

# Coronavirus

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## Constitutional Limitations On Emergency Authority

### Lessons For The COVID-19 Pandemic Landscape

#### INTRODUCTION

Over the last two months, there has been a flurry of federal, state, and local government action to stem the spread of COVID-19. These efforts have included a variety of emergency declarations ordering residents to stay at home and avoid public gatherings, restricting the ability of businesses to raise prices on essential goods, closing schools and non-essential businesses, imposing limitations on travel, and limiting the ability of landlords or lenders to exercise contractual remedies of eviction, foreclosure, or debt collection. [For additional information, see King & Spalding's compilations of State Shelter-in-Place/Stay-at-Home Orders, Restrictions on Eviction and Foreclosure Remedies, and Price Gouging Laws.] These restraints – broadly undertaken pursuant to government police powers in time of emergency – have presented a level of restriction on movement and activity to which many American individuals, businesses, and other organizations are unaccustomed.

These emergency declarations have already become the catalyst for various government enforcement activities, and analogous civil litigation against purported violators should also be expected. For instance, State Attorneys General and the federal government have indicated an intent to enforce various price gouging laws that limit businesses' ability to raise prices on certain essential goods during times of emergency. In addition to official enforcement action by State Attorneys General, many state laws on price gouging and unfair and deceptive trade practices empower individuals to bring their own private lawsuits to enforce such laws, even sometimes as putative class action lawsuits.<sup>1</sup> As a result, these and other privately enforceable emergency restrictions have created the potential for a cascade of litigation – both government enforcement actions and private civil actions – involving the current COVID-19 landscape.

At the same time, the underlying restrictions have stretched into their second month and a growing resistance in some quarters has started to



emerge. This has included limited protests challenging the rules that are affecting commerce, work, and daily activities, as well as lawsuits challenging the underlying executive orders. In one example, a class action in Pennsylvania has challenged the governor's order closing any business that is not "life-sustaining" – shuttered businesses and unemployed individuals make up the class. Their complaint challenges the governor's order as a taking without just compensation and as a violation of their substantive due process rights.<sup>2</sup>

The protests have been caught up in the political discourse, as has much of the initial litigation challenging these restrictions. Even for businesses uninterested in these sorts of political statements, however, the actual legal enforceability of these emergency declarations should be of paramount importance. When considering these issues, companies should understand that state governments, in particular, have broad authority under their police power to act for the health, safety, and welfare of the public. This power is especially pronounced during emergencies.<sup>3</sup> However, emergency power is not without its limits and challenges on a variety of legal grounds are possible.<sup>4</sup> To assist companies in considering the questions these emergency actions raise, this Client Alert provides an overview of two key constitutional principles that should be kept in mind: the Takings Clause and the Due Process Clause. Those constitutional principles will help businesses understand the risks posed by – and the potential bases to challenge – government actions such as: (1) the enforcement of federal, state, or local price gouging or price control laws; (2) the enforcement of freezes on residential rent increases; (3) the enforcement of federal, state, or local anti-hoarding restrictions; (4) the application of mandated eviction moratoriums; (5) the application of mandated foreclosure moratoriums; (6) the application of mandated forbearances of residential or commercial loan payments; (7) the forced closures of businesses and other organizations; (8) the suspension of elective medical procedures; and (9) the confiscation of medical supplies.

## THE TAKINGS CLAUSE

The Takings Clause of the Fifth Amendment provides "nor shall private property be taken for public use without just compensation."<sup>5</sup> The purpose of this protection has been summed up by the Supreme Court: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>6</sup> Put another way, "a State, by *ipse dixit*, may not transform private property into public property without compensation."<sup>7</sup> Even when a taking is justified as a public use, the government can take property only upon the payment of just compensation. Takings Clause analysis is reinforced by and overlaps with principles of due process that require a regulation to be just and reasonable; however, the Takings Clause and Due Process Clause have separate focuses and distinct requirements.

The Takings Clause is most applicable to situations where the government confiscates or commandeers property for public use – this could be tangible private or real property but could also include intangible property interests such as liens or valid contract rights. For example, if a company had a valid contract for certain medical equipment and that equipment was instead diverted to other public needs, this could potentially be a taking of a valid contract right, requiring just compensation. In the current situation, the Takings Clause might be applicable to the confiscation of medical supplies, mandated eviction and foreclosure moratoriums, mandated forbearances of mortgage payments, mandated business closures, and rent and price controls. With these issues in mind, the below discusses (1) *per se* takings and (2) regulatory takings in the current emergency situation.

