

Forced Betting the Farm: How Historic Preservation Law Fails Poor and Nonwhite Communities

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This Note discusses historic preservation law in the context of the redevelopment fight over the D.C. neighborhood Barry Farm. The Note argues that historic preservation law is inadequately structured to protect and preserve properties associated with poor and nonwhite communities. The Note closely examines the efforts of Barry Farm tenants to have their homes historically designated, and it shows how current law placed unnecessary barriers in their path. As a remedy, the Note recommends removing physicality requirements from historic preservation laws.

Unlike prior legal works—which have considered redevelopment and historic preservation as separate phenomena—this Note explicitly discusses historic preservation as a tool to prevent redevelopment-based dispossession and displacement. Thus, it refocuses the debate on historic preservation by looking to who has access to the benefits provided by historic preservation laws. It provides an original literature review of the limited number of works that have addressed this question. It concludes that a gap remains in terms of identifying the systematic barriers to the preservation of properties outside of wealthy, white communities. It then takes a critical look at the D.C. and federal historic preservation statutes. The heart of the Note discusses the case for Barry Farm’s historical merit, and the tenant-led effort to have the neighborhood designated. The experience of the Barry Farm tenants offers a unique and valuable case study to show the

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failures of current historic preservation law. All parties conceded Barry Farm was historic, yet the property faced significant hurdles on the path to designation. The piece concludes with a novel argument as to how and why historic preservation law should be changed to allow communities to use it to prevent dispossession.

The Note comes at a time of heightened awareness of the structural racism undergirding American society as well as a renewed realization of the inequalities in access to historic preservation protections. It is also one of the first pieces of legal scholarship to consider the Barry Farm case. In addition, the Note offers a way forward to better protect the history of traditionally underserved and marginalized communities. It serves as a useful resource for future efforts to use historic preservation law to avert tenant displacement by chronicling the legal developments of the Barry Farm case.

[The land] was taken from them, just like it was taken, over and over again, not just in Barry Farms, but in other developments. This has seemed to be a history of how things are done, whether to displace people or whatever the reason for them to be doing this.

—Paulette Matthews, Barry Farm Resident.¹

INTRODUCTION

A quick glance at a map of historic districts in the District of Columbia reveals a stark, if unsurprising, pattern. These districts tend to cluster in predominantly white, wealthy neighborhoods. By way of example, Georgetown, which commands a mean household income of \$250,437, possesses roughly 4,000 contributing historic buildings.² Anacostia, by contrast, has a

¹ *Historic Preservation Review Board Public Hearing of October 31, 2019*, DC.GOV: OFFICE OF PLAN. (Oct. 31, 2019) [hereinafter *Hearing of October 31*], <https://play.champds.com/dczoning/event/53>, at 56:14–56:33.

² See WASH. D.C. ECON. P'SHIP, WASHINGTON, DC NEIGHBORHOOD PROFILES 24 (2020) [hereinafter WDCEP] (using a half-mile radius for mean household income for the Georgetown

mean household income of \$51,024, but only around 460 buildings are designated as historic.³

This Note asks why this is the case by examining the redevelopment of Barry Farm. Barry Farm is a neighborhood and public housing development on the east side of the Anacostia River.⁴

Despite the neighborhood’s rich history dating back to Reconstruction, the D.C. Housing Authority (DCHA or the Housing Authority) slated it for redevelopment in 2013.⁵ In an effort to save the community, the remaining residents sought to have the neighborhood historically designated.⁶ In January 2020, the D.C. Historic Preservation Review Board (HPRB or the Board) reached a surprising decision. After numerous rounds of hearings and negotiations, the Board voted to preserve a small portion of Barry Farm.⁷

Though a partial victory for the tenants, the Board’s decision shows the deck is stacked against them. This Note argues that historic preservation laws, as currently structured,

neighborhood); D.C. HISTORIC PRES. OFFICE, DISTRICT OF COLUMBIA HISTORIC PRESERVATION PLAN 2020, at 47 (2018) [hereinafter D.C. HPO]. Aside from Georgetown, the neighborhoods with the most contributing historic buildings are Capitol Hill (8,000) and Dupont Circle (3,100), which command mean incomes of \$162,010 and \$153,588 respectively. *See* D.C. HPO, *supra*; WDCEP, *supra*, at 9, 20 (using a one-mile radius for mean household income for the Capital Hill neighborhood and a half-mile radius for mean household income for the Dupont Circle neighborhood); *see also* AFRICAN AM. CULTURAL HERITAGE ACTION FUND, NAT’L TR. FOR HISTORIC PRES., PRESERVING AFRICAN AMERICAN PLACES 40 (2020) (“Current estimates place the combined representation of African American, American Latino, Asian American, Native American, and Native Hawaiian sites on the National Register of Historic Places and among National Historic Landmarks at less than 8 percent of total listings . . .”).

³ *See* WDCEP, *supra* note 2, at 3 (using a one-mile radius for mean household income for the Anacostia neighborhood); D.C. HPO, *supra* note 2, at 47.

⁴ *See* WDCEP, *supra* note 2, at 5. This Note uses the official name “Barry Farm” to refer to the development. However, the neighborhood is colloquially known as “Barry Farms” to residents and neighbors.

⁵ *See infra* note 123 and accompanying text.

⁶ *See infra* Section II.C.

⁷ *See infra* notes 211–212 and accompanying text.

systematically fail to protect places of importance to relatively poorer, frequently nonwhite, communities. By focusing on aesthetic physical features and using a conception of historical “integrity” that prizes physical continuity, historic preservation laws exclude places that may have substantial history, but have been deprived of the resources to create and maintain aesthetic physical features. Indeed, these excluded places may have preserved their history through other means, such as through their residents. Using the experience of Barry Farm as a lens, this Note shows how the rules of historic preservation—in a sad irony—erase the memory of such places.

Some prior scholarship has described the dynamics connecting historic preservation and community displacement and has investigated whether designating a neighborhood tends to displace nonwhite and poor residents.⁸ Scholars, however, have paid comparatively less attention to whether historic preservation rules are accessible to such communities to preserve their own neighborhoods, and to potentially prevent displacement. Advocates and activists have recognized the inequality of access to historic preservation protections, yet considerable work remains for legal scholarship to systematically describe how historic preservation law operates to exclude certain communities and to propose tangible legal changes.

This Note undertakes that task. It argues that the law should reflect a broader conception of historic preservation, one that can both preserve spaces associated with poor and nonwhite communities and protect such communities against the displacements they too often suffer.⁹ As this Note reveals, the history of a place is as much destroyed when its people suffer a “forced

⁸ See *infra* Section I.A.

⁹ See, e.g., Mindy Thompson Fullilove, *Root Shock: The Consequences of African American Dispossession*, 78 J. URB. HEALTH 72, 74, 78 (2001) (describing causes and consequences of dispossession caused by urban renewal programs).

relocation” as when its buildings are torn down. Yet, historic preservation laws—as currently written—offer no protection from this former manner of erasure.

Following this Introduction, Part I will both review the existing literature and survey the statutory framework for preservation in the District of Columbia. Part II will provide a history of Barry Farm, discuss the redevelopment project, and examine the community’s efforts to obtain historic designation. Part III draws some broader lessons from the experience of Barry Farm in seeking historic designation. The Note concludes by reflecting on Barry Farm as both a repetition of history and a new beginning.

I. BACKGROUND

Historic preservation laws do not preserve everyone’s history. This Part provides the foundation for the Note’s argument by both reviewing the literature on critical approaches to historic preservation and reviewing the statutory and regulatory framework that governed the Barry Farm case. The first Section undertakes a literature review of critical approaches to historic preservation rules and who has access to the benefits of these rules. The second Section explains the statutory and regulatory framework governing historic preservation in the District of Columbia. It also shows how D.C. law is representative of many historic preservation regimes throughout the states.

A. LITERATURE REVIEW: PRESERVATION, DISPOSSESSION, AND MEMORY

Early U.S. efforts to preserve historic memory involved building monuments to significant and influential individuals, as opposed to saving particular structures.¹⁰ The preservation of

¹⁰ See Todd Schneider, Note, *From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor*, 8 GEO. J. ON POVERTY L. & POL’Y 257, 259 (2001) (citing MICHAEL HOLLERAN, *BOSTON’S CHANGEFUL TIMES: ORIGINS OF PRESERVATION & PLANNING IN AMERICA* 30 (1998)).

whole neighborhoods only began in 1931, with ordinances in Charleston, South Carolina, to preserve the character of certain private properties.¹¹ Preservation laws remained spotty and ad hoc until the mid-1950s when the Supreme Court, in *Berman v. Parker*,¹² helped create a more permissive atmosphere for state and local historic preservation efforts.¹³

As historic districts and landmarks have become more common, scholars have worried about their practical effects. According to one argument, conferring historic status on a neighborhood actively displaces poorer residents as higher-income families become attracted to the neighborhood and move in, thus triggering the process of gentrification.¹⁴ Furthermore, historic status restricts the construction of affordable housing by preventing high-rise and other multi-

¹¹ JACOB H. MORRISON, *HISTORIC PRESERVATION LAW* 17 (1965). According to Morrison, New Orleans, Louisiana, passed the first ordinance in 1924 but did not enforce it. *Id.* at 17 n.11.

¹² 348 U.S. 26, 33 (1954).

¹³ See A HANDBOOK ON HISTORIC PRESERVATION LAW 7 (Christopher J. Duerksen ed., 1983).

