

# NOTES

## INTERIOR LANDMARKS PRESERVATION AND PUBLIC ACCESS

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*For over half a century, New York City's groundbreaking Landmarks Preservation Law has protected the city's most significant structures and spaces. Yet today, some of New York's most celebrated interior landmarks are closed off to the public, the very group for whose benefit the spaces have been protected. In order to receive a landmark designation, an interior must be "customarily open or accessible to the public, or to which the public is customarily invited." It is not clear, however, that there is any mechanism for ensuring the interior remains accessible to the public once it has been designated or that such a mechanism would withstand constitutional scrutiny under the Takings Clause. While there may be several ways to ensure that the public has access to landmark interiors, this Note argues that the most promising are those that depend on the cooperation of government, the public, and most importantly, owners of landmarks, rather than those that seek to prevent restricted access over owners' objections.*

### INTRODUCTION

Last year marked the fiftieth anniversary of New York City's Landmarks Preservation Law, itself a landmark piece of municipal legislation that pioneered local-government protection of individual buildings, outdoor spaces, and districts of historic, aesthetic, and architectural significance in the city's five boroughs.<sup>1</sup> It is hard to overstate the impact of the Landmarks Law. Nearly a third of the properties in Manhattan alone are now designated landmarks—over 35,000 are protected across all boroughs<sup>2</sup>—and the law has prevented the destruction or permanent alteration of many of the city's most beloved structures,

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1. Landmarks Preservation and Historic Districts (Landmarks Law), N.Y.C., N.Y., Admin. Code §§ 25-301 to -322 (2013).

2. See About the Landmarks Preservation Commission, N.Y.C. Landmarks Pres. Comm'n, <http://www.nyc.gov/html/lpc/html/about/about.shtml> [<http://perma.cc/D96Z-QUN7>] [hereinafter N.Y.C. Landmarks Pres. Comm'n] (last visited Aug. 3, 2016) ("There are more than 35,000 landmark properties in New York City, most of which are located in 139 historic districts and historic district extensions in all five boroughs. The total number of protected sites also includes 1,364 individual landmarks, 117 interior landmarks and 10 scenic landmarks.").

including Grand Central Terminal.<sup>3</sup> Moreover, as one of the earliest attempts at creating a comprehensive plan for historic preservation with significant protections for individual buildings, the Landmarks Law has created a legacy that extends far beyond New York City.<sup>4</sup> As was already apparent to observers twenty-six years ago on the occasion of the law's twenty-fifth anniversary, New York's successful experiment with preservation has "implications that go beyond New York and extend to every community in the country."<sup>5</sup>

New Yorkers celebrated the semicentennial with characteristic fanfare. A group of local preservation organizations came together as the NYC Landmarks50 Alliance to commemorate it by organizing events and projects, placing ads in subway cars, and providing interactive maps and resources online.<sup>6</sup> Several museums presented special exhibits on the city's landmarks,<sup>7</sup> and books were published celebrating the buildings

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3. See Editorial, *New York City's Landmarks Law at 50*, N.Y. Times (Apr. 17, 2015), <http://www.nytimes.com/2015/04/18/opinion/new-york-citys-landmarks-law-at-50.html> (on file with the *Columbia Law Review*) [hereinafter *Landmarks Law at 50*] (describing impact and continued importance of New York City's Landmarks Law).

4. See *infra* Part I (describing historical development of U.S. historic-preservation laws).

5. Paul Goldberger, *Architecture View; A Commission that Has Itself Become a Landmark*, N.Y. Times (Apr. 15, 1990), <http://www.nytimes.com/1990/04/15/arts/architecture-view-a-commission-that-has-itself-become-a-landmark.html> (on file with the *Columbia Law Review*); see also Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *Cornell L. Rev.* 745, 795 (2009) ("Were New York City to lose all of its historic architectural patrimony, its culture would be not merely different but civically impoverished. Distinctive architectural sites are integral to an urban community's identity and the identities of its inhabitants."); Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *Stan. L. Rev.* 473, 477–79 (1981) (noting landmark designation is "fraught with tax consequences and use restrictions," can "carry an extraordinary emotional force," and may be critical "in providing procedural vehicles for community organization and activity").

6. See Mission, NYC Landmarks50 All., <http://www.nylandmarks50.org/about.html> [<http://perma.cc/6T8L-FMDY>] (last visited Aug. 29, 2016).

7. See Press Release, Metro. Transp. Auth., *New York Transit Museum Installs New Exhibit Celebrating the 50th Anniversary of New York's Landmarks Law* (Mar. 13, 2015), <http://www.mta.info/news-transit-museum-landmarks-law-grand-central/2015/03/13/new-york-transit-museum-installs-new> [<http://perma.cc/G5UV-AFHR>] (announcing new exhibit at Transit Museum focusing on transportation landmarks); Press Release, Museum of the City of N.Y., *Saving Place: 50 Years of New York City Landmarks* Opens at the Museum of the City New York in Conjunction with 50th Anniversary of the Landmarks Law (Apr. 20, 2015), <http://www.mcny.org/sites/default/files/MCNY%20Saving%20Place%20Press%20Release%20-%20Final.pdf> [<http://perma.cc/JF3S-B967>] (announcing new exhibition highlighting "expansion and evolution of the landmark law over time"); Press Release, NYC Landmarks50 All., *NYC Landmarks50 Advisory Committee Formed to Commemorate the 50th Anniversary of the NYC Landmarks Preservation Law on April 19, 2015* (Apr. 10, 2013), [http://www.nylandmarks50.org/pdfs/press\\_releases/NYC%20Landmarks50%20Advisory%20Committee%20Formed.pdf](http://www.nylandmarks50.org/pdfs/press_releases/NYC%20Landmarks50%20Advisory%20Committee%20Formed.pdf) (on file with the *Columbia Law Review*) (announcing new exhibition at Queens Museum of Art, "Marking Spaces: New York City's Landmark Historic Districts").

that the Landmarks Law has protected over the years.<sup>8</sup>

The celebrations were especially notable because, for the first time, landmarked interior spaces were a focus of public attention.<sup>9</sup> Protected interiors, in the world of New York City historic preservation, are exceptionally rare—since the Landmarks Law was amended to include interiors in 1973, only 117 have received landmark designations.<sup>10</sup> In March, the New York School of Interior Design organized an exhibition, “Rescued, Restored, Reimagined: New York’s Landmark Interiors,”<sup>11</sup> which was the first show of its kind to focus exclusively on the city’s interior landmarks. Also a first was a book published celebrating forty-seven of the interiors,<sup>12</sup> which in turn led to more coverage by blogs.<sup>13</sup>

Though the rising awareness of and increased interest in protecting New York City’s treasured interiors is certainly worth celebrating, the anniversary of the Landmarks Law also provides an opportunity to shed light on a more troubling aspect of the current state of interior preservation: the disconnect between the law’s purpose and the law in action. The law’s stated purpose is to “foster civic pride in the beauty and noble accomplishments of the past[,] . . . protect and enhance the city’s attractions to tourists and visitors,” and “promote the use of . . . interior landmarks . . . for the education, pleasure and welfare of the people of the city,” yet the law provides no way to ensure that “the people of the city” actually have access to interior landmarks.<sup>14</sup> In order to receive a landmark designation in the first place, an interior must be one “customarily open or accessible to the public, or to which the public is customarily invited.”<sup>15</sup> But it is not clear that there is any mechanism for ensuring the interior remains accessible to the public once it has been designated or that such a mechanism would withstand constitutional

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8. Judith Gura & Kate Wood, *Interior Landmarks: Treasures of New York* (2015); *Saving Place: 50 Years of New York City Landmarks* (Donald Albrecht & Andrew S. Dolkart with Seri Worden eds., 2015).

9. For a list of many of New York City’s interior landmarks, complete with photographs and background information, see N.Y. Sch. of Interior Design, *What Is a Landmark Interior?*, *Rescued Restored Reimagined: N.Y.’s Landmark Interiors*, <http://landmarkinteriors.nysid.net/landmarks-101/> [<http://perma.cc/8XHD-P3VF>] [hereinafter *N.Y. Sch. of Interior Design, What Is a Landmark Interior?*] (last visited Aug. 4, 2016).

10. N.Y.C. Landmarks Pres. Comm’n, *supra* note 2.

11. See N.Y. Sch. of Interior Design, *What Is a Landmark Interior?*, *supra* note 9.

12. Gura & Wood, *supra* note 8.

13. See, e.g., Mark Byrnes, *Browsing New York’s Most Treasured Interiors*, *Atlantic CityLab* (Aug. 26, 2015), <http://www.citylab.com/navigator/2015/08/browsing-new-yorks-most-treasured-interiors/402280/> [<http://perma.cc/MWL3-LWXA>] (“Interiors are landmarks, too.”); Zoe Rosenberg, *Peek Inside 9 of New York City’s Pristine Interior Landmarks*, *Curbed N.Y.* (Sept. 1, 2015, 3:31 PM), [http://ny.curbed.com/archives/2015/09/01/peek\\_inside\\_9\\_of\\_new\\_york\\_citys\\_pristine\\_interior\\_landmarks.php](http://ny.curbed.com/archives/2015/09/01/peek_inside_9_of_new_york_citys_pristine_interior_landmarks.php) [<http://perma.cc/US6A-2XFG>] (highlighting interiors as part of series of posts on “Landmarks at 50”).

14. Landmarks Law, N.Y.C., N.Y., Admin. Code § 25–301(b) (2013).

15. *Id.* § 25–302(m).

scrutiny. Thus, the public may have limited or no access to interiors that are ostensibly protected for its benefit.

This Note explores possibilities for ensuring that the public retains access to admire and learn from those interior spaces that have sufficient historical, cultural, or architectural value to have been designated historic landmarks. Part I will examine the historical background of historic preservation, trace the history of legal challenges to preservation in the courts, and outline the mechanics of New York City's preservation statute. Part II will examine the accessibility of landmarked interiors and the lack of measures available to enforce continued public access. Part III will analyze possible ways to ensure public access, including regulation, eminent domain, and cooperation with owners. This Note ultimately finds that the most promising solutions to the problem of public access to landmark interiors are those that encourage the cooperation of government, the public, and most importantly, owners of landmarks, rather than those that seek to prevent restricted access over owners' objections.

While this Note focuses on landmarked interiors in New York City, it relies, as all historic preservation does, on the constitutional jurisprudence of the U.S. Supreme Court and lower courts in other jurisdictions. The relevance of this issue also extends beyond New York to all of the many jurisdictions in the country in which interiors may be designated as historic landmarks and to those that might consider authorizing the landmarking of interiors in the future.

## I. HISTORIC PRESERVATION AND NEW YORK CITY'S LANDMARKS LAW

Though historic preservation has been recognized as a worthwhile goal since antiquity, it emerged as an accepted feature of the municipal legal landscape only over the last half-century.<sup>16</sup> This Part explores the history of preservation and the way that U.S. courts handled the constitutional issues that arose as local governments began to take on more active roles in the protection of significant buildings and spaces within their jurisdictions. Section I.A summarizes the historical background of historic preservation. Section I.B traces the history of legal challenges to preservation since the midtwentieth century, and section I.C looks at challenges to interior landmarking in particular. Finally, section I.D briefly explains the mechanics of New York City's preservation statute.