### 1. *Per Se* Takings

A *per se* taking occurs where private property is directly appropriated or physically invaded by the government for public use.<sup>8</sup> The Takings Clause applies to tangible property interests as well as intangible property interests, such as liens and valid contract rights.<sup>9</sup>



The clearest potential example of such an appropriation at this time is reported government confiscation of medical supply shipments to hospitals.<sup>10</sup> While these acts are possibly justified by the circumstances, hospitals and other businesses affected should consider their rights to compensation under the Takings Clause. In addition, the CARES Act includes provisions for a foreclosure moratorium, eviction moratorium, and forbearance of residential mortgage loan payments.<sup>11</sup> Such provisions could be argued to infringe on mortgagee and landlord rights and could potentially be construed as a taking requiring just compensation.

The government actually taking physical possession of a business is perhaps an even stronger case that a compensable taking has occurred. While thus far businesses have been willing to produce high-demand goods on their own initiative (for example, distilleries producing hand sanitizer<sup>12</sup> and businesses making and donating face masks to healthcare facilities<sup>13</sup>), it is conceivable that the government would at some point take control of various facilities in order to enable rapid production of large numbers of vaccines or other countermeasures.<sup>14</sup> Such a physical invasion of private property by the government would be easier to establish as a compensable taking.

In addition to actual appropriation or physical invasion, government regulation itself may be so onerous that it constitutes a *per se* taking under the Fifth Amendment.<sup>15</sup> Regulatory actions are *per se* takings if the government completely deprives an owner of “all economically beneficial us[e]” of her property.<sup>16</sup> This standard is difficult to meet. Temporary prohibitions on economic use are generally not compensable takings because “the property will recover value as soon as the prohibition is lifted,” and the regulation thus does not render the property valueless.<sup>17</sup> That said, case law is clear that “‘temporary’ takings which . . . deny . . . all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.”<sup>18</sup>

## 2. Regulatory Takings

Regulatory takings are also compensable under the Fifth Amendment if they satisfy the three-factor *Penn Central* test, which evaluates: (1) the “economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action.”<sup>19</sup> The Takings Clause has been applied to unreasonable price controls, particularly those that deprive a business of a reasonable profit.<sup>20</sup> The Takings Clause has also been applied to rent controls.<sup>21</sup> Similarly, regulations that force businesses to close and that limit landlord and mortgage provider rights could be challenged as a regulatory taking, applying the flexible test from *Penn Central*.

## DUE PROCESS

The Due Process Clause of the Fifth Amendment, applicable to the federal government, provides: “No person shall be . . . deprived of life, liberty, or property without due process of law.”<sup>22</sup> The Fourteenth Amendment contains a similar requirement of the states: “nor shall any state deprive any person of life, liberty, or property, without due process of law.”<sup>23</sup> Due process protects procedural as well as substantive rights. The Due Process Clause is often analyzed alongside the Takings Clause, but the Due Process Clause requires that restraints on liberty are just, reasonable and not arbitrary and thus has a different focus from the Takings Clause. As such, the Supreme Court “has long recognized that property regulations can be invalidated under the Due Process Clause.”<sup>24</sup>

With those points in mind, it should be clear that the Due Process Clause may be applicable to most if not all of the current restrictions and restraints put in place to deal with the current pandemic, though in some cases it would likely be applied more deferentially than others. Below, this section discusses (1) the application of rational basis review for most state action and heightened judicial scrutiny in some limited areas, (2) the specific application of due process to regulated prices, and (3) due process considerations for businesses affected by coronavirus restraints.

## 1. Rational Basis Review and Heightened Scrutiny

Under the Due Process Clause generally, government action cannot be arbitrary and must have at least some level of rationality. Most government action is subject to rational basis review, which requires only that the regulation be rationally related to a legitimate state interest.<sup>25</sup> If a government restriction is not rationally related to a valid governmental interest – such as protecting the public health by ensuring hospitals are not overwhelmed – the restriction should be struck down.<sup>26</sup> Some regulations, however, touch on fundamental rights that are more highly protected and will trigger greater judicial scrutiny.<sup>27</sup>