¹⁴ See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 512–17 (1981); see also Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 772–73 (1993) (describing investigation that revealed historic designation was explicitly sought to displace a minority community); David Listokin, Barbara Listokin & Michael Lahr, *The Contributions of Historic Preservation to Housing and Economic Development*, 9 HOUSING POL'Y DEBATE 431, 457–58 (1998) (arguing that historic preservation is a more potent driver of economic activity than new construction); Donovan D. Rypkema, *The (Economic) Value of National Register Listing*, 25 CULTURAL RESOURCE MGMT. 1, 6 (2002) (“[P]roperty values in local historic districts appreciate significantly faster than the market as a whole in the vast majority of cases and appreciate at rates equivalent to the market in the worst case.”); David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 80–81 (1985) (“Competition among those interested in profiting from [historic] designation inflates property prices, thereby initiating or accelerating the process of ‘gentrification.’”); Schneider, *supra* note 10, at 257–58 (arguing that historic preservation “masks the failure of the liberal imagination to address” social inequities).

family developments that may be more affordable.¹⁵ Against these critiques, other scholars have argued that good historic preservation laws rarely exclude all new construction, only require conformity to historic standards, and contain safety valve clauses permitting needed development.¹⁶

This debate is valuable and important, but a focus on the back-end consequences of conferring historic status does not answer the front-end question of who has access to historic preservation laws.¹⁷ Several scholars, both inside and out of the legal tradition, have elaborated a powerful critique of historic preservation as a tool that is chiefly accessible to wealthy and privileged communities, in part because of its focus on physical structure and aesthetic merit.

¹⁵ See Elizabeth M. Tisher, *Historic Housing for All: Historic Preservation as the New Inclusionary Zoning*, 41 VT. L. REV. 603, 610 (2017) (relating the argument that historic preservation hurts poor individuals by constraining the available supply of area that could be converted to public housing); Kriston Capps, *Why Historic Preservation Districts Should Be a Thing of the Past*, BLOOMBERG CITYLAB (Jan. 29, 2016, 1:09 PM), <https://www.bloomberg.com/news/articles/2016-01-29/michigan-and-wisconsin-state-republicans-are-crusading-against-historic-preservation-districts> [<https://perma.cc/9GWR-EE3A>] (“As cities confront the growing nationwide housing crisis, there will be both a need and a market for building more densely”); see also Binyamin Appelbaum, Opinion, *When Historic Preservation Hurts Cities*, N.Y. TIMES (Jan. 26, 2020), <https://www.nytimes.com/2020/01/26/opinion/historic-preservation-solar-panels.html> (“[H]istoric preservation comes at a cost: It obstructs . . . Washington homeowners in historic neighborhoods from installing visible rooftop solar panels.”).

¹⁶ See, e.g., J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 672–73 (2012); Tisher, *supra* note 15, at 613; see also Fein, *supra* note 14, at 94–95 (applauding the District of Columbia’s special merit exception to its historic preservation laws).

¹⁷ The conventional narrative argues that the democratization of historic preservation occurred in the 1950s. In particular, the narrative argues that *The Death and Life of American Cities* by Jane Jacobs, which emphasized the need “to protect a human-scale built environment,” fostered a movement to protect buildings without “architectural merit but nonetheless formed a coherent landscape.” See SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 5 (2012) (discussing JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961)). Though Jacobs’s influence was no doubt profound, the shift that she helped produce had more to do with architectural preferences than legal structures. See *id.*

Tracing the origins and development of this critique helps to understand the progress that is still required to achieve more equitable and accessible historic preservation laws.

In 1971, Michael deHaven Newsom identified a connection between development and historic preservation in his description of “Georgetown syndrome.”¹⁸ In his essay, Newsom recounts how Georgetown, originally a community with a substantial Black population dating back to well before the Civil War, fell prey to developers who used historic preservation to attract new, wealthier white families to the neighborhood.¹⁹ In addition to decrying the displacement of Black families, Newsom makes a second, “more philosophical” argument regarding the neighborhood’s historic designation.²⁰ “It is not clear that it properly qualifies as ‘historic preservation’ at all. The true history of Georgetown—until the preservationists’ interest in it—was an integrated history. The black elements in that history have now been destroyed, resulting in a perversion and distortion of history.”²¹ Newsom goes on to outline potential responses to displacement-by-preservation,²² but the essence of his point is in the excerpt above. Newsom is effectively arguing for a conception of history that takes account of the social reality

¹⁸ Michael deHaven Newsom, *Blacks and Historic Preservation*, 36 L. & CONTEMP. PROBS. 423, 423 (1971). Newsom tied the displacement effects of historic preservation to the erasure of Black communities. *Id.*

¹⁹ *Id.* at 423–24.

²⁰ *Id.* at 424.

²¹ *Id.* Although developer practice may have changed in superficial respects, Newsom’s critique retains continued vitality as developers still routinely rebrand and repackaging historically Black neighborhoods—going so far as to rename them—for new residents. *See* AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 34 (“Attempts to rename Harlem in Manhattan as ‘SoHa’ by developers, or ‘SOLA’ for South Los Angeles are but two high-profile examples of this.”).

²² Newsom, *supra* note 18, at 425–28.

of a place, beyond just its physical structures, and he shows “preservation” laws actively reshaping that history.

Newsom’s critique did not remain confined to law journals. Writing in a brief 1975 op-ed, Columbia sociology professor Herbert J. Gans decried the historic preservation process as the purview of the wealthy.²³ The op-ed specifically casts opprobrium on the New York City Landmarks Preservation Commission for its tendency to designate “the stately mansions of the rich and buildings designed by famous architects.”²⁴ Gans opines that this “landmark policy distorts the past” and “exaggerates affluence and grandeur.”²⁵ He continues, “[t]he policy is undemocratic, for it . . . ignores the contributions ordinary people have made to the city.”²⁶ According to Gans, 105 of the 113 structures built after 1875 and designated as landmarks were “élite buildings.”²⁷

In her book, *The Power of Place*, Professor Dolores Hayden uses the Gans article to frame the dispute she saw between architecture and sociology.²⁸ The work, a study of the urban

²³ Herbert J. Gans, Opinion, *Preserving Everyone’s Noo Yawk*, N.Y. TIMES, Jan. 28, 1975, at 33.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* Certainly, Gans was not arguing against historic preservation, even of the structures of the wealthy. Rather, he favored a broader expansion of historical preservation to include structures and properties beyond those belonging to people of means. *See id.* The misperception of Gans’s argument appears in some small part to have been aided by the *New York Times*’s illustration, which portrayed an individual in hunting gear literally “taking aim” at an architectural adornment. *See id.*

²⁷ Herbert J. Gans, Letter to the Editor, *Of City Landmarks and Elitism*, N.Y. TIMES, Feb. 25, 1975, at 34. Gans was relying on the Landmarks Preservation Commission’s 1974 booklet, “New York City Landmarks.” *Id.*

²⁸ DOLORES HAYDEN, *THE POWER OF PLACE: URBAN LANDSCAPES AS PUBLIC HISTORY* 8 (1995).

environment of Los Angeles, seeks to draw attention to the interaction of social history and physical space, particularly how aspects of physical space reinforce and ground collective social memory.²⁹ As Hayden writes, “[t]he power of place—the power of ordinary urban landscapes to nurture citizens’ public memory, to encompass shared time in the form of shared territory—remains untapped for most working people’s neighborhoods in most American cities, and for most ethnic history and most women’s history.”³⁰

For Hayden, communities need to affirmatively use historic preservation to protect the potential of “neglected urban places,” places that figured prominently in the everyday lives of working people.³¹ Of course, Hayden did not ignore that preservation could have negative consequences. As she notes, “[p]reservation at the local level . . . often involves gentrification and displacement for low-income residents.”³² Nonetheless, the central aim of her critique concerns the failure to use historic preservation for poorer and nonwhite communities, and she draws attention to telling disparities in the distribution of landmarks among these communities.³³

²⁹ *Id.* at 9.

³⁰ *Id.*

³¹ *Id.* at 11.

³² *Id.* at 53.

³³ *See id.* at 85–86. As Hayden remarked in her study of Los Angeles, “city biographies and the official landmark process have favored the history of a small minority of white, male landholders, bankers, business and political leaders, and their architects.” *Id.* at 85. “[T]hree quarters of the current population [that does not fit the aforementioned category] must find its public, collective past in a small fraction of the city’s monuments, or live with someone else’s choices about the city’s history.” *Id.* at 86. This critique found a political voice in Housing and Urban Development Secretary Henry Cisneros. Writing in 1996, he noted that design “tend[s] to focus on physical form without expanding awareness of social and political meaning” despite a growing awareness of a need for equity in preservation. Henry G. Cisneros, *Preserving Everybody’s History*, CITYSCAPE (SPECIAL ISSUE) 90 (1996). Cisneros continued, “[b]uildings

From the legal perspective, Professor Lisa Alexander looks to historic preservation law to create cultural social capital in low-income, nonwhite communities.³⁴ As an example of this process, Alexander describes the use of the historic preservation process to protect 1520 Sedgwick in the Bronx, a building considered the birthplace of hip-hop.³⁵ For Alexander, this represents a use of historic preservation to protect structures meaningful to actual residents.³⁶ Acknowledging the gentrification danger, Alexander proposes that affordable housing protections accompany historic preservation.³⁷

Alexander rightly points to historic preservation as an opportunity. However, to realize this vision, scholarship still needs to assess systemic barriers to participation in historic preservation law.³⁸ Some have started on this work. Writing a decade prior, then-law student Mark Brookstein

and spaces where important events occurred or that symbolize community lifestyles of the past are given short shrift unless they also are seen as having aesthetic merit.” *Id.*

³⁴ Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 831 (2011). Alexander looks to *cultural collective efficacy*—that is, in part, the ability of individuals in low-income and marginalized communities “to realize common goals and to engage in positive collective action.” *Id.* at 829; *see also* Matthew Fowler, Note, *Building Social Capital Through Place-Based Lawmaking: Case Studies of Two Afro-Caribbean Communities in Miami—the West Grove and Little Haiti*, 45 U. MIAMI INTER-AM. L. REV. 425, 446–47 (2014) (arguing that historic preservation efforts, such as preserving murals depicting local heroes, “can coalesce into a neighborhood identity, and also help less politically powerful communication to establish a claim on a neighborhood in the face of gentrification.”).

