

upheld despite its impairment of protected commercial expression will depend upon whether there is sufficient evidence to demonstrate that the ban on the display of "For Sale" and "Sold" signs is effective in reducing a substantial incidence of panic selling which is attributable to the signs. If such evidence can be established, the ban may be upheld since *Linmark* affirms that common sense differences in commercial speech, based upon the factual context, may give rise to a different constitutional result. However, as appears more likely in view of the difficulty in demonstrating the effectiveness of the ordinances, the holding in *Linmark* that obstructions to the communication of truthful and legitimate commercial information are forbidden by the first amendment suggests that communities will be compelled to develop alternatives that do not abridge constitutionally protected expression.

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Implied Warranty of Habitability in Federal Housing Projects: *Alexander v. United States Department of Housing and Urban Development*¹—Riverhouse Tower Apartments (Riverhouse) is a housing complex consisting of two twelve-story buildings constructed with a mortgage insured by the Secretary of the Department of Housing and Urban Development (HUD).² The mortgagee defaulted on the loan and HUD acquired possession and managed the property after foreclosure.³

By the time HUD foreclosed, Riverhouse had fallen into a "deplorable condition":

The project was infested with roaches and vermin; elevators were often inoperable; security was poor; hot water and heat were inadequate or non-existent; the buildings were often flooded; lighting was poor in the narrow hallways which were often cluttered with garbage; plumbing was deficient, and some tenants had electrical problems.⁴

HUD chose to terminate the project rather than to make repairs.⁵ Once the project was vacant, HUD returned security deposits to those tenants who were current in their rent but applied the amount to the balance due from any tenant who was in arrears.⁶

Tenants brought suit for the return of withheld security deposits on the theory that HUD had breached an implied warranty of habitability in

¹ 555 F.2d 166 (7th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3485 (U.S. Jan. 31, 1978) (No. 77-874).

² *Id.* at 167. The mortgage was insured under 12 U.S.C. § 1715(d)(3) (1970). This section is designed to assist private industry in providing housing for low income families through subsidizing and insuring mortgages made by private lenders.

³ 555 F.2d at 167. HUD's authority to foreclose property in default and subsequently to manage such property is derived from 12 U.S.C. §§ 1713(k), 1713(l) (1970).

⁴ 555 F.2d at 167-68.

⁵ *Id.* at 167.

⁶ *Id.* at 168-69.

renting substandard housing.⁷ They contended that their duty to pay rent was dependent on HUD's duty to maintain the premises in a habitable condition.⁸ Because HUD had breached that duty, plaintiffs contended that their duty to pay rent was wholly relieved and that HUD therefore had wrongfully retained their security deposits.⁹

The United States District Court for the Southern District of Indiana granted the government's motion for summary judgment.¹⁰ On appeal the United States Court of Appeals for the Seventh Circuit affirmed and HELD: There is no implied warranty of habitability in leases of public housing units owned by HUD.¹¹

In reaching its decision, the Seventh Circuit noted the judicial trend in some states toward implying warranties of habitability based on the rationale that the common law rule absolving the lessor from all responsibility to repair had never been intended to apply to urban residential leases.¹² The court observed, however, that while the federal courts might be guided by decisions of state courts, the rule of decision is federal.¹³ The court then distinguished the state decisions on the basis that they involved leases in the private sector.¹⁴ In contrast, the court pointed out that HUD housing is constructed to effectuate the national policy of remedying the acute housing shortage by providing decent, safe and sanitary dwellings for families of low income.¹⁵ The implication of a warranty of habitability, the court reasoned, would be tantamount to a guarantee that congressional goals are being met. The court believed that such a guarantee was best left to Congress and accordingly concluded that it was improper for the court to imply a warranty of habitability in federally owned housing.¹⁶

The significance of the *Alexander* decision lies in its refusal to apply to the federal government a development of tenants' rights which has been

⁷ *Id.* These plaintiffs were joined by several other plaintiff-tenants of Riverhouse in seeking relocation benefits as provided by the Uniform Relocation Assistance and Real Property Acquisitions Act (URA). 42 U.S.C. §§ 4601 *et seq.* (1970). Plaintiffs argued that they were "displaced persons" within the meaning of the URA. Under this Act, a displaced person is one who is forced to move or vacate real property because of a program or project undertaken by a federal agency. The statute has been interpreted to refer only to the construction of a new federal project and not as the court concluded, to the termination of an existing federal project. 555 F.2d at 168-70, *citing* *Jones v. HUD*, 390 F. Supp. 579 (E.D. La. 1974) and *Caramico v. HUD*, 509 F.2d 694 (2d Cir. 1974). A petition for certiorari was filed on this issue. 46 U.S.L.W. 3485 (U.S. Jan. 31, 1978) (No. 77-874). This note will not consider this issue.

⁸ *See* 555 F.2d at 168.

⁹ *Id.*

¹⁰ *Id.* The opinion of the district court is unpublished.

¹¹ *Id.*

¹² *Id.* at 170.

¹³ *Id.* at 170-71.

¹⁴ *Id.* at 171.

¹⁵ *Id.* 42 U.S.C. § 1401 (1970) states the congressional purpose of the National Housing Act:

It is declared to be the policy of the United States . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income, in urban, rural nonfarm and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation

¹⁶ 555 F.2d at 171.

gaining acceptance in state courts and legislatures.¹⁷ For many poor people, HUD housing is the only affordable alternative to unsafe and insanitary housing conditions in the private sector. An implied warranty of habitability would place HUD under an affirmative obligation to maintain leased premises in a habitable condition and would give tenants contractual rights such as rescission, modification and retention of rent upon breach of that obligation.

This note will first discuss why the fashioning of a landlord-tenant rule is determined by application of federal common law and will then consider the process by which federal common law is developed by the federal judiciary. Next, the notion of an implied warranty of habitability will be examined in order to determine whether the development of a federal common law rule of implied warranty is consistent with United States' policy objectives. It will then be submitted that the *Alexander* court misconstrued the nature of an implied warranty of habitability and in so doing failed to adopt the proper rule to be applied in this case.

