

**“EVERY SORT OF INTEREST”:*PENN CENTRAL* AND THE RIGHT
TO COMMUNITY-MAKING PLACES**

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INTRODUCTION

Penn Central Transportation Co. v. New York City, the polestar in constitutional takings analysis, was apparently written in one weekend.¹ In the almost thirty years since the *Penn Central* decision, the case has come to stand for the proposition that historic preservation ordinances are immune from takings challenges.² Implicit in Justice William Brennan’s majority opinion, however hastily written it may have been, is the idea that the community—the public at large—may have some sort of right or interest in historic properties.³ Certainly takings analysis is ultimately a question of the rights of the title-holder. The Fifth and Fourteenth Amendments to the United States Constitution prohibit the states and the federal government from depriving persons of life, liberty or property without due process of law or from taking private property for public use without just compensation.⁴ In the historical preservation law context, the argument has been made that preservation laws are an unconstitutional taking of the title-

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1 438 U.S. 104 (1978); see *Transcript, Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15 *FORDHAM ENVTL. L. REV.* 287, 302 (2004) (“[The opinion] came together and was basically written Memorial Day weekend in three consecutive near all-nighters.”).

2 For more thorough treatments of the takings implications of *Penn Central*, see Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 *BAYLOR L. REV.* 1 (2014); see also Daniel T. Cavarelo, *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 (1995).

3 Generally, the term “historic properties” is used to describe broadly those structures that are significant for historical, architectural, cultural, archeological, educational, or aesthetic considerations. See also, 438 U.S. at 108 (1978) (“Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.”).

4 U.S. CONST. amend. V; *id.* amend. XIV, § 1. See also *Penn Cent.*, 438 U.S. at 122 (citing *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897)) (clarifying that the Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment).

holder's property, in that the title-holder can no longer do what she sees fit with the property, for example, build a thirty-story tower on top of a historically and aesthetically significant rail terminal.⁵ The property interest that the title-holder has, and the potential Fifth and Fourteenth Amendment concerns therein, are readily apparent.

However, as Justice William Rehnquist said in his dissent in *Penn Central*, "property" is not used in the Constitution in the

vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . . [Instead it refers to] the group of rights inhering in the citizen's relation to the physical thing. . . . The constitutional provision is addressed to *every sort of interest* the citizen may possess.⁶

Clearly, the title-holder has an interest in the property in question. However, the community surrounding the property also has a "relation to the physical thing" and at least some "sort of interest" in these community-making places. Too often, when discussing historic preservation law—and *Penn Central* in particular—the conversation jumps straight to the takings question without addressing the underlying premise. There is an incredible public interest in preserving and maintaining the historic buildings that anchor communities, and if the community members have some sort of property interest in these community-making properties, then there may be some sort of due process right to the community that is currently on the back-burner.

In any given neighborhood, members of the community may have some sort of interest in the preservation and maintenance of their historic structures. These are the structures that give a place its distinct character. In many ways, this is exactly the sort of right that arises out of "the citizen's relation to the physical thing"⁷—in this case, a building. Nowhere is this relationship between community and building more clear than in the case of churches. For example, in March of 2015, it seemed like it was the end for St. Laurentius Church in the Fishtown neighborhood of Philadelphia.⁸ Parish churches have long been centers of community. Much more than a place where congregants gather on Sunday morning, the parish church is a symbol of the neighborhood itself, an identifying characteristic for parish-

⁵ See *Penn Cent.*, 438 U.S. at 119 ("Instead, appellants filed suit . . . claiming, *inter alia*, that the application of the Landmarks Preservation Law had 'taken' their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment.").

⁶ *Id.* at 142–43 (Rehnquist, J., dissenting) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945)) (first emphasis omitted).

⁷ *Id.* at 142 (Rehnquist J., dissenting).

⁸ David O'Reilly, *St. Laurentius, Beloved Polish Church in Fishtown, to Be Demolished*, PHILA. INQUIRER (Mar. 3, 2015, 1:08 AM), http://www.philly.com/philly/news/20150323_St_Laurentius_church_in_Fishtown_first_for_city_s_Polish_residents_to_be_demolished.html.

ioners and lay neighbors alike. At what seemed like the end for St. Laurentius, some anonymous community member left a sign among the flowers on the steps of the church. In crude lettering on a piece of cardboard, one community member wrote a desperate plea and taped it to the church door: “Save our Church!”⁹ Though temporarily saved from the wrecking ball by historic designation in July of 2015, the future of St. Laurentius is by no means secure.¹⁰ It is also not alone on the endangered buildings list¹¹; the City of Philadelphia has a rich history of destroying not only its churches but other centers of community as well.¹² Communities are losing landmarks for the sake of progress and as a result are losing community identity.

Since the early-1980s, scholarship on the law of historic preservation has focused on three rationales for legally protecting and preserving historic places: (1) the idea that historic preservation should seek to inspire the observer with a sense of patriotism; (2) the idea that there is a cultural, artistic, or architectural importance of a building worth preserving; and (3) the idea that there is a concern for the environmental and psychological effects and the sense of place created by historic buildings.¹³ Professor Rose concludes that the new direction in historic preservation law is community based and that substantively and procedurally the community needs to be considered in decision-making regarding historic properties.¹⁴ This Comment seeks to take that notion a step further and bring Justice Brennan’s

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- 9 Ronnie Polaneczky, *The Great Church Smackdown: Saving St. Laurentius*, PHILA. DAILY NEWS (May 6, 2015, 3:01 AM), http://www.philly.com/philly/columnists/ronnie_polaneczky/20150506_The_great_church_smackdown_Saving_St_Laurentius.html.
- 10 Inga Saffron, *For Now, St. Laurentius Is Safe from Destruction*, PHILADELPHIA INQUIRER (July 10, 2015, 4:47 PM), http://www.philly.com/philly/news/breaking/20150711_For_now_Fishtown_s_St_Laurentius_Catholic_Church_is_historic_and_safe_from_destruction.html.
- 11 See *Places to Save!*, PRES. ALL. FOR GREATER PHILA., <http://www.preservationalliance.com/advocacy-in-action/places-to-save/> (last visited Apr. 4, 2017), for a list of endangered properties in Philadelphia.
- 12 Each year, Hidden City Philadelphia publishes a list of the most notable lost buildings of that year. See, e.g., Bradley Maule, *Lost Buildings of 2015*, HIDDEN CITY PHILA. (Jan. 4, 2016), <http://hiddencityphila.org/2016/01/lost-buildings-of-2015/>. For 2015, Hidden City listed Pilgrim Congregational Church, the Levy-Leas Mansion, Girard Square, Philadelphia International Records, New Hope Temple Baptist Church, Tourison’s Hall, The Old Medical School Building at Temple University, Barton Hall at Temple University, University City High School, and of course, the Boyd Theatre. *Id.* Oscar Beisert, author of numerous applications for the Philadelphia Register of Historic Places, was recently quoted as saying “it couldn’t get any worse. We are at the threshold of Hell.” Samuel Lieberman, *This Philly Transplant Is Struggling to Save Our Old Buildings: “We Are at the Threshold of Hell”*, BILLY PENN (July 23, 2015, 8:30 AM), <http://billypenn.com/2015/07/23/this-philly-transplant-is-struggling-to-save-our-citys-old-buildings-we-are-at-the-threshold-of-hell/>.
- 13 Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479–80 (1981).
- 14 *Id.* at 479, 491–92.