Within that framework, some recent COVID-19 restrictions may potentially be subject to challenge on due process grounds. For example, several states have been enforcing their state-at-home orders to prevent “drive-in” church services, where churchgoers stay in their cars with their windows up and listen to the service over the radio. Those challenging the orders have pointed out what they view as the irrational application of the order to drive-in religious services, saying: “[Y]ou can be in your car with the windows rolled down at a drive-in restaurant, but you can’t be in your car with the windows rolled up at a drive-in church service.”<sup>28</sup> Moreover, if a government regulation singles out religious institutions for different treatment, the U.S. Justice Department has stated that it believes that the regulation may raise additional constitutional problems.<sup>29</sup>

Setting religious freedom aside, the courts have often been quite deferential when determining whether a law passes rational basis review, operating under a presumption that the law is valid.<sup>30</sup> Some regulations, however, touch on rights that are more highly protected and thus trigger greater scrutiny.<sup>31</sup> For example, in North Carolina in 2012 a group of residents and non-profit organizations successfully challenged a law that made it unlawful for any person to possess a firearm in an area under a state of emergency.<sup>32</sup> The court in that case noted that laws burdening the right to keep and bear arms are subject to “some form of heightened scrutiny.”<sup>33</sup> Applying strict scrutiny, the court held that the law was invalid because it was not narrowly tailored to the compelling interest in public safety and crime prevention.<sup>34</sup> Because the Second Amendment triggers heightened scrutiny, challenges on this basis may potentially be more successful. Similarly, cancellations of in-person religious services and bans on abortions may be more effectively challenged because government action threatening fundamental rights usually requires more than the minimal rationality of rational basis review.<sup>35</sup> While limited in numbers so far, such challenges to executive orders restricting these more protected activities are making their way through courts across the country.<sup>36</sup>

## 2. Due Process and Price Controls

While the Due Process Clause has declined as an instrument of judicial oversight of economic regulation since the 1930s, businesses involved in litigation regarding the coronavirus restrictions should still consider due process as a possible ground for challenging government action. For instance, throughout the 20<sup>th</sup> Century and into the 21<sup>st</sup> Century, the Due Process Clause has effectively been used to challenge unreasonable restraints on prices where businesses were not able to make a fair return on their investment.<sup>37</sup>

These challenges to price restraints under the Due Process Clause can go hand in hand with the Takings Clause. For example, in *Tenoco*, wholesalers challenged orders regulating the price of gasoline, using both the Due Process Clause and Takings Clause.<sup>38</sup> According to the First Circuit, the Due Process Clause required that the regulated rates must be “just and reasonable” and “must provide not only for a company’s costs, but also for a fair return on investment.”<sup>39</sup> Any rate below that level, the court held, is confiscatory and unallowable. Interestingly, according to the First Circuit, this analysis of price controls had been shifted from the Due Process Clause to the Takings Clause<sup>40</sup> — though the court did note that the Due Process Clause still has significance more focused on the adequacy of the government’s procedures and whether the program is “arbitrary, discriminatory, or irrelevant to a legitimate legislative goal.”<sup>41</sup> However, other courts across the country have notably continued to find price control regulations unconstitutional under the Due Process



Clause.<sup>42</sup> Accordingly, businesses facing unreasonable price restraints should consider potential challenges under both the Takings and Due Process Clauses.

### 3. Considerations for Businesses

In evaluating potential due process challenges, businesses should consider the nature of the restriction and whether it is reasonably related, or in some cases more narrowly tailored, to the emergency it seeks to address.<sup>43</sup> First, the restriction should not be overly broad. While executive orders prohibiting price gouging on personal protective equipment would presumably be tied to the current state of emergency and the interest in ensuring the availability and affordability of life-saving equipment, a law that prohibited price gouging on products not tied to the emergency may be subject to attack. Second, the restrictions should not outlast the emergency.<sup>44</sup> Third, the restrictions should be rational and not show unjustified favoritism for certain businesses. Fourth, certain products and services are more highly protected by the Constitution, and regulations limiting them are therefore scrutinized more strictly.<sup>45</sup> Considering each of these factors, businesses may be able to effectively challenge certain government actions that limit their operations.

### CONCLUSION

Companies should keep all of the above principles in mind as they navigate the growing complexity of the executive orders and legislation that now regulate their businesses. In the event it becomes necessary for a business to challenge one of these laws, the above constitutional principles may prove helpful, but each case may also raise its own separate legal issues.

