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Due Process for Hill-Burton Assisted Facilities

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I. INTRODUCTION

"The right to adequate medical care and the opportunity to achieve and enjoy good health" has long been recognized as a right which should be assured to every American citizen.[1] Implementation of this right through health care legislation, however, has been much less resounding than its declaration.[2] The Hospital Survey and Construction Act passed by Congress in 1946, popularly known as the Hill-Burton Act,[3] has recently been employed as a vehicle to achieve this goal.

Through recent litigation[4] and legislation,[5] dramatic changes

1. President Truman's Message to Congress on Health Legislation, [1945] U.S. CODE CONG. & AD. NEWS 1143 [hereinafter cited as President Truman's Message to Congress].

2. *See* Rose, *Federal Regulation of Services to the Poor Under the Hill-Burton Act: Realities and Pitfalls*, 70 NW. U. L. REV. 168 (1975); Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L. J. 243 (1978). Even though the need for national health insurance was actively discussed in the 1930's, national health insurance is still not a reality in 1979.

3. Hospital Survey and Construction Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946) (current version at 42 U.S.C. §§ 291-290 (1976)). The Hill-Burton Act amended Title VI to the Public Health Service Act.

4. *See, e.g.*, Newsom v. Vanderbilt Univ., 453 F. Supp. 401 (M.D. Tenn. 1978).

5. HEW Medical Facility Construction and Modernization; Requirements for Provision of Services to Persons Unable to Pay and Community Service by Assisted Health Facilities, 44 Fed. Reg. 29,372 (1979) (to be codified in 42 C.F.R. § 124).

have been made in the nature of Hill-Burton assisted facilities' obligations to the Government and to the people of America. Facilities that received Hill-Burton funds were required to make two assurances to the Government.[6] In the attempt to make health care available to more Americans, these assurances, the uncompensated service assurance and the community service assurance,[7] have been the focal point of the Government's expansion of Hill-Burton obligations.

Grantee hospitals object to the expansion of their Hill-Burton contractual obligations as an unconstitutional impairment of contract and violation of due process.[8] This Note will explore the validity of that objection by first examining the changes in the contractual obligations of facilities that accepted Hill-Burton funds. The Note will then review the protections afforded contract rights by the contract clause and the fifth amendment due process clause. Finally, this Note will test the changes in the Hill-Burton contractual obligations by the appropriate constitutional standard to determine the validity of those changes.

II. THE EVOLUTION OF THE HILL-BURTON ACT'S TWO ASSURANCES

The purpose of the Hill-Burton Act, as stated in section 601, was to assist the states in determining their needs for medical facilities that would adequately furnish hospital, clinic or similar services to all their people and also to help finance the construction of needed facilities.[9] Section 622 of the Act gave the Surgeon General

6. 42 C.F.R. §§ 53.62-63 (Supp. 1947).

7. *See* Part II *infra.*

8. *See* Summary of Public Comments And Department's Actions On The Uncompensated Services And Community Service Regulations, 44 Fed. Reg. 29,382-99 (1979).

9. Pub. L. No. 79-725, § 601, 60 Stat. 1040 (1946) provides:

> The purpose of this title is to assist the several States—
>
> (a) to inventory their existing hospitals . . . to survey the need for construction of hospitals, and to develop programs for construction of such public and other nonprofit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic, and similar services to all their people; and
>
> (b) to construct public and other nonprofit hospitals in accordance with such programs.

Although section 601 was amended by an Act of Oct. 25, 1949, ch. 722, § 6, Pub. L. No. 81-380, 63 Stat. 900-01 (1949) and an Act of July 12, 1954, ch. 471, § 4(a), 68 Stat. 464 (1954), it was not until an August 18, 1964 amendment that the phrase "physical facilities" was omitted.

The amended declaration of purpose, found in § 600, stated:

> The purpose of this title is —
>
> (a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and

the power to prescribe certain regulations to implement the Act.[10] This authority was later transferred to the Department of Health, Education and Welfare (HEW).[11] The Hill-Burton Act provided for a sharing of responsibilities between federal and state agencies.[12] The Surgeon General had the power to issue regulations prescribing the conditions under which state plans would be acceptable.[13] In section 622(f) the Surgeon General was authorized but not required, to issue regulations requiring certain assurances from the applicants to the state agencies before approval of any application for a hospital or hospital addition could be recommended by a state agency.[14] These assurances, now known as the uncompensated service assurance and the community service assurance,[15] have been the focus of current Hill-Burton litigation and legislation.

The evolution of the two Hill-Burton assurances has been an unusual mix of judicial action and legislative reaction. This section will examine the changes in the Hill-Burton Act and regulations. The legislative history of the original Hill-Burton Act also will be examined to ascertain congressional intent regarding the assurances. Finally, the current status of the assurances will be compared to the original assurances to determine the extent to which they have been changed by subsequent legislation or regulation.

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other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people.

Pub. L. No. 88-443, 78 Stat. 447 (1964). The changes in the declaration of purpose were intended to provide specifically for modernization and renovation of hospital and health facilities and not to change the focus of the Act from providing physical facilities to providing health services themselves. *See* S. REP. No. 1274, 88th Cong., 2d Sess. 1, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2800.

10. Pub. L. No. 79-725, § 622, 60 Stat. 1040 (1946). The regulations promulgated by the Surgeon General under this section were subject to the approval of the Federal Hospital Council and the Administrator.

11. Rosenblatt, *supra* note 2, at 269 n.97.

12. Pub. L. No. 79-725, §§ 601-35, 60 Stat. 1040 (1946).

13. *Id.* at § 622.

14. *Id.* at § 622(f).

15. Section 622(f) of the original Hill-Burton Act, provided for the two assurances in the following way:

Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group; and (2) there will be made available in each such hospital or addition to a hospital a reasonable volume of hospital services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial standpoint.

A. *Changes in the Hill-Burton Obligations*

The first regulations promulgated by the Surgeon General in 1947, designed to implement the Act, virtually ignored the two assurances.[16] Those portions of the regulations that dealt with the uncompensated service and community service obligations were, at best, phrased in precatory language.[17] The two assurances continued to play a very minor role in the impact of the Hill-Burton Act until the early 1970's when a series of lawsuits drew attention to them.[18]

Prior to 1972, only one change had been made in the Hill-Burton regulations pertaining to the assurances. The community services obligation allowed Hill-Burton recipients to maintain segregated facilities.[19] After that clause was held unconstitutional, Congress in 1964 amended the Act to require grantee hospitals to make their services available to all persons residing in the facilities' territories.[20]

In 1972, admittedly in response to a number of lawsuits in which HEW was joined as a defendant,[21] HEW issued new regulations regarding the uncompensated service assurance.[22] The 1972 regulations, for the first time, translated a vague congressional desire for assisted facilities to provide a "reasonable volume of services to people unable to pay"[23] into a dollar and cents requirement.[24] Presumptive compliance levels were established, along with provi-

16. 42 C.F.R. §§ 53.1-79 (Supp. 1947).

17. Rose, *supra* note 2, at 172.

18. *Id.* at 169 n.6 & 172, *citing:* Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972); Corum v. Beth Israel Medical Center, 373 F. Supp. 558 (S.D.N.Y. 1974) (defendants' motion to dismiss granted in part and denied in part); 373 F. Supp. 550 (S.D.N.Y. 1974) (plaintiffs' motion for summary judgment granted in part and denied in part); 359 F. Supp. 909 (S.D.N.Y. 1973) (defendants' motion to dismiss denied); Cook v. Ochsner Foundation Hosp., 61 F.R.D. 354 (E.D. La. 1972) (plaintiffs' motion for summary judgment granted in part); Perry v. Greater Southeast Comm. Hosp. Foundation, Civ. No. 725-71 (D.D.C. June 28, 1972); OMICA v. James Archer Smith Hosp., 325 F. Supp. 268 (S.D. Fla. 1971).

19. 42 C.F.R. § 53.62 (Supp. 1947).

20. Rose, *supra* note 2, at 171 & n.22. The allowance of segregated facilities under the Hill-Burton Act was held unconstitutional in Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 938 (1964). The amended portion of the Hill-Burton Act can be found at 42 U.S.C. § 291c(e) (1976).

21. Rose, *supra* note 2, at 172-74. The cases identified by Rose as prompting HEW's promulgation of the 1972 regulations were: Euresti v. Stenner, 458 F.2d 1115 (10th Cir. 1972); Cook v. Ochsner Foundation Hosp., 61 F.R.D. 354 (E.D. La. 1972) (plaintiffs' motion for summary judgment granted in part); Perry v. Greater Southeast Comm. Hosp. Foundation, Civ. No. 725-71 (D.D.C. June 28, 1972); OMICA v. James Archer Smith Hosp., 325 F. Supp. 268 (S.D. Fla. 1971); 319 F. Supp. 603 (E.D. La. 1970) (defendant's motion to dismiss denied); See Rose, *supra* note 2, for a more detailed history of the Hill-Burton Act.

22. 42 C.F.R. § 53.111 (1975).

23. Pub. L. No. 79-725, § 622(f), 60 Stat. 1040 (1946).

24. *See* 42 C.F.R. § 53.111(d) (1975).

sions for waiver of those compliance levels.[25] The regulations also provided for a means of assessing and enforcing compliance levels, primarily through state agencies.[26]

Despite the fact that Congress was silent on the matter, the greater scope given to the uncompensated service assurance did not stop with HEW's 1972 regulation. Again in response to judicial action HEW amended the 1972 regulations in 1975.[27] The amendments were in particular response to *Corum v. Beth Israel Medical Center,*[28] which invalidated a 1972 provision that allowed eligibility to be determined after services were provided.[29] Thus, the 1975 amendments required eligibility to be determined prior to the rendition of services, except under certain circumstances.[30] These amendments also required grantees to post notices in their facilities informing patients of the availability of uncompensated services.[31]

It was not until 1974 that HEW issued new regulations regarding the community service assurance.[32] The regulations, promulgated in response to *Cook v. Ochsner Foundation,*[33] provided for state agency administration and monitoring of the assurances.[34] In keeping with *Cook* the regulations required assisted facilities to participate in many governmental third-party payment programs,[35] but the facilities could limit the availability of their services to individuals based upon the applicant's age, medical indigency[36] and type of medical or mental affliction.[37] The regulations also established durational limits for the community service obligation: twenty years for Hill-Burton grant recipients and until the loan was repaid for loan recipients.[38] In 1977, again in response to litigation, the regulations were amended to delete the durational limits.[39]

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25. *Id.*

26. *Id.* § 53.111(i).