implicit premise in the *Penn Central* decision, that the community has some sort of property right in historic buildings, to the forefront. Part I explores the aftermath of *Penn Central* and the current state of historic preservation law, describes the relationship between the community members and the physical thing that is so important to property rights, as well as outlines the current failures and problems with so-called takings immunity. Part II looks at elements of Supreme Court jurisprudence outside of the *Penn Central* context that support a property right in historic properties. It then melds those cases with the idea that the public has some sort of interest in historic properties to form a right to community and place-making that gives the general public due process considerations in the historic buildings that make their places their own. Part III then explores standing in historic preservation cases and argues that the inconsistency in the application of standing doctrine to these cases supports the idea that courts are increasingly contemplating a proprietary interest in community-making places. Ultimately, it likely proves unworkable to recognize some sort of ownership right of the general community in historic places. It is, however, important to note that there are property interests at play in our physical space that are not limited to the legal title-holder and, as Justice Rehnquist explained, we must recognize “every sort of interest.”¹⁵

I. HISTORIC PRESERVATION LAW AND THE PERSON’S RELATION TO THE THING

The 2015 Nomination application for the Philadelphia Register of Historic Places says that St. Laurentius in Fishtown is an “established and familiar visual feature of the neighborhood and its larger community. Furthermore, St. Laurentius Church is a symbol of the cultural, economic, social, and historical heritage of the Polish-immigrant and Polish-American population of the City of Philadelphia, as well as being part of the development of the neighborhood itself.”¹⁶ This particular application for recognition as a historic place is emblematic of both the current state of preservation laws and the significance of buildings to the communities around them. First, listing on a registry is incredibly important to preservation today.¹⁷ Second, the title-holder may not be the person with the largest

15 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 143 (1978) (Rehnquist, J., dissenting) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945)).

16 Oscar Breisert & John Christian Bullit LaRue, Nomination of St. Laurentius Roman Catholic Church, Phila. Register of Historic Places, Phila. Historical Comm’n, 24 (Apr. 10, 2015), <http://www.phila.gov/historical/Documents/St%20Laurentius%20Interior%20nomination%20FINAL.pdf>.

17 See generally SARAH C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 57–73 (2012).

stake in preserving the building. In this Part, I outline broadly the current state of historic preservation law, including the takings immunity that came out of *Penn Central*. I then discuss the relationship between the public and landmarks that could be called “community-making” and the potential interests the public has in those buildings outside of the legal context. Finally, this Part concludes by discussing some of the problems with current historic preservation law and its conceptions, most notably, that buildings still come down at an alarming rate and the focus on the title-holder as the dominant party in any litigation.

A. *Penn Central and Takings Immunity*

Since at least the mid-1990s, the pervading wisdom has been that historic preservation laws are immune to Takings Clause challenges.¹⁸ In 1978, the U.S. Supreme Court handed down its decision in *Penn Central Transportation Co. v. City of New York*, in which it held that the New York City Landmarks Law did not constitute an unconstitutional “taking.”¹⁹

Penn Central Transportation Co. wanted to construct a large office tower on top of Grand Central Terminal in New York City.²⁰ After the destruction of the old Penn Station, a masterpiece of the Beaux-Arts style designed by McKim, Mead, and White, in the early twentieth century,²¹ in 1963, New York City passed a landmarks preservation law²² to protect historic buildings from the wrecking ball.²³ The Landmarks Preservation Commission, a body created out of the landmarks preservation law, denied *Penn Central*’s request to build the tower on top of Grand Central Terminal, itself a masterpiece of Beaux-Arts design from the same period as the old Penn Station.²⁴ Given that the Commission had denied the request to construct the office tower on top of the station, *Penn Central* filed a lawsuit against the City of New York arguing that the denial of the proposal to

¹⁸ See ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 314 (1999) (“Landmark preservation largely has withstood takings challenges. . . . Heavily influenced by *Penn Central*, state courts have been similarly inclined to spurn such takings claims.”); see also Cavarello, *supra* note 2, at 594 (“Finally, Section VII analyzes the Pennsylvania Supreme Court’s sudden reversal of opinion in the second *United Artists*’ decision and argues that such reversal demonstrates the proposition that historic preservation laws have become immune from constitutional takings challenges.”).

¹⁹ *Penn Cent.*, 438 U.S. at 138.

²⁰ *Id.* at 116.

²¹ For a fantastic discussion of the rise and fall of Penn Station and the beginning of the historic preservation movement, see *American Experience: The Rise and Fall of Penn Station* (PBS television broadcast Feb. 18, 2014), <http://www.pbs.org/wgbh/americanexperience/films/penn/>.

²² N.Y.C., N.Y., ADMIN. CODE § 25-301 (West 2016).

²³ See Carol Clark, *Albert S. Bard and the Origin of Historic Preservation in New York State*, 18 WIDENER L. REV. 323 (2012).

²⁴ *Penn Cent.*, 438 U.S. at 110, 116–18.

build the office tower under the New York City Landmarks Law was an unconstitutional taking, as it had deprived Penn Central Railroad of the economic value of the tower.²⁵

In the now-famous 6-3 decision, the Supreme Court held that the New York Landmarks Law was constitutional and that the denial of the proposal was not an unconstitutional taking.²⁶ Justice Brennan, writing for the majority, articulated a balancing test for determining the constitutionality of a taking.²⁷ Ultimately, this meant that takings challenges to Historic Preservation Laws in other states were no longer successful.²⁸ The takings implications of *Penn Central* have been discussed ad nauseum by scholars since that time.²⁹

One notable exception was in the State of Pennsylvania, where the Boyd Theater litigation challenged the idea that historic preservation laws were immune from takings challenges.³⁰ The Boyd Theater was one of the last remaining grand movie palaces in the City of Philadelphia.³¹ It was a designated historic building.³² The owners of the theater challenged this designation as an unconstitutional taking.³³ In *United Artists' I*, the Pennsylvania Supreme Court held that the designation without the consent of the property owners was “unfair, unjust, and amount[ed] to an unconstitutional taking without just compensation in violation of Article 1, Section 10 of the Pennsylvania Constitution.”³⁴ Then in 1993, the Pennsylvania Supreme Court reversed its own ruling and concluded that “the designation of a pri-

25 *Id.* at 119–20.

26 *Id.* at 138.

27 *Id.* at 124 (“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.”) (citation omitted); *see also* Cavarello, *supra* note 2, at 605 (“The three factors to be considered are: 1) the economic impact of the law on the claimant; 2) the extent to which the law has interfered with distinct investment-backed expectations; and 3) the character of the governmental action.”).

28 *See* *United Artists' Theater Circuit, Inc. v. City of Philadelphia (United Artists' II)*, 635 A.2d 612, 619 (Pa. 1993) (noting that in the fifteen years since the *Penn Central* decision, no state had broken with the decision except Pennsylvania).