³⁵ Alexander, *supra* note 34, at 837–41.

³⁶ *See id.* at 841, 855, 859–60.

³⁷ *Id.* at 855–60.

³⁸ Alexander discusses the historic “tension” between historic preservation law and the protection of low-income communities, *see id.* at 856 (“[H]istoric-preservation law traditionally has been in tension with the preservation of low-income communities.” (citing Newsom, *supra* note 18; Rose, *supra* note 14)), and as a result, proposes policy solutions that go beyond just new historic districts, *see id.* at 858 (“[L]ow-income, predominately minority inner-city communities with cultural collective efficacy of historical significance should create historic districts with affordable housing protections.”).

questioned whether historic preservation laws are adequate for the task of protecting poor and nonwhite communities.³⁹ Brookstein deplored the effects of focusing on aesthetic and physical elements, as opposed to more intangible factors such as “historical patterns” and a place’s capacity to inspire.⁴⁰ Brookstein identified the “integrity” component of federal standards as a potential problem, but ultimately focused on the intervention of political actors in the designation process as a barrier to equity.⁴¹ This account—though useful—does not fully capture the effect of historic preservation laws in the absence of heavy-handed intervention.

Most recently, advocates for a more inclusive historic designation process have recognized difficulties with the “integrity” element. A 2020 report by the African American Cultural Heritage Action Fund, part of the National Trust for Historic Preservation, included the integrity element as one of the obstacles to designation for places associated with Black history.⁴² Yet, as the report notes, “there have not been coordinated evaluations and adjustments to local, state, and

³⁹ Mark D. Brookstein, Note, *When History Is History: Maxwell Street, “Integrity,” and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1848 (2001).

⁴⁰ *Id.* at 1864, 1876.

⁴¹ *See id.* at 1870–76.

⁴² *See* AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 42; *see also* Casey Cep, *The Fight to Preserve African-American History*, NEW YORKER (Jan. 27, 2020), <https://www.newyorker.com/magazine/2020/02/03/the-fight-to-preserve-african-american-history?irclid=OiwWmRxuAxyLU?owUxOMo38PUkERWC> (describing “architectural significance” as an obstacle to the preservation of “modest buildings” associated with Black history). The report includes an incisive, one-page overview of the Barry Farm case. *See* AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 71. Although the report agrees that the case underscores “the need for more inclusive designation criteria,” including a change to the “stringent integrity requirements,” it does not propose concrete changes or otherwise discuss physicality. *See id.*; *see also infra* Section I.B.2 (detailing the presence of physicality in historic designation criteria).

national designation policies to meaningfully account for inequities in the built environment.”⁴³

Although the report speaks of “policies,”⁴⁴ the laws that structure and constrain official policy choices also merit time under the microscope.

* * *

Today, almost seventy years after Newsom’s critique, all is still not right with historic preservation. This Note picks up on the recent call for more detailed evaluation of local, state, and national policies by providing further evidence of the barriers that hinder certain communities’ access to historic preservation law. Whereas Brookstein’s piece ultimately takes issue with political intervention in the historic designation process,⁴⁵ this Note looks to the laws themselves. As the next Section will show, preservation laws still rest on a narrow conception of “integrity” that prizes the continuity of physical features and constrains the laws’ application to communities that have experienced systemic isolation and neglect.

These barriers entail dramatic consequences. Historic preservation law not only protects a community’s collective memory, but also provides that community with a tangible asset. The owners of historic buildings relinquish part of the right to freely demolish or alter their own buildings, but gain protection from their neighbors undertaking such demolitions, alterations, or new construction. In a sense, preservation rearranges the bundle of sticks in the traditional property law analogy. It legally codes historicity into tangible protections.⁴⁶

⁴³ AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 42.

⁴⁴ *See id.*

⁴⁵ *See supra* note 41 and accompanying text.

⁴⁶ This is of course by no means the first work to describe how legal processes turn intangible concepts about physical things into tangible protections and benefits. *Cf.* KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 21 (2019) (describing

Historic preservation staves off unwanted development,⁴⁷ raises property values,⁴⁸ and provides stability to residents.⁴⁹ Preservation accompanied by sound housing policies that shield residents from unrestrained market forces protects these residents against dispossession and displacement.⁵⁰ As an asset that has been too often monopolized by a subset of communities, historic preservation needs to be more evenly distributed.⁵¹ Preservationists may bristle at using historic preservation for a purpose that appears “a-historic”—that is, protecting current residents—but this mistakes history for something occurring solely in the past. As the next

the creation of different forms of “capital” through legal processes); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 75–76 (2d ed. 2001) (describing the creation of land, labor, and money as commodities as a societal process); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1709 (1993) (arguing that “how whiteness, initially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law.”); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (examining government created rights and benefits as a new form of property).

⁴⁷ See Rose, *supra* note 14, at 475–76; see also BRONIN & BYRNE, *supra* note 17, at 661 (noting that preservation can plausibly slow gentrification by preventing developers from demolishing existing structures and replacing them with more expensive ones).

⁴⁸ Rypkema, *supra* note 14.

⁴⁹ See BRONIN & BYRNE, *supra* note 17, at 658. Byrne and Bronin observe that value grows from context. “Historic district protections secure an aesthetic context within which individual investment decisions may be made with confidence that neighbors can only make exterior changes that are compatible with the historic character of the district.” *Id.*

⁵⁰ See Alexander, *supra* note 34, at 855–60.

⁵¹ Historic preservation has been attacked as being a tool of wealthy, white communities seeking historic designation solely to impede the construction of new, potentially more affordable construction. See Ilya Shapiro & Randal John Meyer, *When Over-Preservation Impedes City Growth*, CATO INSTITUTE (Aug. 15, 2016), <https://www.cato.org/commentary/when-over-preservation-impedes-city-growth#related-content> [<https://perma.cc/V5MU-VYC5>] (“When zoning laws won’t prevent such development, they go to the extreme measure of lobbying city officials to ‘preserve’ unremarkable buildings.”). The proper response to this trend is not to abandon historic preservation wholesale, but to realize that historic preservation has been underused in service of poor and nonwhite communities.

Section will show, historic preservation laws focus on *existing* features, and as the preceding literature demonstrates, the distinct social reality of a place should be worthy of protection, even when physical features may have changed.

B. STATUTORY AND REGULATORY FRAMEWORK FOR HISTORIC PRESERVATION IN THE DISTRICT

If historic designation confers a form of property to homeowners, then understanding the laws that undergird the creation of historic status is a vital step to understanding the maldistribution of this important asset. Although law is by no means the only factor that determines which communities benefit from historic preservation regimes and which are excluded, a legal decision marks the critical juncture where a neighborhood goes from merely being “old” to being “historic,” and thus protected. Correspondingly, this Section takes a close and critical look at the D.C. historic preservation regime, which forms the backdrop of this Note’s case study. As discussed below, historic preservation involves the overlap of federal, state, and municipal law. The Section examines the actors, criteria, and protections that constitute the historic designation process in the District. It pays particular attention to the “integrity” element of the designation criteria, which finds expression in both federal law and state law across the country.

1. Historic Designation Actors

State and federal historic preservation laws operate as parallel legal regimes that can both independently designate properties as historic. The federal regime relies on a mix of state and federal actors to identify, recommend, and evaluate properties for historic designation. At the same time, many states and the District of Columbia rely on a mix of state and local actors to do the same.

On the federal level, Congress in 1966 passed the National Historic Preservation Act (NHPA). The Act created the National Register of Historic Places, which is an official list of national historic landmarks.⁵² Under the current statutory framework, the Secretary of the Interior establishes criteria for inclusion on the list and procedures for designation.⁵³ The framework preserves significant state control by making a State Historic Preservation Officer (SHPO) primarily responsible for identifying and nominating eligible properties to the list.⁵⁴ As one of the final steps, the Keeper of the National Register, within the National Park Service, reviews the nomination.⁵⁵ In the years since the enactment of the NHPA, many states have passed their own state historic preservation laws and created their own state registers.⁵⁶

In the District of Columbia, the D.C. Historic Landmark and Historic District Preservation Act (HLHPA) commits the city to the “the protection, enhancement, and perpetuation of

⁵² See BRONIN & BYRNE, *supra* note 17, at 57–58. For a concise summary of federal historic preservation law, see Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 641–43 (2019).

⁵³ BRONIN & BYRNE, *supra* note 17, at 58.

⁵⁴ *Id.*; 36 C.F.R. § 60.6(a) (2019). The SHPO works with a State Review Board that reviews nominations, though the SHPO can still forward a nomination to the National Park Service, even if the Review Board disagrees. *Id.* § 60.6(h), (l). Additionally, the Review Board is appointed by the SHPO, unless state law provides otherwise. *See id.* § 61.4(f).

