INTERIOR LANDMARK DESIGNATION AND REGULATION: SHOULD GOVERNMENT REGULATE PUBLICLY INACCESSIBLE INTERIOR LANDMARKS

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I. INTRODUCTION

The purpose of interior landmark regulation is "preserving our cultural, historical, aesthetic, and architectural resources from destructive development."[1] Courts in various jurisdictions have maintained

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that public access is not a necessary condition for the regulation of interior landmarks,[2] provided that the interior was accessible to the public at the time of designation;[3] access is a prerequisite to landmark designation that allows municipalities the police power to regulate property. As a matter of policy, governments should not regulate publicly inaccessible interior landmarks.

Landowners have the right to exclude; thus, government cannot compel property owners to maintain public access to interior landmarks.[4] Given that owners also have the right to maintain a private function, governmental regulation of interior landmarks, inaccessible to the public, serves no purpose. Additionally, if government seeks to regulate the maintenance of interior landmarks, public access should be necessary for such regulation and not just a condition for designation; legislatures should introduce protective policies.

II. BACKGROUND

A. History of Landmark Designation and Regulation

The United States government has been purchasing property for preservation purposes since at least 1816, when Philadelphia purchased Independence Hall, the site of the drafting and signing of the Declaration of Independence.[5] In 1850, New York purchased Hasbrouck House, America's first house museum; in 1857, Carpenters' Hall, the first privately owned historic landmark, opened in Philadelphia, and in 1888, the Association for the Preservation of Virginia Antiquities became the first officially recognized state preservation organization.[6] Currently, over six hundred cities across the United States have historic preservation regulations.[7]

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1 Albert H. Manwaring, IV, Note, *American Heritage at Stake: The Government's Vital Interest on Interior Landmark Designations,* 25 NEW ENG. REV. 291, 307-09 (1990).

2 Matter of Save America's Clocks, Inc. v. City of New York, 33 N.Y.3d 198, 208-09 (2019).

3 *Id.* at 208-09.

4 U.S. CONST. amend. V.

5 *Chronology: Historic Preservation Movement in the United States,* CITY OF PONTIAC, MICHIGAN (2018), http://www.pontiac.mi.us/departments/community_development/hdc/docs/HistoricPreservationChronology2018.pdf.

6 *Id.*

7 Albert H. Manwaring, *supra* note 1, at 300 (1990).

The Supreme Court upheld the government's right to condemn property for preservation purposes in 1896 in *United States v. Gettysburg Electric Railroad Company.*[8] The Court permitted local governments to condemn land through eminent domain for historic preservation,[9] holding that condemnation was a legitimate means by which to preserve a historic area.[10] *Gettysburg Electric* examined whether the United States government could constitutionally take Gettysburg Electric's property which was located within a historic area.[11] The case rested on the Sundry Civil Appropriation Act, which authorized condemnation of property to prevent historic district defacement due to the construction of the railroad. Gettysburg Electric sued for unconstitutional taking of land without just compensation and was awarded $30,000 in reparation by a jury.[12] The Supreme Court later reversed the judgement, maintaining that government could condemn land for this type of public use.[13]

In 1906, a decade after the *Gettysburg Electric* decision, Congress passed the Antiquities Act, authorizing the president to declare historic landmarks, structures, and other objects of historic interest on federal land as national monuments.[14] This first significant act of Congress provided for federal preservation legislation. Subsequently, Congress enacted the National Historic Sites Act, which laid the foundation for future historic preservation statutes and federal regulation, giving the Secretary of the Interior the power to acquire historic sites and oversee historic locations.[15]

Congress' enactment of the National Historic Preservation Act of 1966 (NHPA) designated the federal government as the lead for historic preservation, providing a model for state municipalities regarding the implementation of robust policies and encouraging consistent preservation practices.[16] The intent of the NHPA is to "foster conditions under which our modern society and our prehistoric and historic

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8 United States v. Gettysburg Elec. R. Co., 160 U.S. 668, 16 S.Ct. 427 (1896).

9 *Id.* at 681.

10 *Id.* at 681-682, 685.

11 *Id.* at 681-682, 685.

12 *Id.* at 681-682, 685.

13 *Id.* at 681-682, 685.

14 16 U.S.C. § 431-33.

15 *Id.*; *Chronology: Historic Preservation Movement in the United States, supra* note 5.

16 ADVISORY COUNCIL ON HISTORIC PRESERVATION, https://www.achp.gov/preservation-legislation.

resources can exist in productive harmony."[17] The Act entrusted individual state governments with the enactment of preservation laws, but also set federal guidelines for preservation: (1) it established a National Register of Historic Places;[18] (2) it implemented a State Historic Preservation Officer, elected by the state governor, to serve as the authority for nominating properties to the National Register and to determine if preservation ordinances are consistent with the Act;[19] and (3) it provided the Secretary of the Interior the charge to revise state historic preservation regulations or suspend programs accordingly.[20] Additionally, the National Historic Preservation Act established the Advisory Council on Historic Preservation,[21] Section 106 of which specifies that federal agencies must consider the outcome of actions taken on historic properties and provide the Advisory Council the opportunity to evaluate potential damage to historic structures and to respond with guidelines for individual municipalities to promote safe and effective preservation.[22] The Advisory Council works to advance the preservation of historic properties by advising Congress on federal policy legislation.[23]

Congress passed the Tax Reform Act of 1976, providing the first federal tax incentive for the preservation of certified historic structures through rehabilitation programs.[24] The Act defines a certified historic structure as a:

> depreciable building or structure which is (a) listed in the National Register, (b) located in a Registered Historic District and is certified by the Secretary of the Interior as being of historical significance to the district, or (c) located in a

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17 National Historic Preservation Act, P.L. 102-575, 16 U.S.C. 470-1, § 2(1).

18 National Historic Preservation Act of 1966, P.L. 102-575, 16 U.S.C. 470.

19 National Historic Preservation Act of 1966, P.L. 102-575, 16 U.S.C. tit. 1, § 101(b).

20 *Id.*

21 National Historic Preservation Act of 1966, P.L. 102-575, 16 U.S.C. 470 § 106.

22 *Id.*

23 ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 16.

24 Joint Committee on Taxation, *Joint Committee "Blue Book" Tax Legislation Enacted in the 94th Congress*, Summary of the Tax Reform Act of 1976, § 2124 Tax Treatment of Certified Historic Structures, 102-03 (Oct. 1976), https://www.jct.gov/CMSPages/GetFile.aspx?guid=b002566d-edd9-41ae-820e-426ad3512bb7; Tax Reform Act of 1976 H.R. 10612, 94th Cong., Pub. L. 94-455 § 2124 (1976).

