# VARYING SCRUTINY AND CONSTITUTIONAL INCOMPATIBILITY IN NEW YORK MORTGAGE LAW

## INTRODUCTION

Home ownership is inextricably tied with the fulfillment of the American Dream.[1] Reaching this lofty goal entails a tantamount commitment: Mortgages are on average a thirty-year obligation and one of the greatest sources of financial difficulty for old and new families alike.[2] It follows that laws centering around owning a home are especially sensitive.[3] Yet it can be asked: For whose benefit do these laws exist? The obvious answer is that the laws are for the benefit of the homeowners themselves and perhaps for the regulatory efficiency of the state, but there is another party to these rights: lenders. Indeed, mortgage lending is a big business in New York,[4] and is vital to the real estate market and the economy in its entirety.[5] Given this importance, it seems axiomatic that mortgage lenders should be just as secure in the stability of the laws surrounding their property rights and investments as the homeowners are themselves.

The New York State Legislature, however, appears to disagree. On December 30, 2022, New York Governor Kathy Hochul signed into law the

1. *See, e.g.*, Gregory Schmidt, *Homeownership Remains the American Dream, Despite Challenges*, N.Y. TIMES (June 2, 2022), https://www.nytimes.com/2022/06/02/realestate/homeownership-affordability-survey.html [https://perma.cc/MWE7-CPDG].

2. *See, e.g.*, Ben Casselman, *A 30-Year Trap: The Problem with America's Weird Mortgages*, N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/2023/11/19/business/economy/30-year-mortgage.html#:~:text=Today%2C%20nearly%2095%20percent%20of,30%2Dyear%20mortgage%20the%20standard [https://perma.cc/27GE-KSW8].

3. *See, e.g.*, N.Y. REAL PROP. ACTS. LAW §§ 101–2111 (McKinney 2025) (an exhaustive chapter of New York's statutes also known as RPAPL (Real Property Actions and Proceedings Law), spanning twenty-one articles and over 2000 sections); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 271 (1994) (stating that "property rights" are "matters in which predictability and stability are of prime importance," and thus require special attention from the law).

4. *See Total Number of Residential Real Property Mortgages Originated in New York State in 2023*, DEP'T FIN. SERVS., https://www.dfs.ny.gov/apps_and_licensing/mortgage_companies/rrpm_originated_nys [https://perma.cc/YW95-JM24]. In 2021 alone, almost 450,000 thousand mortgages were originated in New York. *Id.*; *see also* OFF. OF THE N.Y. STATE COMPTROLLER, HOUSEHOLD DEBT IN NEW YORK STATE 3 (2022), https://www.osc.ny.gov/files/reports/pdf/household-debt-in-new-york-state.pdf [https://perma.cc/RS9X-YNYF] ("In New York, total household debt increased to $869.4 billion in the fourth quarter [of 2022], an increase of $3.7 billion (or 0.4 percent) from the prior quarter and $37.7 billion (or 4.5 percent) higher than the end of 2019.").

5. *See* John Y. Campbell, *Mortgage Market Design* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18339, 2012), https://www.nber.org/system/files/working_papers/w18339/w18339.pdf [https://perma.cc/58ZZ-L4YZ] ("Residential mortgages are of first-order importance for households, for financial institutions, and for macroeconomic stability.").

Foreclosure Abuse Prevention Act (FAPA),[6] which went into effect immediately and applies to "to all actions commenced on [mortgage notes] in which a final judgment of foreclosure and sale has not been enforced."[7] The legal machinations of the law are complex but, functionally, this law changes what acts toll the statute of limitations that govern New York mortgage legal actions, and applies to acts that were committed before the law went into effect. Consequently, a lender who had an enforceable mortgage before FAPA's enacted date (indeed, even someone who had a final judgment, but had not yet sold the property at auction) might now hold an unenforceable piece of paper. The New York Legislature's rationale for this sweeping change boils down to "fairness."[8]

Mortgage lenders have responded with litigation challenging the constitutionality of FAPA, bringing forth claims that: (1) FAPA is not meant to apply retroactively (to mortgages and actions that were active before the effective date of the law), (2) if FAPA does apply retroactively, that it violates the Fourteenth Amendment's Due Process Clause,[9] (3) the Contracts Clause,[10] and (4) the Takings Clause.[11] This Note analyzes the current judicial split on FAPA's constitutionality with regard to retroactivity, the due process argument, and the Contracts Clause, and argues that retroactive application of FAPA in at least some circumstances would violate due process. It proceeds with a background on New York Mortgage law and FAPA; an explanation of FAPA's intent; an examination of constitutional jurisprudence for retroactivity, due process, and the Contracts Clause; a discussion on the current split in the courts regarding the scope and constitutionality of FAPA; and finally, my own analysis.

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6. Joseph DeFazio, *New York Enacts Foreclosure Abuse Prevention Act*, CONSUMER FIN. SERVS. L. MONITOR (Jan. 10, 2023), https://www.consumerfinancialserviceslawmonitor.com/2023/01/new-york-enacts-foreclosure-abuse-prevention-act/ [https://perma.cc/5MR2-J536].

7. Foreclosure Abuse Prevention Act, 2022 N.Y. Sess. Laws ch. 821 (McKinney).

8. *Senate Bill S5473D*, N.Y. STATE SENATE [hereinafter *Sponsor Memo*], https://www.nysenate.gov/legislation/bills/2021/S5473 [https://perma.cc/N9ZP-5AAR] ("[FAPA] is a matter of fundamental fairness").

9. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

10. U.S. CONST. art. I, §10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

11. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). I do not discuss the Takings Clause challenges in this Note, as they have substantial overlap with the Due Process Clause challenges. For more on the challenges being brought against FAPA, see Christian Fletcher, *Portions of New York's FAPA Survive Constitutional Challenges*, GOODWIN: CONSUMER FIN. INSIGHTS (Feb. 24, 2025) [hereinafter *Portions of FAPA Survive*], https://www.goodwinlaw.com/en/insights/blogs/2025/02/portions-of-new-yorks-fapa-survive-constitutional-challenges# [https://perma.cc/R4CJ-726X]; Christian Fletcher, *New York Courts Split on the Constitutionality of the Foreclosure Abuse Prevention Act*, JD SUPRA (July 7, 2023) [hereinafter *New York Courts Split*], https://www.jdsupra.com/legalnews/new-york-courts-split-on-the-4582502/ [https://perma.cc/DTY9-GQ55].

## I. GENERAL BACKGROUND

### *A. Mortgage Law and FAPA*

In order to understand how to apply a constitutional framework to analyze the constitutionality of retroactive mortgage law, it is important to understand how mortgages operate at a general level. Mortgages function as long term loans secured on real property.[12] The lender has both an interest in the payments of the loan by contract as well as an interest in the property that underlies the loan.[13] Typically, these loans are payable in installments.[14] In New York, mortgage law is governed by the Real Property Action and Proceedings Law (RPAPL) and is subject to New York's Civil Practice Law and Rules (CPLR), while some specific issues, addressed later, relate to the General Obligation Law (GOL).

As a civil matter, a mortgagee's enforcement rights are subject to a six-year statute of limitations.[15] When a borrower defaults on a monthly payment, the mortgagee's claim begins to accrue per the statute of limitations on that payment.[16] Furthermore, within the mortgage contract itself is a default acceleration provision, which allows a mortgagee to elect to call forth the entire debt due (accelerate) under the mortgage in response to a default.[17] When this occurs, the Statute of Limitations runs for the entire debt, giving the mortgagor six years to collect on the defaulted debt.[18] Historically, in New York this acceleration could be decelerated (the cause of action de-accrued for the purposes of the statute of limitations) upon an affirmative act of revocation.[19] In other words, a bank could call forth the

12. *See Mortgage*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/mortgage [https://perma.cc/C6TR-LF8E].

13. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 20, §641.6 (2022).

14. *Mortgage*, *supra* note 11.

15. *See* N.Y. C.P.L.R. 213 (MCKINNEY 2025).

16. *See* HSBC Bank USA, Nat'l Ass'n v. Islam, 197 N.Y.S.3d 599, 600 (App. Div. 2023).

17. Andrew J. Bernhard, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, 88. FLA. BAR J., no. 8, September/October 2014, at 31.

18. *Id.*

19. *See* Freedom Mortg. Corp. v. Engel, 169 N.E.3d 912, 923–24 (N.Y. 2021) ("Practically, the noteholder's act of revocation (also referred to as a de-acceleration) returns the parties to their pre-acceleration rights and obligations—reinstating the borrowers' right to repay any arrears and resume satisfaction of the loan over time via installments, *i.e.*, removing the obligation to immediately repay the total outstanding balance due on the loan, and provides borrowers a renewed opportunity to remain in their homes, despite a prior default. . . . Although this Court has never addressed what constitutes a revocation in this context, the Appellate Division departments have consistently held that, absent a provision in the operative agreements setting forth precisely what a noteholder must do to revoke an election to accelerate, revocation can be accomplished by an 'affirmative act' of the noteholder within six years of the election to accelerate. For example, an express statement in a forbearance agreement that the noteholder is revoking its prior acceleration and reinstating the borrower's right to pay in monthly installments has been deemed an 'affirmative act' of de-acceleration." (citations omitted)),

entire debt of a mortgage in response to a missed monthly payment, initiate the foreclosure proceeding, then perform an "affirmative act of revocation,"[20] and restore the parties to their pre-acceleration positions. Consequently, the mortgagee maintains the right to collect on the entire debt and the monthly payments on their original schedule, although depending on the timing, may be unable to enforce certain individual monthly payments that were due more than six years ago.

