from the time of the loan application through the life of the loan").

143. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 365-67 (1982) (discussing the creation of the Commodity Futures Trading Commission).

144. See 12 U.S.C. § 2609(d) (providing that the Secretary of HUD shall assess penalties for violations of subsection (c) of Section 10).

145. See *Curran*, 456 U.S. at 394 (stating that "persons who are participants in a conspiracy to manipulate the market in violation" of their statutory duties are "subject to suit by futures traders who can prove injury from [those] violations").

146. *Id.* at 378.

147. *Id.* at 381 ("[I]t is abundantly clear that an implied cause of action under the CEA was part of the 'contemporary legal context' in which Congress legislated in 1974.").

private right of action under the CEA.¹⁴⁸ The fact that subsequent amendments left intact the provisions under which the federal courts had implied a cause of action was itself evidence that Congress affirmatively intended to preserve that remedy.¹⁴⁹

At first glance, this argument seems inapplicable to Section 10(a). Federal courts, of course, could not have found an implied private right of action under RESPA prior to its enactment, and federal courts did not "routinely and consistently" find a private right of action under RESPA before its amendments in 1990.¹⁵⁰ This does not matter, however, because Congress both amended the CEA and enacted RESPA in its original form in 1974.¹⁵¹ Congress did not further amend the CEA to include an express private right of action until after *Curran* was decided, several years after RESPA's enactment.¹⁵² When Congress enacted RESPA in 1974,¹⁵³ it arguably relied on the fact that federal courts "routinely and consistently recognized" implied private rights of action under the remarkably similar CEA. RESPA attacks deceptive practices in the mortgage and banking industry, just as the CEA attacks deceptive practices in the futures trading industry. Congress might very well have assumed that courts would find an implied private right of action under Section 10 of RESPA, just as they had done "routinely and consistently" under the CEA.¹⁵⁴ Therefore, Congress in 1974 arguably assumed that the creation of the right under Section 10 was enough to confer a private right of action. The Sixth Circuit, which was the first circuit court of appeals to address the issue of whether a private right of action exists under Section 10—now Section 10(a)—apparently found this reasoning compelling.¹⁵⁵ It concluded without analysis

148. *Id.* at 379.

149. *See id.* at 381–82 ("[T]he fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.").

150. *See* cases cited *infra* note 159 (citing cases that decided both for and against implying a private right of action under Section 10 prior to 1990).

151. *See* Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (creating RESPA in its original form); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (amending the CEA by creating the Commodity Futures Trading Commission).

152. Futures Trading Act of 1982, Pub. L. No. 97-444, § 235, 96 Stat. 2294 (1983) (amending the CEA by adding a private right of action).

153. *See supra* notes 36–41 and accompanying text (detailing RESPA's enactment).

154. *See* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982) (noting that federal courts "routinely and consistently had recognized an implied private cause of action" under the CEA).

155. *See* *Vega v. First Fed. Sav. & Loan Ass'n of Detroit*, 622 F.2d 918, 925 n.8 (6th Cir.

that, as a simple matter of fact, an implied private right of action exists under Section 10.¹⁵⁶

This argument does not retroactively apply the permissive implication doctrine that was in force in 1974. The Supreme Court has clearly rejected the idea that courts should use whatever doctrine of implication was in force at the time of the statute's enactment.¹⁵⁷ Instead, this argument accepts that the intent of the legislature at the time of the statute's enactment controls implied rights of action questions. In other words, courts can no longer interpret a statute in whatever way is necessary to effectuate the purposes of the statute, but in order to determine what an ambiguous statute means, they must look for evidence of legislative intent at the time of the statute's enactment. The circumstances at the time of RESPA's enactment assist in determining this congressional intent.

The 1990 amendments to Section 10 of RESPA merely confirm that Congress intended to confer the same protections as Congress did in 1974.¹⁵⁸ When Congress amended Section 10, it arguably assumed that it could leave the original language, now designated as Section 10(a), alone and that an implied private right of action would remain unaffected. Although some federal courts between 1974 and 1990 decided both for and against finding an implied private right of action under Section 10,¹⁵⁹ Congress did not expressly address the issue. To this day, Congress has never expressly created or denied a private right of action under Section 10(a). When Congress amended RESPA in 1990 it merely added additional protective provisions (b) through (d), and an express administrative remedy for violations of subsection (c).¹⁶⁰

The fact that Congress did not expressly provide administrative enforcement for subsection (a) of Section 10 clearly indicates Congress's intent to leave it alone. Congress arguably intended the language now designated as subsection (a) of Section 10 to have the same meaning it had in 1974 when RESPA was originally enacted. If it wanted to change the understanding that

1980) (stating that an implied private right of action exists under Section 10).

156. *Id.*

157. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (denying a private right of action that would have been inferred at the time that the statute—the Civil Rights Act of 1964—was passed).

158. *See supra* note 20 (stating that the 1990 amendments designated the original language of Section 10 as Section 10(a)).

159. *Compare Vega*, 622 F.2d at 925 n.8 (concluding that Congress did intend to create a private right of action for Section 10 violations), *with Allison v. Liberty Sav.*, 695 F.2d 1086, 1091 (7th Cir. 1982) (holding in opposition to *Vega* that Congress did not intend to create a private right of action under Section 10).

160. *See supra* note 20 and accompanying text (addressing the fact that no express remedy exists for violations of Section 10(a)).

an implied right of action exists to enforce violations of the escrow account limitations under subsection (a), or even to clarify the meaning of Section 10(a), it "knew how to do so."¹⁶¹ Courts should assume, therefore, that Congress meant subsection (a) of Section 10, which is identical to the original Section 10 Congress enacted in 1974,¹⁶² to retain its original meaning. By saying nothing, the Congress of 1990 adopted the intent of the Congress of 1974.

C. *The Obligation of Courts to Save and Not To Destroy*

The obligation of courts to save and not to destroy statutory text underlies the entire analysis. The Supreme Court has stated: "[I]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."¹⁶³ This principle permeates the entire field of statutory construction. The Court "loath[es]" interpreting any statute in a way that would render any part of it superfluous.¹⁶⁴ The Court instead maintains that its obligation is to "construe . . . statute[s] to give every word some operative effect."¹⁶⁵ Justice Harlan observed that this "general principle . . . is meant to guide the courts in furthering the intent of the legislature, not overriding it."¹⁶⁶ The Court eloquently declared: "The cardinal principle of statutory construction is to save and not to destroy."¹⁶⁷ Courts must "give effect, if

161. See *Allison*, 695 F.2d at 1088 (asserting that if Congress wishes "to provide a private damage remedy," it knows how to do so). Just as Congress knows how to create an express right of action under a statute, it knows how to expressly forbid an implied right of action under a statute. Congress has neither explicitly created nor denied a private right of action under Section 10(a).

162. See *supra* note 20 (stating that in 1990 Congress designated the original text of Section 10 as subsection (a)).

163. *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (reaffirming the "cardinal principle of statutory construction" to construe statutes so as not to render any part of them "superfluous"); see also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous."); *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting.").

164. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

165. *Id.* at 167.

166. *United States v. Zacks*, 375 U.S. 59, 69 (1963) (expounding on the "duty" of the Court "to give effect to all portions of a statute if that is possible").

167. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (stating that the Court has "repeatedly held that as between two possible interpretations of a statute, . . . our plain duty

possible, to every clause and word of a statute,"¹⁶⁸ rather than to cripple "an entire section."¹⁶⁹ Courts, of course, cannot escape this obligation when interpreting Section 10(a).