> historic district designated under a State or local statute containing criteria satisfactory to the Secretary of the Interior.[25]

The Act characterizes a qualifying rehabilitation as "any rehabilitation of a certified historic structure which the Secretary of the Interior has certified as being consistent with the historic character of such property or district."[26] Previously, the cost of rehabilitation had not been tax deductible, unless the structure was acquired with the intent of preservation.[27] The Act prohibits deductions for the demolition of historic structures without the Secretary's approval.[28] That same year, the NHPA was amended to create a Historic Preservation Fund to assist both the states and the National Trust for Historic Preservation with the completion of preservation projects.

As federal preservation legislation increased, correspondingly, preservation efforts by states also expanded. The first regional preservation association, the Society for the Preservation of New England Antiquities, was established in 1910.[29] Soon after, Charleston, South Carolina became the first municipality to enact districtwide preservation ordinances.[30] In 1931, the Special Committee on Zoning recognized an area of the city, home to 18th century buildings, as a historic district. City council ratified the committee's proposal to establish a historic district zoning ordinance[31] to "promote general welfare through the preservation and protection of historic places and areas of historic interest."[32] Following the ordinances in Charleston, New Orleans established a commission to preserve the French Quarter in 1936; Salem, Massachusetts was designated as the first National Historic Site in 1938; and San Antonio, Texas enacted a municipal historic ordinance to protect the Mexican village marketplace, La Villita, in 1939.[33]

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25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Chronology: Historic Preservation Movement in the United States,* CITY OF PONTIAC, *supra* note 5.

30 *National Park Service, Charleston, and Preservation*, NATIONAL PARK SERVICE, https://www.nps.gov/articles/charleston-and-preservation.htm (last visited Feb. 2, 2021).

31 *Id.*

32 *Id.*

33 *Chronology Historic Preservation Movement in the United States, supra* note 5; *An Ordinance Authorizing the Execution of Additional La Villita Lease*

The courts delayed upholding government regulation of private landmarks when government sought to avoid paying compensation. For example, in 1941, the Louisiana Supreme Court was the first state court to hear cases questioning municipal authority to regulate property changes in historic districts.[34] In *New Orleans v. Pergament,* the court held that municipal authority to regulate aesthetics was constitutional.[35] In *Pergament*, a property owner appeared in court for the violation of an ordinance prohibiting the display of large, obstructive advertising signs without permission from the historical commission.[36] The ordinance specified signage size and area requirements as a means to preserve the historic character of the district.[37] The property owner argued that the municipality had overstepped its authority,[38] but the court disagreed, concluding that the city had the authority to implement ordinances to protect the aesthetic beauty of a historic region.[39] Additionally, the court maintained the ordinance did not deprive the property owner of property use without due process and did not deny equal protection. The owner failed to obtain permission to erect a billboard and did not adhere to size requirements; the ordinance applied equally to all property owners to preserve the antiquity of the district.[40]

In 1954, the United States Supreme Court also upheld municipal power to impose aesthetic regulations in *Berman v. Parker*, reasoning that if government can establish a relevant and reasonable public purpose for the regulation, then government is entitled to regulate property for the purpose of enhancing the visual appeal of a community.[41] Shortly thereafter, the United States established the first nationwide National Trust for Historic Preservation, a privately funded nonprofit organization for the protection of America's historic places.[42]

Agreements Selected in Response to the Request for Proposal Process for retail Shops, Galleries, Working Artist Studios, and Restaurants, SANANTONIO.GOV https://webapp9.sanantonio.gov/FileNetArchive/%7B5C92D789-8D48-4629-A4C3-55A0FCAE26E2%7D/%7B5C92D789-8D48-4629-A4C3-55A0FCAE26E2%7D.pdf (last visited Feb. 2, 2021).

34 *See* New Orleans v. Pergament, 198 La. 852 (1941).

35 *Id.* at 859.

36 *Id.*at 854-55.

37 *Id.* at 856-58.

38 *Id.* at 854-58.

39 *Id.*

40 *Pergament,* 198 La. 852 at 857-58.

41 *See* Berman v. Parker, 348 U.S. 26 (1954).

42 *Id.* at 34-36.

Landmark preservation laws are a constitutional advancement of public enrichment. The 1978 *Penn Central Transportation Co. v. New York City* Supreme Court decision upheld landmark preservation laws as legitimate, giving state and local governments the authority to enact such laws.[43] *Penn Central* reaffirmed governments have a lawful interest in enacting historic preservation regulations, limiting the type of maintenance and alterations of historic structures to safeguard the historical integrity of those structures.

Municipalities establish landmark preservation commissions to regulate historic districts.[44] Such commissions are not obligated to provide specific guidelines, changes to designated landmarks are considered on a case-by-case basis after evaluation of the impact on the specific historic landmark.[45] In 2009, the court in *Conner v. City of Seattle* held that although landmark preservation regulations were vague, the Landmark Preservation Organization (LPO) was implemented "to designate, preserve, protect, [and] enhance" historical landmark sites; the LPO cannot reasonably provide specificity due to the inherent uniqueness of landmarks.[46] In this case, the second owner of a landmarked home and parcel sought to divide the property to construct three separate dwellings. The court held that the landmark commissioner had the authority to preserve "landscape elements . . . contribute[ing] to the period character and significance of the residence."[47] Furthermore, the court purported "landmark preservation is a legitimate state interest and rejection of Conner's incompatible proposal was 'aimed at' achieving that purpose."[48]

B. History of the Designation and Regulation of Interior Landmarks

At its inception, historic preservation legislation sought to solely regulate the appearance and modification of the exteriors of historic landmarks.[49] Later, legislation was extended to interior landmark

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43 *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

44 *See* Conner v. City of Seattle*,* 153 Wash. App. 673 (2009).

45 *Id.* at 686-87.

46 *Id.*at 686-87.

47 *Id.* at 678-79, 681.

48 *Id.* at 700.

49 *Historic Preservation: Not Just a Façade*, *Legal Memorandum, LU08,* DEPARTMENT OF STATE OFFICE OF GENERAL COUNSEL*,* https://www.dos.ny.gov/cnsl/lu08.htm (last visited Mar. 20, 2021).

designations to protect the interior of historically, culturally, or architecturally significant structures by postponing, limiting, or prohibiting changes considered unsuitable.[50] In 1973, the New York City Landmark Preservation Commission enacted the first preservation ordinance to allow for the designation of interior spaces that are publicly accessible. The possibility that a designated interior space, that was accessible to the public at the time of designation, could later privatize, would not preclude the structure from designation.[51]

To obtain landmark designation in Philadelphia, interiors must have the:

> same character-defining features that qualify exteriors for landmark status. An interior is expected to possess such characteristics as integrity of location, setting, workmanship, feeling and association; be associated with significant events and/or people; embody distinctive characteristics of a type, period or method of construction; represent the work of a master or possess high artistic value; and/or yield important historical information.[52]

Owners seeking to make changes to their landmarked property must submit a Certificate of No Effect.[53] Public access is not considered in the evaluation as access is a requirement for designation, but not a requirement for regulation of maintenance.[54]

For example, the city of Boston uses interior landmark designation as an "insurance policy" to assure that historically significant

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50 *Id.*

51 Nicholas Caros, Note, *Interior Landmarks Preservation and Public Access,* 116 COLUM. L. REV. 1773, 1786-89 (2016); Teachers Ins. & Ass'n, 82 N.Y.2d 35, 43-44.