In response to the New York Court of Appeals holding in *Freedom Mortgage Corporation v. Engel*, which held that a voluntary discontinuance of a foreclosure action operated as an affirmative act of revocation and therefore a deceleration of a mortgage note, the New York Legislature enacted the Foreclosure Abuse Prevention Act (FAPA), which expressly superseded *Engel* and overhauled New York's mortgage foreclosure process.[21] Relevant to this Note are FAPA-amended CPLR 205-a,[22] CPLR 213(4)(a) and (b)[23] and CPLR 3217(e).[24] Functionally, these amendments prevent unilateral deceleration of mortgage notes and prevent a mortgagee from asserting that a previous action did not accrue the claim in an attempt to avoid the Statute of Limitations liability. If FAPA is applied retroactively, a previous foreclosure action on a note presumptively accrues the cause of action. In other words, if FAPA is applied retroactively, a mortgage lender

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*superseded by statute*, Foreclosure Abuse Prevention Act, 2022 N.Y. Sess. Laws ch. 821 (McKinney), *as recognized in* Bank of Am., N.A. v. Kessler, 206 N.E.3d 1228 (N.Y. 2023).

20. *Engel*, 169 N.E.3d at 926. What constitutes an affirmative act of revocation has not been clearly articulated in the New York courts. At issue in *Engel*, and indeed the very impetus for FAPA, was whether a voluntary discontinuance of a foreclosure action constitutes an affirmative act of revocation. *See id.* at 917. This act is referred to as a unilateral deceleration because only one party has acted to decelerate the cause of action (as opposed to a deceleration by agreement, which requires two parties). *See* N.Y. GEN. OBLIG. LAW § 17-105 (McKinney 2025); *see also Sponsor Memo*, *supra* note 8. The New York Court of Appeals came down firmly on this question: "[W]e conclude that where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder." *Engel*, 169 N.E.3d at 926.

21. *See Sponsor Memo*, *supra* note 8.

22. N.Y. C.P.L.R. 205-a (MCKINNEY 2025).

23. N.Y. C.P.L.R. 213 (MCKINNEY 2025). This section applies to all mortgage notes and statutorily estops mortgagees from arguing against a Statute of Limitations defense by way of proving that a prior action on the note was invalid and thus the note was not actually accelerated. The only way to toll the statute of limitations, absent an express contractual provision in the mortgage defining such conduct, is either an express judicial determination in the prior action that the note was not validly accelerated (the judge must hold so explicitly in their order) or conformation with GOL section 17-105 (a process whereby parties agree to a non-foreclosure remedy in a suit, such as agreeing to reinstate the mortgage). *See id.*

24. N.Y. C.P.L.R. 3217 (MCKINNEY 2025). This rule deals with voluntary discontinuances generally, but subsection (e) outlines an exception only for mortgage proceedings. Unlike all other causes of action, a voluntary discountenance in a foreclosure proceeding under this section cannot toll the Statute of Limitations. This prevents the "unilateral deceleration" allowed in *Engel*, thus overruling the New York Court of Appeals.

who previously relied on *Engel*'s holding to maintain a cause of action in the face of the Statute of Limitations through unilateral deceleration (discontinuance of the foreclosure suit) would neither be able to: (1) argue that the unilateral deceleration had the effect of tolling the statute of limitations nor (2) challenge the validity of the prior foreclosure suit by attacking the standing of the prior foreclosure suit (with one exception, namely an express judicial determination that the prior suit was invalid) in order to demonstrate that the mortgage was never legally accelerated in the first place. A borrower can be certain that, absent an express judicial determination to the contrary, a foreclosure suit starts the Statute of Limitations countdown, regardless of the prevailing law at the time of the suit.

### *B. A Brief Timeline of FAPA and New York Mortgage Law*

Because of how important the timeline of events is when considering the "fairness" of retroactive law, it is worth repeating, concisely, the sequence of events that led up to the enactment of FAPA. Ancient New York case law has held that a discontinuance of a mortgage foreclosure suit resets the legal positions of the parties such that "it is as if [the action] never had been."[25] This holding has been well-settled in New York for over 100 years.[26] It was not until July of 2018 that the Appellate Division of the Second Department of New York did away with this tradition in *Freedom Mortgage Corp. v. Engel* (later reversed by the Court of Appeals), thus creating controlling caselaw on whether a voluntary discontinuance of an action, in and of itself, revokes the acceleration of the mortgage and tolls the statute of limitations.[27] *Engel* was the Court of Appeals' swift response, which

25. Loeb v. Willis, 3 N.E. 177, 179 (N.Y. 1885) ("The foreclosure action was discontinued, and all the proceedings therein thus annulled. There was no longer any record or adjudication in that action which bound any one. By the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been."); *see also* Newman v. Newman, 665 N.Y.S.2d 423, 424 (App. Div. 1997) ("When an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified." (citations omitted)).

26. *See* U.S. Bank Tr. Nat'l Ass'n *ex rel.* RCF 2 Acquisition Tr. v. Joerger, 214 N.Y.S.3d 876, at 881 (Sup. Ct. 2024).

27. Freedom Mortg. Corp. v. Engel, 81 N.Y.S.3d 156 (2018), *reversed by* Freedom Mortg. Corp. v. Engel, 169 N.E.3d 912 (N.Y. 2021); Christiana Tr. v. Barua, 125 N.Y.S.3d 420, 426 (App. Div. 2020) ("[T]he mere discontinuance of an action is not tantamount to a withdrawal of the acceleration itself, but merely withdraws the prayer that the court assist the lender in collecting the accelerated amount."), *abrogated by* Freedom Mortg. Corp. v. Engel, 169 N.E.3d 912 (N.Y. 2021). The Second Department does not cite any authority to support this claim. This is indeed an issue, at least for the dissent: "[T]his Court departed from its prior precedent, without acknowledgment or explanation." *Id.* at 439 (Miller, J., concurring in part and dissenting in part). Note, however, that at the trial level, the question of whether a voluntary discontinuance operates as an affirmative act of revocation was not completely certain. Freedom Mortg. Corp. v. Engel, 169 N.E.3d 912, at 924 (N.Y. 2021).

resolved the split in favor of the historical caselaw.[28] However, perhaps inspired by the Second Department's novel application of the law, the New York Legislature enacted FAPA, which made, inter alia, the Second Department's holding law and applicable to all suits, up until the point of a judicial sale of the land, regardless of the prevailing law at the time the suit was filed.

## II. THE REASONS FOR RETROACTIVITY

### *A. The Intent of FAPA and Constitutionality: Due Process and Retroactivity*

As the intent of FAPA is crucial to a constitutional review, one must explore the legislature's reason for enacting FAPA. The clearest rationale of FAPA comes from Senator Sander's Sponsor Memorandum. The sponsor writes:

> The Legislature finds that there is an ongoing problem with abuses of the judicial foreclosure process; that the problem has been exacerbated by court decisions which, contrary to the intent of the Legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage; and that the purpose of the present remedial legislation is to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify erroneous judicial interpretations thereof.[29]

In addition to the aforementioned, the memorandum goes on to address additional purposes of FAPA. First, the bill is intended to restore the "public policy of giving repose to human affairs" that is inherent in the function of the Statute of Limitations in preventing stale claims.[30] Finally, and unique to CPLR 213(4), the "Legislature finds that it imposes an undue burden on the courts and the opposing party for a litigant to assail it or its predecessor's acceleration of a mortgage debt, by or before the commencement of a prior foreclosure action, to avoid a statute of limitations dismissal in a later action."[31] Taken altogether, the purposes of FAPA are to: (1) prevent abuses of the judicial foreclosure process, (2) correct judicial misinterpretations of the law, (3) uphold the public policy of the Statute of Limitations in preventing stale claims, and (4) reduce the undue burden of mortgage

28. *See Engel*, 169 N.E.3d at 926.
29. *Sponsor Memo*, *supra* note 8.
30. *Id.*
31. *Id.*

foreclosure cases on the courts. Because FAPA appears to apply retroactively, and attach new legal significance to acts already done (i.e., bringing a foreclosure action and then discontinuing it has a different effect post-FAPA regarding deceleration of the note), mortgagees have begun to attack the law as unconstitutional.[32] To see how these claims should fare, we must examine how the New York Court of Appeals analyzes retroactive legislation.