29 *See* Gary Lawson et al., “*Oh Lord Please Don't Let Me Be Misunderstood!*”: *Rediscovering the Matthews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 3 (2005) (“[T]he Penn Central formulation . . . has dominated discussion of takings law for a quarter of a century and continues to serve as the canonical standard for regulatory takings analysis . . .”).

30 *United Artists' II*, 635 A.2d at 614; *United Artists Theater Circuit, Inc., v. City of Philadelphia (United Artists' I)*, 595 A.2d 6, 7 (Pa. 1991).

31 *See* Inga Saffron, *Changing Skyline: iPic Didn't Come, So Now What for the Boyd?*, PHILA. INQUIRER (Dec. 19, 2014, 3:00 AM), http://articles.philly.com/2014-12-20/entertainment/57237635_1_boyd-theatre-ipic-live-nation (“So what happens to the Boyd, which opened in 1928 and is the city’s lone survivor of Hollywood’s golden age?”).

32 *United Artists' I*, 595 A.2d at 7.

33 *Id.*

34 *Id.* at 13–14.

vately owned building as historic without the consent of the owner is not a taking under the Constitution of [the] Commonwealth [of Pennsylvania].”³⁵ With that, Pennsylvania became the last state to make historic preservation designation immune from takings challenges.³⁶ What is particularly interesting about the *United Artists’ I* and *II* decisions, and the abrupt reversal of the Pennsylvania Supreme Court, is the subversion of the importance of the consent of the owner. In *United Artists I*, it was the lack of title-holder consent that moved the court to find an unconstitutional taking. Two years later, there were other considerations in play. The protections of the Pennsylvania Constitution were found to no longer give such priority to the title-holder and, indeed, the court recognized the importance of historic properties to the “health, prosperity and welfare of the *people* of Philadelphia.”³⁷

B. *The Due Process Rights Implicit in Penn Central*

In his majority opinion affirming the New York Court of Appeals decision, Justice Brennan rarely actually mentions the lower court’s decision.³⁸ The majority opinion, perhaps rightfully, jumps quickly from the procedural history of the case into the takings analysis that results in the now-famous balancing test.³⁹ It is, however, important to note that in the broader context, both the New York Court of Appeals opinion and Justice Brennan’s opinion, to a lesser extent, operate with the underlying premise that there is some sort of interest that the public has in maintaining and preserving historic places.

Chief Judge Charles Breitel, in his opinion for the New York Court of Appeals, strongly suggested that the public has some sort of ownership right in the historic properties.⁴⁰ Judge Breitel’s argument was partially premised on the idea that this was not an impermissible taking because so much of the value of Grand Central Terminal was created by the public. He wrote: “Grand Central Terminal is no ordinary landmark. . . . Without people Grand Central would never have been a successful railroad terminal, and without the terminal, a major transportation center, the proposed building site would be much less desirable for an office building.”⁴¹ He went on

³⁵ *United Artists’ II*, 635 A.2d at 620.

³⁶ *Id.* at 619 (“The fact that no other state has broken with the *Penn Central* decision is not dispositive of the matter, but it is persuasive. . . . [I]n [the] fifteen years since *Penn Central*, no other state has rejected the notion that no taking occurs when a state designates a building as historic.”).

³⁷ *Id.* at 620 (emphasis added) (quoting PHILA., PA., ZONING CODE §14-2007(1)(a)).

³⁸ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 120–22, 129 n.26, 132 n.28 (1978).

³⁹ *Id.* at 122.

⁴⁰ *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977).

⁴¹ *Id.* at 1275.

further to say that “[o]f primary significance, however, is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property.”⁴² Judge Breitel concluded by emphasizing again the importance of the historic landmarks:

In times of easy affluence, preservation of historic landmarks . . . might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future.⁴³

Chief Judge Breitel explicitly says that there are considerations at play here greater than economics. Further, the focus on the city being able to choose whether to sit passively by and “witness the demolition of *its* glorious past” or actively preserve the buildings shows that there is an ownership interest in these properties that supersedes that of the title-holder.⁴⁴ There are those that are able to make decisions that are not the “owner” in traditional parlance.

Justice Brennan, for his part, in the majority opinion glosses over the reasons for historic preservation, almost as if they are a given.⁴⁵ He wrote that all fifty states and a number of municipalities have enacted preservation laws for two purposes: (1) “in recent years, large numbers of historic structures, landmarks and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways,”⁴⁶ and (2) the “widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. . . . [These buildings] embody precious features of *our* heritage.”⁴⁷ With that statement of purpose, Justice Brennan moved on to the takings analysis.⁴⁸

42 *Id.*

43 *Id.* at 1278.

44 *Id.* (emphasis added).

45 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 109 (1978).

46 *Id.* at 108 (footnotes omitted).

47 *Id.* (emphasis added).

48 The City of New York’s brief and the amicus briefs of the parties supporting the city have similar undertones that support the idea that preservation is for the benefit of the public at large and that there are considerations that supersede the rights of the individual property owner. *See, e.g.*, Appellees’ Brief at 8, Penn Cent., 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206883, at *6 (“This heightened recognition of the public interest in the value of man’s handiwork, particularly in urban areas, has resulted in legislation, at all levels of government, aimed at preserving our historical and cultural heritage.”); Motion for Leave to File and Brief of the National Trust for Historic Preservation et al. as Amici Curiae in Support of Appellees at 3, 5, Penn Cent., 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206889, at *6–7 (noting that “historic preservation . . . of older buildings whose aesthetic or historic merit significantly contributes . . . to the maintenance

Further, as Robert Levy and William Mellor note in their book, *The Dirty Dozen*, the math does not make sense in the takings analysis in *Penn Central*.⁴⁹ Justice Brennan must have had something else underlying the desire to deny Penn Central's argument that this was an impermissible taking.

C. Survey of Historic Preservation Legislation

It is useful to look to the current state of historic preservation law on the legislative side of government and determine what legislative bodies have intended with these laws. The Takings Clause is implicated in Historic Preservation Law only because individual property owners have challenged regulations as impermissible takings.⁵⁰ So what laws are being challenged?

The National Historic Preservation Act of 1966 ("NHPA") is the most important of the Historic Preservation Laws.⁵¹ During the debate on what has come to be known as the National Historic Preservation Act, on July 11, 1966, Senator Ralph Yarborough of Texas said, "[a]nyone who has seen some of our modern urban renewal projects . . . knows that we have not discovered how to build variety into a planned project. There is a depressing sameness about it all. We must not allow ourselves to be victimized by monolithic exteriors."⁵² The Act was clearly conceived to protect

of American cities and towns as livable places [] has become a matter of great public interest," and that "Grand Central Terminal is an important and irreplaceable component of the special uniqueness of New York City" as "the image of its facade symbolizes New York City for millions of visitors and residents") (quoting *Penn Cent.*, 50 A.D.2d 265, 269 (1975)); Brief of the State of New York, Amicus Curiae at 8, *Penn Cent.*, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206891, at *5 ("Today . . . Grand Central remains a splended edifice and a major part of the cultural and architectural heritage of the City of New York.").