52 Preservation Alliance for Greater Philadelphia, *Protecting Historic Interiors, A Survey of Preservation Practices and Their Implications for Philadelphia,* PRESERVATION ALLIANCE FOR GREATER PHILADELPHIA 8 (2007), http://www.preservationalliance.com/wp-content/uploads/2014/09/InteriorsFINAL-1.pdf.

53 *Certificate of No Effect,* NYC LANDMARKS PRESERVATION COMMISSION, https://www1.nyc.gov/site/lpc/applications/certificate-of-no-effect.page (last visited Feb. 2, 2021) ("A Certificate of No Effect (CNE) is needed when the proposed work requires a Department of Buildings permit. CNEs are issued by LPC's staff preservationists, and do not require a public hearing before the full Commission or a presentation to the community board.").

54 Nicholas Caros, *supra* note 51, at 1786-89. *Teachers Ins. Ass'n,* 82 N.Y.2d at 43-44.

architecture and buildings remain intact. Any modification or addition must be reviewed and approved by the governing agency,[55] "where an interior has been designated, changes to specified interior elements are reviewed."[56] The Ebenezer Hancock House, one of Boston's best-known historic sites, was designated as an interior and exterior landmark in 1978. The house is a valuable Revolutionary War Era site, which served as the headquarters to the Deputy Paymaster General and money distribution center for troops.[57] The Ebenezer Hancock House was owned by John Hancock and was occupied by his brother, Ebenezer. The first floor was home to the longest standing shoe store in the country, operating from 1798-1963. Additionally, the Ebenezer Hancock House is the only surviving vernacular structure dating from the mid-18th century in Central Boston.[58]

Likewise, San Francisco's Bay Area is home to some of the country's most impressive interior landmarks.[59] The Bay Area's Beach Chalet was designed by Willis Polk, with frescoes painted by Lucien Labault, depicting life in San Francisco; the Rincon Post Office Annex features twenty-seven murals depicting the history of California, painted by Anton Refregier; the Carnegie Library in Chinatown, designed by Gustave Albert Lansburgh, is known for the spatial volume in the Main Reading Room and ornamental ceiling; and the VC Morris, the only Frank Lloyd Wright building in San Francisco, houses the prototype for the circular ramp located in the Guggenheim Museum.[60]

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55 *Review and Approval Process for Changes to Designated Landmarks*, BOSTON LANDMARKS COMMISSION, https://www.boston.gov/sites/default/files/imce-uploads/2016 11/review_and_approval_process_blc_nov_2016.pdf (last visited Feb. 2, 2021); *Landmarks Design Review Process,* CITY OF BOSTON, https://www.boston.gov/departments/landmarks-commission/landmarks-design-review-process (last visited Mar. 22, 2021).

56 *Review and Approval Process for Changes to Designated Landmarks, supra* note 55. For a list of interior and exterior landmarks, *see* Boston Landmarks Commission, *BLC Landmarks Petitions as of December 2019, https://www.boston.gov/sites/default/files/file/2020/01/BLC%20Landmarks%20Petitions%20Status%20as%20of%20December%202019_3.pdf* (last visited Jan. 11, 2021).

57 *Ebenezer Hancock House Boston Landmarks Commissioner Study Report,* BOSTON.GOV, https://www.boston.gov/sites/default/files/embed/e/ebenezer-hancock-house-study-report.pdf (last visited Mar. 22, 2021).

58 *Id.*

59 Alex Bevk, *Head Indoors with 10 of the Bay Area's Most Spectacular Interior Landmarks,* CURBED SAN FRANCISCO (Sept. 15, 2015), https://sf.curbed.com/2015/9/15/9922358/head-indoors-with-10-of-the-bay-areas-most-spectacular-interior.

60 *Id.*

Similarly, Long Beach lists various regulations regarding interior and exterior landmarks in their municipal code under Title 16: Public Facilities and Historical Landmarks.[61] The regulations discuss specific designations in the region[62] and also govern the maintenance of the Insurance Exchange Building,[63] whose interior is original art deco in design.[64] The municipality determined that the art deco style should be maintained and preserved, and that certificates of appropriateness[65] are necessary for routine maintenance.[66] The Long Beach municipal code also regulates alterations that can be made to the Heartwell/Lowe House,[67] providing that, "'no person owning, renting, or occupying property which has been designated a Landmark' can do so without first applying for a certificate of appropriateness."[68] The interior of the Colonial Revival home features a hardwood stairway, door frames, built-in cabinets, decorative hardwood trim, original bathroom fixtures and ceramic tile, and decorative fireplace.[69] While the Los Angeles preservation ordinance does not specifically dictate the scope of the municipality's landmark designation power, the Office of Historic Resources reviews proposed historic landmark interior alterations when the interior "contain[s] significant, character-defining features of the building that were identified in the nomination."[70]

New York City provides similar regulatory provisions.[71] Administrative Code Section 25-306 requires owners of property in

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61 Long Beach, California; Title 16 - PUBLIC FACILITIES AND HISTORICAL LANDMARKS, *available at* https://library.municode.com/ca/long_beach/codes/municipal_code?nodeId=TIT16PUFAHILA.

62 *Id.*

63 Long Beach Municipal Code tit. 16, § 16.52.060, Insurance Exchange Building, *available at* https://library.municode.com/ca/long_beach/codes/municipal_code?nodeId=TIT16PUFAHILA_CH16.52HILA_16.52.060INEXBU.

64 *Id.*

65 Certificates of Appropriateness are comparable to Certificates of No Effect. *See Certificate of No Effect, supra* note 53.

66 Long Beach Municipal Code tit. 16, § 16.52.060, Insurance Exchange Building, *available at* https://library.municode.com/ca/long_beach/codes/municipal_code?nodeId=TIT16PUFAHILA_CH16.52HILA_16.52.060INEXBU.

67 *Id.; id.* at tit. 16. § 16.52.130 - Heartwell/Lowe House.

68 *Id.*

69 *Id.*

70 *The Cultural Edition, Landmark THIS! Guide to Local Landmark Designation,* LOS ANGELES CONSERVANCY, https://www.laconservancy.org/sites/default/files/files/resources/Landmark%20This%21%20Cultural%20Edition%20FINAL.pdf (last visited Mar. 22, 2021).