27. 43 Fed. Reg. 49,954 (1978) (preface to proposed 1979 regulations-background and summary of current rules).

28. *Id.*

29. Corum v. Beth Israel Medical Center, 373 F. Supp. 550, 557 (S.D.N.Y. 1974).

30. 42 C.F.R. § 53.111(f) (1978).

31. *Id.* § 53.111(i).

32. 43 Fed. Reg. 49,954, 49,955 (1978).

33. *Id.*

34. 42 C.F.R. § 53.113(f) (1976).

35. *E.g.,* Medicaid and Medicare.

36. A medical indigent is one who, while possibly not otherwise indigent, is unable to pay for hospital or medical care.

37. 42 C.F.R. § 53.113(d)(1)(ii) (1976).

38. *Id.* § 53.113(a).

39. 42 C.F.R. § 53.113(a) (1978). The rationale for deletion of durational limits, as stated in 43 Fed. Reg. 49,955 (1978), was that the courts in Cook v. Ochsner Foundation Hosp., Civ. No. 70-1969 (E.D. La. 1975) and Lugo v. Simon, 426 F. Supp. 28 (N.D. Ohio 1976) found no statutory basis for a durational limitation of the community service assurance.

Funding for Title VI was discontinued in 1974.[40] In 1975, however, Congress enacted Title XVI to replace Title VI.[41] Three provisions of Title XVI directly affected Title VI facilities.[42] Section 1602(6) gave the Secretary of HEW the power to prescribe regulations regarding Title VI facilities' compliance with their assurances; section 1602 provided for reporting on compliance; and section 1612(c) gave the Secretary investigatory and enforcement powers and provided for private actions by individuals against facilities to effect compliance under certain circumstances.[43]

An examination of Table 1 (Uncompensated Services Regulations) and Table 2 (Community Service Regulations) in the Appendix reveals that the "clarification" of the Hill-Burton assurances, which began in 1972, continued to mushroom. The 1979 regulations promulgated by HEW completed the transformation of the Hill-Burton Act, originally designed to assist states in building hospital facilities, into an alternative source of Medicaid. The 1979 regulations, promulgated primarily in response to cases such as *Lugo v. Simon*[44] and *Newsom v. Vanderbilt University*,[45] are so extensive that tabular form is the only practical method of depicting their expansive nature.[46] In *Newsom* the district court, holding that indigents have a constitutionally protected property interest in free hospital care,[47] declared that the fifth and fourteenth amendments to the United States Constitution required that due process be provided in the allocation of Hill-Burton Act free care by private hospitals.[48] This declaration had a significant impact on the 1979 regulations,[49] profoundly affecting the notice requirements of the regulations.[50]

The recognition of property rights stemming from the Hill-Burton assurances illustrates the extent to which the nature of the

40. 43 Fed. Reg. 49,954 (1978).

41. *Id.* at 49,954-55.

42. *Id.* at 49,955.

43. *Id.*

44. 453 F. Supp. 677 (N.D. Ohio 1978). In *Lugo*, the plaintiffs sought a declaratory judgment that the Secretary of HEW had violated his duties under Title XVI by failing to issue regulations and requested an injunction compelling the Secretary to perform these duties. *Id.* at 686. Although the court did not grant the plaintiffs' motion for summary judgment, it did note that under 42 U.S.C. § 3000-1(6) the Secretary had a *mandatory* duty to issue regulations respecting compliance with the assurances. *Id.* at 685-86.

45. 453 F. Supp. 401 (M.D. Tenn. 1978).

46. See Table 1 (Uncompensated Services Regulations) and Table 2 (Community Service Regulations) in Appendix.

47. 453 F. Supp. at 422-23.

48. *Id.* at 423.

49. *See* 44 Fed. Reg. 29,382-99 (1979).

50. *See* 44 Fed. Reg. 29,372, 29,376 (1979) (to be codified in 42 C.F.R. § 124.504).

Hill-Burton assurances has changed since 1946. The question remains whether this transformation was intended by Congress when it originally included the assurances in the Act.

B. *Legislative History of the Hill-Burton Act*

When the Hospital Survey and Construction Act was enacted, Congress recognized the existence of serious economic and geographic barriers to health services for all Americans,[51] but was nevertheless reluctant to commit the Government to a national health insurance plan.[52] On November 19, 1945, President Truman sent a message to Congress expressing the need for health legislation that would insure adequate medical care for all.[53] President Truman enumerated five factors that he felt were needed to achieve a comprehensive and modern health program.[54] The factors were: first, construction of hospitals and related facilities; second, expansion of public health, maternal and child health services; third, encouragement of medical education and research; fourth, prepayment of medical costs in order to assure access to all necessary medical, hospital and related services; and last, protection against loss of wages resulting from sickness and disability.[55] The Hill-Burton Act was designed to deal with the first of these five factors and not, as the legislative history distinctly points out, to serve as a small-scale national health insurance program.[56]

The Hill-Burton Act as originally introduced by Senator Lister Hill did not contain language regarding the uncompensated services and the community service assurances.[57] The declaration of purpose contained in section 601 of the bill was identical to the declaration in the final Act.[58] The purpose of the Act was to provide the necessary *physical facilities* for furnishing adequate health services to all people.[59] The provision of services themselves was not the stated objective.

Senator Hill's opening statement to the Senate Committee on Education and Labor at the hearings on the proposed Hill-Burton

51. *See* Rosenblatt, *supra* note 2, at 264.
52. *Id.*
53. President Truman's Message to Congress, *supra* note 1.
54. *Id.* at 1147-52.
55. *Id.*
56. *See* Rosenblatt, *supra* note 2, at 266.
57. *Proposed Amendments to the Public Health Services Act: Hearings on S. 191 Before the Senate Committee on Education and Labor*, 79th Cong., 1st Sess. 1-6 (1945) [hereinafter cited as *1945 Hearings*].
58. *Id.* at 1; *see* note 9 *supra* and accompanying text.
59. *1945 Hearings*, *supra* note 57; *see* note 9 *supra* and accompanying text.

Act provides the distinction that identifies the true intent of this Act. He pointed out that establishing adequate, properly distributed hospital and public health facilities was the "first step" in providing a solution to the existent national health problems.[60] This characterization of the proposed legislation was frequently repeated in the Senate hearings.[61] For example, Senator Pepper stated that although a comprehensive medical program would contain at least two distinct parts, provision of physical facilities and provision of medical care to all who needed it, this bill dealt only with the first.[62]

Indigents' access to facilities aided under the Act was also a frequent topic of discussion. It was not contemplated, however, that the responsibility for providing this care should rest upon the hospitals' financial resources.[63] In fact, there was generalized concern in the Committee that perhaps maintenance funds for the hospitals should be provided in the Act.[64]

In the committee hearing held on March 12, 1945, Dr. Frederick D. Mott, Chief Medical Officer of the Farm Security Administration, suggested that safeguards should be placed in the bill to ensure that recipients carried out the bill's avowed purpose of providing facilities for furnishing adequate medical services to the people.[65] In response, Senator Taft suggested that perhaps a hospital that accepted aid should have an obligation to care for a certain number of indigent patients.[66] Both Senator Pepper and Dr. Mott replied that such a requirement might serve to overburden a hospital.[67] Senator Taft responded: "I do not know whether it ought to be a requirement, although I expect you might modify that through health insurance, or something of that kind."[68] Senator Pepper declared that the burden of paying for the care of indigents should rest upon the public and not upon a particular hospital.[69] Senator Ellender concurred and felt that this was actually what Senator Taft had

60. *1945 Hearings, supra* note 57, at 7.

61. *Id. passim* (for example, see 10, 31, 63, 64, 65, 166, 173).

62. *Id.* at 64-65.

63. *Id.* at 70.

64. *Id.* at 177-78 (Senator Murray, the Chairman, noted that part of the current shortage of hospitals was due to the fact that some facilities lacked operating funds). On Feb. 28, 1945, the hearings were temporarily postponed. Upon resumption, the stated intention of the Committee was to examine the subject of hospital construction in conjunction with the subject of financing medical and hospital services. *Id.* at 178.

65. *Id.* at 188-89.

66. *Id.* at 190.

67. *Id.*

68. *Id.*

69. *Id.*

in mind.[70] Ending this discussion, Senator Taft stated, "My interest in [this bill] is like in a public works bill, just to provide construction. But beyond that, these facilities must be made available to the people."[71] The 380 pages of testimony received by the Senate committee on this bill contain no further discussion of Senator Taft's suggestion. Rather, further discussion regarding care for indigents focused on the appropriation of state or federal funds for this purpose.[72]

The uncompensated service language that appears in the final Act was a product of executive sessions of a subcommittee considering the Hill-Burton legislation.[73] The subcommittee was composed of Senator Hill, Chairman, and Senators Ellender, Tunnell, La Follette, and Taft.[74] Neither the report of the Senate subcommittee nor the report of the House Committee on Interstate and Foreign Commerce, which considered the Hill-Burton Act, explained further the

70. *Id.* at 190-91. Senator Ellender declared, "My reason for supporting a bill providing for Federal aid to build hospitals is to make it easy for the *community* in which a hospital may be built to give aid to the indigent." *Id.* (Emphasis added). It is likely Senator Ellender reasoned that if part of the burden of hospital construction cost was removed from the shoulders of the community, then the community would have more funds to channel into programs for medical care of indigents. Senator Ellender did not state that his reason for supporting the bill was to require the hospitals to give free care to indigents at the hospitals' own expense.

71. *Id.* at 191. Senator Pepper responded to Senator Taft's statement by saying, "That is the next problem we have got to devote ourselves to — is how to make these facilities available to the people," reiterating the point that the Hill-Burton Act was to be the first step followed by subsequent legislation that would complete the long range plan of providing health care for all citizens. *Id.*

72. *Id. passim* (for example, see 211 and 286). Other commentators have reached a different conclusion based on the colloquy found in the *1945 Hearings* at 190-91. *See, e.g.*, Comment, *Provision of Free Medical Services by Hill-Burton Hospitals*, 8 HARV. C.R.-C.L. L. REV. 351 (1973). In that comment, the author concluded that the testimony at the Senate hearings demonstrated that the Act imposed a duty on recipient hospitals to care for those unable to pay for medical treatment. *Id.* at 354. This conclusion was supported by excerpts quoted from the *1945 Hearings* at 190-91. *Id.* at 354 & n.23. Although such a conclusion may be drawn from the quoted fragments of the colloquy, the testimony when read in context and in toto refutes this result.

