

NO IMPLIED CAUSE OF ACTION UNDER THE NATIONAL HOUSING ACT: A BARRIER TO A STATUTORY RIGHT

Unfit housing constitutes a major problem for low-income residents of federally-assisted dwellings.¹ The problem is especially severe in states where local law does not impose a duty to repair upon either private or public landlords.² The United States Housing Act of 1937³, the first of many federal programs⁴ enacted to address the dif-

1. For a discussion of the problems faced by tenants of public housing see Fuerst and Petty, *Public Housing in the Courts: Pyrrhic Victories for the Poor*, 9 URB. LAW. 496 (1977) (a discussion of less than favorable treatment by courts of public housing issues); Kargman, *An Analysis of Landlord-Tenant Disputes in Subsidized Housing*, 17 URBAN L. ANN. 227 (1979) (expectations of public housing tenants and the problems faced by tenants in the courts); and Steinberg, *Adequate Housing for All: Myth or Reality?*, 37 U. PITT. L. REV. 63 (1975) (discussion of ineffective remedies for substandard housing and a plea for a constitutional right to fit housing).

2. The general common law rule regarding habitability of leased property holds that absent fraud or concealment by the landlord, the landlord neither impliedly warrants that the leased premises are fit for habitation nor has a duty to repair and maintain the property. See generally 1 AMERICAN LAW OF PROPERTY §§ 3.11, 3.45, 3.51 (A.J. Casner ed. 1952); and W. BURBY, REAL PROPERTY § 63 (3d ed. 1965). In recent years, many jurisdictions have imposed by statute or by judicial decision some duty on the landlord to provide the tenant with habitable premises. The developing doctrine of implied warranty is discussed at length in Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URBAN L. ANN. 3 (1979). As many as thirty-one states now afford tenants of both public and private landlords some degree of protection from unfit leased housing. *Id.* at 6-9. The remaining states continue to adhere to some form of the common law rule. In a recent decision, *Alexander v. HUD*, 441 U.S. 39 (1979), the Supreme Court affirmed the Seventh Circuit Court of Appeals decision refusing to imply a warranty of habitability in lease agreements where HUD was the lessor. For a critical discussion of the Seventh Circuit opinion and the general law of implied warranties see Note, *Implied Warranty of Habitability in Federal Housing Projects: Alexander v. United States Department of Housing and Urban Development*, 19 B.C. L. REV. 343 (1978); and Note, *Landlord-Tenant-Government Housing—Implied Warranty of Habitability—A Warranty of Habitability is Not Implied in Leases of Federally Owned Public Housing—Alexander v. HUD*, 12 GA. L. REV. 120 (1977). See also Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U. L. REV. 1 (1976) (a detailed look at the rights and remedies at common law, under statute, and by implication to enforce decent housing).

3. 42 U.S.C. §§ 1437-1437g (1976).

facilities attending the provision of low-income housing,⁵ has as its express purpose the assistance of states and local authorities in remedying the "acute shortage of decent, safe, and sanitary dwellings"⁶ for low-income families.⁷ The Act authorizes the local authority to exercise its own discretion in project operations to accomplish this purpose.⁸

The relationship between the local authority and the Department of Housing and Urban Development (HUD) is governed by an Annual Contributions Contract (ACC)⁹ filed with HUD.¹⁰ Though

4. The sheer volume of federal programs dealing with housing places a general discussion beyond the scope of this Comment. For general histories of federal involvement in housing, see A. DOWNS, *URBAN PROBLEMS & PROSPECTS* 87-146 (1976) (a survey and evaluation of federal housing programs between 1960-1974); L. FRIEDMAN, *GOVERNMENT & SLUM HOUSING* (1969) (history of federal housing legislation from the 1930s through the 1960s); *URBAN AMERICA POLICIES & PROBLEMS* (1978) (general survey of major urban issues and legislation between 1973-1977).

5. The United States Housing Act defines "low-income housing" to mean "decent, safe, and sanitary dwellings within the financial reach of families of low income, and embraces all necessary appurtenances thereto." 42 U.S.C. § 1437a(1) (1976). Income limits for participation are set by the local authority with HUD approval; rental is not to exceed one-fourth of family income. *Id.*

6. 42 U.S.C. § 1437 (1976). Similar policy statements are found in related housing statutes. See Housing Act of 1949, 42 U.S.C. § 1441 (1976). The 1949 statute's declared purpose is the elimination of "substandard and other inadequate housing," setting as a national goal "a decent home and a suitable living environment for every American family." *Id.* Congress reaffirmed this policy in the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701t and 42 U.S.C. § 1441a (1976), stating that programs under the act purport to "assist families with incomes so low that they could not otherwise decently house themselves." *Id.*

7. 42 U.S.C. § 1437a(2) (1976). The Act defines "low income families" as families lacking the financial capacity to pay enough to motivate private enterprise in their locality or metropolitan area to construct a sufficient supply of "decent, safe, and sanitary dwellings" for their residence.

8. 42 U.S.C. § 1437 (1976). See S. REP. NO. 693, 93d Cong., 2d Sess. 44, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4314. See also note 10 *infra*.

9. 42 U.S.C. § 1437c (1976). The ACC serves as a contract between the local housing authority and HUD guaranteeing payment by the latter to the former and specifying any conditions which must be fulfilled for funding.

10. 42 U.S.C. § 1437d (1976). The Secretary has authorization to include in the ACC those covenants and conditions deemed necessary "to insure the low-income character of the project involved." *Id.* § 1437d(a). The contract requirements must include "the establishment of effective tenant-management relationships designed to assure that satisfactory standards of tenant security and project maintenance are formulated and that the public housing agency . . . enforces those standards fully and effectively." *Id.* § 1437d(c)(4)(C). The power of HUD to impose management requirements is tempered by the statute's policy of giving local agencies broad opera-

HUD has statutory remedies available for violation of the Act or the ACC,¹¹ tenants have no express private right of action to seek relief. In a recent decision, *Perry v. Housing Authority City of Charleston*,¹² a United States district court declined to find an implied cause of action in the Housing Act. As a result, the court denied tenants of a low-income project federal jurisdiction to redress alleged indecent, unsafe, and unsanitary conditions at the project.

In *Perry*, public housing tenants brought a class action suit¹³ against the local housing authority for failure to maintain the project in accordance with the United States Housing Act,¹⁴ the ACC,¹⁵ and

tional discretion. See 42 U.S.C. § 1437 (1976). See also S. REP. NO. 693, 93d Cong., 2d Sess. 44, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4314, 4314.

The Senate Report states that the public housing authority has the right to make management decisions subject only to *basic* guidance from HUD regulations. The report suggests that the regulations should conform to the "letter and spirit" of the statute and should comply with the policy of vesting "as much decision making as possible" in local, as opposed to federal, authorities. The Report warns that HUD "regulations abrogating the local decision making power" will be viewed with disfavor. *Id.*

11. 42 U.S.C. § 1437d(g) (1976).