71 N.Y.C. Admin. Code § 25-306.

historic districts, including interior landmarks, to obtain a permit or a Certificate of No Effect from the city planning commission[72] prior to the commission's determination of whether alterations would negatively impact the structure or disrupt the continuity with neighboring structures.[73] In New York, very few resources are available to property owners for the funding of maintenance per municipal regulations.[74] However, in a small number of cases, municipalities, nonprofits, and religious organizations are eligible for highly competitive grants to cover preservation costs.[75] For income-producing landmarks, the federal government offers tax incentives to compensate for costs incurred.[76]

C. Purpose of Interior Landmark Designation

Congress passed the National Historic Preservation Act in the interest of preserving sites that will benefit the "cultural, educational, aesthetic, inspirational, economic, and energy" needs of America.[77] Similarly, the intent of legislation for the preservation of the interiors of historic structures is to further "preserv[e] our cultural, historical, aesthetic, and architectural resources from destructive development,"[78] ensuring that history is accessible to the public. Interior landmarks document culture and history, bringing communities together to learn and interact in historic places. Landmarking interiors ensures the continuation of historical value and protects against potential damage to the historic character of a district. Interior landmarks allowed to discontinue public access do not further legislative intent and should

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72 *Id.*

73 *Id.*

74 *Resources - Find Funding,* LANDMARK SOCIETY OF WESTERN NEW YORK, https://www.landmarksociety.org/resources/.

75 *Id.*

76 *Id.; see also Historic Tax Credits,* PRESERVATION LEAGUE OF NYS, https://www.preservenys.org/tax-credits (last visited Mar. 23, 2021) ("The Federal Historic Rehabilitation Tax Credit program provides a 20% federal income tax credit for owners of income-producing properties listed on the National Register of Historic Places. Property owners completing a substantial rehabilitation of their historic buildings can receive the credit if their work meets the Secretary of the Interior's Standards for Rehabilitation and is approved by the National Park Service.").

77 National Historic Preservation Act of 1966**,** P.L. 102-575, 16 U.S.C. 470; *National Park Service Historic Preservation,* NATIONAL PARK SERVICE, https://www.nps.gov/subjects/historicpreservation/education.htm (last visited Mar. 19, 2021).

78 Manwaring, *supra* note 1, at 295.

not be regulated by government thereafter. Governmental regulation of inaccessible interior landmarks is an unnecessary intrusion on private property. While interior landmarks are customarily open to the public or are areas to which the public is ordinarily invited;[79] land use regulation of interior landmarks, inaccessible to the public, restrict property owner use and may diminish property value.[80]

Historic structures may be listed in the National Register, may be locally designated, or both.[81] Listing in the National Register is an honorary status,[82] allowing the ability to alter structures without seeking permission.[83] When properties are designated as landmarks by local municipalities, local government is given the authority to preserve the historic character by restricting alterations.[84]

III. CHALLENGES TO LANDMARK REGULATIONS

Interior landmark regulation was initially viewed as an unnecessary governmental intrusion; however, courts began to support the interior directive concluding that regulation of interiors would serve the legitimate public purpose of preserving history for present and future generations.[85]

A. First Amendment Challenges

State and local governments' ability to regulate landmark designated properties is not a violation of an owner's right to free speech and expression.[86] Regulation of landmarks falls within a local government's authority to decide what activities will interfere least with the historic and aesthetic precedents in historic districts. In *Burke v. City*

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79 *See* discussion *infra* Section IV.

80 *Id*.

81 *National Register of Historic Places,* NATIONAL PARK SERVICE, https://www.nps.gov/subjects/nationalregister/faqs.htm (last visited Mar. 23, 2021).

82 *Id.; People Protecting Community Resources, Strengths of Local Listing,* NATIONAL PARK SERVICES, U.S. DEPARTMENT OF THE INTERIOR, https://web.archive.org/web/20110512192512/http://www.cr.nps.gov/hps/workingonthepast/strengths.htm (last visited Mar. 25, 2021).

83 *National Register of Historic Places*, *supra* note 81; *People Protecting Community Resources, Strengths of Local Listing, supra* note 82.

84 *National Register of Historic Places*, *supra* note 81; *People Protecting Community Resources, Strengths of Local Listing, supra* note 82.

85 *See National Register of Historic Places*, *supra* note 81; *see also* Preservation Alliance for Greater Philadelphia, *supra* note 52.

86 Burke v. City of Charleston, 139 F.3d 401 (4th Cir. 1998).

of Charleston, the court held that landmark regulations were not intended to silence individual expression, but were intended to maintain similar features within historic districts.[87] In *Burke*, the appellant, a local artist, had painted a wall mural on the exterior of a restaurant located on King Street in Charleston's historic district.[88] The Board of Architectural Review denied the property owner's application to display the mural as it did not comply with historic preservation ordinances and was in stark contrast to the street's style.[89] The mural was a depiction of colorful cartoons, intended "to convey a message of tolerance for diversity by showing different creatures co-existing peacefully."[90] The appellant claimed that rejection of the permit was a violation of his First Amendment rights.[91] This argument was denied by the court, stating that once the appellant sold his services, only the property owner had the right to display the work; therefore, only the property owner had the right to bring the claim.[92] Given the state's authority to regulate historic landmarks, the First Amendment claim would have likely failed for the property owner as well, as the regulations were not substance-specific and applied to all landmarked structures in the city.[93]

However, the landmark designation of religious dwelling interiors can in fact be considered an unlawful governmental intrusion on the freedom of religious expression.[94] The court, in the *Society of Jesus*

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87 *Id.* at 408 ("Burke asserts a core First Amendment interest in artistic speech. Charleston counters with its interest in maintaining the aesthetic integrity of its historic district and the related interests of protecting property values and promoting tourism.").

88 *Id.* at 403.

89 *Id.* at 403.

90 *Id.* at 403.

91 *Id.* at 404-07.

92 *Burke,* 139 F.3d at 404-07.

93 *Id.*

94 *Soc'y of Jesus v. Boston Landmarks Commission,* 409 Mass. 38, 39, 40-43 (1990) ("[A] Superior Court judge held that the designation violated the free exercise clause of the First Amendment to the United States Constitution, and, therefore, granted summary judgment to the Jesuits. This court [the Supreme Judicial Court of Massachusetts] granted the application of the commission for direct appellate review, and we [the Supreme Judicial Court of Massachusetts] now affirm the judgment on the ground that the designation of the church interior violated art. 2 of the Declaration of Rights of the Massachusetts Constitution.") ("Because we [the Supreme Judicial Court of Massachusetts] hold that the designation violates art. 2, we do not reach the Jesuits' remaining constitutional claims . . . "'Article 2 provides, in part: "[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates

of New England v. Boston Landmarks Commission, held that designating a church interior as a landmark, only allowing for renovations subject to municipal approval, infringed on the right to freedom of religion.[95] In this case, the church had planned to renovate the main church area into an office, counseling, and residential center. However, the Landmarks Commission designated the church and part of its interior, as a landmark which restricted permissible alterations. In designating the church as a landmark, the Commission was effectively regulating the church's conduct, resulting in an unconstitutional restraint on religion. Government interest in historic preservation does not justify restraints on the free exercise of religion afforded by the First Amendment and by states' constitutions.[96]

Landmark regulations do not inherently violate the First Amendment. Owners who conduct religiously-oriented activities on their property are not automatically exempt from landmark regulation;[97] nonreligious government intrusion is not a violation of the First Amendment.[98] In *Society for Ethical Culture v. Spatt,* the court held that the landmark designation did not physically or financially prevent, or seriously interfere with, the conducting of charitable and religious activities.[99] The property in question, the Meeting House of the Society of Ethical Culture of the City of New York (Society), was designated a historic landmark for its art nouveau style facade designed by architect Robert D. Kohn.[100] The Society contended that the designation was an unconstitutional taking and an interference with the free practice of religion.[101] Over the years, the Society had grown substantially in popularity and purchased the property to expand and establish a permanent home. The designation would not allow for the realization of the property's full economic value and would prohibit the demolition of the existing structure necessary to expand business operation.[102] This developmental limitation could potentially affect the

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of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.'").