⁵⁵ *Id.* § 60.6(k), (r); *see also How to List a Property*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/how-to-list-a-property.htm> [<https://perma.cc/RVR2-VMJH>] (last updated Nov. 26, 2019) (“Complete nominations, with certifying recommendations, are submitted by the state to the National Park Service in Washington, D.C. for final review and listing by the Keeper of the National Register of Historic Places.”).

⁵⁶ *See State Register of Historic Places*, NAT’L TR. FOR HIST. PRESERVATION: PRESERVATION LEADERSHIP F., <https://forum.savingplaces.org/learn/fundamentals/preservation-law/state-laws/state-register> [<https://perma.cc/2H7U-5CV4>] (last visited Feb. 7, 2021) (describing different state register programs).

properties of historical, cultural, and esthetic merit.”⁵⁷ The Act creates the HPRB, which controls the D.C. designation process.⁵⁸ In turn, the HPRB receives administrative assistance from the Historic Preservation Office (HPO).⁵⁹ The HPRB determines whether to designate properties to the D.C. Inventory of Historic Sites.⁶⁰ That process involves a public hearing before the Board.⁶¹ Prior to this hearing, the HPO issues a staff report making a designation recommendation to the HPRB.⁶² At the same time as it considers a property for the D.C. inventory, the Board may also recommend the property to the D.C. SHPO for nomination to the National Register.⁶³

Although the Act’s statement of purpose does not explicitly reference equity or distributional considerations,⁶⁴ these considerations find expression in the makeup of the HPRB. The Board’s membership must represent “to the greatest practicable extent” the District’s adult population “with regard to race, sex, geographic distribution, and other demographic characteristics.”⁶⁵ This language stands as a noteworthy commitment to diverse representation in the historic designation process.

⁵⁷ D.C. CODE § 6-1101 (2020); D.C. Mun. Regs. tit. 10-C, § 9901 (2020) (defining the HLHPA). Specifically, the HLHPA declares an intent to “retain and enhance” properties within historic district and historic landmarks, as well as “encourage their adaptation for current use.” D.C. CODE § 6-1101(b).

⁵⁸ *Id.* § 6-1103(c)(3); tit. 10-C, § 106.

⁵⁹ D.C. CODE § 6-1102(6A).

⁶⁰ tit. 10-C, § 200.

⁶¹ *Id.* §§ 217, 219.1.

⁶² *Id.* § 216.

⁶³ *Id.* § 219.6.

⁶⁴ *See* D.C. CODE § 6-1101.

⁶⁵ *Id.* § 6-1103(b)(1).

2. Designation Criteria

Aside from the actors who control the designation process, the legal criteria for designation are the key factors determining whether properties receive the protections of historic designation. This subsection focuses primarily on the “integrity” element, which includes a physical features requirement that is present not just in D.C. law, but in historic preservation regimes across the country.

The D.C. regulations set forth three criteria required for a historic designation: significance, historic perspective, and integrity.⁶⁶ Significance is judged by whether the place meets one or more items on a list, which includes criteria such as being the site of important events in the District of Columbia, being associated with important periods in D.C. history, and being connected to the lives of important individuals.⁶⁷ For historic perspective, sufficient time must have elapsed to understand the historic nature of the property.⁶⁸ Finally, integrity requires that properties “possess sufficient integrity to convey, represent or contain the values and qualities for which they are judged significant.”⁶⁹ The regulations define integrity as “[a]uthenticity of a

⁶⁶ See HISTORIC PRES. OFFICE, CRITERIA FOR DESIGNATING HISTORIC PROPERTIES IN THE DISTRICT OF COLUMBIA 1, <https://planning.dc.gov/node/1186561> [<https://perma.cc/R3WZ-98P5>] (last visited Feb. 12, 2021); see also tit. 10-C, § 201 (explaining the criteria). The term “significance” does not appear in the regulations; however, this is the term used in guidance documents to refer to the list of factors set out in Section 201.1. See *id.* § 201.1; HISTORIC PRES. OFFICE, *supra*.

⁶⁷ tit. 10-C, § 201.1.

⁶⁸ *Id.* § 201.3.

⁶⁹ *Id.* § 201.2.

property’s historic identity, evidenced by the survival of *physical characteristics* that existed during the property’s period of significance.”⁷⁰

At the national level, property must be significant to be designated. Under current federal regulations, this means that the property must fit into one of four historical categories *and* retain “integrity.”⁷¹ Agency guidance describes integrity as the “ability of a property to convey its significance.”⁷² Although the document permits some change over time, it notes that the property “must retain, however, the *essential physical features* that enable it to convey its historic identity.”⁷³ In their casebook, professors J. Peter Byrne and Sara Bronin justify this requirement by noting that “[p]roperties that have been neglected or modified may lack those physical features that impress upon a viewer the associations or values for which the property might be preserved.”⁷⁴

Looking beyond the District of Columbia briefly, the integrity requirement is a core feature of many historic preservation regimes across the country. Historic preservation regulations in at

⁷⁰ *Id.* § 9901 (emphasis added); *see id.* § 9900.1 (“The definitions in this chapter apply throughout this subtitle.”).

⁷¹ BRONIN & BYRNE, *supra* note 17, at 61. Specifically, the national regulations require “integrity” of “location, design, setting, materials, workmanship, feeling, and association.” 36 C.F.R. § 60.4 (2020).

⁷² U.S. DEP’T OF THE INTERIOR, NATIONAL REGISTER BULLETIN: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 44 (1995), https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf [<https://perma.cc/Q4ZX-99UA>].

⁷³ *Id.* at 46 (emphasis added). At the national level, integrity is reflected through seven factors. *See id.* at 44. These are: location, design, setting, materials, workmanship, feeling, and association. *Id.* Park Service guidance states that, “[t]o retain historic integrity a property will always possess several, and usually most, of the aspects.” *Id.* Note the physicality requirement applies to each of these factors.

⁷⁴ BRONIN & BYRNE, *supra* note 17, at 61.

least seven states require integrity and define the term as the District does: by requiring the continued existence of physical features.⁷⁵ Another ten states require integrity without providing a definition.⁷⁶ These state regulations use the same language as the national criteria in the agency

⁷⁵ See CAL. CODE REGS. tit. 14, § 4852(c) (2020) (“Integrity is the authenticity of an historical resource’s physical identity evidenced by the survival of characteristics that existed during the resource’s period of significance.”); GA. COMP. R. & REGS. 391-5-8-.02, -10-.02 (2020) (requiring “integrity” for designation, and listing several physicality requirements in the definition); MD. CODE REGS. 34.04.05.07 (2020) (“[The property] [r]etains the minimum specific physical characteristics or data which define the ability of that property type, within that historic context, to satisfy the requirements of §§ B [integrity] and C of this regulation”); N.D. ADMIN. CODE 40-02-01-03(4) (2020) (“[The property] possess[es] integrity of form, material, and setting, generally retaining those historic characteristics such as: a. Physical features; b. Evidence of workmanship; c. Fabric; d. Location; and e. Surroundings that convey, support, represent, or contain values and qualities for which they are judged significant.”); S.D. ADMIN. R. 24:52:00:01(10) (2020) (“‘Historical integrity,’ authentic structure, features, elements, artifacts, physical characteristics, or setting surviving from a property’s period of historic significance which substantiate its identity as a genuine historical place”); 17 VA. ADMIN. CODE § 5-30-50 (2020) (defining integrity by requiring physical characteristics for every element); W. VA. CODE R. § 82-2-2.2 (2020) (“‘Integrity’ means the authenticity of a property’s historic identity as evidenced by the survival of physical characteristics”); *id.* § 82-2-3.1.b (“The site must possess integrity.”).

⁷⁶ See ALA. ADMIN. CODE r. 460-X-3-.02(1) (2020) (“The landmarks should possess integrity of location and construction”); ARIZ. ADMIN. CODE § R12-8-302(A)(3) (2020) (“The property possesses integrity of location, design, setting, materials, workmanship, feeling, or association”); CONN. AGENCIES REGS. § 10-321-4 (2020) (“[The property] possess[es] integrity of location, design, setting, materials, workmanship, feeling and association”); HAW. CODE R. § 13-198-8(1) (2020) (“[The property] possess[es] integrity of location, design, setting, materials, workmanship, feeling, and association”); ILL. ADMIN. CODE tit. 17, § 4120.10(c) (2020) (“[The property] possess[es] integrity of location, design, setting, materials, workmanship, feeling and association” (quoting Illinois Historic Preservation Act, 1979 Ill. Laws ch. 127, par. 133d2(e))); 312 IND. ADMIN. CODE 20-5-2(2) (2020) (“Demonstrates sufficient integrity of location, setting, design, workmanship, and materials.”); N.J. ADMIN. CODE § 7:4-2.3(a)(1) (2020) (“[The property] possess[es] integrity of location, design, setting, materials, workmanship, feeling and association”); N.Y. COMP. CODES R. & REGS. tit. 9, § 427.3(a) (2020) (“[The property] possess[es] integrity of location, design, setting, materials, workmanship, feeling and association”); 530-10 R.I. CODE R. § 1.4(B)(1)(a) (2020) (“[The property] possess[es] integrity of location, design, setting, materials, workmanship, feeling and association”); 13 TEX. ADMIN. CODE § 16.3(a)(3) (2020) (“The property should have exceptional integrity of location (including surrounding environment), design, material, setting, feeling, and association.”).

guidance, thus implicitly signaling a physicality requirement.⁷⁷ Indeed, some states explicitly adopt the national standards for designation to their historic lists.⁷⁸ Finally, many states do not have their own historic designation regimes, meaning the only vehicle for protection is nomination to the National Register,⁷⁹ or municipal historic preservation regimes.⁸⁰ In short, the District of Columbia’s conception of integrity rooted in physical characteristics represents the rule rather than the exception.