[U]pon the occurrence of a substantial default in respect to the covenants or conditions to which the public housing agency is subject (as such substantial default shall be defined in such contract), the public housing agency shall be obligated at the option of the Secretary either to convey title in any case where, in the determination of the Secretary (which determination shall be final and conclusive), such conveyance of title is *necessary to achieve the purposes* of this chapter, or to deliver to the Secretary possession of the project, as then constituted, to which such contract relates. (emphasis added).

Id. § 1437d(g)(1). Upon remedying the defaulting condition, the housing authority is allowed to resume control. *Id.* § 1437d(g)(2).

12. 486 F. Supp. 498 (D. S.C. 1980).

13. Four named plaintiffs brought suit individually and on behalf of all other residents of the George Legare Homes of Charleston, South Carolina. Plaintiffs requested that the court take jurisdiction over the action under 28 U.S.C. § 1337(a) (1976), which provides for original jurisdiction when an action arises under any act regulating commerce. 486 F. Supp. at 500. Alternate bases for jurisdiction are discussed in note 21 *infra*.

Under 28 U.S.C. § 2201 (1976), plaintiffs sought declaratory judgment that the local housing agency was in violation of the Act and that plaintiffs were third party beneficiaries under the Act and ACC. Plaintiffs also sought an injunction under 28 U.S.C. § 2202 (1976) to require defendants to restore and maintain the project in a habitable condition, and requested the court to exercise pendent jurisdiction over damage claims, including recovery of 35% of rents paid. 486 F. Supp. at 499.

14. 42 U.S.C. §§ 1437-1437(a)(1), (2). See notes 5-7 and accompanying text *supra*.

15. Section 201 of the ACC entered into by defendant housing authority requires the authority at all times to operate the project:

HUD regulations.¹⁶ Plaintiffs, alleging the project's condition impaired the health and well-being of project residents,¹⁷ predicated their federal right of action on their status as the prime beneficiaries of the housing program.¹⁸

The district court refused to infer a federal cause of action solely on the basis of plaintiffs' membership in the class especially benefited

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- (1) solely for the purpose of providing a decent, safe, and sanitary dwelling . . . within the reach of families of low income;
 - (2) in such a manner as to promote serviceability, efficiency, economy, and stability; and
 - (3) in such a manner as to achieve the economic well-being of the tenants thereof.

TERMS AND CONDITIONS CONSTITUTING PART TWO OF A CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT BETWEEN LOCAL AUTHORITY AND THE UNITED STATES OF AMERICA, HUD-53011 §§ 201 and 209(2), Nov. 1969. Section 209(2) also requires the local authority to maintain the project in good repair, order, and condition. *Id.* See H.R. REP. NO. 1545, 75th Cong., 1st Sess. 8 (1937).

16. HUD regulations pursuant to the Act require all tenant leases to include the following obligations of the local housing authority:

- (1) To maintain the premises and the project in decent, safe, and sanitary condition;
- (2) To comply with requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;
- (3) To make necessary repairs to the premises;
- (4) To keep project buildings, facilities and common areas, not otherwise assigned to the tenant for maintenance and upkeep, in a clean and safe condition;
- (5) To maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities and appliances, including elevators, supplied or required to be supplied by the PHA;
- (6) To provide and maintain appropriate receptacles and facilities (except containers for the exclusive use of an individual tenant family) for the deposit of ashes, garbage, rubbish and other waste removed from the premises by the tenant in accordance with paragraph (f)(7) of this section; and
- (7) To supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage) except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or where heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct utility connection.

24 C.F.R. § 866.4(e) (1980).

17. 486 F. Supp. at 500. Plaintiffs alleged in part that the project was unfit due to the presence of lead based paint, the deterioration of floors and roofing, inadequate lighting and security, insufficient heating, total neglect of the grounds and roads, and failure of the authority to provide routine garbage collection which allowed vermin to infest the project area. *Id.*

18. *Id.* at 501.

by the legislation.¹⁹ The court stressed the necessity of finding express language in the statute or its legislative history indicating congressional intent to create such an action.²⁰ Discovering no such indication in the Housing Act's legislative materials, the court dismissed the action for failure to state a justiciable claim.²¹

Implied private causes of action²² derive from statutory construc-

19. *Id.* at 502. The court reached this conclusion by applying the test from *Cort v. Ash*, 422 U.S. 66 (1975) (discussed in notes 27-28 and accompanying text *infra*) in light of more recent Supreme Court decisions. See *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979), discussed in notes 41-61 and accompanying text *infra*.

20. 486 F. Supp. at 502.

21. When a claimant seeks jurisdiction under 20 U.S.C. § 1337 (1976) the threshold question is whether or not Congress enacted the statute forming the basis of the action under the federal commerce power. The court in *Perry* found this requirement to be met after reviewing the legislative history of the original statute. 486 F. Supp. at 500-501. *But see Potrero Hill Community Action Comm. v. Housing Auth. of the City and County of San Francisco*, 410 F.2d 974, 979 (9th Cir. 1969) (holding the Housing Act is welfare legislation for the purposes of § 1337 and has only an incidental effect on commerce).

Courts have further required that a party claiming § 1337 jurisdiction present a federal claim independent from the commerce power. 486 F. Supp. at 500 and cases cited therein. The court, in the instant case, ruling that there was no implied federal cause of action under the Housing Act, held there was no independent ground on which to preserve plaintiffs' action. Absent a federal issue, declaratory judgment and pendent jurisdiction also failed. *Id.* at 503.

Plaintiffs had presented as alternate bases for jurisdiction 28 U.S.C. § 1343(3) (1976), which grants original jurisdiction in all suits authorized by 42 U.S.C. § 1983 (1976), and 28 U.S.C. § 1331 (1976), which provides jurisdiction for civil actions arising under the Constitution, laws, or treaties of the United States, wherein the amount in controversy exceeds \$10,000. 486 F. Supp. at 500. The court rejected § 1331 jurisdiction, finding plaintiffs' claim did not come within due process protections, and without discussion held § 1343(3) jurisdiction inadequate. *Id.* at 503. The quick dismissal of § 1343(3) appears at least questionable in light of the subsequent decision, *Maine v. Thiboutot*, 448 U.S. 1 (1980), which held that 42 U.S.C. § 1983 is not constrained to violations of civil rights laws but extends to any violation of federal law under color of state law.

