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Retroactive Application and its Setbacks to Addressing Housing Concerns in New York City: An Analysis of the Regina Metro Holding and its Implications to Part K MCI Changes Pursuant to the HSTPA

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RETROACTIVE APPLICATION AND ITS SETBACKS TO ADDRESSING HOUSING CONCERNS IN NEW YORK CITY: AN ANALYSIS OF THE *REGINA METRO* HOLDING AND ITS IMPLICATIONS TO PART K MCI CHANGES PURSUANT TO THE HSTPA

Arjana Balaj

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I. INTRODUCTION

In establishing judicial review, Chief Justice Marshall stated in his monumental holding in *Marbury v. Madison*:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of

each.¹

The establishment of judicial review, however, has left courts with many problems in the modern era due to the requirement to resolve statutory ambiguities when “modern statutes are often unclear.”²

One such “modern” piece of legislation is the recent Housing Stability & Tenant Protection Act (“HSTPA”) passed on June 14, 2019 by the New York Legislature to address the housing crisis affecting New York City and other boroughs (hereinafter “City”).³ This legislation altered provisions set out in the Rent Stabilized Laws (“RSL”) to empower tenants possessing apartments under rent regulation and to strengthen their statutory rights against landlords who hold significantly more power, theoretically and financially, over vulnerable and less business-savvy occupants.⁴ However, the Court of Appeals of New York recently held in *Regina Metro Co. v. New York State Division of Housing & Community Renewal* that Part F of the HSTPA, which amends calculation for landlords overcharging rent in regulated apartments, may only apply prospectively because retroactive application does not “comport with [the] retroactivity jurisprudence . . .” and that it burdens the substantive due process rights, or property rights, of landlords.⁵

The *Regina Metro* decision was the first time the Court of Appeals has struck down retroactive application, and this has complicated and hindered the HSTPA’s efforts to accommodate tenants challenging a landlord’s deceptive conduct, while also yielding to a sharp disagreement between the majority and dissent in *Regina Metro*.⁶ The majority strictly followed the Supreme Court decision of *Landgraf v. USI Film Products*, where the Court laid a framework for how to assess

1. 5 U.S. 137, 177 (1803).

2. Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 639 (2008) (discussing statutory interpretation by courts).

3. See Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 154 N.E.3d 972, 1005–06 (N.Y. 2020).

4. See Maxwell Breed & Lisa Liu, *A Possible Blow to NY Rent Regulation Law Constitutionality*, LAW360 (Apr. 16, 2020, 5:47 PM), <https://www.law360.com/articles/1262743/a-possible-blow-to-ny-rent-regulation-law-constitutionality>.

5. 154 N.E.3d at 976.

6. See Roberta Kaplan et al., *NY Housing Ruling Raises Bar for Retroactive Economic Regs*, LAW360 (May 18, 2020 5:57 PM), <https://www.law360.com/articles/1274188/ny-housing-ruling-raises-bar-for-retroactive-economic-regs>.

the issue of retroactive application to recently amended legislation.⁷ This decision also has the potential, outside of the landlord-tenant realm, for “wide-reaching ramifications for the regulation of individuals and companies worldwide with operations in New York State . . . ” and increasing the possibility of legal challenge for retroactive application of newly amended laws in the State.⁸

The *Regina Metro* decision also leaves other parts of the HSTPA susceptible to retroactive challenge.⁹ Specifically, Part K of the HSTPA, which amended calculations for rent when a landlord makes Major Capital Improvements (“MCIs”), raises constitutional issues because, similar to the consequences of Part F in the HSTPA, Part K also increases liability without any notice. Part I of this article will analyze and discuss the housing crisis impacting New York City since the mid-twentieth century, as well as outline the holding of *Regina Metro* and how the court came to its conclusion. Part II accordingly will analyze Part K’s sensitivity to retroactive challenge in New York courts and will also outline ways to resolve the policy issues that emerge from disallowing retroactive legislation, including courts conceding more deference to the agencies’ tactics, administered to the legislature.

II. RENT STABILIZED LAWS, THE HSTPA, AND THE OUTCOME OF *REGINA*

A. Housing Crisis in New York City and Responses by the New York Legislature

Rent Control and the RSL are both designed to assist tenants living in the City to find affordable housing. The most widely used regulation, however, is the RSL, which was passed in 1969 to “ameliorate, over time, the intractable housing emergency in the City of New York.”¹⁰ The housing shortage in the City at the time was a result of high demand for apartments, new household formations, and decreased supply of units and housing.¹¹ The passing of the RSL eliminated the assumption existing prior to 1969 that “the market, governed by supply and demand, would work reasonably and

7. See 511 U.S. 244 (1994).

8. Kaplan et al., *supra* note 6.

9. See Breed & Liu, *supra* note 4.

10. *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 480 (N.Y. 1994).

11. See *id.*

controls would be unnecessary.”¹² The RSL is a “less onerous form of [rent] regulation,” than Rent Controlled apartments, but New York State intended to protect dwellers or tenants who could not compete in an “overheated rental market” with the passing of this legislation.¹³

Although the legislature’s main purpose in enacting the RSL was to alleviate the housing crisis facing the City, the problems continued to persist and materialized even after the RSL was passed, harming moderate and low-income earners in obtaining affordable housing. In recent years, the housing crisis continues to present problems for the City. Since 2015, median rents have been increasing, but income has remained steady.¹⁴ The City also anticipates that the population of the five boroughs will increase to nine million residents by the year 2040 because more people are choosing to live in the City.¹⁵ Currently, there are around 979,000 extremely low income and very low income renters in the City, while the supply and number of affordable housing for these groups is merely around 424,000 units.¹⁶ This is patently and undeniably much lower than what is needed to provide housing to the residents of the City.