I. FEDERAL COMMON LAW

By finding that the rule of decision regarding the implication of a warranty of habitability in HUD housing is federal,¹⁸ the Seventh Circuit implicitly recognized that it was fashioning a rule of federal common law. Although the Supreme Court in its landmark decision in *Erie Railroad Co. v. Tompkins*¹⁹ held that there is no federal general common law applicable in federal courts,²⁰ there is nevertheless a federal common law which governs when state law is inapplicable.²¹ Such circumstances exist whenever a

¹⁷ The following fourteen courts have held that there is an implied warranty of habitability in residential leases: *Lemle v. Breedon*, 51 Haw. 426, 428, 462 P.2d 470, 472 (1969); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072-73 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Marini v. Ireland*, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970); *Kline v. Burns*, 111 N.H. 87, 92, 276 A.2d 248, 251-52 (1971); *Glyco v. Schultz*, 62 Ohio Op.2d 459, 461, 289 N.E.2d 919, 923 (Ohio Mun. Ct. 1972); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972); *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 199, 293 N.E.2d 831, 843 (1973); *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973); *King v. Moorehead*, 495 S.W.2d 65, 75 (Mo. Ct. App. 1973); *Derr v. Cangemi*, 66 Pa. D. & C. 2d 162, 175 (1974); *Green v. Superior Court* 10 Cal. 3d 616, 629, 517 P.2d 1168, 1176, 111 Cal. Rptr. 704, 712 (1974); *Steele v. Latimer*, 214 Kan. 329, 336, 521 P.2d 304, 309-10 (1974); *Old Town Dev. Co. v. Langford*,—Ind. App.—, 349 N.E.2d 744, 764 (1976). Not all state courts, however, have chosen to find implied warranties of habitability in residential leases. *Thomas v. Roper*, 162 Conn. 343, 349-50, 294 A.2d 321, 325 (1972) (no implied warranty of habitability in Connecticut leases); *Blackwell v. Del Bosco*,—Colo.—, —, 558 P.2d 563, 565 (1976) (implication of a warranty left to the legislature). The following three states have passed legislation creating a warranty of habitability: New York: N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1977); Minnesota: MINN. STAT. ANN. § 504.18 (West Supp. 1977); Michigan: MICH. STAT. ANN. § 26.1109 (Callaghan 1970). Eleven states have passed the Uniform Residential Landlord and Tenant Act, section 2.104 of which creates a warranty of habitability in residential leases. The states which have passed the act are Alaska, Arizona, Florida, Hawaii, Kansas, Kentucky, Nebraska, New Mexico, Oregon, Tennessee, and Virginia. *Uniform Residential Landlord and Tenant Act*, 7 UNIFORM LAWS ANN. 400 (Supp. 1978).

¹⁸ 555 F.2d at 170.

¹⁹ 304 U.S. 64 (1938).

²⁰ *Id.* at 78.

²¹ See *Hinderlander v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (whether the water of an interstate stream must be apportioned between two states is a

federal court is free to decide for itself the rule of decision to be applied.²² This generally will occur when the courts are called upon to resolve problems arising from the operation of a federal enactment²³ or to decide federal questions²⁴ where the relevant federal statute, if any, is silent on a particular issue.²⁵ The federal courts also are empowered to create rules necessary to fill in the interstices of congressional statutory schemes.²⁶ By fashioning rules in such a manner, federal courts create federal common law.

In the creation of a federal common law rule, a court may incorporate the state rule as the federal rule within that state,²⁷ or, alternatively, may create a uniform federal rule.²⁸ Where the state rule is

question of federal common law). *Hinderlander* was decided on the same day and by the same Justice—Justice Brandeis—as *Erie*. See also *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 468-70, (1942) (Jackson, J. concurring). See generally C. WRIGHT, *LAW OF FEDERAL COURTS*, § 60 (3d ed. 1976); Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in The Choice of National and State Rules of Decision*, 105 U. PA. L. REV. 797 (1957); Hill, *The Law Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Note, *Rules of Decision in Non-Diversity Cases*, 69 YALE L.J. 1428 (1960); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

²² WRIGHT, *supra* note 21, at 279.

²³ E.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (labor relations covered by federal statute); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (issuance of commercial paper by federal government).

²⁴ E.g., *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (apportionment of interstate waters); *DeSylva v. Ballentine*, 351 U.S. 570 (1956) (scope of a federal right); *United States v. Standard Oil*, 332 U.S. 301 (1947) (federal fiscal policy).

²⁵ *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

²⁶ Mishkin, *supra* note 21, at 800.

²⁷ See *United States v. Brosnan*, 363 U.S. 237, 241 (1960) (state law governing divestiture of federal tax liens utilized); *Commissioner v. Stern*, 357 U.S. 39, 45 (1958) (creditors' rights determined by state law in federal income tax dispute); *DeSylva v. Ballentine*, 351 U.S. 570, 580, 581 (1956) (state law adopted to define children under federal copyright act); *Board of County Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939) (state law adopted as to whether state must pay interest on taxes wrongfully assessed against Indians); *Bumb v. United States*, 276 F.2d 729, 736 (9th Cir. 1960) (state definition of chattel mortgage adopted in private contract dispute with the Small Business Administration). Even though it is determined as a general matter that state law will constitute the rule of decision on a given issue, the federal courts are free to scrutinize the particular rule of any state in order to ensure that the state's rule is not inconsistent with federal policy. Where such inconsistency is present, the federal courts are empowered to fashion an independent federal rule. The Supreme Court suggested this in *DeSylva* where it noted that it would not adopt a state's definition of a child if it went beyond permissible variations of ordinary usage. 351 U.S. at 581.

Thus it is possible to have a situation where state law is applied as to controversies in some states and an independent rule is fashioned in other states to govern the same type of situation. This is the case as to measure of damages for wrongful death under the Federal Tort Claims Act (F.T.C.A.), 28 U.S.C. § 2674 (1970). Under judicial construction of that Act, local law is adopted for all states except those states that provide for only punitive damages in wrongful death actions. Punitive damages may not be assessed against the United States under the F.T.C.A. *Id.* See Mishkin, *supra* note 21, at 806 n.33; *Massachusetts Bonding Co. v. United States*, 352 U.S. 128, 133 (1956).

²⁸ *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381-82 (1969) (uniform rule necessary for resolution of labor disputes); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (uniform rule needed regarding government's issuance of commercial paper); *United States v. View Crest Garden Apartments, Inc.*, 268 F.2d 380, 383-84 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959) (uniform rule necessary to govern breach of mortgage agreement with United States); *Keydata Corp. v. United States*, 504 F.2d 1115, 1124 (Ct. Cl. 1974) (uniform rule required as to lessor's obligation to deliver possession to United States).