For further information on coronavirus-related regulations, visit King & Spalding's surveys of [State Shelter-in-Place/Stay-at-Home Orders](#), [Restrictions on Eviction and Foreclosure Remedies](#), and [Federal and State Price Gouging Laws](#). Business are encouraged to seek legal help for clarifications of regulations and constitutional protections or to consider potential legal challenges.

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- <sup>1</sup> See, e.g., California, Michigan, and Ohio in Survey of Federal and State Price Gouging Laws.
- <sup>2</sup> Complaint, *Schulmerich Bells, LLC v. Wolf*, No. 2:20-cv-01637 (E.D. Pa. March 26, 2020).
- <sup>3</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426, 444 (1934) (case involving a Minnesota Mortgage Moratorium Law passed in response to the economic emergency posed by the Great Depression that was challenged under the Contracts Clause but held constitutional – the Court explained that “[w]hile emergency does not create power, emergency may furnish the occasion for the exercise of power” and concluded “[a]n emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community”); see also *In re Prop. Located at 14255 53rd Ave., S., Tukwila, King Cty., Washington*, 120 Wash. App. 737, 86 P.3d 222, 223 (2004) (analyzing Washington State Department of Agriculture action related to preventing an infestation of dangerous citrus longhorned beetles where the state destroyed all potential host trees near the location infestation, finding that “[b]ecause the Department justifiably took action necessary to avert a public calamity, the Takings Clause did not require compensation to the owners of the trees”).
- <sup>4</sup> *Home Bldg. & Loan Ass'n*, 290 U.S. at 426.
- <sup>5</sup> U.S. Const. amend. V.
- <sup>6</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
- <sup>7</sup> *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).
- <sup>8</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).
- <sup>9</sup> See *Armstrong*, 364 U.S. at 44 (materialman's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602 (1935) (real-estate lien); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts).
- <sup>10</sup> Zolan Kanno-Youngs and Jack Nicas, ‘Swept Up by FEMA’: Complicated Medical Supply System Sows Confusion: The Trump administration’s new method for distributing medical supplies has led to charges of confiscation, N.Y. Times (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/coronavirus-fema-medical-supplies.html>.
- <sup>11</sup> 15 U.S.C. §§ 9056-9058.
- <sup>12</sup> Michael Levenson, *Anheuser-Busch and Distilleries Race to Make Hand Sanitizer Amid Coronavirus Pandemic*, N.Y. Times (March 19, 2020), <https://www.nytimes.com/2020/03/19/us/distilleries-virus-hand-sanitizer.html>.
- <sup>13</sup> Liz Gelardi, *Denver businesses get involved in mask-making effort, donating masks to healthcare workers*, TheDenverChannel.com (Apr. 6, 2020), <https://www.thedenverchannel.com/news/coronavirus/denver-businesses-get-involved-in-mask-making-effort-donating-masks-to-healthcare-workers>.
- <sup>14</sup> See Donald G. McNeil Jr., *The Coronavirus in America: The Year Ahead*, N.Y. Times (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/health/coronavirus-america-future.html> (quoting a retired medical historian at Johns Hopkins School of Medicine stating that the government could take over and repurpose distilleries for vaccine production).
- <sup>15</sup> *Lingle*, 544 U.S. at 537.
- <sup>16</sup> *Id.* at 538.
- <sup>17</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002) (explaining that a temporary prohibition on economic use cannot render a property valueless because “the property will recover value as soon as the prohibition is lifted”).
- <sup>18</sup> *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 318 (1987).
- <sup>19</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).
- <sup>20</sup> See *Tenoco Oil Co. v. Dep't of Consumer Affairs*, 876 F.2d 1013, 1020-21 (1st Cir. 1989) (“[T]he takings clause prevents states (unless they offer other means of compensation to sellers) from imposing price controls capping prices below just and reasonable levels.”).
- <sup>21</sup> See *id.* at 1020 (citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988)) (“[T]he takings clause imposes limits on the proper scope of rental control programs...”); *Charleston Corp. v. Sinclair*, 264 U.S. 543 (1924) (finding order cutting apartment rents was inconsistent with the Fifth Amendment); *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (“For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.”).
- <sup>22</sup> U.S. Const. amend. V.
- <sup>23</sup> U.S. Const. amend. XIV.
- <sup>24</sup> *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 735 (2010) (Kennedy, J., concurring in part and concurring in the judgment).
- <sup>25</sup> See, e.g., *Eighth St. Car Wash v. City of Chanute*, No. 13-1070-JTM, 2013 WL 875283, at \*5 (D. Kan. Mar. 7, 2013) (applying rational basis review to water restrictions that were put in place to address emergency drought conditions and that limited the hours of operation of carwashes).
- <sup>26</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).
- <sup>27</sup> *D.C. v. Heller*, 554 U.S. 570, 628 n.27 (2008) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)) (“There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments...”).
- <sup>28</sup> Matt Zapotosky, *Justice Dept. appears to back Mississippi church contesting ban on drive-in services*, The Washington Post (Apr. 14, 2020), [https://www.washingtonpost.com/national/mississippi-church-drive-in-justice-department/2020/04/14/05ef4f0e-7e70-11ea-9040-68981f488eed\\_story.html](https://www.washingtonpost.com/national/mississippi-church-drive-in-justice-department/2020/04/14/05ef4f0e-7e70-11ea-9040-68981f488eed_story.html).
- <sup>29</sup> The United States’ Statement of Interest, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-00064 (Apr. 14, 2020), <https://www.justice.gov/opa/press-release/file/1268651/download>.
- <sup>30</sup> *Armour v. Indianapolis*, 566 U.S. 673, 685 (2012) (on rational basis review in analogous precedent on equal protection, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it”).
- <sup>31</sup> *Heller*, 554 U.S. at 628 n.27 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4, (1938)) (“There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments...”).
- <sup>32</sup> *Bateman v. Perdue*, 881 F. Supp. 2d 709, 711 (E.D.N.C. 2012).
- <sup>33</sup> *Id.* at 715.

