HISTORIC PRESERVATION — INTERIOR LANDMARKS — NEW YORK COURT OF APPEALS HOLDS THAT PUBLIC ACCESS IS NOT REQUIRED FOR INTERIOR LANDMARKS. — *Save America's Clocks, Inc. v. City of New York*, 124 N.E.3d 189 (N.Y. 2019).

Historic preservation law focuses overwhelmingly on exterior structures, those architectural and artistic details that are visible to any passerby.[1] The ability to preserve these structures as landmarks was famously upheld as constitutional in *Penn Central Transportation Co. v. New York City*.[2] However, the U.S. Supreme Court has been silent on questions of interior landmarks,[3] those pieces of cultural heritage that occupy a liminal space between public (accessible, open) and private (exclusive, closed). Recently, in *Save America's Clocks, Inc. v. City of New York*,[4] the New York Court of Appeals held that the municipal agency charged with landmark preservation may allow the privatization of an interior landmark that had previously been publicly accessible.[5] The court's brief opinion resolved the case on statutory grounds and did not address the underlying constitutional consideration, thereby missing an opportunity to address whether mandated public access would be an unconstitutional taking and leaving interior landmarks in an uncertain state.

The building at 346 Broadway in Manhattan housed one of the few remaining public mechanical clocks in the United States.[6] In 1987, portions of the interior of the then-city-owned building, including the clock and the clocktower suite housing its machinery, were designated a landmark.[7] The City of New York sold the building to a developer in 2013

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[1] *See, e.g.*, Rebecca Birmingham, Note, *Smash or Save: The New York City Landmarks Preservation Act and New Challenges to Historic Preservation*, 19 J.L. & POL'Y 271, 288 (2010) ("[T]he use of the interior space is generally left up to the owner, as the bulk of the restrictions laid out in [New York's landmarks law] deal solely with exteriors."). New York's municipal law has been incredibly influential in other jurisdictions. *See* Paul Goldberger, *New York, Lost and Found*, N.Y. TIMES (Apr. 9, 1995), https://nyti.ms/29iBYvu [https://perma.cc/R5G9-7MQP].

[2] 438 U.S. 104, 138 (1978).

[3] Nicholas Caros, Note, *Interior Landmarks Preservation and Public Access*, 116 COLUM. L. REV. 1773, 1783 (2016).

[4] 124 N.E.3d 189 (N.Y. 2019).

[5] *Id.* at 196–97.

[6] Save Am.'s Clocks Inc. v. City of New York, 28 N.Y.S.3d 571, 574 (Sup. Ct. 2016). The building was constructed in the late 1800s and served as the headquarters for the New York Life Insurance Company until it moved out in 1928. *Id.*

[7] *Id.* at 574–75; *see also* LANDMARKS PRES. COMM'N, DESIGNATION LIST 187 LP–1513, at 1 (1987). The clocktower suite had been publicly accessible through the Clocktower Gallery, an art space operating independently from the city, but after September 11, 2001, heightened security protocols throughout the building blocked casual public access. Nicholas Stango, *Inside the Hidden NYC Clocktower Gallery's Grand Finale*, GIZMODO (Nov. 8, 2013, 12:00 PM), https://gizmodo.com/inside-the-hidden-nyc-clocktower-gallerys-grand-finale-1456348230 [https://perma.cc/S6T7-HLLZ].

and noted the landmark status in the deed.[8] The following year, the developer sought to convert the building from offices into private condominiums and submitted an application to the Landmarks Preservation Commission (LPC) for a Certificate of Appropriateness (COA),[9] the procedure by which an owner can "construct, reconstruct, alter or demolish" a landmarked site.[10] The application included a proposal to convert the floors comprising the clocktower suite into a single luxury unit and "convert the [c]lock [itself] from mechanical to electrical."[11] The LPC then held a public hearing, during which its general counsel suggested that the Agency lacked the legal authority to mandate continued public access.[12] The LPC ultimately voted to approve the COA.[13]

A coalition of organizations dedicated to historic preservation brought an Article 78 Proceeding[14] in the New York County Supreme Court, the trial-level court, to challenge the LPC's decision, seeking annulment of the COA, an injunction to stop any changes to the clock and maintain public access, and declaratory relief.[15] The court rejected the petitioners' procedural argument that approving the changes "was tantamount to a rescission" of the landmark designation,[16] but granted the annulment of the COA on the grounds that the LPC acted without rational basis.[17] The court found that the decision to eliminate public access was irrational because it undermined the statutory purpose of "protecting, enhancing and perpetuating landmarks."[18] It deferred to the LPC's expertise in approving conversion of the clock to electrical,[19] but found that the decision was based on an error of law: the LPC's general counsel had advised that the commission lacked statutory authority to require that the clock remain mechanical, but the court disagreed that the legislature imposed this limitation on the LPC's power.[20]

The Appellate Division affirmed.[21] Regarding the public access issue, the majority agreed with the trial judge about the statutory purpose

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[8] *Save Am.'s Clocks*, 28 N.Y.S.3d at 575.