22. A cause of action is simply defined as the authority to institute a judicial proceeding to enforce some right or duty. See *Davis v. Passman*, 442 U.S. 228, 239 (1979). A cause of action differs from a "remedy" which is the means used to effectuate a cause of action and "relief" which is the result obtained through the remedy. *Id.* See also J. POMEROY, REMEDIES AND REMEDIAL RIGHTS §§ 452-54 (2d ed. 1883) and Note, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?*, 51 U. COLO. L. REV. 355, 356 (1980). Causes of action normally have their basis in express language in a statute conferring the authority to enforce statutory rights and duties. An implied cause of action may lie, absent express language, where a court determines the legislature intended the plaintiff to be able to enforce their rights and duties. "Cause of action" should properly be distin-

tion. Judicial inquiry focuses on whether or not Congress intended to create such a remedial avenue.²³ The principal area of dispute is the extent to which the reviewing court may look beyond the language of the statute and its legislative history to whether implication of a cause of action would advance statutory purposes.²⁴

A broad role for statutory purposes developed in early Supreme Court implied cause of action cases.²⁵ The Court's initial approach

guished from "right of action" but the basis for the distinction is not important here and the terms shall be used interchangeably. *See* J. POMEROY, *supra*, at §§ 452-54.

23. *See, e.g.*, *Touche, Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("our task is limited solely to determining whether Congress intended to create a private right of action"); *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979) (vital to whether an implied cause of action exists is whether Congress intended such an action to be implied); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (inference of private cause of action must be consistent with apparent legislative intent).

24. *Cf.*, *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 15 & 00 (1979) (the Court criticizing the appeal to legislative purposes in prior decisions). *See also* *Touche, Ross & Co. v. Lewis*, 442 U.S. 560, 578 (1979) and *Cannon v. University of Chicago*, 441 U.S. 677, 740 (1979) (Powell, J. dissenting).

25. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (discussed note 26 *infra*), represents the first modern statement of implied cause of action doctrine. *See also* *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (held a private cause of action would be inconsistent with the structure and purposes of securities laws); *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (held Constitutional right to be free from illegal search and seizure implies a right to sue for damages where plaintiff is the victim of an illegal search); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (held consistent with voting rights legislation to allow voter to sue state to ensure state does not deny persons their right to vote); *Wyandotte Transport Co. v. United States*, 389 U.S. 191 (1967) (where statute provides criminal penalties for deliberately sinking a vessel, this does not preclude implied cause of action on part of federal government to recover costs of salvage); Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 *FORDHAM L. REV.* 441 (1974) (discussion of implied cause of action in the circuit courts prior to *Cort v. Ash*).

Although prior to the *Borak* line of cases the Supreme Court found implied causes of actions, the bases for the findings did not form a coherent doctrine. For a sampling of the early implied right of action cases *see, e.g.*, *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916) (widely considered the first implied cause of action case; the Supreme Court held that "where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy for the thing enacted for his advantage. . . ."); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) (although statute regulating freight rates made illegal unjust and unreasonable rates, implication would be inconsistent with the purposes of the act in granting enforcement to federal agency); *Montana-Dakota Utility Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951) (implication refused where statute regulating utility rates made unlawful, unjust and unreasonable charges); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) (black railroad employees found to have cause of action against union under statute requiring union to bar-

held a private right of action appropriate when it substantially aided the regulatory mechanism in carrying forward the purposes of the act.²⁶ This test underwent refinement in the securities law case of *Cort v. Ash*.²⁷

In *Cort*, the Supreme Court ruled that the following four factors would guide implied right of action analysis: (1) whether the plaintiff is a member of the class especially benefited by the statute; (2) whether there is either an express or implicit indication of legislative intent to create or deny a right of action in that class; (3) whether the finding of implication would be consistent with the legislation's purposes; and (4) whether the subject matter is traditionally governed by state law such that federal interference would be inappropriate.²⁸

gain on behalf of the entire bargaining unit, where union refused to bargain on behalf of black employees; *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) (finding implied cause of action in purchasers of securities under jurisdictional section of statute for violation of substantive section containing no express authorization of private suits).

26. See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). In *Borak*, the Supreme Court found an implied cause of action in plaintiff-stockholder to seek damages and invalidation of a merger between Case Company and another corporation effectuated by false and misleading proxy solicitation in violation of section 14(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976). The Court reasoned from the act and legislative history that the statutory purpose was protection of investors. 377 U.S. at 431-32. In addition the SEC, which was empowered to enforce the act through administrative sanctions or criminal prosecutions, was overwhelmed by the vast number of proxy statements submitted to it each year. *Id.* at 432. The Court held that in carrying out the statute's policy, "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Id. But cf. Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975) (distinguished *Borak*, noting SEC was better able to administer requirements of Investor Protection Act than Securities Exchange Act and implied cause of action would not be consistent with structure or purpose of statute).

27. 422 U.S. 66 (1975).

28. *Id.* at 78. In *Cort*, a stockbroker brought suit on behalf of the corporation to recover corporate funds spent on political advertisements in alleged violation of criminal provisions of the Federal Election Campaign Act, 18 U.S.C. § 610 (1976). The Supreme Court held the plaintiff did not meet the four-factor test.

First, the Court concluded that the purported act to benefit all citizens by lessening the influence of large corporate expenditures on public elections; protection of stockholders at best constituted only a secondary concern. 422 U.S. at 80-81. Second, the Court found no intent to create private actions in the legislative history. *Id.* at 83-84. Third, private suits would not aid, and might hinder enforcement. *Id.* at 84. Fourth, any civil action should be left to state corporation law. *Id.* at 84-85.

For a discussion of the impact of *Cort v. Ash*, see Note, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392

Until the Supreme Court's recent reappraisal of the four-factor test,²⁹ application of the *Cort* formula led to predictable results. The first factor of the *Cort* analysis operated as a general screening mechanism. Implication would result if the statute at issue primarily benefited the public at large.³⁰ Nor would courts imply a cause where the plaintiff was not the intended beneficiary but merely shared with the especially benefited class an interest in the proper administration of the statutory scheme.³¹

(1975) (analysis of development of implied cause of action doctrine and predictions of future application); Note, *Implied Private Rights of Action—The Cort v. Ash Test—Interaction of “Especial Beneficiary” and Legislative Intent*, 24 WAYNE L. REV. 1173 (1976) (beneficiary status allows implication unless express language is found in legislative history denying private action); Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429 (1976) (critical discussion of *Cort* as too restrictive in its approach to implied rights of action).

29. See *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979); *Touche, Ross & Co. v. Redington*, 442 U.S. 560 (1979).

30. See, e.g., *Cort v. Ash*, 422 U.S. 66, 81 (1975) (discussed in note 28 *supra*). See also *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979). “[T]his Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.” On the other hand, it has been unreceptive to implication where the statute “create[s] duties on the part of persons for the benefit of the public at large.” *Id.* at 691 n.13.

31. See, e.g., *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) (Court declined to find implied cause of action in unsuccessful tender offeror to overturn successful tender offer by competitor made in violation of statute, finding plaintiff to be member of regulated class and beneficiaries of statute to be investors); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (in a decision prior to *Cort*, held parties merely affected by violations of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), could not benefit from implied cause of action but buyers and sellers of securities could benefit).