IV. Specific Application to Section 10(a)

When deciding the issue of whether a statute implies a private right of action where it does not expressly provide one, federal courts typically apply the four-part test that the Court established in *Cort v. Ash*.¹⁷⁰ As the foregoing discussion indicates, however, the Supreme Court now emphasizes legislative intent above the other factors,¹⁷¹ and consistently utilizes other applicable tools of construction to help with the determination of that intent.¹⁷² Importantly, the *Cort* analysis cannot definitively resolve the issue alone. Discerning legislative intent also requires reference to the "totality of the circumstances" and the "equity of the statute" theories of construction.¹⁷³

is to adopt that which will save the act"). Although this case involved interpreting a statute so as to preserve its constitutionality, this saving principle is generally applicable to all statutory interpretations. See, e.g., *infra* notes 168–69 (citing cases that applied the saving principle to statutory construction).

168. *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

169. See *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (refusing to adopt a statutory interpretation that would require the Court "to emasculate an entire section" of the statute).

170. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (establishing a four-pronged framework for the determination of whether a statute implies a private right of action where it does not expressly provide one); Walsh, *supra* note 21, at § 2(a) (stating that "[i]n deciding the issue" of whether to imply a private right of action under a statute not expressly providing one, "courts generally have applied the 4-part test established by the Supreme Court" in *Cort v. Ash*).

171. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15–16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted.").

172. See *supra* notes 63–68 and accompanying text (discussing general approaches to statutory construction).

173. See *supra* notes 114–33 and accompanying text (discussing the current standard for implying a private right of action); see also *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091 (1982) (Posner, J., dissenting) ("[A] court may not create a private right of action unless it has evidence—whether based on the language, structure, background, or history of the statute—that Congress . . . would have [intended] the statute to be privately enforceable.").

A. *Cases Deciding Whether a Private Right of Action Exists Under Section 10 Generally*

The issue of statutory silence makes the argument that a private right of action exists under Section 10(a) challenging but plausible.¹⁷⁴ Neither Congress nor the Supreme Court has definitively resolved Section 10(a)'s silence. Consequently, the circuits are split over whether a private right of action exists under Section 10.¹⁷⁵ The Eleventh, Fourth, Fifth, and Seventh Circuit Courts of Appeals have held that no private right of action exists for Section 10 violations generally.¹⁷⁶ The Sixth Circuit and at least two federal district courts from the Second and Third Circuits have held the opposite.¹⁷⁷

1. *Cases Deciding For Implying a Private Right of Action*

The strongest support for implying a private right of action under Section 10(a) comes from Judge Posner's¹⁷⁸ compelling dissent in a 1982 Seventh

174. See *Redington*, 442 U.S. at 571 (stating that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best"); see also *supra* notes 63–135 and accompanying text (discussing approaches to statutory interpretation, focusing particularly on implying private rights of action).

175. See *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359–60 (11th Cir. 2006) (holding that no private right of action exists for violations of Section 10); *Clayton v. Raleigh Fed. Sav. Bank*, 107 F.3d 865, 1997 WL 82624, at *1 (4th Cir. 1997) (same); *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301–02 (5th Cir. 1995) (holding that Congress did not intend to create a private right of action under Section 10); *Allison*, 695 F.2d at 1091 (7th Cir. 1982) (holding that no implied private cause of action exists under Section 10); see also *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995) (referring to the circuit split regarding Section 10). *Contra Vega v. First Fed. Sav. & Loan Ass'n of Detroit*, 622 F.2d 918, 925 n.8 (6th Cir. 1980) (concluding that Congress did intend to create a private right of action for Section 10 violations). Notably, Congress did not resolve this split when it amended RESPA in 1990. See *supra* note 20 (citing the 1990 amendments to Section 10).

176. See *supra* note 21 and accompanying text (citing the Eleventh, Fourth, Fifth, and Seventh Circuit opinions, along with several federal district court opinions, holding that no private right of action exists under Section 10); see also *supra* note 175 and accompanying text (discussing the circuit split on the issue).

177. See *Vega v. First Fed. Sav. & Loan Ass'n of Detroit*, 622 F.2d 918, 925 n.8 (6th Cir. 1980) (stating that a private right of action exists under Section 10); see also *Heller v. First Town Mortgage Corp.*, No. 97 Civ. 8575, 1998 WL 614197 at *2–4 (S.D.N.Y. Sept. 14, 1998) (ruling that Section 10 affords consumers a private right of action); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 620 (E.D. Pa. 1994) (holding that Section 10 allows for federal question jurisdiction). *But see McAnaney v. Astoria Fin. Corp.*, 357 F. Supp. 2d 578, 591 (E.D.N.Y. 2005) (disagreeing with *Heller*).

178. See Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981-1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 Mo. L. REV. 73, 74 (2004) (referring to Judge Posner as "a leading influence on American

Circuit opinion,¹⁷⁹ in which a three-to-two panel held that no private right of action exists under Section 10.¹⁸⁰ Judge Posner persuasively argued in his dissent that Congress intended to create a private right of action under Section 10.¹⁸¹ He criticized the panel for "[setting] forth an approach, potentially of general application, to deciding when federal statutes may be enforced by private damage actions and [for creating] a conflict with another circuit."¹⁸² Focusing on the intent of the legislature, Judge Posner insisted that "Congress, had it thought about the matter, would have wanted suits for restitution of money withheld in violation of [S]ection 10 to be maintainable in federal courts."¹⁸³ Other federal district courts have followed Posner's reasoning to find that a private right of action exists under Section 10.¹⁸⁴

Judge Posner would have followed the 1980 Sixth Circuit opinion which concluded, without analysis or discussion, that RESPA's legislative history indicated that Congress intended to create a private right of action under Section 10.¹⁸⁵ The Sixth Circuit apparently relied on an inference that the legislative history supported the existence of a private right of action under Section 10, because RESPA's legislative history does not address the issue of a private remedy specifically.¹⁸⁶ Later courts have, for this reason, criticized the Sixth Circuit's cursory and conclusory analysis of the issue.¹⁸⁷ These later courts apparently did not consider the fact that the Sixth Circuit could have

legal opinion").

179. *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091-93 (7th Cir. 1982) (Posner, J., dissenting).

180. *See id.* at 1091 (majority opinion) (holding that Section 10 creates no private right of action for borrowers).

181. *See id.* at 1091-93 (Posner, J., dissenting) (arguing that Congress did intend to create a private right of action for borrowers under Section 10).

182. *Id.*

183. *Id.* at 1093.

184. *See Heller v. First Town Mortgage Corp.*, No. 97 Civ. 8575, 1998 WL 614197, at *2-4 (S.D.N.Y. 1998) (ruling that Section 10 affords consumers a private right of action for redress of violations); *id.* at *4 (concluding that "despite the considerable case law to the contrary . . . a private right of action exists under Section 10"); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 620 (E.D. Pa. 1994) (holding that enough doubt exists as to whether Section 10 creates a private cause of action to allow for federal question jurisdiction).

185. *See Vega v. First Fed. Sav. & Loan Ass'n of Detroit*, 622 F.2d 918, 925 n.8 (6th Cir. 1980) (concluding that RESPA does create a private cause of action for violations of Section 10).

186. *See Allison v. Liberty Sav.*, 695 F.2d 1086, 1089 (7th Cir. 1982) ("The parties' briefs, the district court's opinion and our own research disclose no legislative history on the issue of private remedies under [Section] 10.").