CASENOTES

incorporated as the federal rule, it applies not through the lawmaking powers of the state, but rather because recognition of the state interest is not inconsistent with federal policy.²⁹ The rule thus fashioned, even though it incorporates state law, is nevertheless federal law.³⁰ The state rule often is incorporated in questions concerning real property because concepts of real property are deeply rooted in the conditions, customs, habits and laws of an individual state.³¹ Uniform rules, on the other hand, generally are adopted where uniformity is needed to effectuate congressional goals, policies or programs;³² or where adoption of state rules would subject the rights, duties and obligations of the United States to uncertainty.³³

*Clearfield Trust Co. v. United States*³⁴ is the starting point for considering federal common law development in the post-*Erie* era. There, the United States brought an action against the Clearfield Trust Company for clearing a check issued by the government which had been fraudulently endorsed.³⁵ Clearfield defended on the ground that the United States unreasonably delayed in giving notice of the forgery.³⁶ Under the law of the state, the United States would have been barred from recovery.³⁷ In ascertaining liability, the Supreme Court noted that when the United States pays debts or disburses funds it is exercising a constitutional power and that therefore federal and not state law should govern.³⁸ Because there was no applicable act of Congress which was determinative, the Court was free to fashion its own rule of law.³⁹

The Court then rejected the rule of the state noting that the United States issues commercial paper on a vast scale in several states.⁴⁰ The Court believed that application of the rules of the various states in which the government transacts business would subject the rights and duties of the United States to exceptional uncertainty in that identical transactions would

²⁹ *Board of County Comm'rs v. United States*, 308 U.S. 343, 351-52 (1939).

³⁰ *Id.* at 349-50.

³¹ *See, e.g., Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 210 (1946) (state definition of "real property" used); *United States v. Certain Property*, 344 F.2d 142, 144-45 (2d Cir. 1965) (state law used to define "fixtures"); *Bumb v. United States*, 276 F.2d 729, 737-38 (9th Cir. 1960) (state law governs interpretation of chattel mortgages).

In some cases the dispute is so local in nature that the federal courts do not apply federal law but rather apply state law by its own force. *See, e.g., United States v. Fox*, 94 U.S. 315, 320 (1877) (disposition of real property is determined by state law); *United States v. 1078.27 Acres of Land*, 446 F.2d 1030, 1040 (5th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (state law governs in a land title dispute).

³² *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969) (regulation of a labor dispute); *Farmers Educ. & Cooperative Union v. WDAY Inc.*, 360 U.S. 525, 531-33 (1959) (Federal Communications Commission regulations).

³³ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (issuance of commercial paper by United States government); *Keydata Corp. v. United States*, 504 F.2d 1115 (Ct. Cl. 1974) (government's need to know in advance what its rights are under a lease).

³⁴ 318 U.S. 363 (1943).

³⁵ *Id.* at 365.

³⁶ *Id.* at 366.

³⁷ *Id.*

³⁸ *Id.* The check was drawn for services rendered to the Works Progress Administration, a federal agency. *Id.* at 364.

³⁹ *Id.* at 367.

⁴⁰ *Id.*

be subject to the laws of the several states.⁴¹ A uniform rule of federal common law was therefore fashioned by the court to resolve the liabilities of the parties.⁴²

For reasons similar to those enunciated in *Clearfield* as supporting uniformity, contracts with the federal government are governed by a uniform federal common law.⁴³ A lease, in addition to its real property characteristics, has contractual aspects as well.⁴⁴ This was recognized in *Girard Trust Co. v. United States*⁴⁵ where the United States Court of Appeals for the Third Circuit held that leases with the federal government are to be construed, like government contracts, according to uniform rules of federal common law.⁴⁶ The only exception to this contractual uniformity appears where the contract involves or defines a relationship, such as the relationship to real property, which is peculiarly within the state's province to regulate.⁴⁷ Thus where a lease provision is contractual in nature it will be interpreted according to a uniform rule of federal common law.⁴⁸ Where,

⁴¹ *Id.*

⁴² *Id.* at 370. The Court held that one who accepts a forged signature of a payee is allowed to shift his loss to the drawee only on a clear showing that the drawee's delay in notifying him of the forgery caused him damage. Under state law, the loss would have automatically shifted if there was unreasonable delay even if the delay did not cause the loss. *Id.*

⁴³ *United States v. Seckinger*, 397 U.S. 203, 209 (1970); *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947); *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944); see *Pofcher, Choice of Law, State or Federal in Government Contracts*, 12 LA L. REV. 37 (1951).

⁴⁴ "[T]he landlord's duties no longer end when he delivers possession. He now provides . . . care and maintenance for the building. . . . These services are of a type usually purchased by contract." *Schoshinski, Remedies of the Indigent Tenant: Proposals for Change*, 54 GEO. L. REV. 519, 535 (1966). See 2 R. POWELL, REAL PROPERTY ¶ 221[1], at 181 (1967); C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 69 (2d ed. 1962).

⁴⁵ 149 F.2d 872 (3d Cir. 1945).

⁴⁶ *Id.* at 874. In holding that federal common law governs a lease executed by the United States the *Girard* court quoted from *United States v. Allegheny County*, 322 U.S. 174 (1944) where the Supreme Court stated: "The validity and construction of contracts through which the United States is exercising its constitutional functions . . . present questions of federal law. . . ." *Id.* at 183, quoted in, 149 F.2d at 874 n.5 (emphasis added).

Federal courts have continued to apply federal law in construing leases to which the United States is a party. *Boccardo v. United States*, 341 F. Supp. 858, 862 (N.D. Calif. 1972); *United States v. Morgan*, 196 F. Supp. 345, 349 (W.D. Pa. 1961) *aff'd* 298 F.2d 255 (3d Cir. 1962); *Keydata Corp. v. United States*, 504 F.2d 1115, 1124 (Ct. Cl. 1974). *Cf. American Houses v. Schneider*, 211 F.2d 881, 882-83 (3d Cir. 1954) (federal law governs rights of sublessee as against lessor where United States is lessee).

⁴⁷ In *United States v. Yazell*, 382 U.S. 341 (1966), the United States sued to enforce against a wife's property a security agreement executed by a married couple in favor of the Small Business Administration. In allowing the defense of coverture the Supreme Court left open the question whether the state rule applied as a matter of federal common law or by its own force as state law. *Id.* at 357. The Court placed great emphasis on the fact that the parties contracted specifically with reference to state law which allowed such a defense. *Id.* at 345-46.

Contractual uniformity also deferred to local property interests in *Bumb v. United States*, 276 F.2d 729 (9th Cir. 1960). There, in a suit against the Small Business Administration brought by a trustee in bankruptcy to contest the validity of certain chattel mortgages held by the SBA, the issue was whether the validity of such mortgages should be tested by local or federal law. In holding that the state law is to be adopted as the federal common law rule, the Ninth Circuit noted that the states have a vital interest in the protection of local property rights. *Id.* at 738.

⁴⁸ *American Homes v. Schneider*, 211 F.2d 881, 883 (3d Cir. 1954) (as against lessor, sublessee of United States seeking to exercise option to renew lease has rights determined by federal law); *Boccardo v. United States*, 341 F. Supp. 858, 862 (N.D. Cal. 1972) (breach of implied covenant not to cause damage presents a question of contract construction); *Keydata*

on the other hand, a lease provision involves the definition of a real property interest it will be interpreted according to state rules.