A frequently cited authority for legislative history on the Hill-Burton Act is Rose, *The Duty of Publicly-Funded Hospitals to Provide Services to the Medically Indigent*, 3 CLEARINGHOUSE REV. 254, 261-62 (1970). After examining the legislative history Rose draws only one firm conclusion, that the requirement that grantees afford a reasonable volume of services for free patient care was contractually binding. *Id.* at 262. Rose does not conclude that the inclusion of the above requirement was meant to serve eventually as a surrogate for national health insurance for indigents. *Id.* In fact, she concedes, "It might be argued that Congress (and certainly the Senate Committee members) were clearly aware of the deficiencies in the bill in not providing funds for maintenance and operation for hospitals in the neediest areas and accordingly no provision was made for the indigent in fact." *Id.*

73. S. REP. No. 674, 79th Cong., 1st Sess. 9 (1945).

74. *Id.* at 1.

meaning of the assurances.[75]

Commentators have stated that the uncompensated service obligation was included in the Act as a concession to Senate liberals who had been unsuccessful in securing the passage of a national health insurance program.[76] One commentator opined that the inclusion of the uncompensated service assurance was a very significant concession because Congress expected the assurance to be given operational effect.[77] This conclusion was based on four factors. First, a phrase in section 623(a)(4)(D) of the original Hill-Burton Act provided that a state plan must set forth a hospital construction program "which meets the requirements . . . for furnishing needed hospital services to persons unable to pay therefor."[78] Second, the Act allowed for an exception to the uncompensated service assurance if compliance would not be financially feasible.[79] From these two points, it was inferred that Congress intended a grantee hospital to devote some of its resources to providing free care.[80] Although this conclusion may not be totally erroneous, the conjecture that Congress may have intended assisted facilities to provide some free care falls far short of the highly regulatory nature the uncompensated service assurance has assumed in 1979.

Third, it was noted that the legislative history frequently referred to the need for subsidized or charitable care.[81] A portion of a statement of Dr. Smelzer, the President of the American Hospital Association, was specifically quoted to support this contention. The colloquy went as follows:

> The Chairman (Senator Murray): Could the administrator of this bill compel a State to see to it that all the people are going to get care in these hospitals, that they are going to be aided through this system?
> Dr. Smelzer: I think if this bill will provide the hospitals, will develop programs for the construction of such public and nonprofit hospitals, people who get into them will be taken care of at the local level.
> . . . .
> Senator Pepper: You are leaving it to us to find, if we can, some proper way to aid the people, all the people in getting access to these hospital facilities and services, and this is considered as a first step and merely as a part of a whole program. This bill, mainly, is to provide facilities.
> Dr. Smelzer: That is correct.[82]

75. *Id.*; H. R. REP. No. 2519, 79th Cong., 2nd Sess. 1, *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1558 [hereinafter cited as H. REP. No. 2519]; H. REP. No. 2697, 79th Cong., 2nd Sess 1, *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1571.

76. Rose, *supra* note 2, at 170; Rosenblatt, *supra* note 2, at 266.

77. Rosenblatt, *supra* note 2, at 267.

78. Pub. L. No. 79-725, § 623(a)(4)(D), 60 Stat. 1040 (1946).

79. *Id.* § 622(f).

80. Rosenblatt, *supra* note 2, at 267.

81. *Id.* at 267-68.

82. *Id.* at 268; *1945 Hearings, supra* note 57, at 30-31.

Although Dr. Smelzer's statement recognized the need for charitable or subsidized care, he did not view this as a function of the Hill-Burton Act itself.

Fourth, although the legislative history recognized some need for reliance on the private nonprofit hospitals' tradition of community service and charitable care, it also recognized that this was not adequate to meet the health needs of all Americans.[83] From this observation the commentator concluded that Congress must have intended the Hill-Burton legislation to fill the gap in American health care.[84] What Congress actually intended to accomplish through the Hill-Burton Act, however, was to take the first step in making adequate health care available to all Americans. This first step was to be accomplished by providing adequate physical facilities.[85] With the assurance that private nonprofit hospitals and facilities would continue in their tradition of community service and charitable care, improved health facilities would necessarily be a stride in the direction of adequate health care services for all people.

In conclusion, the community service and uncompensated service assurances were merely intended to be agreements to treat the public in general, and indigents in particular, in a nondiscriminatory manner. Congress hoped, and through the assurances declared its desire, that aided hospitals would continue to do their best to serve their communities. Congress feared that aided facilities would be "diverted to some restricted use not contemplated at the time of approval of the project."[86] This fear, voiced by Dr. Mott, was the statement to which Senator Taft responded with his now famous suggestion regarding uncompensated services. Therefore, the inclusion of the two assurances was merely intended to prevent such diversion.

By giving these assurances Hill-Burton facilities were simply promising to do their best to serve the people of their communities in the spirit in which the Hill-Burton Act was promulgated. The spirit and mood of Congress regarding the true nature of the assurances were captured by the 1947 precatory regulations.[87] Thus, the transformation that these regulations have undergone is not consistent with the intent of the 79th Congress. The 1979 regulations issued by HEW reflect the health care policies of 1979. The ultimate

83. Rosenblatt, *supra* note 2, at 268.

84. *Id.*

85. *See* H. R. REP No. 2519, *supra* note 75.

86. *1945 Hearings, supra* note 57, at 189-90.

87. It is reasonable to believe that the Surgeon General had a more accurate concept in 1947 of what the 79th Congress intended by the inclusion of the two assurances than HEW does in 1979.

question, therefore, is whether the aided facilities can be required to fulfill obligations vastly different from those they agreed to perform when they accepted aid under the Hill-Burton Act of 1946.

III. THE PROTECTION OF CONTRACT RIGHTS UNDER THE CONTRACT CLAUSE AND THE FIFTH AMENDMENT

A contractual relationship, and its attendant reasonable expectations of the contracting parties, is afforded some constitutional protection from governmental interference. The sources of this protection are the contract clause and the fifth amendment due process clause of the United States Constitution.

The contract clause prohibits states from impairing existing contractual obligations.[88] This restraint, however, is limited to legislation promulgated by the states.[89] Although no explicit language in the Constitution protects private contracts from federal legislation, the fifth amendment due process clause's protection of property rights[90] has been interpreted as shielding private contracts from interference by the federal government.[91] The fourteenth amendment imposes the fifth amendment's due process guarantee upon the states.[92]

Many commentators feel that the same standard is applicable to the determination whether retroactive legislation has violated the contract clause or the due process clause.[93] The cases support this

88. The contract clause provides, in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10.

89. G. GUNTHER, CONSTITUTIONAL LAW 615 (9th ed. 1975).

90. The fifth amendment provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Although the same balancing test, weighing private loss against public gain, has been used by many courts to determine a deprivation of property without due process and a taking of property without just compensation, the two fifth amendment guarantees are not synonymous. One commentator has stated, "A taking without compensation can be corrected by payment, but a governmental action that is arbitrary or serves no valid public purpose must be voided." Note, *Balancing Private Loss Against Public Gain To Test for A Violation of Due Process Or A Taking Without Just Compensation*, 54 WASH. L. REV. 315, 326 (1979). The analysis is a two step operation. First and foremost, the government's action must meet the requirements of substantive due process. Only when this is accomplished is the question asked whether compensation is constitutionally required, and if so, what is just compensation. No attempt, however, will be made to distinguish the two fifth amendment protections in this Note.

91. In Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), the Court recognized the due process clause of the fifth amendment as "kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National government." *Id.* at 623. *Hepburn* was later overruled on different grounds in Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 465 n.1 (1978).

92. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); TRIBE, *supra* note 91, at 567.

93. *See, e.g.*, TRIBE, *supra* note 91, at 465 n.1; Hale, *The Supreme Court and the*

contention.[94] Thus, this section will explore both contract clause and due process clause cases to find that standard.

A retroactive statute has been defined as "one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute."[95] A statute that does not purport to have effect prior to its enactment can still be retrospective if for example, it alters preexisting rights or obligations.[96] Retroactive or retrospective statutes have traditionally been considered suspect.[97] Several rationales have been offered to support this characterization. The most fundamental rationale is that one should be able to plan his conduct with reasonable certainty of the legal consequences.[98] Therefore, to protect and preserve settled expectations, greater scrutiny should be given to retrospective laws.[99] Another reason for treating retroactive legislation as inherently suspect is that issuing such legislation adjudicates rights of known individuals,[100] a function that is best reserved to the judiciary.[101] Discussing the effect that uncertainty of contract can have on society, Chief Justice Marshall stated in *Ogden v. Saunders,*[102] "This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to

Contract Clause: III, 57 HARV. L. REV. 852, 890-91 (1944); Hochman, *The Supreme Court And The Constitutionality Of Retroactive Legislation,* 73 HARV. L. REV. 692, 695 (1960).

94. *E.g.,* City of El Paso v. Simmons, 379 U.S. 497, 517 (1965) (Black, J., dissenting); Veix v. Sixth Ward Bldg. and Loan Ass'n, 310 U.S. 32 (1940). In *Veix,* after holding that a state legislative act did not violate the contract clause, the Court did not even think it necessary to address the fourteenth amendment due process challenge. *Id.* at 41. In *El Paso* Justice Black dissented from what he viewed to be "the Court's balancing away the plain guarantee of Art. I, § 10 . . . a balancing which results in the . . . violation of the equally plain guarantee of the Fifth Amendment, made applicable to the States by the Fourteenth, that 'private property [shall not] be taken for public use, without just compensation.'" 379 U.S. at 517. *But cf.* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 251 (1978) (Brennan, J., dissenting). In *Allied Steel* Justice Brennan asserted that the majority analyzed the case in the wrong constitutional framework when it proceeded under the contract clause. He felt that the proper analysis would have been under the due process clause of the fourteenth amendment. In his dissent Justice Brennan alludes to the idea that a violation of the contract clause and the due process clause are analytically different, but he never specifically identifies the difference. *Id.*

95. Hochman, *supra* note 93, at 692. Hochman pointed out that a classic example of a retroactive statute is one which reaches back to an already completed transaction and attaches new rights and obligations. *Id.*

96. *Id.* Hochman noted that the Supreme Court has treated the terms retroactive and retrospective interchangeably. *Id.* at 692 n.1.

97. Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977); Hochman, *supra* note 93, at 692.

98. Hochman, *supra* note 93, at 692.

99. *See* Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d at 1080.

100. *Id.*

101. Hochman, *supra* note 93, at 693.

102. 25 U.S. (12 Wheat.) 213 (1827).

sap the morals of the people, and destroy the sanctity of private faith."[103] Thus the value placed on certainty in contractual obligations in this country is a restraining force against retrospective state and federal legislation.

To invoke the protection of the contract clause or the due process clause against retroactive legislation, several factors must be assessed. First, in order to invoke the contract clause, the private right affected must be a contract right.[104] To invoke due process protections the private right must be a vested property right.[105] Valid contracts and the rights that arise therefrom are vested property rights.[106] Although many vested rights are not contractual in origin, the focus of this section will be on vested rights arising from contractual relations.

Once it is determined that a property right is affected, the next level of analysis is whether the legislation impairs the contract. A contract is found to be impaired when a party is deprived of the benefit of his contract.[107] It is not necessary that the legislation completely destroy the contract.[108] Impairment can be found when a law substantially reduces the contractual rights.[109]

In determining whether a contract is impaired, it is essential to know the terms of the contract, especially the consideration.[110] The laws in existence at the time of execution in the places of execution and performance are usually considered to be part of the contract, even if not expressly incorporated.[111] Contracts involving an area that is heavily regulated by the government are often held to incorporate future legislation on the subject.[112]

Even when it is established that a property or contract right has been impaired by retroactive legislation, the constitutional protections are not absolute. The contract clause's prohibition that "No State shall. . . pass any . . . Law," is not as absolute as it may seem.[113] The same is true of the restraint placed on retroactive legis-

103. *Id.* at 355.

104. *See* TRIBE, *supra* note 91, at 465.

105. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 608 (1960); Coombes v. Getz, 285 U.S. 434, 442 (1932); South Windsor Convalescent Home, Inc. v. Weinberger, 403 F. Supp. 515, 520 (D. Conn. 1975), *rev'd on other grounds, sub nom.* South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910 (2d Cir. 1976).

106. *See* Lynch v. United States, 292 U.S. 571, 577 (1934).

107. *See* Northern Pac. Ry. v. Minnesota, 208 U.S. 583, 591 (1908).

108. *See* Thorpe v. Housing Authority of Durham, 393 U.S. 268, 279 (1969).

109. *Id.*

110. *See* FHA v. Darlington, Inc., 358 U.S. 84 (1958).

111. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 429-30 (1934).

112. *E.g.*, Veix v. Sixth Ward Bldg. and Loan Ass'n, 310 U.S. at 38.

113. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. at 426-30.

lation by the due process clause.[114]

Various factors have been considered by courts determining the constitutionality of retroactive statutes.[115] These factors can be characterized as first, the legislature's justification for retroactive legislation; second, the degree of impairment of the contract; and last, the nature of the rights affected.[116] These factors provide an analytical framework for determining how much protection from governmental interference a contract will be given.

A. A Period of Scrutiny

The Supreme Court has traditionally recognized that constitutional restrictions placed on retroactive legislation affecting contract rights are modified by police or paramount powers.[117] The scrutiny given to legislative acts, however, to determine if they were a reasonable exercise of paramount or police powers has varied.[118]

In 1922, Justice Holmes stated in his majority opinion in *Pennsylvania Coal Co. v. Mahon,* "When [the fifth amendment's] seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[119] In *Pennsylvania Coal,* a tight rein was placed on police power. Consequently, the Court found the legislative abrogation of preexisting rights unjustifiable.[120] Although the legislation in question did promote personal safety, the Court recognized that personal safety could be achieved by other means.[121] The private contract in question was found to be greatly impaired because, if the Kohler Act[122]

114. *See* Fleming v. Rhodes, 331 U.S. 100 (1947).

115. *See, e.g.,* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The Court looked at the extent of the diminution in property value, the public interest served, and the private right affected.

116. Another commentator grouped these factors into the following categories: First, the nature and strength of the public interest served by the statute, second, the extent to which the statute modifies or abrogates the asserted preenactment right, and last the nature of the right that the statute alters. Hochman, *supra* note 93, at 697.

117. *See, e.g.,* Fleming v. Rhodes, 331 U.S. at 107; East N.Y. Savings Bank v. Hahn, 326 U.S. 230, 232 (1945). Police powers are considered to be the power to promulgate legislation that is reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community. Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 558 (1914). Paramount powers are the essential powers of Congress.

118. *See* Hochman, *supra* note 93.

119. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 415.

120. *Id.* at 416.

121. *Id.* at 414.

122. The Kohler Act, a Pennsylvania statute approved May 27, 1921, forbade mining of coal in such ways as to cause subsidence of any structure used for human habitation, with certain exceptions. The plaintiff owned a parcel of land to which the coal company in 1878

applied, mining coal would become commercially impractical.[123] For constitutional purposes, such impairment was deemed to have destroyed the contractual right.[124]

In *Lynch v. United States* retroactive legislation was not allowed to abrogate the rights created by insurance policies issued by the federal government pursuant to the War Risk Insurance Act of 1917.[125] The Act provided that, if payment were refused under the policy, the beneficiary had the right to sue the Government.[126] In 1933, however, the Economy Act withdrew the Government's consent to be sued.[127] Abrogating contracts in an attempt to lessen government expenditures, even in times of economic depression, was found to be insufficient justification.[128] Although a distinction between impairing contract rights and changing remedies is often drawn, the *Lynch* Court equated the Government's removal of the beneficiaries' remedy with a repudiation of the contract itself.[129]

In the same term in which *Lynch* was decided, the Court was presented with another contractual impairment case. In *Home Building & Loan Association v. Blaisdell,* however, private contracts, rather than governmental contracts, were impaired by legislation.[130] The Court held that the Minnesota Mortgage Moratorium Law was not repugnant to the contract clause or the due process clause of the fourteenth amendment.[131] Minnesota's justification for passage of a law that admittedly impaired contracts was the existence of an economic emergency.[132] Noting that the emergency did not create the state's power to impair contracts, the Court stated that an emergency may furnish the occasion for the exercise of the power.[133]

In *Blaisdell,* the Court specifically recognized that the economic interests of a state may justify the exercise of its police pow-

had reserved the right to remove all coal. The plaintiff brought a bill in equity to prevent the coal company from mining under his property. *Id.* at 412.

123. *Id.* at 414.

124. *Id.*

125. 292 U.S. 571 (1934).

126. *Id.* at 575.

127. *Id.*

128. *Id.* at 580. Justice Brandeis, in *Lynch,* quoted from the *Sinking Fund Cases,* 99 U.S. 700, 719 (1879): " 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' " 292 U.S. at 580.

129. *Id.*

130. 290 U.S. 398 (1934).

131. *Id.* at 447-48.

132. *Id.* at 409.

133. *Id.* at 426.

ers,[134] but in *Lynch* economic justifications did not suffice.[135] Perhaps the reconciling elements are the differences in the extent and nature of the impairment of the contracts and the rights involved in each case. The extent of the impairment of the contract was more limited in *Blaisdell* than in *Lynch.* The Court in *Blaisdell* noted that legislation must be addressed to a legitimate end and the measures taken must be reasonable and appropriate to accomplish that end.[136] In *Blaisdell* the legislation was appropriately limited to deal with the economic emergency and, as a result, the extent of the impairment of contracts was kept to a minimum. The Mortgage Moratorium Law was to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935."[137] In addition, mortgagors were to pay mortgagees the rental value of the property plus interest upon the indebtedness during the extended time that the Act provided to redeem the property.[138] No such limitations were found in the legislation challenged in *Lynch.*[139] The nature of the rights that the Mortgage Moratorium Law affected in *Blaisdell* were contractual rights between private individuals. In *Lynch,* however, the contractual obligations impaired existed between the federal government itself and private individuals. This is a significant factor in determining the constitutional validity of retroactive legislation. The Court in *Blaisdell* based its conclusion that the legislation was addressed to a legitimate end upon the fact that the legislation was not for the mere advantage of particular individuals, but for the protection of an important societal interest.[140] When one has the power to legislatively abrogate its own contractual obligations, the motives behind the legislation naturally become more suspect and demand greater scrutiny.

The importance of whether legislation impairs private or government contracts became more apparent in cases dealing with the Gold Clause Resolution.[141] In *Norman v. Baltimore & Ohio*

134. *Id.* at 428.

135. 292 U.S. at 580.

136. 290 U.S. at 438.

137. *Id.* at 416.

138. *Id.* at 416-17.

139. In W.B. Worthen Co. v. Thomas, 292 U.S. 426, 432 (1934), the Supreme Court also recognized the importance of appropriately limiting legislation to the emergency situation that necessitated its promulgation. In *Thomas,* a state statute retroactively exempting insurance policies from writs of garnishment was found to violate the contract clause.

140. 290 U.S. at 445.

141. The Gold Clause Resolution declared that " 'Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which

Railroad[142] the Gold Clause Resolution was upheld as applied to private contracts. Yet in *Perry v. United States,*[143] the Supreme Court concluded that the same was not true regarding the Government's own contracts. The Court stated:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements . . . .[144]

The extent to which a legislative act impairs a contract was given great weight in *W.B. Worthen Co. v. Kavanaugh.*[145] In *Kavanaugh* a municipal commission issued bonds. State statutes that originally made these bonds acceptable security were subsequently changed to such a great extent that the security was impaired.[146] The Court recognized, as it did in *Lynch,* that changing a party's remedy under the contract can have the effect of unconstitutionally abrogating the party's contractual rights.[147] The changes in the statutes were found to be "an oppressive and unnecessary destruction" of almost all of the incidents that made the bonds attractive and secure.[148] Also, the changes were executed with "studied indifference" to the interests of the bondholders.[149] The standard enunciated in *Kavanaugh,* delineating the extent of impairment necessary to find a violation of the contract clause, was adopted in many subsequent decisions.[150] An important limitation of that standard, often overlooked, is the Court's statement that this was an outermost limit only and did not exclude the possibility that an unconstitutional impairment could be found within narrower bounds.[151]

B. A Period of Deference

For the next forty years, the Supreme Court continued to examine the same factors in assessing the validity of retroactive legisla-

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at the time of payment is legal tender for public and private debts.' " Norman v. Baltimore & O.R.R., 294 U.S. 240, 292 (1935).