187. *See, e.g., id.* at 1091 (criticizing the Sixth Circuit's 1980 decision in *Vega*).

been relying on RESPA's similarity to the CEA, a statute under which courts had routinely and consistently implied a private right of action.¹⁸⁸

2. Cases Deciding Against Implying a Private Right of Action

Most federal courts today find that RESPA leaves enforcement of Section 10 completely up to the Secretary of Housing and Urban Development (HUD),¹⁸⁹ leaving borrowers with no private remedy and essentially no recourse. RESPA, however, does not provide such express administrative remedies for violations of Section 10(a).¹⁹⁰ Even if it did, HUD would only be able to provide general protection to consumers.¹⁹¹ By penalizing predatory lenders, the Secretary can arguably deter RESPA violations and thereby protect the general public, but the Secretary can offer no specific remedy to individual consumers. Notably, state attorneys general can also provide general protection by filing lawsuits against lenders that violate Section 10(a) on behalf of the state and for the public good, but they too cannot represent individuals.¹⁹²

Despite competing considerations, the Eleventh Circuit, in 2006, held that no private right of action exists under Section 10, relying wholly on the fact that the Secretary of HUD is authorized to assess penalties against lenders that

188. See *supra* notes 150–56 and accompanying text (asserting that the Sixth Circuit apparently reasoned that Congress in 1974 assumed that the creation of the right under Section 10—now Section 10(a)—was enough to confer a private right of action (citing *Vega*, 622 F.2d at 925 n.8)).

189. See, e.g., *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359–60 (11th Cir. 2006) (arguing that Congress did not intend to create a private right of action under Section 10 and that RESPA authorizes the Secretary of HUD alone to assess penalties for Section 10 violations).

190. See 12 U.S.C. § 2609(d) (2000) (authorizing the Secretary of HUD to assess penalties for violations of subsection (c), but not subsections (a) or (b)).

191. See *id.* § 2617(a) (giving the Secretary of HUD rule making and interpretive powers, but no specific enforcement powers); see also *infra* note 283 and accompanying text (illustrating that HUD enforcement provides some general but no individual protection).

192. See, e.g., *Georgia v. Pa. R.R.*, 324 U.S. 439, 447 (1945) (stating that a state, suing as *parens patriae*, may assert the rights of its citizens based on federal laws); 72 AM. JUR. 2d *States, Territories, and Dependencies* § 90 (2007) ("A state in its sovereign capacity may, in a proper case, maintain a suit in behalf of its citizens for the protection of their rights."); Romualdo P. Eclavea, Annotation, *State's Standing to Sue on Behalf of its Citizens*, 42 A.L.R. FED. 23, § 3 (1979) ("It is settled that a state may in a proper case maintain, as *parens patriae*, a suit on behalf of its citizens for the protection of their rights."). This sort of general protection may deter lenders from overcharging their borrowers' escrow accounts in the future, but it provides no recourse to individual borrowers who have suffered injury as a result of Section 10(a) violations.

fail to comply with subsection (c) of Section 10.¹⁹³ The court noted that "Congress unambiguously designated authority to the Secretary to enact disclosure regulations" under Section 10.¹⁹⁴ The court failed to address the fact that Congress only expressly designated authority to the Secretary to enforce the statement requirements under subsection (c). Instead, it made the overly broad statement that "RESPA explicitly states that the Secretary of HUD enforces violations of [Section] 10."¹⁹⁵ The Eleventh Circuit's holding followed the earlier decisions of the Fifth and Seventh Circuits, each of which purported to apply the *Cort*¹⁹⁶ test.¹⁹⁷ Each of these circuit courts of appeals, however, effectively stopped its analysis after consideration of legislative intent because it felt "comfortable" concluding that Congress did not intend a private right of action under Section 10.¹⁹⁸

Also in 2006, the United States District Court for the Western District of Washington, applying the *Cort* test, concluded similarly that no private right of action exists under Section 10.¹⁹⁹ Notably, the plaintiffs in that case alleged a violation of subsection (b) of Section 10, for which no express remedy exists, but the court, similar to the Eleventh Circuit, did not address subsection (b) specifically.²⁰⁰ Despite the fact that HUD does not have express authority to enforce subsections (a) and (b) of Section 10, the court assumed that HUD has authority to enforce these subsections.²⁰¹ The court also found that Congress must not have intended to create a private right of action under Section 10 because it provided private rights of action expressly

193. See *Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006) ("Under [Section] 10, no private right of action exists because 'the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty'" (quoting Section 10(d) of RESPA)).

194. *Id.* at 1360 n.1.

195. *Id.* at 1360.

196. *Cort v. Ash*, 422 U.S. 66 (1975).

197. See *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301 (5th Cir. 1995) (concluding that Congress did not intend to create a private right of action under Section 10); *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091 (7th Cir. 1982) (same); see also *Clayton v. Fed. Sav. Bank*, 107 F.3d 865, 1997 WL 82624, at *1 (4th Cir. 1997) (affirming, without opinion, a district court holding that no private right of action exists under Section 10).

198. See, e.g., *Litton*, 50 F.3d at 1301–02 ("We are comfortable in deciding for this circuit that there is no private right of action under Section 10 of RESPA.").

199. See *Birkholm v. Wash. Mut. Bank*, 447 F. Supp. 2d 1158, 1161–63 (W.D. Wash. 2006) (holding that no private right of action exists under Section 10).

200. *Id.*

201. *Id.*

under Sections 6, 8, and 9 of RESPA.²⁰² Other lower courts have followed this same line of reasoning.²⁰³

B. Why Courts Should Imply a Private Right of Action Under Section 10(a)

Instead of looking at all four *Cort* factors when deciding whether a private right of action exists under Section 10, many federal courts have stopped their analyses with the factor of legislative intent.²⁰⁴ By insisting that legislative intent is clear, courts avoid creating a judicially implied private right of action and, perhaps, usurping the role of the legislature. The Supreme Court has emphasized, however, that "there is no merit to the argument . . . that the judicial recognition of an implied private remedy violates the separation of powers doctrine."²⁰⁵ Courts cannot avoid their duty to say what the law is²⁰⁶ by punting issues back to a legislature that may never expressly address them.

The Supreme Court expressly set up a four-step inquiry to guide the analysis of implied rights of action questions and has never back-tracked.²⁰⁷ Where Congress clearly indicates its intent, the Court's inquiry ends without consideration of the remaining *Cort* factors.²⁰⁸ Congress has not clearly indicated its intent regarding private rights of action under Section 10(a). Analysis of Section 10(a), therefore, cannot end without reference to the other three *Cort* factors. These factors weigh strongly in favor of implying a private right of action under Section 10(a). The following discussion demonstrates that

202. *Id.*

203. *See, e.g.,* *McAnaney v. Astoria Fin. Corp.*, 357 F. Supp. 2d 578, 591 (E.D.N.Y. 2005) (finding that no private right of action exists under Section 10).

204. *See, e.g.,* *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301 (5th Cir. 1995) ("[O]nce we have concluded that Congress did not intend to create a private remedy, our inquiry is at an end.>").

205. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 375–76 (1982); *see also* *Montana-Dakota Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 261–62 (1951) (Frankfurter, J., dissenting) ("Courts . . . are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations.").

206. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

207. *See supra* notes 118–25 and accompanying text (detailing the four-part *Cort* test).