The New York Court of Appeals clarified the constitutional scrutiny used to analyze retroactive civil legislation in *Regina Metropolitan Co. v. New York State Division of Housing & Community Renewal*.[33] First, courts must assess whether the statute "truly implicates the concerns historically associated with retroactive application of new legislation."[34] Such concerns are implicated when statutes "have 'retroactive' effect upsetting reliance interests and triggering fundamental concerns about fairness."[35] The court then states that "[a] statute has retroactive effect if 'it would impair rights a party possessed when [the party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights."[36] This initial hurdle, born out of respect for the intent of the legislature, but also perhaps cognizant of the potential for constitutional violations, is to determine if the law in question is meant to apply retroactively.[37] If a statute is deemed to have retroactive effect, it is presumed to apply only prospectively unless rebutted

32. *See* sources cited *supra* note 11.

33. 154 N.E.3d 972 (N.Y. 2020).

34. *Id.* at 987–88. The court does not enumerate what these concerns are, but rather gestures to them generally as occurring when substantive rights change because of retroactive legislation. *Id.* at 988. Examples of previous retroactive legislation that were invalidated on these grounds include a law requiring retroactive allocation of funds to a health benefits program of retried miners after the company was no longer in the mining business, *see* E. Enters. v. Apfel, 524 U.S. 498 (1998), and a law that retroactively changed the criteria for the receipt of tax benefits without forewarning to businesses, *see* James Square Assocs. LP v. Mullen, 993 N.E.2d 374 (N.Y. 2013). Finally, we have a broad warning from the Supreme Court that retroactive impact on substantive rights is particularly sensitive where it "affect[s] contractual or property rights, matters in which predictability and stability are of prime importance." Landgraf v. USI Film Prods., 511 U.S. 244, 271 (1994).

35. *Regina*, 154 N.E.3d at 988 (citing *Landgraf*, 511 U.S. 244).

36. *Id.* (quoting *Landgraf*, 511 U.S. at 280).

37. *See* HSBC Bank USA, N.A. v. Besharat, 195 N.Y.S.3d 380, 385–86 (Sup. Ct. 2023). The court analyzed a mortgage case that turned on the application of FAPA-amended CPLR 205-a and determined that, contrary to the majority of New York courts, FAPA was not meant to apply retroactively. *See id.* at 389. Notwithstanding this dispositive determination, the court also conjectured that retroactive application of FAPA to the facts of the case would violate the mortgagee's due process rights. *Id.* at 390–91. The longstanding constitutional avoidance doctrine requires courts to interpret statutes in such a manner as to avoid constitutional conflicts. *See, e.g.*, Michaelson v. United States *ex rel.* Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42 (1924). If a given statute were interpreted not to apply retroactively, it could not have any retroactive effect that would mandate a *Regina* analysis. Thus, in cases where a statute's retroactive application may violate constitutional rights, courts are encouraged to interpret the law not to apply retroactively, if possible.

by a "clear expression of the legislative purpose"[38] that justifies retroactive application.

Even assuming a legislative intent for retroactivity, the retroactive effect of legislation is crucial in analyzing its constitutionality. "To comport with the requirements of due process, retroactive application of a newly enacted provision must be supported by 'a legitimate legislative purpose furthered by rational means,'"[39] and owing to the due process concerns inherent in statutes with retroactive effect, "retroactive legislation must be supported by a rational basis commensurate with the degree of retroactive effect."[40] Thus, "retroactive legislation does have to meet a burden not faced by legislation that has only future effects."[41]

The court establishes three factors that must be assessed to determine if the retroactivity comports with due process: the length of the retroactivity period, forewarning of change in legislation as indicative of reliance interests, and the public purpose for retroactivity.[42] Particularly crucial is the permissible length of the retroactivity period, which can be divided into two permissible categories: "those employing brief, defined periods" and those cases in which "retroactivity . . . is integral to the to the fundamental aim of the legislation."[43] Both cases still require a rational basis, but they are often easily found.[44] In other words, if a law found itself either to have

38. *Regina*, 154 N.E.3d at 992 (quoting Gleason v. Gleason, 256 N.E.2d 513, 516 (N.Y. 1970)).

39. *Id.* at 995 (quoting Am. Econ. Ins. Co. v. State, 87 N.E.3d 126, 142 (N.Y. 2017)).

40. *Id.*

41. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). Note that the typical means-ends scrutiny language employed by the New York Court of Appeals in declaring that the rational basis for retroactive legislation must be commensurate with its retroactive effect is absent from the Supreme Court case that it bases its opinion on, which creates a "bifurcation" of review between retroactive economic regulation and prospective economic regulation. *Regina*, 154 N.E.3d at 1023 (Wilson, J., dissenting). The majority in *Regina* nevertheless responds to this criticism from the dissent stating that the test "does not represent a 'bifurcation' between the rational basis analyses for prospective and retroactive legislation." *Id.* at 995 (majority opinion). Instead, the majority absorbs the rational justification of the statute's retroactive effect in its rational review test: "Consideration of the scope of legislation is critical to a rational basis analysis, regardless of whether it is solely prospective or also involves retroactive effects." *Id.* at 996.

42. *Regina*, 154 N.E.3d at 996. The court explained these factors as deriving from its analysis of retroactive tax legislation and Supreme Court precedent, noting that "retroactivity is more tolerable in tax legislation." *Id.* However, the court does not elaborate on how that difference manifests in substantively different results.

43. *Id.*

44. *See, e.g.*, *Pension Benefit Guar. Corp.*, 467 U.S. at 730–31 (holding that the limited period of retroactivity was common practice and rationally supported Congress's desire to prevent employers from withdrawing from a pension plan prior to the statute's enactment which would modify that plan); *Am. Econ. Ins. Co.*, 87 N.E.3d 126 (holding that the retroactive closing of a worker's compensation fund that benefitted insurance carriers was necessary to achieve the legislation's purpose). Note that the court in *American Economy Insurance Co.* employed very different language regarding a due process analysis in retroactive civil legislation than what we see in *Regina*: "A challenged statute will survive rational basis review so long as it is rationally related to *any conceivable* legitimate State purpose." *Id.* at 142

a short, defined period of retroactivity, or retroactivity itself is necessary for the legislation to have its intended effect, the law will almost certainly be upheld against constitutional attack. Because the length of the retroactivity period necessarily implicates both settled expectations (as one reaches further back, the settled expectations of completed acts are more likely to be frustrated) and the public purpose of the legislation, the inquiry turns on how the latter two factors relate to the former.[45] In other words, the shorter the period of retroactivity, the more likely that the given legislation is limited in scope to be rationally related to legitimate state interests and the less likely it is to upset settled expectations. Where the retroactive period is large or indefinite (as it is in the Foreclosure Abuse Prevention Act), retroactivity necessarily faces a higher rational bar, unless, as alluded to in *American Economy Insurance Co.*, it does not impact vested rights.[46]

## III. RHETORIC AND REVIEW

### *A. The Relationship, and Confusion, of Due Process and the Contracts Clause*

The confusion in the proper constitutional review reflects the apparent rift in Contracts Clause analysis undertaken by some courts in New York. In *Melendez v. City of New York*, the Second Circuit Court of Appeals articulated the standard of review for contracts clause challenges, stating that:

(quoting Myers v. Schneiderman*,* 85 N.E.3d 57, 64 (N.Y. 2017)). Nowhere does the court use language implicating a balancing of degree or justification "commensurate" with the retroactive effect. In fact, the court states that it rejects a request for heightened scrutiny to be applied in retroactivity cases, distinguishing precedent indicating otherwise as being confined to the "vested rights" axiom and Takings Clause challenges. *See id.* at 141–42.

45. *See Regina*, 154 N.E.3d at 996.

46. *See Am. Econ. Ins. Co.*, 87 N.E.3d at 141. Note that the court does not explain how there can be a retroactive effect (defined by *Regina* as when a law "'impair[s] rights a party possessed when [the party] acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed,' thus impacting 'substantive' rights," *Regina*, 154 N.E.3d at 988 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994))) but not an impact on a "vested right." *See Am. Econ. Ins. Co.*, 87 N.E.3d at 141–42. To the extent that the court intended to limit this exception to takings cases, then the exception can be understood to apply strictly to vested property rights, the absence of which would defeat a takings claim. This appears to be the intent of the court, which assumed, without deciding, that the law had a retroactive effect, but did not violate due process. *Id.* at 142. However, lower courts have applied this "vested rights" principle in due process challenges, finding that the absence of such an impairment sustains the law against due process challenges: "As final judgment has not yet been entered herein, the plaintiff does not have any vested property rights in this action or the orders of this court and thus its due process rights will not be violated by the retroactive application of the FAPA." U.S. Bank Tr., N.A. *ex rel.* LSF9 Master Participation Tr. v. Miele, 197 N.Y.S.3d 656, 671 (Sup. Ct. 2023).