95 *Id.* at 40-42.

96 *Id.* at 40-41.

97 Soc'y for Ethical Culture v. Spatt, 51 N.Y.2d 449, 456 (1980).

98 *Id.* at 455-56.

99 *Id.*

100 *Id.* at 452.

101 *Id.* at 452, 453-56 ("The Society is a religious, education and charitable organization founded in 1877 to unite interested person to further the goal of nonsectarian moral improvement.").

102 *Id.* at 453-54.

property's market value, as well as the Society's ability to continue charitable and religious activities. Nevertheless, the court found the landmark designation did not place an excessive burden on the owner, nor restrict the realization of its charitable mission.[103] Unreasonable restriction on charitable activity will be found when the designation renders the property insufficient for carrying out religious needs, with the sole alternative of ceasing all religious or charitable activity.[104] Although the designation inconvenienced the Society, no evidence was presented to support the argument that the only viable solution for accommodating was to demolish and rebuild. While the Society and other religious and charitable organizations are entitled to First Amendment protections, they are not immune from reasonable governmental intrusion.[105]

B. Fifth Amendment Takings Challenges

The Fifth Amendment of the United States Constitution states that private property cannot be taken by government to confer a public benefit without compensation.[106] To determine whether state regulation constitutes a taking under the Fifth Amendment, courts should consider the economic impact of regulation on the owner and the extent to which the regulation interferes with reasonable investment-backed expectations, and the type of government action involved.[107] Government does not have a responsibility to assure maximum economic benefit, but must ensure equitable use of property.[108] However, physical invasions of personal property by government or governmental denial of all economically viable uses of property will almost always be upheld as a taking. In contrast, obstruction of property development will likely not be considered a taking.[109]

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103 *Soc'y for Ethical Culture,* 51 N.Y.2d at 453-54.

104 *Id.* at 454-55 (citing Lutheran Church in Am. v. City of New York, 35 N.Y.2d 121 (1974)).

105 *Id.* at 456.

106 U.S. CONST. amend. V, § 2; STEWART E. STERK ET AL., LAND USE REGULATION 235 (2nd ed., University Casebook Series) ("[A]ny action that would violate the Fifth Amendment if done by the federal government is deemed to violate the Fourteenth Amendment when done by state or local officials."); Penn Central Transp. Co. v. City of New York, 438, U.S. 104, 123 (1978).

107 *Penn Central,* 438 U.S. at 123-24; Manwaring, *supra* note 1, at 307-09.

108 *Penn Central,* 438 U.S. at 124, 136-38.

109 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, (1982).; *see also* Lucas v. S. Carolina Coastal Council, 505 U.S. 1003 (1992); *see also* STEWART E. STERK ET AL., *supra* note 106.

Typically, if government regulation acts as permanent physical invasion or occupation, if there is a singling out or concentration of losses, and/or if regulations interfere with the existing use of property, then government must provide compensation.[110] If the regulation is not invasive, prevents harm, has a reciprocity advantage, or solely interferes with a prospective use no compensation is required.[111]

Local municipalities can make and enforce landmark regulations without violating the Fifth Amendment's Takings Clause.[112] *Penn Central Transportation Co. v. New York City* laid the groundwork for imposing building and maintenance restrictions on landmarked properties to advance public interests, excluding *per se* challenges. In *Penn Central,* the Supreme Court rejected Penn Central's assertion that any economic restriction imposed on their use of property, under the Landmarks Preservation Law, was a taking.[113] New York enacted the Landmarks Preservation Law (LPL) allowing local municipalities to designate neighborhoods, buildings, and structures as historical landmarks.[114] Penn Central Transportation Company, which owned Grand Central Station, a historic landmark designated under the LPL,[115] leased the airspace above Grand Central and submitted proposals for the construction of an office building above the designated structure.[116] When the proposal was denied by the city's Landmarks Preservation Commission, Penn Central challenged the decision arguing the rejection was a violation of the Fifth Amendment's Taking Clause, requiring just compensation.[117] The Court reasoned the economic impact did not constitute total diminution of property value as the owners retained the ability to generate revenue. Merely prohibiting property owners from generating additional revenue, in this case through leasing the airspace rights above the building, is not a constitutional taking.[118] The Court reasoned that Penn Central's investment-backed expectations were not significantly impacted as potential

110 *See Loretto,* 458 U.S. 419; Lecture, Professor Stewart Sterk, Property Law (2019).

111 *See Penn Central,* 438 U.S. 104; Lecture, Professor Stewart Sterk, Property Law (2019).

112 *See Penn Central,* 438 U.S. 104.

113 *Id.* at 104-05.

114 *Id.* at 104.

115 *Id.* at 107-09, 113-15.

116 *Id.* at 104-05.

117 *Id.*

118 *Penn Central,* 438 U.S. at 120-22.

revenue generated from the developed airspace was not a viable option at the time the property was purchased.[119] In this case, the government's actions prohibited further development; the Court maintained that significant public interest in protecting a landmark was advanced by the regulation, which prohibits the development of airspace above the terminal.[120]

An exception to the holding in *Penn Central* arises when all economically viable use of property is denied or when reasonable use is noxious and prohibited by nuisance law.[121] Exceptions should follow the decision in *Lucas v. South Carolina Coastal Council*, in which the Supreme Court held that not allowing Lucas, the property owner, to build on beachfront property would result in total deprivation of any potential beneficial use of property, having the same effect as a permanent physical invasion, rendering it a taking.[122]