208. *See, e.g.,* *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) ("The dispositive question remains whether Congress intended to create [a private right of action]. Having answered that question in the negative, our inquiry is at an end."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979) (stating that the inquiry ends where the "question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitively answered in the negative").

victims of Section 10(a) violations are clearly "members of the class for whose especial benefit the statute was enacted," that Congress intended to create a private right of action, that a private right of action would obviously "be consistent with the underlying purposes of the legislative scheme," and that the "cause of action is [not] one traditionally relegated to state law."²⁰⁹

1. Members of the Class for Whose Special Benefit the Statute was Enacted

For most of the last century, the Supreme Court followed the principle that "a disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute is enacted, the right to recover the damages from the party in default is implied."²¹⁰ Though previously dispositive, this factor, which is merely relevant today, clearly weighs in favor of implying a private right of action under Section 10(a). Victims of Section 10(a) violations unquestionably fit the mold of "members of the class for whose especial benefit the statute was enacted."²¹¹ Congress specifically designed RESPA to protect mortgage consumers and stifle predatory mortgage lending.²¹² Section 10(a), in particular, targets lenders' abuse of escrow accounts.²¹³ Congress enacted this provision for the very purpose of protecting victims from that harm.²¹⁴ Mortgage borrowers that fall victim to violations of Section 10(a) are, therefore, "members of the class for whose especial benefit the statute was enacted."²¹⁵

2. Explicit and Implicit Indications of Congressional Intent

Two factors admittedly weigh against the argument that Congress intended to create a private right of action under Section 10(a). First, RESPA does not expressly create a private remedy for violations of Section 10,²¹⁶ but it does

209. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth the four-part framework for implied cause of action analysis); see also *supra* notes 118–25 and accompanying text (detailing the four-part *Cort* test).

210. *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916).

211. *Cort*, 422 U.S. at 78; see also *supra* note 122 and accompanying text (providing the first prong of the *Cort* test).

212. See *supra* notes 36–38 and accompanying text (discussing RESPA's purposes).

213. See *supra* notes 39–41 and accompanying text (discussing Section 10(a)'s purposes).

214. See *supra* notes 39–41 and accompanying text (discussing Section 10(a)'s purposes).

215. *Cort v. Ash*, 422 U.S. 66, 78 (1975); see also discussion *supra* note 209.

216. See 12 U.S.C. § 2609 (2000) (failing to provide language respecting private

expressly vest borrowers with a private right of action to recover damages for violations of Section 6,²¹⁷ Section 8,²¹⁸ and Section 9²¹⁹ of RESPA.²²⁰ Second, Congress expressly provided administrative enforcement for subsection (c) of Section 10 but has said nothing in regard to enforcement of subsections (a) and (b).²²¹ These factors, of course, do weigh against the implication of a private right of action. Yet they only provide partial evidence of congressional intent. They do not definitively exclude the possibility that Congress intended to create a private right of action under Section 10(a). Sections 6, 8, and 9 of RESPA differ fundamentally from Section 10(a),²²² calling for express statutory authority because these sections provide extraordinary remedies—treble damages, minimum recovery, and attorney’s fees.²²³

Other factors positively evince that Congress intended to create a private right of action under Section 10(a). Arguably, one cannot truly comprehend congressional intent without reference to the statute as a whole and the equity of the statute.²²⁴ To look at RESPA "as a whole" means to look at the statute’s

remedies).

217. *See id.* § 2605 (regulating the servicing of mortgage loans and the administration of escrow accounts); *id.* § 2605(f) (providing putative damages, costs, and attorney’s fees for violations of Section 6).

218. *See id.* § 2607 (prohibiting kickbacks and fee splitting for unearned services); *id.* § 2607(d) (providing treble damages, costs, and attorney’s fees as penalties for violations of Section 8).

219. *See id.* § 2608 (prohibiting sellers from requiring buyers to purchase title insurance from a particular insurer); *id.* § 2608(b) (providing that sellers are liable to buyers for an amount equal to three times all charges made for such title insurance).

220. *See id.* § 2614 (providing jurisdiction to enforce Sections 6, 8, and 9 of RESPA). Notably, there was no need for Congress, in RESPA itself, to confer jurisdiction on the federal courts to enforce Section 10 because Sections 1331 and 1337 of the judicial code, 28 U.S.C. §§ 1331 & 1337, confer jurisdiction over such suits. 28 U.S.C. §§ 1331, 1337 (2000); *see also* Allison v. Liberty Sav., 695 F.2d 1086, 1093 (7th Cir. 1982) (Posner, J., dissenting) ("It is true that Congress did not in RESPA itself confer jurisdiction on the federal courts to enforce Section 10. But there was no need to [do so]."). Section 16 of RESPA, which confers jurisdiction over actions brought under Sections 6, 8, and 9 of RESPA, does not "exclude jurisdiction over suits under Section 10." Allison, 695 F.2d at 1092; *see also* Lake v. First Nationwide Bank, 156 F.R.D. 615, 620 (E.D. Pa. 1994) (holding that Section 10 allows for federal question jurisdiction).

221. *See supra* note 20 and accompanying text (emphasizing that Section 10 says nothing about enforcement of subsection (a)).

222. *See infra* notes 258–60 and accompanying text (distinguishing Section 10(a) from Sections 6, 8, and 9 of RESPA).

223. *See infra* notes 252–71 and accompanying text (rebutting the argument that no private right of action exists under Section 10(a) because three previous sections of RESPA explicitly provide private rights of action).

224. *See supra* notes 95–113 and accompanying text (discussing the totality of the circumstances and equity of the statute approaches to statutory construction).

language, the history of the subject matter involved, the underlying purposes of the statute, and its legislative history.²²⁵ It also means that "courts should attempt to accommodate . . . the policies and judgments expressed in the statutory scheme as a whole."²²⁶ The fact that the legislative history says virtually nothing about a private right of action under Section 10 means little. The statute itself is clear enough. RESPA's very language states that its purpose is to effectuate "a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance."²²⁷ To accomplish this aim, Section 10(a) specifically outlaws lenders' maintenance of overlarge escrow accounts.²²⁸ A private right of action is arguably the only way to effectively accomplish these aims.

Clearly, the structure and circumstances of RESPA's enactment support implying a private right of action under Section 10(a). Congress enacted RESPA in response "to perceived abuses in the real estate settlement process."²²⁹ The 1970s consumer protection movement successfully persuaded Congress to combat predatory lending.²³⁰ Congress designed Section 10(a), in particular, to attack lenders' overcharging of escrow accounts.²³¹ Without implying a private right of action, however, Section 10(a) becomes practically meaningless.²³² The fact that subsection (d) of Section 10 provides administrative remedies for violations of subsection (c) does nothing to defeat this evil. Nowhere does RESPA provide administrative remedies for violations of subsection (a) of Section 10. In fact, HUD guidelines allow lenders to violate Section 10(a).²³³ RESPA's equity, or spirit, implies that Congress intended to protect mortgage consumers and stifle predatory mortgage lending. With no private remedy, Section 10(a) does neither.

Remarkably, RESPA does not provide a single express remedy for victims whose lenders overcharge their escrow accounts. In fact, the statute makes no

225. See *supra* notes 96–104 and accompanying text (listing factors that are relevant considerations under the totality of the circumstances approach to statutory construction).

226. *Califano v. Wescott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring).

227. 12 U.S.C. § 2601(b) (2000).

228. See *supra* note 41 and accompanying text (describing Section 10(a)'s purposes).

229. 12 U.S.C. § 2601(a).

230. See *supra* note 36 and accompanying text (providing that Congress enacted RESPA as a result of the 1970s consumer protection movement to regulate mortgage lending).