Whether a particular case presents questions of contractual rights or real property interests is well illustrated by *Keydata Corp. v. United States*.⁴⁹ In *Keydata*, the issue arose as to whether the United States as lessee could rescind a lease agreement for failure of the lessor to deliver actual possession.⁵⁰ In holding that the lessor had to deliver actual possession, the Court of Claims applied federal common law, citing the need for a uniform rule so that the government could know in advance what its rights were.⁵¹ In assessing the state's interest in having its own rule apply, the court noted that the question of the lessor's obligation to make the premises available is relatively unconnected with its concern for the definition of real property.⁵² Thus, the court concluded that the application of federal contract law in no way would impinge upon the states' interest in defining property rights.

Applying these federal common law principles to *Alexander*, it is clear that the Seventh Circuit correctly determined that a rule regarding implied warranties in HUD owned housing is federal. A warranty of habitability, like the obligation to deliver possession at issue in *Keydata*, is a contractual obligation dealing more with contractual rights and liabilities than with interests pertaining to definitions of real property. A warranty of habitability renders the tenant's covenant to pay rent contractually dependant upon the landlord's covenant to deliver and maintain the premises in suitable condition. Where the landlord breaches this covenant, the tenant is relieved from his contractual duty to pay rent.⁵³ Thus, since the *Alexander* court was faced with the interpretation of a government contract, it was correct in deciding that the question of an implied warranty presented an issue of federal common law.⁵⁴

Corp. v. United States, 504 F.2d 1115, 1123 (Ct. Cl. 1974) (obligation to deliver possession to tenants found to be a contractual requirement rather than a property interest).

⁴⁹ 504 F.2d 1115 (Ct. Cl. 1974).

⁵⁰ *Id.* at 1117. The rule of the state, obligating the lessor to deliver only the right to possession, is in effect in a minority of jurisdictions. The rule that the landlord must deliver actual possession is the law of the majority. 1 AMERICAN LAW OF PROPERTY § 3.37, at 249-52 (A.J. Casner ed. 1952).

⁵¹ 504 F.2d at 1124. The court stressed the necessity of a uniform rule, noting that there were several jurisdictions in which it had not been established which rule applied. In these jurisdictions, the court reasoned, the government would either have to litigate the point or take a chance that its position was correct. *Id.*

⁵² *Id.*

⁵³ 1 AMERICAN LAW OF PROPERTY § 3.45, at 35-36 (A.J. Casner ed. Supp. 1976).

⁵⁴ 555 F.2d at 170-71. The application of federal law does not preclude a finding that the United States is in breach of a contractual term. The United States, like any private individual, may be held liable for breach of contract. 28 U.S.C. § 1346(a)(2) (1970) provides that:

- (a) The district courts shall have original jurisdiction . . . of:
 - (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

In interpreting government contracts, the United States is not in a preferred position. Contracts between the government and private individuals are construed as if they were contracts between two private parties. *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564 (1946); *Darlington, Inc. v. Federal Housing Adm.*, 142 F. Supp. 341, 351 (E.D.S.C. 1956), *rev'd on other grounds*, 352 U.S. 977 (1957).

Despite the fact that the *Alexander* court correctly determined that the rule to apply was federal, the court sidestepped any analysis of the reasons for or against the establishment of an implied warranty as the federal common law rule. Instead, the court indicated that it would not decide the issue because the establishment of such a warranty was a matter of congressional, rather than judicial, action. By failing to reach the merits, the court tacitly denied its power to make law in this area and thus did not consider fully its role as an expositor of federal common law.

Federal courts have the ability to develop common law rules in controversies which arise out of a contractual relationship between private individuals and the federal government.⁵⁵ Leases with the federal government have been held to create a contractual relationship between the parties; a warranty of habitability is an implied term of such a lease which defines contractual rights and liabilities within that relationship. Hence the *Alexander* court should have considered, but did not, the fashioning of a uniform federal common law rule in this area.⁵⁶

II. FASHIONING A FEDERAL RULE OF DECISION

In fashioning rules of federal common law, the federal courts turn to the traditional methods, techniques and source material of the common law.⁵⁷ These materials have included federal general common law de-

Nor does the application of federal law preclude finding an implied term in leases with the United States. Implied terms have long been read into government contracts to create liability as if the term were incorporated into the contract by express language. *United States v. Spearin*, 248 U.S. 132, 136-37 (1918) (United States impliedly warrants that plans it provides are sound); *United States v. Bostwick*, 94 U.S. (4 Otto) 53, 65-66 (1877) (implied obligation to treat property so as to avoid injury); *Alliance Assurance Co. v. United States*, 252 F.2d 529, 532 (2d Cir. 1958) (United States as bailee impliedly promised to redeliver goods to lawful owner); *City of Philadelphia v. Page*, 363 F. Supp. 148, 154 (E.D. Pa. 1973), *motion to vacate judgment denied*, 373 F. Supp. 453 (E.D. Pa. 1974) (implied warranty of habitability in the sale of HUD housing); *Luria Bros. & Co. v. United States*, 369 F.2d 701, 708 (Ct. Cl. 1966) (implied obligation that neither party would hinder or delay the other); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 964 (Ct. Cl. 1965) (United States implicitly warrants that if its plans are followed, the contractor will be able to complete the project).

⁵⁵ See text at notes 43-52 *supra*.

⁵⁶ This note suggests that a uniform federal common law rule is appropriate here because a contract with the federal government is involved. Arguably, an implied warranty affects a real property interest and for this reason the federal courts should not apply a uniform rule but rather should incorporate the state rule as the federal rule. This may be done so long as the rule incorporated is not inconsistent with federal policy. See, e.g., *DeSylva v. Ballentine*, 351 U.S. 570, 581 (1956); *Board of County Comm'rs v. United States*, 308 U.S. 343, 352 (1939). By the time *Alexander* was decided, Indiana had judicially created an implied warranty of habitability in residential leases. *Old Town Dev. Co. v. Langford*, — Ind. App. —, —, 349 N.E.2d 744, 764 (1976). Thus plaintiffs would have prevailed on this issue.

⁵⁷ *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.* 315 U.S. 447, 469-70 (1942) (Jackson, J., concurring). See generally Hill, *The Law Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1069 (1967). Professor Hill states that the common law is applied even though the federal courts lack a reception statute. Reception statutes, passed by many states, adopted English common law developments until a certain date as state law. See *Murray v. Chicago & N.W. Ry.* 62 F. 24, 28 (N.D. Iowa 1894), *aff'd*, 92 F. 868 (8th Cir. 1899) (common law explicitly adopted).

veloped before the *Erie* decision,⁵⁸ laws of the states,⁵⁹ English common law,⁶⁰ the intent and policy manifested in congressional legislation,⁶¹ Restatement of Property,⁶² principles of equity and convenience,⁶³ and "the best in modern decision and discussion."⁶⁴ In sum, the courts have been free to look to a multitude of sources in determining the best rule of decision in a particular case. Specifically, as applied to the issue of an implied warranty of habitability, those sources which the *Alexander* court should have taken note of were the common law background, as well as the congressional purpose for entering the housing field.