[9] *Id.*

[10] Landmarks Preservation and Historic Districts (Landmarks Law), N.Y.C., N.Y., ADMIN. CODE § 25-307 (2013).

[11] *Save Am.'s Clocks*, 28 N.Y.S.3d at 575.

[12] *Id.* at 575–76.

[13] *Id.* at 579.

[14] This proceeding allows plaintiffs to appeal agency decisions in New York that were affected by errors of law or lacked rational basis. N.Y. C.P.L.R. 7801–7803 (McKinney 2018).

[15] *Save Am.'s Clocks*, 28 N.Y.S.3d at 573–74.

[16] *Id.* at 579, 581.

[17] *Id.* at 581.

[18] *Id.* at 582.

[19] *Id.* at 583.

[20] *Id.* at 583–84.

[21] Save Am.'s Clocks, Inc. v. City of New York, 66 N.Y.S.3d 252 (App. Div. 2017). Justice Gesmer wrote the majority opinion and was joined by Presiding Justice Acosta and Justice Kapnick.

and found that the Landmarks Preservation and Historic Districts Law[22] (Landmarks Law) "requires" interior landmarks to be publicly accessible after the initial designation.[23] The court's interpretation turned on the statutory definition of "[i]nterior landmark" as something that "is customarily open or accessible to the public,"[24] reading the use of the present tense "is" as a clear indication of postdesignation status.[25] The court further held that requiring continued public access would not constitute a regulatory taking under *Penn Central* based on the public purpose of the Landmarks Law and the reasonable beneficial use still available to the property owner.[26] Regarding the regulation of the clock mechanism, the majority found that the LPC's vote of approval was affected by an error of law because the commissioners believed they lacked authority to regulate the clock's workings.[27] Under the court's interpretation, the statutory category "interior architectural feature" included the inner workings of the clock, especially because the mechanism was significant enough to warrant the initial landmark designation.[28] Justice Kahn dissented,[29] arguing "that the LPC acted rationally in issuing the COA"[30] and correctly interpreted its statutory mandate.[31] She further argued that, even if the LPC's counsel had misstated the law, the hearings showed that the commissioners' votes of approval were based on other factors.[32]

The Court of Appeals reversed and upheld the COA.[33] Writing for the majority, Judge Garcia[34] first agreed with the LPC's interpretation that the Landmarks Law does not mandate ongoing public access for interior landmarks.[35] He pointed to state precedent that identified public access as merely a "jurisdictional predicate" for designation rather than a requirement for future use.[36] Judge Garcia then noted that the law allows issuance of a COA for changes as drastic as complete

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[22] N.Y.C., N.Y., ADMIN. CODE §§ 25-301 to 25-322 (2013).

[23] *Save Am.'s Clocks*, 66 N.Y.S.3d at 263.

[24] ADMIN. § 25-302(m).

[25] *Save Am.'s Clocks*, 66 N.Y.S.3d at 263. The court also cited to New York's General Construction Law stating that "[w]ords in the present tense include the future." *Id.* (alteration in original) (quoting N.Y. GEN. CONSTR. LAW § 48 (McKinney 2019)).

[26] *Id.* at 264–65.

[27] *Id.* at 261–62.

[28] *Id.* at 261 (quoting ADMIN. § 25-302(l)).

[29] Justice Kahn was joined by Justice Tom.

[30] *Save Am.'s Clocks*, 66 N.Y.S.3d at 268 (Kahn, J., dissenting); *see id.* at 275.

[31] *Id.* at 273, 276.

[32] *Id.* at 273–74.

[33] *Save Am.'s Clocks*, 124 N.E.3d at 193.

[34] Judge Garcia was joined by Judges Stein, Fahey, and Feinman. Chief Judge DiFiore took no part in the decision.

[35] *Save Am.'s Clocks*, 124 N.E.3d at 196–97.