231. See *supra* notes 36–41 and accompanying text (explaining the background and purposes of Section 10(a)).

232. See *infra* notes 286–93 and accompanying text (arguing that Section 10(a) becomes practically superfluous without a private remedy).

233. See *infra* note 274 and accompanying text (noting that HUD's administrative regulations allow lenders to violate Section 10(a)'s escrow account limitation).

mention of any type of enforcement for subsections (a) and (b)²³⁴ and says nothing about private enforcement of subsection (c).²³⁵ "The natural remedy," for overcharging a borrower's escrow account, however, is "a suit by the borrower to get the excess deposit returned to him."²³⁶ The legal "duty declared by Congress" on lenders not to overcharge their borrowers' escrow accounts should not vanish just because Congress has not provided an express remedy.²³⁷ It seems highly unlikely that Congress would have wanted mortgage lenders to rob their borrowers, invest the illegally procured funds, and keep the proceeds, in violation of the statute.²³⁸ Furthermore, when lenders effectively steal their borrowers' money in violation of Section 10(a), invest the money for high rates of interest, and keep the gains, they are clearly guilty of unjust enrichment.²³⁹ "You may not steal a man's pregnant cow and after it has given birth return the cow and keep the calf."²⁴⁰ Congress could not have expected that lenders would be free to do the very thing it proscribed and keep their ill gotten gain.²⁴¹ It should make little difference that Congress did not expressly create a private right of action. Congress has not expressly denied one, and when legislative intent is unclear courts should probably err on the side of protecting the class for whose special benefit Congress enacted the statute. In short, no express provision for a private right of action and no alternative remedy exist to protect the pecuniary rights of borrowers under Section 10(a). These two factors overwhelmingly support the inference that Congress, had it chosen to specifically address the matter, would have wanted an express private right of action under Section 10(a) to be cognizable in federal courts.²⁴²

234. See 12 U.S.C. § 2609(d) (2000) (providing no guidance regarding enforcement for subsections (a) and (b)); see also 24 C.F.R. § 3500.17(m), (n) (2006) (detailing enforcement regulations for subsection (c) but remaining silent regarding enforcement of subsections (a) and (b)).

235. See 12 U.S.C. § 2609(d) (remaining silent regarding private enforcement).

236. *Allison v. Liberty Sav.*, 695 F.2d 1086, 1092 (7th Cir. 1982) (Posner, J., dissenting).

237. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 376 (1982) ("A duty declared by Congress does not evaporate for want of a formulated sanction.").

238. See *Allison*, 695 F.2d at 1092 (Posner, J., dissenting) ("Congress could not have wanted the lender to be able to retain the excess deposit in violation of the statute.").

239. See, e.g., *Williams v. Nat'l Hous. Exch., Inc.*, 949 F. Supp. 650, 652 (N.D. Ill. 1996) (stating that a claim for unjust enrichment lies under Illinois law whenever "the defendant has unjustly retained a benefit to the plaintiff's detriment, and . . . the defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.").

240. *Id.*

241. See *id.* ("No more should the defendant in this case be allowed to keep the increase in its wealth from investing the plaintiff's money.").

242. See *id.* at 1093 ("[T]he nature of the right created, a pecuniary right of borrowers, coupled with the absence of express provision of any alternative remedy to damages for the

Congress could not have intended Section 10(a) to have no practical effect. This invites the question: Why has Congress not stepped in to clarify the statute and expressly provide a cause of action given the problem of predatory lending? Perhaps the lending industry strongly discourages Congress from getting involved.²⁴³ Even HUD, the agency specifically charged with some enforcement power under RESPA, has unsuccessfully sought clarification from Congress regarding its enforcement power.²⁴⁴ No matter the reason why Congress has not stepped in, lenders that violate Section 10(a) harm consumers in a way that Congress has explicitly forbidden²⁴⁵ and the resulting damage is national in scope.²⁴⁶ Chief Justice Marshall's words must still have some force:

enforcement of that right, supports an inference that Congress . . . would have wanted suits for restitution money withheld in violation of [S]ection 10.".)

243. See Myers, *supra* note 13, at 1 (quoting one consumer advocate as saying that "bankers . . . really put on a full-court press" to oppose consumer protection legislation that would require them to pay borrowers over five percent interest on escrow accounts).

244. See *id.* (quoting Frank Keating, HUD's former chief lawyer as saying: "We've asked Congress to resolve . . . conflict[s] [between HUD regulations and RESPA], and we've asked Congress to give us power to enforce the two-month cushion rule [under Section 10(a)]. So far we've gotten neither."). To this day, Congress has not given HUD specific enforcement power over Section 10(a), despite the popular notion that HUD alone can enforce Section 10(a).

245. See Sagers, *supra* note 120, at 1383 (clarifying that "banks that violate [S]ection 10 engage in a practice harmful to consumers that Congress has determined should be unlawful"); *id.* (specifying that "escrow accounts nationwide now represent a huge store of mortgage consumers' funds"); see also Pillsbury *supra* note 19, at 517 n.7 (noting that in 1973 the General Accounting Office estimated that homeowners lost \$235,000,000 annually in possible interest income to escrow accounts). Sagers argues that "an action should be implied under [S]ection 10 because RESPA was enacted at a time when Congress relied on a more permissive judicial implication doctrine." See Sagers, *supra* note 120, at 1384–85 (summarizing the Note's arguments). He concedes that "if RESPA were enacted in its present form today, a claim for an implied cause of action would probably fail." *Id.*; see also *id.* at 1385 n.19 (explaining that "it is unlikely that, if [S]ection 10 were enacted today, courts would recognize a private action"). The Supreme Court has since rejected the kind of reasoning Sagers used. See *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (denying a private right of action that would have been inferred at the time that the statute—the Civil Rights Act of 1964—was passed). This Note, in contrast, asserts that even under current standards of statutory interpretation, the courts should imply a private right of action under Section 10(a).

246. See Sagers, *supra* note 120, at 1383 (demonstrating that the manipulation of mortgage consumers' funds "can result in harms of national scope"); S. REP. NO. 93-866, at 13 (1974) (reporting that high settlement charges depress the housing market "by making it impossible for moderate income families to afford to purchase a home"); see also Leo Grebler & Sherman J. Maisel, *Determinants of Residential Construction*, in *IMPACTS OF MONETARY POLICY* 475, 491 (Commission on Money and Credit ed., 1963) (reporting on research findings that "short-run fluctuations in residential building have resulted mainly from changes in financial conditions labeled as ease of borrowing, availability of mortgage funds, or supply of mortgage credit"); KENNETH T. ROSEN, *AFFORDABLE HOUSING* 61, 75–78 (1984) (asserting that weaknesses in the housing industry can result in severe harms to the general economy).

"[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy"²⁴⁷ Courts should not blithely assume that Congress intended to leave borrowers with no recourse and to let predatory lenders go virtually scot-free.

Although the Supreme Court has grown increasingly textualist,²⁴⁸ it has never foreclosed the possibility of judicially implied private rights of action. The Court has never explicitly rejected the intentionalist theory of statutory construction, nor has it refused to look beyond the language of the statute and to the totality of the circumstances surrounding its enactment to determine legislative intent.²⁴⁹ These methods of statutory construction remain viable tools for the interpretation of statutes that are silent or too ambiguous regarding a particular issue to support a plain meaning interpretation. In this case, at least, they point toward implying a private right of action.