### A. *Historical Background*

The historic-preservation movement in the United States began in the early nineteenth century, mostly in the form of local responses to the

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16. Scott H. Rothstein, Comment, Takings Jurisprudence Comes in from the Cold: Preserving Interiors Through Landmark Designation, 26 Conn. L. Rev. 1105, 1106-11 (1994).

threatened destruction of individual buildings in which a famous person had lived or an important event had taken place.<sup>17</sup> New Orleans, Charleston, and San Antonio enacted the first local preservation ordinances in the 1930s, with a handful of cities following in the 1940s and 1950s.<sup>18</sup> These early laws applied to entire areas rather than individual structures, and the rationale given for them was economic rather than aesthetic: Preserving historic areas of the city would increase property values and promote tourism, among other beneficial effects.<sup>19</sup> The adoption of preservation ordinances spread rapidly in the late 1950s after the Supreme Court used language in *Berman v. Parker* that supported government action based on aesthetic considerations.<sup>20</sup> The Court explained that the “values [public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>21</sup>

In New York, the *Berman* decision coincided with the announcement in late 1954 of a plan to demolish and replace midtown Manhattan’s Grand Central Terminal, a building “regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.”<sup>22</sup> This threat spurred preservationists into action, and in 1956, the state legislature passed the Bard Act, which gave municipalities the

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17. See generally Christopher J. Duerksen & David Bonderman, Preservation Law: Where It’s Been, Where It’s Going, in *A Handbook on Historic Preservation Law* 1, 1–22 (Christopher J. Duerksen ed., 1983) (describing origins of historic-preservation movement).

18. *Id.* at 6.

19. *Id.* Economic reasons are still among the most common—and controversial—justifications given for preservation. In New York, for example, government officials consider preservation a “central component to long-term economic development.” Pres. League of N.Y. State, New York: Profiting Through Preservation 2–3 (2001), <http://www.placeeconomics.com/pub/placeeconomicspub2001.pdf> [<http://perma.cc/B5P3-2FBS>] (concluding historic preservation “contributes hundreds of millions of dollars annually to New York’s economy” through “[t]ourism, construction, housing, transportation, films, arts and culture, education, [and] community development”); *id.* at 4 (observing every “\$1 million spent rehabilitating an historic building in New York State ultimately adds \$1.9 million to the state’s economy”). But see Justin Davidson, Which New York Is Yours? A Fierce Preservationist and a Pro-Development Blogger Debate, *N.Y. Mag.* (May 1, 2015, 10:36 AM), <http://nymag.com/daily/intelligencer/2015/05/new-york-landmarks-law-debate.html> [<http://perma.cc/A6FJ-PR75>] (arguing economic benefits of historic preservation are disproportionately received by the wealthy); Michelle Higgins, Robin Finn & Constance Rosenblum, In 2013, the High End Ruled, *N.Y. Times* (Dec. 27, 2013), <http://www.nytimes.com/2013/12/29/realestate/a-sellers-market-for-manhattans-new-luxury-condos.html> (on file with the *Columbia Law Review*) (describing “seemingly endless debate about whether a landmark designation hurts real estate values”).

20. Duerksen & Bonderman, *supra* note 17, at 7.

21. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

22. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115 (1978).

legal authority to enact local landmarks-preservation laws.<sup>23</sup> In 1962, New York City Mayor Robert F. Wagner appointed the city's first Landmarks Preservation Commission (LPC), a mayoral agency that could designate historic landmarks but lacked any legal authority to protect the landmarks it so designated.<sup>24</sup> The impotence of this commission became dramatically apparent after it failed to prevent the demolition and replacement of the city's other major beaux-arts-masterpiece transportation hub, Pennsylvania Station, in 1963.<sup>25</sup> Though the destruction of the historic station is now commonly thought to have catalyzed the passage of the city's Landmarks Law,<sup>26</sup> the City Council did not in fact take action until two years later, after the demolition of the landmarked Brokaw Mansion at 1 East 79th Street.<sup>27</sup> In 1965, New York City became the first major city to pass a landmarks ordinance with significant legal protections for individual buildings.<sup>28</sup>

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23. Anthony C. Wood, *Preserving New York* 10, 138–43 (2008).

24. *Id.* at 2, 286–89.

25. See *id.* at 295–302 (describing failed campaign to prevent destruction of Pennsylvania Station). The legacy of the original Penn Station—its architectural value, its controversial destruction, and its replacement with what is certainly now one of the most maligned features of New York City's urban footprint—is still debated today. See, e.g., Rowley Amato, *What Would It Take to Rebuild the Original Penn Station?*, *Curbed N.Y.* (May 3, 2015, 11:30 AM), [http://ny.curbed.com/archives/2015/05/03/what\\_would\\_it\\_take\\_to\\_rebuild\\_the\\_original\\_penn\\_station.php](http://ny.curbed.com/archives/2015/05/03/what_would_it_take_to_rebuild_the_original_penn_station.php) [<http://perma.cc/3J7M-UPEU>] (“It's been over 50 years, but for many, the destruction of Charles Follen McKim's original Pennsylvania Station still stings (hey, even *Mad Men* mourned its passing.)”); David W. Dunlap, *Longing for the Old Penn Station? In the End, It Wasn't So Great*, *N.Y. Times* (Dec. 30, 2015), <http://www.nytimes.com/2015/12/31/nyregion/longing-for-the-old-penn-station-in-the-end-it-wasnt-so-great.html> (on file with the *Columbia Law Review*) (arguing old Penn Station is not deserving of reverence it now receives but rather was “ruined long before it was wrecked”); Landmarks Law at 50, *supra* note 3 (“Pennsylvania Station in 2015 is a monument to civic suffocation, a basement of low, dust-blackened ceilings, confusing corridors, beer-and-popcorn dealers, yowling buskers and trudging commuters.”); Liz Stinson, *NYC's Nightmarish Penn Station Is Finally Getting a Makeover*, *Wired* (Jan. 7, 2016, 7:08 PM), <http://www.wired.com/2016/01/nycs-nightmarish-penn-station-is-finally-getting-a-makeover/> [<http://perma.cc/ASA8-PH4Z>] (“New York City's Penn Station is the stuff of nightmares. The greasy pizza box of a building has some serious issues: For starters, it's devoid of natural light, overstuffed with cranky commuters, [and] lacking any respectable seating options . . .”). New York Governor Andrew Cuomo recently announced plans to redevelop the site into a “world-class transportation hub” that will “be better than it ever was.” Karissa Rosenfield, *New York Commits to Penn Station Transformation Plan*, *ArchDaily* (Jan. 8, 2016, 2:05 PM), <http://www.archdaily.com/780093/new-york-commits-to-penn-station-transformation-plan> [<http://perma.cc/9WLX-QLCG>].

26. See, e.g., Goldberger, *supra* note 5 (“To no small extent can we attribute the creation of the Landmarks Commission to the shock of Penn Station's loss: this really was a building that died so that other buildings might live.”).

27. See Wood, *supra* note 23, at 1–19 (questioning “myth of Pennsylvania Station”); *id.* at 333–51 (detailing reactions to demolition of Brokaw mansion and “huge boost” that demolition gave to preservation movement). See generally *id.* at 338–64 (describing legislative history of Landmarks Law).

28. Landmarks Law, N.Y.C., N.Y., Admin. Code §§ 25–301 to –322 (2013); Duerksen & Bonderman, *supra* note 17, at 13; cf. David Schnakenberg, *Speech: New York City's*

The LPC's preservation powers were expanded even further in 1973. After the demolition of the original Metropolitan Opera building at Broadway and 40th Street, and facing a new proposal to gut Grand Central Terminal, the City Council amended the Landmarks Law in 1973 to explicitly authorize the Commission to designate interiors as historic landmarks.<sup>29</sup>

B. *Constitutional Issues in Local Land Use Law*

1. *Early Development.* — The Takings Clause of the Fifth Amendment, which applies to the federal government and to state and local governments through the Fourteenth Amendment,<sup>30</sup> prohibits the government from taking private property for public use without paying just compensation.<sup>31</sup> The Supreme Court first resolved whether the Fifth Amendment proscribed government regulations that prevent the demolition of buildings or limit their height without compensation in *Welch v. Swasey* in 1909.<sup>32</sup> In *Welch*, the Court rejected a challenge to a Massachusetts statute that limited the heights of buildings in Boston without providing compensation to the buildings' owners.<sup>33</sup> The Court explained that the height restrictions, said to aid in fire prevention, were reasonable and appropriate measures to promote public safety.<sup>34</sup> Thirteen years later, the Court limited its holding in *Swasey*. In *Pennsylvania Coal Co. v. Mahon*, the Court held that if a government regulation "goes too far it will be recognized as a taking" for which just compensation must be paid.<sup>35</sup> Whether a regulation went too far depended in part on "the extent of the diminution" in value of the property affected by the regulation.<sup>36</sup>

In 1926, the Court applied this regulatory takings doctrine to a local zoning ordinance in *Village of Euclid v. Ambler Realty Co.*<sup>37</sup> The ordinance prohibited industrial development of Ambler's property, decreasing its value from \$10,000 per acre to \$2,500 per acre—a diminution in value of seventy-five percent.<sup>38</sup> The Court held that the ordinance did not consti-

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Landmarks Law, 18 Widener L. Rev. 259, 262 (2012) ("[New York City] is a city that's characterized and defined by two things: forward momentum and finite space. This is a recipe for demolition, and this is why New York City still badly needed a landmarks law.")

29. N.Y. Sch. of Interior Design, What Is a Landmark Interior?, supra note 9.

30. *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 238–39 (1897) (incorporating Fifth Amendment Takings Clause via Due Process Clause of Fourteenth Amendment).

31. U.S. Const. amend. V.

32. 214 U.S. 91 (1909).

33. *Id.* at 94, 106–07.

34. *Id.* at 106–07 (holding height restrictions are "reasonable, and . . . justified by the police power").

35. 260 U.S. 393, 415 (1922).

36. *Id.* at 413.

37. 272 U.S. 365 (1926).

38. *Id.* at 384.

tute a “taking” because it applied to many properties, not just the individual property, and because its purpose was to secure “the public health, safety and general welfare.”<sup>39</sup> *Euclid* was a major step forward for local governments’ ability to regulate land use, and the decades that followed saw the enactment of the country’s first local preservation ordinances.<sup>40</sup> Still, the *Euclid* decision left preservationists facing two significant uncertainties: first, whether local governments could act to protect individual buildings or parcels and second, whether they could regulate land use for aesthetic reasons, rather than merely for reasons of public health and safety.<sup>41</sup>

A breakthrough came in 1954 when the Court, in *Berman v. Parker*, heard a challenge to an exercise of eminent domain “to eliminate and prevent slum and substandard housing conditions” in Washington, D.C.<sup>42</sup> Writing for a unanimous Court, Justice Douglas used language that supported the exercise of government authority for aesthetic purposes. While “public safety, public health, morality, peace and quiet, law and order” were traditional examples of the exercise of municipal police power, the government could also use that power to address housing conditions that were “an ugly sore, a blight on the community which robs it of its charm.”<sup>43</sup> “It is within the power of the legislature,” he wrote, “to determine that the community should be beautiful as well as healthy.”<sup>44</sup>

Supported by this language and faced with developers’ continued destruction of historic buildings, state and local governments rapidly began to expand their roles in historic preservation.<sup>45</sup> New York City’s 1965 Landmarks Law, with its unique protection of individual designated buildings, was particularly vulnerable to a “takings” challenge, since the vast majority of buildings considered worthy of preservation under the law were privately owned.<sup>46</sup> That challenge would be brought in federal court four years after the law was passed.<sup>47</sup>

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39. *Id.* at 383, 397; see also Duerksen & Bonderman, *supra* note 17, at 5.

