Notes

Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent

Plaintiffs benefited by a federal contract have two claims if the contract is breached.[1] First, they can assert a private right of action based on the statute authorizing the contract. The Supreme Court's increasingly restrictive view of implied rights of action makes the success of this claim unlikely.[2] Second, they can assert standing as third party beneficiaries of the contract.[3] In recent years the number of third party claims arising from welfare-related public contracts[4] has grown significantly.[5] Yet courts have improperly conflated the third party beneficiary and implied right of action analyses by failing to distinguish congressional from administrative agency intent, and, as a result, have denied third party beneficiary standing in cases in which it is a conceptually distinct alternative to implied right of action standing.

This Note will describe and compare the implied right of action and

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1. Frequently a third claim is available to beneficiaries of federal contracts: They can and sometimes must seek administrative remedies before seeking review. *See* City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972) (applying doctrine that administrative remedies must be exhausted before judicial remedies can be pursued).

2. *See infra* pp. 876–77 (discussing development of implied right of action analysis).

3. Third party contract standing was recognized as early as Dutton v. Poole, 2 Lev. 210, 83 Eng. Rep. 523 (K.B. 1677) (father's agreement not to sell wood which son would inherit if son would pay his sister's dowry enforceable by her). In the United States, recognition of beneficiary rights spread after the celebrated case of Lawrence v. Fox, 20 N.Y. 268 (1859) (creditor may enforce promisee's agreement to pay debt of promisor).

4. *See* Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV. C.R.-C.L. L. REV. 1, 23–31 (1983). The phrase "welfare-related public contracts" is meant to distinguish public contracts related to welfare legislation from more traditional public contracts that have long been the focus of third party claims.

5. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 313 reporter's note comment a (1981) (recognizing recent cases involving rights arising from social service contracts as well as more "traditional disputes" arising from contracts to "provide services to the general public . . . and to be liable for damages to third parties").

third party beneficiary analyses, and demonstrate how courts have collapsed the analytic distinction between the two. It will then establish the relevance of administrative agency intent to the contractual analysis by introducing the concept of levels of governmental intent and by examining pertinent case law. The Note will conclude by proposing a three-tier analysis of third party standing on public contracts.

I. Implied Rights of Action

A private right of action is "implied" from a statute when a court grants a litigant standing to sue for breach of the statute even though Congress did not explicitly grant such standing. The problem of when to imply a private action has resisted easy solution, and the Supreme Court has shifted among more and less restrictive tests for the determination.[6]

In *Cort v. Ash*[7] the Supreme Court adopted an expansive analysis to determine whether a right of action can be judicially implied. The *Cort* test enquires: first, whether Congress enacted the statute for the "especial benefit" of the plaintiff's class;[8] second, whether Congress intended to create a private remedy; third, whether implying such a remedy would be consistent with the statutory scheme; and fourth, whether the cause of action is "traditionally relegated to state law" so that implying a federal right would be inappropriate.[9]

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6. Several articles trace the development of implied rights of action. *See* Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to* Borak, 79 Nw. U.L. Rev. 227 (1984); Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 Mercer L. Rev. 973 (1983); Frankel, *Implied Rights of Action*, 67 Va. L. Rev. 553 (1981); Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 Vand. L. Rev. 1333 (1980); Note, *Implied Private Rights of Action: The Courts Search for Limitations in a Confused Area of the Law*, 13 Cum. L. Rev. 569 (1983).

The first Supreme Court application of the common law rule that violation of a statute could lead to private damages occurred in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916) (right of action implied from Federal Safety Appliance Acts; plaintiff a member "of the class for whose especial benefit the statute was enacted"). For the next half century, implied rights of action were rarely invoked. The next methodologically significant case was J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (private remedy implied from § 27 of Securities Exchange Act of 1934), in which the Court emphasized the desirability and necessity of making available private damages to enforce the statutory requirements. This focus on implying rights to supplement statutory enforcement schemes was reemphasized in Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201-04 (1967) (government may recover costs of raising sunken barge under § 15 of Rivers and Harbors Act of 1899). In the time period between *Borak* and Cort v. Ash, 422 U.S. 66 (1975) (no implied right in favor of corporate stockholder under 18 U.S.C. § 610), the Supreme Court generally favored implied rights, and it implied private rights in important civil rights areas. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237-40 (1969) (Civil Rights Act of 1866); Allen v. State Bd. of Elections, 393 U.S. 544, 554-57 (1969) (Voting Rights Act of 1965); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (right of action implied from Fourth Amendment).

7. 422 U.S. 66 (1975).

8. *Id.* at 78.

9. *Id.*

Recent Supreme Court decisions,[10] however, apply an increasingly stringent standard for the implication of private causes of action.[11] These decisions[12] emphasize the centrality of congressional intent to the implication analysis, and often do not reach the third and fourth *Cort* factors, finding legislative intent dispositive.[13]

II. Third Party Beneficiary Law

Intent is also the focus of third party beneficiary law, which has developed different standing tests for private and public contracts.

A. *Application to Private Contracts*

Contracts which benefit third parties sometimes vest enforceable rights in third party beneficiaries. The search continues for a reliable test to determine which of the benefited third parties has an enforceable contract right.[14] The Restatement (Second) of Contracts—the generally accepted

10. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (private right implied from Commodities Exchange Act); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (no implied right of action under Davis-Bacon Act where contracting agency viewed contract as not covered by Act); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (no implied right of action under Investment Advisors Act of 1940); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (no implied right of action under § 17(a) of Securities Exchange Act of 1934).

11. *See infra* p. 892-93 (discussing separation-of-powers objections which have contributed to constriction of implied right analysis).

12. *See Touche Ross*, 442 U.S. at 575-76; *id.* at 579-80 (Brennan, J., concurring); *see also Merrill Lynch*, 456 U.S. at 377-78, 388 (*Cort* test focuses on legislative intent; "there is no need . . . to 'trudge through all four of the factors when the dispositive question of legislative intent has been resolved'") (quoting California v. Sierra Club, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring in judgment)); *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 23-24 (first two *Cort* factors dispositive); Ashford, *supra* note 6, at 231 (Supreme Court has abandoned common law judicial role in determining implied rights and instituted narrower focus on statutory construction to determine existence of private rights); Frankel, *supra* note 6, at 562 (Court's restrictive analysis treats implication of private rights as a matter of statutory construction).

13. Legislative intent must be expressed either explicitly or through the legislative choice of certain right-creating language. The Court has distinguished right-creating from duty-creating statutory language, finding that the former but not the latter supports an implication of congressional intent to confer private standing. *See* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979). Right-creating language can be found, for example, in the Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 (1982)): "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Duty-creating language, by contrast, does not focus directly on the benefited class. An example is a rejected proposal for Title IX: "The Secretary shall not make any grant . . . nor shall the Secretary enter into any contract . . . unless the . . . contract . . . contains assurances satisfactory to the Secretary that [the contractor] . . . will not discriminate on the basis of sex . . . ." *Cannon*, 441 U.S. at 693 n.14.