49 ROBERT A. LEVY & WILLIAM MELLOR, *THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY CHANGED THE SUPREME COURT AND ERODED FREEDOM 175* (2008) ("In effect, the Court said, 'Sure, you lost \$150 million, but look at all the things the government let you keep!' Apparently, in the Court's view, \$150 million was small change when one considers that Penn Central was allowed 'to use the property precisely as it [had] been used for the past 65 years . . .'" (citing *Penn Cent.*, 438 U.S. at 136).

50 See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982) ("[Appellant] brought a class action against Teleprompter . . . on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a . . . taking without just compensation."); *Penn Cent.*, 438 U.S. at 107 ("[W]e must decide whether the application of New York City's Landmarks Preservation Law to the parcel of land occupied by Grand Central Terminal has 'taken' its owners' property in violation of the Fifth and Fourteenth Amendments."); *Dist. Intown Props. Ltd. P'ship v. District of Columbia (Cathedral Mansions)*, 198 F.3d 874, 876 (D.C. Cir. 1999) ("[T]he Mayor of the District of Columbia denied District Intown's request for construction permits . . . finding that the construction was incompatible with the property's landmark status. Alleging that the District of Columbia's denial constituted a taking, District Intown and its general partners sued . . .").

51 54 U.S.C. §§ 300101-307108 (2014).

52 112 CONG. REC. 15,168 (1966) (statement of Sen. Yarborough).

the public. In practice, the primary mechanism by which the NHPA protects historic structures is Section 106.⁵³ Under Section 106, when there is a federal undertaking that effects a historical property, federal agencies must “take into account the effect of the undertaking” on any site listed in the National Register or eligible for listing.⁵⁴ Generally, if the Section 106 process is successful, a memorandum of agreement is written between the federal agency and the local historic preservation organization.⁵⁵

D. The Public’s Relation to Buildings and Historic Places—Place-making with Buildings

If we take Justice Rehnquist’s discussion of property rights in his *Penn Central* dissent to heart—that we must take into account “every sort of interest that the citizen may possess,”⁵⁶ including the group of rights “inhering in the citizen’s relation to the physical thing”⁵⁷—then it is critically important, in the historic preservation context, to consider the interests citizens may have in the buildings that make up the built environment of their community and the relationships individuals have with those buildings.

As Carol Rose noted in her article, *Preservation and Community: New Directions in Historic Preservation Law*, “the saga of shattered neighborhoods [moved] architects and urbanologists to reconsider the political ramifications of the physical environment.”⁵⁸

The structures that make up a neighborhood, the community-making buildings, have an enormous effect on the community.⁵⁹ Kevin Lynch distilled the importance of buildings in his 1960 book, *The Image of the City*, as the sense of not feeling “lost.”⁶⁰ Indeed, the National Historic Preservation Act’s statement of purpose includes the desire to provide a “sense of

⁵³ See Protection of Historic Properties, 36 C.F.R. § 800 (2000) (implementing a complex scheme through which federal agencies are to comply with the statutory provisions of Section 106).

⁵⁴ 54 U.S.C. § 306108 (2014).

⁵⁵ 36 C.F.R. § 800.6(b)–(c) (2000). It is important to note the role that the public at large plays in most historic preservation legislation. See THOMAS F. KING, FEDERAL PLANNING AND HISTORIC PLACES: THE SECTION 106 PROCESS 31–32 (2000) (concluding that “[t]he public, whose members are to be kept informed of the undertaking and the process of Section 106 review and given opportunities to provide input and otherwise participate,” is a party to the Section 106 process, noting that “[c]learly, the definition of parties embraces just about everyone, as I, for one, think it should”).

⁵⁶ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 142–43 (1978) (Rehnquist, J., dissenting) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945)).

⁵⁷ *Id.*

⁵⁸ Rose, *supra* note 13, at 488.

⁵⁹ See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (discussing the importance of structures to community life); OSCAR NEWMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* (1972) (discussing the effect of architecture on crime rates in urban areas).

⁶⁰ KEVIN LYNCH, *THE IMAGE OF THE CITY* 4 (1960).

orientation to the American people.”⁶¹ Neighborhoods and communities are lost without the historic structures that have made them communities.

The Willard Hotel in Washington, D.C. was for years the site of conflict between developers and preservationists.⁶² In one congressional oversight hearing, a Park Service representative was asked why the Willard Hotel was historic. He responded:

[A] lot of things make things historic. It is anything that gives a place a sense of place. . . . And if we keep tearing down everything which gives the city a sense of identity, and putting up duplicates of commercial glass boxes . . . how do you know where you are?⁶³

Justice Brennan articulated this theme, albeit more mildly, in his *Penn Central* opinion: “[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all.”⁶⁴

Finally, from the very beginning, the ownership interest of the public was considered by those involved in the preservation movement. In *With Heritage So Rich*, a compilation of essays and reports that was pulled together to advocate for the passage of the National Historic Preservation Act, the Historic Preservation Committee wrote:

[The preservation movement] must be more than a cult of antiquarians It must attempt to give a sense of orientation to our society, using structures and objects of the past to establish values of time and place.

. . . .

. . . [P]reservation must look beyond the individual building and individual landmark and concern itself with the historic and architecturally valued areas and districts which contain a special meaning for the community.⁶⁵

Is it workable to say that the general public should be some sort of quasi-title-holder of historic properties? Of course not. It is, however, incredibly important to note the rich history of recognizing the value of community-making structures to the general public and to recognize that there is,

61 Nat’l Historic Pres. Act of 1966, Pub. L. No. 89-665, § 1, 80 Stat. 915, *as amended by* Pub. L. No. 96-515, 94 Stat. 2987 (1980).

62 *See* Comm’r of D.C. v. Benenson, 329 A.2d 437, 438–39 (D.C. 1974) (noting the Fine Arts Commission’s refusal to permit the owners to deface or alter the hotel because it is a historical landmark); *Don’t Tear It Down, Inc. v. Washington*, 399 F. Supp. 153, 154–56 (D.D.C. 1975) (discussing the hotel owners’ litigation seeking a permit to demolish certain elements of the hotel).

63 *Oversight Hearing on Pennsylvania Avenue Development Plan: Hearing Before the Subcomm. on Nat’l Parks & Recreation of the H. Comm. on Interior & Insular Aff.*, 94th Cong. 65 (1975) (statement of Earnest A. Connally, Assoc. Dir., Prof. Servs., Nat’l Park Serv., Dep’t of the Interior).

64 *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108 (1978).

65 Special Comm. on Historic Pres., U.S. Conference of Mayors, *Findings and Recommendations, in WITH HERITAGE SO RICH* 203, 207 (1966).

to borrow Justice Rehnquist's words, some "sort of interest" in the property that community members may possess.⁶⁶

E. Problems—But Buildings Still Come Down

The obvious problem is that despite the great strides that have been made since *Penn Central*, buildings still come down at an alarming rate.⁶⁷ Indeed, the individual property owners have an inordinate amount of control over what happens to these place-making structures. This is readily apparent in properties owned by the Archdiocese of Philadelphia, like St. Laurentius.⁶⁸ In 2016, the Archdiocese of Philadelphia instructed parish priests not to help in preservation efforts for the church buildings in Philadelphia.⁶⁹ This was undoubtedly motivated by economic rationales, however, it does put the priests at odds with the communities that they are there to serve. If the church really is a place-making community center, should not the priest be allowed to fight with the neighborhood to save the church? Additionally, if an owner has decided to stand in the way of preserving these significant structures, does not the public, which may have some sort of ownership right, need some recourse?