40. See *supra* notes 17–18 and accompanying text (describing early preservation laws).

41. See Duerksen & Bonderman, *supra* note 17, at 5–8 (detailing early history of preservation movement).

42. 348 U.S. 26, 26 (1954).

43. *Id.* at 32.

44. *Id.* at 33 (“The values [public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”).

45. See Duerksen & Bonderman, *supra* note 17, at 8–11 (describing years following *Berman* as an “extraordinary period of activity in preservation law”).

46. See *id.* at 13–14 (describing legal issues preservationists faced going into 1970s).

47. The Landmarks Law was upheld in New York state court in 1968. See *Trs. of Sailors’ Snug Harbor v. Platt*, 288 N.Y.S.2d 314, 315 (App. Div. 1968) (holding state has the “right, within proper limitations, . . . to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community”).



2. *The Developments of Penn Central*. — In 1968, Penn Central Transportation Co., owner of landmarked Grand Central Terminal, applied to the LPC for approval to construct an office tower on top of the terminal.<sup>48</sup> The Commission soundly rejected the proposal, describing the plan as “nothing more than an aesthetic joke.”<sup>49</sup> Penn Central sued, claiming that the application of the Landmarks Law in this instance constituted a “taking” of its property without just compensation in violation of the Fifth and Fourteenth Amendments.<sup>50</sup> The case was the first—and to this day, the only—case considering the merits of landmarks preservation to reach the Supreme Court.<sup>51</sup> In an opinion by Justice Brennan, the Court admitted that it, “quite simply, ha[d] been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government.”<sup>52</sup> Rather, when engaging in “essentially ad hoc, factual inquiries,” the Court had “identified several factors that have particular significance.”<sup>53</sup> The Court emphasized three: (1) the “economic impact of the regulation on the claimant,” (2) whether the interference with the claimant’s property could be characterized as a “physical invasion by government,” and (3) whether the challenged action interfered with “interests that were sufficiently bound up with the reasonable expectations of the claimant.”<sup>54</sup> The Court rejected Penn Central’s claims that the Landmarks Law’s application to individual parcels, rather than whole districts, was significant.<sup>55</sup> The law was not like discriminatory, “reverse-spot” zoning but rather embodied “a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”<sup>56</sup>

The Court upheld the Commission’s action and the Landmarks Law itself, noting that the law did not interfere with Penn Central’s “primary

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48. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 116 (1978).

49. Id. at 118; see also id. at 117 (describing how plan would destroy the “majestic approach” and “dramatic view of the Terminal” from the south).

50. Id. at 107.

51. In 1992, the Court declined to hear a challenge to landmarks designations—including interior designations—brought by Broadway theater owners. See Shubert Org. v. Landmark Pres. Comm’n of N.Y., 570 N.Y.S.2d 504 (App. Div. 1991), cert. denied, 504 U.S. 946 (1992).

52. *Penn Cent.*, 438 U.S. at 124 (internal quotation marks omitted) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). This aspect of the Court’s decision has garnered the most severe criticism. See, e.g., Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill Rts. J. 679, 681 (2005) (“*Penn Central* lacks doctrinal clarity because of its outright refusal to formulate the elements of a regulatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine.”).

53. *Penn Cent.*, 438 U.S. at 124.

54. Id. at 124–25.

55. Id. at 132.

56. Id.

expectation concerning the use of the parcel”—the use of Grand Central as “a railroad terminal containing office space and concessions.”<sup>57</sup> The Court explicitly stated that state and local governments could “enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”<sup>58</sup>

The opinion was a significant victory for preservationists, providing a solid legal foundation for the local preservation laws that were by then in place in all fifty states and over 500 municipalities.<sup>59</sup> As one commentator put it, historic preservation, over the course of only a few years, moved from “an odd and harmless hobby of little old ladies in floppy hats who liked old houses” to “an integral, administrative part of city government dealing with an essential part of the city’s fabric.”<sup>60</sup> Today, there are over 2,300 historic-preservation ordinances in place across the country,<sup>61</sup> including a federal program authorized by the National Historic Preservation Act of 1966: the National Register of Historic Places.<sup>62</sup>

### C. *Legal Challenges to Interior Landmarking*

Though the issues surrounding landmarking generally have a long and contentious history, *interior* landmarking has received relatively little attention in scholarship and the courts.<sup>63</sup> While preserving exteriors is common, most state legislation does not include the authority to designate interiors as landmarks.<sup>64</sup> A 1990 student note in the *New England*

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57. *Id.* at 136.

58. *Id.* at 129; cf. Alexander, *supra* note 5, at 795–96 (arguing no compensation should be required to prevent a private owner of culturally significant infrastructure from inflicting “on the community of New York a significant loss of cultural meaning and identity . . . fundamentally at odds” with the owner’s “special obligations”).

59. *Penn. Cent.*, 438 U.S. at 107; see also Duerksen & Bonderman, *supra* note 17, at 17–23 (describing *Penn. Central* as “provid[ing] a major impetus to adoption of stronger state and local landmark restrictions”).

60. Landmarks Law at 50, *supra* note 3.

61. Local Preservation Laws, Nat’l Tr. for Historic Pres.: Pres. Leadership Forum, <http://forum.savingplaces.org/learn/fundamentals/preservation-law/local-laws> [<http://perma.cc/UM7C-ARKV>] (last visited Aug. 5, 2016).

62. See National Register of Historic Places Program: About Us, Nat’l Park Serv., <http://www.nps.gov/nr/about.htm> [<http://perma.cc/2DX8-RWNJ>] (last visited Aug. 5, 2016).

63. See Johnathan Lloyd, Interior Preservation: In or Out? 1, 6, 32 (May 13, 2008) (unpublished manuscript), [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1026&context=hpps\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1026&context=hpps_papers) [<http://perma.cc/AWL5-P654>] (surveying legal literature and concluding interior landmarking has been “neglected” and “academic treatment of interior preservation has been spare at best”).

64. Robert W. Mallard, Avoiding the “Disneyland Facade”: The Reach of Architectural Controls Exercised by Historic Districts over Internal Features of Structures, 8 *Widener L. Symp. J.* 323, 324 (2002). Aesthetic value as a justification for land use regulation is still hotly debated, and even those who support the protection of aesthetically important exteriors may disagree about the value of preserving significant interiors. Compare *id.* at 323 (arguing “something of value is lost forever” when a building’s exterior, but not

*Law Review* observed that, while *Penn Central* confirmed the validity of landmarking exteriors, it left the legal status of interior preservation unclear.<sup>65</sup> The author argued that state and local governments did have the authority to protect significant interiors and that the exercise of such power would survive constitutional scrutiny.<sup>66</sup> The Supreme Court has never dealt with interiors directly, but the few courts that have addressed the issue have tended to agree. This section summarizes the relevant cases in Washington, D.C., Pennsylvania, and New York.

1. *Constitutional Challenges in Washington, D.C., and Pennsylvania.* — The first of the cases to address the validity of interior landmarks preservation was *Weinberg v. Barry* in 1986.<sup>67</sup> In *Weinberg*, plaintiffs contested the designation of the interior and exterior of the Warner Building in Washington, D.C., as historic landmarks. Among other claims, plaintiffs argued that the portion of the city law permitting designation of the interior of buildings was facially unconstitutional as a violation of the Takings Clause because it would fail to serve a legitimate public interest, would require a public invasion of private property, and would completely deny owners any economically viable use of their property.<sup>68</sup> The district court rejected all three of these claims, holding that, on its face, the law did not deny owners reasonable use of their property as a theater and served multiple reasonable public purposes, including:

[T]o accomplish the protection, enhancement and perpetuation of features of landmarks which represent distinctive elements of the city's cultural, social, economic, political and architectural history; to safeguard the city's historic, aesthetic and cultural heritage; to foster civic pride in the accomplishments of the past; to protect and enhance the city's attraction to visitors, thereby supporting and stimulating the economy; and to promote the use of landmarks and historic districts for the education, pleasure and welfare of the people of the District of Columbia.<sup>69</sup>

The court also rejected plaintiffs' argument that these purposes could only be served by also requiring public access and viewing of designated interiors, noting that all of the stated purposes referred to benefits other than visual enjoyment of the property.<sup>70</sup>

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interior, is kept intact), with Davidson, *supra* note 19 (arguing "skin-deep beauty of old neighborhoods has value" but developers ought to be permitted to demolish interiors for redevelopment).

65. Albert H. Manwaring, IV, Note, American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations, 25 *New Eng. L. Rev.* 291, 292 (1990).

66. *Id.* at 295.

67. 634 F. Supp. 86 (D.D.C. 1986).

68. *Id.* at 92.

69. *Id.* at 92–93.

70. *Id.* at 93.

A Pennsylvania court, hearing a similar case in *Sameric Corp. v. City of Philadelphia*, came to the same conclusion.<sup>71</sup> That court, citing *Weinberg*, held that the landmark designation of the interior of a theater was not a per se taking and rejected the public access requirement, noting “public viewing is not the *sine qua non* to serve a public good.”<sup>72</sup> The court also recognized the possibility that a landmark interior, though closed to the public, might not always remain so in the hands of future owners.<sup>73</sup> However, the Supreme Court of Pennsylvania soon reversed the lower court’s decision.<sup>74</sup> The court controversially declined to follow the U.S. Supreme Court’s holding in *Penn Central*.<sup>75</sup> It cited Justice Rehnquist’s dissent in *Penn Central* and concluded that “the historic designation of private property . . . without the consent of the owner, [is] unfair, unjust, and amount[s] to an unconstitutional taking without just compensation in violation” of the Pennsylvania state constitution.<sup>76</sup> The court’s opinion was a surprising development in the law of preservation and left the field in a state of uncertainty.<sup>77</sup>

This uncertainty, however, would not last long. The City of Philadelphia soon filed a request for re-argument, which was granted.<sup>78</sup> Two years later, the Supreme Court of Pennsylvania reversed its earlier decision and agreed with the lower court on the constitutional issue: The landmark designation of an interior was not a per se taking.<sup>79</sup> However, because it concluded that the Philadelphia Historic Commission only had the statutory authority to designate exteriors, not interiors, the court

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71. 558 A.2d 155, 158 (Pa. Commw. Ct. 1989) (citing *Weinberg*, 634 F. Supp. at 93), rev’d, *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 595 A.2d 6 (Pa. 1991), and rev’d, *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993).

72. *Id.* (“Allowing a private property owner to escape designation of his building’s interior simply because the owner may choose to deny public access deprives the Commonwealth the opportunity to preserve its historic resources.”).

73. *Id.* (“Although *Sameric* may permissibly choose to close the theatre’s interior, we are not so omniscient to conclude that future owners will not use the building in a manner that once again allows interior public appreciation.”).

74. *United Artists Theater Circuit, Inc.*, 595 A.2d at 14.

75. Daniel T. Cavarello, Comment, From *Penn Central* to *United Artists’ I & II*: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges, 22 B.C. Envtl. Aff. L. Rev. 593, 610 (1995) (“Despite the majority’s attempt to distinguish *Penn Central*, its decision clearly contradicted the Supreme Court’s takings jurisprudence, a jurisprudence which had not been challenged in the fifteen years since *Penn Central*.”).