> an impairment [of contract] effecting only "[m]inimal alteration of contractual obligations" may bear so little weight as to "end the [Contracts Clause] inquiry at its first stage." On the other hand, "[s]evere impairment . . . will push the inquiry to a careful examination of the nature and purpose" of the challenged state legislation. Implicit in a "careful examination," is recognition that factors can bear different weights in different circumstances.[47]

Thus, a law that causes a de minimis impairment on contractual rights need not be subjected to the means-ends scrutiny employed by the court.[48] However, after identifying such a substantial impairment, a court should continue to the next steps: identify if the impairment serves a significant and legitimate public purpose and finally, if the law was a reasonable and appropriate means of advancing that purpose.[49]

While the language employed by both the Supreme Court in *Spannaus* and the Court of Appeals in *Melendez* appear to suggest the same concerns regarding the extent of impairment relative to the justification of the law, the *Melendez* court assures us that the standard of review for Contracts Clause challenges is "more demanding than the rational basis review that applies when legislation is challenged under the Due Process Clause."[50] Nevertheless, there are concerns as to whether that statement is entirely accurate.[51] Indeed, the dissent in *Melendez* invokes the ghost of *Lochner* in

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47. Melendez v. City of N.Y., 16 F.4th 992, 1035 (2d Cir. 2021) (second, third, and fourth alterations in original) (citations omitted) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978)). The court listed three factors for assessing a contracts clause challenge to legislation: first, whether there is a substantive contractual impairment; if there is, whether the impairment served a significant and legitimate state purpose; and finally, whether the law was appropriate and reasonable to reach that purpose. *See id.* at 1016. In assessing the final step, the majority strongly relied on the language used by the Supreme Court in *Allied Structural Steel Co. v. Spannaus*: "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Id.* at 1035 (quoting *Spannaus*, 438 U.S. at 245).

48. *See* Sveen v. Melin, 584 U.S. 811, 819 (2018). In this case, the Supreme Court found that Minnesota's automatic-revocation-on-divorce statute did not substantially impair pre-existing contractual rights regarding an ex-spouse former designation as a beneficiary on an ex-husband's life insurance policy. *Id.* Thus, even though the law automatically removes an ex-spouse as a beneficiary of a life insurance policy, the Court found no substantial impairment for three reasons: "First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment." *Id.* at 819–20.

49. *Melendez*, 16 F.4th at 1035.

50. *Id.* at 1032.

51. "As Professor Cass Sunstein notes, 'the [*Blaisdell*] Court read the police power very broadly—thus replicating the outcome in *West Coast Hotel* and rendering the contracts clause functionally identical to the due process clause.'" Note, *The Contract Clause: Reawakened in the Age of COVID-19*, 136 HARV. L. REV. 2130, 2140 (2023) (alteration in original) (quoting Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891 (1987)). The article goes on to suggest that the difference

its criticism of the majority's application of heightened scrutiny in contracts clause cases.[52] Furthermore, while the language cited in relevant Supreme Court cases by the majority invokes a balancing test, modern application of the test has revealed an entirely different, and government deferential, standard that is very similar to rational review.[53] The result is that the Supreme Court says one thing, but does another and lower courts are left to struggle to strike the right balance between rhetoric and review.

### *B. The Confusion of the Courts: The Right Review for FAPA*

This issue brings us to the current issue facing New York trial courts as they assess the far-reaching effects of retroactively applying the Foreclosure Abuse Prevention Act. The vexing constitutional precedent these courts have inherited has led to multiple splits in the rulings on FAPA. First, there is a split as to whether FAPA is meant to be retroactive.[54] Then, for those courts that find it is to be applied retroactively, there is a split as to whether

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stated by the Supreme Court might exist only due to the typical nature of economic due process as a prospective issue, while contractual impairment is inherently retroactive. *Id.* at 2140–41. Of course, when economic due process is questioned because a law is applied retroactively, that distinction may disappear.

52. *Melendez*, 16 F.4th at 1057 (Carney, J. concurring in part and dissenting in part). While the dissent acknowledges that the constitutional hurdle to the contracts clause is higher than that for rationale review (note that this assertion does not appear to refute the point in the Harvard Law Review note above), it nonetheless states that "it is telling that the modern standard of review for Contracts Clause challenges when private contracts are at issue is so deferential as to bear a resemblance to rational basis review." *Id.* at 1052.

53. *See, e.g.*, Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). Both of these cases cited *Spannaus*, but they only applied a cursory review of the legislature's rationale despite the large contractual impairment. *See Melendez*, 16 F.4th at 1053–54 (Carney, J., concurring in part and dissenting in part) ("True, the Supreme Court stated in [*Energy Reserves* and *Keystone Bituminous Coal*] that the 'severity of the impairment' affects the 'level of scrutiny' . . . . [but later] 'returned to its previous, more deferential approach.'" (first quoting *Energy Rsrvs. Grp.*, 459 U.S. at 411; then quoting *Keystone Bituminous Coal*, 480 U.S. at 504 n.31; and then quoting GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW 986 (7th ed. 2013))). One potential explanation for this difference may be the majority's misreading of *Spannaus*. While the language that the Supreme Court uses indicates something more than mere rational review, *see* Am. Econ. Ins. Co. v. State, 87 N.E.3d 126, 142 (N.Y. 2017)), the dissent is right that later precedent was not nearly as searching as the language implied. Indeed, the *Spannaus* Court noted that the legislature never articulated its purpose for the law, and thus it could never have justified a contractual impairment: That "[t]he only indication of legislative intent in the record before us is to be found in a statement in the District Court's opinion," combined with the fact that "there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem" requires that the law be found to violate the contracts clause. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247 (1978). In other words, it is perhaps a bit disingenuous to rely on a case advocating for heightened scrutiny of the government's rational purpose when the case itself cannot analyze that purpose as it was never articulated.

54. *See New York Courts Split*, *supra* note 11 (providing a breakdown on all of the NY courts' holdings regarding FAPA; it is slightly outdated, but sufficient for the purposes of showing the split and where the disagreement lies).

the retroactivity is then unconstitutional.[55] Two courts have so far addressed the due process concerns of FAPA with particular attention to the inquiry laid out in *Regina*, yet these courts reach different results.[56]

The court in *U.S. Bank Tr., N.A. ex rel. LSF9 Master Participation Tr. v. Miele* errs on the side of high deference to the legislature's intent and acceptance of the rationality of their purpose regarding retroactive civil legislation.[57] This position is far more in line with traditional rational review as well as with the dissent in *Melendez* (insofar as we accept that contracts clause review is the same as due process).[58] Demonstrating this deference, the court accepts as rational the purpose set forth in FAPA's Sponsor Memorandum and also contends, without explaining, that retroactivity is integral to the fundamental aims of the legislation.[59] However, the court never mentions that the extent of the retroactive effect of FAPA (in rendering mortgagees unable to enforce their claims) impacts its retroactivity analysis. In this manner, it appears to deviate from *Regina* on the balancing inquiry despite seeming to mimic *Regina*'s reliance on Supreme Court precedent,[60] which holds that the due process concerns of retroactive legislation are satisfied when "the application of the legislation is *itself* justified by a rational legislative purpose."[61] But even then, the court's dissection of the rationality of the legislature's intent is minimal and

55. *Id.*

56. Among the courts struggling with the current status of the law is the Second Circuit Court of Appeals. *See* E. Fork Funding LLC v. U.S. Bank, Nat'l Ass'n *ex rel.* Greenpoint Mortg. Funding Tr. Mortg. Pass-Through Certificates, Series 2006-AR6, 118 F.4th 488 (2d Cir. 2024). Despite the New York appellate courts coming down with decisions on the retroactivity and constitutionality of FAPA in recent months, the Second Circuit was not convinced enough as to the settled status of the law to render a judgment. *Id.* at 497–99. The court issued a certified question to the New York Court of Appeals to answer the question of whether FAPA applies retroactively to mortgages that were already unilaterally decelerated (and therefore not pending) when FAPA was enacted. *Id.* at 498–99. Despite the controversy of FAPA and the confusion of the courts, the state's highest court declined the invitation. *See* E. Fork Funding, LLC v. U.S. Bank, Nat'l Ass'n *ex rel.* Greenpoint Mortg. Funding Tr. Mortg. Pass-Through Certificates, Series 2006-AR6, 245 N.E.3d 1147 (N.Y. 2024).

57. U.S. Bank Tr., N.A. *ex rel.* LSF9 Master Participation Tr. v. Miele, 197 N.Y.S.3d 656, 667 (Sup. Ct. 2023) (because "it is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality," the constitutional limitations on retroactive civil legislation are now modest (quoting *Am. Econ. Ins. Co.*, 87 N.E.3d at 135)).

58. *Compare id.*, *with* Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (due process is satisfied by a law that has "a legitimate legislative purpose furthered by rational means").

59. *Miele*, 197 N.Y.S.3d at 670. "The legislature's intent in enacting the FAPA was 'to clarify the meaning of existing statutes, codify correct judicial applications thereof, and rectify erroneous judicial interpretations thereof.' The Legislature had a rational legislative purpose and 'persuasive reason' for the 'potentially harsh' impact of retroactive application of the FAPA — to prevent lenders and loan servicers from manipulating the statute of limitations and abusing the judicial foreclosure process . . . ." *Id.* (quoting *Sponsor Memo*, *supra* note 8). The court then states that "statutory retroactivity is integral to the fundamental objective of the FAPA." *Id.*

60. *Id.* at 669–70.

61. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984).

harkens back to the issue seen in *Spannaus*.[62] It is certainly rational that FAPA prevents abuse of the judicial process if we accept that unilateral deceleration of a mortgage note, sanctioned by the New York Court of Appeals in *Engel*, is in fact abuse.[63] Even so granted, retroactive legislation cannot prevent acts that already occurred. *Miele* thus impliedly relies on FAPA's purpose of "correct[ing] judicial applications" of law in expressly nullifying *Engel*.[64] There is precedent supporting retroactive application of legislation on the grounds that the courts have misinterpreted the law.[65]

Finally, we have the approach used by the court in *HSBC Bank USA, N.A. v. Besharat*.[66] While this court analyzed a different provision of FAPA (CPLR 205-a),[67] the functional effect of FAPA on the mortgagee's contractual rights is the same: If FAPA is applied retroactively, the mortgage in question is unenforceable.[68] As in *Miele*, the court cites *Regina*

62. *Miele*, 197 N.Y.S.3d at 670. The court's entire discussion of the rationality of FAPA is a restatement of the Sponsor's Memoranda: FAPA's rational purpose is "to prevent lenders and loan servicers from manipulating the statute of limitations and abusing the judicial foreclosure process, and ensure equal application of state laws to all litigants currently in foreclosure actions and related actions. Further, statutory retroactivity is integral to the fundamental objective of the FAPA. *Id.*

63. Freedom Mortg. Corp. v. Engel, 169 N.E.3d 912, 926 (N.Y. 2021), *superseded by statute*, Foreclosure Abuse Prevention Act, 2022 N.Y. Sess. Laws ch. 821 (McKinney), *as recognized in* Bank of Am., N.A. v. Kessler, 206 N.E.3d 1228 (N.Y. 2023). The *Engel* court held that a voluntary discountenance of a foreclosure action constitutes an affirmative act that would then toll the statute of limitations. *Id.* The court did not mention that this act, or unilateral deceleration in general, was an abuse of the judicial process. In fairness, unilateral deceleration can be used by a mortgagee to recover from a defect in their foreclosure suit. An obvious example would be when a mortgagee initiates a foreclosure suit, but lacks standing to do so (e.g., they do not hold the mortgage note because they bought it the day before from a different mortgagee and had not yet received it). In this example, the mortgagee can unilaterally decelerate the note and recommence a foreclosure proceeding with proper standing while avoiding potential statute of limitations liability.

64. *Miele*, 197 N.Y.S.3d at 670 (quoting *Sponsor Memo*, *supra* note 8).

65. *See In re* Gleason, 749 N.E.2d 724, 726 (N.Y. 2001). The court mentions correcting judicial interpretation as one of the factors that evinces an intent for retroactivity. *Id.* Yet there is less evidence that correcting judicial misinterpretation is alone sufficient to survive a due process challenge for retroactive legislation, particularly in cases in which the legislature has allowed the judicial misinterpretation to persist for decades. *See* U.S. Bank Nat'l Ass'n v. Speller, No. 500088/2022, 2023 WL 7174591, at *12 (N.Y. Sup. Ct. Oct. 31, 2023) ("Astonishingly, the Senate Sponsor [for FAPA] implies that for 60 years the entire judiciary of the State of New York failed to understand that GOL § 17-105 as enacted in 1963 always precluded the 'cancelling' or 'resetting' of the statute of limitations upon a cause of action to foreclose the entire mortgage debt by a lender's unilateral act of revocation.").

66. 195 N.Y.S.3d 380 (Sup. Ct. 2023).

67. *See id.* at 384–85. Referred to as the "savings provision," *see, e.g.*, *id.* at 383, CPLR 205-a allows a six-month grace period for certain litigants to file a claim after a previous claim had been terminated for specific reasons, with the filing date of the subsequent claim acting as if it were filed at the same time the original complaint was. *See* N.Y. C.P.L.R. 205-a (MCKINNEY 2025). Functionally, the law allows in limited circumstances for a subsequent claim to avoid a Statute of Limitations defense. *See id.*

68. FAPA-amended CPLR 205-a strictly cabins the circumstances which allow a mortgagee to revitalize a claim based on a mortgage note. N.Y. C.P.L.R. 205-a (MCKINNEY 2025). The previous provision, CPLR 205(a), was read much more broadly and aligned with typical plaintiff's rights in the savings provision. *See Speller*, 2023 WL 7174591, at *24 ("Application here of newly enacted CPLR

and notes that there is a retroactive effect on the mortgagee's substantive rights.[69] At issue was the discrete impact of FAPA-amended CPLR 205-a's use of the word "completed" as opposed to the previous CPLR 205(a)'s "effected."[70] Depending on which provision was used, the mortgagee may or may not have a claim that can take advantage of the savings provision, which would allow them to try and enforce their mortgage in court. After concluding that FAPA was not meant to apply retroactively (thus obviating the need for further analysis) the court continued, in dicta, to apply the rest of the *Regina* test.[71]

Nowhere does the *Besharat* court make note of the legislature's entitlement to deference.[72] Indeed, in lieu of that explicit pronouncement, the court instead assumes that

> FAPA reforms are supported by a legitimate legislative purpose to correct "abusive litigation tactics" by mortgage lenders. The court further assumes, without deciding, that retroactive application of statutory remedial measures designed to counteract the cited abuses may "*itself* [be] justified by a rational legislative purpose" and "integral to the fundamental aim of the legislation."[73]

Note that these assumptions formed the entire basis for the *Miele* court to conclude that FAPA was constitutional.[74] Instead, the *Besharat* court held that because there was no mention of the different impact of the word "completed" in the Sponsor Memorandum, the amended language could not advance any of FAPA's remedial aims, and even if it did, it would not be "commensurate with the degree of disruption to settled, substantial rights."[75] Thus, the court assumed arguendo that the legislature's intent was rational, but argued that even so, the retroactive effect of FAPA is too great to sustain the legislature's rationale against constitutional attacks.[76]

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§ 205-a(a) would render untimely an action that was timely commenced under the law prevailing at the time of commencement.").

69. HSBC Bank USA, N.A. v. Besharat, 195 N.Y.S.3d 380, 386 (Sup. Ct. 2023) ("Here, application of the newly enacted CPLR § 205-a to the events surrounding the recommencement of Plaintiff's mortgage foreclosure action in 2021 plainly has retroactive effect upsetting reliance interests and triggering fundamental concerns about fairness.").

70. *Id.* at 384. CPLR 308 defines "effected" compared to "completed," but for our purposes, it suffices that completing service occurs after effecting service and, in this case, service was effected within 60 days but was not completed within 60 days. *See* N.Y. C.P.L.R. 308(2), (4) (MCKINNEY 2025).

71. *Besharat*, 195 N.Y.S.3d at 390.

72. *See id.* at 380–92.

73. *Id.* at 392 (alteration in original) (quoting Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 154 N.E.3d 972, 995–96 (N.Y. 2020)) (applying the second part of the *Regina* test).

74. *See supra* notes 59–62 and accompanying text.

75. *Besharat*, 195 N.Y.S.3d at 392 (quoting *Regina*, 154 N.E.3d at 1003).

76. *Id.*

### *C. Explaining the Differences*

Despite their in-depth discussion on the constitutional issues presented, the Besharat and Miele courts reach opposite conclusions. As shown above, the courts emphasize different language in the precedent formed by *Regina*, and illustrating where these differences are is key to determining how the courts apply the precedent differently. As shown below, the courts focus on different aspects of precedent to arrive at their respective conclusions, despite basing the judgement on the same rule of law. The three primary constitutional attacks against FAPA focus on the Due Process Clause, the Takings Clause, and the Contracts Clause of the federal and New York constitutions. As the takings and due process claims are substantially similar, and this Note focuses on the relationship between due process and the Contracts Clause, the discussion below will continue in that vein.

As alluded to earlier,[77] whether or not an individual's due process rights were violated in this context hinges on whether or not a "vested right" was impacted by retroactive legislation.[78] After FAPA took effect, some mortgages that were enforceable under the prevailing law at the time were rendered unenforceable. *Miele* suggests that such an occurrence, in and of itself, does not impact "vested rights" because "the [mortgagee] does not have any vested property rights in this action or the orders of this court" as "final judgment has not yet been entered herein."[79] The court thus relied on the vested rights doctrine to determine that the mortgagee's right to maintain its action has not vested.[80] The *Besharat* court disagreed.[81] Indeed, an old case, *Gilbert v. Ackerman* (a case that is still good law), determined that "[t]he right possessed by a person of enforcing his claim against another is property."[82]

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77. *See supra* note 46 and accompanying text.

78. *Regina*, 154 N.E.3d at 988.

79. U.S. Bank Tr., N.A. *ex rel.* LSF9 Master Participation Tr. v. Miele, 197 N.Y.S.3d 656, 671 (Sup. Ct. 2023). The court distinguished FAPA from other laws which frustrated a plaintiff's right to pursue a claim that became time barred, stating that "[t]he FAPA did not shorten the six-year statute of limitations within which to commence a foreclosure," and instead merely altered which acts toll the statute of limitations. *Id.* at 670.

80. *Id.* at 671; *see also* Hodes v. Axelrod, 515 N.E.2d 612, 615 (N.Y. 1987) ("The vested rights doctrine recognizes that a 'judgment, after it becomes final, may not be affected by subsequent legislation.' Once all avenues of appeal have been exhausted . . . a judgment becomes an inviolable property right which thereafter may not constitutionally be abridged by subsequent legislation." (quoting N.Y. STAT. LAW § 58 (McKinney 2025))).