As a result of the COVID-19 pandemic, the housing crisis in the City has intensified. Two-thirds of New Yorkers rent their homes; however, due to the COVID-19 pandemic, unemployment is increasing in parts of the City where the typical rent is approximately double the national average.¹⁷ New York has extended its moratoriums to ban

12. 8200Realty Corp. v. Lindsay, 261 N.E.2d 647, 653 (N.Y. 1970).

13. *Manocherian*, 643 N.E.2d at 479.

14. See *Problem: Our Current Affordable Housing Crisis*, NYC HOUSING (OCT. 24, 2020, 3:16 PM), <https://www1.nyc.gov/site/housing/problem/problem.page#:~:text=New%20York%20City's%20shortage%20of,power%20in%20the%20housing%20marketplace.&text=During%20the%20same%20period%2C%20the,increased%20by%20almost%2040%20percent>.

15. See *id.*; see also Matthew Haag, *New Yorkers Are Fleeing to the Suburbs: 'The Demand Is Insane'*, N.Y. TIMES (Aug. 30, 2020), <https://www.nytimes.com/2020/08/30/nyregion/nyc-suburbs-housing-demand.html> (discussing the belief that more people are choosing to live in the City. However, it seems to be changing as the COVID-19 pandemic has altered many residents' views and opinions about living in heavily populated areas. In fact, more people are flocking to the suburbs of New York City or its neighboring states, which saw a forty-four percent increase in home sales between March 2020 to July 2020).

16. See *Problem: Our Current Affordable Housing Crisis*, *supra* note 14.

17. See Prashant Gopal, *NYC Rental Market Pushed to Breaking Point by Tenant Debts*, BLOOMBERG BUSINESSWEEK (July 8, 2020, 2:30 PM), <https://www.bloomberg.com/news/articles/2020-07-08/coronavirus-moves-nyc-affordable-housing-crisis-to-breaking-point>.

evictions and mitigate the economic troubles arising out of the pandemic,¹⁸ while tenants have taken advantage of the stimulus checks received and their possible savings to pay for rent while they remain unemployed.¹⁹ Yet, these responses provide no long term solutions because rent will be owed eventually once the moratoriums end, and stimulus checks and savings accounts will eventually deplete.²⁰

B. The Passing of the HSTPA

In order to respond to the growing housing crisis facing the City—and which continues to endure even during this pandemic with increased unemployment—the New York Legislature passed the HSTPA on June 14, 2019.²¹ In passing the HSTPA, which overhauled the landlord-tenant laws of New York State and the City, the legislature intended “to impose new burdens and grant new rights in order to address societal issues.”²² Further, in passing the HSTPA, the legislature “sought to alleviate a pressing affordable housing shortage that it rationally deemed warranted action.”²³ Accordingly, the two significant purposes of the HSTPA are to: (1) “provide permanent rent regulation protections to covered buildings,” and (2) “extend tenant protections state wide,” including within New York City.²⁴ The New York State Legislature echoed these commitments when explaining its reasoning behind the enactment of the HSTPA, which had come to fruition in response to a statistic revealing New York only ranked

18. See *Governor Cuomo Announces Moratorium on COVID-Related Residential Evictions Will Be Extended Until January 1, 2021*, N.Y. STATE GOV., (Sept. 28, 2020), <https://www.governor.ny.gov/news/governor-cuomo-announces-moratorium-covid-related-residential-evictions-will-be-extended-until#:~:text=September%2028%2C%202020-Governor%20Cuomo%20Announces%20Moratorium%20on%20COVID%2DRelated%20Residential%20Evictions%20Will,Extended%20Until%20January%201%2C%202021&text=%22As%20New%20York%20continues%20to,COVID%2C%22%20Governor%20Cuomo%20said.>

19. See Gopal, *supra* note 17.

20. See *id.*

21. See *Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 154 N.E.3d 972, 1006 n. 2 (N.Y. 2020).

22. *Id.* at 1003.

23. *Id.*

24. *Jimenez v. 1171 Washington Ave, LLC*, 2020 NY Slip Op 50615(U), *10 (Civ. Ct. Bronx Co. 2020) (the third purpose the Civil Court listed was to “expand tenant protections for owners and residents of mobile and manufactured homes”).

thirty-ninth in the United States for tenant protections.²⁵ Also, the Legislature notes the HSTPA is designed to ensure tenants do not come into contact with barriers when applying for or being offered leases, provide more leniency during the eviction proceedings, and guarantee execution of warrants are done with justice.²⁶ Thus, “[c]learly, the focus is on expanding protections for tenants; the rights of occupants without significant possessory rights were not the concern of the Legislature.”²⁷

Pursuant to Part F of the HSTPA, the Legislature enacted four prominent changes in the RSL when calculating overcharge damages, which are damages a tenant living in a Rent Stabilized unit is entitled when landlords charge excess of the legal regulated rent set by the City’s Rent Guidelines Board.²⁸ First, the HSTPA extended the four year limitation period for overcharge claims to six years, while also allowing the claim to be filed at any time.²⁹ Second, the HSTPA abolished the lookback rule by now permitting the base date, used to assess rent overcharges, to be the “most recent reliable” registration filed six or more years before the most recent registration.³⁰ The courts can also now consider all available rent history that is reasonably necessary to assess and investigate overcharge claims and to determine the legal rent a landlord was supposed to be charging under the RSL.³¹ Third, the HSTPA lengthened the four year retention period to six years, and the courts are no longer limited to specific years when examining the rental history.³² Fourth, the legislation increased damages for willful overcharges, or treble damages, from two years to six years, while also making it more difficult for landlords to establish a lack of willfulness.³³

25. See N.Y. Rent Stabilization Code § 25-516 (McKinney 2019).

26. See *id.*

27. *Jimenez*, 2020 NY Slip Op 50615(U) at *10.

28. See *Rent Increases and Rent Overcharges*, N.Y. STATE, <https://hcr.ny.gov/rent-increases-and-rent-overcharge> (last visited Feb. 6, 2020).