3. Protections Accompanying Historic Designation

Having examined the actors and criteria for historic designation, this final subsection offers a glimpse at some of the protections that accompany historic designation. Under D.C. law, a

⁷⁷ See U.S. DEP’T OF THE INTERIOR, *supra* note 72 (listing the seven elements of integrity: “Location, Design, Setting, Materials, Workmanship, Feeling, [and] Association”).

⁷⁸ See IOWA ADMIN. CODE r. 223-38.2(303), -44.2(303) (2020) (adopting national standards); 950 MASS. CODE REGS. 71.03(a) (2020) (same); MONT. ADMIN. R. 10.121.916(1) (2020) (same, including guidance documents); 7 N.C. ADMIN. CODE 4R.0304 (same, but only National Register); UTAH ADMIN. CODE r. 455-6-3(1) (2020) (adopting national standards); VT. ADMIN. CODE § 5-2-1:10.1 (2020) (same).

⁷⁹ These states include Alaska, Delaware, Florida, Idaho, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, Wisconsin, and Wyoming. See *Protection of Archeological and Historical Sites*, 0070 REGSURVEYS 15 (Thomson Reuters, 2020).

⁸⁰ Probably the most significant historic preservation regimes, in terms of people affected, belongs to New York City. The New York City landmark preservation code does not explicitly contain a physical “integrity” requirement; however, it does define historic landmarks, for instance, in a manner that suggests the need for the continuity of distinctive physical features. See N.Y.C. ADMIN. CODE § 25-302(n) (2020) (defining “landmark” as “[a]ny *improvement* . . . which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation . . .”) (emphasis added); *id.* at (i) (defining “improvement” as “[a]ny building, structure, place, work of art or other object constituting a *physical betterment of real property*, or any part of such betterment.”) (emphasis added).

property may be nominated as either a historic landmark or a historic district.⁸¹ Both receive significant protection. The D.C. Code protects against demolition of both landmarks and buildings within historic districts by requiring a finding by the Mayor that any demolition be in the public interest.⁸² The same or similar protections also apply to alterations,⁸³ subdivisions,⁸⁴ and new construction.⁸⁵

Although the ultimate protections afforded to a historic landmark or historic district are virtually identical, the two statuses differ at the application stage. Properties identified as “historic districts” only receive protection upon designation by the HPRB or nomination to the National Register.⁸⁶ By contrast, properties identified as “historic landmarks” receive protection while an application is pending before the HPRB.⁸⁷

⁸¹ See D.C. CODE § 6-1102(5), (6) (2020).

⁸² *Id.* § 6-1104(a), (e).

⁸³ *Id.* § 6-1105(a), (f).

⁸⁴ *Id.* § 6-1106(a), (e).

⁸⁵ *Id.* § 6-1107(a), (f). The new construction provision does not require a “public interest” certification, rather it states that permits “shall” issue unless the design of the new building is “incompatible” with the “character” of the historic district. *Id.* § 6-1107(f). Additionally, regardless of compatibility, the Mayor may issue permits for projects of special merit. *Id.* In practice, the Mayor’s Agent makes these determinations. D.C. Mun. Regs. tit. 10-C, § 400 (2020). The Mayor’s Agent is designated by the Mayor. *Mayor’s Agent*, DC.GOV: OFFICE OF PLAN., <https://planning.dc.gov/page/mayors-agent-01#:~:text=The%20Mayor's%20Agent%20is%20the,the%20DC%20historic%20preservation%20law> [https://perma.cc/GF9J-ATHE] (last visited Feb. 12, 2021). The Current Mayor’s agent is Professor J. Peter Byrne of Georgetown University Law Center. *Hearing Officer Biography*, DC.GOV: OFFICE OF PLAN., <https://planning.dc.gov/biography/hearing-officer-biography> [https://perma.cc/5AP6-Z3PQ] (last visited Feb. 12, 2021).

⁸⁶ D.C. CODE § 6-1102(5)(B), (C); D.C. Mun. Regs. tit. 10-C, § 200.2.

⁸⁷ § 6-1102(6)(B); tit. 10-C, § 200.2.

Finally, it is worth noting that the D.C. statute establishes a targeted homeowner grant program to provide money to low-income homeowners to rehabilitate their buildings.⁸⁸ The cap is set at \$25,000 for all districts except for Anacostia, which is set at \$35,000.⁸⁹ In the 2018 fiscal year, the program only disbursed a total of \$118,000 for ten active grants, four of which were in Anacostia.⁹⁰ On the national level, listing on the National Register provides additional protections from demolition.⁹¹ Listing also opens up the owner to various tax credits and gives the owner the possibility to receive certain federal grants.⁹²

These regulations and statutes provided the backdrop against which the fight to preserve Barry Farm occurred. They determined legal rights of the parties and helped condition the kind of case that both sides would make. The next Section considers Barry Farm’s history and then delves into this fight.

II. BARRY FARM

East of the Anacostia River stood the modest homes and open lawns of Barry Farm. Only thirty-two buildings remained in the fall of 2019, less than half of the original neighborhood.⁹³

⁸⁸ See § 6-1110.02.

⁸⁹ *Id.* § 6-1110.02(d).

⁹⁰ See HISTORIC PRES. OFFICE, D.C. OFFICE OF PLANNING, 2018 ANNUAL REPORT 3 (2019), <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/2018%20Annual%20Report.pdf> [<https://perma.cc/CC5A-32AM>]. The total disbursement amount in 2018 was down from \$284,362 the prior year. *Id.*

⁹¹ See 36 C.F.R. § 60.2(c) (2020).

⁹² *Id.* (“These provisions . . . discourage destruction of historic buildings by eliminating certain otherwise available Federal tax provisions both for demolition of historic structures and for new construction on the site of demolished historic buildings.”).

⁹³ See Paul Schwartzman, *D.C. Panel Voices Support for Historic Landmark Status for Barry Farm*, WASH. POST (Oct. 31, 2019, 6:47 EDT), <https://www.washingtonpost.com/local/dc->

Although the press often associates Barry Farm with rampant crime,⁹⁴ residents nonetheless fostered a distinct community with local traditions and a firm sense of identity.⁹⁵ As a part of Ward 8, the residents of Barry Farm are predominantly Black.⁹⁶ In addition, the neighborhood's median household income is one of the lowest in the city.⁹⁷ These facts prove critical to any account of the obstacles Barry Farm residents faced in seeking to protect their homes by obtaining historic designation status.

politics/dc-panel-voices-support-for-historic-landmark-status-for-barry-farm/2019/10/31/f3e8ee08-fbf9-11e9-8906-ab6b60de9124_story.html. The layout and organization of Barry Farm consists of rows of duplex townhouses arranged in repeating patterns. See BARRY FARM TENANTS & ALLIES ASS'N, APPLICATION FOR HISTORIC LANDMARK OR HISTORIC DISTRICT DESIGNATION TO THE HISTORIC PRESERVATION REVIEW BOARD 3–5 (Apr. 8, 2019) [hereinafter APPLICATION FOR HISTORIC LANDMARK DESIGNATION]. “Building,” as used throughout this Note, refers to a single row.

⁹⁴ See *id.*

⁹⁵ See Telephone Interview with Detrice Belt, Chair, Barry Farm Tenants & Allies Ass'n (Dec. 4, 2019) (notes on file with author); Jenny Gathright, *Against the Backdrop of Barry Farm's Demolition, The Goodman League Returns*, WAMU 88.5 (June 10, 2019), <https://wamu.org/story/19/06/10/against-the-backdrop-of-barry-farms-demolition-the-goodman-league-returns/> [<https://perma.cc/4HXE-WEMS>] (last visited Feb. 12, 2021). For more background on Barry Farm, see generally Joy Sharon Yi, Barry Farm (May 21, 2017) (unpublished M.A. thesis, George Washington University) (on file with author); *From Barry's Farm to Barry Farms*, ANACOSTIA UNMAPPED, <http://www.anacostiaunmapped.com/stories/#/from-barrys-farm-to-barry-farms> [<https://perma.cc/F7LU-U3G4>] (interview with resident Paulette Matthews) (last visited Feb. 12, 2021).

⁹⁶ D.C. OFFICE OF PLANNING, POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN, FOR ALL AGES AND FOR 18 YEARS AND OVER, AND HOUSING UNITS, FOR THE DISTRICT OF COLUMBIA—WARD 8: 2000 AND 2010, <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Census%25202010%2520Population%2520by%2520Race%2520and%2520Ethnicity%2520-%2520Ward%25208.pdf> [<https://perma.cc/LD3E-BQJ3>] (identifying the population of Ward 8 as 93.5% Black or African American per the 2010 Census).

⁹⁷ See WDCEP, *supra* note 2, at vi, 5 (listing median household income in the Barry Farm neighborhood as \$24,500 and the median household income for the District of Columbia as \$82,381).

This Part dives into the struggle over the historic status of Barry Farm. The first Section provides a brief overview of Barry Farm’s history from the community’s origin in 1876 to its redevelopment and the fight for preservation. This Section not only offers background, but also helps one appreciate Barry Farm’s historic worth. The second Section introduces the Barry Farm redevelopment and initial tenant efforts to avoid displacement. Finally, the third Section examines how the Barry Farm case proceeded through the historic review process.⁹⁸ A look into the HPRB proceedings shows divisions along race and class lines running up against historic preservation law in a manner that suggests these laws need to change.