For related cases in the area of public housing see, e.g., *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977) (held a cause of action cannot be implied in favor of a publicly assisted mortgagor to challenge transfer by mortgagee of mortgage in violation of HUD handbook procedures, the court noting the handbook deals solely with matters between HUD and the mortgagee); *M.B. Guran Co., Inc. v. City of Akron*, 546 F.2d 201 (6th Cir. 1976) (held low bidder who is not granted contract to construct housing project cannot benefit from implied cause of action under Housing Act of 1949, 42 U.S.C. § 1441, because the especially benefited class is composed only of persons inhabiting inadequate housing); *People's Housing Development Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976) (held a private contractor is not the intended beneficiary of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5309, and thus cannot maintain an action for alleged racial motivation by the city in terminating a rehabilitation project). Compare *People's Housing with Martin Luther King Tenants Improvement Council v. Philadelphia Hous. Auth.*, 15 Eq. Opp. Hous. (CCH) ¶ 942 (E.D. Pa. 1980) (finding tenants and prospec-

The second factor served to bar implication only where express language in the statute or its legislative history evidenced consideration and rejection of a private right of action.³² Congressional silence as to whether an implied cause of action should exist militated in favor of, rather than against, the plaintiff-beneficiary.³³ Absent some clear expression of intent to deny private redress, courts allowed the second factor to merge into the third, viewing statutory purpose as the guide to whether Congress intended to create a cause of action.³⁴

Where a federal agency effectively protected the interests of statutory beneficiaries, courts routinely found implication unnecessary to the furtherance of legislative purposes.³⁵ The existence of effective

tive residents of housing project can maintain an implied cause of action under the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5309, to challenge discrimination in project finding).

32. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (even though plaintiffs are clear beneficiaries, the structure of the statutory scheme and legislative history weighs against private action).

33. The Supreme Court basically reasoned that Congressional silence as to the existence of private remedial rights does not necessarily evidence an intent to deny such rights. (See discussion of the maxim of construction, *expressio unius est exclusio alterius*, in note 36 *infra*.) To the contrary, silence could fairly be interpreted as a failure to expressly provide for private causes of action which Congress did not intend to foreclose. This latter interpretation of Congressional silence tended to be favored where implication of a private cause of action would coincide with statutory purposes and the regulatory scheme. See *Cort v. Ash*, 422 U.S. 66 (1975). "[I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such a cause of action would be controlling." *Id.* at 82 (emphasis in original) (cited with approval in *De Jesus Chavez v. LTV Aerospace Corp.*, 412 F. Supp. 4, 6 (N.D. Tex. 1976)). See also *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). "We must recognize . . . that legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Id.*

34. Third factor analysis under *Cort* involves two inquiries: (1) are the remedies created by statute adequate to effectuate the legislative purposes, and (2) would implication of a private cause of action assist or frustrate the accomplishment of legislative goals. See *Cort v. Ash*, 422 U.S. 66, 84 (1975). See also *Martin Luther King Tenant Improvement Council v. Philadelphia Hous. Auth.* 15 Eq. Opp. Hous. (CCH) ¶ 942 (E.D. Pa. 1980) (finding remedies available under the Housing and Community Development Act, 42 U.S.C. § 5309(b) inadequate to enforce statutory provisions, and that a private cause of action in tenants or prospective tenants of a housing project would aid effectuation of statutory goals). For additional discussion of effectiveness of legislative remedies see note 38 and accompanying text *infra*.

35. See, e.g., *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216 (9th Cir. 1978) (beneficiaries of federal land preservation statute cannot challenge government plan to alter land where agency is available to

agency protection served as an implicit expression of congressional intent to enforce obligations created under the statute through the regulatory mechanism and not through private actions.³⁶ If, however, implication of a cause of action in members of the beneficiary class would substantially further the purposes of the act,³⁷ courts would normally infer legislative intent in favor of private actions.³⁸

represent their interests); *People's Housing Dev. Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976) (where Congress vests enforcement responsibilities in a government agency with expertise in the particular area courts are inclined to view the grant of authority to the agency as exclusive; courts disfavor fragmented approaches to problems that may result where lower federal courts without expertise respond to private actions). For a discussion of pre-*Cort* cases consistent with this analysis see note 26 *supra*.

36. Under the maxim of construction *expressio unius est exclusio alterius*, where a statute expressly provides for a particular remedy, there is an implication that the legislature intended to exclude all other possible remedies. See J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* §§ 325-29 (1891).

Prior to *Cort*, the *expressio unius est exclusio alterius* inference was operative unless contradicted by "clear contrary evidence of legislative intent". *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). *Cort* reversed that inference, holding that where the legislation fails to provide for private remedies but does provide public remedies, this fact alone should not stand in the way of implication unless legislative history indicates the exclusivity of public remedies. 422 U.S. at 82-83. See also *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979). But see *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1221 (9th Cir. 1978). For a discussion of the appropriateness of the *expressio unius* maxim see Note, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975) (*expressio unius* maxim is inappropriate as it ascribes an intent to Congress which is often false).

37. See note 30 *supra*.

38. Two considerations seem important as to whether or not courts will imply a cause of action in beneficiaries to further statutory purposes where a regulatory or enforcement mechanism exists: (1) the capabilities of the overseeing agency in effectuating the statutory policy; and (2) the degree to which available statutory sanctions are too severe to be used often or effectively in protecting beneficiary interests. With regard to the former see, e.g., *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), cert. denied *sub nom.* *Harry Goodkin & Co. v. Abrahamson*, 436 U.S. 905 (1978) and 436 U.S. 913 (1978).

According to the Second Circuit, courts should imply a cause of action under federal securities acts because "[a]bsent judicial recognition of private rights of action, the federal securities laws most assuredly would fail to provide the effective regulation over the securities industry which Congress intended." 568 F.2d at 872. Then quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), the *Abrahamson* court indicated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." 568 F.2d at 972. See also *De Jesus Chavez v. LTV Aerospace Corp.*, 412 F. Supp. 4 (N.D. Tex. 1976) (holding intent of Congress in enacting Higher Education Act of 1965, § 421, 20 U.S.C. § 1071 (1976), is best achieved by allowing vigorous private actions brought by student borrowers be-

If the plaintiff reached the fourth factor with his action still intact, courts tended to find that the mere existence of a federal statute imposing rights and duties in a traditional state law area would suffice to allow the plaintiff a federal forum.³⁹

The first departure⁴⁰ from the *Cort* approach came in *Touche Ross & Co. v. Redington*.⁴¹ In *Redington*, a trustee in bankruptcy brought suit against an accounting firm for alleged violation of section 17(a) of the Securities Exchange Act of 1934.⁴² The trustee contended that improperly audited and certified financial statements of an insolvent brokerage firm prevented discovery of the firm's financial trouble in time to protect the firm's customers. Addressing the first *Cort* factor, the Supreme Court found that the section 17(a) requirement that brokers keep records and file reports with the Securities and Exchange Commission (SEC) was merely a reporting mechanism to assist the

cause the Commissioner of education cannot prosecute every violation of interest subsidy and loan guarantee provisions); and pre-*Cort* cases discussed note 26 *supra*.