76. *United Artists Theater Circuit, Inc.*, 595 A.2d at 13–14 (footnote omitted).

77. Cavarello, *supra* note 75, at 610 (“The majority opinion in *United Artists’* was an unexpected development in American historical preservation law.”).

78. *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 614 (Pa. 1993).

79. *Id.* at 621.

upheld its earlier vacation of the Historic Commission's order designating the theater as a landmark.<sup>80</sup>

2. *Constitutional Challenges in New York.* — In New York City, the city's power to designate landmark interiors was challenged in state court after the LPC issued designations in 1987 for twenty-eight theaters near Times Square, some of which landmarked both the theater's exterior and interior.<sup>81</sup> In *Shubert Organization v. Landmarks Preservation Commission of New York*, the theater owners challenged procedural aspects of the city's designation process, claimed that designation excessively burdened building owners, and again raised the issue of the constitutionality of the city's Landmarks Law as a whole.<sup>82</sup> The court rejected all of these arguments, concluding simply that the constitutional challenge could easily be dismissed in light of *Penn Central*.<sup>83</sup> In its opinion, the court placed no weight on the fact that, unlike in *Penn Central*, some of the interiors of the buildings at issue had also been designated.<sup>84</sup> The court thus implicitly held that *Penn Central's* holding that landmarking was constitutional applied equally to both exterior and interior designations. The U.S. Supreme Court later declined to hear the case.<sup>85</sup>

In 1993, the issue of the application of New York City's Landmarks Law to an interior finally reached the New York Court of Appeals in *Teachers Insurance and Annuity Ass'n of America v. City of New York*.<sup>86</sup> In 1959, the now-famous Four Seasons restaurant opened in the ground floor of the Seagram Building, designed by German architect Ludwig Mies van der Rohe, on Park Avenue in Manhattan.<sup>87</sup> Renowned American architect Philip Johnson designed the interior of the restaurant.<sup>88</sup> At the time of the case, as now, both the exterior of the building and the interior of the restaurant were of undisputed "special historical and aesthetic interest," and both received landmark designations in 1989.<sup>89</sup> The owners of the building brought suit, claiming that the LPC had exceeded its authority by designating the interior. The owners argued that designations of such interior spaces would overly burden

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80. Id. at 622.

81. *Shubert Org. v. Landmarks Pres. Comm'n of N.Y.*, 570 N.Y.S.2d 504, 506 (App. Div. 1991), cert. denied, 504 U.S. 946 (1992).

82. Id. at 506–07.

83. Id. at 507–08.

84. Indeed, the only mention of that fact in the entire opinion was in the court's summary of petitioners' claims. Id. at 506. In its legal analysis and conclusion, the court did not acknowledge a distinction between the interior and exterior designations. Id. at 507–08 (holding simply that *Penn Central* controls petitioners' claims); see also Rothstein, *supra* note 16, at 1123 ("Perhaps the most striking aspect of the [*Shubert*] decision is that no issue was made of the fact that interiors, as opposed to exteriors, were involved.").

85. *Shubert Org. v. Landmarks Pres. Comm'n of N.Y.*, 504 U.S. 946 (1992).

86. 623 N.E.2d 526, 527 (N.Y. 1993).

87. Id.

88. Id.

89. Id. at 527–28.

owners and adversely impact the city's real estate market and economy.<sup>90</sup> The lower court rejected this argument, holding instead that the Landmarks Law and its application to both exteriors and interiors were proper, constitutional exercises of the city's police power.<sup>91</sup> The Court of Appeals rejected a further appeal on statutory grounds.<sup>92</sup> The court made explicit the implicit holding in *Shubert Organization*: The doctrine laid out in *Penn Central*—that the landmark designation of a building's exterior was not a “taking”—could be extended to designations of interiors as well.<sup>93</sup> The court specifically held that future public access to the interior space—as opposed to “customary public availability” at the time of designation<sup>94</sup>—was not a requirement for a landmark designation.<sup>95</sup>

Since these cases, there have been no significant challenges to the constitutional validity of the landmarking of interiors. The law in this area is essentially settled: Property owners may no longer challenge a landmark designation of an interior as an unconstitutional taking.<sup>96</sup>

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90. *Id.* at 529.

91. *Teachers Ins. & Annuity Ass'n of Am. v. City of New York*, 185 A.D.2d 207, 208–09 (N.Y. App. Div. 1992).

92. *Teachers Ins. & Annuity Ass'n*, 623 N.E.2d at 528.

93. Rothstein, *supra* note 16, at 1123 (“The [*Shubert*] court's citation to *Penn Central* . . . to uphold landmark designation of interiors against a per se takings challenge was subsequently interpreted in *Teachers Insurance* . . . as extending the *Penn Central* doctrine to interiors as well.”).

94. *Teachers Ins. & Annuity Ass'n*, 623 N.E.2d at 530; see Rothstein, *supra* note 16, at 1132 (“Essentially, the issue is not so much whether an interior *will be* open to the public, but whether it *has been* open to the public and has become a part of the cultural, aesthetic, historic and economic fabric of a community.”); see also *infra* notes 156–159 and accompanying text (noting distinction between requiring public access for initial designation and continuing to require that owners permit public access to interior).

95. *Teachers Ins. & Annuity Ass'n*, 623 N.E.2d at 530 (“[A]ny structure, even a railroad station, can be converted to private use in the future; that potential cannot preclude the landmarking of appropriate interiors.”).

96. Cavarello, *supra* note 75, at 616 (“[H]istoric preservation designations have become immune from successful constitutional takings challenges. As the law stands today, a property owner is essentially powerless to successfully challenge a historic designation as a taking.”). The one possible exception to this would be for the property owner to challenge the designation under the Supreme Court's holding in *Lucas v. South Carolina Coastal Council* that a “regulation that deprives land of all economically beneficial use” without just compensation is an unconstitutional taking. 505 U.S. 1003, 1027 (1992). However, in *Lucas*, the regulation at issue precluded a landowner from ever building “habitable structures” on his beachfront property—property he had bought for that exact purpose. *Id.* at 1003. In the context of historic preservation, it is highly unlikely that a property owner could ever show that a landmark designation has made her property completely valueless. See Cavarello, *supra* note 75, at 618 (“[S]ince this phenomenon is highly unlikely to occur in the historic preservation designation context, the *Lucas* rationale would seem to have little or no effect on the current state of immunity from takings challenges in American historical preservation jurisprudence.”). As most landmarking statutes are currently written, it is hard to imagine a landmark designation that would be permissible under the preservation-enabling legislation and could also be described under *Lucas* as “physically appropriating and eliminating all beneficial use of” a

D. *Interior Landmarking Under New York's Landmarks Law*

The Landmarks Law states that its purpose, among others, is to “promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.”<sup>97</sup> The law empowers the LPC<sup>98</sup> to designate, after a public hearing, a site or district as a protected landmark.<sup>99</sup> Though the Commission itself conducts surveys to identify potential landmarks, anyone may nominate a site for designation.<sup>100</sup>

Once a site has been designated, an owner may seek judicial review of the designation, but judges, showing deference to the “particular expertise” of the Commission, will not overturn the Commission’s judgment unless its decision can be shown to have been arbitrary and capricious.<sup>101</sup> The owner of a designated landmark or a site within a historic district must maintain the property and keep it in “good repair.”<sup>102</sup> The owner is also prohibited from altering, reconstructing, or demolishing the landmark without authorization from the Commission.<sup>103</sup> In determining whether to grant an owner’s request for authorization, the Commission considers “aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color”<sup>104</sup> and holds a public hearing on the appropriateness of the proposal.<sup>105</sup> The ordinance also provides for additional procedural safe-

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property. *Lucas*, 505 U.S. at 1004; see also, e.g., *infra* notes 102–110 and accompanying text (describing limited restrictions that LPC may place on landmarked properties under New York City’s Landmarks Law).

97. Landmarks Law, N.Y.C., N.Y., Admin. Code § 25–301(b) (2013) (listing purposes of Landmarks Law).

98. The Commission consists of eleven members appointed by the mayor and must include at least three architects, a historian, a city or landscape planner, and a realtor. It also must include at least one resident from each of New York City’s five boroughs. See N.Y.C., N.Y., Charter § 3020 (1989) (detailing requirements for appointment of Commission members).

99. N.Y.C., N.Y., Admin. Code § 25–303.

100. Nominate a Landmark, N.Y.C. Landmarks Pres. Comm’n, <http://www.nyc.gov/html/lpc/html/propose/propose.shtml> [<http://perma.cc/665C-YRDP>] (last visited Aug. 5, 2016) (“LPC reviews approximately 200 Requests for Evaluation (RFEs) each year.”).

101. *Shubert Org. v. Landmarks Pres. Comm’n of N.Y.*, 570 N.Y.S.2d 504, 507 (App. Div. 1991).

102. N.Y.C., N.Y., Admin. Code § 25–311(b).

103. *Id.* § 25–305. The law provides for exceptions where owners act to remedy dangerous conditions and for ordinary repairs and maintenance, like removing small amounts of graffiti. See *id.* §§ 25–310, 25–312.

104. *Id.* § 25–307.

105. *Id.* § 25–308; see also J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 *Fordham Envtl. L. Rev.* 313, 333–34 (2004) (observing “[r]egulators . . . have an incentive to approve responsible proposals, because doing so enhances the political acceptability of preservation review, eases opposition to expansion of the system from additional designations, and allows the municipality to avoid costly and embarrassing takings losses”).

guards for owners,<sup>106</sup> including when an owner claims that she is “not capable of earning a reasonable return” on the parcel without the requested improvement.<sup>107</sup>

Altering or destroying a landmarked site or failing to maintain it can expose violators to criminal penalties, including imprisonment.<sup>108</sup> The law also authorizes the New York City Law Department to bring civil actions against violators.<sup>109</sup> The chair of the Commission herself is authorized to issue stop-work orders when she reasonably believes that work is being performed on a landmark site in violation of the law, and violators may face further penalties for failure to comply with such orders.<sup>110</sup>

The law specifies three criteria that must be satisfied for a site to be designated as an interior landmark. An interior or part thereof must (1) be thirty years old or older; (2) have “a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation”; and (3) be “customarily open or accessible to the public, or to which the public is customarily invited.”<sup>111</sup> The definition of an interior architectural feature includes “[t]he architectural style, design, general arrangement and components of an interior, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures,” but movable furnishings are not included.<sup>112</sup>

Opposition to the designation of an interior is often more fierce than it is with exterior designations. Though owners find limitations on their ability to alter exteriors onerous, they are especially resistant to restrictions on their ability to upgrade busy common areas or to allow tenants to customize retail spaces.<sup>113</sup> As a result, the Commission takes a

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106. N.Y.C., N.Y., Admin. Code § 25–309.

107. Id. § 25–309(a)(1)(a). The statute explicitly defines a reasonable return as a net annual return of six percent of the value of the parcel. Id. § 25–302(v).

108. Id. § 25–317.

109. Id. § 25–317.1.

110. Id. §§ 25–317.2(a)(1), 25–317.2(c); see also Frequently Asked Questions, N.Y.C. Landmarks Pres. Comm’n, <http://www.nyc.gov/html/lpc/html/faqs/designation.shtml> [<http://perma.cc/7GY3-U89C>] (last visited Aug. 5, 2016) (providing more detailed information about how the Landmarks Law works in practice).