142. 294 U.S. 240 (1935).

143. 294 U.S. 330 (1935).

144. *Id.* at 350-51.

145. 295 U.S. 56 (1935).

146. The Court noted that the obligation of a contract includes the laws in force at the time of its making. *Id.* at 60.

147. *Id.* at 60-61.

148. *Id.* at 62.

149. *Id.* at 60.

150. *See, e.g.,* East N.Y. Savings Bank v. Hahn, 326 U.S. 230, 234 (1945); Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 515 (1942).

151. 295 U.S. at 60.

tion. Significantly, less importance was given to the factors of degree of impairment and the nature of the rights affected. At the same time, more deference was given to the government's justification for the legislation.[152]

In *Veix v. Sixth Ward Building and Loan Association*[153] the Court followed *Blaisdell.* The limitation of the legislation to the emergency and the consequential minimization of contractual impairment that existed in *Blaisdell,* however, were absent in *Veix.* The regulations in *Veix* were not limited in time to the emergency situation, nor did the Court seem to consider this important.[154] The extent of the impairment caused by the legislation in *Veix* was justified to some extent by what the Court considered should have been the contracting parties' reasonable expectations. The legislation in *Veix* dealt with savings and loan associations that had been regulated by the state for many years before the petitioner purchased his shares.[155] The Court reasoned that when a person enters a field that is already regulated in the aspect to which he now objects, the person actually contracts subject to further legislation on the same topic.[156] In *East New York Savings Bank v. Hahn*[157] the legislation in question was a mortgage moratorium similar to that in *Blaisdell.* Nevertheless, in *East New York Savings Bank* the moratorium, due to its yearly extensions, was not limited in time to the existence of the emergency that prompted its enactment. The absence of the limitation did not, however, prevent the Court from finding the legislation constitutional.[158] No "studied indifference" to the interests of the mortgagee was found as in *Kavanaugh.*[159] Deference was given to the judgment of the legislature that continuation of the moratorium was necessary.

In 1958, the Court in *FHA v. Darlington, Inc.* held that the due process clause was not violated by a section added in 1954 to the

152. The same shift in the Supreme Court's level of deference to legislative judgment is seen in the economic substantive due process cases. The *Adair-Lochner-Coppage* doctrine of strict scrutiny and interventionism pervaded the Supreme Court's decision making until 1934. *See* Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915). Then in 1934, beginning with *Nebbia v. New York,* a deferential philosophy engulfed the Court. *See* Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); North Dakota Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

153. 310 U.S. 32 (1940). As in *Blaisdell,* the justification for the retroactive legislation in *Veix* was economic.

154. *Id.* at 39.

155. *Id.* at 38.

156. *Id.*

157. 326 U.S. 230 (1945).

158. *Id.*

159. *Id.* at 234.

National Housing Act.[160] The Court reached this decision because it felt that the addition to the Act was not retroactive and no vested rights were impaired.[161] The Court reasoned that the addition merely clarified congressional intent and, as a consequence, did not alter preexisting rights.[162] Concluding the majority opinion, Justice Douglas stated, "[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end. Invocation of the Due Process Clause to protect the rights asserted here would make the ghost of *Lochner v. New York* walk again."[163]

In his dissent in *Darlington,* Justice Frankfurter recognized that curative statute cases typically upheld the retroactive validity of legislation adversely affecting an existing interest.[164] For example, retroactive, curative statutes have traditionally been upheld if they were designed to cure defects in an administrative system in order to effectively carry out the original legislative intent.[165] The rationale used to sustain retroactive, curative statutes has been that they typically entail only remedial modifications,[166] and the rights they do affect are not equitably vested.[167] Justice Frankfurter, however, found that *Darlington* did not fall within that class.[168] Moreover, Justice Frankfurter had less fear of the *Lochner* ghost than Justice Douglas, reasoning that the *Lynch* decision demanded the invocation of the due process clause to protect the rights asserted in *Darlington.*[169]

In *City of El Paso v. Simmons* the Supreme Court gave unprecedented deference to the legislature by allowing the State of Texas to impair the State's own contracts.[170] The Court relied heavily on the reasoning of *Blaisdell* without noticing, as Justice Black's dissent pointed out, the striking differences between the two cases.[171]

160. 358 U.S. 84 (1958).

161. *Id.* at 90-91. In Flemming v. Nestor, 363 U.S. 603 (1960), the Court also found that the petitioner was not deprived of a vested property right.

162. 358 U.S. at 90-91.

163. *Id.* at 91-92 (citations omitted). *See* note 151 *supra.*

164. 358 U.S. at 93.

165. *See* Hochman, *supra* note 93, at 704.

166. *See* 358 U.S. at 93.

167. *See* Hochman, *supra* note 93, at 705.

168. 358 U.S. at 93.

169. *Id.*

170. 379 U.S. 497 (1965). The challenged statute in this case amended an earlier statute that allowed a purchaser or his vendee to reinstate their claim to land forfeited to the state by paying the amount of interest due. The amendment limited the right of reinstatement to five years from the date of forfeiture. *Id.*

171. 379 U.S. at 523-27. Justice Black distinguished *Blaisdell* from *El Paso* on the basis of private versus government contracts and limited versus total impairment. *Id.*

In *El Paso,* not only was the degree of impairment greater than in *Blaisdell,* but also the justification for the legislation was significantly weaker. Although *Blaisdell* recognized that economic interests of the state could justify interference with contracts,[172] the economic needs in *El Paso*—efficient utilization of land and revenues for the school fund[173]—were not equivalent in nature to those created by the depression of the 1930's that supported *Blaisdell.*

The Court's deference to legislatures was again demonstrated in 1976 in *Usery v. Turner Elkhorn Mining Co.*[174] In *Usery* the Black Lung Benefits Act of 1972,[175] which amended Title IV of the Federal Coal Mine Health and Safety Act of 1969,[176] was upheld as not violative of due process even though it imposed unexpected liability on mining companies for past, completed acts that were legally proper at the time done.[177] The Act required operators to compensate former employees who had terminated their work in the industry before the Act was passed.[178] The Court stated that legislative acts adjusting the burdens and benefits of economic life are presumed to be constitutional unless proven arbitrary.[179] The fact that a legislative act upsets settled expectations does not of itself render the act unconstitutional.[180] The Court considered the expectations of the operators at the time they employed the former employees, but concluded that even if the liability provided in the Act was not expected, the liability imposed was a rational measure.[181] Once the legislative act was found to be rational, the Supreme Court refused to second-guess the legislature concerning the wisdom of the chosen scheme.[182] Thus, a very deferential judicial attitude toward legislative judgment was confirmed in *Usery.*

C. *A Return to Scrutiny*

After many years of minimal significance, *Lynch* was again recognized as a restraint on governmental abrogation of contracts in

172. 290 U.S. at 437.
173. 379 U.S. at 515-16.
174. 428 U.S. 1 (1976).
175. 30 U.S.C.A. §§ 901-45 (Supp. 1979).
176. 30 U.S.C.A. §§ 901-36 (1971).
177. 428 U.S. 1.
178. *Id.* at 14-15.
179. *Id.* at 15.
180. *Id.* at 16.
181. *Id.* at 18. The Court concluded that imposition of liability on the operators for disabilities caused by employment in the past was a rational method of distributing the costs of the employees' disabilities to those who had profited from the employees' labor. *Id.*
182. *Id.* at 18-19.

Larionoff v. United States.[183] In *Larionoff* the Court of Appeals, and later the Supreme Court, found no congressional intent to deprive servicemen of vested rights.[184] Although these decisions did not rely on *Lynch,*[185] both courts recognized that if the legislation had been intended by Congress to deprive servicemen of vested rights, *Lynch* would have presented serious constitutional questions.[186]

Two months prior to the Supreme Court's decision in *Larionoff,* the Court revitalized the contract clause in *United States Trust Co. v. New Jersey.*[187] The Court explicitly recognized important distinctions that had been previously observed in early contract clause and due process cases.[188] The Court found that a different level of scrutiny should be applied when the contract impaired is a purely private one and when the contract is one involving the governmental body itself.[189] The Court also concluded that legislation which adjusts the rights between private contracting parties must be reasonable and of a character appropriate to the public purpose that justified its adoption[190] and noted that deference would be given to the legislative judgment on this matter.[191] The Court added that legislation which impairs a governmental contract must also be both reasonable and necessary to serve an important public purpose.[192] Because the interest of the state itself is at stake, however, the Court reasoned that complete deference should not be given to the legislative assessment of reasonableness and necessity.[193] Therefore, contrary to *Usery,*[194] the Court decided that it should examine various methods of achieving the legislative goal to determine if less drastic means would suffice.[195]

In *United States Trust* the Court held that a retroactive statute that repealed a security provision which benefited government bondholders unconstitutionally impaired the government's obligation.[196] The reasoning of the Court is helpful in assessing the full impact of the Court's decision upon scrutiny of government con-

183. 533 F.2d 1167, 1180 (D.C. Cir. 1976), *aff'd,* 431 U.S. 864 (1977).
184. 431 U.S. at 879; 533 F.2d at 1180.
185. *See* 431 U.S. 864; 533 F.2d 1167.
186. 431 U.S. at 879; 533 F.2d at 1179-80.
187. 431 U.S. 1 (1977).
188. *Id.* at 22-26.
189. *Id.*
190. *Id.* at 22.
191. *Id.* at 23.
192. *Id.* at 25.
193. *Id.* at 26.
194. 428 U.S. at 18-19.
195. *See* 431 U.S. at 29-30.
196. *Id.* at 1.

tracts. Before assessing the reasonableness and necessity of the legislation, the Court made an initial inquiry into the state's ability to enter into an agreement that might limit the state's power to act in the future.[197] The Court noted that, because a state may not compromise an essential attribute of its sovereign powers, the contract clause would not protect a contract affecting such powers.[198] Governmental contracts that are financial in nature, however, do not compromise a state's sovereign powers.[199] The Court determined that the contract in *United States Trust* concerned a financial obligation that fell outside the reserve powers the government could not contract away.[200] The involvement of money, however, does not automatically render the transaction financial. Instead, the Court will look beyond the title of the contract to determine how it actually restrains the government.[201] A state will not be allowed to evade a legitimate financial obligation simply because it would prefer to spend the money to promote the public good.[202]