While landmark regulations are constitutional, there are cases in which regulation is deemed unconstitutional as applied to specific properties.[123] If landmark designation and regulation interferes with an owner's right to own and manage property or forces the owner to discontinue longstanding use of the property, it is a violation of the Fifth Amendment.[124] In *Lutheran Church in America v. City of New York,* the court held the New York Landmarks Preservation Commission did not have the authority to infringe upon the free use of the owner's property, which was utilized for charitable purposes and which was experiencing documented hardship.[125] In *Lutheran Church,* the property owner, a religious entity, acquired property for use as religious, corporate offices. The property was selected for designation as it is one of few standing Anglo-Italianate brownstones, once belonging to J.P. Morgan, Jr.[126] If landmark designation continued, it would result in insufficient space to operate current business; property use of the past twenty years could not continue as the designation would prevent the construction of additional workspace.[127] A

119 *Id.* at 124-26.
120 *Id.* at 119-20.
121 Lucas v. South Carolina Coastal Council*,* 505 U.S. 1003, 1003-04 (1992).
122 *Id.* at 1003-05.
123 *See* Lutheran Church in Am. v. City of New York, 35 N.Y.2d 121 (1974).
124 *Id.*
125 *Id.*at 123-24, 132.
126 *Id.* at 123-25.
127 *Id.* at 123-24, 132.

municipality's infringement upon an owner's free, consistent, and continuing pre-existing use of property is a taking under the Fifth Amendment.[128]

C. Challenges to Interior Landmark Regulations

The First Amendment and the Fifth Amendment do not protect owners of interior landmarks who choose to privatize their structures. The legal analysis of First and Fifth Amendment challenges to the regulation of interior spaces are similar to those of exterior landmarks and focus on the unreasonable nature of regulations, the extent to which such regulations are arbitrary and capricious, and whether regulations fail to bring out their intended benefit.[129] Property owners argue that government should not regulate interior landmarks if the interior is inaccessible to the public.[130] State and local governments, along with the courts, stand by the contention that public access is not necessary, even though regulations are enacted with the intent of public benefit.[131] Suspending public access to interior landmarks eliminates the essential nexus between government regulation and public interest.[132]

Governments have argued, and courts have agreed, that if cities are deprived of historic property by an owner's decision to suspend access, it would diminish the municipality's ability and authority to restore and regulate current landmark structures. In *Weinberg v. Barry*, the court held that interior landmark designation was a power afforded to states and interior regulation was proper even when public access was not permitted.[133] In *Weinberg,* the trustees for the beneficial owners of the property argued that recommending the interior for landmark designation would be a burden on their use of the interior by making alterations subject to onerous review, forcing them to maintain the wholly private interior as a public landmark at their own expense during the ninety-day application review period.[134] The court maintained that economic interest did not outweigh public purpose. However, the court did contend that if the review exceeded ninety days, designation

128 *Id.*
129 STERK ET AL., *supra* note 106, at 135-55.
130 *Id.*
131 *Id.*
132 *Id.*
133 Weinberg v. Barry, 604 F.Supp. 390 (1985).
134 *Id.* at 394-98.

would be untimely and unlawful, and a landmark designation application would need to be refiled.[135]

The designation of interiors as landmarks is not a violation of the Fifth Amendment. In 1987, twenty-eight theaters, including their interiors, were landmark designated. These designations were challenged in *Shubert Org. v. Landmarks Pres. Comm'n of New York*. The court rejected the buildings owners' contention that regulation was an excessive burden and a violation of the Fifth Amendment,[136] reasoning that the *Penn Central* decision should apply to both interior and exterior landmark designations.[137] The theater owners argued that designating the interior and exterior would adversely affect the owners' ability to adapt the theaters to changes in production equipment, would increase the expense of maintaining the theaters in accordance with regulations and would also increase the cost burden on producers. The court maintained there was a reasonable basis for the designations, previous theater designations included the Apollo Theater, the Beacon Theater, City Center, Carnegie Hall, and Town Hall.[138]

Potential private use of an interior does not preclude designation as any structure can be made private.[139] At the time of designation, interior structures must be locations which the public may visit or is typically invited; regulations apply even if there is an entrance fee. However, these prerequisites do not preclude interiors from closing to the public in the future.[140] The explicit purpose of Landmarks Law is the protection of historic landmarks. Following the *Shubert* decision, the court in *Teachers Ins. & Annuity Ass'n v. City of New York* held that the designation of an interior landmark does not constitute a taking.[141] Both the interior and exterior of the Four Seasons Restaurant, located on the ground floor of the Seagram Building in New York City, was designated as a landmark in 1989 due to its "special historical and aesthetic interest."[142] The Seagram Building is the only building in New York City designed by German architect, Ludwig Mies

135 *Id.* at 397-400.

136 *See* Shubert Org., Inc. v. Landmarks Pres. Comm'n., 166 A.D.2d 115 (1st Dep't 1991).

137 *Id.* at 121-22.

138 *Id.* at 119, 121-23.

139 Teachers Ins. & Annuity Ass'n v. City of New York, 82 N.Y.2d 35, 43-44 (N.Y. 1993).

140 N.Y.C. Admin. Code § 25-302(1); *id.* at 43-45.

141 *Teachers Ins. & Annuity Ass'n,* 82 N.Y.2d at 45-46.

142 *Id.* at 40.

van der Rohe; his design assistant, Philip Johnson, created the interior. When Teachers Insurance and Annuity Association (Association) purchased the Seagram Building, they agreed to propose the exterior of the building for landmark designation when eligible, however, the restaurant operator proposed the interior of the building for designation without consulting the Association.[143] The owners argued interior designation was an unfair burden, prohibiting renovations to maximize the real estate value and economic benefit and that interiors cannot be landmarked under owner objection.[144] The court, however, rejected the arguments concluding that Landmarks Law does not require owner consent for designation and future public access would not influence landmark designation decisions.[145]

IV. CHALLENGES TO REGULATION OF PRIVATE INTERIORS

Courts continue to uphold landmark commissions' authority to determine appropriate alterations to interior landmarks. However, when interior landmarks discontinue public access, regulation becomes purposeless.

Penn Central emphasized that Landmarks Preservation Law enacted in New York was not designed for public "acquisitions of historic properties . . . rather, [provides] services, standards, controls, and incentives that will encourage preservation by private owners and users."[146] Therefore, if private owners desire to alter their landmark designated property, interior or exterior, they must obtain a Certificate of Appropriateness or Certificate of No Effect[147] with the purpose of ensuring that changes are consistent with, and promote the interests of, the Landmarks Commission in preserving such structures.[148]

Landmark commissions must decide each case on the merits of the application. In *Martin v. City and County of San Francisco*, the court held that conceivable adverse effects on the environment were not grounds for the municipality to refuse review of alterations or renovations of an interior landmark.[149] The homeowner challenged

143 *Id.* at 40-41.

144 *Id.*at 40-45.

145 *Id.* at 42-46.

146 *Penn Central,* 438 U.S. at 109-10.

147 *Certificate of No Effect, supra* note 53.

148 *See Matter of Save America's Clocks, Inc.,* 33 N.Y.3d 198 (2019).