3. *Private Right of Action Consistent with Purposes of Statutory Scheme*

Any argument that a private right of action would run counter to RESPA's purposes stretches the imagination. Congress created RESPA—Section 10(a) in particular—to protect consumers and stifle predatory lending.²⁵⁰ If RESPA's purposes alone drove the analysis, an implied private right of action would exist under Section 10(a) without question. Likely no controversy would exist over the matter because implying a private right of action under Section 10(a) can only help effectuate RESPA's purposes whereas denying this right simply cuts against RESPA's purposes. Implying a private right of action under Section 10(a) can help consumers protect themselves from predatory lenders by providing an effective mechanism by which they can seek true recourse for lenders' overcharging of escrow accounts and can deter lenders from overcharging other consumers. Denying borrowers this right can only do the opposite by providing no specific recourse and by allowing predatory lenders, as a consequence, to violate Section 10(a) without the risk of private action.

247. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

248. *See supra* Part III.A.1 (discussing the textualist method of statutory construction).

249. *See supra* Part III.A.2 (discussing the intentionalist method of statutory construction); *supra* Part III.A.3 (discussing the totality of the circumstances method of statutory construction).

250. *See supra* notes 36–41 and accompanying text (detailing the purposes of RESPA and Section 10(a)).

4. *Private Remedy Not Traditionally Relegated to State Law*

A private remedy for violations of Section 10(a) is not traditionally relegated to state law. Plaintiffs generally can, however, turn to state consumer protection statutes for some related protection. For example, they can plead state claims related to misapplication of funds or unfair and deceptive practices.²⁵¹ Thus, state consumer protection statutes provide some protection to mortgage borrowers from predatory lenders. Yet, they do not provide specific recourse for violations of Section 10(a), which is a distinct federal right. They merely soften the blow by providing a related remedy under state law. In other words, state consumer protection statutes may provide consumers with a mechanism by which they can seek damages against their lender for predatory lending practices, but these statutes do not provide consumers with a mechanism by which they can seek damages specifically for their lender's overcharging of escrow accounts.

C. *Addressing Counter-Arguments*

Many federal courts have insisted that no private right of action exists under Section 10(a) because—in contrast to Section 10(a)'s silence—Congress expressly provided private rights of action for violations of Sections 6, 8, and 9 of RESPA.²⁵² Arguments like this depend on the so-called "negative pregnant" rule of statutory construction, which holds that the inclusion of a term in one section of a statute implies its intentional exclusion from another section.²⁵³ Under the negative pregnant rule, "express mention is implied exclusion."²⁵⁴

251. See *supra* note 43 and accompanying text (noting that mortgage consumers can turn to state consumer protection statutes for some redress).

252. See, e.g., *McAnaney v. Astoria Fin. Corp.*, 357 F. Supp. 2d 578, 590 (E.D.N.Y. 2005) (stating that unlike other sections of RESPA, Section 10 says nothing regarding private remedies, indicating that Congress did not intend to create a private right of action under Section 10) (citing *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301 (5th Cir. 1995)); *Bergkamp v. N.Y. Guardian Mortgagee Corp.*, 667 F. Supp. 719, 722–23 (D. Mont. 1987) (stating that borrowers have no private right of action under Section 10 because the statute and legislative history say nothing about a private remedy, whereas the sections immediately preceding Section 10 expressly provide private remedies).

253. See, e.g., *Field v. Mans*, 516 U.S. 59, 59–60 (1995) (rejecting "as unsound" an argument that relied on the negative pregnant rule of statutory construction).

254. Charlene Carres, *Legislative Efforts to Limit State Reproductive Privacy Rights*, 25 FLA. ST. U. L. REV. 273, 296 (1998).

The Supreme Court has often expressly rejected this "*expressio unius est exclusio alterius*" type of reasoning.²⁵⁵ Indeed, *Cort v. Ash* itself rejected this doctrine.²⁵⁶ The fact that a private remedy appears in one section but does not appear in another does not necessarily imply the negative inference. The rule has failed to support such an inference on several different occasions²⁵⁷ and cannot support the inference that no private right of action exists under Section 10(a). Sections 6, 8, and 9 of RESPA provide extraordinary remedies—treble damages, minimum recovery, and attorneys' fees—which always require express statutory authority.²⁵⁸ In sharp contrast to these remedies, "there is nothing extraordinary about the [natural] remedy sought" for Section 10(a) violations.²⁵⁹ Their provision, therefore, does not suggest that Congress did not

255. See, e.g., *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168–69 (2003) ("The canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.") (emphasis added); *United States v. Vonn*, 535 U.S. 55, 65 (2002) (stating that "the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives"); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80–84 (2002) (disallowing use of the interpretive canon *expressio unius est exclusio alterius* to show that the harm-to-others provision in the Americans with Disabilities Act of 1990 excluded the harm-to-self defense); *Field*, 516 U.S. at 67–68 (stating that "where there are multiple contenders remaining . . . the inference from the negative pregnant does not finish the job"); see also *Burns v. United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."). But see *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

256. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 29 (1979) (White, J., dissenting) (noting that *Cort* itself rejected the negative pregnant doctrine).

257. See, e.g., *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80–84 (2002) (stating that the "*expressio unius*" canon "fail[ed] to work" in showing that the "threat-to-others" provision under the Americans with Disabilities Act excluded the "threat-to-self" defense) (emphasis added); *United States v. Vonn*, 535 U.S. 55, 65 (2002) (rejecting use of the negative pregnant rule where it would support a finding that Federal Rule of Criminal Procedure 11(h) implied that Rule 52(b) had no application to Rule 11 errors, thereby partially repealing Rule 52(b) by implication); *Field v. Mans*, 516 U.S. 59, 67 (1995) (refusing to elevate "the negative pregnant argument . . . to the level of interpretive trump card").

258. See, e.g., *Heller v. First Town Mortgage Corp.*, No. 97 Civ. 8575, 1998 WL 614197, at *2–4 (S.D.N.Y. Sept. 14, 1998) (distinguishing Sections 6, 8, and 9 of RESPA from Section 10); *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091–93 (7th Cir. 1982) (Posner, J., dissenting) (rejecting the arguments for not implying a private right of action under Section 10).

259. *Allison*, 695 F.2d at 1092 (Posner, J., dissenting).

intend Section 10(a) to provide normal remedies for consumers.²⁶⁰ Applying the "negative pregnant rule" to find that no private right of action exists under Section 10(a), in fact, cuts "contrary to all other textual and contextual evidence of congressional intent."²⁶¹ The doctrine does not show "that Congress did not want victims of [Section 10(a)] violations to be able to get their money back through suits in federal courts."²⁶²

Indeed, RESPA's purposes make it illogical that Congress would intentionally give borrowers a private right of action for violations of Sections 6, 8, and 9 of RESPA, but purposely refuse to provide a private right of action for violations of Section 10(a). The injuries resulting from violations of Section 10(a) mirror those resulting from violations of Sections 6, 8, and 9 of RESPA. Section 6 requires that lenders fully disclose and provide notice to borrowers of any assignment, transfer, or sale of their loan.²⁶³ Section 8 proscribes kickbacks and unearned fees.²⁶⁴ Section 9 prohibits sellers from requiring buyers to use a particular title insurance²⁶⁵ policy.²⁶⁶ Sections 6, 8, 9, and 10(a) all regulate forms of dishonesty that predatory lenders use to profit at borrowers' expense. Ironically, of these four provisions, only Section 10(a) clearly purports to protect borrowers from predatory lenders.²⁶⁷ Section 6 protects borrowers from problems that may arise from the assignment, sale, or transfer of the servicing of their loan.²⁶⁸ Section 8 protects borrowers from individuals involved in real estate transactions.²⁶⁹ Section 9 protects borrowers

260. See *Heller*, 1998 WL 614197, at *3 (summarizing Judge Posner's arguments for implying a private right of action under Section 10) (citing *Allison*, 695 F.2d at 1091-93 (Posner, J., dissenting)).