II. EVERY SORT OF INTEREST

Historic Preservation Laws are immune from takings challenges. However, buildings still come down. If there is to be a solution to this found in public interest in these community-making places, then there must be a due process right that the public has in these sorts of places. In this Part, I look to examples from other areas of law where the court has held that there is

⁶⁶ *Penn Central*, 438 U.S. at 143 (Rehnquist, J., dissenting).

⁶⁷ See, e.g., Bradley Maule, *supra* note 12 (documenting notable buildings that disappeared in Philadelphia in 2015).

⁶⁸ See Daniel Craig, *Archdiocese Signals Pending Battle over Churches' Historic Designations*, PHILLY VOICE (Jan. 14, 2016), <http://www.phillyvoice.com/archdiocese-memo-signals-pending-battle-over-historic-designations/> ("A recent Archdiocese of Philadelphia memo directs parish pastors not to get involved with any efforts to designate its churches or properties for historical preservation. . . . [T]he archdiocese intends to challenge recent efforts to designate Philadelphia churches as historic, including a designation given to . . . the St. Laurentius Church building in Fishtown . . .").

⁶⁹ *Id.*; see also Patrick Hildebrandt, *New AD Directive Is a Call to Arms*, PHILA. CHURCH PROJECT (Jan. 11, 2016), <http://www.phillychurchproject.com/project-blog/2016/1/10/new-ad-announcement-is-a-call-to-arms> (noting the Archdiocese's policy against pastors' involvement in historic preservation of churches); Letter from Daniel J. Kutys, Moderator of the Curia, Archdiocese of Phila., to Clergy Members, Archdiocese of Phila. (Jan. 7, 2016) (memorializing the Archdiocese's intent to fight the historic designation of St. Laurentius and several other parishes and referencing the Archdiocese's policy against priests aiding preservationists in designating church buildings).

some sort of due process right or interest that may be able to be translated to a right to historic buildings.

A. A Right to Community-Making Places as a Statutorily Created Interest

1. Matthews v. Eldridge

Completely outside the scope of historic preservation law sits *Matthews v. Eldridge*.⁷⁰ Decided two years before *Penn Central*, the Court in *Matthews* held that individuals have a statutorily granted property right in social security benefits.⁷¹ For almost twenty years before his benefits were terminated, George Eldridge received benefits under the disability insurance benefits program created by Title II of the Social Security Act.⁷² Eldridge challenged the constitutionality of the termination arguing that he had a property right in the benefits and that the Due Process Clause mandated that he have an evidentiary hearing before termination of those benefits.⁷³ In reaching their conclusion, the Court enumerated three factors to consider when determining whether an individual's interest implicates due process, and if so, how much due process is afforded. The Court held that in determining the "specific [procedural] dictates of due process" a court must consider "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used . . . and finally, the Government's interest, including the function involved and the fiscal and administrative burdens."⁷⁴ The Court went on to further hold that despite the statutorily created property interest in social security benefits, Eldridge had been afforded sufficient due process given the balancing test.⁷⁵

Incidentally, Justice Brennan dissented in *Matthews v. Eldridge*. Justice Brennan agreed with the district and court of appeals that Eldridge was entitled to an evidentiary hearing before the discontinuation of his social security benefits.⁷⁶ In other words, the interest that George Eldridge had in the "property" granted him by the Social Security Act was not afforded sufficient due process considerations without the evidentiary hearing.

⁷⁰ 424 U.S. 319 (1976).

⁷¹ *Id.* at 332 ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . . [T]he interest of an individual in continued receipt of [social security] benefits is a statutorily created 'property' interest protected by the Fifth Amendment.").

⁷² *Id.* at 323.

⁷³ *Id.* at 325.

⁷⁴ *Id.* at 335.

⁷⁵ *Id.* at 349.

⁷⁶ *Id.* at 349–50 (Brennan, J., dissenting).

2. *The NHPA as a Right-Creating Statute*

Clearly, the language of the Social Security Act creates a much stronger argument for a statutorily created property right than the National Historic Preservation Act does.⁷⁷ However, the National Historic Preservation Act (“NHPA”) does say that it is the policy of the federal government to “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”⁷⁸

Additionally, Section 106 of the NHPA requires that where there is a federal undertaking that affects historic properties (from licensing to ownership) the federal agency must study ways to avoid or mitigate any adverse impacts to those property.⁷⁹ This includes a memorandum of agreement (“MOA”) at the end of the process between the State Historic Preservation Office and the agency.⁸⁰

In 2000, the Ninth Circuit held owners of historic properties near a development did have standing to sue the City of San Francisco under an MOA that had been executed between the City of San Francisco, the U.S. Department of Housing and Urban Development (“HUD”), and the developers of a large project.⁸¹ The court cited contract principles that third party beneficiaries must show that the contract was made for their direct benefit and that they were an intended beneficiary of the contract.⁸² Further, the court references that the public is a beneficiary of the MOA, a group which the homeowners definitely fall into.⁸³ If we are to take the idea that the public benefits from historic preservation laws and the preservation of historic places as important, then the public is being deprived of a benefit here and could have standing to sue as intended beneficiaries of many of these MOAs.

This suggests, at least mildly, that there is a benefit granted to the public by the NHPA and other state historic preservation acts. When an individual or entity (presumably with licensing from a state or federal agency) chooses to deprive the public or the community of that benefit by demol-

77 See Social Security Act, 42 U.S.C. § 421(d) (2012) (noting that any individual dissatisfied with a determination regarding his qualifications for disability benefits is entitled to an evidentiary hearing).

78 54 U.S.C. § 300101(1) (2014) (emphasis added).

79 *Id.* § 306108.

80 36 C.F.R. §§ 800.5(e)(4).

81 *Tyler v. Cuomo*, 236 F.3d 1124, 1135 (9th Cir. 2000).

82 *Id.* at 1134–34 (citing *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)).

83 *Tyler*, 236 F.3d at 1135; see also 36 C.F.R. § 800.5 (suggesting that the general public is the intended beneficiary of the assessment of adverse effects of a federal undertaking for historic properties).

ishing or otherwise abridging it, the public may be entitled to some level of due process under the *Matthews v. Eldridge* framework.⁸⁴

B. A Fundamental Right to Places

1. *United States v. Gettysburg*

Arguably, the beginning of historic preservation law, *United States v. Gettysburg Electric Railway Co.*, is a cloyingly patriotic example of public benefit over individual rights.⁸⁵ In the nineteenth century, preservation was marked with a focus on inspiring the population to be better people.⁸⁶ In the late nineteenth century, the government wanted to condemn the Gettysburg Battlefield for the purpose of creating a national park.⁸⁷ The question arose whether or not this was a legitimate public purpose. Justice Rufus Peckham's majority opinion suggests that there can be no greater public purpose than the preservation of this battlefield.⁸⁸

Importantly though, as Carol Rose pointed out, Justice Peckham's opinion understands that "a place can convey this sense of community, or more generally, that visual surroundings work a political effect on our consciousness."⁸⁹ *Gettysburg*, independent of its extreme political and social importance, stands for the proposition that places matter and that the public stands to benefit from them.