29. See *Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 154 N.E.3d 972, 987 (N.Y. 2020); see also N.Y. Rent Stabilization Code § 25-516(a)(2) (McKinney 2019); N.Y. C.P.L.R. 213-a.

30. *Matter of Regina Metro. Co., LLC*, 154 N.E.3d at 987; see also N.Y. Rent Stabilization Code § 26-516(a)(i) (McKinney 2019).

31. See *Matter of Regina Metro. Co., LLC*, 154 N.E.3d at 987; see also N.Y. Rent Stabilization Code § 26-516(a)(i)(h) (McKinney 2019).

32. See *Matter of Regina Metro. Co., LLC*, 154 N.E.3d at 987; see also N.Y. Rent Stabilization Code § 26-516(g) (McKinney 2019).

33. See *Matter of Regina Metro. Co., LLC*, 154 N.E. 3d at 987; see also N.Y. Rent Stabilization Code § 26-516(a)(2).

C. Holding by the Court of Appeals in Regina Metro

In a hotly contested opinion rendered during the height of the COVID-19 pandemic in the City, the Court of Appeals in *Regina Metro* held Part F of the HSTPA—described briefly above—cannot be applied retroactively.³⁴ In coming to its holding, the majority opinion applied the rules and analysis set out in the United States Supreme Court case of *Landgraf v. USI Film Products*.³⁵ The Supreme Court analyzed a plaintiff's claim against her employer under Title VII of the Civil Rights Act for a hostile work environment.³⁶ While the plaintiff's appeal was pending, Congress passed the Civil Rights Act of 1991, increasing the recovery a plaintiff may be entitled to under a Title VII action by not merely offering equitable damages, but also compensatory relief; the plaintiff thus requested the case to be remanded to take into account these new damages.³⁷ The Court of Appeals of New York, the jurisdiction where the case originated, denied the plaintiff's request for remand.³⁸

To resolve the issue of whether the new law can be applied retroactively, the Supreme Court stated retroactivity is viewed unfavorably, and generally, there is a presumption for "a court [] to apply the law in effect at the time it renders its decisions."³⁹ This presumption is rooted in the belief that parties and individuals should have an opportunity to know the law and conform their conduct in light of the new or amended legislation.⁴⁰

The presumption, however, can be rebutted. As explained in *Landgraf*, the Supreme Court holds the plain text of the statute *and* the legislative history of the legislation is imperative to understanding whether Congress intended for the piece of legislation to be applied retroactively.⁴¹ Principally, examining the legislative history ensures Congress has considered the advantages and disadvantages of a

34. See *Matter of Regina Metro. Co., LLC*, 154 N.E3d at 977.

35. See *id.*

36. See *Landgraf v. USI Film Prods.*, 511 U.S. 244.

37. See *id.* at 249, 252–53.

38. See *id.* at 249–53.

39. *Id.* at 264. See also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (stating "Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result" to support its holding the legislative history of the cost limit provision of the Medicare Act explicitly forbid retroactive cost-limit rules).

40. See *Landgraf*, 511 U.S. at 266.

41. See *id.* at 256, 286.

potential “disruption or unfairness” to apply the statute retroactively.⁴² In analyzing the Title VII changes, the Court held the plain text of the statute did not possess any express language by Congress depicting an intent for retroactive application.⁴³ Turning to the legislative history, the Supreme Court explained the Act, specifically § 102 at issue in the case, “significantly expand[ed] the monetary relief potentially available to plaintiffs,” and expanded what may constitute as workplace discrimination to create a cause of action.⁴⁴ Nonetheless, the history revealed Congressional members reached a compromise to disallow retroactivity.⁴⁵ In fact, although retroactive application had been struck down by Congress, the Supreme Court still found the legislative history inconclusive in determining whether there was consensus to apply or not apply the statute retroactively because of a partisan divide over this issue.⁴⁶

However, the Supreme Court did not end its discussion by just examining the plain language and legislative history of the statute. Instead, the Court assessed the implication of the defendant’s property interests with a retroactive application and potential increased damages.⁴⁷ The Court held that it cannot permit retroactive application where it burdens private rights unless Congress has made it clear it intended the legislation to be functioned retroactively.⁴⁸ In other words, retroactive application will impair the substantive rights, or substantive due process rights, of defendants because it increases their liability with the expanded damages offered to plaintiffs under this statute and cause of action.⁴⁹ Therefore, if Congress or other legislative bodies have not expressed an intent to create retroactive application and the retroactive effect does in fact burden private rights, the presumption cannot be overcome to compel the court to allow retroactivity.⁵⁰

The Court of Appeals in *Regina Metro* strictly followed and shadowed the *Landgraf* decision. The case also consisted of facts similar to that of the Supreme Court case. While appeals were

42. *Id.* at 268.

43. *See id.* at 286.

44. *Id.* at 253–54.

45. *See id.* at 256.

46. *See id.* at 262–63.

47. *See id.* at 280–81.

48. *See id.* at 281.

49. *See id.* at 286.

50. *See id.* at 285–86.

pending for the four consolidated claims commenced by tenants against their landlords for overcharges and improperly destabilizing apartments during receipt of the J-51 benefits, the New York Legislature passed the HSTPA, raising questions as to the usage of Part F of the HSTPA for the appeals process in determining and calculating overcharge damages.⁵¹

First, the court examined whether there was any legislative intent to apply Part F of the HSTPA retroactively, which does not require particular or specific words to be used.⁵² Consequently, the court stated that if the statute imposed “new liability on past conduct but also revive[s] claims that were time-barred at the time of the new legislation, [the court] require[s] an even clearer expression of legislative intent than that needed to effect other retroactive statutes”⁵³ The HSTPA’s fifteen parts contain an effective date provision, and Part F states that the section “shall take effect immediately and shall apply to any claims *pending* or filed on and after such date.”⁵⁴ The Court of Appeals held this language in the statute and bill is not indicative of a legislative intent to apply retroactively because the language means Part F will apply to those cases which were unresolved as of June 2019, the date the HSTPA was passed and implemented.⁵⁵ Particularly, the word “pending” was too general for the Court of Appeals to find clear and unequivocal intent to impose retroactive application.⁵⁶