81. *Besharat*, 195 N.Y.S.3d at 391 ("[A]pplying a statute effective 'immediately' retroactively to dismiss an action that was viable at the time it was filed impairs vested rights and violates due process.").

82. Gilbert v. Ackerman, 53 N.E. 753, 754 (N.Y. 1899). The court further notes that "if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law." *Id.*

There are two issues to resolving this disagreement. The first is to assess whether the limitations period has been altered so as to raise due process concerns, and either cabin *Gilbert* strictly to the context of the legislature imposing a new statute of limitations or modifying an old one, or read *Gilbert* more broadly to include alterations in the operation of the statute of limitations that functionally deny claims. *Miele* distinguished FAPA from the cases cited by mortgagees and removed it from *Gilbert* analysis.[83] Viewing FAPA as a law designed to determine what actions toll the statute of limitations instead of modifying the length of the limitations period would limit, if not destroy, a due process argument. However, while FAPA "did not literally shorten the statute of limitations for mortgage foreclosure actions," FAPA's effect on the enforceability of claims functionally produces the same result as if the limitations period was in fact shortened.[84] The next issue is to recognize whether there is a difference between the federal and New York constitutions regarding limitations periods.[85] *Miele*'s narrower interpretation of the spirit of *Gilbert* may be underpinned by the weaker due process protections in the federal constitution. To the extent that *Gilbert*'s broader protections have persisted for over a century through intervening Supreme Court decisions that weakened due process,[86] greater protections are likely owed to claimants.

Similar issues of legal fact dominate the Contracts Clause dispute as courts use different levels of granularity regarding the contractual obligation. If the obligation is viewed as one owing a debt, then intervening state law that removes the enforceability of that contract may violate the clause, whereas permissible alterations of state procedural law may operate in the background, even if that procedural change affects a claim. The *Miele* court illustrates the issue succinctly:

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83. *See Miele*, 197 N.Y.S.3d at 670 (identifying that the issue presented by the cases cited by the mortgagee, which held that a reasonable period of time to litigate claims subject to a new limitations period was constitutionally required, were "distinguishable from that which is presented here. . . . The FAPA did not shorten the six-year statute of limitations within which to commence a foreclosure. The issue here is whether the statute of limitations was tolled or expired prior to the commencement of this action").

84. *Besharat*, 195 N.Y.S.3d at 387.

85. *See* Est. of Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907, 919 (S.D.N.Y. 1997) ("The Court need not determine whether, after *Landgraf*, these 'modest' constraints are enough to bar retroactivity in the circumstances of this case. I find that the *Gilbert* rule is so firmly entrenched in state law that it is likely that New York's Court of Appeals will find that rule rooted in the state Constitution if necessary to preserve it." (footnote omitted)); *see also* People v. Isaacson, 378 N.E.2d 78, 82 (N.Y. 1978) ("[U]nder our own State due process clause, this court may impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provision." (citing N.Y. CONST. art. I, § 6)).

86. "In recent decisions, coming after *Landgraf*, trial courts have relied upon *Gilbert* and declined to enforce amended limitations periods against litigants whose actions were otherwise timely filed." *Est. of Re*, 958 F. Supp. at 919–20.

> The [mortgage contract] does not contain an express provision setting forth what a note holder must do to revoke an election to accelerate the debt. In such circumstance, prior to the FAPA's enactment, plaintiff's right to de-accelerate its prior acceleration of the entire mortgage debt was subject to the constraints of judicial decisions and legislative determinations.[87]

Thus, FAPA does not impair the obligation of contract. However, a larger view of the contractual relationship uncovers that, regardless of the form of the legislation, the substantive rights are impacted in the same manner as if the legislature had vitiated the contracts individually, which the court in *U.S. Bank National Ass'n v. Speller* elucidates:

> [B]y working a sea change in the law regarding a lender's right to revoke a prior acceleration of mortgage debt and the effect of such revocation upon the operation of the statute of limitations, FAPA would plainly undermine the parties' contractual bargain, interfere with their reasonable expectations under the law at the time those contracts were made, and wholly destroy the lender's rights under the Mortgage. That would unquestionably constitute a severe impairment of the contractual relationship.[88]

As shown, the New York courts plainly disagree as to what are vested rights for a due process analysis and what laws truly implicate the obligation of contract. Moreover, the courts disagree as to the degree that *Regina* requires a balancing test for retroactive civil legislation. *Miele* cites *Regina*, but not the specific language of the balancing test.[89] Both *Besharat*[90] and *Speller*[91] applied a balancing test that favored mortgagees, but likely in a manner that would require reading the New York constitution as affording greater due process protections than the federal constitution. Indeed, the

87. *Miele*, 197 N.Y.S.3d at 667–68.

88. U.S. Bank Nat'l Ass'n v. Speller, No. 500088/2022, 2023 WL 7174591, at *18 (N.Y. Sup. Ct. Oct. 31, 2023).

89. *Miele*, 197 N.Y.S.3d at 669–70 (noting only that "[c]onsideration of the scope of the legislation is critical to a rational basis analysis" and that "the Supreme Court has made clear that 'retroactive legislation does have to meet a burden not faced by [purely prospective] legislation,' which is satisfied when 'the application of the legislation is *itself* justified by a rational legislative purpose'" (first quoting Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 154 N.E.3d 972, 996 (N.Y. 2020); and then quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984))).

90. HSBC Bank USA, N.A. v. Besharat, 195 N.Y.S.3d 380, 391 (Sup. Ct. 2023) ("In the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights . . . ." (emphasis omitted) (quoting *Regina*, 154 N.E.3d at 1003)).

91. *Speller*, 2023 WL 7174591, at *18, *31 (referring to the appropriate Contracts Clause scrutiny as "Ends and Means Analysis" and stating for the due process challenge that "[i]n the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights" (quoting *Regina*, 154 N.E.3d at 1003)).

language that ultimately drives *Miele*'s holding does not come from New York caselaw, but instead from Supreme Court precedent.[92] The more basic parts of the disagreement, such as if a cause of action is a vested right, is beyond the scope of this Note. Instead, this Note will undertake its own analysis of precedent and alternative arguments that can resolve the dispute.

## VI. CONSTITUTIONAL CRITICISMS OF FAPA

### *A. FAPA as Unconstitutional: Separation of Powers*

One pathway to resolving the dispute without having to dive too deeply into the constitutional doctrine which surrounds it is to attack the retroactivity of FAPA by making a separation of powers argument. Many litigants have already attempted to directly attack FAPA's retroactivity in the conventional way of arguing that the legislature did not intend the law to apply retroactively.[93] This approach has met limited success, with a majority of courts, including the New York Appellate Division[94] and a federal district court,[95] applying the law retroactively. Part of the issue that argument faces is the fact that the legislature claims it is merely clarifying and correcting judicial misinterpretation of the law.[96] Some courts have viewed the justification of correcting judicial misinterpretations of the law more favorably.[97] After all, the representative and democratic capacity of the legislature would be frustrated by erroneous application of the law by the judiciary.

However, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[98] Allowing the legislature to receive the benefit of doubt to overcome constitutional and jurisprudential constraints on their power, simply by claiming that the courts got it wrong, would invite a strong and judicially unaccountable power to facilitate retroactive application of law: "Crediting this approach would compromise the separation of powers, and would provide too simple a tool for legislatures to enact improper *ex post facto* provisions under the guise of 'correcting' prior court pronouncements."[99]

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92. *See Miele*, 197 N.Y.S.3d 656.

93. *See id.* at 663; E. Fork Funding LLC v. U.S. Bank, Nat'l Ass'n *ex rel.* Greenpoint Mortg. Funding Tr. Mortg. Pass-Through Certificates, Series 2006-AR6, 118 F.4th 488, 493 (2d Cir. 2024).

94. GMAT Legal Title Tr. 2014–1 v. Kator, 184 N.Y.S.3d. 805, 807–08 (App. Div. 2023).

95. Article 13, LLC v. Ponce de Leon Fed. Bank, 868 F. Supp. 3d 212, 218 (E.D.N.Y. 2023).

96. *Sponsor Memo*, *supra* note 8.

97. *Miele*, 197 N.Y.S.3d at 846–48; *see also In re* Gleason, 749 N.E.2d 724, 726 (N.Y. 2001) (including correcting judicial interpretation as one of the factors that evinces an intent for retroactivity).

98. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

99. Est. of Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907, 918 (S.D.N.Y. 1997).

Indeed, at least one court expressed skepticism that the New York legislature was being honest when they claimed that the courts simply misinterpreted New York law given that relevant aspects of FAPA-amended law had been settled in New York courts for decades.[100] If the courts refuse to credit the legislature when they claim they are merely correcting judicial misinterpretation, not only does that remove a factor that militates toward retroactivity,[101] but it also weakens the *Miele* court's argument that "the application of the legislation is *itself* justified by a rational legislative purpose."[102] In other words, even if the *Gleason* factors weigh against retroactivity,[103] but retroactive intent is still clear (as determined by, e.g., the language of the law or its legislative history), the potential rational justifications for the retroactive application of the law to survive a constitutional attack are now fewer.