14. This search has been only partly successful. *See* Restatement of Contracts §§ 133-147 (1932), criticized in Note, *The Third Party Beneficiary Concept: A Proposal*, 57 Colum. L. Rev. 406, 415-25 (1957) [hereinafter cited as Note, *Third Party Beneficiary Concept*]; Restatement (Second) of Contracts §§ 302-315 (1979), discussed and criticized in Note, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 Cornell L. Rev. 880, 887-99 (1982) [hereinafter cited as Note, *Beneficiaries and Restatement*].

text for beneficiary rights—categorizes beneficiaries as either "intended" or "incidental."[15] A beneficiary is intended, and consequently may sue for breach of contract, if the promisee is his debtor or if the promisee meant the contract to benefit him.[16] On the other hand, a beneficiary is incidental, and consequently without contractual rights, if the promisee neither owed him money (or services) nor contracted for his direct benefit.[17]

B. *Application to Public Contracts*

Government contract cases raise discrete analytic difficulties for the determination of beneficiary rights. Because every member of the public is in some sense an intended beneficiary of a government contract, courts and codifiers have been forced to fashion a more restrictive test to determine

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The First Restatement's categorization of third party beneficiaries as donee, creditor, or incidental only compounded the confusion over third party contract rights. If the promisee intended to make a gift to the beneficiary or to confer on him an enforceable right against the promisor for some performance not already owed him by the promisee, the beneficiary was a donee beneficiary. RESTATEMENT OF CONTRACTS § 133(1)(a). If the promisor's performance of the promise would discharge the promisee's debt to the beneficiary, the beneficiary was a creditor beneficiary. *Id.* § 133(1)(b). Third parties unable to characterize themselves as donee or creditor beneficiaries were incidental beneficiaries without contractual rights. *Id.* §§ 133(1)(c), 147. These categories reappear in the intent test of the Second Restatement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302.

Proposals for determining third party rights continue to surface. *See, e.g.*, Jones, *Legal Protection of Third Party Beneficiaries: On Opening Courthouse Doors*, 46 U. CIN. L. REV. 313, 326-37 (1977) (proposing an evaluation of beneficiary rights based on three policies: discovering and enforcing common intentions of contracting parties, supplementing contracts that contain insufficient evidence by invoking specific values, and assuring that contracts do not conflict with essential community values); Note, *Beneficiaries and Restatement*, *supra*, at 891-99 (proposing guidelines to ensure proper use of the Second Restatement's intent to benefit test); Note, Martinez v. Socoma Companies: *Problems in Determining Contract Beneficiaries' Rights*, 27 HASTINGS L.J. 137, 167-70 (1975) (proposing refined intent to benefit test for both private and public contracts) [hereinafter cited as Note, Martinez v. Socoma Companies]; Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision-Making*, 54 VA. L. REV. 1166, 1186-92 (1968) (proposing that intent test be abandoned in favor of test that measures "justifiable reliance" by beneficiary in light of surrounding commercial and social circumstances) [hereinafter cited as Note, *Beneficiaries and the Intention Standard*]; Case Comment, 88 HARV. L. REV. 646, 652-53 (1975) (arguing that beneficiary rights on government contracts should be determined by measuring "impact of an additional remedy" on objectives of the relevant statute).

15. Section 302 of the RESTATEMENT (SECOND) OF CONTRACTS provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
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> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
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> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

16. If, for example, *A* promises *B* to purchase a painting for *B*'s close friend *C*, *C* is an intended beneficiary of the contract. *B* intended to benefit *C*.

17. If, for example, *A* promises to buy *B* a General Electric toaster, G.E. is a mere incidental beneficiary of the promise. *B* may have wanted a G.E. toaster, but there is no evidence that *A* or *B* intended to benefit G.E. in any way.

third party rights on public contracts.[18] The most widely adopted approach is that formulated in section 313 of the Restatement (Second) of Contracts.[19]

Section 313(1) applies the general rules of the Second Restatement's chapter on contract beneficiaries—including the intent to benefit test—to government contracts.[20] Section 313(2) turns to the unique problem posed by government contracts: how to differentiate among the many beneficiaries of government contracts.[21] According to section 313 and section 302,[22] beneficiary rights under public contracts arise only if the promisee both intended to benefit the third party and intended to confer a right to *enforce* the benefit on the third party.[23]

The Second Restatement has not been universally adopted, and courts have been inconsistent in their application of beneficiary law.[24] In suits in

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18. A more restrictive test is necessary because, under the intent to benefit test, the class of potential plaintiffs who can sue on a public contract is prohibitively large. Promisors, faced with the threat of enormous liability to many third party beneficiaries, would demand compensation before accepting this risk. This demand would make public contracting unacceptably expensive.

19. Section 313 of the Second Restatement preserves the basic standard proposed by the First Restatement, but it employs more general language and expands its coverage from municipalities to other governmental bodies. *See* RESTATEMENT OF CONTRACTS § 145 (1932).

20. The general rules apply to government contracts "except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." RESTATEMENT (SECOND) OF CONTRACTS § 313(1).

21. The promisor:

> is not subject to contractual liability to a member of the public for consequential damages . . . unless
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> (a) the terms of the promise provide for such liability; or
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> (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

Id. § 313(2). According to comment a to § 313, § 313(2)(b) is applicable only when there remains "doubt," after applying §§ 302, 313(1), and 313(2)(a), as to whether the beneficiaries of a government contract are intended. If doubt exists, the promisor will not be liable for "consequential damages to individual members of the public unless the conditions of Subsection (2)(b) are met."

Commentators have noted several apparent limitations in § 313(2). It applies to claims brought by "a member of the public," rather than by a more identifiable or discrete class of individuals, and to claims for consequential damages rather than to claims for specific performance. In addition, it may have been written with traditional government construction and supply contracts in mind, and may be ill-adapted for analysis of welfare-related public contracts. For a discussion of the limits of § 313(2), see sources cited *infra* note 24. Nevertheless, many courts rely on § 313(2) to determine beneficiary rights. *See* cases cited *infra* note 26.

22. *See supra* note 15 (quoting § 302).

23. Although the Second Restatement emphasizes the intentions of the promisee alone in determining third party rights, some courts and critics have insisted that the promisor's intentions are also relevant to the analysis, arguing that contracts embody shared intentions, not the intentions of either party alone. *See* Holbrook v. Pitt, 643 F.2d 1261, 1270 n.17 (7th Cir. 1981); Jones, *supra* note 14, at 319-20.

24. *See* cases cited *infra* notes 25-26. Even courts that accept the applicability of the Restatement occasionally disagree on whether the appropriate standing test for public contracts is intent to benefit or intent to grant an *enforceable* benefit. An example of this disagreement can be found in Martinez v. Socoma Co., 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1974). *Martinez* involved a federally funded project to renovate an East Los Angeles jail. The defendants contracted, among other things, to train and employ an agreed-upon number of disadvantaged local residents, in return for

which third parties assert rights based on government contracts, many courts focus only on intent to benefit,[25] while other courts, more faithful to section 313 (or section 145 of the First Restatement), search for an intent to grant standing to enforce the benefit.[26] This inconsistency, however, obscures neither the analytic similarity of third party beneficiary and implied right of action analysis nor their judicial conflation.[27]

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which the defendants received large subsidies. The plaintiffs represented the class of persons eligible to participate in the program. In holding that the plaintiffs were not third party beneficiaries of the contract, the majority applied § 145 of the First Restatement, governing public contracts, thus requiring that the contract manifest an intent that the defendants pay damages to the plaintiffs in the event of a breach. *Id.* at 401-02, 404, 521 P.2d at 845-46, 847-48, 113 Cal. Rptr. at 589-90, 591-92. The dissent also applied the First Restatement, but it argued that § 145 was not appropriate since the contract manifested "an intent to benefit directly a particular person or ascertainable class of persons." *Id.* at 412-13, 521 P.2d at 853, 113 Cal. Rptr. at 597 (Burke, J., dissenting). Thus the applicable standing test should have been whether the third party was "a member of a class for whose benefit the contract was made." *Id.* at 411, 521 P.2d at 852, 113 Cal. Rptr. at 596.