261. *Burns v. United States*, 501 U.S. 129, 136 (1991); see also *supra* note 255 and accompanying text (stating that the Supreme Court often rejects the negative pregnant rule of construction).

262. *Allison*, 695 F.2d at 1092 (Posner, J., dissenting).

263. See 12 U.S.C. § 2605(a)-(b) (2000) (providing disclosure and notice requirements for the servicing of mortgage loans and the administration of escrow accounts).

264. See *id.* § 2607 (placing broad prohibitions on any unearned fees).

265. See BLACK'S LAW DICTIONARY 819 (8th ed. 2004) (defining title insurance as "[a]n agreement to indemnify against loss arising from a defect in title to real property, usu[ally] issued to the buyer of the property by the title company that conducted the title search").

266. See 12 U.S.C. § 2608 (stating that "[n]o seller of property . . . shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company").

267. See *id.* § 2609 (placing escrow limitations on lenders, but not on sellers or other individuals, to prevent abusive uses of escrow funds).

268. See *id.* § 2605 (regulating the assignment, sale, or transfer of any federally related mortgage loan, but not the terms and conditions of the loan).

269. See *supra* note 264 and accompanying text (discussing Section 8 of RESPA).

from sellers.²⁷⁰ Congress arguably intended borrowers to have an implied private right of action against lenders for violations under Section 10(a), just as they have express private rights of action for violations under Sections 6, 8, and 9.²⁷¹

The argument that Congress intended to limit enforcement of Section 10 as a whole to administrative remedies through HUD also holds no weight. For one thing, RESPA's drafters intended to protect borrowers "without expanding the federal bureaucracy."²⁷² Additionally, subsection (d) of Section 10 explicitly provides administrative enforcement for subsection (c) only.²⁷³ This cannot mean that Congress intended to limit enforcement of subsections (a) and (b) to administrative remedies. And, in fact, HUD's administrative regulations leave plenty of room for lenders to violate Section 10(a)'s escrow account limitation.²⁷⁴ HUD, moreover, admits no legal authority to pursue violators of Section 10(a).²⁷⁵

Furthermore, arguing that Congress intended to limit enforcement of Section 10 as a whole to administrative remedies necessarily extends administrative enforcement to subsections (a) and (b).²⁷⁶ This contradicts the assertion that Congress intended not to extend a private right of action under RESPA to Section 10.²⁷⁷ Subsection (d) of Section 10 provides an express

270. See *supra* note 266 and accompanying text (discussing Section 9 of RESPA).

271. See 12 U.S.C. § 2614 (2000) (providing jurisdiction to enforce Sections 6, 8, and 9 of RESPA).

272. See Sagers, *supra* note 120, at 1398 (stating that "RESPA's drafters expressed animosity toward government expansion, which strongly suggests they intended [S]ection 10 to be enforced by means other than bureaucratic oversight" (citing S. REP. NO. 93-866, at 4-5 (1974); H.R. REP. NO. 93-1177, at 5 (1974) ("[H]eavy administrative involvement is likely to create a bureaucratic monstrosity."))).

273. See 12 U.S.C. § 2609(d) (providing penalties through administrative enforcement for violations of subsection (c), which regulates escrow account statements, but not for violations of subsection (a), which prohibits overcharging escrow accounts, or (b), which requires proper notification of escrow shortages).

274. See Myers, *supra* note 13, at 1 ("HUD's chief lawyer . . . admits that his own agency's regulations allow lenders to violate [Section 10(a) of] RESPA by keeping more than a two-month cushion in reserve."); see also 24 C.F.R. § 3500.17 (m), (n) (2006) (detailing enforcement regulations for Section 10(c) only—effectively allowing lenders to violate Section 10(a)).

275. See Myers, *supra* note 13, at 1 (stating that, according to HUD's then chief lawyer, "even though HUD regulations may conflict with RESPA, [the] agency doesn't have any legal authority to pursue violators.").

276. See *supra* notes 189-90 and accompanying text (addressing the argument that the Secretary of HUD alone should assess penalties for Section 10 violations).

277. See *supra* notes 189-201 and accompanying text (addressing the argument that no private right of action exists under Section 10).

administrative remedy for violations of subsection (c) only.²⁷⁸ Similarly, Section 16 of RESPA explicitly provides federal jurisdiction for actions brought under Sections 6, 8, and 9, but not 10.²⁷⁹ It is clearly inconsistent to argue that administrative enforcement extends beyond its explicit terms in subsection (d) of Section 10 but that a private right of action does not extend beyond its explicit terms under Section 16. Because of this contradiction, the argument fails. A private right of action under RESPA arguably extends to Section 10(a).

Even if HUD—the agency with some enforcement power under RESPA—had express authority to enforce Section 10(a), HUD would still not have the ability to enforce Section 10(a) by itself. HUD does "not have the resources or the time to prosecute each alleged violation or to provide immediate relief for borrowers faced with imminent foreclosure."²⁸⁰ Administrative enforcement through HUD "cannot adequately address the needs of mortgage borrowers or achieve RESPA's goals."²⁸¹ State attorneys general similarly lack adequate resources to effectively enforce Section 10(a).²⁸² Even if HUD and state attorneys general had adequate time and resources to prosecute each Section 10(a) violation, they would continue to provide only general—not individual—protection.²⁸³ Individual consumers would still be left with no specific remedy.

278. See 12 U.S.C. § 2609(d) (2000) (providing an express remedy for subsection (c) but not for subsections (a) or (b) of Section 10).

279. See 12 U.S.C. § 2614 (providing jurisdiction to enforce Sections 6, 8, and 9 of RESPA); see also R. Elizabeth Topoluk, *RESPA, HOEPA and High-Cost Mortgage Litigation and Related Developments*, 55 CONSUMER FIN. L.Q. REP. 62, 65 (2001) (reporting that Section 16 of RESPA provides explicitly for private rights of action only under Sections 6, 8, and 9 of RESPA).

280. Fogel, *supra* note 4, at 459–60 (citing *Predatory Lending: Are Federal Agencies Protecting Older Americans from Financial Heartbreak?: Hearing Before the S. Spec. Comm. on Aging*, 108th Cong. 60–61 (2004) (statement of Gavin Gee, Director of Idaho Department of Finance)); see also Francesca S. Laguardia, *Enforcing the Fair Housing Act: Can Agency Interpretations Override Congressional Intent in Anti-Discrimination Legislation?*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 535, 542 (2006) (providing that state "[a]ttorneys [g]eneral are more likely to have the resources and capability to vigorously enforce th[e] laws," than the agencies charged with enforcement); cf. Fogel, *supra* note 4, at 460 (stating that "consumers have been unsuccessful in their efforts to convince Congress to provide an express private right of action under RESPA" (citing Margot Sanders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. BANKING INST. 111, 121 (2002))).

281. Sagers, *supra* note 120, at 1398; see also *id.* (arguing that "administrative enforcement of Section 10 . . . [is] inadequate").

282. See *supra* note 59–60 and accompanying text (pointing out that state attorneys general lack adequate time and resources to effectively enforce Section 10).