149 Martin v. City & County of San Francisco, 135 Cal.App.4th 392, 396-97 (2005).

municipal authority to lawfully require the owner of a private, single-family home to endure the expense of review of proposed interior alterations pursuant to the California Environmental Quality Act.[150] The Atkins House was built in 1853 and was designated as an interior landmark in 1977 due to its status as one of the oldest structures in San Francisco and for its 1893 remodeling by 19th century architect Willis Polk,[151] known for his iconic, natural redwood interiors.[152] The owner wished to dismantle portions of the redwood interior, however, the municipality refused to consider the permit without review under the California Environmental Quality Act, as the project impacted a historic resource.[153] A municipality cannot lawfully require an owner of a private residence, who proposes to modify the interior not visible to the public, to undergo the expense of review pursuant to another governing body. The court determined that, although the municipality can grant or deny permits for alterations to interior landmarks, their authority does not extend to deferment to the California Environmental Quality Act review of interior modifications that are not perceptible to the public.[154]

In accordance with the holding in *Teachers,* public accessibility is simply a "jurisdictional predicate" for Landmark Preservation Commission (LPC) designation.[155] In 2019, in *Matter of Save America's Clocks, Inc. v. City of New York*, the court held that the LPC has full discretion in deciding if changes to landmarks are appropriate and determined that terminating public access complied with the statutory standard.[156] The interior of the Old New York Life Insurance Company headquarters in New York City was designated a landmark in 1987; the designation included a banking hall and a clock tower.[157] The clock tower is located in the western end and is the largest of purely mechanical clock towers in New York City, the only comparable clock is Big Ben in London.[158]

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150 *Id.* at 397-99.

151 *Id.*

152 *Id.*

153 *Id.* at 398.

154 *Id.* at 405-08.

155 *Teachers Ins. & Annuity Ass'n,* 82 N.Y.2d at 42.

156 Matter of Save America's Clocks, Inc., 33 N.Y.3d 198, 209-10 (2019).

157 *Id.* at 204.

158 Save America's Clocks, Inc. v. City of New York, 157 A.D.3d 133, 135-37 (2017).

In 2013, the building was sold to the Civic Center Community Group Broadway LLC, which received approval to convert the building to private residences.[159] Although the developer was not required to maintain the clock in working condition, the LPC approved keeping the clock running electrically and allowed the clock tower to become an integrated part of a private residence.[160] The court held that the LPC had a rational basis for approving the clock's modernization, as these changes would ensure the clock's continued operation and would allow for easier maintenance. Additionally, the changes would enhance the clock's exterior, which is visible to the public.[161]

The placement of the clock tower in a private residence was challenged by Save America's Clocks, Inc.; the LPC responded by stating, "there's no power under the Landmarks Law to require interior-designated spaces to remain public."[162] The court held that public access was merely a "threshold" condition that would allow for the exercise of police power over private property.[163]

Conversely, the dissent[164] emphasized that the purpose of the LPC was to designate and regulate landmarks for public enjoyment.[165] The dissent maintained that the LPC could only approve changes and alterations that would not imperil the integrity of the landmarked structure and that the LPC exceeded its authority in a "contravention of the plain language of the Landmarks Preservation Law."[166] Both the court and the LPC's contention that public access is solely a "threshold" requirement is misguided,[167] approving privatization "effectively rescinds the clock's landmark designation . . . [and] contravenes the LPC's statutory mandate to permit only those alterations that effectuate the purpose of Landmarks Preservation Law,"[168] which does not include converting a "public treasure" into private, luxury residences.

The purpose of landmark designation is to "enhance the quality of life for all, not merely a few."[169] The majority concluded that the

159 *Matter of Save America's Clocks, Inc.,* 33 N.Y. at 205.
160 *Id.*at 205-06.
161 *Id.* at 208-09.
162 *Id.* at 205.
163 *Id.* at 208.
164 *Id.* at 210-27.
165 *Matter of Save America's Clocks, Inc*., 33 N.Y.3d at 210-27.
166 *Id.* at 220.
167 *Id.* at 212-15, 220-21.
168 *Id.* at 220.
169 *Id.* at 212.

LPC did not have the authority to make determinations regarding the public's access to the interior landmark; if this is valid, it follows that the LPC's authority to regulate landmark maintenance should be suspended if the owner privatizes the landmark after designation.[170] Modernizing the clock and integrating it into a private residence renders the LPC's power to regulate the landmark obsolete, contradicting the fundamental purposes of the LPC and its regulation.[171]

A. If Government Cannot Require that Interior Landmarks Be Publicly Accessible, Government Should Not Be Permitted to Regulate Alterations of Publicly Inaccessible Interiors

If municipalities lack the authority to require that interior landmarks be open to the public, correspondingly, municipalities should not possess the authority to impose regulations on publicly inaccessible landmarks as the essential function of landmark preservation and regulation is to "promote the use of landmarks and historic districts for the education, pleasure and welfare" of the public.[172]

Permanent intrusion is an infringement on an owner's fundamental property rights and on an owner's right to exclude. Regardless of the extent of government intrusion, permanent infringements are a taking, even when economic impact is nominal.[173] In *Loretto v. Teleprompter Manhattan Catv Corp.*, the Court held that the size of the area physically taken by government is an irrelevant factor in a takings case, if the area is permanently occupied, then it is considered a taking.[174] In *Loretto*, New York City passed a law prohibiting

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170 *Id.* 210-27.

171 *Matter of Save America's Clocks, Inc*., 33 N.Y.3d at 210-27.

172 Code of the District of Columbia § 6-1101, *available at* https://code.dccouncil.us/dc/council/code/sections/6-1101.html (last visited Mar. 24, 2021) ("Promote the use of landmarks and historic districts for the education, pleasure, and welfare of the people of the District of Columbia."); *About LPC,* NYC LANDMARKS PRESERVATION LAW, https://www1.nyc.gov/site/lpc/about/about-lpc.page (last visited Mar. 24, 2021) ("Promote the use of historic districts, landmarks, interior landmarks, and scenic landmarks for the education, pleasure and welfare of the people of the City."); Santa Monica Municipal Code, § 9.56.020, *available at* http://www.qcode.us/codes/santamonica/view.php?version=beta&view=mobile&topic=9-6-9_56-9_56_020 (last visited Mar. 24, 2021) ("Promote the use of Landmarks, Structures of Merit and Historic Districts for the education, pleasure and welfare of the people of this City. (Added by Ord. No. 2486CCS §§ 1, 2, adopted June 23, 2015).").