A number of commentators have agreed with the *Martinez* dissent. *See* Block, *supra* note 4, at 20 (third party beneficiary of Title VI compliance agreement "need not prove that the promisee intended him to have a *right of enforcement*, but need only show that the promisee intended him to receive the *benefit* of the promise") (emphasis in original). Block argues that § 313 of the Second Restatement is designed to apply principally to commercial contracts between state agencies and construction, supply and service contractors. *Id.* at 20 n.62. *See also* Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA. L. REV. 822, 857 (1975) (restrictive test for third party beneficiary standing on public contracts applies only when the remedy is consequential damages and does not apply when remedy is specific performance); Case Comment, *supra* note 14, at 650 (section 145 of First Restatement, "designed to limit liability for 'personal injury and property damage arising out of the operations of a government contractor,'" should not be applied when suit "was not for personal injury or property damage, but was rather for the value of promised performance") (citation omitted).

25. *See, e.g.*, Holbrook v. Pitt, 643 F.2d 1261, 1270 (7th Cir. 1981) (applying intent to benefit test); Norfolk & Western Co. v. United States, 641 F.2d 1201, 1208-09 (6th Cir. 1980) (applying state law intent to benefit test); Organization of Minority Vendors v. Illinois C.G.R.R., 579 F. Supp. 574, 600-01 (N.D. Ill. 1983) (applying intent to benefit test); Taylor Woodrow Blitman Constr. Corp. v. Southfield Gardens Co., 534 F. Supp. 340, 343 (D. Mass. 1982) (applying intent to benefit and reasonableness of reliance test); Harrison v. Housing Auth., 445 F. Supp. 356, 359 (N.D. Ga. 1978) (applying intent to benefit test), *aff'd*, 592 F.2d 281 (5th Cir. 1979).

26. *See, e.g.*, Nguyen v. United States Catholic Conference, 719 F.2d 52, 55-56 (3rd Cir. 1983); McCullough v. Redevelopment Auth., 522 F.2d 858, 867 n.27 (3rd Cir. 1975); Carson v. Pierce, 546 F. Supp. 80, 87 (E.D. Mo. 1982), *aff'd*, 719 F.2d 931 (8th Cir. 1983); Schell v. National Insurers Ass'n, 520 F. Supp. 150, 157 (D. Colo. 1981); Feldman v. United States Dept. of Hous. and Urban Dev., 430 F. Supp. 1324, 1328 (E.D. Pa. 1977); Commonwealth of Pennsylvania v. National Ass'n of Flood Insurers, 378 F. Supp. 1339, 1347-48 (M.D. Pa. 1974), *aff'd in part and rev'd in part on other grounds*, 520 F.2d 11 (3rd Cir. 1975).

27. The unsettled state of third party beneficiary law has not escaped judicial notice. *See* Organization of Minority Vendors v. Illinois C.G.R.R., 579 F. Supp. 574, 600 (N.D. Ill. 1983). This Note accepts, for convenience of exposition, that the more stringent intent to confer standing test is the appropriate one. The Note should not be read as an endorsement of that test. Courts have failed to recognize the importance of levels of governmental intent to both tests, and the analysis this Note proposes in order to remedy this failure applies to the less stringent test as well. *See infra* note 74.

III. The Disaggregation of Governmental Intent

A. *The Conflation of the Analyses*

The intent-based test of implied right of action analysis overlaps with the test employed to determine third party beneficiary rights arising from government contracts.[28] Both ask whether the government intended to confer standing on the plaintiff to enforce the benefit at issue.

In cases in which litigants assert both third party beneficiary and implied right of action claims, the similarity of the two analyses has undermined the independence of the third party beneficiary determination.[29] Often, courts expend considerable energy determining that a private action cannot be implied from a statute and then with little consideration brush aside the contractual issue, as if its failure follows *a fortiori* from the failure of the statutory claim.[30] Even those courts that give the contract claim more detailed examination frequently conflate the two analyses.[31]

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28. The first two *Cort* factors almost exactly parallel the requirements for third party beneficiary standing on public contracts. The requirement that the plaintiff must be the "especial" beneficiary of the statute echoes the general requirement in third party beneficiary law, embodied in § 302(1)(b) of the Second Restatement, that the beneficiary must be the intended recipient of the contracting parties' promise. The second *Cort* factor adds the requirement, also present in § 313(2)(a) of the Second Restatement, that the promisee must have intended to grant the beneficiary standing to enforce the promise.

The third *Cort* factor, requiring consistency with the underlying legislative scheme, also may be relevant to third party beneficiary law. In both analyses one can imply, from the lack of an alternative enforcement mechanism, possible legislative or contracting party intent in favor of third party statutory or contractual standing. On the other hand, the existence of an enforcement mechanism may suggest that private standing was not contemplated by the government or by the contracting parties.

29. A few courts have noted the similarity of the two analyses. In Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980) (no implied action under § 503 of the Rehabilitation Act of 1973), *cert. denied*, 449 U.S. 889 (1980), the court did

> not undertake to discuss the issues . . . whether a federal contract containing provisions required by statute creates a third-party beneficiary relationship . . . . If the thesis is plausible, we would also need to consider whether implication of a third-party beneficiary claim turns on the same considerations as implication of a private cause of action.

611 F.2d at 1079 n.5. *See also* Chaplin v. Consolidated Edison Co., 579 F. Supp. 1470, 1473 (S.D.N.Y. 1984) (analyses are "conceptually distinct" but turn on substantially overlapping considerations).

30. *See* Hodges v. Atchison, T. & S.F. Ry., 728 F.2d 414, 416 (10th Cir.) (no implied right of action under § 503 of Rehabilitation Act of 1973; third party beneficiary claim also rejected as "but another aspect of the implied right of action argument"), *cert. denied* 105 S. Ct. 97 (1984); Perry v. Housing Auth., 664 F.2d 1210 (4th Cir. 1981) (no implied right or third party beneficiary standing under provisions of the United States Housing Act of 1937); Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979) (tenants have no implied right and are not third party beneficiaries of contracts entered pursuant to 12 U.S.C. § 1715*l* of National Housing Act); Harlib v. Lynn, 511 F.2d 51 (7th Cir. 1975) (same).