Additionally, New York jurisprudence strongly supports the conclusory nature of the legal determinations of the New York Court of Appeals. In *Ruffolo v. Garbarini & Scher*, the Appellate Division First Department considered a law that changed the statute of limitations for certain malpractice claims from six to three years.[104] Similarly to FAPA, the defendant argued that the new "amendment does not shorten a limitations period or create a new statutory period, but merely constitutes a legislative clarification that the statutory period in nonmedical malpractice actions 'is and always was' three years."[105] The court rebuffed that argument on two grounds: (1) it did not find sufficient legislative intent that the particular malpractice claim alleged was included in the category of malpractice subject to the three year statute of limitations and (2) crucially for our purposes:

> Even if . . . it was the legislature's original intent to require all nonmedical malpractice actions, whether based on contract or tort, to be commenced within three years, the Court of Appeals, by repeatedly interpreting that statute so as not to apply to malpractice actions based on breach of contract, fixed its meaning "as definitely as if it had been so amended by the legislature."[106]

100. U.S. Bank Nat'l Ass'n v. Speller, No. 500088/2022, 2023 WL 7174591, at *27 (N.Y. Sup. Ct. Oct. 31, 2023); *see supra* note 65 and accompanying text.

101. *In re Gleason*, 749 N.E.2d at 726.

102. *Miele*, 197 N.Y.S.3d at 669–70 (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

103. *See supra* note 65 and accompanying text.

104. Ruffolo v. Garbarini & Scher, P.C., 668 N.Y.S.2d 169 (App. Div. 1998).

105. *Id.* at 171.

106. *Id.* (quoting Winters v. New York, 333 U.S. 507, 514 (1948)).

Indeed, the decisions of the Court of Appeals are as much a part of the statute "as if incorporated into the language of the act itself."[107] As the Court of Appeals in *Engel* has already determined that GOL 17-105 is not the sole means to decelerate a mortgage note,[108] the New York Legislature cannot simply claim that it is now a misinterpretation of GOL 17-105.

One more conclusion of the *Ruffolo* court, albeit in dicta, is relevant to our discussion. Namely, that even if the law was meant to apply retroactively, "it cannot be applied to require dismissal of an action that was viable at the time it was filed. Such a result would impair vested rights and violate due process."[109] Admittedly, it is unclear in the opinion whether the court was applying the defendant's interpretation of the law (that is, that the law did not change the statute of limitations, but merely clarified the law on what was always the statute of limitations) or if it was setting a new limitations period for a category of malpractice cases.

Finally, there is a concern that FAPA functionally undoes final judicial judgments.[110] Admittedly, there are differences in which judgments the legislature can upset, turning on where in the appeals process the case lies.[111] It has been held that enforcement orders of the lower courts do not vest into property rights until the appeals process has been closed.[112] Nevertheless, because of FAPA's emphasis on the foreclosure sale, new importance was placed on the "ministerial act of a [judge] in effectuating a . . . sale."[113] Had a judge known the significance of a speedy foreclosure sale in light of the coming changes of FAPA, the dates of enforcement for court orders could have been different. Moreover, FAPA makes no mention of which court orders can stop its retroactive application before the sale. In other words, relying on just the language of FAPA, it is unclear if FAPA would touch a mortgage suit that had been finalized by the appeals process (e.g., affirmed by the Court of Appeals), but has not yet ordered the foreclosure sale.[114] Indeed, it may even be the case that the *sale* of the foreclosed property is needed to protect a lender who has won his foreclosure suit from the

107. N.Y. STAT. LAW § 72 (McKinney 2025).

108. *See supra* note 20 and accompanying text; *supra* note 65.

109. *Ruffolo*, 668 N.Y.S.2d at 172 (citations omitted).

110. U.S. Bank Tr. Nat'l Ass'n *ex rel.* RCF 2 Acquisition Tr. v. Joerger, 214 N.Y.S.3d 876, 886 (Sup. Ct. 2024) ("This Court is troubled by the fact that the state legislature ignores the bedrock 'finality of judgment' case law . . . . It is the judgment that settles the legal rights of the parties, not a future scheduled sale date.").

111. U.S. Bank Tr., N.A. *ex rel.* LSF9 Master Participation Tr. v. Miele, 197 N.Y.S.3d 656, 669 (Sup. Ct. 2023) ("[L]itigants do not obtain any vested property rights in the orders or judgments of the court during the period they are subject to review by a higher court." (citations omitted)).

112. *See id.*

113. *Joerger*, 214 N.Y.S.3d at 886.

114. FAPA applies "to all actions commenced on [mortgage notes] in which a final judgment of foreclosure and sale has not been enforced." Foreclosure Abuse Prevention Act, 2022 N.Y. Sess. Laws ch. 821 (McKinney).

retroactive effects of FAPA.[115] As described, not only does FAPA impose new legal significance to acts already taken, but it adds new significance to the orders of a court that was enforcing prior law.

### *B. FAPA as Unconstitutional: The Considerations of Fairness and Due Process*

As due process is concerned with fundamental notions of fairness,[116] it is helpful to establish hypotheticals to illustrate the circumstances under which lenders' due process rights might be violated. A mortgage lender can be considered subject to two broad zones of legal obligation: The first zone occurs when a mortgage lender has obtained a mortgage note under contract before the enaction of FAPA, and the second zone occurs when the note is obtained after the enaction of FAPA. As retroactivity is not implicated in the second, post-FAPA zone, and the mortgage lender is functionally put on notice for the change in law, due process would almost certainly not be violated.[117] Indeed, such an application of the law would seem to be fully and completely within the discretion of the legislature to enact, as it is the province of the legislature "to balance the advantages and disadvantages" of law, especially purely economic law.[118] As no case has emerged challenging the prospective application of FAPA, this Note is concerned only with the first zone.

Within the first zone there is a wide spectrum of subzones. At one end of the spectrum, there is a lender who has exhausted his appeals process, but has not yet sold the land at a foreclosure sale. On the other end, there is a lender who has a signed mortgage note that was defaulted after FAPA's enaction, but who has not yet filed suit. As we near the former end, due process concerns are more gravely implicated. This is so despite the fact that, under either of these circumstances, retroactive application of FAPA would have the same effect (preventing the foreclosure suit) because the first lender has a greater reliance on settled rights.[119] That litigant has

115. *See id.* At present, no court has had the opportunity to rule on whether the sale of the foreclosed property is what is needed to prevent the application of FAPA.

116. *See generally* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105 (2005).

117. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955). The Court sustained an Oklahoma law against due process challenges that prevented anyone who was not licensed as an optometrist or ophthalmologist in the state from fitting eyeglass frames with lenses, unless given a prescription by one who was so licensed. *Id.* at 485–86. The law was more or less a state decision to economically favor the optometrist/ophthalmologist lobbying groups. Nevertheless, the Court said a "law may exact a needless, wasteful requirement in many cases" and still survive a due process challenge. *Id.* at 487.

118. *Id.*

119. *See* Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 154 N.E.3d 972, 988 (N.Y. 2020).

already invested resources into the judicial process and relied on rights and law that were prevailing at the time of the suit. Moreover, that litigant would have had no notice of the intervening FAPA, and thus would be effectively denied the opportunity to fairly challenge the law.[120] In the slew of litigation that has arisen due to FAPA, some New York courts have broken custom and remitted cases to the trial court to hear arguments first brought up on appeal, or otherwise to compel the trial court to rule firmly on the issue of FAPA's constitutionality.[121] Finally, the latter litigant would be aware of FAPA's new implications for the Statute of Limitations, and would be able to more hastily file suit. When thirty years of mortgage obligation turn on the final months that round the six-year Statute of Limitations, every moment of forewarning is critical for a lender to secure their rights and loan.

Given *Regina*'s emphasis on the relationship between retroactivity, rationality, and the commensurate effect on settled substantive rights,[122] it is troubling to note that nowhere does FAPA account for each of these differently situated lenders. This evidences the fact that the legislature did not consider the degree to which the retroactive application of FAPA would impact reliance expectations at all. One can only assume that the legislature's stated rationale would be commensurate with vitiating mortgage contracts on a state-wide scale.

## V. SCRUTINY OF THE RATIONALE

### *A. Justification 1 & 2: Prevent Abuses of the Judicial Foreclosure Process/Correct Judicial Misinterpretations of the Law*

The Assembly Sponsor Memo in support of FAPA is replete with criticisms of lenders and the "abuse" of the foreclosure process.[123] However, as noted previously, the New York Legislature was under a misapprehension regarding the existing caselaw that governed the mortgage process.[124] Indeed, despite the fact that *Engel* was the first appeals-level

120. *See, e.g.*, ARCPE 1, LLC v. DeBrosse, 193 N.Y.S.3d 51 (App. Div. 2023). Because the lender had filed the appeal before the enaction of FAPA, they had no opportunity to raise constitutional challenges to the law or to challenge its retroactivity. *See id.* Because of this, the Appellate Division applied FAPA retroactively and refused to entertain the lender's attempt to bring up new arguments on appeal: "The parties' remaining contentions either are improperly raised for the first time on appeal, are without merit, or need not be reached in light of our determination." *Id.* at 55.