After finding no clear legislative intent for retroactivity, the Court of Appeals delineates the language of the Supreme Court in *Landgraf* regarding the harm of substantive due process rights arising from retroactive application of the statute. The court held that, although the legislature is entitled to impose burdens and grant new rights “in order to address societal issues . . . ,” retroactive application of Part F of the HSTPA reaches “particularly far” into the past and imposes higher liability to landlords without any notice.⁵⁷ Retroactive application of Part F would “undermine considerable reliance interests concerning income owners already derived from rents

51. See *Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 154 N.E.3d 972, 976 (N.Y. 2020).

52. See *id.* at 991.

53. *Id.* at 992.

54. *Id.* at 987 (emphasis added).

55. See *id.* at 995.

56. See *id.* at 992–95.

57. *Id.* at 1003.

collected on real property years – if not decades – before”⁵⁸ the HSTPA was passed.⁵⁹ Alternatively, prospective applications in highly regulated areas of the law are related to the legislative decisions for a “proper division of economic burdens going forward,” and landlords’ rights under the Constitution are to collect a reasonable return.⁶⁰ Therefore, although the validity of the HSTPA in its whole is not in question, the Court of Appeals held Part F’s retroactive application considerably altered and infringed on landlords’ substantive due process rights and property rights; the court acted to “safeguard the [landlords’] rights afforded under our State [and Federal] Constitution[s]” because of the lack of legislative intent to instruct otherwise.⁶¹

The decision by the Court of Appeals in *Regina Metro* has already impacted tenants’ ability to prevail or recover damages because the pre-HSTPA overcharge statute makes it more difficult for tenants to assert a cause of action for overcharges due to the complex Court of Appeals cases making it difficult to ascertain damages under the pre-HSTPA laws. For example, the New York Appellate Division in *435 Cent. Park W. Tenant Assn v. Park Front Apts., LLC* affirmed a lower court’s denial of the defendant’s motion for summary judgment because there was sufficient evidence to prove landlord’s fraudulent conduct in its overcharge scheme, but it could potentially limit damages to the pre-HSTPA four-year limitation period instead of six years if the plaintiff could not prove an indicia of fraud.⁶² The *Regina*

58. *Id.* at 991.

59. The court in *Regina Metro* also stated “retroactive application of the overcharge calculation provisions in Part F implicates all three *Landgraf* retroactivity criteria by impairing rights owners possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed.” *Id.*

60. *Id.*

61. *Id.* at 1005.

62. See 125 N.Y.S.3d 85, 86–87 (N.Y. App. Div. 2020); see also *Fuentes v. Kwick Realty LLC*, 130 N.Y.S.3d 16 (N.Y. App. Div. 2020) (holding the plaintiffs could not commence a claim for rent overcharge because, using the pre-HSTPA laws, the plaintiff failed to show an indicia of fraud to look back further than four years of the statute of limitations; under the HSTPA, statute of limitations is increased to six years, presumably making it easier for the tenant to claim more damages); *Dugan v. London Terrace Gardens, L.P.*, 128 N.Y.S.3d 497 (N.Y. App. Div. 2020) (remanding four consolidated cases commenced in response to defendants deregulation of hundreds of apartments in accordance with pre-HSTPA rules to address merit and damages); *Santana v. Fernandez*, 124 N.Y.S.3d 205, 206 (N.Y. App. Div. 2020) (reinstating the plaintiff’s cause of action alleging rent overcharge against defendant landlord; however, ordered use pre-HSTPA rules to assess damages plaintiffs are entitled).

Metro holding will continue to impact tenants seeking reimbursement of rent paid in excess to that of the legal rent, but it also hinders and weakens the HSTPA's intended effects to strengthen tenant rights and increase the ability for tenants to commence actions against landlords' inherently deceptive and misleading conduct.

D. The Dissent's Concern, and the Court of Appeals Historical Rulings on the Issue of Retroactive Application

The dissent in *Regina Metro* expressed criticism and concern of the precedent the majority has set and the potential dangers that could emerge from the holding rendered, notwithstanding the clear language of Part F to apply to cases *pending*. Specifically, the dissent argued the majority's decision is "analytically indistinguishable" from the Supreme Court decision of *Lochner v. New York*.⁶³ The *Lochner* decision was decided after New York State had passed a statute setting maximum working hours, and the Supreme Court held the statute was unconstitutional because "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."⁶⁴ As a result, the Supreme Court struck down the state statute as an improper exercise of police power.⁶⁵

The dissent argues that a landlord's constitutional rights are not infringed whatsoever if the statute permits retroactive application, which is meant to address the City's housing crisis.⁶⁶ Instead, the dissent exclaims the rights infringed are merely economic rights or interests, and the legislature has a right to enforce and regulate, similar to the power the legislature possessed in enforcing labor laws and maximum working hours in *Lochner*, irrespective of the outcome of the case.⁶⁷ The court concluded by contending that although the majority acknowledged the legislature's right to pass legislation in accord with policy decisions to remediate crises, particularly the housing crisis, this belief and acknowledgement was "here unrecognizable, as we deny the legislature the right to determine how best to address New York City's housing crisis," and the court

63. *Matter of Regina Metro. Co., LLC*, 154 N.E.3d at 1011.

64. *Lochner v. New York*, 198 U.S. 45, 53 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

65. *See Lochner*, 198 U.S. at 64.

66. *See Matter of Regina Metro. Co., LLC*, 154 N.E.3d at 1003.