A. The Common Law Background

There was no implied warranty of habitability at common law. The common law considered a lease a conveyance of an interest in real property.⁶⁵ The primary purpose of the lease was agricultural; any building or dwelling upon the land was considered incidental.⁶⁶ A lease was viewed as the transfer of a freehold interest and as such there was no implied warranty that the premises conveyed were fit for any particular use. The tenant, as a purchaser of an estate in land, took the premises as they were,⁶⁷ and was responsible for their upkeep and repair. He was protected by his right to inspect the premises to determine for himself their condition and suitability.⁶⁸ This rule of caveat emptor, settled as of 1485,⁶⁹ was of minor concern to the pre-industrial, agrarian tenant because of his right to inspect and because the relative simplicity of design of the dwelling meant that he had the ability, skill and resources to repair it.⁷⁰

⁵⁸ See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (federal general common law developed under *Swift v. Tyson* termed a convenient source of reference for fashioning federal rules). *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), stands for the proposition that the rule of decision in diversity actions is federal general common law. *Swift* was later overruled on this point by *Erie*.

⁵⁹ *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972).

⁶⁰ See *Moore v. United States* 91 U.S. (1 Otto) 270, 273, 274 (1875) (Court derived rules of evidence from the common law).

⁶¹ *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 n.5 (1972) (federal statutes "provide useful guidelines in fashioning . . . rules of decision"); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (federal laws must be fashioned from the policy of national labor laws).

⁶² *Keydata Corp. v. United States*, 504 F.2d 1115, 1122-23 (Ct. Cl. 1974).

⁶³ *Board of County Commissioners v. United States*, 308 U.S. 343, 350-51 (1939) (Court chose the rule that it found best comported with general notions of equity while also taking into consideration public convenience).

⁶⁴ *Keydata Corp. v. United States*, 504 F.2d 1115, 1122 (1974).

⁶⁵ See 1 AMERICAN LAW OF PROPERTY § 3.11, at 202-03 (A.J. Casner ed. 1952).

⁶⁶ *Green v. Superior Court*, 10 Cal. 3d 616, 622, 517 P.2d 1168, 1172, 111 Cal Rptr. 704, 708 (1974).

⁶⁷ 1 AMERICAN LAW OF PROPERTY § 3.45 at 267 (A.J. Casner ed. 1952).

⁶⁸ *Id.*

⁶⁹ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 n.30 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

⁷⁰ Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability*, 1975 WISC. L. REV. 19, 28. This state of the common law was recognized by the Supreme Court in *Viterbro v. Friedlander*, 120 U.S. 707 (1887). *Viterbro* involved premises which were rendered unfit by flooding for the use contemplated by the parties when they executed the lease. In dictum, the Court pointed out that under the common law there is no implied covenant that the premises are fit for the purpose for which they are let. *Id.* at 712.

This concept of a lease as an interest in land developed in an agrarian society. The right to possession itself was the chief element of the exchange.⁷¹ However, as the industrial revolution sped the migration from rural to urban areas, there was an increase in the importance of structural improvements and a corresponding decrease in the significance of the land to which the premises were attached.⁷² Tenants came to occupy structures that were no longer as simple as those in rural areas. Because the increasing complexity of modern dwellings required both expertise and resources in order to make necessary repairs, urban tenants found themselves decreasingly capable of making such repairs.⁷³ Property law, however, failed to keep pace with these changing conditions. The tenant continued to take the premises as they were and the landlord remained under no obligation to repair.

This traditional view of the landlord-tenant relationship continued despite the recognition that the modern lease more nearly resembles a contract than a conveyance.⁷⁴ The modern urban lease involves space in a building; its value to the tenant is its furnishing of a place to live. It has become increasingly divorced from the land itself. The landlord's duties to the tenant no longer end once possession is delivered but continue and include such contractual services as utilities and maintenance.⁷⁵ The modern tenant is less concerned with the bare right to possession than he is with such goods and services as heat, light, electricity, plumbing, sanitation and security. That the modern lease is essentially contractual in nature has become increasingly recognized by both state and federal courts.⁷⁶

Recently, several state courts have been called upon to analyze the rationale behind the rule of caveat emptor and have determined that it was never intended to apply to urban residential leases.⁷⁷ *Javins v. First National Realty Corp.*,⁷⁸ which dealt with residential leases in the District of Columbia, is the leading case dealing with this issue. Its rationale for the adoption

⁷¹ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 189, 293 N.E.2d 831, 837 (1973).

⁷² *Old Town Dev. Co. v. Langford*, — Ind. App. —, —, 349 N.E.2d 744, 755 (1976).

⁷³ Love, *supra* note 70, at 28.

⁷⁴ Schoshinski, *supra* note 44, at 535; C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 70 (2d ed. 1962). "[T]he modern lease is a highly complex instrument in which the contract element is a substantial, if not the predominant, ingredient." *Id.*

⁷⁵ Schoshinski, *supra* note 44, at 535.

⁷⁶ See state cases in note 17 *supra*; federal cases in notes 45 & 46 *supra*. A contractual approach led to two common law exceptions to the rule of caveat emptor. First, an implied warranty of habitability is read into short term leases of furnished premises on the ground that the parties intended for an immediate entry and the tenant does not have the opportunity for inspection. *Ingalls v. Hobbs*, 156 Mass. 348, 351, 31 N.E. 286, 287 (1892); *Young v. Povich*, 121 Me. 141, 144, 116 A. 26, 27 (1922). Second, where leases are executed when the premises are under construction there is an implied warranty that the property will be suited for the purpose for which it was leased. *Woolford v. Electra Appliances*, 24 Cal. App. 2d 385, 391, 75 P.2d 112, 114 (1938); *Hardman Estate v. McNair*, 61 Wash. 74, 77, 111 P. 1059, 1061 (1910).

⁷⁷ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). "[T]he old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban lease-holds." See cases cited in note 17 *supra*.