With regard to the severity of administrative sanction consideration, see, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979). In *Cannon*, plaintiff brought a damage action claiming she had been denied admission to the university's medical school in violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (1976) which prohibits sex discrimination in educational programs receiving federal funds. The Supreme Court found that plaintiff was a member of the especially benefited class in which Congress had established a right to be free from sex discrimination. 441 U.S. at 694. The Court then concluded that since the only available administrative action, the withholding of federal funds under 20 U.S.C. § 1682 (1976), was so burdensome that it would not be appropriate when only isolated violations had occurred, private suits were necessary to see that federally created rights were protected. 441 U.S. at 705-707. For a discussion of *Cannon* see, e.g., Comment, *Private Cause of Action Under Title IX: Cannon v. University of Chicago*, 20 URBAN L. ANN. 273 (1980).

39. See, e.g., *Cort v. Ash*, 422 U.S. 66, 85 (1975) ("Violations arising under federal regulations are not 'traditionally' relegated to state law"). See also *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977) (held implication improper where interest sought to be protected only tangentially relates to purpose of federal law and where adequate state law remedies exist).

40. The first major expression of discontent with the *Cort* approach came in the concurring and dissenting opinions in *Cannon v. University of Chicago*, 441 U.S. 677, 717-49 (1979) (separate opinions).

41. 442 U.S. 560 (1979). For discussions of *Redington*, see Underwood, *Transamerica Mortgage Advisors Inc. v. Lewis: An Analysis of the Supreme Court's Definition of an Implied Right of Action*, 7 PEPPERDINE L. REV. 533, 540-44 (1980); Note, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?*, 51 U. COLO. L. REV. 355 (1980).

42. 15 U.S.C. § 78q(a) (1976).

SEC in protecting investors.⁴³ The section did not reflect an intent to directly benefit plaintiff's class.⁴⁴ The Court distinguished cases finding implied rights of action,⁴⁵ which unlike *Redington* involved statutes either prohibiting certain conduct or creating certain rights in private parties.⁴⁶

The *Redington* Court's major break with the *Cort* doctrine involved the elevation of the second factor over the other three.⁴⁷ The Court held that where the statutory scheme of enforcement "clearly" imports⁴⁸ to deny a private right of action, silence on the issue in legislative history weights *against* implication.⁴⁹ Justice Rehnquist, writing for the Court, refused to examine the "necessity" of private action in furthering the statute's purpose.⁵⁰ The Justice ruled instead that the third *Cort* factor served no useful purpose where the act prohibited no conduct and created no personal rights.⁵¹

The Court carried the *Redington* analysis further in *Transamerica Investment Advisors v. Lewis*.⁵² The Supreme Court in *Transamerica*

43. 442 U.S. at 569.

44. *Id.*

45. *Id.* at 569 (citations omitted).

46. *Id.* at 569-71. Compare *Redington* with *Cannon v. University of Chicago*, 441 U.S. 677 (1979), discussed in note 38 *supra*.

47. *Id.* at 575-76. The Court in *Redington* reasoned that whereas *Cort* established four factors relevant to determination of whether implication should lie, *Cort* did not establish that the factors were "entitled to equal weight." Rather, the inquiry should focus on "the language and focus of the statute, its legislative history and its purpose. . . ." *Id.*

48. The Court speaks of the "plain language" of the statute but it is clear that something less will suffice. *Id.* at 571.

49. *Id.* Compare cases discussed in note 33 and accompanying text *supra*.

50. *Id.* at 578 (phrasing the issue as one of strict statutory construction and "not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law"). See also note 47 *supra*.

51. *Id.* at 577. This phrasing seems to limit the reach of *Redington* and makes it reconcilable with *Cannon*. For a discussion of this interpretation see Underwood, *Transamerica Mortgage Advisors, Inc. v. Lewis: An Analysis of the Supreme Court's Definition of an Implied Right of Action*, 7 PEPPERDINE L. REV. 533, 543-44 (1980).

52. 444 U.S. 11 (1979). For discussions of *Transamerica*, see articles cited in note 41 *supra*. Since *Transamerica*, the Supreme Court decided several cases impacting on the doctrines involved in implying private rights of actions. See *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Northwestern Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981). In each case the

declined to find an implied cause of action to recover damages⁵³ in the prime beneficiaries⁵⁴ of the Investment Advisors Act of 1940.⁵⁵ Justice Stewart, writing for a bare majority, expressly rejected any appeal to legislative purpose.⁵⁶ Describing the issue solely as one of statutory construction, Justice Stewart examined the Act's language and found Congress created no private right in the beneficiary class to seek a damage remedy.⁵⁷

The Advisors Act conferred power on the SEC to prosecute violations or impose administrative sanctions for breach of statutory duties.⁵⁸ This provision allowed the Court to deny a cause of action by reviving a previously disregarded maxim: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."⁵⁹ As additional support the Court noted that companion legislation provided expressly for private actions.⁶⁰ Congress also deleted certain language allowing private relief from the investment

Court denied plaintiffs a cause of action under various statutes. The opinions indicate, however, that the Court is not yet willing to apply the *Redington-Transamerica* approach in all cases and would be willing to infer a private right of action in appropriate circumstances.

In *Sierra Club*, *supra*, five members of the Court reaffirmed the *Cort* test in its entirety, despite a separate opinion filed by four justices arguing reliance on only the second *Cort* factor and criticizing the majority's approach as a deviation from *Redington* and *Transamerica*. Additionally, in *Sierra Club*, as well as *Universities Research*, *supra*, the Court placed heavy emphasis on the failure of the statute to designate a specific class of statutory beneficiaries—the second *Cort* factor.

53. Plaintiff also sought and was allowed an implied right to rescind the investment contract, as the Court found that the legislative history and statutory use of the word "void" favored implication. 444 U.S. at 19.

54. 444 U.S. at 24. Plaintiffs, shareholders in a real estate trust operated by defendants, alleged that defendants committed fraudulent acts in violation of their fiduciary duties. The Court, after surveying the statute and its legislative history, determined that plaintiffs were members of the class of persons Congress sought to protect by passage of the Investment Advisors Act of 1940. As a result of this finding, *Transamerica* stands for extension of the *Redington* analysis into cases where the plaintiffs are in fact members of the beneficiary class.

55. Section 206, 15 U.S.C. § 80b-6 (1976).

56. *Id.* at 18.

57. *Id.* at 24.

58. 15 U.S.C. § 80b-6 (1976).