A. A BRIEF HISTORY OF BARRY FARM 1876–2006

In the wake of the Civil War and Emancipation, the United States faced an internal refugee crisis. In the District of Columbia, some forty thousand newly freed individuals flooded into the city.⁹⁹ This development, plus the discrimination against and exclusion of Black individuals, resulted in an acute housing shortage in the District.¹⁰⁰ In an attempt to deal with this crisis, Congress in 1865 created the Bureau of Refugees, Freedman, and Abandoned Lands (the

⁹⁸ The Barry Farm case has attracted attention, *see, e.g.*, Hannah Love & Jennifer S. Vey, *Making Black History Matter in Public Space*, BROOKINGS: THE AVENUE (Oct. 2, 2019), <https://www.brookings.edu/blog/the-avenue/2019/10/02/making-black-history-matter-in-public-space/> [<https://perma.cc/6JEM-CNSB>]. However, this Note is the first work to look at the case in connection with a broader argument surrounding historic preservation law. Love and Vey’s Brookings piece, for instance, uses Barry Farm as a springboard to pose several questions concerning the commemoration of Black history, yet they do not make an argument concerning the underlying legal structure. *See id.*

⁹⁹ *See* Kevin McQueeney, *Freedpeople and the Federal Government’s First Public Housing in Washington, DC*, 10 FED. HIST. 61, 65 (2018). This dramatically swelled a city whose population had only numbered around 75,000. *See id.*

¹⁰⁰ *See* Thomas J. Cantwell, *Anacostia: Strength in Adversity*, 49 REC. COLUM. HIST. SOC’Y 330, 339 (1975).

Freedman’s Bureau) within the Department of War to provide vital necessities—such as food and shelter—to freedpeople.¹⁰¹

In 1867, the Bureau purchased land across the Anacostia River to foster homeownership among freed Black individuals.¹⁰² The transaction had to occur in secret to avoid obstruction from nearby white communities.¹⁰³ The Bureau began selling one-acre plots for \$200 to \$300, which could be paid off in installments.¹⁰⁴ One hundred and eighty lots were sold quickly, and almost ninety homes were built before the winter of that first year.¹⁰⁵ As Thomas Cantwell notes, life for the freedpeople was particularly precarious.¹⁰⁶ They had to find work in an inhospitable environment and then keep that work.¹⁰⁷ This meant residents had to work during the day, often traveling long distances, and then had to make repairs on their homes at night.¹⁰⁸

Many of the original houses were still standing by the Second World War.¹⁰⁹ However, the city government was seeking to increase public housing for Black individuals working in the war

¹⁰¹ *Id.* at 338.

¹⁰² *Id.* at 340. The Bureau bought the land from one James Barry with money appropriated for school construction. *Id.* at 340–41.

¹⁰³ Sarah Shoenfeld, *The History and Evolution of Anacostia’s Barry Farm*, D.C. POL’Y CTR. (July 9, 2019), https://www.dcpolicycenter.org/publications/barry-farm-anacostia-history/#_ftn5 [https://perma.cc/62LS-3453]. Note that Sarah Shoenfeld was involved on the applicant side of the Barry Farm nomination to the HPRB. *See id.*

¹⁰⁴ Cantwell, *supra* note 100, at 341.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 342.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See* NAT’L CAPITAL HOUS. AUTH., TEN-YEAR REPORT OF THE NATIONAL CAPITAL HOUSING AUTHORITY, at 55–56 (1944).

industries.¹¹⁰ Public housing was segregated until the 1950s, so with the explosion of the D.C. population during the war years, the government looked to pre-existing Black communities to house Black residents.¹¹¹ The Housing Authority originally intended to build on a vacant lot in northeast Anacostia, but resistance from an all-white citizens' association and a real estate developer pushed the project to Barry Farm.¹¹² In 1941, the Authority condemned a thirty-four acre section and demolished the original houses.¹¹³ This new public housing unit retained the original street plan, which included open, connecting green spaces and an absence of cross streets.¹¹⁴ In 1943, the federal government condemned another large portion of the original Barry Farm for a new highway, displacing 112 families and further destroying the original homes.¹¹⁵

The account here provides only a snapshot of Barry Farm's history. Residents of Barry Farm participated as plaintiffs in the D.C. public school desegregation case, *Bolling v. Sharpe*.¹¹⁶ Residents such as Etta Mae Horn became involved in organizing the welfare rights movement, focusing particularly on women recipients.¹¹⁷ The community also saw activism and organizing around discriminatory policing and contributed to the development of Go-Go with its own

¹¹⁰ *See id.* at 55, 57.

¹¹¹ *See* Shoenfeld, *supra* note 103.

¹¹² *See* NAT'L CAPITAL HOUS. AUTH., *supra* note 109, at 55. This public housing project was formally named "Barry Farm Dwellings." *See* APPLICATION FOR HISTORIC LANDMARK DESIGNATION, *supra* note 93, at 8.

¹¹³ *See id.* at 56; Shoenfeld, *supra* note 103.

¹¹⁴ Shoenfeld, *supra* note 103.

¹¹⁵ *See* NAT'L CAPITAL HOUS. AUTH., *supra* note 109, at 116; Shoenfeld, *supra* note 103.

¹¹⁶ *See* Shoenfeld, *supra* note 103.

¹¹⁷ *See id.*

locally acclaimed band.¹¹⁸ Throughout it all, basic maintenance funds from the city were scarce, and living conditions continued to deteriorate.¹¹⁹

B. DEVELOPMENT AND DISPOSSESSION 2006–2019

In 2006, the D.C. Council approved the Barry Farm redevelopment plan.¹²⁰ The project was part of the District’s New Communities Initiative, which served as a local replacement of funds lost in the wake of the withdrawal of federal funding under the HOPE VI program.¹²¹ According to its stated principles, the New Communities Initiative seeks to replace concentrated, low-income communities with mixed-income communities and strives to fully achieve one-for-one replacement of all low-income housing.¹²²

In 2013, the DCHA and the District selected partner organizations for Barry Farm’s redevelopment.¹²³ These included A&R Development and Preservation of Affordable

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ 54 D.C. Reg. 35 (Jan. 5, 2007).

¹²¹ *See id.*; Alexander Altskan, Public Housing Redevelopment and Crime: The New Communities Initiative, Washington, DC 2 (May 2015) (unpublished Master’s thesis, Columbia University) (on file with author).

¹²² *See Altskan, supra* note 121, at 3. It is arguable that the New Communities Initiative is primarily a crime-control device. *See* 54 D.C. Reg. 35 (listing crime reduction as one of the reasons for selecting Barry Farm); Altskan, *supra* note 121, at 3 (noting that new development plans aim to increase street level visibility and increase integration into the grid to facilitate crime control); *see also* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1093 (2002) (“By strategically placing [public] housing units, windows, corridors, and entryways in areas that provide natural surveillance, design protects both inhabitants and passersby—who will then venture out in public more and draw additional people to the area.”).

¹²³ *Barry Farm Tenants & Allies Ass’n v. D.C. Zoning Comm’n*, 182 A.3d 1214, 1220 (D.C. 2018).

Housing.¹²⁴ The proposed site included the 432 World War II-era townhouses of Barry Farm and the twelve units of the Wade Road Apartments, both owned and operated by DCHA.¹²⁵ The following year, the DCHA applied to the Zoning Commission for approval.¹²⁶ The Commission ultimately voted in favor of the redevelopment, despite opposition by the newly-formed Barry Farm Tenants and Allies Association (BFTAA).¹²⁷ The BFTAA did not oppose redevelopment on principle, but instead requested that the DCHA use a development model which would permit residents to live in place during construction.¹²⁸ The Commission denied the BFTAA's petition for review in 2015, and the tenants petitioned the D.C. Court of Appeals.¹²⁹

The court found significant flaws with the Commission's review and rejected the zoning plan, faulting the Commission for failing to make adequate findings concerning the state and nature of the amenities already enjoyed by the residents¹³⁰ and for failing to monitor the

¹²⁴ *Id.*; Katie Arcieri, *D.C. Lines Up Millions to Demolish Barry Farm*, WASH. BUS. J. (Feb. 7, 2018), <https://dmped.dc.gov/release/dc-lines-millions-demolish-barry-farm> [<https://perma.cc/78XK-Q75F>].

¹²⁵ *Barry Farm Tenants & Allies Ass'n*, 182 A.3d at 1220.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1221.

¹²⁸ See Sasha-Ann Simons, *D.C. Government Is Trying to Intimidate Us into Leaving, Barry Farm Residents Say*, WAMU 88.5 (July 28, 2017), <https://wamu.org/story/17/07/28/d-c-government-trying-intimidate-us-leaving-barry-farm-residents-say/> [<https://perma.cc/9EV5-27DJ>].

¹²⁹ *Barry Farm Tenants & Allies Ass'n*, 182 A.3d at 1223.