67. *See id.*

overstepped its bounds as a judicial power to prevent the legislature from determining the solutions.⁶⁸ The dissent observed the Court of Appeals reverting to the *Lochner* era with its decision and holding.⁶⁹

The denial of retroactive application based on substantive due process rights is the first time the Court of Appeals has held in such a way, but not the first time the Court of Appeals has rendered decisions on the issue of retroactivity. For example, in *Matter of World Trade Center Lower Manhattan Disaster Site Litigation*, the Court of Appeals considered the possibility of retroactive application for New York Legislature's amendment of a law to revive the plaintiffs' claims for one year after its enactment because the plaintiffs were time-barred from asserting a claim concerning recovery for illnesses they developed cleaning the City after 9/11.⁷⁰ The court held that the law could be applied retroactively because it satisfied the State Due Process Clause.⁷¹ Moreover, the court stated the amendment of the statute did not violate the defendant's substantive due process rights because the revival was only for a limited time of one year and was reasonable in light of the injustice for workers harmed after 9/11.⁷² The court concluded by explaining "[i]n the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of plaintiffs is blameless; *such moral determinations are left to the elected branches of government.*"⁷³ Prior to this decision, the Court of Appeals also permitted retroactive application in *Hymowitz v. Eli Lilly & Co.*⁷⁴ This case concerned another amendment to a statute where the plaintiffs were time-barred from commencing a claim against a drug company for a drug that harmed them during pregnancy because the injury was discovered after the statute of limitations period tolled.⁷⁵ Similar to the facts in *In Re World Trade Center*, the legislature revived the claim for one year.⁷⁶ However, unlike in *Regina Metro*, the Court of Appeals in *Hymowitz* stated that a strict test is used to assess whether retroactive application can apply when "the circumstances

68. *Id.* at 1031.

69. *See id.*

70. *See* 89 N.E.3d 1227, 1230 (N.Y. 2017).

71. *See id.* at 1243.

72. *See id.*

73. *Id.* (emphasis added).

74. *See* 539 N.E.2d 1069, 1079 (N.Y. 1989).

75. *See id.* at 1078.

76. *See id.* at 1079.

are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated.”⁷⁷ Alternatively, the Court of Appeals states a less strict test is used when an injustice calls for a “remedy” that is “‘reasonable’ and not ‘arbitrary.’”⁷⁸ The court did not choose which test to use because the plaintiffs had satisfied both to allow retroactive application after revival and amendment of the statute.⁷⁹

There are clear differences between the *Hymowitz* and *Matter of World Trade Center* decisions from the holding and facts in *Regina Metro*. The first key difference is that the two cases before *Regina Metro* only concerned limited revival of causes of actions while the HSTPA has been amended for the foreseeable future. Additionally, the plaintiffs in the two cases did not discover their injuries until after the statute of limitations was tolled, and thus, the Court of Appeals set out to correct an injustice. It could be argued however, that the housing crisis is an “injustice” that must be addressed by the legislature, especially considering the longevity and persistence of the housing crisis, which initially was being addressed in the mid-twentieth century and continues into the modern day.

E. Retroactivity: Problems and Strengths

The concept of retroactive application after a substantive change in civil law is one that has not been discussed or articulated in as much depth compared to that of retroactive application in criminal cases and statutes. In fact, the U.S. Constitution article 1 sections 9 and 10 prohibit *ex post facto* legislation under both federal and state governments; however, this has only been interpreted to apply to criminal laws.⁸⁰

Nonetheless, there are two types of retroactive laws that come into effect from a legislature’s fruition. First, there is primary retroactivity, which “alters the legal consequences of past private action,” and it is action that was “permissible at the time it occurred,

77. *Id.*

78. *Id.* (citing *Robinson v. Robins Dry Dock & Repair Co.*, 144 N.E. 579, 582 (1924)).

79. *See id.*

80. *See generally* Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 TOLEDO L. REV. 301, 302 (1996) (discussing *ex post facto* laws in the criminal sphere).

[but] is either made impermissible, or is burdened, in the past.”⁸¹ Alternatively, secondary retroactivity, which is the type of retroactivity seen in both *Regina Metro* and *Landgraf*, is one where (1) there was an “old law” adopted by the legislature; (2) after private conduct “occurs consistent with, or perhaps because of, this old law”; (3) a “new law” is adopted; and (4) the new law “affects the legal consequences of the private conduct that occurred under the old law.”⁸²

Further, two views arise when analyzing retroactive application: an analytic argument and a normative argument. Under the analytic argument, the concept of law is being used as a “means of societal ordering and control.”⁸³ In other words, “[i]f a law has yet to be enacted, limiting or adjusting one’s behavior . . . is a temporal impossibility.”⁸⁴ Pursuant to the normative view, it is difficult to demand a person to “behave” under a retroactive application to a rule when that person was not put on notice that his or her conduct was forbidden.⁸⁵

This latter argument is pertinent when it comes to disallowing secondary retroactive legislation by the courts because the application “holds the potential of adversely affecting those who in good faith have reasonably relied on the then extant legal regime.”⁸⁶ Thus, secondary retroactivity is “entirely at odds” with the view that law should be “clear and understandable” to be applied consistently, leading to prospective application being seen as within the scope of the type of thinking the law and courts have tended to mold.⁸⁷ Conversely, the justification for tolerating secondary retroactivity is that a “system of laws which is purely prospective in nature would be too confining and limiting to a lawmaker wishing to improve the status quo.”⁸⁸ Retroactive application is beneficial because it allows the legislature to “fix” any issues occurring due to the old laws passed, which have neither worked nor produced the results intended.⁸⁹

Nevertheless, courts highly disfavor secondary retroactivity.

81. Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 87 (1997) (discussing primary and secondary retroactivity).

82. *Id.* at 92.

83. Ricciardi & Sinclair, *supra* note 80, at 329.

84. *Id.* at 330 (footnote omitted).

85. *See id.*

86. Laitos, *supra* note 81, at 99.

87. *Id.* at 108.

88. *Id.* at 99.