59. 444 U.S. at 20, citing *Botany Mills v. United States*, 278 U.S. 282, 289 (1929). *Cf.* cases discussed in note 36 and accompanying text *supra*. Prior to *Transamerica*, the Supreme Court had not invoked the *expressio unius* maxim since *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 441 U.S. 453, 458 (1974).

60. 444 U.S. at 20-21.

advisors bill before passage, thus indicating contemplation and rejection of such relief.⁶¹

The issue of implication under the United States Housing Act of 1937 surfaced in *Boston Public Housing Tenants' Policy Council v. Lynn*⁶² and *Silva v. East Providence Housing Authority*.⁶³ Both cases predate *Redington-Transamerica*. *Boston Tenants* arose out of facts similar to those in *Perry*. Tenants of several low-income housing projects brought suit to compel HUD and the local housing authority to upgrade the quality of living conditions in the projects.⁶⁴ A United States District Court⁶⁵ found no judicially enforceable duty in HUD to insure that all federally funded projects be maintained in "decent, safe, and sanitary condition."⁶⁶ Rather, the court found only a duty to assist local authorities in remedying the "acute shortage of decent, safe, and sanitary dwellings";⁶⁷ project maintenance itself was left to the local authority.⁶⁸ Further, though the ACC imposed certain maintenance obligations upon the housing authority,⁶⁹ the court held that tenants were not third party beneficiaries, but only "incidental beneficiaries" to the contract.⁷⁰ The

61. *Id.* at 21-22.

62. 388 F. Supp. 493 (D. Mass. 1974).

63. 423 F. Supp. 453 (D. R.I. 1976), *rev'd on other grounds*, 565 F.2d 1217 (1st Cir. 1977).

64. Plaintiffs' action was predicated on violation of the "decent, safe, and sanitary" clause in the United States Housing Act of 1937, 42 U.S.C. § 1337 (1976).

65. The federal district court did not specifically rely on implication analysis in denying plaintiffs relief. The court held plaintiffs lacked standing to challenge HUD under the Administrative Procedure Act, 5 U.S.C. § 702 (1976). No privately enforceable duties existed in HUD, and no privately enforceable duties existed in the local authority. *Boston Pub. Hous. Tenants Policy Council, Inc. v. Lynn*, 388 F. Supp. 493, 495-96 (D. Mass. 1974).

66. *Id.* at 495. *See Ramos Perez v. United States*, 594 F.2d 280 (1st Cir. 1979) (HUD had no duty to insure that a housing project built under the United States Housing Act was constructed so as to be safe for residents, even though HUD approved the project's design).

67. 388 F. Supp. at 495. *See* note 6 and accompanying text *supra*.

68. 388 F. Supp. at 495-96. *See* note 8 and accompanying text *supra*.

69. *See* note 15 and accompanying text *supra*.

70. 388 F. Supp. at 496. The court reasoned that being the "ultimate beneficiaries" under the ACC is not enough to make the tenants true "third-party beneficiaries." *See also Falzarano v. United States*, 607 F.2d 506, 509 (1st Cir. 1979) (holding tenants are not the sole beneficiaries under the National Housing Act, 12 U.S.C. § 1715(d)(3) (1976), as Congress used the private sector to provide housing). *But see* note 80 and accompanying text *infra*. The court in *Boston Tenants* also found

tenants were thus powerless to enforce the terms of the ACC. The appeals court concluded that if relief were to come it must come through HUD action.⁷¹

In *Silva*,⁷² a federal district court applied the *Cort* test⁷³ and granted an implied cause of action under the United States Housing Act.⁷⁴ *Silva* involved a suit brought by prospective tenants of a federally subsidized low-income housing project.⁷⁵ The plaintiffs sought to enjoin delays in site selection and construction by the local authority, alleging that the delays imperiled continuation of federal funding to the project.⁷⁶

Reviewing the purposes of the Housing Act,⁷⁷ Chief Judge Pettine concluded that the intended beneficiaries were "low-income families eligible for public housing."⁷⁸ Turning to the second *Cort* factor, the court held that the absence of dispositive language in either the statute or its legislative history required examination of the act's reme-

that the authority was not required to implement recommendations in HUD circulars. 388 F. Supp. at 497.

71. *Id.* at 496-97. "HUD has the right or authority, but not the duty, to insure that a local housing authority provides decent, safe, and sanitary housing." *Id.* at 496. *But see* *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972) (relied on in *Silva*, note 72 *infra*) (holding plaintiffs seeking low-cost hospital services under federal act are not required to rely on a possible cut-off of federal funding by the overseeing federal agency). *See also* *Lefcoe, HUD's Authority to Mandate Tenants Rights in Public Housing*, 80 YALE L.J. 463 (1971) (a general appraisal of the limits of HUD's power under statute and the Constitution to protect tenant interests); Note, *HUD's Authority to Mandate Effective Management of Public Housing*, 50 J. URB. L. 79 (1972) (comment on and extension of *Lefcoe's* analysis).

72. 423 F. Supp. 453 (D. R.I. 1976), *rev'd on other grounds*, 565 F.2d 1217 (1st Cir. 1977).

73. *See* note 28 and accompanying text *supra*.

74. 423 F. Supp. at 465. The court found it unnecessary to determine whether plaintiffs could bring this action as third-party beneficiaries of the ACC entered into by HUD and the housing authority. *Id.*

75. Low-Rent Housing Act, §§ 1, 13(a), 42 U.S.C. §§ 1401, 1413(a) (1970) (current version United States Housing Act of 1937 §§ 1437, 1437g (1976)).

76. HUD had already terminated the subsidy due to the local authority's failure to diligently prosecute the project. Plaintiffs also challenged HUD's authority to end funding. A federal district court had decided the action against HUD in plaintiff's favor, but the First Circuit reversed on appeal. *Silva v. East Providence Hous. Auth.*, 565 F.2d 1217 (1st Cir. 1977). The action against the housing authority is the only part of the opinion relevant to this Comment.

77. 423 F. Supp. at 464. *See* notes 6, 7, 10 and accompanying text *supra*.

78. 423 F. Supp. at 464. *Accord*, *Thorpe v. Hous. Auth. City of Durham, N.C.*, 393 U.S. 268 (1969).

dial structure.⁷⁹ The court rejected application of the exclusionary maxim later relied upon by the *Transamerica* Court.⁸⁰ Instead, quoting from *Cort*, the judge reasoned that since the plaintiffs' class had certain statutory rights,⁸¹ plaintiffs need not show evidence of "an intent to create a private cause of action" in the legislative history.⁸²

Judge Pettine, addressing the *Cort* policy factor, held that affording a hearing to persons with considerable interest in the project would further the purpose of alleviating the shortage of decent, low-income housing.⁸³ Moreover, allowing the suit to go forward would not interfere with "discretionary management decisions" of the housing authority⁸⁴ or with administrative decisions of HUD.⁸⁵ Under the fourth *Cort* factor, the court held that in a situation involving substantial issues of national housing policy a private right of action does not impermissibly encroach on the domain of state law.⁸⁶

79. 423 F. Supp. at 464. *But see* Falzarano v. United States, 607 F.2d 506, 510 (1st Cir. 1979).