¹³⁰ *Id.* at 1227–28. The court's list is worth citing in full, for it provides a concise summary of the aspects that made Barry Farm an important place. In effect, development threatened “the loss of green space and personal yards, the addition of high-density apartment buildings, the disruption of existing social support networks, gentrification of their existing community, the net loss of 100 public housing units on the PUD site, and the loss in availability of 440 currently existing public housing units during the development process.” *Id.* at 1227.

adequacy of replacement affordable housing units.¹³¹ Indeed, the court noted that the plan could entail a loss of one hundred public housing units on the site and could dramatically expand the amount of market-rate housing.¹³² The court also found the relocation plan lacked sufficient units to accommodate all families.¹³³ It observed that, “[g]iven the dramatic effect that a forced relocation can have on a family’s well-being, such families are entitled to some semblance of predictability.”¹³⁴

Victory in court, however, did not provide relief for tenants. With the lawsuit pending, the DCHA in 2017 successfully filed for a raze permit with the Department of Housing and Urban Development.¹³⁵ The court’s review only pertained to zoning modifications, so the DCHA could begin demolition as the property’s owner and operator.¹³⁶ Demolition began in the summer of 2018.¹³⁷ The city partially funded the demolition and redevelopment out of the budget for the

¹³¹ *Id.* The Small Area Plan had called for a third of the housing to be affordable, a third workforce, and at third market rate. *Id.* By contrast, the new plan could have allowed almost as much a 60% of the redevelopment to be market rate. *See id.*

¹³² *Id.*

¹³³ *Id.* at 1228–30.

¹³⁴ *Id.* at 1230.

¹³⁵ *See* Keely Sullivan, *With Barry Farm All but Abandoned, the Fight for Its Future Is Just Beginning*, EAST RIVER (Mar. 12, 2019), <https://eastoftheriverdcnews.com/2019/03/12/with-barry-farm-all-but-abandoned-the-fight-for-its-future-is-just-beginning/> [<https://perma.cc/G2BR-ZAQ7>].

¹³⁶ *See* Michelle Goldchain, *D.C. Housing Authority Files Raze Applications for Barry Farm, Hopes for Demolition by Q1 2018*, CURBED DC (Nov. 10, 2017), <https://dc.curbed.com/2017/11/10/16633620/barry-farm-raze-application> [<https://perma.cc/788S-VXEQ>].

¹³⁷ *Demolition Underway*, BARRY FARM REDEVELOPMENT (Aug. 14, 2018), <http://barryfarmredevelopment.org/construction-underway/> [<https://perma.cc/FU32-XQDG>] (including a video of the demolition of one the first houses).

Deputy Mayor for Planning and Economic Development.¹³⁸ The overall redevelopment also received financing through tax exempt bonds and low-income housing tax credits.¹³⁹

DCHA provided housing vouchers for residents to relocate or allowed residents to move to different public housing units.¹⁴⁰ One resident attributed the pressure to move to the rapid expiration dates of the vouchers.¹⁴¹ Others received “urgent” weekly notices to vacate the property with an apparent deadline attached.¹⁴² By December 2018, many of the families had moved out, with less than forty remaining in Ward 8.¹⁴³ According to one resident, crime only increased in Barry Farm *after* the demolition process started and households began moving out of the neighborhood.¹⁴⁴

¹³⁸ Acieri, *supra* note 124.

¹³⁹ *Id.*

¹⁴⁰ See Sullivan, *supra* note 135 (“Nicole Odom, a new Park View resident, received a DCHA housing voucher that expired a week later.”); see also Meena Morar, *Barry Farm Tenants Await a Final Decision After 20 People Testified Before the Historic Preservation Review Board Two Months Ago*, STREET SENSE MEDIA (Sept. 4, 2019), <https://www.streetsensemedia.org/article/the-barry-farm-tenants-await-a-final-decision-after-20-people-testified-before-the-historic-preservation-review-board-two-months-ago/#.YC11f2hKhyw> [<https://perma.cc/NXK9-AV2U>] (“In some instances residents have been relocated to smaller houses without the proper accommodations for storage, according to [Detrice] Belt, who now lives in an apartment.”).

¹⁴¹ See Sullivan, *supra* note 135.

¹⁴² See Delia Goncalves, *Final Days at Barry Farm Public Housing in DC*, WUSA9 (Nov. 21, 2019, 12:50 PM EST), <https://www.wusa9.com/article/news/local/dc/final-days-at-barry-farm-public-housing-in-dc/65-624059114> [<https://perma.cc/VZ9M-YL3E>].

¹⁴³ *Id.*

¹⁴⁴ See Morar, *supra* note 140 (statement of Detrice Belt, then-BFTAA chair).

C. FIGHT FOR PRESERVATION: 2019–2021

Under the pressure of forced relocation and dispossession, the Barry Farm residents turned to historic preservation. Throughout the designation process, BFTAA members made clear they sought historic designation status both to preserve the historical memory of their community and to stop the demolition of their homes. The dynamics of this effort are instructive. Recounting them here shows how the physicality requirement and the pressure of the proposed redevelopment stymied the effort to fully designate Barry Farm as historic.

In early April 2019, the BFTAA—with assistance from Prologue DC, LLC—filed an application to nominate Barry Farm to receive historic landmark designation.¹⁴⁵ The application identified thirty-two contributing buildings—the only remaining buildings—along Stevens and Wade roads, as well as on Firth Stirling Avenue.¹⁴⁶ It sought designation for the buildings as being associated “with events that have made a significant contribution to the broad patterns of . . . history.”¹⁴⁷ The application described the whole sweep of Barry Farm’s history.¹⁴⁸ In the summary statement, the applicants grounded the connection to the past in “the layout and names of the streets” as “the last physical imprint of the original [Barry Farm] community.”¹⁴⁹ It called

¹⁴⁵ See APPLICATION FOR HISTORIC LANDMARK DESIGNATION, *supra* note 93, at 1, 20.

¹⁴⁶ *Id.* at 1–2.

¹⁴⁷ *Id.* at 7.

¹⁴⁸ *Id.* at 7–18.

¹⁴⁹ *Id.* at 8. The streets retained their original names: those of prominent abolitionists. *Id.* at 9. They include Charles Sumner, Thaddeus Stevens, Benjamin Wade, and John Eaton. *See id.* at 8–9.

attention to the pattern of city government neglect of public housing, and how such neglect places existing public housing units at “risk.”¹⁵⁰

In late June 2019, the HPO released its report on the nomination.¹⁵¹ It recommended against historic designation.¹⁵² The office determined that “[t]he property no longer possesses sufficient integrity to convey, represent or contain the values and qualities for which it is judged significant.”¹⁵³ The report acknowledged Barry Farm’s long history, but stressed a paucity of aesthetic merit.¹⁵⁴ Discussing the World War II-era homes, the office noted “[t]he only decorative flourish was bands of brick spanning the windows at the second-story and in the street-facing end walls.”¹⁵⁵

According to the HPO, Barry Farm lacked sufficient “physical associations” with its connections to the past.¹⁵⁶ The HPO noted that “[n]one of the first-generation houses of the post-Civil War Barry Farm survives.”¹⁵⁷ It conceded that several streets rested on their original positions from the Civil War era, but it did not find this sufficient.¹⁵⁸ Continuing on to the more

¹⁵⁰ *Id.* at 14.

¹⁵¹ HISTORIC PRES. OFFICE, HISTORIC LANDMARK CASE NO. 19-07, BARRY FARM DWELLINGS (2019); Nick Sementelli, *Don’t Label Barry Farm a Landmark, Say Historic Preservation Staff*, GREATER GREATER WASH. (July 9, 2019), <https://ggwash.org/view/72864/hpo-staff-recommend-against-designating-barry-farm-dwellings-historic> [<https://perma.cc/C23K-MW6H>].

¹⁵² *See* HISTORIC PRES. OFFICE, *supra* note 151, at 1.

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 1–2.

¹⁵⁵ *Id.* at 2.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

recent history, the HPO noted that the complex was substantially redeveloped in the 1980s and many of the houses had already been razed.¹⁵⁹ On these grounds, the HPO determined that the buildings no longer manifested the criteria which made them significant.¹⁶⁰ At the time, this outcome did not bode well for the future of Barry Farm. Of the twenty-three prior decisions issued by the HPO on historic designation in 2018 and 2019, the HPRB had disagreed with those decisions only twice.¹⁶¹

In response to the BFTAA's preservation efforts, DCHA and the parties pushing the redevelopment tried to mobilize their own support. Through the redevelopment website, for example, they warned that granting historic status to Barry Farm would result in the loss of some 400 affordable housing units.¹⁶²

The HPRB heard public comments about the Barry Farm historic designation on July 25.¹⁶³ Detrice Belt, BFTAA chair, spoke first.¹⁶⁴ "When the city announced the redevelopment of our

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* The HPO also dismissed Barry Farm's claim to its historic connection to the fight against desegregation on the grounds that other areas were more closely associated with the fight. *Id.* It dismissed the argument about tenant organizing occurring at Barry Farm on the basis that such organizing is not uncommon in low-income communities in the United States. *Id.*

¹⁶¹ *See infra* Appendix A. It is unclear how many of the proceedings were contested in the same way as the Barry Farm project.

¹⁶² *See* Sarah Jane Shoenfeld, Opinion, *Barry Farm's Historic Landmark Designation Was Pitted Against Affordable Housing*, WASH. POST (Feb. 21, 2020, 4:00 AM PST) ("In its own promotional materials, the developer also warned that a designation would result in the loss of some 400 affordable units.").

¹⁶³ *Historic Preservation Review Board Public Hearing of July 25, 2019*, DC.GOV: OFFICE OF PLAN. (July 25, 2019) [hereinafter *Hearing of July 25*], <https://play.champds.com/dczoning/event/27>.