89. *See id.*

This aversion is displayed in the 1814 case of *Society for the Propagation of the Gospel v. Wheeler*.⁹⁰ In *Wheeler*, Judge Story stated “[u]pon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.”⁹¹ Judge Story later went on to hold that statutes can be declared void if there is secondary retroactivity applied, and a strict rule was established that even when there was legislative intent, the statute could still be ruled void for retroactive application if interests, such as under property or contract law, had not already been vested by prior laws.⁹² During the twentieth century, this strict rule coming out of the *Wheeler* case was not utilized; instead, the Supreme Court tended to interpret the viability of secondary retroactive applications of statutes under the Due Process Clause, Takings Clause, and Contracts.⁹³ These applications tended to be less strict than the *Wheeler* test, and the “courts’ reluctance to use of the Constitution’s property-protective clauses to halt backwards-looking legislation, meant that secondary retroactivity was routinely upheld by courts.”⁹⁴ Regardless of this shift, the Supreme Court in *Landgraf* transferred itself back to the strict test designed in *Wheeler*, making it difficult to overcome the supposed presumption created for a court to preclude retroactivity without a clear legislative intent; it also returned to a “vested rights” theory of retroactive application.⁹⁵

Prior to the *Landgraf* ruling, there was disagreement and little conversation as to retrospective versus prospective application of the laws.⁹⁶ Therefore, the misunderstanding surrounding the *Regina* decision is in part due to the confusion by courts in attempting to discern when retroactive application is required due to the back and forth regarding the leniency of the test to use; the *Landgraf* case has built a higher barrier for legislatures and advocates to overcome the presumption against retroactivity.⁹⁷ In fact, this is what the dissent was alluding to in *Regina Metro* during its stand against the holding

90. 22 F.Cas. 756 (C.C.D.N.H. 1814).

91. *Id.* at 767.

92. *See* Laitos, *supra* note 81, at 109–10.

93. *See id.* at 111.

94. *Id.* at 115.

95. *See id.* at 122.

96. *See id.*

97. *See generally* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

by arguing that merely economic rights were being harmed rather than property or contract rights—i.e. vested rights.⁹⁸ As a result, in accordance with the dissent, because the problems legislatures are faced with when entertaining changes or enactments of new criminal laws, which involves higher stakes as a defendant could lose his or her freedom, this apprehension in civil law does not exist. Nevertheless, the *Regina Metro* decision has made it difficult for a tenant in housing court to succeed under the HSTPA, and it will not only change the way overcharge damages are calculated for some time considering the length cases stay in housing court, with the volume of cases in the City estimated to reach 50,000 or 60,000 not including those filed prior to COVID-19 shutdowns,⁹⁹ but also increasing wariness to the problems the holding can create in other sections of the HSTPA, such as Part K's MCI calculation changes. Although the Court of Appeals acts as if they are giving deference to the legislative branch, the court is in fact moving away from permitting the legislature to act in a way that it deems is necessary for policy reasons.

III. MCI'S: AMENDMENTS PURSUANT TO THE HSTPA, POTENTIAL PROBLEMS ARISING POST-REGINA, AND THE COURT OF APPEALS LACK OF DEFERENCE TO THE LEGISLATURE

Inquiries arise when the legislature passes or amends legislation. The most notable argument, at least for law students during their studies, is who is best to address the political, economic, and/or social problems—the legislature or the court? Some might argue courts are in the best position to address any policy concerns arising in the modern era because courts tend to act apolitical, whereas legislatures are easily persuaded by the political demands of the powerful.

This point of view, however, does not represent the vast majority of legislatures across the country; even taking New York State as an example, the legislature passed the HSTPA in order to address the pressing problem of the housing crisis in the City, arguably favoring the tenants over the “powerful” landlords and their advocates. Legislatures, but also governmental agencies, are in tune with the

98. See *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Cmty. Renewal*, 154 N.E.3d 972, 1105–31 (N.Y. 2020) (Wilson, J., dissenting).

99. See Matthew Haag, *A Moratorium on Evictions Ends, Leaving Thousands of Tenants Fearful*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/nyc-evictions-moratorium-coronavirus.html>.

needs and desires of their constituents more so than the courts, which should compel courts to defer to the agencies on the reasons and decisions behind a passage or amendment of law. Without this deference, decisions will be rendered without paying close attention to the troubles arising in local towns and cities where the people have nominated certain legislators, who in turn create agencies, to remedy. Thus, the Court of Appeals should have deferred to the agencies on its decision to draft not just Part F, but also, presumably, Part K MCI amendments pursuant to the HSTPA.

A. Part K of HSTPA: Amendments

Along with Part F overcharge claims, the HSTPA also considerably altered and amended the eligibility, notice requirements, and calculation rent increases due to an owner's investment into MCIs. Generally, the Division of Housing and Community Renewal ("DHCR"), an organization that maintains and supervises rent-regulated and low-income housing, allows rent increases for MCIs, such as adding new boilers and/or new plumbing.¹⁰⁰ It is the owner's responsibility to file an application for rent increase for apartments subject to the RSL, where DHCR can either accept or deny the application.¹⁰¹

Under the HSTPA, there were several additions affecting an owner's ability to increase rent and receive eligibility by the DHCR for the increase. For example, the HSTPA altered the six percent cap of MCI increases to two percent.¹⁰² Additionally, that two percent cap can apply to renewal leases or rent increases approved between June 16, 2012 and June 15, 2019.¹⁰³ Further, the rent increase is now only temporary and must be removed after thirty years; once the thirty years ceases, DHCR must give notice to the tenants and owners sixty days prior to the end of the MCI increases about the change in rent and the total amount of rent that is due without the MCIs.¹⁰⁴ MCIs are also now prohibited when the building charges thirty-five percent or fewer rent regulated apartments, while also prohibiting MCI increases

100. See #26 *Guide to Rent Increases for Rent Stabilized Apartments*, N.Y. STATE DIV. OF HOUS. AND CMTY. RENEWAL, (Sept. 2019), https://www.msnhlaw.com/docs/fact_sheet_-_rent_increases_for_rent_stabilized_apts.pdf.