2. *Communities as Fundamental*

All historic properties are not Gettysburg. Gettysburg's importance was eloquently stated by Justice Peckham in 1896:

Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. . . . [The preservation of the battlefield] touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country, the greater

⁸⁴ 424 U.S. 319, 335 (1976); see also *supra* notes 70–76 and accompanying text.

⁸⁵ 160 U.S. 668 (1896).

⁸⁶ Rose, *supra* note 13, at 481 ("The nineteenth century inspirational view of preservation was marked by an interest in civic education intended from the outset to have important political ramifications.").

⁸⁷ *Gettysburg*, 160 U.S. at 670.

⁸⁸ *Id.* at 681–82 ("The battle of Gettysburg was one of the great battles of the world. . . . The existence of the government itself and the perpetuity of our institutions depended on the result. . . . Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress . . . for the purpose of . . . preserving the whole country.").

⁸⁹ Rose, *supra* note 13, at 483 (emphasis omitted).

is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country, which were saved at this enormous expenditure of life and property, ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense.⁹⁰

It may not be that all historic properties are of the importance on a national scale as Gettysburg, but are similar sentiments not true of communities and neighborhoods? The right to a community seems almost fundamental. Fundamental rights under the due process clause are those that are “implicit in the concept of ordered liberty”⁹¹ or “deeply rooted in this Nation’s history and tradition.”⁹²

On a much smaller scale, it may seem that there is a due process right to community and as a result community-building spaces that arises out of our conception of liberty and traditions. Individual neighborhoods and a sense of home are embedded in the American psyche.⁹³ Home is an explicitly protected concept in American law.⁹⁴ That idea may well be extended to the neighborhood and the intangibles from the exterior that make a house a home.⁹⁵

C. *The Right of Cities to Be Beautiful*

1. *Berman v. Parker*

One of the foundational cases in land use and historic preservation law is *Berman v. Parker*.⁹⁶ In *Berman*, the property owner appealed a decision of the District Court for the District of Columbia that held it was not an unconstitutional taking for the city to “condemn property only for the reason-

90 *Gettysburg*, 160 U.S. at 682–83.

91 *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

92 *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion).

93 Ronald E. Wilson, *Why Neighborhoods Matter: The Importance of Geographic Composition*, 2 GEOGRAPHY & PUB. SAFETY (2009) (“Neighborhoods are the places where the everyday practice of life occurs. They are geographical units that are essential to people’s lives—people connect these living environments to their identity and, thus, neighborhoods become personally meaningful.”) (footnote omitted).

94 D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (discussing generally, how homes are more favored under the law than are other forms of property, including overt protections under the Third and Fourth Amendments).

95 *See id.* at 255 (noting the cliché “a house is not a home” implicates the cultural construct of “home” as evocative of sentimental values beyond the the physical structure); Katherine Levine Einstein & David M. Glick, *Model Neighborhoods Through Mayor’s Eyes Fifty Years After the Civil Rights Act*, 95 B.U. L. REV. 873, 875 (2015) (discussing the important impact of neighborhoods, especially racially segregated neighborhoods, on individuals’ lives).

96 348 U.S. 26 (1954).

able necessities of slum clearance and prevention, its concept of ‘slum’ being the existence of conditions ‘injurious to the public health, safety, morals and welfare.’”⁹⁷

The Supreme Court unanimously affirmed the district court’s ruling, albeit with modifications. Justice William Douglas, writing for the Court, wrote that “[m]iserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden.”⁹⁸ He continued that “[poor housing conditions] may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.”⁹⁹ Justice Douglas felt so strongly about the importance of healthful and beautiful communities that he broadened the district court’s conception of what may be constitutionally condemned: “We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the district court but also the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending.”¹⁰⁰ Walter Muir Whitehill later wrote of Justice Douglas’s opinion that “[a] 1954 United States Supreme Court decision (*Berman vs Parker*) ruled that a city has as much right to be beautiful as it has to be safe and clean.”¹⁰¹

2. *The Right of People to Beautiful Communities*

Eminent domain and potentially problematic considerations aside,¹⁰² Justice Douglas’s opinion stands for the proposition that cities (and by extension communities) have a right to be beautiful as well as safe and

97 *Id.* at 28, 31.

98 *Id.* at 32.

99 *Id.* at 32–33.

100 *Id.* at 35.

101 Walter Muir Whitehill, *The Right of Cities to Be Beautiful*, in WITH HERITAGE SO RICH 45, 45 (1966).

102 *See Kelo v. City of New London*, 545 U.S. 469, 480–84 (2005) (expanding the reasoning of *Berman* regarding what constitutes a public use for eminent domain analysis, and holding that the City of New London could condemn an entire neighborhood for economic gains); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 46 (2003) (“Douglas’s opinion in *Berman* reflects a faith in the political system’s ability to operate in a non-discriminatory manner. Urban renewal, however, was an economic development program with profound racial implications that were ignored by all the parties to the litigation.”) (footnote omitted).

clean.¹⁰³ Gerald E. Frug argued in 1980 that cities need to be given more power in order to achieve true “public freedom.”¹⁰⁴ It is people, however, who make up cities. If the benefits that Justice Douglas mentioned in *Berman* are to be fully realized, beautiful cities that are helpful to the public welfare and education, then the idea needs to be reconceived from the city writ large having a right to be beautiful to the individuals having a right to beautiful neighborhoods and beautiful communities. Further, this recasting as a smaller entity from Justice Douglas’s original idea helps to avoid the problem that is articulated by Wendell Pritchett in his article, “The ‘Public Menace’ of Blight.”¹⁰⁵ In his article, Pritchett notes that while Justice Douglas’s intentions may have been good, the application of the principle in *Berman* has largely been to shape the racial demographic of cities and to push racial minorities into other areas.¹⁰⁶ If the right of cities to be beautiful is recast as a right of individuals to beautiful cities (or communities), then the decisions are no longer being made from on high and the risk of discriminatory action by decision-makers is avoided.

III. STANDING

The question ultimately comes down to whether or not that interest is important enough for a court to recognize that the individual is sufficiently interested in the controversy to bring the claim. This is called the standing requirement.¹⁰⁷ In the wake of the National Historic Preservation Act, courts created two major categories of parties who had sufficient standing to bring a lawsuit. This was based in a pseudo-equitable doctrine intended to avoid inquiry into the injury that the party had suffered. In the ensuing decades, these two buckets of parties who can bring lawsuits have remained largely unchanged; however, courts have dropped the pseudo-equitable explanation and instead undergo traditional standing analysis to reach the same conclusion. This Part explores this inconstancy in the court’s treatment of standing analysis in historic preservation cases from the 1960s to present and argues that the difference is largely in the jurist’s conception of the injury in question and the underlying interest that the party may have in community-making structures. This Part goes on to conclude that under the Supreme Court’s current conception of standing in historic preservation cases, the old buckets of individuals who are able to

103 *Berman*, 348 U.S. at 33.

104 Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

105 Pritchett, *supra* note 102.

106 *Id.* at 47.

107 *See Standing*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A party’s right to make a legal claim or seek judicial enforcement of a duty or right.”).

bring claims should be abandoned in favor of more inclusive opportunities for parties and interested groups to save their community-making structures.