80. 423 F. Supp. at 464. Where the act provided no limited private right of action, there was no congressional intent to deny a broader private right of action even though the statute established a public remedial mechanism. *Id.* See note 36 and accompanying text *supra*. *But see* note 56 and accompanying text *supra*.

81. *Id.* See *McQueen v. National Capital Hous. Auth.*, 366 A.2d 786, 793 (D.C. Ct. App. 1976) (holding Congress by the United States Housing Act created an "entitlement" to a decent, safe, and sanitary dwelling). *But see* note 67 and accompanying text *supra*.

82. 423 F. Supp. at 464. The judge in *Silva* relied expressly on former Justice Clark's opinion in *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1972) (reasoning that a civil remedy may be implied for persons clearly within the protective realm of legislation in the public interest even though the statute's language contains no explicit indication that statutory beneficiaries possess a right to enforce the statute's provisions). For other cases finding implied causes of actions under the rationale of *Euresti* in the statutory beneficiaries of welfare legislation see, e.g., *Saine v. Hospital Auth. of Hall County*, 502 F.2d 1033 (5th Cir. 1974); *New York City Coalition for Community Health v. Lindsay*, 362 F. Supp. 434 (S.D.N.Y. 1973).

83. 423 F. Supp. at 465.

84. *Id.* The court distinguished *Boston Tenants* (discussed notes 64-71 and accompanying text, *supra*), stating plaintiffs in *Silva* are not second guessing discretionary managerial decisions, but are armed with the ACC which spells out specific obligations of the housing authority. See also note 8 and accompanying text, *supra*. The *Silva* court appears less than forthright in its effort to distinguish *Boston Tenants*. The court did not provide a basis for treating ACC imposed construction procedures differently from ACC required maintenance provisions, and the court's language in general seems to cut directly against *Boston Tenants*.

85. 423 F. Supp. at 456.

86. *Id.* See also note 39 and accompanying text, *supra*.

*Perry v. Housing Authority*⁸⁷ arose out of this background. Chief Judge Hemphill's opinion in *Perry* paid lip service to the four factor test of *Cort v. Ash*,⁸⁸ and also, without noting the limitations of *Transamerica*,⁸⁹ adopted the Supreme Court's reasoning in that case as a guide.⁹⁰ The decision focused exclusively on the first two *Cort* factors. Judge Hemphill reasoned that the Housing Act's eligibility requirements limited the statutory beneficiaries to an ascertainable group of which plaintiffs were members.⁹¹ Although the plaintiffs met the first part of the test, the court found no statutory language sufficiently concrete to establish congressional intent to allow private actions.⁹²

The failure of Judge Hemphill to read *Transamerica* in light of the general line of implication cases,⁹³ as well as those involving the United States Housing Act,⁹⁴ led to substantial flaws in his opinion. Any discussion of implication must begin from the accepted premise that a cause of action involves the power to institute a judicial proceeding to enforce some right.⁹⁵ Injury alone cannot give rise to a

87. 486 F. Supp. 498 (D. S.C. 1980).

88. *Id.* at 502.

89. See note 52 and accompanying text *supra*. Compare the discussion of Cannon v. University of Chicago, 441 U.S. 453 (1974) at note 38 and accompanying text *supra*.

90. 486 F. Supp. at 502.

91. *Id.*

92. *Id.* The district court found the policy statement in 42 U.S.C. § 1437 "too amorphous" to create a private right of action. The court also found reason to employ the *expressio unius maximi* (discussed notes 36 and 59 and accompanying text *supra*). The court asserted that Congress impliedly excluded private remedies by allowing HUD to terminate subsidies under 42 U.S.C. § 1437(g), for substantial breaches of the ACC. 486 F. Supp. at 502.

93. See notes 98-99 *infra*.

94. See notes 62-86 and accompanying text *supra*.

95. See note 21 *supra*. Recently, in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), the Court overturned a decision in the Third Circuit which found an implied cause of action under the Developmentally Disabled Assistance & Bill of Rights Act, 42 U.S.C. §§ 6001-81 (1976) in favor of mentally ill residents of a state institution. The residents sought to compel the institution to comply with provisions of the Act relating to quality of treatment and residential life. The Supreme Court held that these provisions did not impose requirements on the state but were merely "goals"—indications of desired treatment. Justice Rehnquist reasoned for the majority, that if Congress desired to impose upon the states the heavy costs of the Act's treatment and residential programs, Congress would have stated so expressly. Thus in *Halderman* the private plaintiffs—and presumably the Secretary of Health and Human Services, who was charged with enforcement of the Act—had no statutory rights or requirements to enforce.

cause of action.⁹⁶ Without explicitly saying so, the Supreme Court resolves implication cases with reference to the type of rights involved.⁹⁷ Where a statute creates a direct right in both a definable beneficiary class and the overseeing federal agency, courts have uniformly found an implied cause of action in members of the class under a traditional *Cort* approach.⁹⁸ Where the statute creates a right to certain performance in the overseeing agency for the benefit of a defined class of persons, but not directly in the class, the analysis becomes more complex.⁹⁹ *Redington* would seem to refuse implication in the latter type of case unless congressional language indicates

96. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

97. Statutes which impose a *duty* on a party to act or not to act in a certain way necessarily involve a correlative *right* in some other party to performance of that duty. See J. POMEROY, *REMEDIES & REMEDIAL RIGHTS*, § 453 (2d ed. 1883). In all implication cases a right is created in a federal agency to enforce duties and obligations imposed by statute. Although not commanded by statute a right to the performance may run to the statutory beneficiaries by implication. The questions to be resolved in each case are (1) whether the right is created in both the federal agency and the beneficiary class; and (2) if not, whether members of the beneficiary class may succeed to the agency's right of action as third party beneficiaries, or must instead passively await administrative action.

98. Implied right of action cases appear to break into two lines of precedent. One line is composed of those cases where a right is created in the beneficiary class and the other is composed of those cases where no right is created directly in the beneficiary class but a policy is established by statute which benefits the class. The latter grouping of cases is discussed in note 99 *infra*.

The former line of cases consists of those cases involving a statutorily created civil right in members of the beneficiary class. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (discussed notes 38 *supra* & 103 *infra*). The circuit courts have also included in this grouping cases involving statutory grants of welfare-type benefits to members of the beneficiary class. See, e.g., *Euresti v. Stenner*, 458 F.2d 1115 (5th Cir. 1974) (discussed note 71 *supra*). See also Note, *Implied Federal Rights of Action and the Migrant Farmworker*, 44 U. COLO. L. REV. 237 (1972) (courts should provide remedies for "existing rights" where available remedies are inadequate; such findings by courts do not interfere with legislative programs but supplement the programs); Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L. J. 1378 (1978) (outline of the "proper" application of *Cort* factors to cases raising civil rights issues).