31. *See* Murphy v. Villanova Univ., 547 F. Supp. 512, 521 (E.D. Pa. 1982) (by claiming third party beneficiary status, plaintiff "merely reclothed in a common law outfit his" implied right of action claim), *aff'd mem.*, 707 F.2d 1402 (3rd Cir. 1983); Carson v. Pierce, 546 F. Supp. 80, 87 (E.D. Mo. 1982) (conclusion that "tenants are not intended third party beneficiaries follows" from negative implied right of action determination under 12 U.S.C. § 1713 of the National Housing Act; to allow a third party beneficiary claim would be "inconsistent" with determination that Congress

B. *Two Levels of Governmental Intent*

This conflation is caused by a narrow judicial view of the governmental intent measured by both the implied right of action and the third party beneficiary tests. By equating governmental intent with congressional intent, courts have eliminated the impact of agency policy making on contract interpretation. As a result, they have left no independent role for third party beneficiary standing.

Congress often leaves broad discretion to agencies[32] to determine both the specific language of public contracts and the best means of effectuating the statutory scheme.[33] Agencies thus play an important role in developing the intent of public contracts. Agencies not only sign public contracts and draft most of the language, they also develop many of the underlying policies of the contracts. Courts have not consistently recognized the decision-making role of agencies in the third party beneficiary context.[34] As a result they have often overstated the pertinence of congressional, rather than agency, intent to grant enforceable third party contract rights.

Courts should evaluate both congressional and agency intent to determine third party beneficiary standing.[35] Only statutory language need be construed for implied right of action analysis because congressional intent to confer standing is dispositive.[36] In contrast, third party beneficiary

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intended no private remedy); *see also* Hoopes v. Equifax, Inc., 611 F.2d 134, 135 (6th Cir. 1979) (§ 503 third party beneficiary claim defeated by lack of private right under that section); Chaplin v. Consolidated Edison Co., 579 F. Supp. 1470, 1473 (S.D.N.Y. 1984) (no implied action or third party beneficiary standing under § 503 of Rehabilitation Act of 1973; "although the language of [§ 503 contracts], viewed in isolation, may well suggest" plaintiffs have beneficiary status, "such an interpretation would be inconsistent with the conclusion" that they have no implied right).

32. This Note does not distinguish independent from executive-branch agencies, since both have the necessary discretion to grant third party contract rights. *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 585 (1984) (noting "commonalities of internal structure, function, and procedure").

33. One example of the exercise of agency discretion to tailor the terms of public contracts to the specific circumstances of the parties—in this case, beneficiaries of Title VI compliance agreements—is discussed in Block, *supra* note 4, at 13.

34. *See* cases cited *supra* notes 30-31.

35. One commentator has noted the multiple levels of government intent in the context of third party beneficiary rights. *See* Case Comment, *supra* note 14. The author of this case comment proposed that, as in implied right of action cases, courts should determine third party standing on public contracts by judging the impact of an additional remedy on the legislative policy embodied in the statutes authorizing the contracts (what was to become the third prong of the *Cort* test). The analogy to implied right of action analysis which the comment drew, however, has become obsolete since the Supreme Court's recent deemphasis of the last two *Cort* factors. The comment incorrectly assumed that the complexity of governmental intent disqualifies third party beneficiary analysis. The complexity of governmental intent instead revitalizes third party beneficiary analysis by distinguishing it from the currently restrictive implied right of action analysis.

36. *See supra* notes 10-12 and cases cited therein. Implication may also occur from executive orders, in which case presidential intent may have some role. *See* Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 862-72 (1981) (congressional intent, not presidential intent, should be major factor in determining whether to imply rights from executive orders).

analysis requires examination of agency intent, as expressed in administrative decisions and public contract terms, as well as examination of congressional intent.[37]

IV. Varieties of Congressional Guidance

Agencies can influence third party contract rights only if they have an opportunity to introduce their intent into the contract. This opportunity arises when Congress leaves the agencies discretion to choose the terms of the agreements into which they enter. Consequently, the impact of agency intent on beneficiary rights depends ultimately upon the comprehensiveness of congressional guidance.

A. *Complete Guidance: Section 503 of the Rehabilitation Act of 1973*

Congress gives complete guidance in statutes that comprehensively set forth the terms to be included in certain contracts. For these contracts, governmental intent is synonymous with congressional intent; the role of agencies in formulating the contractual terms is purely mechanical. As a result, the third party beneficiary and implied right of action analyses pose the same question: Did Congress intend to confer an enforceable benefit on the person asserting contractual or statutory standing?

Congress provided complete guidance in section 503 of the Rehabilitation Act of 1973.[38] Section 503 requires the inclusion in certain federal contracts of an affirmative action clause that provides for employment and advancement of qualified handicapped individuals.[39] In section 503 cases

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37. Few courts recognize the importance of levels of intent to third party beneficiary analysis. Courts tend to focus on congressional intent, and partly or wholly ignore administrative agency intent. *See* Chaplin v. Consolidated Edison Co., 579 F. Supp. 1470, 1473 (S.D.N.Y. 1984) (when contract relates to statutory scheme, courts should examine congressional intent to determine contracting parties' intent); *see also* Note, Martinez v. Socoma Companies, *supra* note 14, at 169 ("[I]f a contract is made pursuant to a statutory scheme, the purposes of the contract should be determined by reading the statute and the contract together.").

38. 29 U.S.C. § 793 (1982). Section 503 is discussed here only as an example of comprehensiveness, and no effort is made to analyse its substance.

39. 29 U.S.C. § 793 provides, in part:

> (a) . . . Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . .
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> (b) . . . If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, . . . such individual may file a complaint with the Department of Labor.

The President, by Executive Order, authorized the Secretary of Labor to promulgate regulations to implement § 503. Exec. Order No. 11758, 3A C.F.R. 116 (1974), *reprinted as amended by* Exec. Order No. 11784, 3A C.F.R. 149 (1974), at 29 U.S.C. § 701 (1982). The resulting regulation is the uniform affirmative action clause:

> Each agency and each contractor and subcontractor shall include the following affirmative

in which plaintiffs have asserted third party contract rights, their claims have been correctly dismissed but incorrectly analyzed.[40] Section 503 permits agencies no opportunity to express their intent to grant or deny standing,[41] leaving congressional intent as the sole touchstone for both implied right and third party beneficiary standing. Since courts have held, almost unanimously, that section 503 does not contain an implied right of action,[42] no further inquiry into third party beneficiary rights is necessary.[43]

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action clause in each of its covered Government contracts . . . .

AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS

(a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination . . . .

. . . .

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

41 C.F.R. § 60-741.4 (1984).

40. *See* Howard v. Uniroyal, Inc., 719 F.2d 1552 (11th Cir. 1983) (§ 503 preempts state law third party beneficiary claim); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979) (no implied right of action or third party beneficiary standing); Chaplin v. Consolidated Edison Co., 579 F. Supp. 1470 (S.D.N.Y. 1984) (no third party beneficiary standing).

41. Contracting agencies have no discretion to alter the terms of the affirmative action clause. The Department of Labor does have some discretion, however, in promulgating and enforcing the clause. Although the Department of Labor is not a promisee to the contracts at issue, because it has some slight discretion in implementing § 503 there is arguably more than one level of governmental intent relevant to the contractual analysis. But because this discretion is limited—the language of the uniform affirmative action clause tracks the language chosen by Congress for § 503—the relevant intent to confer an enforceable benefit is solely that of Congress. Moreover, the Department of Labor's inability, under the provisions of § 503, to tailor its discretionary power to fit the needs of each contract further weakens the importance in these cases of agency intent.