111. N.Y.C., N.Y., Admin. Code § 25–302(m); N.Y. Sch. of Interior Design, What Is a Landmark Interior?, *supra* note 9 (noting definition of landmark “could hardly be broader”).

112. N.Y.C., N.Y., Admin. Code § 25–302(l).

113. C.J. Hughes, The Tricky Task of Renovating a Building Without Altering Its Landmark Insides, *N.Y. Times* (Nov. 22, 2011), <http://www.nytimes.com/2011/11/23/realestate/commercial/the-tricky-task-of-renovating-a-buildings-landmark-interior.html> [hereinafter Hughes, Tricky Task] (on file with the *Columbia Law Review*); see also, e.g., N.Y. Sch. of Interior Design, Timeline, Rescued Restored Reimagined: N.Y.’s Landmark Interiors, <http://landmarkinteriors.nysid.net/timeline/> [<http://perma.cc/Z7VV-2MWN>]



“tentative approach” to interior designations and is more careful when considering such proposals.<sup>114</sup> The result of this hesitation is apparent: Interiors very rarely receive landmark designations. In contrast to the nearly 29,000 protected exteriors in New York City, only 117 interiors have been landmarked under the law since 1973.<sup>115</sup>

## II. RESTRICTED ACCESS TO LANDMARK INTERIORS AND THE LPC'S LACK OF ENFORCEMENT POWER

Most of the city's 117 landmark interiors are spaces that the public may easily access. Some—Grand Central Terminal, the Empire State Building, the Plaza Hotel, the Metropolitan Museum of Art, the Solomon R. Guggenheim Museum, the American Museum of Natural History, the Apollo Theater, Federal Hall—are major tourist attractions, while others—public libraries, subway stations, and courthouses—are regularly trafficked by locals.<sup>116</sup> Beyond these, however, the public's ability to access a particular interior landmark is unpredictable. While an interior must be one “customarily open or accessible to the public, or to which the public is customarily invited” in order to receive a landmark designation, there is no clear mechanism for ensuring public access once it has been designated.<sup>117</sup>

For a potential admirer, student, or tourist, arriving at a landmark only to be turned away is certainly a disappointing experience. A lack of public access to landmark interiors, however, has more important ramifications than just the disappointment of sightseers. Restricted access makes it more difficult to achieve some of the stated goals of the Landmarks Law, such as the protection and enhancement of interiors for the city's tourism industry and the use of interior landmarks for the “education, pleasure and welfare of the people of the city.”<sup>118</sup> At the very least, the exclusion of “the people of the city” from interiors that are ostensibly protected for their benefit produces a tension between the general spirit of the Landmarks Law and its application in practice.

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[hereinafter N.Y. Sch. of Interior Design, Timeline] (last visited Aug. 6, 2016) (noting Seagram Building owners sought exterior landmark designation but opposed interior designation of Four Seasons restaurant).

114. Hughes, *Tricky Task*, supra note 113 (observing interior landmarking in New York “stands out among major cities because it seems tougher”); see also Wood, supra note 23, at 376 (arguing “timidity and conservatism have more often characterized the agency's behavior”).

115. N.Y. Sch. of Interior Design, *What Is a Landmark Interior?*, supra note 9. It is also noteworthy that in the fifty-three-year history of the Commission, only one interior designer has ever been a member. N.Y. Sch. of Interior Design, *Timeline*, supra note 113.

116. See NYCityMap, NYC.gov, <http://maps.nyc.gov/doitt/nycitymap/> (on file with the *Columbia Law Review*) (last visited Aug. 18, 2016) (providing interactive map of all New York City landmarked exteriors, interiors, and historic and scenic districts).

117. N.Y.C., N.Y., Admin. Code § 25–302(m).

118. *Id.* § 25–301(b).

This Part examines the accessibility of landmarked interiors and the lack of measures available to enforce continued public access. Section II.A discusses the stated purpose of the Landmarks Law. Section II.B details restrictions on access to landmark interiors and owners' attitudes toward their landmarked properties. Finally, section II.C explores whether the LPC has the authority to enforce continued public access after designation.

A. *The Purpose of the Landmarks Law*

The premise of the Landmarks Law is the recognition of the fact that many improvements and landscape features of the city

having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features.<sup>119</sup>

In light of this, the statute declares that "protection, enhancement, perpetuation and use" of these features is "a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people."<sup>120</sup> One purpose of the Landmarks Law is therefore the "protection, enhancement and perpetuation . . . of the city's cultural, social, economic, political and architectural history" and the safeguarding of the city's heritage.<sup>121</sup>

The mere protection, enhancement, perpetuation, and safeguarding of culturally significant interiors would serve a valid public purpose and could still be accomplished even if the spaces were to be made completely inaccessible to the public by owners who acquire the building after designation.<sup>122</sup> In *Weinberg v. Barry*, for example, the district court upheld Washington, D.C.'s landmark-preservation law, even though all

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119. Id. § 25-301(a).

120. Id. § 25-301(b).

121. Id.

122. See *Teachers Ins. & Annuity Ass'n of Am. v. City of New York*, 623 N.E.2d 526, 530 (N.Y. 1993) ("[A]ny structure, even a railroad station, can be converted to private use in the future; that potential cannot preclude the landmarking of appropriate interiors."); *Sameric Corp. v. City of Philadelphia*, 558 A.2d 155, 158 (Pa. Commw. Ct. 1989) ("Although Sameric may permissibly choose to close the theatre's interior, we are not so omniscient to conclude that future owners will not use the building in a manner that once again allows interior public appreciation.").

five of its articulated purposes referred to public benefits other than visual enjoyment or public viewing.<sup>123</sup>

The purpose of New York City's Landmarks Law, however, is to “foster civic pride in the beauty and noble accomplishments of the past,” “protect and enhance the city's attractions *to tourists and visitors*,” and “promote the *use* of . . . interior landmarks . . . for the *education, pleasure and welfare of the people of the city*.”<sup>124</sup> Can one foster civic pride in the “beauty and noble accomplishments of the past” if no one can actually *see* the beauty and nobility of those accomplishments?<sup>125</sup> Can the city's attractions be enhanced for its visitors and tourists if those tourists cannot actually take tours of or visit those attractions? Can interiors that are closed off to the “people of the city” be “use[d]” for their education, pleasure, and welfare?<sup>126</sup>

A plausible claim might therefore be made that restricting access to a landmarked interior—let alone altering a building to physically prevent access or privatize the space—would violate the purpose of the Landmarks Law. At the very least, the exclusion of “the people of the city” from interior landmarks that are ostensibly protected for their use and pleasure would clearly be in tension with the general spirit of the law.

#### B. *Restricted Access to Landmark Interiors*

The public may not be able to access a landmark interior for one of three reasons. First and most commonly, a building owner may refuse to permit the public to enter the space. Second, an owner may make structural changes to the building that physically prevent access to the landmark interior. Finally, a landmark may be abandoned, leaving it vulnerable to deterioration and decay.

1. *Restricted Access by Building Owners.* — In 2006, a *New York Times* reporter was perhaps the first to notice the lack of access to certain city

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123. 634 F. Supp. 86, 93 (D.D.C. 1986) (“But on their face, the five articulated purposes of the D.C. Act refer to public benefits other than visual enjoyment . . . . Thus, public viewing of the historic area is not necessary to serve a public purpose.”).

124. N.Y.C., N.Y., Admin. Code § 25–301(b) (emphasis added). Another indication that the New York City Council understood itself to be doing something especially significant is its derivation of the language regarding public access to interior landmarks from the language of the Civil Rights Act of 1964. See N.Y. Sch. of Interior Design, *What Is a Landmark?*, supra note 9.

125. N.Y.C., N.Y., Admin. Code § 25–301(b). Even though public view is not a requirement for preservation to have a valid public purpose, courts have recognized that the value of historic preservation is at least in part derived from the benefits the public receives from actually *seeing* the preserved site. See, e.g., *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 450 (N.C. 1979) (“The preservation of historically significant residential and commercial districts protects and promotes the general welfare . . . [by] provid[ing] a *visual, educational medium* by which an understanding of our country's historic and cultural heritage may be imparted to present and future generations.” (emphasis added)).

126. N.Y.C., N.Y., Admin. Code § 25–301(b).

landmark interiors.<sup>127</sup> Hoping to see what luck he would have getting into fourteen landmark interiors in downtown Manhattan,

[h]e simply showed up unannounced at each place, in the garb of a history-minded visitor—spectacles, old Harris tweed jacket, button-down shirt, bow tie, thick-soled shoes (actually, he dresses like that every day)—with a copy of the official Guide to New York City Landmarks tucked under one arm.

He was allowed to walk through just one space without undergoing a search. Two buildings admitted him after scanning him electronically. He was allowed to glimpse a couple of lobbies and sneaked a peek at another. At two buildings, however, he was told firmly to leave.<sup>128</sup>

At the Verizon Headquarters at 140 West Street, visitors were not permitted “even to stand at the entrance and gaze at the painstakingly restored ceiling murals.”<sup>129</sup> The landmarked lobby of the famous Woolworth Building was “among the most zealously patrolled.”<sup>130</sup> Outside the building, a sign often warns “Tourists Are Not Permitted Beyond This Point.”<sup>131</sup> In this instance, a guard intercepted the reporter “a mere 12 seconds after he set foot inside.”<sup>132</sup> Summing up his experience, the reporter concluded that there are “very few interior landmarks in Lower Manhattan that welcome casual visitors.”<sup>133</sup>

2. *Structural Changes to Buildings that Physically Prevent Access.* — Another way that the public can lose access to an interior is when an owner alters the building in a way that physically blocks access to the landmarked space. As part of a plan to convert a historic building at 346 Broadway into luxury condominiums, a developer proposed—and the LPC approved—an alteration to the building’s structure such that the landmarked interior of the building’s iconic clock tower would no longer be physically accessible to the public.<sup>134</sup> This sort of change is far more

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127. David W. Dunlap, *So, You Think You Can See a Landmark?*, N.Y. Times (Jan. 20, 2006), <http://www.nytimes.com/2006/01/20/nyregion/20landmark.html> (on file with the *Columbia Law Review*) [hereinafter Dunlap, *Think You Can See a Landmark?*].

128. *Id.*; see also Carl Glassman, *News: Retail Reuse for Interior Landmark?*, Hist. District Council (Dec. 29, 2006), <http://hdc.org/uncategorized/news-retail-reuse-for-interior-landmark> [<http://perma.cc/8582-ZFDD>] (observing that if the plan to reopen landmarked lobby of 195 Broadway “to the public for the first time in years” were approved, it would be “among only four of 14 landmarked interiors downtown that the public can enter”).

129. Dunlap, *Think You Can See a Landmark?*, *supra* note 127.

130. *Id.*

131. *Id.*; Isabel Vincent & Melissa Klein, *Woolworth Building Won’t Allow Tourists to Sightsee in Lobby*, N.Y. Post (Sept. 21, 2014, 3:09 AM), <http://nypost.com/2014/09/21/woolworth-building-wont-allow-tourists-to-sightsee-in-lobby> [<http://perma.cc/M4N7-DR8G>] (showing sign in front of entrance to Woolworth Building lobby).