121. *See, e.g.*, Sarkar v. Deutsche Bank Tr. Co. Ams., 207 N.Y.S.3d 96, 98 (App. Div. 2024) ("[O]n appeal, [lender] challenges the constitutionality of the retroactive application of FAPA to this and other matters. Inasmuch as the Supreme Court did not consider issues relating to the constitutionality of FAPA . . . we remit the matter to the Supreme Court . . . for consideration thereof . . . .").

122. *See Regina*, 154 N.E.3d at 988.

123. *Sponsor Memo*, *supra* note 8.

124. *See supra* note 65.

court to effectuate a ruling similar to the effect of FAPA,[125] the legislature has allowed the courts to deviate from the "original" understanding of New York mortgage law for decades.[126] Indeed, it would be quite serendipitous if the *Engel* court were the first appellate court to correctly guess the true meaning of New York's real property law, and even more astonishing that it was only after that court's holding, and subsequent reversal by the Court of Appeals, that the legislature decided to clarify its intent. If the legislature is being candid, it must admit that it was sluggish at best in making its meaning known.

Additionally, the New York Legislature established a vague standard for determining what amounts to an "abuse of the foreclosure process."[127] It can hardly be said that obeying the law as it existed at the time is somehow an abuse of that law, even if we credit the legislature when they claim that the courts misinterpreted the law. Moreover, imposing retroactive liability for that "abuse" cannot possibly address those abuses because they have already occurred. For similar reasons, in addition to due process concerns, the United States has generally declared ex post facto criminal law unconstitutional.[128] Admittedly, if one grants that reliance on a misinterpretation of a law is indeed an abuse of that law, then retroactive imposition of liability would in this setting restore the "abused" party (the borrower) to a fairer position. However, neither the legislature nor the courts have identified what constitutes an abuse of existing caselaw. Short of the legislature's contempt for particular actions, there is no objective standard to answer this question. Where something lacks an objective measure, it must be arbitrary. And arbitrary law fails even the least demanding standard of rationale review in the retroactivity setting.[129]

125. *See* Freedom Mortg. Corp. v. Engel, 81 N.Y.S.3d 156 (2018), *reversed by* Freedom Mortg. Corp. v. Engel, 169 N.E.3d 912 (N.Y. 2021); Christiana Tr. v. Barua, 125 N.Y.S.3d 420, 424–26 (App. Div. 2020), *abrogated by* Freedom Mortg. Corp. v. Engel, 169 N.E.3d 912 (N.Y. 2021); *see also id.* at 424 (responding to contrary lower court holdings by merely stating "[v]arious reported trial level decisions and orders holding to the contrary should no longer be followed.").

126. *See supra* note 65 and accompanying text.

127. *Sponsor Memo*, *supra* note 8. The memo fails to define what an abuse is at all.

128. *See, e.g.*, Paul D. Reingold & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CALIF. L. REV. 593 (2018). "[T]he Ex Post Facto Clause is based not on the individual's right to less punishment, but rather on the *values* [it] was designed to protect—namely to ensure fair notice of the punishment . . . and to restrain . . . 'potentially vindictive legislation' against the politically weakest members of society . . . ." *Id.* at 600 (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

129. *See* Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 154 N.E.3d 972, 998 (N.Y. 2020) (holding there had been a due process violation in a cited case and explaining that "retroactive application would be irrational given the extent of settled interests, degree of repose and lack of a permissible basis for unsettling those interests").

### *B. Justification 3: Uphold the Public Policy of the Statute of Limitations in Preventing Stale Claims*

The Statute of Limitations serves the important "objectives of finality, certainty, and predictability that New York's contract law endorses,"[130] and FAPA seeks to strictly apply the six year Statute of Limitations, in contravention of existing caselaw, such that absent an express judicial determination to the contrary, any foreclosure suit begins the accrual of the limitations period, without any concern of tolling.[131] As applied, FAPA clearly marks the beginning and the end of the limitations period, and any litigant knows that a court's determination of tolling needs to occur before any such tolling occurs in fact. To that end, the stated purpose of FAPA is rational. Furthermore, considering that the pre-FAPA caselaw would, at least theoretically in some cases, "extend" the period beyond six years, FAPA applies CPLR 213 "evenly" across claims.[132]

However, this articulation of FAPA fails to account for the expectations of the mortgage lenders. The Statute of Limitations cannot exist solely for the benefit of the borrower; prospective mortgagees and note holders would undoubtedly be concerned about the enforceability of loans. Because mortgage notes can be bought and sold, a prospective note buyer would want to know if any foreclosure suits had been commenced under the note. Application of FAPA would clearly attach great significance to the dates on which the suit was filed. As such, the Statute of Limitations protects mortgage note buyers from acquiring "bad paper."

Additionally, if the legislature can determine what actions retroactively toll the Statute of Limitations, no one can be completely confident that their claim is tolled or otherwise impacted by the limitations period. The legislature could have just as easily determined that "abandonment" of the suit (failure to prosecute) was always intended to toll the statute of limitations (operate as an affirmative act of revocation), to the detriment of borrowers.[133] The New York courts' discussions about the differences of meddling with the limitations period itself, as opposed to the acts that begin or toll that period, seems pedantic in light of the fact that regardless of either

130. U.S. Bank Tr., N.A. *ex rel.* LSF9 Master Participation Tr. v. Miele, 197 N.Y.S.3d 656, 670 (Sup. Ct. 2023) (quoting ACE Sec. Corp. v. DB Structured Prods., 36 N.E.3d 623, 627 (N.Y. 2015)).

131. *Sponsor Memo*, *supra* note 8.

132. *Sponsor Memo*, *supra* note 8. For a simple illustration, consider Bank and Borrower. Bank files to foreclose in year 1 and then voluntarily discontinues the suit in year 2 (thus tolling the limitations period). Borrower goes back to paying monthly installments, until year 20 where he defaults again. Bank forecloses again. In this situation, assuming the court has not explicitly ruled that the limitations period was tolled, pre-FAPA caselaw would allow this suit to continue, despite being obviously older than six years since the first suit.

133. This is purely an illustrative example, as no court has ever held this to be the case, and the text of CPLR 213 appears to disavow such a stance. *See* N.Y. C.P.L.R. 213 (MCKINNEY 2025).

approach, the outcome is the same: A cause of action is no longer enforceable.

An argument can be made regarding the rationality of the legislature in favoring borrowers here. In other words, although the statute of limitations is designed to provide stability for all litigants, the legislature is entitled to pronounce that the stability of borrowers is more important than that of lenders. While that may be true, it is uncertain if that justification can itself rationally support an unlimited imposition of retroactive liability that threatens billions of dollars of mortgage loans.

### *C. Justification 4: Reduce the Undue Burden of Mortgage Foreclosure Cases on the Courts*

A final justification for FAPA is to reduce the burden that mortgage foreclosures impose upon the courts.[134] Indeed, the New York Legislature has tried to combat this expanding sphere of litigation, to great success.[135] While this is certainly a rational justification for the prospective application of FAPA, it is unclear that retroactive application of the law would decrease mortgage litigation at all. Indeed, it would stand to reason that lenders, fearful of losing their mortgage loans, would more actively initiate foreclosure suits to maintain their investments. The data is not yet available to determine if the likely effect of FAPA is to reduce litigation, but it seems a stretch that to argue that upending decades of law would lead to a decrease in litigation. At the least, it can be said that retroactive application of FAPA (if not in the immediate, given constitutional challenges) would make those suits easier to decide as all foreclosure suits presumptively begin the limitations period. Yet, that was not the stated goal of the legislature in reducing the burden to the courts.

Balanced against these proposed justifications echoes the *Regina* court's requirement that the rationale be "commensurate with the degree of retroactive effect."[136] The legislature's strongest argument for the retroactive application of FAPA boils down to reducing the burden on New York courts that arise from foreclosure litigation. If a lender's contractual right to payment and settled expectations can be so easily upended to spare the courts of their obligation to hear cases, then "commensurate" cannot possibly mean what the *Regina* court uses it to mean.

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134. *See Sponsor Memo*, *supra* note 8.

135. *See, e.g.*, LAWRENCE K. MARKS, 2019 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS ON THE STATUS OF FORECLOSURE CASES 2 (2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-12/ForeclosureAnnualReport2019.pdf [https://perma.cc/G6GC-4L7R] (noting a sharp decline in foreclosure suits as late as 2019).

136. Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 154 N.E.3d 972, 995 (N.Y. 2020).

## CONCLUSION

The New York courts are split regarding the constitutionality of FAPA, and indeed appear to apply different levels of scrutiny to the applicability of retroactive legislation. It seems inevitable that the Court of Appeals will have to step in and clarify what it meant in its holding in *Regina*, and in so doing, establish the operative effect of the word "commensurate" when analyzing rationality. Such issues of means-end scrutiny have appeared in New York's Contracts Clause Jurisprudence and have now made its way into Due Process Clause arguments. To the extent that the New York Legislature's proffered justifications for retroactivity of FAPA fail to be commensurate with the degree of its retroactive effect, the law should be declared unconstitutional.

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