283. See, e.g., Diane L. Slifer & Paul H. Shieber, *Beware of "Kickbacks": HUD's Recent RESPA Enforcement Actions*, 123 BANKING L.J. 519, 519 (2006) (reviewing several recent settlement agreements entered into by HUD with lenders in RESPA enforcement proceedings);

Although RESPA's purposes are not dispositive,²⁸⁴ they support the controlling inference that Congress intended for courts to imply a private right of action under Section 10(a).²⁸⁵

D. Other Pertinent Considerations

Refusing to imply a private right of action under Section 10(a) renders this provision's language practically superfluous. Section 10(a) might not be utterly without teeth,²⁸⁶ but because HUD, state attorneys general, and state consumer protection statutes do so little,²⁸⁷ courts should arguably avoid interpreting Section 10(a)'s silence to deny a private right of action. Without an implied private right of action, the language of Section 10(a) becomes insignificant. It should make little difference whether state consumer protection statutes can provide remedies in some roundabout way for Section 10(a) violations. If states were meant to take care of the problem, Congress would not have passed RESPA.

Judge Posner remarked that "[i]t is, of course, possible that the banking industry managed to get [S]ection 10 enacted without teeth, . . . [b]ut there is no indication that it did."²⁸⁸ The fact that Judge Posner argued in favor of implying a private right of action under Section 10—now Section 10(a)—before the 1990 amendments added subsections (b) through (d) and an administrative remedy for violations of subsection (c), makes little

see also supra note 59 and accompanying text (discussing a \$100 million settlement agreement that GMAC entered into for Section 10(a) violations). These settlement agreements contemplate penalties against predatory lenders, but do not provide remedies to individual borrowers.

284. *See supra* notes 30–35 and accompanying text (stating that congressional purposes are not controlling but that they are highly relevant to the determinative question of legislative intent).

285. *See supra* Part II.A (discussing the purposes of RESPA and Section 10(a)).

286. *See Allison v. Liberty Sav.*, 695 F.2d 1086, 1092 (7th Cir. 1982) (Posner, J., dissenting) (noting that consumers can complain to the agency with regulatory authority over their lender, which might result in a refund for their excess deposits, but cannot file suit for damages); *supra* note 42–44 and accompanying text (remarking that mortgage consumers can fall back on related state consumer protection statutes); *supra* note 192 and accompanying text (discussing the authority of state attorneys general to file suit on behalf of the state for violations of Section 10(a)).

287. *See supra* note 251 and accompanying text (emphasizing that state consumer protection statutes provide some related protection but offer no specific recourse for violations of Section 10(a)); *supra* notes 280–83 and accompanying text (discussing the inadequacy of HUD and state attorneys general to enforce Section 10(a) effectively).

288. *Allison*, 695 F.2d at 1093 (Posner, J., dissenting).

difference.²⁸⁹ His point remains valid. To this day, RESPA provides no express remedy for subsections (a) or (b). Subsection (a) of Section 10 attacks something RESPA meant to eliminate, perhaps above all other abuses of the real estate settlement process—overcharging escrow accounts.²⁹⁰ As Judge Posner observed, Senator Proxmire described the bill which became RESPA as "a major defeat for consumers and a stunning victory for the real estate settlement lobby," because the bill did not go far enough in stifling predatory mortgage lending practices.²⁹¹ Senator Proxmire did not, however, go so far as to complain "that [S]ection 10 lacked teeth."²⁹² Arguably, he would have "if he had thought that the banking industry had succeeded in defanging the section."²⁹³

Clearly, "[a]mbiguous contract terms, weak enforcement provisions, and numerous statutory exceptions" debilitate RESPA's protective purposes.²⁹⁴ If RESPA indeed fails to provide a private right of action under Section 10(a), it does nothing to protect borrowers from unnecessarily high settlement charges and fails to limit the size of escrow accounts lenders may establish to pay taxes and insurance premiums.²⁹⁵ To find that no private right of action exists under Section 10(a) adds, moreover, to a collective failure of federal consumer protection legislation to protect consumers adequately.²⁹⁶

289. See *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1301 (5th Cir. 1995) (emphasizing that Congress amended Section 10 after *Allison*); see also *supra* note 20 (discussing the 1990 amendments to Section 10).

290. See *supra* Part II.A (introducing the purposes of Section 10(a) of RESPA).

291. *Allison*, 695 F.2d at 1093 (Posner, J., dissenting) (citing S. REP. NO. 93-866, at 13 (1974), as reprinted in 1974 U.S.C.C.A.N. 6546, 6557).

292. *Allison v. Liberty Sav.*, 695 F.2d 1086, 1093 (7th Cir. 1982) (Posner, J., dissenting).

293. *Id.*

294. Fogel, *supra* note 4, at 435; see also *id.* at 459 (scrutinizing the problem of inadequate protection from predatory lenders under federal legislation).

295. See *id.* at 459–60 (stating that "RESPA . . . [does] not adequately protect borrowers against predatory lending" where RESPA does not allow for a private right of action); see also Skehan, *supra* note 44, at 790 ("While this area has been the subject of both federal and state regulation in the past, neither has effectively resulted in the protection of consumers in the mortgage lending industry.").

296. As an illustrative example, without a private right of action, lenders remain virtually free to conceal yield spread premiums—and increase interest rates undetected, thereby "circumventing the intended use of the yield spread premium—to give . . . borrower(s) the option of deferring closing costs." See Fogel, *supra* note 4, at 459 (citing *Predatory Mortgage Lending*, *supra* note 2, at 1–2 (opening statement of Senator Paul S. Sarbanes, Chairman, S. Comm. on Banking, Housing, and Urban Affairs)). In addition to forcing borrowers to pay tens of thousands of dollars in excessive interest, "the resulting higher interest rates often force borrowers into foreclosure." See *id.* (illustrating how predatory lenders devastate borrowers without adequate protection) (citing ELIZABETH RENUART, STOP PREDATORY LENDING: A GUIDE FOR LEGAL ADVOCATES 26 (Nat'l Consumer Law Ctr. ed., 2002)). For more information on the

V. Conclusion

Implied private rights of action do exist, and Section 10(a) of RESPA falls within the limited category of cases in which the Supreme Court arguably could find an implied private right of action. To deny consumers a private right of action under Section 10(a) not only cuts contrary to Congress's intent in passing this provision, but renders its language insignificant by practically annihilating its meaning. As this Note asserts, Congress at the time of RESPA's enactment intended to create an implied private right of action under what is now Section 10(a), and the Congress of 1990 adopted the same intent. Victims of Section 10(a) violations are clearly members of the class for whose specific benefit Congress enacted the statute, an implied private right of action is consistent with the underlying purposes of the statute, and this right is not traditionally relegated to state law. Because all of these factors weigh in favor of implying a private right of action under Section 10(a), federal courts should not deny mortgage borrowers this right, even under the stringent doctrine that controls questions of implied rights of action today. Indeed, with some mortgage lenders continuing to "bend the law, twist the law, and wink at violations of the law,"²⁹⁷ the implication of a private right of action under Section 10(a) of RESPA should be "irresistible."²⁹⁸

definition of a "yield spread premium," see BLACK'S LAW DICTIONARY 1647 (8th ed. 2004), which defines "yield spread" as "[t]he differences in yield between various securities issues."

297. Thomas S. Monson, *In Quest of Abundant Life*, ENSIGN, Mar. 1988, at 2.

298. *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916) (stating that the statutory provision at issue in that case rendered the "inference of a private right [of action] irresistible").