132. Dunlap, *Think You Can See a Landmark?*, *supra* note 127.

133. *Id.*

134. See Jeremiah Budin, *Preservationists Fight Developers over Historic Tribeca Clock*, *Curbed N.Y.* (June 19, 2015, 6:20 PM), <http://ny.curbed.com/archives/2015/06/>

problematic than simply restricting access. Though the landmarked interior would itself remain mostly undisturbed,<sup>135</sup> all three landmarked floors would become inaccessible to the public as part of “an enormous triplex penthouse for a wealthy buyer.”<sup>136</sup> Preservationists criticized the plan, arguing that it would improperly allow for the privatization of a public space and set “a dangerous precedent for future landmarking disputes.”<sup>137</sup> Similar “adaptive reuse” proposals are likely to recur, as converting historic buildings to private apartments has advantages: Historic districts make completely new construction projects difficult, some older structures are larger than what current zoning would allow on the same site, and conversion may be faster than new construction.<sup>138</sup>

3. *Abandoned Landmarks.* — A third way the public loses access to an interior landmark is when the entire structure is abandoned. A significant number of landmarked buildings in New York City sit abandoned, unused, and deteriorating and as a result have been closed to the public for decades.<sup>139</sup> Such situations are becoming less common as the economy has rebounded over the last few years. But they remain especially dangerous because an abandoned landmark is at risk not just of going unappreciated by the public but also of facing irreparable decay and eventual destruction.<sup>140</sup>

4. *Owners' Perceptions.* — Despite the requirement that only interiors that are “customarily open or accessible to the public” may be landmarked,<sup>141</sup> many owners of landmark interiors consider the interiors to be simply their own private property, not public spaces. This view aggravates the problem of restricted public access to interior landmarks. *The*

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19/preservationists\_fight\_developers\_over\_historic\_tribeca\_clock.php [http://perma.cc/WH87-MNER].

135. Katherine Clarke, *Wealthy Real Estate Developers Want to Close Historic Tribeca Clock to Public and Give It to Rich Condo Buyer: Suit*, N.Y. Daily News (June 19, 2015, 3:14 PM), <http://www.nydailynews.com/life-style/real-estate/developers-stop-access-landmark-clock-condos-article-1.2264295> (on file with the *Columbia Law Review*) (noting allegation that “developers also want to dismantle the clock’s historic state-of-the-art non-electric mechanism and replace it with a run-of-the-mill electric one, which would be easier to maintain”).

136. *Id.*

137. *Id.*

138. C.J. Hughes, *Buildings with a Past: Creating New York Apartments from Unlikely Buildings*, N.Y. Times (July 4, 2014), <http://www.nytimes.com/2014/07/06/realestate/creating-new-york-apartments-from-unlikely-buildings.html> (on file with the *Columbia Law Review*).

139. Nathan Kensinger, *What’s Next for New York City’s Many Abandoned Landmarks?*, Curbed N.Y. (May 28, 2015, 2:25 PM), [http://ny.curbed.com/archives/2015/05/28/whats\\_next\\_for\\_new\\_york\\_citys\\_many\\_abandoned\\_landmarks.php](http://ny.curbed.com/archives/2015/05/28/whats_next_for_new_york_citys_many_abandoned_landmarks.php) [http://perma.cc/7ZZ7-GFDY].

140. *Id.* (“Today, a surprising number of official New York City landmarks are abandoned, having been left to rot for decades, and are in danger of becoming victims of demolition by neglect.”).

141. Landmarks Law, N.Y.C., N.Y., Admin. Code § 25–302(m) (2013).

*Times* reporter's exchange with a guard at the Woolworth Building exemplifies this attitude:

Guard: "Excuse me. You have to exit out. There's no sightseeing."

Visitor: "I'm sorry?"

Guard: "You have to exit out. There's no sightseeing."

Visitor: "There's no sightseeing?"

Guard: "No."

Visitor, showing the official landmarks guide: "Oh, but this—"

Guard: "I know what it says, but it's wrong. You have to exit, please."

Visitor: "Oh, it's not a landmark? No? It's not a landmark?"

Guard: "It's a private office building."<sup>142</sup>

Another *New York Times* reporter may have jumped the gun when he observed, twenty-six years ago, that the Landmarks Law had become "a fact of life" in New York, that one rarely "hear[s] real-estate developers grumble that the commission's very existence is an affront to their property rights."<sup>143</sup> Battles between real estate mogul Aby Rosen, owner of the Seagram Building and its Four Seasons restaurant, and the LPC illustrate one owner's attempts to treat landmarks as private property. Rosen has been a repeat player in disputes with the LPC and preservationists. In 2006, the LPC blocked his attempt to build a tower on Madison Avenue that would have risen fifteen stories higher than any of the buildings surrounding it.<sup>144</sup> In 2014, village officials in Old Westbury on Long Island took issue with "a 13-ton, 33-foot-high painted bronze sculpture by the contemporary English artist Damien Hirst that Rosen had placed on the 5.5-acre estate [of the historic A. Conger Goodyear glass house], depicting a pregnant woman, with the skin peeled off half her body, and the fetus exposed."<sup>145</sup> And in 2013, the Seagram Building and the Four Seasons again entered the historic preservation spotlight<sup>146</sup> thanks to Rosen's attempts to make drastic changes to the landmarked interior space, which he owns, and find a new tenant for the restaurant.<sup>147</sup> Rosen made the controversial announcement that he

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142. Dunlap, *Think You Can See a Landmark?*, *supra* note 127.

143. Goldberger, *supra* note 5.

144. Suzanna Andrews, *Showdown at the Four Seasons*, *Vanity Fair* (Sept. 8, 2014, 12:03 AM), <http://www.vanityfair.com/style/society/2014/10/picasso-curtain-four-seasons-restaurant> (on file with the *Columbia Law Review*).

145. *Id.*

146. See *supra* notes 86–95 and accompanying text (discussing *Teachers Insurance*, which upheld interior landmark designation of Four Seasons restaurant).

147. See Richard Johnson, *Aby Rosen's 'Outlandish' Plan for Four Seasons Space*, *Page Six* (Dec. 10, 2015, 6:00 AM), <http://pagesix.com/2015/12/10/aby-rosens-outlandish-plan-for-four-seasons-space/> [<http://perma.cc/B3LZ-XTZL>] (quoting source describing Rosen's plan for Four Seasons as "outlandish" and costing a "beyond preposterous" amount of money); Robin Pogrebin, *Landmarks Commission Rejects Plan to Change Interior of Four Seasons*, *N.Y. Times* (May 19, 2015), <http://www.nytimes.com/2015/05/20/nyregion/>

would remove Pablo Picasso's nineteen-by-twenty-foot stage curtain, *Le Tricorne*, from the Picasso Alley in the Four Seasons, where the work had hung since it was personally chosen and placed by Philip Johnson, the architect of the restaurant's interior, in 1959.<sup>148</sup> Rosen insisted, even after a conservator determined that "[r]emoving the historic, 94-year-old Picasso curtain . . . 'will more than likely result in irreparable damage.'"<sup>149</sup> Eventually, a compromise was reached, and the curtain was successfully transferred to the New-York Historical Society.<sup>150</sup> But in the aftermath of this showdown, Rosen made a telling statement to *Vanity Fair* that despite its landmark designations, the Seagram Building

is "a private building. This is not a public space. The only public space is the plaza." Mies van der Rohe's magnificent glass-enclosed lobby is private. So is Philip Johnson's Four Seasons, and Picasso Alley. "It is my property. It is a piece of art that is in my property. I should have the right to demand it to be removed for whatever reason."<sup>151</sup>

### C. *The Commission's Lack of Enforcement Power*

The LPC has been accused of failing to prevent the privatization of interior landmarks. During a public hearing on the proposal, discussed above, to convert 346 Broadway into luxury condominiums and in doing so permanently block public access to the landmarked interior of the building's clock tower, a member of the Commission asked whether the owner of the planned penthouse "could store his suitcases up there."<sup>152</sup> The Commission's general counsel replied, "Correct."<sup>153</sup> Despite criticism from the public and preservationists, the LPC approved the plan.<sup>154</sup>

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landmarks-panel-rejects-changes-to-four-seasons-restaurant.html (on file with the *Columbia Law Review*).

148. Andrews, *supra* note 144.

149. *Id.* (quoting conservator's report on proposed changes to interior).

150. *Id.*

151. *Id.* The lobby of the building has also been designated as an interior landmark. David M. Breiner, Research Dep't, Landmarks Pres. Comm'n, Designation List 221 LP-1665 (Marjorie Pearson & Elisa Urbanelli eds., 1989), <http://s-media.nyc.gov/agencies/lpc/lp/1665.pdf> [<http://perma.cc/8JW5-CLEA>]. Though recognized in the Four Seasons's designation report, the Picasso curtain was not protected by the designation because it was a freestanding work of art unattached to the actual structure of the building. See Andrews, *supra* note 144; David M. Breiner & Elisa Urbanelli, Research Dep't, Designation List 221 LP-1666 (Marjorie Pearson ed., 1989), <http://s-media.nyc.gov/agencies/lpc/lp/1666.pdf> [<http://perma.cc/6GW5-3N85>]. The owners recently announced they will soon be auctioning off much of the restaurant's nonlandmarked pieces—"even the silverware and banquettes deigned [sic] by Philip Johnson." Amy Plitt, *Four Seasons Restaurant Will Auction Off Its Iconic Interiors This Summer*, *Curbed N.Y.* (Apr. 15, 2016, 2:45 PM), <http://ny.curbed.com/2016/4/15/11439800/four-seasons-restaurant-modernist-auction> [<http://perma.cc/8LYG-JNG8>].

152. Clarke, *supra* note 135.

153. *Id.* The accusation that the LPC fails to prevent the privatization of interior landmarks is actually rather mild, relative to some other criticism it has received. The *New*

Yet even if the LPC wanted to prevent building owners from restricting public access to landmark interiors, it is unclear whether it has the authority to do so. When preservationists brought suit in New York state court to prevent the 346 Broadway conversion, the court held in *Save America's Clocks, Inc. v. City of New York* that the LPC *did* have the authority to enforce public access:

Even though the Landmarks Law does not expressly require that public access to an interior landmark be maintained, absent an express limitation to that extent, the general provisions of the Landmarks Law vest the Commission with the power to regulate an interior landmark. That power must include the ability to direct an owner to maintain public access, since public access is a specific characteristic of an interior landmark.<sup>155</sup>

While the court was right to note that public access is a “specific characteristic of an interior landmark” under the Landmarks Law, it is much less clear that the statute therefore gives the LPC the authority to regulate public access. The “general provisions” of the law that the court cited seem to suggest the opposite conclusion: that the LPC has *no* enforcement authority to ensure that interior landmarks retain the public access that is required for designation beyond the date of designation itself.

In order to receive a landmark designation, an interior must be one “customarily open or accessible to the public, or to which the public is customarily invited” at the time of the designation.<sup>156</sup> Restaurants, bars, train stations, libraries, banks, theaters, lobbies of office buildings, museums, subway stations, courthouses, airport terminals, and hotels have all met this criterion and received designations.<sup>157</sup> However, this “public” nature of interiors is only described in the law as a criterion for design-

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*York Times*, for one, observed the anniversary of the Landmarks Law with something less than enthusiasm: “[T]he law is not being used aggressively enough, has never met its potential, and has let too many precious buildings languish or be leveled while saving architectural mediocrities. The Landmarks Preservation Commission, with one of the tiniest budgets and staffs of any city agency, has had a bush-league reputation.” Landmarks Law at 50, *supra* note 3.