[36] *Id.* at 196 (quoting Teachers Ins. & Annuity Ass'n of Am. v. City of New York, 623 N.E.2d 526, 528 (N.Y. 1993)); *see id.* at 197.

demolition.[37] The LPC thus had a rational basis for approving the privatization of the clocktower suite.[38]

Second, the court found that the electrification of the clock effectuated the statutory purpose and was therefore similarly rational.[39] The developer's proposal included plans to preserve the exterior clock face, and LPC determined that the modernization of the interior mechanism would preserve it.[40] The court then addressed the error of law argument and found there was insufficient evidence to sustain the charge because the Agency did not invoke the general counsel's remarks as grounds for its decision to approve the COA.[41] Judge Garcia concluded by emphasizing the "broad discretion" that the Landmarks Law conveys to the LPC and the deference owed by the court to the Agency's judgment.[42]

Judge Rivera dissented.[43] She argued that the alterations approved in the COA amounted to a "de facto rescission" of the building's landmark status[44] and the LPC thus failed to comply with the appropriate procedural steps.[45] Judge Rivera disagreed with the statutory interpretation of the Landmarks Law and the relevant precedent, arguing that the statute's plain language and purpose both require continued public access as a condition of an interior landmark.[46] She also discussed the public policy behind the Landmarks Law, connecting the issue of access to the public's overall welfare.[47] Regarding the electrification of the clock, Judge Rivera characterized the change as "the destruction of an essential characteristic," meaning the LPC's issuance of the COA undermined the initial purpose of designating it a landmark and thus lacked a rational basis.[48] Throughout the opinion, she stressed the cultural loss at stake in the case, putting forth the normative claim that landmarks "embody[ing] the spirit of the City should be preserved even when commercial interests seek their destruction."[49]

The Court of Appeals analyzed *Save America's Clocks* as a case about statutory authority and agency discretion, so it did not reach the underlying constitutional question of whether mandating public access to interior landmarks would be a taking under the Fifth Amendment. This approach is wholly consistent with the well-established principle that judges should avoid unnecessary constitutional issues and decide

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[37] *Id.* at 197.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 197–98.
[42] *Id.* at 198.
[43] Judge Rivera was joined by Judge Wilson.
[44] *Save Am.'s Clocks*, 124 N.E.3d at 199 (Rivera, J., dissenting).
[45] *Id.* at 200.
[46] *Id.* at 205–06.
[47] *Id.* at 206.
[48] *Id.* at 207.
[49] *Id.* at 209.

only the case before them. But the field of landmark preservation calls for constitutional clarity. Before *Penn Central*, agencies rarely enforced exterior-landmark preservation laws, in part because of profound uncertainty cast by the Takings Clause. Interior landmarks today are in a similarly uncertain position, as questions of preservation and access have never come before the Supreme Court. The facts of *Save America's Clocks* — particularly the timing of the acquisition — created a potential opportunity for the Court of Appeals to work through a takings analysis and consider the public's interest in the clock. The court's silence on this constitutional question leaves publicly accessible interior landmarks at risk of privatization, which would remove them from the cultural fabric of New York.

The history of landmark preservation and the degree of agency enforcement have always been closely tied to constitutional considerations. The Takings Clause of the Fifth Amendment prohibits the seizure of private property for public use without "just compensation,"[50] whether the seizure is through physical intrusion[51] or regulatory action.[52] When New York passed its Landmarks Law in 1965 and gave the LPC authority to regulate private property for the benefit of the public, it entered new legal territory — and uncertainty about the outcome of future legal challenges under the Takings Clause meant that the Agency acted with "[c]onservatism and caution."[53] The LPC had no guarantee of its own continued existence; it conducted itself with "a general awareness . . . that the Landmarks Law would be tested."[54] The eventual takings challenge came more than a decade later in *Penn Central* — still considered the "lodestar of regulatory takings jurisprudence"[55] — which crucially affirmed that landmark preservation can be constitutional and established a balancing test that weighs the economic impact and degree of interference with the owner's "distinct investment-backed expectations"

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[50] U.S. CONST. amend. V; *see also* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 877–78 (2006) (tracing the incorporation of the Takings Clause to *Penn Central*).

[51] *See, e.g.*, United States v. Causby, 328 U.S. 256, 265–66 (1946).

[52] The Supreme Court has been notoriously vague about the boundary line between permissible and impermissible regulation. *See* 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."); *see also* Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. & PUB. POL'Y 1, 1 n.1 (2010) (collecting scholarship discussing the murkiness of takings jurisprudence).

[53] ANTHONY C. WOOD, PRESERVING NEW YORK 377 (2008).