42. The Courts of Appeals of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th Circuits have held that no private action can be implied from § 503. *See* Davis v. United Air Lines, Inc., 662 F.2d 120 (2nd Cir. 1981), *cert. denied*, 456 U.S. 965 (1982); Beam v. Sun Shipbuilding & Dry Dock Co., 679 F.2d 1077 (3rd Cir. 1982); Painter v. Horne Bros., 710 F.2d 143 (4th Cir. 1983); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 459 U.S. 881 (1982); Hodges v. Atchison, T. & S.F. Ry., 728 F.2d 414 (10th Cir.), *cert. denied* 105 S. Ct. 97 (1984).

Although in the minority, a number of district courts have implied private rights from § 503. *See, e.g.*, Davis v. Modine Mfg. Co., 526 F. Supp. 943 (D. Kan. 1981); California Paralyzed Veterans Ass'n. v. FCC, 496 F. Supp. 125 (C.D. Cal. 1980); Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979). The precedential value of the California district court decisions has been undermined by *Fisher*, 663 F.2d 861.

43. Probably as a result of the overlap in the intent pertinent to the two analyses, decisions construing standing under § 503 are among the clearest examples of the conflation of implied right of action and third party beneficiary analysis. For example, in Chaplin v. Consolidated Edison Co., 579 F. Supp. 1470, 1473 (S.D.N.Y. 1984), the court recognized the theoretical difference between the two analyses but found that, as a "practical matter," the considerations determining each were substantially the same. Because the parties executed the contract at issue pursuant to a legislative scheme, the intent relevant to the contract was that of Congress. Therefore, although the contractual language, "viewed in isolation," appeared to grant third party contract rights, the contractual issue had already

B. *No Guidance: 18 U.S.C. Section 4002: The Safekeeping of Federal Prisoners in State Correctional Facilities*

In other statutes, Congress gives agencies no guidance as to the terms to be included in the contract. This often occurs when Congress delegates almost complete discretion to agencies to determine how to implement a statutory scheme. When Congress gives no guidance, third party beneficiary and implied right of action analyses entirely diverge. The statute may contain no shred of congressional intent to grant enforceable rights to private individuals. At the same time, the agency administering the statute may decide that the best way to achieve the statutory goal is to grant contractual standing to the statute's beneficiaries. In such cases third party beneficiary law has an important and independent function.

Congress gave no guidance regarding what terms should be included in contracts authorized by 18 U.S.C. section 4002.[44] In section 4002, Congress delegated broad power[45] to the Attorney General to enter into and to

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been determined by the decision that § 503 did not contain an implied congressional intent to grant private standing. *Id.* This decision may be supportable, but the court failed to recognize that congressional intent was determinative in this instance only because § 503 permits no agency choice in the inclusion of the uniform affirmative action clause. Other statutes make agency intent pertinent to the third party beneficiary claim. The *Chaplin* analysis does not allow for such a possibility. Instead, *Chaplin* completely erased the analytic distinction between the two analyses, holding that the contract claim was precluded by its negative implied right of action determination. *See also* Hodges v. Atchison, T. & S.F. Ry., 728 F.2d at 416 (third party beneficiary claim is "but another aspect of the implied right of action argument"); Hoopes v. Equifax, Inc., 611 F.2d 134, 135 (6th Cir. 1979) (conflating two analyses).

The college work-study statute, 42 U.S.C. §§ 2751-2756b (1982), is another example of a statute that leaves relatively little discretion to the administering agency, once that agency decides to enter into work-study contracts. Section 2753(a) authorizes the Secretary of Education to contract with colleges and universities for work-study grants. Congress specified certain provisions that must be included in these contracts, including guarantees of secure employment for certain students, *see* § 2753(b)(4). In a decision dismissing a student's implied right of action and state law third party beneficiary claims, a Pennsylvania district court emphasized the lack of agency discretion to grant the plaintiff enforceable contract rights:

> Since the Secretary exacted this promise [to make work-study employment reasonably available] . . . at Congress's behest, and since Congress did not intend to create a statutory right of action on plaintiff's behalf, it would be anomalous indeed to construe the promise as one which the Secretary . . . intended or understood as imposing on the University potential contract liability for such claims . . . .

Murphy v. Villanova Univ., 547 F. Supp. 512, 521 (E.D. Pa. 1982), *aff'd mem.*, 707 F.2d 1402 (3rd Cir. 1983).

44. 18 U.S.C. § 4002 (1982) provides:

> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under [federal] authority . . . the Attorney General may contract, for a period not exceeding three years, with the proper [state or local] authorities . . . for the imprisonment, subsistence, care and proper employment of such persons . . . .
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> . . . .
>
> The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

45. *See infra* note 86 (discussing delegation to agencies of power to grant contractually based standing).

determine the content of contracts for the housing of federal inmates in state facilities.[46]

Courts have refused to imply a private cause of action from section 4002,[47] and in only one federal decision reaching the question have third party contract rights on a section 4002 contract been favorably reviewed.[48] The Court of Appeals for the Second Circuit, after focusing on the language of the contract and on the Bureau of Prison's—rather than Congress'—intent, ordered the lower court to redetermine third party beneficiary rights.[49] In doing so, it gave proper weight to the intent-creating role of the agency. As the court implicitly recognized, Congress made agency intent relevant to the third party beneficiary analysis of section 4002 contracts by providing general rather than detailed statutory instructions.

C. *Partial Guidance: Selected Housing Statutes*

Finally, in some statutes Congress gives partial guidance regarding the content of specified contracts, leaving some contractual terms to be chosen and drafted by agencies. In such cases, the contractual and the statutory analyses overlap. Courts must determine whether Congress or the agency chose to include the contractual term on which the standing claim is based and, if the agency intended to grant standing, whether the agency's action is consistent with the limited discretion delegated to it by Congress.

1. *The National Housing Act*

The National Housing Act[50] has been the subject of several implied right of action and third party beneficiary suits. Many courts have refused

46. Indeed, § 4002 requires the Attorney General to tailor at least one aspect of the contract to the conditions of each state facility. The Attorney General must determine the price of each contract by reviewing the general conditions of the state facility involved.

47. Owens v. Haas, 601 F.2d 1242 (2nd Cir.), *cert. denied*, 444 U.S. 980 (1979); Johnson v. Lark, 365 F. Supp. 289 (E.D. Mo. 1973).

48. *Owens*, 601 F.2d 1242. Plaintiff, a federal prisoner incarcerated in a New York County jail pursuant to a § 4002 contract, alleged that he had been assaulted by several guards. The court was persuaded in part by its determination that the United States owed federal prisoners a duty of protection, thus making plaintiff a creditor beneficiary of the contract. *See also* Blair v. Anderson, 325 A.2d 94 (Del. 1974) (prisoner a third party beneficiary of § 4002 contract).

49. The *Owens* court remanded because of the possibility that the contract it examined differed from the actual contract in effect at the time of the plaintiff's injury. 601 F.2d at 1248 n.3, 1251.