154. Clarke, *supra* note 135 (“The city’s Landmarks Preservation Commission, which approved the plan to close the clock suite, is also under fire from the preservationists, who say the commission was well within its rights to demand that it stay open to the public but failed to do so.”).

155. 28 N.Y.S.3d 571, 584–85 (Sup. Ct. 2016).

156. Landmarks Law, N.Y.C., N.Y., Admin. Code § 25–302(m) (2013); see *Teachers Ins. & Annuity Ass’n of Am. v. City of New York*, 623 N.E.2d 526, 530 (N.Y. 1993) (“[A]ny structure, even a railroad station, can be converted to private use in the future; that potential cannot preclude the landmarking of appropriate interiors.”).

157. NYCityMap, *supra* note 116 (providing interactive map of all New York City landmarked interiors).



nation.<sup>158</sup> It is not mentioned anywhere else in the statute. Restriction of public access is not among the listed violations for which the Commission may impose civil or criminal penalties on owners.<sup>159</sup>

Furthermore, the statute does not provide the Commission with the authority to reject a proposal to alter an interior or its features on the basis of public access. In general, building owners may not make changes to interiors without first receiving from the LPC a “certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work.”<sup>160</sup> Yet in evaluating an application requesting one of these permits to make changes to a landmark interior, the Commission is instructed to consider the “effects of the proposed work upon the protection, enhancement, perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value.”<sup>161</sup> As the statutory definition of an “interior landmark” makes clear, the public accessibility of an interior is not a “use” of the landmark that causes it to have its special value but rather a required element of designation separate from an interior’s “special historical or aesthetic interest or value.”<sup>162</sup>

The LPC itself also reads the statute as not granting it the authority to enforce public access. During the public hearing regarding the proposed conversion of 346 Broadway, the Commission’s general counsel stated simply that “[t]here’s no power under the Landmarks Law to require interior-designated spaces to remain public.”<sup>163</sup> A former chairman of the Commission once explained that while he made an effort to ensure that people could get in to see interior landmarks, his means were limited only to his own “powers of persuasion.”<sup>164</sup>

The last and perhaps most important reason to interpret the Landmarks Law as not granting the LPC the authority to enforce public access is that such a reading, in accordance with the canon of constitutional avoidance,<sup>165</sup> would avoid exposing the Landmarks Law to a challenge under the Takings Clause, as discussed in Part III.

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158. See N.Y.C., N.Y., Admin. Code § 25–302(m).

159. See *id.* § 25–302(x) (listing such violations).

160. *Id.* § 25–305(a)(1).

161. *Id.* § 25–307(e).

162. *Id.* § 25–302(m) (defining an “[i]nterior landmark” as “an interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value”).

163. *Save Am.’s Clocks, Inc. v. City of New York*, 28 N.Y.S.3d 571, 576 (Sup. Ct. 2016).

164. *Dunlap, Think You Can See a Landmark?*, *supra* note 127.

165. See, e.g., *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1908) (“[T]he rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”).

## III. ENSURING PUBLIC ACCESS TO LANDMARK INTERIORS

How might the Commission act to prevent owners from restricting access to interior landmarks? This Part analyzes several possible answers. Section III.A examines first the constitutional difficulties that would arise if the Landmarks Law were read as authorizing the Commission to regulate public access to interiors or if the City Council were to explicitly grant to the LPC that authority. Section III.B examines the costly alternative of the government exercising the power of eminent domain to gain public access easements on landmarked interiors. Finally, section III.C suggests alternative mechanisms for ensuring continued public access to interiors that work with, rather than around, owners' consent.

A. *Enforcement of Public Access Under the Takings Clause*

The most straightforward way to ensure that the public retains access to interior landmarks would be for the LPC to directly prevent owners from restricting access. The court in *Save America's Clocks* held that the "general provisions" of the Landmarks Law gave the LPC the authority to enforce public access.<sup>166</sup> Because the court's holding is problematic, the City Council could also explicitly grant to the Commission the authority to impose civil or criminal penalties on owners who restrict access to their landmarked spaces, assuming such an amendment to the Landmarks Law would be politically feasible. Either way, an attempt to enforce public access would likely be vulnerable to a legal challenge under the regulatory takings doctrine.

The regulatory takings doctrine effectively asks whether the government has gone too far in regulating private property. If so, the regulation will be considered an exercise of eminent domain.<sup>167</sup> It will thus be a "taking" for which just compensation must be paid and for which there must be a valid public purpose.<sup>168</sup> The *Penn Central* Court examined the Landmarks Law under the regulatory takings doctrine, concluding that historic preservation served a valid public purpose and that the limits the law placed on owners' use of their properties was not so excessive as to rise to the level of a "taking" within the meaning of the Fifth Amendment.<sup>169</sup> The Court took great care to distinguish the application of the Landmarks Law to Grand Central Terminal, which did not "interfere in any way with the present uses of the Terminal,"<sup>170</sup> from other governmental acts challenged before the Court that did interfere with the

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166. 28 N.Y.S.3d at 584.

167. See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

168. U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation . . .").

169. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

170. *Id.* at 136.

present use of the properties at issue.<sup>171</sup> Under this line of thinking, one might suppose that if interiors can only be landmarked under the Landmarks Law when they are “customarily open or accessible to the public,” a regulation that requires owners to maintain this same level of public access would in no way interfere with the present use of the property.<sup>172</sup> Thus, following *Penn Central*, such a regulation should not be considered a “taking.”

There is, however, another line of Supreme Court jurisprudence that bears more directly on the issue of public access. The Court has repeatedly held that, given the longstanding importance of the common law right to exclude, government interference with the right to exclude will often be considered a “taking” that requires just compensation. In the first such case to arise after *Penn Central*, *Kaiser Aetna v. United States*, plaintiff Kaiser Aetna dredged a channel connecting a land-locked pond on its land in Hawaii to Maunaua Bay and the Pacific Ocean.<sup>173</sup> When Kaiser Aetna later denied the public access to the newly accessible pond, the federal government brought suit, arguing that as a result of the channel’s connection of the pond to the ocean, the pond had become “a navigable water of the United States” subject to Congress’s regulatory authority under the Commerce Clause and so fell within the regulatory scope of the Rivers and Harbors Appropriation Act.<sup>174</sup> The Supreme Court agreed that “[i]n light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose.”<sup>175</sup> However, the Court held that the government’s “attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking” because the regulation at issue would “result in an actual physical invasion of the privately owned marina.”<sup>176</sup> “In this case,” the Court concluded, “we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”<sup>177</sup>

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171. See *id.* (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 590 (1962) (regulating dredging and pit excavating); *Griggs v. Allegheny County*, 369 U.S. 84, 89–90 (1962) (regulating flying into and from county airport over land); *United States v. Causby*, 328 U.S. 256, 266–67 (1946) (regulating flying over land and so destroying present use of land as chicken farm); *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (ordering destruction of trees on land to prevent spread of plant disease); *Hadacheck v. Sebastian*, 239 U.S. 394, 408 (1915) (prohibiting establishment or operation of brickyards within city limits)).

172. Landmarks Law, N.Y.C., N.Y., Admin. Code § 25–302(m) (2013).

173. 444 U.S. 164, 167 (1979).

174. *Id.* at 168–69.

175. *Id.* at 174.

176. *Id.* at 178–80.

177. *Id.* at 179–80. Some have pushed back against the weight the Court has given to the common law right to exclude. In New Jersey, for example, the state supreme court has repeatedly held that the right to exclude may be abrogated if the abrogation would serve a

Interestingly, the Court distinguished physical invasions—which would be “takings”—from regulations “in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property”<sup>178</sup>—which would not. Enforcing continued public access to an already-public interior space would seem to put these two factors into conflict: It would constitute an actual, physical invasion that would simultaneously cause an insubstantial devaluation of the owner’s property. Presumably, requiring the owners of Grand Central Terminal—still a major railroad hub—to keep its doors open to the public would scarcely affect the property’s value to its owners and operators.<sup>179</sup> Might a physical invasion usually be considered a “taking” exactly because it would usually cause a substantial devaluation of the owner’s property? Such an interpretation of the rule would still be consistent with the Court’s opinion in *Kaiser Aetna*. Indeed, in a similar case the following year, *PruneYard Shopping Center v. Robins*, the Court denied relief to property owners when the owners had “failed to demonstrate that the ‘right to exclude others’ [wa]s so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking.’”<sup>180</sup>

Even the Court’s holding in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>181</sup> on one plausible reading, leaves open the possibility that an actual, physical invasion might not be a sufficient condition for a government action to be considered a “taking.” In *Loretto*, the Court held that a New York statute requiring a building owner to permit a television cable to be placed along the roof of the building was a “taking” requiring just compensation.<sup>182</sup> The Court explained that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve,” even if the occupation has only a de minimis effect on the value of the property.<sup>183</sup>

Yet the rule laid out in *Loretto* might not apply to a regulation that requires continued public access to a privately owned space. Note that

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sufficiently important public purpose. See, e.g., *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 372 (N.J. 1982) (holding property owners who open premises to general public may not exclude people unreasonably or arbitrarily); *State v. Shack*, 277 A.2d 369, 371–72 (N.J. 1971) (holding landowner may not exclude representatives of nonprofit organization seeking to provide services to migrant workers); cf. Alexander, *supra* note 5, at 795 (noting *Penn Central* Court enforced “democratically sanctioned scheme of use-sacrifices required of all private owners of New York City buildings whose aesthetic and historic integrity the Commission has determined to be vital to the continuing well-being of the city’s culture”).

178. *Kaiser Aetna*, 444 U.S. at 180.

179. See Alexander, *supra* note 5, at 794 (“The designation of Grand Central Terminal as a historic landmark in all likelihood made it an even bigger tourist attraction than it already was. More tourists generated more revenue for the owner.”).

180. 447 U.S. 74, 84 (1980) (emphasis added).

181. 458 U.S. 419 (1982).

182. *Id.* at 421–22.

183. *Id.* at 426.

the Court's chosen phrase here—"permanent physical occupation"—differed from its language in *Kaiser Aetna*—"actual physical invasion." In *Loretto*, the Court seems to have defined a "permanent physical occupation" in a more narrow and literal sense. The installation of the cable, the Court noted, was "a direct physical attachment of plates, boxes, wires, bolts, and screws to the building."<sup>184</sup> The rule would also present few evidentiary problems, the Court further explained, because "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute."<sup>185</sup> Thus, the rule in *Loretto* could be read as limited only to the literal, physical placement of third-party structures on an owner's property.<sup>186</sup>

Ultimately, though, the Court firmly rejected the idea that government interference with the right to exclude could avoid the just compensation requirement of the Takings Clause if the interference did not cause a devaluation of the owner's property. In *Nollan v. California Coastal Commission*, the Court reviewed whether California executed a "taking" that required just compensation when it conditioned the grant of a permit to rebuild a house on the owners' granting the state an easement across their property.<sup>187</sup> Citing *Loretto* and *Kaiser Aetna*, the Court held that it did.<sup>188</sup> In no uncertain terms, the Court explained that "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning."<sup>189</sup> The point, Justice Scalia wrote, was "obvious."<sup>190</sup> *Nollan* explicitly extended the principle *Loretto* laid out for public access to private property:

We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.<sup>191</sup>

In light of *Nollan*—and more generally the trend in the Supreme Court's takings jurisprudence of considering interference with the right to exclude to be especially serious—it is highly likely that any attempt by

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184. *Id.* at 438.