99. Traditional regulatory statutes are generally involved in the second, and more traditional line, of implied cause of action cases. See note 98. Compare cases discussed in note 96 *supra*. Cases which arise out of statutes prohibiting certain conduct but not creating civil rights or conferring welfare grants fall under the analysis of *Cort v. Ash*, 422 U.S. 66 (1975) (discussed at notes 31-39 and accompanying text *supra*), as modified by *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and *Transamerica Mortgage Advisors*, 100 S. Ct. 242 (1979). See notes 41-61 and accompanying text *supra*).

a private cause of action.¹⁰⁰

The district court in *Perry* should have begun by determining not only whether plaintiffs were members of a beneficiary class,¹⁰¹ but also whether that class possesses a right to "decent, safe, and sanitary" housing.¹⁰² Though some case law indicates otherwise,¹⁰³ at least one court has found that the United States Housing Act vests tenants with a statutory right to fit housing.¹⁰⁴ Such a finding in *Perry* would have allowed the court to essentially by-pass the second *Cort* factor,¹⁰⁵ and appeal to the remedial scheme and to whether private actions would further the Act's purpose as required by the third *Cort* factor.¹⁰⁶ Failure to so determine leaves no proper basis

100. *Redington* inverts the approach taken in prior cases utilizing the *Cort* test. Before *Redington*, courts interpreted the second factor as an inquiry whether Congress expressed an intent to *deny* a private right of action, not whether Congress expressed an intent to *grant* such an action. *See, e.g., Jenkins v. S & A Chaissan & Sons, Inc.*, 449 F. Supp. 216 (D.C. N.Y. 1978) and note 33 *supra*.

101. 486 F. Supp. at 502. "Since the eligibility requirements of the statute limit the recipients to a precisely, ascertainable group, plaintiffs meet the first test." *Id.*

102. *See* note 97 *supra*. The threshold question of whether or not a statutory right exists must be answered before a court can proceed to determine whether or not Congress intended a private right of action. The *Perry* court in addressing a due process issue raised by the plaintiffs reaffirmed a well established position that there is no constitutional right to housing decent or otherwise. 486 F. Supp. at 503. The court did not address, however, whether once a party is a participant in a federal housing program, that party acquires some sort of statutory property right in the housing. *See* note 105 *infra*.

The Supreme Court's decision in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), discussed in note 95 *supra*, indicates that where a reviewing court is faced with a statutory provision that would require a state agency to undertake a large expenditure such as the "decent, safe, and sanitary" language of the United States Housing Act, 42 U.S.C. § 1437 (1976), that language may be construed as a mere goal and not as imposing a requirement upon the state. 451 U.S. at 11-18.

103. *See, e.g., Potrero Hill Community Action Comm. v. Housing Auth. City & County of San Francisco*, 410 F.2d 974, 978 (9th Cir. 1969) (holding tenants of a public housing project possess no rights as a group under the statute but possess only those rights as individual tenants stemming from leases with the local housing authority).

104. *Silva v. East Providence Hous. Auth.*, 423 F. Supp. 453, 464 (1976). In finding no need to inquire into the second *Cort* factor, the *Silva* court quoted *Cort*, "in situations in which it is clear that federal law has granted a class of persons *certain rights*, it is not necessary to show an intention to *create* a private cause of action . . ." (emphasis added) (quoting *Cort v. Ash*, 422 U.S. 66, 82 (1975)).

105. *See* note 38 and accompanying text *supra*.

106. *See* note 79 and accompanying text *supra*.

for applying the *Redington—Transamerica* test.¹⁰⁷

Case law indicates that whereas HUD has a right to enforce provisions of the Act or the ACC, HUD has no obligation to do so.¹⁰⁸ As a result, if a federal court denies private right of action, tenants would have only potential relief—relief dependent on discretionary HUD action. Yet in a case analogous to *Perry*, the Fifth Circuit held that members of a beneficiary class need not await possible administrative action to enforce rights created in the class by federal statute.¹⁰⁹

HUD has available only one sanction for breaches of duty by the local authority—a HUD takeover of the project. Considering the severity of such a sanction and the burdens it would place upon HUD and the project residents, a HUD takeover seems improbable as an alternative.¹¹⁰ Thus, private action would assist and not hinder HUD in protecting those rights under its charge.¹¹¹ Equally important, private actions would not interfere with managerial discretion reserved to the local authority because the ACC imposes specific and judi-

107. See note 90 and accompanying text *supra*. The judge failed to consider the limitations of *Touche, Ross & Co. v. Redington*, 442 U.S. 560 (1979) and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), in applying the strict construction approach of *Transamerica*. In *Redington* the Court limited its holding by noting that an appeal to statutory purposes was appropriate where the statute created personal rights in members of the beneficiary class. See note 51 and accompanying text *supra*. In addition, the application of the *expressio unius* maxim of construction and the disregard of statutory purposes in *Transamerica* only makes sense in light of the above quoted language from *Redington* and *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (discussed in note 38 *supra*) if the reviewing court determines that the statute was merely enacted to benefit some group of persons that conferred no substantive right in group members to the benefit. Although *Cannon* involves a civil rights claim, the case's reach appears broader. The Supreme Court reasoned that it had never withheld a private remedy "where the statutes explicitly conferred a benefit on a class of persons" and where those persons were not assured of the "ability to activate and participate in the administrative process contemplated by the statute." 441 U.S. at 706 n.40.

108. See note 66 and accompanying text *supra*.

109. See *Euresti v. Stenner*, 458 F.2d 1115 (5th Cir. 1974) (discussed note 71 *supra*). This aspect of *Euresti* was expressly adopted by the court in *Silva v. East Providence Hous. Auth.*, 423 F. Supp. 453, 465 (D.R.I. 1976) *rev'd on other grounds* 565 F.2d 1217 (1st Cir. 1977) (discussed notes 74-86 and accompanying text *supra*). See also *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

110. See *Cannon v. University of Chicago*, 441 U.S. 677, 705-707 (1979) discussed in note 38 *supra*. The fact that *Cannon* was decided only one month before *Redington* and was extensively relied on in both *Redington* and *Transamerica* indicates that the *Cannon* approach is still good law.

111. See note 85 and accompanying text *supra*.

cially enforceable obligations on the authority.¹¹²

Although the *Redington-Transamerica* decisions clearly hold that beneficiary status alone cannot support the finding of an implied private right of action, these decisions should not stand in the way of implication where intended beneficiaries of a legislative scheme assert a statutory right.

Mark Packer

112. See notes 10 and 84 and accompanying text *supra*.