In *United States Trust,* mass transportation, energy conservation, and environmental protection were recognized as legitimate and important goals, but were insufficient justification to allow the government to impair its own contract.[203] Deciding that the plan chosen by the legislature was not necessary to achieve the stated goals, the Court also determined that the contracts were impaired to an unnecessary degree.[204] In fact, the Court found that the goals could have been achieved without modifying the covenants at all.[205] The impairment was not justified merely because it was the least expensive and most convenient option for the government.[206]

Another important element was revealed when the Court reconciled *United States Trust* with *El Paso.* The statute amended in *El Paso* had effects that were unforeseeable and unintended by the legislature.[207] Yet in *United States Trust* the conditions that called for the challenged legislation were foreseeable.[208] The Court indi-

197. *Id.* at 23.
198. *Id.*
199. *Id.* at 24-25.
200. *Id.*
201. *See id.* at 25. An example cited by the Court was, "[A] revenue bond might be secured by the State's promise to continue operating the facility in question; yet such a promise surely could not validly be construed to bind the State never to close the facility for health or safety reasons." *Id.* at 25.
202. *Id.* at 29.
203. *Id.* at 32.
204. *Id.* at 30.
205. *Id.*
206. *See id.* at 30-31.
207. *Id.* at 31.
208. *Id.* at 31-32.

cated that it would be proper to allow a statute to be amended only if it served to restrict a party to those gains he reasonably expected from the contract.[209] In other words, if a statute is changed but does not defeat a party's reasonable expectations, both the extent of the impairment and the private rights affected are in fact minimal.[210]

Coupling the closer scrutiny given to a legislature's justification for altering its own contractual obligations with the requirement that the legislature minimize the extent of impairment of private rights, the Supreme Court in *United States Trust* announced a different level of protection for contractual rights than it had offered in the past forty years. Some commentators feel that *United States Trust* is consistent with precedent,[211] while other commentators believe that it is an aberrational case[212] and question whether it genuinely signaled a resurgence of scrutiny by the Supreme Court.[213] Two decisions of the Supreme Court since *United States Trust* indicate, however, that the constitutional protections afforded contracts by the due process clause and the contract clause are truly revitalized.

The Supreme Court's opinion in *Larionoff,* handed down two months after *United States Trust,* hinted at the revitalization of the due process clause as a source of protection from impairment of contracts by retroactive legislation.[214] Because the Court found no contractual impairment, however, it did not face the issue squarely.[215] The dicta in *Larionoff* does indicate that the reasoning of *Lynch* is not to be forgotten.[216]

In *Allied Structural Steel Co. v. Spannaus* the application of a Minnesota statute to the appellant was held violative of the contract clause.[217] Because cases concerning impairment of private contracts commonly exhibit deference to legislative judgment, it is sig-

209. *See id.* at 31.

210. The Court rejected the construction that *Kavanaugh* had enunciated a "total destruction" test. *Id.* at 26-27. An unconstitutional impairment of contract can be found even if the contract is not totally destroyed.

211. *See, e.g.,* Note, *Repeal of Covenant Providing Security of Municipal Bond Violates Contract Clause:* United States Trust Co. v. New Jersey, 31 RUTGERS L. REV. 786 (1978).

212. *See, e.g.,* 55 J. URB. L. 200 (1977).

213. *See, e.g.,* 17 WASHBURN L.J. 416 (1978).

214. *See* 431 U.S. at 879.

215. *Id.*

216. *Id.*

217. 438 U.S. 234 (1978). The Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01-.17 (1974), made a private employer of 100 or more employees, at least one of whom had to be a Minnesota resident, who provided pension benefits under a plan meeting the requirements of § 401 of the Internal Revenue Code subject to a "pension funding charge" if he either terminated the plan or closed a Minnesota office. The charge was only assessed if the pension funds were inadequate to cover full pensions for all employees who had worked for the employer for at least ten years. *Id.* at 238.

nificant that the *Allied Steel* Court relied on cases that were not totally deferential to legislatures.[218] The Court noted five factors in *Blaisdell* that justified sustaining the constitutionality of the challenged legislation.[219] These factors were: First, the act was prompted by an emergency; second, the act served a basic societal interest, rather than the interest of favored groups; third, the relief was appropriately tailored to the emergency it was designed to meet; fourth, the imposed conditions were reasonable; and last, the legislation was limited to the duration of the emergency.[220] The Court next examined the decisions in *W.B. Worthen Co. v. Thomas,*[221] *W.B. Worthen Co. v. Kavanaugh,*[222] *Treigle v. Acme Homestead Association*[223] and *United States Trust,*[224] all of which found challenged legislation unconstitutional.[225] Applying the principles derived from these cases, the *Allied Steel* Court found the presumption favoring legislative judgment as to the necessity and reasonableness of the particular measure could not stand.[226] The Court held that the legislation, which nullified express terms of contractual obligations and imposed a completely unexpected liability in potentially disabling amounts, was unjustified.[227] The legislation, promulgated to secure pension plans for Minnesota residents in the face of plant closures and pension plan terminations,[228] attempted to deal with a narrow class rather than a broad societal interest.[229] Also, no desperate economic emergency existed as in *Blaisdell.*[230] Finally, the legislation was not a temporary alteration of contractual obligations, but a severe and permanent change.[231] Thus, the five *Blaisdell* factors were absent. A less deferential judicial attitude was revealed not only by the holding in *Allied Steel,* but also by the precedent relied upon.

As a result of *United States Trust, Larionoff,* and *Allied Steel,* contractual obligations once again are truly afforded protection

218. *See* 438 U.S. 234.
219. *Id.* at 242.
220. *Id.*
221. 292 U.S. 426 (1934).
222. 295 U.S. 56 (1935). The Court in *Allied Steel* also rejected the notion that *Kavanaugh* established the principle that an impairment must be done without moderation or reason or in a spirit of oppression to be unconstitutional. 438 U.S. at 250.
223. 297 U.S. 189 (1936).
224. 438 U.S. at 243-44.
225. *Id.* at 243-44. *El Paso* was relegated to a footnote in *Allied Steel. Id.* at 243 n.14.
226. *Id.* at 247.
227. *Id.*
228. *Id.* at 247-48.
229. *Id.* at 248.
230. *Id.* at 249.
231. *Id.* at 250.

from impairment by retroactive legislation. While the Court may give some deference to legislative judgment when private contracts are considered, *Allied Steel* declares that deference does not mean the Court will abdicate its role as guardian of constitutional liberties. *United States Trust* assures that even closer scrutiny will be given to legislation when a governmental body seeks to alter its own obligations. While the contract clause and the due process clause will not be allowed to completely tie the hands of legislatures in fulfilling their sovereign duty to protect the general welfare, they are not mere shadows of protections of times past.

IV. THE 1979 REGULATIONS: GOVERNMENTAL IMPAIRMENT OF ITS OWN CONTRACTUAL OBLIGATIONS

When facilities received Hill-Burton funds, they entered into a contractual relationship with the state and federal governments.[232] In consideration for the receipt of the federal funds, the facilities agreed to construct their projects in accordance with the pertinent regulations and to comply with the assurances they made in their applications to the state agency.[233] The two assurances were intended to make the facilities available without discrimination on account of race, creed, or color to all persons residing in the service area of the facilities and to furnish a reasonable volume of free patient care.[234] The facilities' consideration has been altered by governmental action many times since the first Hill-Burton regulations were promulgated in 1947. Although not every change in a contractual obligation impairs the contract, examination of the changes made in the Hill-Burton assurances demonstrates that the contracts of Hill-Burton recipients have been impaired.

In determining whether a contract is impaired, it is essential to know what the contract and the consideration actually encompassed.[235] The consideration the assisted facilities promised was to fulfill the two assurances. The content of the two assurances, and therefore the content of the contract, was embodied in the 1947 regulations because laws that are in existence at the time and the place of the making of the contract are part of the contract even if not expressly included.[236]

A contract does not have to be totally destroyed in order to be

232. *See* Euresti v. Stenner, 458 F.2d 1115, 1118 (10th Cir. 1972).
233. *Id.*
234. 42 C.F.R. §§ 53.62-63 (Supp. 1947).
235. *See* FHA v. Darlington, Inc., 358 U.S. 84 (1958).
236. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. at 429-30.

impaired in the constitutional sense.[237] For example, changes that derogate from substantial contractual rights can impair a contract.[238] In *Kavanaugh* numerous small changes, considered together, were found to impair a contract because cumulatively they destroyed nearly all the incidents of attractiveness to the contract.[239] An examination of Tables 1 and 2 reveals an identical situation in the case of Hill-Burton recipients.

The Hill-Burton regulations issued subsequently to those promulgated in 1947, particularly the 1979 regulations, impaired the Government's contracts with Hill-Burton facilities due to the regulations' retroactive effect. The regulations were retroactive because they altered preexisting rights and obligations.[240]

As previously discussed, the due process clause and the contract clause protect contracts from impairment by retroactive legislation. This protection provided by the Constitution, however, is not absolute and must give way to certain exceptions such as curative legislation, contracts in which the government has compromised its sovereign powers, and contracts that are impaired by legislation that is a reasonable and necessary exercise of a governmental body's police power.

The regulations promulgated by HEW do not fit within the curative statute exception. The rationales which support the constitutionality of this type of legislation are: The government should be allowed to cure inadvertent defects in statutes or their administration[241] and such statutes merely do what should be within the reasonable expectations of people contracting in highly regulated fields.[242] These rationales, however, do not justify the changes in the regulations. In light of the legislative history, the recent regulations do not implement the true intent of the 79th Congress,[243] nor do they simply make "small repairs" to cure inadvertent defects.[244] Moreover, when Hill-Burton grantees entered into their contractual rela-

237. *See* Thorpe v. Housing Authority of Durham, 393 U.S. at 279.

238. *Id.*

239. 295 U.S. at 62.

240. *See* Hochman, *supra* note 93, at 692.

241. *Id.* at 705.

242. *See, e.g.*, FHA v. Darlington, Inc., 358 U.S. at 91; Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d at 1081.