[54] Benjamin Baccash, *The New York City Landmarks Law: Embracing Litigation and Moving Toward a Proactive Enforcement Philosophy*, 18 WIDENER L. REV. 159, 162 (2012). In addition to having constitutional concerns, the LPC lacked the requisite political will and effective enforcement mechanisms to prevent violations. *Id.* at 160–61.

[55] Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 7 (2008).

against the public benefit of a regulation.[56] It was only after *Penn Central* explicitly upheld landmark preservation that the LPC began to enforce its statutory mandate in earnest,[57] indicating the importance of constitutional certainty to agency action.

Like exterior preservation before *Penn Central*, mandated access to interior landmarks exists in an uneasy state of constitutional ambiguity. The Supreme Court has never addressed interiors directly.[58] New York State decisions in the immediate wake of *Penn Central* did not explicitly distinguish between interiors and exteriors and affirmed the LPC's statutory authority to designate interior landmarks over the property owners' objections,[59] laying a potential groundwork for the authority to mandate access. However, the Supreme Court has repeatedly emphasized the paramount importance of an owner's right to exclude.[60] When private property is permanently or regularly physically invaded by government actors or third parties authorized by the state, such action is typically considered a taking under established jurisprudence.[61] As some commentators have argued, then, the strong protections around the right to exclude would seemingly hinder any attempts by the LPC to mandate public access to private property.[62] This tension helps to explain why the takings question was briefed and argued at every stage of the *Save America's Clocks* litigation.[63]

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[56] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[57] *See* Baccash, *supra* note 54, at 164.

[58] *See* 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) (noting *Penn Central*'s silence on interior landmarks and the resulting lack of clarity).

[59] Teachers Ins. & Annuity Ass'n of Am. v. City of New York, 623 N.E.2d 526, 527 (N.Y. 1993) (Four Seasons restaurant); Shubert Org., Inc. v. Landmarks Pres. Comm'n, 570 N.Y.S.2d 504, 508 (App. Div. 1991) (Broadway theaters); *see also* Scott H. Rothstein, Comment, *Takings Jurisprudence Comes in from the Cold: Preserving Interiors Through Landmark Designation*, 26 CONN. L. REV. 1105, 1123 (1994) ("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.").

[60] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

[61] David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39, 48–50 (2000). *But see* Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 947 (2015) (noting that physical invasions in the antidiscrimination context have not been considered takings).

[62] *See* Caros, *supra* note 3, at 1799–802 (arguing that a takings challenge against hypothetical LPC action would likely succeed).

[63] *See* Save Am.'s Clocks, Inc. v. City of New York, 66 N.Y.S.3d 252, 264–65 (App. Div. 2017); *id.* at 271–72 (Kahn, J., dissenting); Transcript of Oral Argument at 11, *Save Am.'s Clocks*, 124 N.E.3d 189 (No. APL-2017-00248); Reply Brief for Respondent-Appellant Civic Center Community Group Broadway LLC at 19, *Save Am.'s Clocks*, 124 N.E.3d 189 (No. APL-2017-00248) ("The First Department's decision below thus creates takings concerns."); Brief for Respondent-Appellant Civic Center Community Group Broadway LLC at 4–5, *Save Am.'s Clocks*, 66 N.Y.S.3d 252 (No. 3422) (discussing takings arguments made at the trial level). The Court of Appeals majority did not acknowledge the issue. Judge Rivera mentioned the takings argument in a footnote to her dissent,

Against the backdrop of the academic uncertainty surrounding mandated public access in theory, *Save America's Clocks* presented an interesting opportunity for the court to analyze the relevant factors in practice. First, the physical takings question would have called for an assessment of ownership rights *at the time of transfer*.[64] As the Appellate Division majority pointed out, the developer purchased 346 Broadway with notice of the interior-landmark designation,[65] suggesting that the right to exclude was not necessarily included in the bundle of rights acquired by the new owner. Second, the regulatory takings question, like any balancing test, would have depended on the inputs — in this case, those inputs identified in *Penn Central*.[66] The economic interests held by the owner depend on his investment-backed expectations, which may have been affected by the existing landmark status at the time of acquisition.[67] On the other side of the scale, determining the nature of the regulation and the public's interest in continued access is a fundamentally normative inquiry. One perspective sees a "minimal" public benefit to keeping the clocktower suite open,[68] while the other, notably advanced by Professor Joseph Sax, sees a right held by the public that deserves serious recognition from courts.[69]

Though the Court of Appeals may have had prudent reasons for avoiding the takings issue,[70] *Save America's Clocks* leaves interior-landmark regulation without clear constitutional guidelines, thus imperiling

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but stated it was not before the court and was, "[i]n any event, . . . meritless." *Save Am.'s Clocks*, 124 N.E.3d at 209 n.6 (Rivera, J., dissenting).