50. 12 U.S.C.A. §§ 1701-1750g (West Supp. 1984).

to imply a private right from the Act's provisions.[51] Third party beneficiary suits based on contracts executed under the Act have also been dismissed.[52]

Section 1713 of the Act authorizes the Secretary of Housing and Urban Development (HUD) to insure mortgages held by certain owners of rental housing.[53] It contains both mandatory and non-mandatory provisions. The Secretary must insure the mortgages of only those mortgagors who certify that they will not discriminate on the basis of family size. On the other hand, the Secretary may but need not take other action, by "regulation or otherwise," to direct the mortgage insurance primarily to projects which house families with children.[54] Thus, a HUD-landlord contract entered into pursuant to section 1713 can be expected to embody a mixture of congressional intent and agency initiative.

Carson v. Pierce[55] involved one such contract.[56] The court first decided that no private right of action could be implied from section 1713(b).[57] It then found that the tenants were not the intended beneficiaries of the mortgage agreement. This conclusion followed, it argued, from the decision that no implied right existed: "[S]ince the statute did not create an

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51. Burroughs v. Hills, 741 F.2d 1525 (7th Cir. 1984) (no implied right under National Housing Act); Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979) (no implied right under National Housing Act, 12 U.S.C. § 1715*l*); Carson v. Pierce, 546 F. Supp. 80 (E.D. Mo. 1982) (no implied right under National Housing Act, 12 U.S.C. § 1713(b)).

52. Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979); Feldman v. United States Dep't of Hous. and Urban Dev., 430 F. Supp. 1324 (E.D. Pa. 1977); Fenner v. Bruce Manor, Inc., 409 F. Supp. 1332 (D. Md. 1976).

53. 12 U.S.C.A. § 1713(b) provides in part:

> The insurance of mortgages under this section is intended to facilitate particularly the production of rental accommodations . . . suitable for family living. The Secretary is, therefore, authorized in the administration of this section to take action, by regulation or otherwise, which will direct the benefits of mortgage insurance hereunder primarily to those projects which make adequate provision for families with children . . . .
>
> Notwithstanding any other provisions of this section, the Secretary may not insure any mortgage under this section . . . unless the mortgagor certifies under oath that in selecting tenants for the property covered by the mortgage he will not discriminate against any family by reason of the fact that there are children in the family, and that he will not sell the property while the insurance is in effect unless the purchaser so certifies, such certification to be filed with the Secretary. Violation of any such certification shall be a misdemeanor punishable by a fine of not to exceed $500.

54. This authority, prior to November 1983, was mandatory; the 1983 amendment deleted the words "and directed" which had followed "the Secretary is, therefore, authorized."

55. 546 F. Supp. 80 (E.D. Mo. 1982).

56. Plaintiffs, tenants in an apartment that was limited to families with no more than two children, argued that the two-child limitation violated § 1713. They sought to compel HUD to enforce its obligation to prevent such discrimination in housing with HUD-insured mortgages. Plaintiffs also unsuccessfully alleged standing based on 12 U.S.C. § 1715*l*.

57. Section 1713(b), rather than directly conferring rights on tenants, directs the Secretary to take certain action, and bans discriminatory conduct by recipients of federal mortgage insurance. The court found that the statutory language thus failed to conform to the standards for implying rights set forth in Cannon v. University of Chicago, 441 U.S. 677 (1979), *see supra* note 13. Furthermore, the existence of a criminal remedy convinced the court that Congress did not intend a private remedy. *Carson*, 546 F. Supp. at 85-86.

enforceable right, surely HUD in entering into the agreement did not intend to create an enforceable right in the tenants."[58] This would otherwise allow the plaintiffs "to bring indirectly the action that they cannot bring directly under the National Housing Act."[59]

The language of section 1713 supports the court's conclusion that the tenants were not third party beneficiaries of the contract.[60] The HUD-landlord contract at issue in *Carson* may simply reflect HUD's mechanical application of the requirements of the section. If so, congressional intent is appropriately applied in both the implied right and third party beneficiary tests. Yet the court, had it analyzed the contractual terms and agency action more closely, could have found that agency intent should have determined the plaintiffs' contract rights.[61]

2. *Section 8 of the United States Housing Act of 1937*

Like the National Housing Act, section 8 of the United States Housing Act[62] has been tested by implied right of action and third party beneficiary suits. Most courts have held that no private action may be implied from the provisions of the Act.[63] Third party beneficiary suits brought under the Act have also been mostly unsuccessful,[64] with one notable exception.[65]

Section 1437 authorizes the Secretary of Housing to make annual contribution contracts with public housing agencies to assist in the creation

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58. *Carson*, 546 F. Supp. at 87.

59. *Id.*

60. Section 1713 may be read, as currently written, to grant HUD the discretion to contract for third party standing rights. But when the *Carson* contract was written, the Secretary had less discretion than under the current version of § 1713(b). *See supra* note 54.

61. The court failed to examine the language of the HUD-landlord contract. From the facts presented in the decision, it is impossible to distinguish agency action that Congress required from agency action taken by HUD on its own initiative. Consequently, the importance of agency intent to third party rights on the contract is also unclear.

62. 42 U.S.C.A. §§ 1404a-1440 (West Supp. 1984).

63. Perry v. Hous. Auth., 664 F.2d 1210 (4th Cir. 1981) (no implied right under 42 U.S.C. § 1437a); Stone v. District of Columbia, 572 F. Supp. 976 (D.D.C. 1983) (same); Harrison v. Housing Auth., 445 F. Supp. 356 (N.D. Ga. 1978) (no implied right based on HUD Low Rent Housing Administration of Program Handbook). A private right of action was implied in Silva v. East Providence Hous. Auth., 423 F. Supp. 453 (D.R.I. 1976) (private right implied from entire act). But *Silva* misapplied the *Cort v. Ash* test. It limited the inquiry under the second *Cort* factor to whether Congress intended the plaintiffs to benefit from the statute, not whether Congress intended to create a private right of action on their behalf. *See* Perry v. Hous. Auth., 664 F.2d at 1215-16.

64. Perry v. Hous. Auth., 664 F.2d at 1218 (plaintiffs not third party beneficiaries of HUD-landlord contract under 42 U.S.C. § 1437a); Roberts v. Cameron-Brown Co., 556 F.2d 356, 361-62 (5th Cir. 1977) (same, based on HUD Handbook); McCullough v. Redevelopment Auth., 522 F.2d 858, 867 n.27 (3rd Cir. 1975) (plaintiff not third party beneficiary under United States Housing Act); Boston Public Hous. Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493, 496 (D. Mass. 1974) (same).

65. Holbrook v. Pitt, 643 F.2d 1261, 1271-73 (7th Cir. 1981) (tenants are third party beneficiaries of HUD-landlord contract under 42 U.S.C. § 1437f).

and maintenance of low-rental projects.[66] The section specifies many of the provisions that must be included in the annual contribution contracts.[67] It also leaves the Secretary broad discretion to create rules and regulations to further the policies embodied in the statute.[68]

Because Congress gave partial guidance to the Secretary regarding what to include in the contracts, the governmental intent relevant to beneficiary suits varies according to the contractual clause at issue. Two contrasting examples of the interpretation of the government intent underlying section 1437 contracts are *Perry v. Housing Authority of Charleston*[69] and *Holbrook v. Pitt.*[70]

The *Perry* court dismissed the plaintiffs' third party beneficiary claim

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66. The policy statement of § 1437 does not conform to the standard enunciated in Cannon v. University of Chicago, 441 U.S. 677 (1979), for right-creating language. *See supra* note 13. Section 1437 declares:

> It is the policy of the United States . . . to assist the several States . . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of . . . dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs . . . .

This policy statement has been read, in conjunction with similar, related statutory declarations of purpose, to include a congressional intent not to allow private rights of action, since allowing private suits reduces local administrative control of housing programs. *See* Perry v. Hous. Auth., 664 F.2d 1210, 1213 (4th Cir. 1981). This statement might also indicate lack of congressional intent to grant third party contract rights, although such an inference is less plausible than the negative implication of private statutory rights.

67. For example, § 1437d(*l*) provides: "Each public housing agency shall utilize leases which . . . (2) obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition."

68. For example, § 1437d: The

> (a) . . . Secretary may include in any contract for . . . annual contributions . . . such . . . conditions . . . as he may deem necessary in order to insure the lower income character of the project involved. . . .
>
> . . . .
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> (c) . . . (4) the public housing agency shall comply with such . . . requirements as the Secretary may prescribe . . . including requirements pertaining to . . .
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> . . .
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> (C) 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.

This section permits the Secretary to determine that tenant security and project maintenance are best assured by granting tenants third party beneficiary rights in the annual contributions contract.

69. 664 F.2d 1210 (4th Cir. 1981). In *Perry* tenants of a public housing project sued to remedy the allegedly hazardous conditions of the project. They asserted both an implied right of action under § 1437 and other sections of the Housing Act and third party beneficiary standing based on an annual contributions contract. The Fourth Circuit affirmed dismissal of both of these claims. The court refused to imply a private right, persuaded in part by the emphasis on local responsibility and control manifested in the legislative history of the Housing Act, the annual contributions contract and the landlord-tenant contract.

70. 643 F.2d 1261 (7th Cir. 1981). In *Holbrook* tenants of a housing project successfully sued as third party beneficiaries of an annual contributions contract executed pursuant to 42 U.S.C. § 1437f. Section 1437f authorizes HUD to make assistance payments to landlords to aid lower-income families in obtaining inexpensive housing. Plaintiffs sought to compel the initiation of these assistance payments, alleging that the payments had been wrongfully withheld because of the landlord's failure to comply with a required certification procedure.

with little discussion, citing supporting precedents and finding—based on the statute, the HUD-landlord Annual Contributions Contract, and the landlord-tenant leases—that the tenants were mere incidental beneficiaries of the HUD-landlord contract.[71] The court did not discuss the role of the agency in developing the contents of the annual contributions contract,[72] and the brevity of the analysis suggests that the court did not consider agency intent as an element of governmental intent in the contract analysis. Yet section 1437 grants HUD sufficient discretion to contract, in circumstances HUD deems appropriate, in favor of third party rights. By failing to consider HUD's intent to grant third party contract standing, *Perry* may have undermined the authority granted the agency by Congress.

In *Holbrook* the court determined that the plaintiffs were third party beneficiaries of a HUD-landlord contract by looking to the language of the statute, "relevant legislative history, HUD's implementing regulations and interpretations and the terms of the Contracts."[73] The court thus correctly examined all levels of governmental intent. Although it did not explicitly consider the importance of agency discretion in its analysis, the court's focus on agency action suggests that the agency had sufficient discretion to grant third party beneficiary standing. This reliance on agency as well as congressional intent is appropriate to a statute such as section 1437, which gives an agency only partial guidance on what terms to include in specified public contracts.

V. Proposal for Determining Third Party Standing on Public Contracts

A. *A Three-Tier Analysis*

The existence of these varieties of congressional guidance suggests the need for a more responsive test for standing on public contracts. Courts should employ a three-tier analysis to determine beneficiary rights in government contracts, looking first to the language of the contract, and then to the agency's intent and authority to grant standing.

The first tier of this analysis establishes whether the language of the public contract supports the third party's claim to beneficiary status. If the contract expressly denies third party standing, courts need not investigate

71. *Perry*, 664 F.2d at 1218.

72. The *Perry* court set forth some provisions of the annual contributions contract and landlord-tenant contracts during its discussion of the implied rights claim. Some of these provisions clearly were written for the tenants' benefit. For example, one clause required the landlord to maintain the housing project in conformity with local housing codes and with applicable HUD guidelines "materially affecting health and safety." *Id.* at 1214-15.

73. *Holbrook*, 643 F.2d at 1271.

agency intent or agency authority. And if the contract expressly grants third party standing, courts need not investigate other evidence of agency intent but may proceed directly to the question of whether Congress delegated to the agency the authority to confer third party rights. But if the contract is ambiguous, or if it incorporates the governing statutory or regulatory norms, further inquiry is necessary into whether the agency or Congress intended to grant third party rights.

The second tier of this proposed analysis examines whether the administering agency intended to grant third party standing on the contract.[74] Courts should compare the content of the disputed contract with the content of other similar contracts executed by the agency. Differences in the contracts may reflect agency intent to grant standing in one but not the other.[75] If the agency did not intend to grant standing, the judicial inquiry is at an end.[76] If the agency did intend to grant standing, courts must determine whether Congress delegated authority to the agency to grant third party beneficiary rights.

Thus, the third tier of this analysis is reached only if the contracting agency intended to grant private standing. This tier raises the problem of delegation: Did Congress give the administering agency discretion to create third party contract standing?[77] The answer overlaps with and partially depends upon the outcome of the implied right of action analysis.[78] Obviously, if Congress explicitly granted private standing, or if the court determines that Congress implicitly granted such standing, then the issue of third party beneficiary rights will ordinarily be superfluous.[79] Both the statute and the contract confer rights on the beneficiaries. Assuming that

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74. Courts which accept intent to benefit rather than intent to confer standing as the proper third party beneficiary test should substitute their preferred test at this point in the analysis. *See supra* pp. 879-80.

75. Courts also could examine agency rules and regulations, which might suggest how best to interpret the language in the contract at issue.

76. Although the plaintiff might still have an implied right of action based on the statute authorizing the contract, he has no rights specifically arising from the contract if the agency did not intend to grant beneficiary status.

77. The importance of congressional delegation of the authority to grant standing has been recognized in the context of implying private rights from executive orders. *See* Noyes, *supra* note 36.

78. *See* Note, Martinez v. Socoma Companies, *supra* note 14, at 150-52.

79. Even when Congress grants standing in the statute, third party beneficiary law may have a limited role. For example, it might be necessary to identify the class of persons benefited by and therefore entitled to sue on the statute by referring to the third party beneficiaries of contracts executed pursuant to the statutory scheme.

In addition, there may be some instances in which third party contract standing provides the litigant important advantages that he would not enjoy if his standing were based on the statute alone. *See* Weinberger v. New York Stock Exchange, 335 F. Supp. 139 (S.D.N.Y. 1971) (third party beneficiary may maintain contract action based on § 6 of the Securities Exchange Act of 1934 although implied right claim is barred by statute of limitations); Block, *supra* note 4, at 4 (third party beneficiaries of Title VI Compliance Agreements need not prove intentional prejudice as they would if asserting a fresh Title VI violation).

the statutory claim is determined first, the contract claim will not be reached. If Congress explicitly denied private standing on any matter arising from the statute, contract standing is foreclosed; an agency which attempts to grant such standing exceeds its delegated authority.