<sup>34</sup> *Id.* at 715-716. The Court in *Bateman* applied strict scrutiny because the law burdened the “core” of the Second Amendment – a law abiding citizen’s right to self-defense in the home. Laws burdening Second Amendment rights that do not affect the “core” may not trigger strict scrutiny but will still require heightened scrutiny.

<sup>35</sup> See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (“[A] statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends” and is constitutionally invalid.); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”).

<sup>36</sup> See, e.g., *In re Abbott*, No. 20-50296, 2020 WL 1911216 (5th Cir. Apr. 20, 2020) (upholding inclusion of abortions among the elective procedures banned in governor’s emergency order); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB\SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (rejecting a church’s request for a temporary restraining order that prohibits the Secretary for the Department of Health from enforcing mass gathering restrictions on places of worship); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128, at \*12 (M.D. Ala. Apr. 12, 2020) (explaining that the state’s interests, even when viewed with a tremendous degree of deference, cannot support denial of the right to an abortion); Edvard Pettersson, *NRA Loses Court Challenge on Order to Shut California Gun Shops*, Bloomberg (Apr. 6, 2020), [bloomberg.com/news/articles/2020-04-07/nra-loses-court-challenge-on-order-to-shut-california-gun-shops](https://www.bloomberg.com/news/articles/2020-04-07/nra-loses-court-challenge-on-order-to-shut-california-gun-shops).

<sup>37</sup> See, e.g., *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001); *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 919 (S.D. Ohio 2004), as modified on reconsideration (June 14, 2004).

<sup>38</sup> *Tenoco*, 876 F.2d at 1017.

<sup>39</sup> *Id.* at 1020.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1021.

<sup>42</sup> See *Michigan Bell*, 257 F.3d at 593 (“The Due Process Clause requires a mechanism through which a regulated utility may challenge the imposition of rates which may be confiscatory.”); *Guar. Nat. Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990); *Monongahela Power Co.*, 322 F. Supp. 2d at 919; see also *Hutton Park Gardens v. Town Council of Town of W. Orange*, 68 N.J. 543, 568-72 (1975) (applying the requirement of a “just and reasonable” return on investment to rent regulation).

<sup>43</sup> See *Eighth St. Car Wash v. City of Chanute, Kan.*, No. 13-1070-JTM, 2013 WL 875283 (D. Kan. Mar. 7, 2013).

<sup>44</sup> *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546 (1924) (“The first and most important is that the emergency that justified interference with ordinarily existing private rights in 1919 had come to an end in 1922, and no longer could be applied consistently with the Fifth Amendment of the Constitution.”); *Block v. Hirsh*, 256 U.S. 135, 157 (1921) (“The regulation is put and justified only as a temporary measure . . . A limit in time to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.”).

<sup>45</sup> See footnotes 31-35 and accompanying text above.