In order to even get in the door, a plaintiff must allege that she has suffered an injury in fact, that the injury is fairly traceable to the action of the defendant, and that the injury will likely be redressed by a favorable decision.¹⁰⁸ This injury in fact must be “an invasion of a legally protected interest” that is both “concrete” and “particularized.”¹⁰⁹ To summarize in historic preservation terms, in order to show that the party has a sufficient interest in order to file a lawsuit related to the demolition or alteration of a historic or community-making property, the proposed plaintiff or intervenor must allege that she has a legally protected interest in the historic property that is real and specific to that property. Further, she must allege that the actions of the defendant, usually the title-holder, are causing an injury to that interest and that there is a mechanism by which the courts can rectify the situation. For purposes of this Part, assume that the proposed plaintiff in a case can show to the satisfaction of the court that the injury is traceable to the defendant and that the injury will be redressed by a favorable decision.¹¹⁰

In the years following the passage of the National Historic Preservation Act,¹¹¹ courts relied on the “private attorney general” doctrine to deal with the issue of standing in cases arising out of the demolition or alteration of historic structures.¹¹² Under the private attorney general doctrine, standing is provided for in historic preservation lawsuits under two circumstances: “(1) when the plaintiffs are citizens of the area and their direct interests are to be affected, and (2) when the group seeking to represent the citizens has been actively engaged in the administrative process and has thereby shown

¹⁰⁸ U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁰⁹ *Lujan*, 504 U.S. at 560.

¹¹⁰ For example, assume that the local community and the preservation community wanted to get a temporary restraining order against the owner of a landmark, but not designated, church who desires to bulldoze the church in order to build a mixed-use development. In this case, the offending action is easily traceable to the defendant and there is a commonly used tool at the court’s disposal to stop the act. The question that remains is whether or not any of the interested parties have a sufficient interest that will be injured in order to have legal standing. See, e.g., Ryan Briggs, *Fishtown Residents Push Back Against Planned Church Demolition*, HIDDEN CITY PHILA. (Feb. 11, 2016), <http://hiddencityphila.org/2016/02/fishtown-residents-push-back-against-planned-church-demolition/> (describing a situation similar to the proposed working hypothetical surrounding the former East Montgomery African Methodist Episcopal Church in the Fishtown section of Philadelphia).

¹¹¹ 54 U.S.C. §§ 300101-307108 (2014).

¹¹² See *South Hill Neighborhood Ass’n v. Romney*, 421 F.2d 454, 461 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970) (describing the use of the private attorney general doctrine in a suit arising out of the demolition of historic buildings in connection with an urban renewal project).

a special interest in the area of the controversy.”¹¹³ The idea here is that plaintiffs’ standing is based on the ground that they are suing as representatives of the general public and that the action is a public action in which the plaintiffs are affected no differently than any other people.¹¹⁴ For example, in *South Hill Neighborhood Association v. Romney*, the Sixth Circuit held that the private attorney general doctrine provides for standing in the two extremely limited circumstances.¹¹⁵ In *South Hill*, plaintiffs sought to enjoin developers from demolishing fourteen historic buildings as part of an urban renewal program.¹¹⁶ The court said explicitly that:

[I]t is . . . clear that none of the plaintiffs have any real interest in this litigation. None of the plaintiffs own or have owned any of the . . . buildings in controversy. None of the plaintiffs had legal control or title to the buildings when they were placed on the National Register. . . . None of the plaintiffs . . . submitted a proposal for development of the area.¹¹⁷

Even while acknowledging the private attorney general doctrine, the Sixth Circuit determined that the lack of a legal interest barred any of the plaintiffs from having standing given the circumstances.¹¹⁸

Other courts in the late 1960s espoused the same idea—that there is no legal interest in community-making places—that was articulated in *South Hill*. For example, Judge Joseph Smith of the Second Circuit wrote in 1968 that the personal interest that an individual may have in demolished structures is not enough to create a legal interest.¹¹⁹ Judge Smith wrote, “Even where a plaintiff has a personal stake in the outcome of a case, he may be denied standing to sue on the ground that the right which he is attempting to assert is not one which the courts will recognize.”¹²⁰ Judge Smith did ultimately hold that the interest of the plaintiffs in *Norwalk CORE* was sub-

113 *Id.* (citations omitted).

114 *See* *Office of Commc’n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (holding that petitioners had sufficient economic interest to establish standing). *See also* *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 616 (2d Cir. 1965) (per curiam) (finding sufficient economic and statutory injuries to establish standing); John W. Vardaman, Jr., *Standing to Sue in Historic Preservation Cases*, 36 L. & CONTEMP. PROBS. 406, 410 (1971) (questioning whether representatives of the listening public had standing in a license renewal proceeding).

115 *South Hill Neighborhood Ass’n*, 421 F.2d at 461.

116 *Id.* at 457–58. Additionally, it is worth noting that seven of the buildings in question were listed on the National Register of Historic Places.

117 *Id.* at 460.

118 *Id.* at 456, 461.

119 *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).

120 *Id.* at 927.

stantial and immediate enough that the plaintiffs did have standing to proceed.¹²¹

In 1971, John W. Vardaman, Jr. wrote that the rationale for the private attorney general doctrine was that the injury to the individual or organization was too nebulous to hold up to traditional standing tests.¹²² Vardaman based his analysis on the five years of litigation immediately subsequent to the passage of the National Historic Preservation Act. As Vardaman wrote, “[P]laintiffs are frequently not able to assert proprietary or economic interests to give them standing and may be unable to identify any specific individualized injury except in the most remote fashion.”¹²³ In other words, because only a title-holder has a sufficient proprietary or economic interest in the property to suffer a traditionally cognizable injury, courts have had to develop a quasi-equitable standing doctrine to allow other parties to get in the door. Vardaman continued by making a comparison to wildlife protection statutes, saying that it may be a strain to say that any individual or group is harmed by the destruction of a particular species but through legislation there has been a congressional determination that there is a public interest in the preservation of wildlife species.¹²⁴

Generally speaking, equitable standing doctrines have become disfavored in American jurisprudence.¹²⁵ Courts, including the U.S. Supreme Court, began to question whether or not standing doctrines that are not firmly rooted in the traditional constitutional analysis were permissible.¹²⁶ This is reflected in the body of Historic Preservation cases as well. In the

121 *Id.* (“[The plaintiffs’] stake in the outcome of the case is immediate and personal, and the right which they allege has been violated—the right not to be subjected to racial discrimination in government programs—is one which the courts will protect. Their standing to sue is clear”).

122 Vardaman, *supra* note 114, at 410.

123 *Id.*

124 *Id.*

125 See Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213 (2015) (discussing the decline of the zone of interests test and the generalized grievances doctrine leading up to the Supreme Court’s decision in *Lexmark International*, which some scholars think has effectively ended third-party lawsuits); see also *Lexmark Int’l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 (2014) (Scalia, J.) (holding that a direct application of the zone-of-interests test and the proximate-cause requirement supplies the limits on those who may sue for false advertising under the Lanham Act); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (questioning whether any prudential standing principles not based on constitutional standing are valid, and arguing that the lack of basis in firm constitutional standing doctrine calls into question the authority of the court to make decisions).