The more difficult case arises when the implied right of action analysis determines that Congress did not intend to grant private standing but does not foreclose the possibility that Congress has authorized the agency to grant it. Congress frequently directs agencies to adopt such measures as they deem necessary to enforce statutory schemes. Third party beneficiary standing is one such measure. Thus, a statute may contain no implied private right while a contract executed under it nevertheless grants private standing. When Congress gives an agency either no guidance or partial guidance regarding the terms of public contracts, the agency's intent to grant standing is consistent with the limited discretion given it by Congress and should be recognized and enforced.

B. *Separation of Powers and Third Party Contract Rights*

This three-tier analysis reflects the divergent theoretical bases of the two standing doctrines that have been the subject of this Note. Implied rights of action have been conceptualized as a judicial corrective for administrative failure.[80] This conceptualization invites the most frequent objection to the implication of remedies not explicitly provided by Congress: that implying such rights violates the principle of separation of powers.[81] Because Congress at times provides explicitly for private causes of action, its failure to provide a private right of action may reflect a purposeful choice worthy of judicial respect.[82]

The judicial implication of private rights potentially conflicts with other separation-of-powers values. Implying private rights may both change the

80. Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1198 (1982). Third party beneficiary standing on public contracts also has been conceptualized as a remedy for administrative agency failure. *See* Block, *supra* note 4, at 39-40, 46-50.

81. Justice Powell has accepted this constitutional objection and become its spokesman on the Supreme Court: "[R]espect for our constitutional system dictates that the issue should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision. It is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process." Cannon v. University of Chicago, 441 U.S. 677, 731 (1979) (Powell, J., dissenting). *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375-76 (1982) (no merit to the argument that implying private rights violates separation of powers); Creswell, *supra* note 6, at 992-96 (criticizing separation-of-powers objection, except insofar as objection reflects federalism concerns).

82. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979) ("When Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.").

focus of the administering regulatory agency[83] and upset the remedial balance struck by it.[84] This not only undermines congressional authority, it also usurps the agency's authority to administer the statutory scheme.

Third party beneficiary standing may not be subject to similar objections.[85] In fact, judicial recognition of appropriate third party beneficiary standing may reinforce the principles of separation of powers threatened by the implication of private rights.[86] Because third party beneficiary law requires analysis of congressional and agency intent in statutorily-based contracts, it honors rather than usurps the decisionmaking powers of the

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83. By changing the focus of the agency administering the statute, the implication of private rights alters the effective content of the statute. *See* Stewart & Sunstein, *supra* note 80, at 1221.

84. Compared to agencies, courts are ill-equipped to make systematic and coordinated decisions of how to enforce the statutory scheme. *See id.* at 1210-11; *Merrill Lynch*, 456 U.S. at 408 (Powell, J., dissenting) (implying private rights may disrupt complex policy decision of when to provide enforcement mechanisms).

85. Third party beneficiary standing may be more vulnerable to similar separation-of-powers objections if the test for beneficiary rights on public contract cases is intent to benefit rather than intent to confer enforceable rights. *See supra* pp. 879-80. Because it may be difficult to define and discern an intent to benefit, *see* Note, *Third Party Beneficiary Concept*, *supra* note 14, at 408-10 (criticizing imprecision of intent to benefit test); Note, *Beneficiaries and the Intention Standard*, *supra* note 14, at 1170-74 (criticizing intent concept as ambiguous); Case Comment, *supra* note 14, at 651 (same), courts that grant standing based on the broad notion of agency or congressional intent to benefit may endanger the independence of the other branches. The vagueness of the intent to benefit test invites judicial determination of appropriate enforcement mechanisms for statutory schemes, a determination that arguably should be made by Congress and by administering agencies, *see supra* note 84.

The intent to confer standing test may also be faulted for relying on the vague notion of intent, but it is a test tied more specifically to agency and congressional determinations of enforcement. As a result, it is less vulnerable to separation-of-powers objections. Moreover, unlike implied right of action analysis, both of the intent based analyses of third party beneficiary law focus on levels of government intent. This focus reduces the danger of judicial usurpation of legislative and executive authority because it requires courts to examine in detail the enforcement scheme developed by the other branches.

86. Third party beneficiary analysis arguably raises a different separation-of-powers problem. The problem differs, however, from that raised by implied right of action analysis. Whereas judicial willingness to imply private rights may foster conflict between the judicial and legislative branches, a willingness to recognize agency intent to grant standing may foster conflict between the executive and legislative branches. This is because Congress, by granting agencies the broad discretion to grant third party rights, may violate the doctrine against delegation.

The doctrine against delegation attempts to narrow agency discretion to apply sanctions by demanding legislative rules which control and direct agency action. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1672 (1975). Agency action which "touches constitutionally sensitive areas of substantive liberty" is particularly likely to raise over-delegation issues. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 288 (1978). However, the power of agencies to grant standing to contest either agency action or the action of private parties contractually linked to agencies does not raise delegation problems. On the contrary, private standing has been touted as one of the remedies for the problem of delegation. Stewart, *supra*, at 1674-76, 1678-81. Moreover, agencies frequently and noncontroversially confer standing on private parties in other contexts. All agency contracts give enforceable rights to private promisors, and many agency programs mandate enforceable procedural rights for program beneficiaries. There is no reason to treat the rights of third party beneficiaries differently, particularly since agency choice about contract enforcement may be countermanded by Congress.

legislative and executive branches.[87] Proper performance of public contracts may in fact rely on the courts' ability to enforce the agency's intent to grant third party rights.[88]

CONCLUSION

Implied right of action and third party beneficiary analyses are not the same. They implicate different levels of governmental intent. A closer judicial examination of the role of agency intent will restore the independence of third party standing to sue on public contracts.

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87. Courts that recognize third party beneficiary standing are also well-situated to contribute to a coordinated enforcement scheme, since they grant agencies the flexibility to make third party enforcement decisions for individual contracts.

88. The classic objection to third party beneficiary standing was that it violated the doctrine of privity of contract. *See* F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 1117 (2nd ed. 1970) (privity has been treated "as a sort of mystical absolute. To lack privity is to have failed to achieve the requisite state of contractual grace."). A second objection to third party beneficiary standing, based on foreseeability, developed in the field of government contracts because of the potentially limitless number of contract beneficiaries who might demand compensation in case of breach. For example, in finding a water company that had contracted with a municipality not liable to individuals whose property was damaged as a result of the company's failure to maintain adequate water pressure to fire hydrants, the New York Court of Appeals stated: "A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward." *See* H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 166, 159 N.E. 896, 898 (Ct. App. 1928). Neither the privity nor the foreseeability objections are especially relevant to implied right of action analysis, although limiting potential damages is sometimes a desirable effect of denying private rights. In any event, neither objection implicates separation-of-powers values. Judicial enforcement of the requirements of privity and foreseeability affects public contracts on the same basis as it does private contracts, and does not usurp the decisionmaking authority of the legislative and executive branches.