185. *Id.* at 437.

186. But see Rothstein, *supra* note 16, at 1131 ("There can be little doubt following the Court's ruling in *Loretto* that mandating accessibility would constitute a per se taking." (footnote omitted)).

187. 483 U.S. 825, 828 (1987).

188. *Id.* at 831–32, 832 n.1, 841–42.

189. *Id.* at 831 (citation omitted) (quoting *id.* at 848 n.3 (Brennan, J., dissenting)).

190. *Id.*

191. *Id.* at 832.

the LPC to enforce continued public access would be successfully challenged in court as a “taking” requiring just compensation.<sup>192</sup>

B. *Resorting to Eminent Domain*

An alternative to directly regulating public access to landmark interiors is to exercise eminent domain, the government’s power to take private property for public use *with* just compensation. In the context of historic preservation, eminent domain has been called a “double-edged sword”: Though the government’s use of eminent domain has often been a threat to historically significant buildings, it has also been used to protect them.<sup>193</sup> That second, protective edge of the sword could perhaps be used to ensure the public can access landmarked interiors. In the *Nollan* case, in which the government sought an easement across privately owned land to enable the public to access a beach, Justice Scalia explained that “one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.”<sup>194</sup> The idea is that the government would exercise this power over owners’ objections by compensating owners for an easement of public access to the interior space. Assuming that providing public access to interior landmarks would be upheld as a valid public purpose,<sup>195</sup> the central problem with the exercise of eminent domain is, of course, that providing just compensation is an expensive proposition. At a minimum, the high cost of the use of eminent domain

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192. Cf. Rothstein, *supra* note 16, at 1131 (“[T]o require that the interior be accessible to the public would be a permanent physical invasion of the property and hence constitute a taking per se.”).

193. See R. Benjamin Lingle, *Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation*, 63 Fla. L. Rev. 985, 985 (2011) (“Governments’ powers of eminent domain have long served as a tool for historic preservation; however, eminent domain also facilitates the destruction of historic structures.”).

194. *Nollan*, 483 U.S. at 831, 841–42 (“California is free to advance its ‘comprehensive program,’ if it wishes, by using its power of eminent domain for this ‘public purpose,’ but if it wants an easement across the Nollans’ property, it must pay for it.” (citation omitted)).

195. Courts have repeatedly adopted similar positions. See, e.g., *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 679–80, (1896) (holding condemnation of former battlefield for preservation was valid public purpose); *Cordova v. City of Tucson*, 494 P.2d 52, 53–54 (Ariz. Ct. App. 1972) (noting it is “established that a taking to preserve historic property represents a proper ‘public use’”); *Flaccomio v. Mayor of Balt.*, 71 A.2d 12, 14 (Md. 1950) (holding condemnation of land next to historic house for educational and inspirational use was valid public purpose); *Lubelle v. City of Rochester*, 536 N.Y.S.2d 325, 326 (App. Div. 1988) (holding, in challenge to condemnation, “there is no dispute that historic preservation serves a public purpose”); *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 450 (N.C. 1979) (“The preservation of historically significant residential and commercial districts protects and promotes the general welfare . . . [by] provid[ing] a visual, educational medium by which an understanding of our country’s historic and cultural heritage may be imparted to present and future generations.”); cf. *Kelo v. City of New London*, 545 U.S. 469, 478–79 (2005) (holding exercise of eminent domain served valid public purpose even when government was “not planning to open the condemned land . . . to use by the general public”).

would likely reduce the overall number of interior designations that municipalities would be willing to make. More likely, though, the government may not be able or willing to fund condemnations at all.<sup>196</sup>

Yet even if the city were willing to foot the bill, the resort to eminent domain is still a less-than-ideal approach. The greatest benefit of eminent domain for the government is that it can be exercised over the objections of the owners of a property, but enforcing continued public access this way over owners' objections might have other, detrimental consequences. First, owners whose buildings may be targets for landmark designation might rush to demolish them.<sup>197</sup> Alternatively, an owner might rush to alter the use of the interior space so as to expose an exercise of eminent domain for public access to a challenge based on interference with the owner's present use or "primary expectation concerning the use" of the interior space.<sup>198</sup> Second, though perhaps less likely, is the concern that developers considering new buildings "may turn down dramatic or innovative designs out of fear that they will be 'rewarded' with a historic preservation designation" and a public access easement, forever prohibiting them from altering the use of the space to one that would exclude the public.<sup>199</sup> Finally, opposition to designations of interiors, which is already often more fierce than it is with exterior designations, would likely become much more intense, given the higher stakes involved.<sup>200</sup>

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196. New York City's extremely high property values would make condemning even an easement prohibitively expensive. In 2007, the Seagram Building alone was valued at roughly \$1.6 billion. John Koblin, *The Ten Most Expensive Buildings*, *Observer: Style & Design* (Apr. 9, 2007, 12:00 AM), <http://observer.com/2007/04/the-ten-most-expensive-buildings/> [<http://perma.cc/BHN2-LFPA>]. New York City's entire annual budget that year was \$59 billion. Ray Rivera, *Mayor and Council Agree on Budget, Providing Breaks on Property and Sales Tax*, *N.Y. Times* (June 13, 2007), <http://www.nytimes.com/2007/06/13/nyregion/13city.html> (on file with the *Columbia Law Review*).

197. Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 1301 n.8 (2d ed. 2012). This is not just a theoretical worry. In 2012, actor David Schwimmer infamously demolished the 1852 townhouse he purchased on East 6th Street after receiving multiple letters from the LPC notifying him that the building would be up for historic designation in a matter of months. Jennifer Gould, *E. Village Outrage at Schwimmer's Home Raze*, *N.Y. Post* (Feb. 6, 2012, 5:00 AM), <http://nypost.com/2012/02/06/e-village-outrage-at-schwimmers-home-raze/> [<http://perma.cc/2LHA-YTFT>]. He replaced the building with a "six-story mansion" with "an elevator and roof terrace." *Id.*

198. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 ("Unlike the governmental acts in *Goldblatt*, *Miller*, *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal . . . . So the law does not interfere with . . . Penn Central's primary expectation concerning the use of the parcel.").

199. Merrill & Smith, *supra* note 197, at 1301 n.8.

200. See *supra* notes 113–115 and accompanying text (describing relatively greater opposition to interior designations).

C. *A Different Approach: Working with Owners*

A third way of ensuring public access—one that would avoid both constitutional difficulties and the practical difficulties of taking public access easements over owners' objections—would be for the government to encourage owners to grant public access voluntarily. Seeking owners' voluntarily cooperation, rather than resorting to the heavy-handed exercise of eminent domain, opens up the possibility of using other incentives to encourage owners to allow access to their interiors.<sup>201</sup> Incentives already in place for encouraging preservation, such as income tax credits, grants, and property-tax abatements, could be used and expanded to encourage owners to keep their spaces open to the public.<sup>202</sup>

Soliciting voluntary grants of public access easements might also be a viable option. This mechanism has been used successfully to protect significant interior spaces in jurisdictions in which the preservation-enabling statute does not authorize the relevant preservation commission to designate interiors.<sup>203</sup> The most significant advantage of utilizing voluntary easements is that it enables local government to tap into federal income tax incentives to encourage owners to grant easements: Because a public easement "encumbers the property and restricts its use," the value of the property for income tax purposes drops, lowering the property tax the owner owes.<sup>204</sup> This mechanism might be especially effective in the case of access to interior landmarks in New York because under the Landmarks Law, only interiors that are already customarily open to the public may be landmarked.<sup>205</sup> Owners may thus be willing to grant public access easements, since they will benefit from the lower property tax they will owe, without realizing the lower assessed value of the property.

In addressing issues of historic preservation, New York is unique in that it has underutilized alternative methods "such as direct intervention in the real estate market, the creation of incentives for preservation property owners, the passage of additional laws, or the development of preservation-supportive zoning policies."<sup>206</sup> Alternative mechanisms like these could prove useful not just for furthering the goals of preservation

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201. See Memorandum from Paul Edmondson, Vice President & Gen. Counsel, Nat'l Tr. for Historic Pres. 5 (Aug. 2, 2005), <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/resources/Kelo-Commentary.pdf> [<http://perma.cc/ULJ3-CT33>] (advising "preservationists should continue to encourage communities to use a variety of planning tools and economic incentives to promote historic preservation so that condemnation is not necessary").

202. See Mallard, *supra* note 64, at 336.

203. See *id.* at 339–43 (giving South Carolina as an example of a state that has successfully used voluntary conservation easements to protect interiors in the absence of legal authority to impose landmark restrictions on interiors).

204. *Id.* at 342.

205. Landmarks Law, N.Y.C., N.Y., Admin. Code § 25–302(m) (2013).

206. Wood, *supra* note 23, at 383.



generally but also for ensuring that the public can continue to have access to significant interior spaces.

Finally, the public, in addition to the government, could encourage owners to allow continued access to landmark interiors. The respective histories of the creation of the Landmarks Preservation Commission and the passage of the Landmarks Law reveal how effective public energy can be when focused on the use of a city's significant structures and spaces.<sup>207</sup> The excitement and publicity surrounding the Landmarks Law's fiftieth anniversary confirm that New Yorkers' interest in preserving and visiting their cultural landmarks remains as strong now as it was in the middle of the twentieth century. Tens of thousands of people participated in this year's Open House New York annual event, during which owners allowed the public to "take a peek inside many of New York City's architectural gems that are typically behind closed doors," including the interior-landmarked City Hall and Woolworth Building.<sup>208</sup> Owners may be responsive to further public awareness and support for access to interior spaces.

#### CONCLUSION

While the success of New York City's groundbreaking Landmarks Preservation Law—fifty years old as of last year—may be debated, its impact on the city's physical, cultural, and historical fabric over its half-century in existence is beyond question. More important than its effects on the city itself is the immeasurable influence the law has had on the millions of people who have experienced and seen first hand the landmarks that might otherwise have been altered or destroyed without the law's protections. Yet today, some of New York City's most celebrated interior landmarks are closed off to the public, the very group the protection of the spaces was meant to benefit. While there may be several avenues available for ensuring that the public has access to landmark interiors, the most promising are those that depend on the cooperation of government, the public, and most importantly, owners of landmarks, rather than those that seek to prevent restricted access over owners' objections.

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207. See *supra* notes 22–28 and accompanying text (describing origins of Landmarks Law); see also Landmarks Law at 50, *supra* note 3 ("The landmarks law gains its moral force from the engagement of the public."); cf. Wood, *supra* note 23, at 385 ("Landmarks preservation depends on political will, and that begins with citizen advocacy.").

208. Scott Heins, *Explore the Most Beautiful Corners of NYC at This Year's Open House New York*, Gothamist (Oct. 5, 2016, 4:52 PM), [http://gothamist.com/2016/10/05/ohny\\_2016\\_preview.php#photo-1](http://gothamist.com/2016/10/05/ohny_2016_preview.php#photo-1) [<http://perma.cc/N8L3-C76P>]; *Mission & History*, Open House N.Y., <http://www.ohny.org/about/mission> [<http://perma.cc/G4VT-ZM2G>] (last visited Aug. 6, 2016); Jessica Plautz, *How to Get an Inside Look at New York City's Architectural History*, Mashable (Oct. 6, 2015), <http://mashable.com/2015/10/06/open-house-new-york/#Rtv7IXu6ZuqB> [<http://perma.cc/JN6M-BJFE>].