126 See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (affirming the general rule against federal taxpayer standing and denying a broad reading of an exception to that rule); see also *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) (“For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution’s democratic character.”).

twenty-first century, courts began to abandon the private attorney general doctrine in favor of the traditional Article III standing analysis articulated by the Supreme Court in *Lujan*.¹²⁷ Indeed, since the 1970s, a variety of injuries have been recognized by federal and state courts as sufficient to establish injury in fact for standing purposes. Functionally, this has not expanded the limited scope of the private attorney general doctrine.¹²⁸ These injuries are often asserted without solid basis in some sort of economic or proprietary interest. For example, in *Committee to Save the Fox Building v. Birmingham Branch of Federal Reserve Bank of Atlanta*, the court held that the injury in fact requirement is satisfied by a showing of harm to the aesthetic and environmental well being of the plaintiff and then moved past the standing argument.¹²⁹ Courts have also held more explicitly that injury to the aesthetic, architectural, cultural, environmental, or historic values can constitute sufficient injury to warrant standing.¹³⁰

In order for there to be an injury, the plaintiff must have an interest in something that is concrete and particularized that can be injured.¹³¹ Courts, however, have skipped over this critical step and have determined that

127 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61; *see also supra* 108–109. *Lujan* has been cited as the proper analysis for standing in many historic preservation cases in recent years. *See, e.g.*, *Pye v. United States*, 269 F.3d 459, 467–68 (4th Cir. 2001) (holding that residents living near the site of a road being constructed by the Army Corps of Engineers had standing to sue and had suffered a sufficient injury in fact under a rigorous *Lujan* analysis); *Soc’y Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 176–77 (3d Cir. 2000) (applying the *Lujan* formulation of the standing analysis to determine that Philadelphia residents had standing to challenge a proposed urban renewal project).

128 It is worth noting that other scholars have noted the seemingly arbitrary switch between constitutional and prudential standing doctrines. *See, e.g.*, Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 692 (1990) (arguing that the Court’s distinction between prudential and constitutional standing doctrines is often arbitrary).

129 *Comm. to Save the Fox Bldg. v. Birmingham Branch of Fed. Reserve Bank of Atlanta*, 497 F. Supp. 504, 509 (N.D. Ala. 1980).

130 *See, e.g.*, *Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis*, 701 F.2d 784, 787 (9th Cir. 1983) (holding that demolishing a historic structure is sufficient injury to establish standing); *Neighborhood Dev. Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 23–24 (6th Cir. 1980) (holding that injury to aesthetic value constitutes sufficient injury in fact for standing); *Hall Cty. Historical Soc’y v. Georgia Dep’t of Transp.*, 447 F. Supp. 741, 747 (N.D. Ga. 1978) (holding that injury to environmental concerns is sufficient); *Weintraub v. Rural Elec. Admin.*, 457 F. Supp. 78, 88 (M.D. Pa. 1978) (holding that injury to architectural heritage is sufficient).

131 The *Lujan* Court noted that particularly in suits against the government, the injury requirement is of the utmost importance. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“[O]ur cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’”) (citations omitted); *Office of Comm’n of the United Church of Christ v. FCC*, 359 F.2d 994, 1002 (D.C. Cir. 1966) (“[T]he concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding . . .”).

there is an injury without an interest. This means that there must be some implicit interest that an individual in the zone of interest and/or an organization that has been involved in the process has in order to establish an injury in-fact. To put it another way, Vardaman articulated the rationale for the private attorney general doctrine as allowing plaintiffs to proceed on claims because there was no proprietary or economic interest or where that interest was too nebulous or remote for the plaintiff to be able to plausibly allege some sort of interest in fact.¹³² In abandoning the private attorney general doctrine in favor of a traditional analysis under *Lujan*, courts are functionally saying that it is no longer necessary to create the legal fiction of an interest that necessitated the private attorney general doctrine. In fact, the underlying assumption that comes from these cases is that there is not an interest, proprietary or economic, that an individual or involved not-for-profit organization has in community-making structures.

There are numerous ways in which an individual has a relation to community-making structures and therefore has a proprietary interest in them.¹³³ Additionally, organizations and individual business owners may have an economic interest in the community-making structures in their community.¹³⁴ If we are to take these proprietary and economic interests seriously, then for purposes of standing we should never have needed to get to the private attorney general doctrine or other pseudo-equitable standing doctrines (for example, prudential standing) in order for affected plaintiffs to be able to bring lawsuits to preserve historic buildings. By recognizing these property interests we can further recognize concrete and particularized injury in fact to a very real interest that is far from the nebulous and remote interest described by Vardaman.

As courts have done away with the private attorney general doctrine in favor of a more traditional Article III standing analysis, it is time to remove the categorical barriers to standing that have persisted in the jurisprudence.

CONCLUSION

Is it farfetched to say that individual community members may have a property right in their community-making places that would supersede that of the title-holder? Very possibly. However, it is clear that the jurispru-

132 Vardaman, *supra* note 114, at 410.

133 See generally JACOBS, *supra* note 59 (discussing the importance of structures to community life); NEWMAN, *supra* note 59 (discussing the effect of architecture on crime rates in urban areas).

134 See DONOVAN RYPKEMA ET AL., PLACEECONOMICS, MEASURING ECONOMIC IMPACTS OF HISTORIC PRESERVATION: A REPORT TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION (2d ed. 2013), <http://www.achp.gov/docs/Economic%20Impacts%20v5-FINAL.pdf> (citing numerous sources measuring the value of the economic impact historic preservation has on communities).

dence from Justice Brennan, Chief Justice Breitel, Justice Peckham, and Justice Douglas contemplates some sort of interest that the community has in its historic buildings. If we are to take Justice Rehnquist at his word, that property in the Constitution is meant to encompass “every sort of interest” that an individual may have in property and to take into account the person’s relationship with the thing¹³⁵ then we clearly need to recognize that there is an underlying due-process-worthy property right in historic structures.

Of course, this Comment has blinders on with respect to the obvious realities of old buildings in the real world. Buildings inevitably deteriorate and become expensive to maintain even with the best maintenance. Historic preservation is inherently an expensive endeavor.¹³⁶ However, there are numerous studies that show the economic benefits of preservation, including individual instances where economic hardship arguments proved to be completely counter to the reality of the situation.¹³⁷

The Archdiocese of Philadelphia may have legal title to the Church of St. Laurentius. The parishioners, however, and the community members at large, are the ones who were married and baptized there, educated there, and grew up there. The community members are the ones who going to have to look at the empty lot if the Archdiocese were to leave and the community is the one who would lose the structure that gave them a sense of place for almost a century. When the wrecking ball pulls up to a structure like that, whose ownership interest should we be protecting?

135 *Penn Central*, 438 U.S. at 142-43 (Rehnquist, J., dissenting) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

136 *See, e.g.*, *Nat’l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 924–25 (D.D.C. 1996) (holding that despite the expense associated with maintaining a large historic property, property owner could not simply allow historic properties to fall into disrepair).

137 *See, e.g.*, RYPKEMA ET AL., *supra* note 134, at vi (providing data showing the economic benefits of preservation).