101. See *id.*

102. See N.Y. Rent Stabilization Code § 26-511.1(8).

103. See *id.*

104. See N.Y. Rent Stabilization Code § 26-511.1(7)-(8).

when the building has an unresolved hazardous or immediately hazardous condition.¹⁰⁵

The extensive changes leave Part K vulnerable to the same constitutional questions of retroactivity that faced Part F of the HSTPA. Similar to the arguments made in *Regina Metro*, retroactive application of Part K harms owners who were abiding by the old rule, specifically when it comes to the decreased cap permissible for MCI increases. Additionally, many owners who initially thought they would be eligible to increase rent may no longer be eligible under the new rule if there are either thirty-five percent or less of apartments regulated, or if there are hazardous violations outstanding in the building. Most significantly, landlords will certainly argue against the retroactive effect of the two percent cap because it “unjustly penalizes landlords who relied on then-existing law,” especially when it takes years for DHCR to approve MCI increase applications.¹⁰⁶ Tenants have also disliked, and continue to argue against, the MCI program post HSTPA, by stating it “reward[s] fraud, as landlords take exorbitant rent increases with no oversight over the work or the validity of costs beyond the tenant themselves”¹⁰⁷ Subsequently, tenants also argue the MCI program is a way for landlords to deregulate apartments.¹⁰⁸ Due to these disagreements, it is likely that Part K of the HSTPA will be subject to constitutional challenge if applied retroactively.

However, the most significant reason why Part K could potentially be subject to constitutional challenges on its retroactive applications is that the effective language date is more ambiguous than Part F’s “claims pending” language.¹⁰⁹ Instead, Part K ends by stating that the amendments will “take effect immediately” without any language of pending claims.¹¹⁰ As a result, the courts might argue against retroactivity absent clear legislative intent to require such administration and due to the lack of notice owners possessed to the new changes.

105. See N.Y. Rent Stabilization Code § 26-511.1(6)–(8).

106. Gerald Lebovitz et al., *NY’s Housing Stability and Tenant Protection Act of 2019-Part II – What Lawyers Must Know*, N.Y. STATE BAR ASS’N (Nov. 1, 2019), <https://nysba.org/nys-housing-stability-and-tenant-protection-act-of-2019-part-ii-what-lawyers-must-know/>.

107. *Id.*

108. See *id.*

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

110. N.Y. Rent Stabilization Code § 26-511.1.

B. Judicial Deference: Reshaping the Court's Thinking Approach to Retroactivity

Due to the challenges facing the MCI amendments, intended to address the concerns tenants have with landlords' superfluous improvements, the courts must weigh the legislative intent in passing these laws. The idea of judicial deference, the relationship between the court and different branches of government, has been questioned when discussing the federal courts' judicial deference towards decisions or policies generated by administrative agencies.¹¹¹ This stance by the federal courts emerged under the Supreme Court case of *Chevron, U.S.A. v. NRDC, Inc.*, where the Court was considering a disagreement over the change of the Environmental Protection Agency's interpretation of an amendment to the Clean Air Act allowing plants to receive permits for equipment that did not meet emission standards so long as the emissions did not increase with the new equipment.¹¹² The Court stated:

[T]he principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended on more than ordinary knowledge representing the matters subjected to agency regulations.'¹¹³

The Court established a two-prong test to assess an agency's interpretation by first analyzing whether the statute passed by Congress delegated to the agency is ambiguous, and second, if it is ambiguous, to assess whether the interpretation by the agency is reasonable.¹¹⁴ If the statute is not ambiguous, or if there is an express intent by Congress, the inquiry ends, and the agency must abide by Congress's clear interpretation.¹¹⁵ As a result, this holding has been

111. See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2032–34 (2011) (discussing critiques of judicial deference towards administrative agencies).

112. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 840 (1984).

113. *Id.* at 844.

114. See *id.* at 842–43.

115. See *id.*

beneficial to agencies litigating against complaints of their policies. Between 2003 and 2013, if the statute was found ambiguous under the threshold question of the *Chevron* test, agencies prevailed around 77.4% under the second prong of the test.¹¹⁶

The *Chevron* deference, as it has been coined, has been met with both extreme skepticism and credibility. Some argue the *Chevron* deference is beneficial when interpreting administrative decisions because the agencies “cannot function effectively if they do not possess substantial discretion to set agency policy.”¹¹⁷ In other words, an agency must have the flexibility to “adjust its regulations in the face of scientific or economic progress . . .”¹¹⁸ This allows the agency to shift its policy goals in favor of newer, preferable policies without obstacles, especially if Congress has given deference to the agencies in its legislative enactments.¹¹⁹ The other side of the argument, however, states the *Chevron* ruling violates the separation of powers doctrine.¹²⁰ Supreme Court Justice Gorsuch, just one of many opponents, was also skeptical of the constitutionality of the *Chevron* decision during his tenure at the Tenth Circuit.¹²¹ Other Supreme Court justices, including Chief Justice Roberts and Justice Thomas, are seeking to either confine or limit *Chevron’s* holding.¹²² Critics also argue that judicial deference to administrative agencies is counterintuitive because we “assume that judicial review would be . . . desirable, when unelected, less accountable officials design the challenged policies.”¹²³ Subsequently, this deference to agencies could potentially harm individual rights, even though courts have “bold pronouncements of judicial supremacy elsewhere . . .”¹²⁴ Although the Supreme Court has attempted to limit *Chevron’s* scope, the case remains good law.¹²⁵

116. See Alison Frankel, *The (Other) Attack on Chevron Deference*, REUTERS (Dec. 8, 2017, 5:46 PM), <https://www.reuters.com/article/frankel-chevron-otc/the-attack-on-chevron-deference-idUSKBN1E22SM>.

117. Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1026 (2007).

118. *Id.*

119. See *id.* at 1026, 1030.

120. See Frankel, *supra* note 116.

121. See *id.*

122. See Cass R. Sunstein, *Chevron as Law*, 17 GEO. L.J. 1613, 1616, 1657 (2019).

123. Berger, *supra* note 111, at 2032.

124. *Id.* at 2033.

125. See Sunstein, *supra* note 122, at 1615–16.

C. Reframing the Judicial Deference Towards the Legislature:
Preventing Important Policy Decisions such as Part K from
Facing the Same Consequences as Part F of the HSTPA

The significant problem stemming from *Regina Metro* is that it does not give the legislature and the agencies implementing the laws enough credit to its reasoning for passing the HSTPA, which is one of the many criticisms the dissent had with the majority's viewpoints.¹²⁶ By creating a strict test to analyze the constitutionality of an application of a statute that is specifically about economics, especially when the language of the statute clearly seeks to apply to "claims pending,"¹²⁷ the court has hindered the legislature's power to enact laws deemed to be beneficial for society in the modern day. Therefore, as the Supreme Court has shifted to deference towards unelected officials in executive agencies, the New York courts should also issue slight deference towards New York State agencies, such as the DHCR, that are interpreting, what the Court of Appeals has argued in *Regina Metro*, "vague" or "ambiguous" language.

The reach of the *Chevron* deference, however, goes too far, increasing its chances for the constitutionality argument of separation of powers to arise. Thus, the full impact or rules assessed by the Supreme Court when interpreting agency decisions or interpretations cannot work in the long term in interpreting agency actions, as doubt is already clouding the Supreme Court's *Chevron* decision.¹²⁸ It would be most useful to find a middle ground between the *Regina Metro* and *Chevron* cases to avoid the constitutionality arguments and to maintain the rights for the legislatures and agencies to do its job as outlined in the Constitution. It is well argued that the *Chevron* deference is not perfect, especially in this specific context dealing with a presumption against retroactivity. But with certain tweaks, it will become less difficult for the New York legislature to propose legislation over concerns of the housing crisis that has harmed and implicated the City's inability to progress, specifically in its battle with the aftereffects of COVID-19. Examining agency decisions is imperative to this analysis because most of the tenants affected by the HSTPA legislation are rent-regulated by the agencies themselves. This new proposition, however, should not be considered the new

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

127. *Id.*

128. See Sunstein, *supra* note 122, at 1615–16.

“test” in interpreting every statute. Instead, it should only be used in very specific factual scenarios.

In essence, the Court of Appeals and the lower courts of New York must avoid reverting to the *Lochner* era when assessing legislative and agency actions focusing on economics and policy.¹²⁹ By circumventing the *Lochner* era, the key goals of deference to the legislature can be achieved once again, however, only in very narrow circumstances as separation of powers still looms over the heads of the branches of government.

First, it is vital to start with the two-prong test because it is an essential benchmark of how most legislation is interpreted by the executive branch. Here, the Court of Appeals in *Regina Metro* did find the effective language date of Part F ambiguous and vague, and will potentially also find the language of Part K ambiguous or vague if it were to reach litigation.¹³⁰ As a result, because there will be a high likelihood of finding ambiguous language from the statute by the Court of Appeals, the next step under the *Chevron* deference is to look into how agencies have been interpreting the legislature’s words.

Nonetheless, unlike in *Chevron*, it is most likely not a wise choice for the courts to use a “reasonableness” standard to examine an agency’s interpretation of an ambiguous statute or provision passed by the legislature because it is such a low bar and will most certainly clash with the retroactivity analysis most courts have followed. Instead, perhaps a more intermediate test is beneficial to achieve balance and avoid separation of powers and constitutional arguments.

Accordingly, just as the Supreme Court defers to the federal agency’s interpretation of a statute when it is ambiguous, the Court of Appeals should somewhat defer to what the agencies in New York are doing and operating in the scope of the HSTPA in conjunction with the housing crisis to assess the broad purpose of the actual legislation in real life action. This is quite different from Justice Scalia’s methodology of looking at the legislative history when the statute’s plain meaning is ambiguous.¹³¹ As a result, this will give a clearer picture as to the problems impacting the City outside of the legislative history, which can be complex to evaluate considering the number of

129. See *Matter of Regina Metro. Co., LLC*, 154 N.E.3d at 389 (Wilson, J., dissenting) (arguing a reversion back to *Lochner*).

130. See *Matter of Regina Metro. Co., LLC*, 154 N.E.3d at 403.

131. See Elizabeth A. Liess, *Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568, 569 (1993).

voices involved in passing a piece of legislation such as the HSTPA. Although a reasonableness standard is far too harsh, as seen in the criticisms arising from the *Chevron* deference, some higher level of scrutiny on the agencies of the State can provide a better emphasis on how the HSTPA has been interpreted and continues to operate by the agencies, specifically an agency such as the DHCR in implementing rent changes in light of MCIs produced by the landlord.

IV. CONCLUSION

To reiterate, this proposition should only apply in narrow circumstances, such as the prolonged housing crisis, because not all amendments to statutes deserve or require retroactive application, and this could leave the courts with tremendous troubles in resolving the presumption against retroactivity. Nonetheless, the housing crisis afflicting the City presents considerable problems in the face of economic inequity and has only been compounded due to the COVID-19 pandemic. The Court of Appeal's response to the HSTPA amidst the deadly pandemic only enhances the need for the court to reevaluate its approach in handling retroactive application of amendments that are specifically designed economically to aid tenants with minimal bargaining power despite the rise of rent regulation. The *Chevron* deference test is not perfect. Regardless, this deference, although maybe too overreaching, provides a great beginning point for the courts in New York to reassess the issue of retroactivity when there are serious policy considerations, such as regulated housing, being implicated in the decision.