⁷⁸ 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

of the warranty, widely followed by the states, can be taken as representing a general statement of the desirability of the rule.⁷⁹

The facts in *Javins* were relatively simple. The landlord instituted an action for possession of rented premises on the ground that tenants had not paid rent. Tenants conceded that they had failed to pay rent but alleged numerous housing code violations as a set-off equal to the rent claim.⁸⁰

The United States Court of Appeals for the District of Columbia Circuit held that the rule of caveat emptor should be abandoned in favor of an implied warranty of habitability. The court pointed out that its holding reflected a belief that urban leases should be interpreted and construed like any other contract. The court found support for its holding in both the common law⁸¹ and the local housing code.⁸²

In particular, three reasons were articulated by the court in support of its conclusion that the common law rule should be changed. First, the rule was based on factual assumptions no longer true. The court found that urban tenants are interested not in the land but in a habitable dwelling.⁸³ Further, modern tenants, unlike their agrarian predecessors, are no longer able to repair their premises themselves. The modern urban tenant possesses neither the skill, equipment nor funds to make complex repairs. Second, the court found that the development of consumer protection law, by which sellers are held impliedly to warrant that their goods are fit for the use intended by the parties, should be extended into the landlord-tenant area.⁸⁴ The relationship between landlord and tenant has become increasingly similar to that between the buyer and seller of goods. Just as the buyer of goods must rely on his seller's good faith as to the quality of goods purchased, so too must the tenant rely on his landlord's assertions of housing quality. The third reason cited by the *Javins* court for abandoning the common law rule concerned the urban housing market. The court took cognizance of the housing shortage and the subsequent inequality of bargaining power that has resulted in tenants having little leverage for enforcing demands for better housing.⁸⁵ The court reasoned that its decision could be based as well on the presence of a local housing code which it treated as the enactment of a legislative policy placing the landlord under a duty to repair.⁸⁶

The fourteen other courts that have adopted the rule of implied warranty have done so for substantially the same reasons as those articulated in *Javins*.⁸⁷ Of the courts that have addressed the issue only two of seventeen

⁷⁹ Courts considering the issue of implied warranty have quoted freely from the *Javins* opinion. See *Jack Spring Inc. v. Little*, 50 Ill.2d 351, 363-66, 280 N.E.2d 208, 215-17 (1972); *Old Town Dev. Co. v. Langford*, — Ind. App. —, —, 349 N.E.2d 744, 756-57 (1976); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 197-98, 293 N.E.2d 831, 842 (1973); *Foisy v. Wyman*, 82 Wash. 2d 22, 26-27, 515 P.2d 160, 163-64 (1973).

⁸⁰ 428 F.2d at 1073.

⁸¹ *Id.* at 1075-77.

⁸² *Id.* at 1080-82.

⁸³ *Id.* at 1078.

⁸⁴ *Id.* at 1079.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1080.

⁸⁷ See cases listed in note 17 *supra*. *Alexander* is the first federal court case to consider the issue of an implied warranty of habitability in federal residential leases. However, a federal

have refused to imply a warranty of habitability into residential leases.⁸⁸ Moreover, one of the two rejecting the rule appeared to favor its adoption but regarded the establishment of such a warranty as a legislative decision.⁸⁹ The fact that sixteen of seventeen courts which recently have addressed the issue have favored the implication of a warranty of habitability leads to the conclusion that this is the current direction of legal thinking. While these court decisions are in no way binding, they do serve to inform the federal judiciary of the rule that is currently most favored by courts addressing the issue.⁹⁰ Thus while the rule of caveat emptor was the recognized common law rule of the past, it seems to have lost its vigor under modern circumstances. The trend of the last decade clearly has been in favor of establishing an implied warranty of habitability.⁹¹

B. The Legislative Background

In addition to the common law background, federal courts are guided by legislative intent and policy in fashioning rules of federal common law.⁹² Federal statutes are the starting point in this process.⁹³ Specifically, federal

district court has held that there is an implied warranty of habitability in the sale of HUD housing. *City of Philadelphia v. Page*, 363 F. Supp. 148 (E.D. Pa. 1973). The court found that the buyers

justifiably relied on the expertise of HUD as being able to recondition a home that would be fit for human habitation. In fact we feel that [they] . . . are entitled to expect more from their own Government than they are from a seller dealing at arm's length. HUD is not selling houses for profit, but rather to provide "a decent home . . . for every American family." By affirming the existence of an implied warranty of habitability, this Court is confirming [their] . . . trust in their own government to do what it promised, and to carry out its statutory goals.

363 F. Supp. at 154 (citations omitted).

⁸⁸ *Thomas v. Roper*, 162 Conn. 343, 349-50, 294 A.2d 321, 325 (1972) (no implied warranty of habitability in Connecticut leases); *Blackwell v. Del Bosco*, — Colo. —, —, 558 P.2d 563, 565 (1976) (implication of a warranty left to the Colorado legislature).

⁸⁹ *Blackwell v. Del Bosco*, — Colo. —, —, 558 P.2d 563, 565 (1976). The Colorado Supreme Court decided that however desirable the rule might be, the resolution of the issue is more properly the function of the legislature.

⁹⁰ The Seventh Circuit in *Alexander* was cognizant of this influence. The court pointed out, however, that while a state's standards are relevant they are not conclusive as a source of federal common law. 555 F.2d at 171 n.5. The court expressly declined to follow state court decisions on this issue.

Other sources which have influenced the federal judiciary in fashioning rules of federal common law also support an implied warranty. The *Keydata* court extensively relied on the Restatement of Property to fashion the federal rule in that situation. 504 F.2d at 112. The Restatement of Property notes with approval the recent trend to place upon the landlord the responsibility to provide the tenant with property in a condition suitable for the use contemplated by the parties. RESTATEMENT (SECOND) OF PROPERTY, Introductory Note to Chapter 5 (Tent. Draft No. 2, 1974). England, where the rule of caveat emptor originated, has also adopted a warranty of habitability for residential leases. Housing Act, 1961, 9 & 10 Eliz. 2, C. 65, § 32.

⁹¹ See cases cited in note 17 *supra*. See generally Blumberg and Robinson, *Beyond ULRTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1 (1976); Moshkovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974).

⁹² See cases cited in note 61 *supra*.

⁹³ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). See also Mishkin, *supra* note 21, at 811.

housing statutes are the focal point of the inquiry as to congressional intent with respect to the implication of a warranty of habitability in HUD housing.