64 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992) (noting government's physical intrusion onto private property would be constitutional if there were a "pre-existing limitation upon the landowner's title").

65 *Save Am.'s Clocks*, 66 N.Y.S.3d at 265. *But see id.* at 273 (Kahn, J., dissenting) (arguing that the notice was insufficient because the preservation of public access was not made explicit, either in the deed or in the statutory text).

66 The *Penn Central* test discussed here is by no means uncontroversial and has been critiqued by several Justices. *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) (arguing against majority's use of *Penn Central* factors to define "private property"); *id.* at 1957 (Thomas, J., dissenting) (suggesting that the Court "take a fresh look at [its] regulatory takings jurisprudence").

67 *See id.* at 1945 (majority opinion) ("A reasonable restriction that predates a landowner's acquisition . . . can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.").

68 *Save Am.'s Clocks*, 66 N.Y.S.3d at 273 (Kahn, J., dissenting).

69 JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 48–59 (1999) (discussing the public's stake in architectural landmarks); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150–51, 155–56 (1971).

70 The background principles of constitutional avoidance and judicial minimalism likely informed the court's narrow holding. *See generally* Gomez v. United States, 490 U.S. 858, 864 (1989) (describing constitutional avoidance as "settled policy"); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2128 (2015) (noting that judicial silence on constitutional issues is a form of constitutional adjudication); Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347,

designated pieces of history. Some of the most important pieces of cultural heritage exist indoors.[71] Although they are not always fully open to members of the public, the public holds an interest — perhaps a kind of property right — in their continued accessibility.[72] Those interests are best poised to influence regulatory outcomes under a takings analysis, which explicitly calls for a balancing approach. But, in the absence of such an analysis that might provide a clear answer, future agency action may be influenced by the characteristic "conservatism and caution" that tend to accompany the enforcement of constitutionally ambiguous laws. Landmarks that were once public and part of a collective cultural tradition will continue to become private commodities, accessible only to a privileged few.[73] This, at a time when New York is becoming increasingly privatized: a public park is turning into office space;[74] the last public music room is closing;[75] public library land is being sold for luxury condo developments.[76] Such changes alter the very nature of the city.

The horological details of the clock at 346 Broadway were a unique part of the city's public life. The escapement design that operated to move the hands of the clock can now be found in only one tower clock in the world; any New Yorker wishing to view it will need to travel to London's Elizabeth Tower to do so.[77] Theirs is the interest that is overlooked when courts do not reach the lurking constitutional issue. More fundamentally, the current conception of property rights in the judiciary and the popular imagination fails to give adequate weight to these interests collectively held by the public, and so the public loses these battles all too often. If and when courts take up the constitutional question underlying public access to interior landmarks, they would do well to consider the full extent of the benefit to the public, in the present moment and beyond.

369–70 (2010) (arguing that judicial minimalism may amplify uncertainty and raise decision and error costs); Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15–21 (1996) (describing merits of judicial minimalism).

71 *See generally* JUDITH GURA & KATE WOOD, INTERIOR LANDMARKS (2015) (cataloguing forty-seven designated interior landmarks in New York City).

72 *See* John Nivala, Droit Patrimoine*: The Barnes Collection, the Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 529 (2003) ("[T]he idea of cultural preservation arises from a general concern for preserving our national heritage and a general conception that cultural property belongs to the public even if privately owned.").

73 *See Save Am.'s Clocks*, 124 N.E.3d at 206 (Rivera, J., dissenting) ("What would be the purpose of preserving a space for the public that the public will never enjoy?").

74 Lincoln Anderson, *Future Office Buildings O.K. for Pier 40*, THE VILLAGER (July 1, 2019), https://www.thevillager.com/2019/07/future-office-building-o-k-d-for-pier-40 [https://perma.cc/3E9U-QF7Y].

75 Anthony Tommasini, *As the Frick Expands, New York City Music Suffers*, N.Y. TIMES (June 29, 2018), https://nyti.ms/2N8fvnv [https://perma.cc/K5NP-MH4H].

76 Rebecca Nathanson, *New York Libraries Turn the Page on Public Control*, AM. PROSPECT (May 26, 2017), https://prospect.org/economy/new-york-libraries-turn-page-public-control [https://perma.cc/J9XT-RMTG].

77 *See Save Am.'s Clocks*, 124 N.E.3d at 194.