243. The question whether the 1979 HEW regulations are so different from the legislative intent that they are ultra vires is a viable issue. That issue, however, is beyond the scope of this Note. As stated in Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978) "[T]he actions of the government representative on which a taking claim is premised must be authorized either expressly or by necessary implication, by some valid enactment of Congress." *Id.* at 819.

244. *See* 548 F.2d at 1081.

tionship with the federal government, hospital construction was not a highly regulated area. The grantees were justifiably unaware that approximately twenty-five years later the focus of their contract with the Government would shift from hospital construction to a Medicaid surrogate.

Application of the standards recently enunciated in *United States Trust* and *Allied Steel* requires the conclusion that the 1979 Hill-Burton regulations are beyond constitutional boundaries. The impaired contracts did not involve the surrender of a sovereign right by the federal government. Nor is the legislation justified as a reasonable and necessary exercise of legislative power appropriate to accomplish a public purpose.

Although a legislature cannot contractually surrender an essential attribute of its sovereignty,[245] a contract essentially financial in nature does not, in and of itself, compromise sovereign powers.[246] The contract that exists between the federal government and the Hill-Burton grantees was created to provide for the construction of needed health care facilities. The mere fact that the Government intended to improve the health and welfare of Americans, does not bring the contract under the umbrella of sovereign powers. The nature of the contractual obligations must be examined, as opposed to the subject matter of the contract, to determine if sovereign powers have been compromised. The only way in which the federal government bound itself to the Hill-Burton grantees was monetarily. Because its contractual obligations were essentially financial in nature, no essential attribute of the Government's sovereign powers was surrendered. Because the federal government was free to contract as it did, some restraints were consequently placed on the legislature's power to subsequently alter these contracts.

If the legislature retroactively impairs its contractual obligations, the impairment must be both reasonable and necessary to effectuate an important public purpose.[247] Because the Government's self-interest is at stake when the regulations promulgated by HEW impair the Government's contractual obligations, complete deference should not be given to the legislative assessment of reasonableness and necessity.[248] Three major factors should be balanced to determine whether the challenged legislation is both reasonable and necessary: the legislature's justification for its action,

245. *E.g.*, United States Trust Co. v. New Jersey, 431 U.S. at 23.
246. *Id.* at 24.
247. *See id.* at 25.
248. *Id.* at 26.

the nature and extent of the impairment, and the nature of the rights affected.

Arguably HEW's new regulations are justified by the need to promote adequate health care for all Americans. Admittedly, this is an important goal, but, as in *United States Trust,* in which mass transportation, energy conservation, and environmental protection were advanced as justifications for the challenged legislation,[249] this important goal does not rise to a level that would justify the consequent impairment of contracts. In *United States Trust* the Court stated, "Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors."[250] In the case of Hill-Burton grantees, the Government has already spent its money. What it seeks to do now is to get more for its money by increasing the grantees' obligations and thereby avoiding the expenditure of more money to further its goal of improved health care. The Court noted in *Lynch* that Congress is without power to reduce its expenditures by abrogating contracts.[251] The need to provide health care for all Americans does not give the legislature the freedom to impair its own contracts in any manner it desires.

The nature and extent of the impairment inflicted by the 1979 regulations is severe. It is so far-reaching that the actual substance of the two assurances given by Hill-Burton grantees has been changed. When made, in light of the 1947 regulations, the assurances were statements of the good faith intentions of the recipients to do their best to meet the needs of their communities. An examination of the demands of the 1979 regulations reveals the altered nature of the assurances. A few representative examples illustrate this point. Not only has the grantees' promise to provide a "reasonable amount" of free care been given a dollar sign (by the 1972 regulations),[252] but now a plus mark has been added. The 1979 regulations provide that the "reasonable volume" dollar amount be adjusted upwards for inflation.[253] Deficits in compliance must now be made up and adjusted for inflation.[254] Both the Hill-Burton Act, enacted in 1946, and the 1947 regulations specifically included a provision allowing for a waiver when compliance with the uncom-

249. *Id.* at 28-29.
250. *Id.* at 29.
251. 292 U.S. at 580.
252. *See* 42 C.F.R. § 53.111(d).
253. 44 Fed. Reg. 29,372, 29,376 (1979) (to be codified in 42 C.F.R. § 124.503(a)).
254. *Id.*

pensated service assurance was not financially feasible.[255] No such waiver is available under the 1979 regulations.[256] In fact, the obligation will be extended ad infinitum until all deficits in compliance are eliminated.[257] New procedural requirements, too numerous to recount,[258] are also added to the obligation and therefore, to the burden of the grantees. Today the regulations governing the two Hill-Burton assurances have transformed these promises into a financial and procedural nightmare for health care providers.[259]

The extent and nature of the impairment of the Hill-Burton grantees' contracts with the federal government is not necessary. As in *United States Trust,* the important governmental interest prompting the challenged legislation can be provided for without modifying the Hill-Burton contracts at all.[260] Alternative means of achieving the Government's goal could be adopted. A governmental body is not free to consider impairing its own contracts when other viable policy alternatives are open to it.[261]

No mitigating factors justifying the impairment are found in the nature of the private rights affected. The rights of the Hill-Burton grantees do not rest on insubstantial equity. The Government made the contracts with the Hill-Burton grantees fully aware of the health care needs of Americans.[262] Yet the 1947 regulations did not demand what the 1979 regulations call for. As in *United States Trust,* the Government should not now be allowed to unilaterally modify its contract to provide for needs that it did not choose to provide for when the contract was made.[263] If a retroactive statute merely restricts a party to gains that he might reasonably have expected from his contract, the statute is more likely to be reasonable.[264] The regulations of HEW were not promulgated to prevent the

255. Pub. L. No. 79-725, § 622(f), 60 Stat. 1040 (1946); 42 C.F.R. § 53.63 (Supp. 1947).

256. *See* 44 Fed. Reg. 29,372-79 (1979) (to be codified in 42 C.F.R. § 124.503).

257. *Id.* at 29,375 (to be codified in § 124.503(b)).

258. See Table 1 (Uncompensated Services Regulations) and Table 2 (Community Service Regulations) in Appendix.

259. Written comments submitted by the American Hospital Association to HEW in response to HEW's 1978 Notice of Proposed Rulemaking dealt with the impact the proposed regulations would have on providers. It was pointed out that the addition of the inflation factor alone would result in a doubling of the uncompensated care obligation by the tenth year, nearly quintupling the obligation by the twentieth year, and increasing the annual obligation to 600% of the original amount by the time final loan repayment is made. Comments of the American Hospital Association, December 26, 1978, page 28, found in Public Comments to the Proposed 1979 Hill-Burton Regulations, Vol. I, Providers.

260. *See* 431 U.S. at 30.

261. *Id.* at 30-31. For example, independent legislation could be utilized to deal with the problem of access to health care for indigents.

262. *See 1945 Hearings, supra* note 57.

263. *See* 431 U.S. at 31-32.

264. *Id.* at 31.

assisted facilities from enjoying a windfall. Quite to the contrary, the post-1947 regulations deny the reasonable expectations of assisted facilities in order to permit HEW to expand its own contractual benefits.

The need to make health care available to all Americans does not justify the impairment of governmental contracts with Hill-Burton grantees. When substantial rights are greatly impaired by retroactive legislation, the need for a strong governmental justification becomes more acute. The impairment caused by the post-1947 Hill-Burton regulations, particularly the 1979 regulations, is neither reasonable nor necessary in light of the nature and extent to which they impair substantial private rights. The recent Hill-Burton regulations attempt to make health care more available to Americans, but the Government seeks to do this without additional financial expenditure on its part. Although the goal is noble, the means are improper.

V. CONCLUSION

To allow the Government to unilaterally, unnecessarily, and drastically alter the contractual obligations owed by assisted Hill-Burton facilities to the Government is to deny Hill-Burton grantees the constitutional protection of fifth amendment due process. The post-1947 Hill-Burton regulations, particularly the 1979 regulations, pertaining to the uncompensated service and community service assurances, do not merely clarify or serve to accomplish the intent of the original Hill-Burton Act. These regulations retroactively impair valid contractual obligations. In light of recent Supreme Court decisions, these regulations are unconstitutional.

MARGARET LYNCH HUDDLESTON

TABLE 1

UNCOMPENSATED SERVICES REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1972 (42 C.F.R. 1975)	1975 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Compliance Level/Reasonable Volume	"In determining what constitutes a reasonable volume of free patient care, there shall be considered conditions in the area to be served by the applicant, including the amount of free care that may be available otherwise than through the applicant." § 53.63	Presumptive compliance is met if the facility provides the lesser of 3% of operating costs, or 10% of all federal assistance provided under the Act (does not include supplemental programs). Or a facility can achieve presumptive compliance if it certifies that it will have an "open door" policy. § 53.111(d)	Same as in 1972	Compliance is met if the facility provides the lesser of 3% of operating costs for the current fiscal year, or 10% of all Federal assistance provided (including supplemental programs) adjusted by a percentage change in the national Consumer Price Index for medical care between the year in which the facility received assistance or 1979, whichever is later. § 124.503(a)
Deficit in Compliance	"The requirement of assurance from the applicant may be waived if the applicant demonstrates to the satisfaction of the State Agency, subject to subsequent approval by the Surgeon General, that furnishing such free patient care is not feasible financially." § 53.63	No deficit make-up requirements.	Same as in 1972	Facilities assisted under Tit. VI which fail to meet compliance must make up the deficit (adjusted upwards for inflation). The deficit may be made up at any time during the period of obligation (extending beyond that time if necessary). But if the deficit is due to failure to comply with the regulations, then the dificit must be made up in the very next year. § 124.503(b)

TABLE 1

UNCOMPENSATED SERVICES REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1972 (42 C.F.R. 1975)	1975 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Excess Compliance				Facilities that exceed compliance in a fiscal year will receive credit for the excess. The credit may be used to reduce the compliance level of any subsequent year. § 124.503(c)
Duration of Obligation		The duration of obligation for grantees is 20 years from completion of construction. The duration of obligation for loan recipients is the period during which the assisted loan remains unpaid. § 53.111(a)	Same as in 1972	The duration of obligation for Tit. VI grantees is 20 years from completion of construction. The duration of obligation for loan recipients is the period during which the assisted loan remains unpaid. § 124.501(b)(1)
Affirmative Action Requirement		A State Agency may allow a facility to give a lower level of uncompensated services than required by the presumptive compliance guidelines, based on four criteria. § 53.111(h)	Same as in 1972	A facility that fails to meet its annual compliance level must adopt an affirmative action plan, except where the failure is due to financial inability and this inability is claimed and reported to the Secretary. § 124.504(a)
Affirmative Action Requirement (continued)		If a facility fails to meet compliance level, then the facility shall file a justification therefor and a description of the steps it proposes to take to assure that compliance will be achieved for the current fiscal year. § 53.111(e)(2)		