Congress has been involved in providing housing to families of low income since the enactment of the Housing Act of 1937.⁹⁴ It was at that time that Congress first articulated its policy of alleviating the shortage of decent, safe and sanitary dwellings for families of low income.⁹⁵ The importance of this goal was restated by Congress in passing the Housing Act of 1949.⁹⁶ Congress declared at that time that the elimination of substandard housing would improve the general welfare and would contribute to the advancement of the growth, wealth and security of the nation.⁹⁷

Two decades later, Congress passed the Housing and Urban Development Act of 1968 which explicitly reaffirmed the housing policy of the 1949 Act.⁹⁸ In considering the legislation, Congress determined that although there had been many accomplishments, national housing goals still had not been met.⁹⁹ This was found to be a matter of grave national concern.¹⁰⁰ In 1974 Congress once again reiterated its concern that national housing goals be met.¹⁰¹

Thus for forty years Congress consistently has established as a goal of national policy a decent home for every American family. Congress has stated on several occasions the importance of this goal and its concern that it is not being met. Thus in looking at this legislation as a whole, it is clear that Congress has manifested a deep and long-lasting concern with respect to the deteriorating state of this nation's housing stock and its effect upon the populace. Hence, any interpretation or enforcement of these laws should reflect the nature and extent of this concern.

In determining the responsibility of the government as lessee, the *Alexander* court was faced with the decision of determining whether the rule of caveat emptor or an implied warranty of habitability better comports with articulated congressional policy in the area of housing. The court should have, but did not, determine whether placing an affirmative contractual obligation upon the government to repair low income dwellings in its possession would further the congressional goal of a safe, decent home for every American family. Rather, the court avoided the issue of how best to effectuate explicit congressional goals, preferring instead to defer to possible future congressional action.

⁹⁴ 42 U.S.C. § 1401 (1970).

⁹⁵ See note 15 *supra* for text of this policy.

⁹⁶ 42 U.S.C. 1441 (1970). The Senate Committee report noted that "the general welfare and security of the Nation requires the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." S. REP. NO. 84, 81st Cong., 1st Sess., reprinted in [1949] U.S. CODE CONG. & AD. NEWS 1550, 1559.

⁹⁷ 42 U.S.C. § 1441 (1970).

⁹⁸ 42 U.S.C. § 1441a (1970).

⁹⁹ H.R. REP. NO. 1585, 90th Cong., 2nd Sess. reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2873, 2873. "Since the declaration . . . that our national objective was 'a decent home and a suitable living environment for every American family,' our country has invested heavily in the production of housing . . . [T]hese accomplishments . . . have fallen far short of today's needs."

¹⁰⁰ H.R. REP. NO. 1585, 90th Cong., 2nd Sess. reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2873, 2877. "Congress finds that the goal [of national housing policy] has not been fully realized . . . and states that this is a matter of grave national concern." *Id.*

¹⁰¹ 42 U.S.C. § 1441a(a) (Supp. IV 1974).

III. TOWARDS A FEDERAL IMPLIED WARRANTY OF HABITABILITY

Since federal courts can develop common law rules in controversies arising out of contractual relationships between private individuals and the federal government, and since Congress has not legislated on the issue of repairs, the *Alexander* court was free to fashion a federal rule of common law vis-a-vis caveat emptor. In determining whether to adopt an implied warranty as plaintiffs urged, the court should have looked to common law developments and legislative intent and policy in the relevant statutory scheme.

Javins illustrates the weight and persuasiveness of the common law development in the field. Its three-pronged analysis for establishing a warranty of habitability:¹⁰² 1) common law assumptions have changed, 2) consumer protection developments should apply to tenants and 3) housing shortages have resulted in unequal bargaining positions—seems to be equally applicable to the federal government as to private landlords.

The first point raised by *Javins* is that the factual assumptions made by the common law are no longer valid. These assumptions, that the tenant's primary interest is the land and that tenants are able to make their own repairs, are no more true for public sector tenants than for tenants in the private sector. Thus, the observation that the interest in land is far outweighed by the tenant's interest in occupying a habitable dwelling seems especially true when dealing with government tenants who occupy one of approximately 147 apartment units in a twelve-story building as was the case in *Alexander*.¹⁰³ Repairs of a building this size seem to fit exactly into the concept of a complex dwelling, difficult, costly and nearly impossible for the average low income tenant to repair.¹⁰⁴ If repairs to such a building are to be made, they can only be expected to be made by the landlord. HUD tenants are therefore subject to the same common law change in circumstances that has led the state courts to abandon the rule of caveat emptor.

Consumer protection developments, the second point raised by *Javins*, are based on the recognition that the buyer of goods and services in an industrial society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality.¹⁰⁵ This reliance was cited by the United States District Court for the Eastern District of Pennsylvania as the basis for an implication of a warranty of habitability in the sale of HUD housing.¹⁰⁶ The district court found that the buyer is entitled to expect more from the government by way of housing quality than he would from a private sector seller.¹⁰⁷ This reliance on the government is even more pronounced where the government is the landlord of a

¹⁰² See text at notes 83-85 *supra*.

¹⁰³ 555 F.2d at 167.

¹⁰⁴ Remedying the conditions of Riverhouse was obviously beyond the ability of any tenant. The elevators, plumbing and electrical and heating systems were defective. *Id.* at 167-68. The court in *Javins* refers to repairs of exactly this type when it discussed the problems which can arise in modern dwellings, problems that only the lessor is in a position to remedy. 428 F.2d at 1078-79.

¹⁰⁵ 428 F.2d at 1075.

¹⁰⁶ *City of Philadelphia v. Page*, 363 F. Supp. 148, 154 (E.D. Pa. 1973), *motion to vacate judgment denied*, 373 F. Supp. 453 (E.D. Pa. 1974).

¹⁰⁷ *Id.*

large apartment complex and low income families are the tenants. Inspection before entry is meaningless because the ability to assess a large complex building's physical and mechanical suitability is beyond the capability of the average tenant's knowledge and financial means. Low income tenants of large complexes such as Riverhouse have no choice but to rely on the expertise and good faith of HUD as their landlord. Hence, the rationale of consumer protection decisions strongly suggests that the government, as a dealer in rental housing, impliedly warrants that the housing it provides is fit for the use intended.

The final reason articulated in *Javins* for the change in the common law, market shortages, is equally applicable to HUD housing built for low income tenants as it is to private sector housing.¹⁰⁸ The perception of the tenant as being at the "mercy of the market-place" is especially apt with regard to those low income tenants occupying buildings built precisely because there is a shortage of good housing for people in the low income bracket. HUD tenants, as much as other tenants in the private marketplace, certainly have "little leverage" in enforcing demands for better housing. Like the tenants described in *Javins*, the tenants of HUD are in a "take it or leave it" situation.

Thus, all of the factors listed by *Javins* as reasons for changing the common law relationship between landlord and tenant with respect to the issue of a warranty of habitability in the private sector can be applied to government housing in the public sector. The assumptions upon which the old common law rule was based are no longer valid for urban residential tenants. The rationale behind consumer protection developments, based on the buyer's reliance on his seller's expertise, is applicable to landlord-tenant relations. Finally, the housing shortage which has left tenants devoid of either bargaining power or choice is as relevant in government housing as it is in private housing.