173 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

174 *Id.* at 440-41.

interference with the installation of cable boxes on apartment buildings. The owner of a New York City apartment building brought suit alleging that the installation of a cable box on the owner's building was an unconstitutional taking of property; the Court agreed.[175] The bolting of cable wires and boxes to the building, as well as complete occupancy of a space on the building's exterior, satisfied the conditions for permanent, physical occupation.[176] This occupation authorized by government is a taking requiring just compensation regardless of economic impact, minimal or significant.[177]

According to the Court in *Loretto*, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . property law has long protected an owner's expectation that he will be relatively undisturbed at least in possession of his property."[178] In *Seawall Associates v. City of New York,* the Court of Appeals held that the right to exclude applied to an owner's right to refuse to alter or restore apartment units and lease them at a controlled price.[179] In this case, the owner was subjected to Local Law No. 9, which prohibited the demolition and alteration of single room occupancy properties and mandated that the owner restore and lease all units at controlled rent for an unspecified period. Local Law No. 9 was more invasive than the government occupancy in *Loretto,* the loss of possessory interest through government regulation is a *per se* physical taking. Furthermore, regulatory takings occur when government regulation, for the advancement of public good, results in individuals bearing public burdens.[180]

Regulating private interior landmarks renders government-imposed regulation for public good disproportionate to the burden on property owners.[181] Legislatures should alleviate property owners from the burden of limited economic gain for public benefit. Government intrusion is considered a taking when it does not advance a legitimate state interest. Placing the burden of preservation on interior landmark property owners, for public enjoyment when the public

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175 *Id.* at 441.

176 *Id.* at 437-40.

177 *Id.* at 437-41.

178 *Id.,* 458 U.S. 436.

179 Seawall Associates v. New York, 74 N.Y.2d 92, 107 (1989).

180 *Id.* at 99, 101-03, 106-07.

181 *See* discussion *supra* Section III; *see also* discussion on *Loretto* and *Sewall,* Section IV. A.

cannot access the interior, does not advance state interests.[182] Additionally, restrictions on property use may prevent future sales, making it more difficult for the owner to exercise their right to dispose of property.[183]

Average reciprocity advantage in "a land use regulation that resulted in benefits to regulated landowners roughly equal to the burdens imposed on them d[o] not violate the United States Constitution."[184] The same does not hold true for private interior landmark regulation. If property owners do not allow access to interior landmarks, there is no public benefit. In the case of private interior landmarks closed to the public, landowners do not derive income from the property as is the case with interior landmarks such as theaters and restaurants. Conversely, the public does not reap cultural or historic benefits as it would from house museums.

In most municipalities, such as New York City, landmark commissions rely on owners to preserve property in accordance with landmark regulations at their own expense. A property owner's obligation is often, if not always, met with no mutual advantage.[185] In addition, if not located in a designated historic district, many landmarked buildings and interiors are often the only landmarks in a neighborhood, therefore, the burden is placed on a sole property owner with no restriction or property regulation placed on adjacent owners.[186] If government requires property owners to maintain publicly inaccessible interior landmarks in accordance with landmark regulations for future public enjoyment, then the burden of maintenance should be funded by taxpayers, or public accessibility should be required.[187]

The Fifth Amendment does not allow municipal enforcement of public accessibility to interior landmarks. The courts' failure to interpret the Fifth Amendment to provide protection to private interior landmark owners leaves the responsibility to the legislature to

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182 *Id.*

183 *Id.*

184 William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: 'Magic Words' or Economic Reality – Lessons from Palazzolo*, 39 THE URBAN LAWYER 319-370, 10 (forthcoming 2007) (citing Lynda J. Oswald, *The Role of the 'Harm/Benefit' and 'Average Reciprocity of Advantage' Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1489 (1997)).

185 Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138-39 (1978).

186 *Id.* at 139-43.

187 *Id*. at 140.

recognize owners' rights to private purpose and restrict governmental reach into private property management.

Justice Rehnquist maintained, in his dissent in *Penn Central,* that the Supreme Court not only gave municipalities the power to prohibit specific uses or alterations to a landmark structure, but also imposed an affirmative obligation on property owners to preserve the landmark at their own expense.[188] While there may not be a significant number of inaccessible interior landmark properties in a specific area, all such owners across the U.S. bear the same responsibility and must maintain their property in accordance with similar landmark regulations.

V. CONCLUSION

The regulation of interior landmarks, inaccessible to the public, does not provide the same beneficial effects on historical districts as does the regulation of exterior landmarks. Although the objectives of interior landmark regulation are comparable to those outlined in *Penn Central* for exterior landmarks, exterior landmarks ordinarily promote public welfare; they are visible to the community and positively enhance the cultural and aesthetic value of historic districts. Continuity of historic districts, through the preservation of exterior landmark structures, drives tourism, builds community, and conserves American history. If the public is not admitted into private interior landmarks, there are no cultural or aesthetic benefits. The imposition of interior landmark regulation upon landowners results in high costs and restrictions, depriving property owners of potential benefits and return on investment. Although cities and municipalities may want to preserve interior landmarks for their own interest, if the interior remains private, no benefit will be conferred, and regulations will continue to burden the property owner.[189]

However, if legislatures discontinue the regulation of interior landmarks inaccessible to the public, a subterfuge may occur; interior landmark owners may close the interior to the public, remodel, and subsequently reopen as a business, generating greater revenue and significantly increasing property value, while simultaneously depriving the public of historical education. To prevent this and similar outcomes, legislatures could impose a statutory period during which the interior landmark must remain closed after privatization. As an

188 *Id.* at 139-53.

189 Manwaring, *supra* note 1, at 291-321.

example, legislatures could prohibit property owners who disallow public access from reopening for a period extending five to ten years, depending on the landmark. Interior landmarks reopening to the public prior to the end of the statutory period, must be in the original, historic state as at the time designation.

First Amendment challenges arising from such legislation would likely fail, as legislation would not interfere with freedom of expression in private spaces. If interior landmarks were to reopen, property owners would be in the same position as prior to privatization.[190] Similarly, equal protection claims are unlikely to be upheld, as legislation would apply equally across all types of interior landmarks.[191]

Fifth Amendment Takings Challenges may also arise; the argument could be made that if government cannot demand that interior landmarks remain publicly accessible, conversely, government cannot mandate that structures remain closed.[192] However, proposed regulation does not require that landmarks remain permanently closed, therefore, landowners can reopen at any time on the condition that historically relevant features and uses of the interior are restored. As stated in *Penn Central* and in *Lucas,* government is under no obligation to ensure the most economically favorable use of property provided it does not deny the owner of all economic benefit.[193] Considering government would allow interior landmarks to remain open or reopen prior to the expiration of the statutory period, there is no governmental taking, physical or regulatory.[194]

The responsibility of preserving interior landmarks should fall on taxpayers, alleviating costs incurred by landowners. As Justice Rehnquist maintained in his dissent in *Penn Central,* as regulations benefit the public, they should incur the cost, burdens and benefits would be more equally distributed; property owners would bear the burden of maintaining the property, while the taxpayers would bear the responsibility of cost.[195]

190 *See* discussion *supra* Section III. A.
191 U.S. CONST. amend. XIV.
192 *See* discussion *supra* Section III. B.
193 *Id.*
194 *Id.*; *see* discussion *supra* Section III. C.
195 *Penn Central,* 438 U.S. at 140-47.