TABLE 1

UNCOMPENSATED SERVICES REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1972 (42 C.F.R. 1975)	1975 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Notice of Availability of Uncompensated Services			Facilities are required to post notices in various areas of the facility. The notices shall be multilingual where the facility serves a multilingual community. § 53:111(i)	Facilities are required to: (1) publish a notice in a newspaper of general circulation, (2) provide a copy of the notice to the HSA for the area, (3) post notices in various areas of the facility in English and Spanish (additional languages required in certain population areas) (notices are supplied by HEW), (4) give individual written and, where appropriate, oral notice to each person who seeks services in the facility (the individual written notice shall be given prior to provision of services except in emergency situations and, under no circumstances, shall the notice be given later than when first presenting a bill for services). § 124.505

TABLE 1

UNCOMPENSATED SERVICES REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1972 (42 C.F.R. 1975)	1975 (42 C.F.R. 1978)	1979 (42 C.F.R. 19___)
Financial Eligibility Criteria for Identifying Persons Unable to Pay	"'Persons unable to pay therefor' [include] both the legally indigent and persons who are otherwise self-supporting but are unable to pay the full cost of needed hospital care." § 53.63	State agencies are required to set forth criteria fo ridentifying such individuals in their State plan. § 53.111(g)	Same as in 1972	(1) A person whose income for the preceding 12 months falls below the current poverty income guideline of the Community Services Administration (CSA) is eligible for services without charge. (2) A person whose income for the preceding 12 months falls between the CSA guideline and twice that guideline is eligible for services free of charge or at a reduced charge as specified in the allocation plan. § 124.506(a) Annual income is determined by either multiplying by four the person's income for the preceding three months, or by using the person's actual income for the preceding twelve months. § 124.506(b)
Allocation of Services				(1) Each facility must designate a plan on which HSA and the public may comment. The plan must encompass persons with incomes below the CSA guidelines. § 124.505

TABLE 1

UNCOMPENSATED SERVICES REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1972 (42 C.F.R. 1975)	1975 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Allocation of Services (continued)				(2) If a facility does not designate a plan, it will be presumed to have adopted a plan which provides all services of the hospital to all persons unable to pay, on a first-come first-served basis until its compliance level has been met. (3) Any plan must provide that every individual eligible under the plan who requests uncompensated services shall receive such services until the facility's annual obligation is exhausted. § 124.507
Determinations of Eligibility		Only services provided to an individual whose eligibility was determined prior to any collection effort, other than rendition of bills, shall be included in uncompensated services. § 53.111(f)(1)	Determination of eligibility shall be made prior to the provision of services, except in the case of emergency services, where a change has occurred in financial circumstances, or where incomplete or erroneous information was received. § 53.111(f)(1)	During any period in a fiscal year, as long as uncompensated services remain available, a facility shall make a determination of eligibility within two working days following the request. Written reasons for approval or denial are to be given to the applicant. A facility may require verification of income as a condition of providing free services. § 124.508

TABLE 1

UNCOMPENSATED SERVICES REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1972 (42 C.F.R. 1975)	1975 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Exclusions From Uncompensated Services	"Such care [free patient care] may be paid for wholly or partly out of public funds or contributions of individuals and private and charitable organizations such as community chests or may be contributed at the expense of the hospital itself." § 53.63	The following shall be excluded from the computation of uncompensated care: (1) Amounts received by a facility and amounts the facility is entitled to receive from a third party insurer or under a governmental program, and (2) the reasonable cost of services that could be reimbursed to the facility under a governmental program in which the facility is eligible to participate, regardless of its actual participation. § 53.111(f)(2)	Same as in 1972	Generally, any amount which the facility has received or could receive from a third party insurer or under a governmental program through the facility's own action, whether or not such action is taken, is excluded from the computation of uncompensated services. And any amount in excess of the payment that could be received by the facility from the above mentioned sources is excluded if the facility has agreed or is required to accept this payment as payment in full for the services. § 124.509
Reporting and Record Maintenance Requirements		Annual compliance reports and proposed budgets are to be filed with State Hill-Burton agencies. § 53.111(e)	Same as in 1972	Facilities must submit to the Secretary of HEW a report to assist in determining compliance every three years. Under certain circumstances more frequent reporting will be required. Records necessary to document compliance should be maintained and made available to the public and the Secretary for inspection. § 124.510

TABLE 1

UNCOMPENSATED SERVICES REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1972 (42 C.F.R. 1975)	1975 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Investigation and Enforcement		The State Hill-Burton agencies are to provide for evaluation and enforcement in their State plans. There are certain requirements, however, that the State plans must meet (annual evaluations must be conducted, complaint procedures must be established, effective sanctions must be established). § 53.111(i)	Same as in 1972, but now found in § 53.111(j).	The Secretary will make periodic investigations and also will investigate complaints. The Secretary may take any action authorized by law to secure compliance including deficit make up for noncomplying facilities. Private causes of action are provided for under certain circumstances. § 124.511
Administration	Primarily by State Hill-Burton agencies	Primarily by State Hill-Burton agencies	Primarily by State Hill-Burton agencies	Where the Secretary finds that it will promote the purposes of the regulations, and the State agency is able and willing, the Secretary may enter into an agreement with the State agency for the State agency to assist in administering the regulations. § 124.512

TABLE 2

COMMUNITY SERVICE REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1974 (42 C.F.R. 1976)	1977 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Duration of Obligation		The duration of obligation for grantees is 20 years from completion of construction. The duration of obligation for loan recipients is the period during which the assisted loan remains unpaid. § 53.113(a)	No durational limit § 53.113(a)	No durational limit § 124.601
Provision of Services	"[F]acilities ... built with aid under the act will be made available without discrimination on account of race, creed, or color to all persons residing in the area to be served by that hospital." This requirement, however, may be waived if separate hospital facilities are provided for separate population groups. § 53.62	An assisted facility must make its services available to the general public. The only limitations on the "availability of such services allowable are those based on age, medical indigency, or type or kind of medical or mental disability." § 53.113(d)(1)	Same as in 1974	Services of an assisted facility shall be "available to all persons residing ... in the facility's service area without discrimination on the grounds of race, color, national origin, creed, or any other ground unrelated to an individual's need for the service or the availability of the needed service in the facility." Services may be denied, however, to persons who are unable to pay unless (1) those persons are required to be provided uncompensated services under that assurance, or (2) emergency services are required (a facility may transfer or discharge a person that has received emergency service only when the risk is not substantial). § 124.603

TABLE 2

COMMUNITY SERVICE REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1974 (42 C.F.R. 1976)	1977 (42 C.F.R. 1978)	1979 (42 C.F.R. 19___)
Third Party Payor Programs		Facilities are required, if eligible, to make arrangements for reimbursement with federal, state, and local governmental third-party payor programs.* Facilities are also required to take such additional steps as may be necessary to ensure that admission to and services of such facilities will be available to beneficiaries of governmental programs without discrimination. § 53.113(d)(2) *state and local programs which pay actual costs *federal programs, such as Medicare and Medicaid, which pay reasonable costs	Same as in 1974	Facilities are required, if eligible, to make arrangements for reimbursement with federal, state, and local governmental third-party payor programs.* Facilities are also required to take such additional steps as are necessary to ensure that admission and services of such facilities will be available to beneficiaries of governmental programs without discrimination. § 124.603(c) *state and local programs which pay actual costs *federal programs, such as Medicare and Medicaid
Admission Policies		Admission may be denied to an individual based on age, medical indigency, or type or kind of medical or mental disability. § 53.113(d)(ii)	Same as in 1974	Exclusionary admissions policies are prohibited. An admission policy is exclusionary if it has the effect of excluding persons on a ground other than those permitted in § 124.603(a). Practices that may, under certain circumstances, be exclusionary are: (1) admitting only patients referred by a physician with staff

TABLE 2

COMMUNITY SERVICE REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1974 (42 C.F.R. 1976)	1977 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Admission Policies (continued)				privileges, (2) a facility which is a medicaid provider, but few or none of the physicians with staff privileges will treat medicaid patients, or (3) a facility that requires preadmission deposits when the effect of that policy is to exclude people who probably can pay but do not have the cash available at the time services are requested. § 124.603
Notice				Facilities are required to post notices in various areas of the facility in English and Spanish (additional languages required in certain population areas) (notices are supplied by HEW). § 124.604
Reporting and Record Maintenance Requirements		Facilities are required to report annually to the State agencies the amount of reimbursement received from each arrangement with a principal governmental third-party payor. § 53.113(e)	Same as in 1974	Facilities must submit to the Secretary a report to assist in determining compliance every three years. Under certain circumstances more frequent reporting will be required. Records necessary to document compliance should be maintained and made

TABLE 2

COMMUNITY SERVICE REGULATIONS				
Policy	1947 (42 C.F.R. Supp. 1947)	1974 (42 C.F.R. 1976)	1977 (42 C.F.R. 1978)	1979 (42 C.F.R. 19__)
Reporting and Record Maintenance Requirements (continued)				available to the public and the Secretary for inspection. § 124.605
Investigation and Enforcement		The State Hill-Burton agencies are to provide for evaluation and enforcement in their State plans. There are certain requirements, however, that the State plans must meet (annual evaluations must be conducted, complaint investigation procedures must be established, effective sanctions must be established). § 53.113(f)	Same as in 1974	The Secretary will make periodic investigations and will also investigate complaints. The Secretary may take any action authorized by law to secure compliance. Upon a finding of noncompliance, the Secretary may require the facility to establish an affirmative action plan. § 124.606
Administration	Primarily by State Hill-Burton agencies	Primarily by State Hill-Burton agencies.	Primarily by State Hill-Burton agencies	Where the Secretary finds that it will promote the purposes of the regulations, and the State agency is able and willing, the Secretary may enter into an agreement with the State agency for the State agency to assist in administering the regulations. § 124.607