Articulated congressional policy is another source on which the *Alexander* court could have relied in fashioning a federal common law rule concerning an implied warranty of habitability. The stated congressional purpose of the housing legislation throughout the years indicates a congressional intent that HUD tenants be given a habitable environment in which to live. The rule of caveat emptor is at odds with this intent in that substandard housing conditions would thereby be allowed to continue without government obligation to correct them.

The Housing Acts were enacted precisely because there is a shortage of decent housing and because Congress believed that this condition was detrimental to the nation's well-being. It is unlikely that Congress would intend that a program designed to alleviate shortages of decent housing would provide tenants with housing which is below accepted standards of habitability. Rather, the stated congressional purpose behind these acts strongly suggests that HUD should be placed under an affirmative obligation to meet minimum standards of fitness.¹⁰⁹

¹⁰⁸ 42 U.S.C. § 1401 (1970). The Act is directed to families of low income. The lack of choice in the market place would appear to be hardest felt by those with the smallest incomes.

¹⁰⁹ It is presently undecided whether local housing code standards are applicable to HUD. However, the courts which have considered the issue have found that, at the least, local codes constitute a point of reference for giving content and meaning to the standard of "de-

It is at this point that the legislative intent and the common law development in the states converge. Congress intended to provide good housing for low income families. The states, both in the courts and the legislatures, have determined that an effective way to guarantee decent housing is to imply a warranty of habitability into residential leases. Thus, although Congress has remained silent on this point, the common law development illustrates that articulated legislative policy can best be effectuated by the implication of a warranty of habitability. While the *Alexander* court preferred to leave the decision to the Congress, it is arguable that Congress already has spoken in favor of such a warranty through its statements of purpose in the various Housing Acts.

The Seventh Circuit considered neither the common law background nor the intent behind the congressional legislation in reaching its decision in *Alexander*. Rather, the court decided that the implication of such a warranty was not a judicial function. The court reasoned that since a warranty of habitability would serve as a warranty that "stated objectives of national policy have been and are being met," only Congress was empowered to create such a warranty.¹¹⁰ This result was reached despite the general recognition that leases with the government are construed in the same manner as contracts with the government, that government contracts are interpreted according to federal common law as developed by the courts and that federal courts have long implied terms into such contracts so as to create governmental liability.¹¹¹

Furthermore, the court of appeals apparently overstated the ramifications of an implied warranty of habitability. Such a warranty is not a warranty that the shortage of good housing will be remedied. Rather it is a warranty that the housing that is provided by the government will meet minimum standards of habitability. It would place upon HUD, as upon any other landlord, an affirmative obligation to make repairs, an obligation not heretofore imposed. This warranty would not guarantee that all poor families will be provided with decent housing but rather would place a contractual obligation upon the government in purporting to provide such housing to meet minimal standards of habitability. Where HUD does not meet that obligation, the tenant would have a contractual remedy similar to that of any other person injured by breach of contract.¹¹²

cent, safe and sanitary housing" in the National housing act. *Knox Hill Tenant's Council v. Lynn*, 448 F.2d 1045, 1057 (D.C. Cir. 1971); *Coleman v. United States*, 311 A.2d 496, 497-98 (D.C. 1973). *Cf. Davis v. Romney*, 490 F.2d 1360, 1368 (3rd Cir. 1974) (local codes apply to the sale of HUD housing); 24 C.F.R. § 221.545(c) (1977) (HUD financed property must comply with all applicable building and other governmental regulations; however, this regulation refers to property insured by HUD and may not be applicable where HUD is the actual title owner).

¹¹⁰ 555 F.2d at 171.

¹¹¹ See text at notes 43-52 and note 54 *supra*.

¹¹² Tenants have been granted such contractual remedies as termination, damages, rent abatement, rent application and rent withholdings in situations in which a court has determined that a landlord has breached an implied warranty of habitability. 1 AMERICAN LAW OF PROPERTY § 3.45, at 36 (A.J. Casner ed. Supp. 1976).

CONCLUSION

An implied warranty of habitability recognizes that if premises are to be in a state of good repair, it is the landlord who must have the obligation to repair them. The considerations outlined above indicate that such an obligation should apply to HUD as landlord in the same way that it increasingly has been applied to private landlords. It is therefore submitted that there is a need for a uniform federal rule regarding federally owned housing and that the rule which best effectuates congressional policy is that of an implied warranty of habitability. The implication of a warranty of habitability is not a guarantee that federal housing policy goals are being met but rather is a rule which alters the common law duty to repair and grants to tenants a contractual remedy where the premises are below minimum standards of fitness. The Seventh Circuit in *Alexander* should not have deferred a decision to Congress but instead should have decided the issue presented on the merits and held that there is an implied warranty of habitability in HUD housing. Since it seems inappropriate that tenants of the federal government should be afforded fewer rights than those tenants who have contracted in the private sector, the federal courts should adopt as a uniform rule of federal common law an implied warranty of habitability in urban residential leases where the United States is the lessor.

DAVID A. SLACTER

Federal Gift Taxation of Non-Interest-Bearing Loans: *Crown v. Commissioner*¹—Lester Crown and his two brothers were equal partners in Areljay Company, an Illinois general partnership.² Prior to 1967, twenty-four trusts benefiting children and other relatives of the Areljay partners were established and funded in part by the partners.³ During 1967, Areljay made various non-interest-bearing loans to the trusts so that by December 31, the trusts owed Areljay a total of \$18,030,024, all of which were recorded in the books of Areljay and the respective debtor trusts, and were payable on demand.⁴ Throughout 1967, interest was neither due nor paid on any of these loans.⁵

In 1974, the Commissioner of Internal Revenue (Commissioner) issued a notice of deficiency, claiming that Crown owed \$46,084.54 in additional gift tax for 1967.⁶ The Commissioner alleged that the deficiency

¹ 67 T.C. 1060 (1977), *appeal docketed*, No. 77-1898 (7th Cir. Sept. 2, 1977).

² *Id.*

³ *Id.* at 1061. In 1967, the Areljay partners had a total of 15 children, separate trusts for 12 of whom were involved in *Crown*. Harry N. Wyatt was the sole trustee of all the trusts.

⁴ *Id.* All were evidenced either by demand notes or by open account entries in Areljay's records. No interest was charged on any of the open account loans. The demand notes similarly required no payment of interest before demand, but did call for six percent interest after demand. As of December 31, 1967, loans represented by demand notes totaled \$2,073,649 and loans on open account totaled \$15,956,375.

⁵ *Id.* at 1060. At all pertinent times, Areljay, its partners, and all of the trusts have operated on the cash basis method of accounting. During 1967, the market prime rate of interest ranged between five and one-half percent and six percent per annum, averaging 5.63 percent.

⁶ *Id.*