¹⁶⁴ *Id.* at 1:12:00.

community, we proposed that our homes be renovated and restored, not torn down and replaced. That’s because we have always believed our homes to be historic.”¹⁶⁵ Belt relayed the sense of disbelief among residents that the demolition of the homes would even be allowed.¹⁶⁶ She continued, “we knew that only historic landmark status could protect our homes.”¹⁶⁷ Following Belt, others made the technical case for nomination.¹⁶⁸

These speakers stressed how the relative geographic isolation from D.C. had fostered the community’s own self-development.¹⁶⁹ As the HPO report made clear, the BFTAA faced an uphill battle on the integrity element.¹⁷⁰ The third speaker, Amber Wiley, a Professor at Rutgers University,¹⁷¹ argued that the elements necessary for integrity were all intact in a broader sense.¹⁷² “The topography, I could see right down to the Washington Monument and the Capitol. The streetscape is intact, even the treescape . . . spatial relationships, patterns of windows and doors”¹⁷³ All of these provided direct links to Barry Farm’s history, according to Wiley.¹⁷⁴

¹⁶⁵ *Id.* at 1:12:09–12:22.

¹⁶⁶ *See id.* at 1:12:23–12:33.

¹⁶⁷ *Id.* at 1:12:33–12:37.

¹⁶⁸ *See id.* at 1:14:35–43:16.

¹⁶⁹ *See, e.g., id.* at 1:16:12–16:23.

¹⁷⁰ *See supra* notes 151–155 and accompanying text.

¹⁷¹ *Id.* at 1:34:52–34:58.

¹⁷² *See id.* at 1:37:52–43:14.

¹⁷³ *Id.* at 1:38:59–39:38.

¹⁷⁴ *See id.* at 1:38:34–39:50.

After the tenants had spoken, the Housing Authority took its turn before the Board.¹⁷⁵ It was represented by Kerry Smyser, Senior Deputy Director of Capital Programs at DCHA, and Cynthia Giordano, legal counsel.¹⁷⁶ Neither contested the historic nature of Barry Farm; instead, they argued that redevelopment was needed at the property, and that historic preservation would impede these changes.¹⁷⁷ As Smyser conceded, “[t]he Housing Authority has always known about the historic nature of Barry Farm.”¹⁷⁸ The testimony provoked some interest on the Board. Board member Outerbridge Horsey asked about the lack of maintenance of the existing buildings; Smyser responded that DCHA relied on federal money, which had not been forthcoming.¹⁷⁹ Board member Tom Brokaw asked why the older houses could not simply be kept and rehabilitated; the response was simply that DCHA did not usually retain older structures.¹⁸⁰

The Board did not vote at the July meeting because of a lack of quorum.¹⁸¹ After a series of delays, the parties met again before the Board on October 31.¹⁸² Between the July and October meetings, the tenants and the DCHA began negotiating.¹⁸³ Returning before the HPRB, the

¹⁷⁵ *See id.* at 2:27:50.

¹⁷⁶ *Id.* at 2:27:50–28:20.

¹⁷⁷ *See id.* at 2:33:19–34:31.

¹⁷⁸ *Id.* at 2:35:05–35:09.

¹⁷⁹ *See id.* at 2:40:10–41:48.

¹⁸⁰ *See id.* at 2:45:10–46:00.

¹⁸¹ *See Morar, supra* note 140.

¹⁸² *See Hearing of October 31, supra* note 1.

¹⁸³ *See id.* at 32:30–32:53.

Housing Authority now proposed to keep a single original structure next to a new neighborhood community center.¹⁸⁴ Giordano stated that this commitment would stand regardless of whether the HPRB designated the property and again urged against designation.¹⁸⁵ Looking at the plan, Board member Dr. Sandra Jowers-Barber commented that the house appeared “put away” and she expressed doubt about its ability to convey the historic significance of the place.¹⁸⁶ At the applicant’s turn, Detrice Belt echoed this sentiment. “When I saw that . . . they’re saying they’re going to give us one house and commemorate the history of Barry Farms, to me it didn’t look good, it just didn’t look right.”¹⁸⁷ The DCHA also offered to keep historic street names and rename the park to have a historic connection.¹⁸⁸ In response, one tenant, Paulette Matthews, characterized these as “trinkets.”¹⁸⁹

Despite evident qualms about the proposal, the tenants had been willing to agree to it, at least in part. According to Empower D.C., a group supporting the BFTAA, the sticking point preventing an agreement came when DCHA presented a legal document with an onerous gag order.¹⁹⁰ The Housing Authority had requested that the tenants waive their rights to speak out against the agreement and against the Barry Farm redevelopment generally.¹⁹¹ This piqued the

¹⁸⁴ *See id.* at 36:43–37:03.

¹⁸⁵ *See id.* at 36:26–36:42.

¹⁸⁶ *Id.* at 52:30–53:06.

¹⁸⁷ *Id.* at 54:28–55:02.

¹⁸⁸ *See id.* at 35:07–36:00.

¹⁸⁹ *Id.* at 56:46.

¹⁹⁰ *See id.* at 1:21:41–22:43.

¹⁹¹ *See id.* at 1:22:06–22:23.

interest of Dr. Sandra Jowers-Barber. “Is that a quid pro quo?” she asked,¹⁹² “is your intention that you’re going to do this [commemorate Barry Farm’s history] whether anything is signed or not . . . ?”¹⁹³

Responding to Board questions, Giordano recast the clauses as a “standard . . . commit[ment] to supporting the development,”¹⁹⁴ which provoked noises of disbelief from the applicant side of the room.¹⁹⁵ Empower D.C. countered that the tenants could have agreed to the gag order had the agreement been comprehensive.¹⁹⁶ However, the agreement had only concerned historic preservation.¹⁹⁷ For instance, the commitment to the number of replacement public housing units—the DCHA had said earlier in the hearing that 380 replacement units would now be available—was nowhere codified at the time of the proposal.¹⁹⁸

A persistent sense of urgency ran through the meeting.¹⁹⁹ Numerous speakers commented on the need to provide more housing and to return residents who had been dislocated.²⁰⁰ By this

¹⁹² *Id.* at 1:22:48–22:50.

¹⁹³ *Id.* at 1:22:57–23:04.

¹⁹⁴ *Id.* at 1:23:05–23:30.

¹⁹⁵ Author’s observation.

¹⁹⁶ *Hearing of October 31, supra* note 1, at 1:24:38–24:45.

¹⁹⁷ *See id.* at 1:24:38–25:35.

¹⁹⁸ *See id.* at 1:16:04–16:10; 1:24:38–25:35. The Empower D.C. speaker did express satisfaction that the DCHA was willing to state the commitment on the record, in other words, at the hearing. *Id.* at 1:22:23–22:35. By this point the DCHA had committed to 380 public housing units on the site, which it noted made up 25% of the 11,000 total units. *Id.* at 1:16:04–16:20.

¹⁹⁹ Author’s observation.

²⁰⁰ *See, e.g., Hearing of October 31, supra* note 1, at 1:44:01–44:04 (Marnique Heath, Board Chair) (“We need more affordable housing.”); *id.* at 55:13–1:00:24 (Paulette Mathews) (discussing the need for individuals to return).

point, Board members explicitly acknowledged that many of the elements of the discussion would be better suited to a zoning hearing.²⁰¹ As such, the Board seemed reluctant to completely halt the redevelopment.²⁰² When called before the Board, SHPO David Maloney spoke against designating all of the remaining thirty-two buildings.²⁰³ “[I]f you designate now, then it does mean you’re immediately invoking a very cumbersome, [not] cumbersome but specific, detailed Mayor’s Agent’s hearing process,” said Maloney, referring to the procedures required for demolition in a landmarked site, “which no one I think wants to see.”²⁰⁴

On Maloney’s advice, the Board deferred a final vote on the status of Barry Farm.²⁰⁵ Instead, the Board members decided to express their support or opposition on the record for designating *some portion* of Barry Farm, then let the parties continue negotiating over the precise boundaries.²⁰⁶ Five members indicated they would vote to designate Barry Farm.²⁰⁷ One did not.²⁰⁸ One of the affirmative voters, Horsey, specifically identified the original grid, including

²⁰¹ *See id.* at 1:25:36–26:23.

²⁰² Author’s observation.

²⁰³ *See Hearing of October 31, supra* note 1, at 1:52:00–53:50.

²⁰⁴ *Id.* at 1:53:35–53:50. For a brief, argumentative summary of the differences between zoning and historic preservation law, see Amicus Curiae Brief of Historic Preservation Organizations and Legal Scholars, in Support of Respondent at 12–25, *Powell v. City of Houston*, No. 19-0689 (Tex. Aug. 6, 2020).

²⁰⁵ *See Hearing of October 31, supra* note 1, at 1:33:03–36:26.

²⁰⁶ *See id.*

²⁰⁷ *See id.* at 1:36:28–46:33 (Board members Outerbridge Horsey, Tom Brokaw, Dr. Sandra Jowers-Barber, Linda Mercado Greene, and Chair Marnique Heath all voted in favor of the designation).

²⁰⁸ *See id.* at 1:40:49–41:42 (Board member Chris Landis voted against the designation).

Stevens Road and its view of D.C., as worthy of preservation.²⁰⁹ Other members, including Linda Mercado Greene from Ward 8, spoke more generally to the property’s historic importance.²¹⁰

In January 2020, the Board officially designated five rows of eight townhouses along Stevens Road, for a total of forty preserved units.²¹¹ This decision was in line with a new recommendation by the HPO that only a “fragment” of the original neighborhood needed to be preserved.²¹² This time around, the HPO, acting on the Board’s directive from its October and December meetings, found sufficient integrity in the layout and location of houses to convey the significance of 1930s and 1940s public housing.²¹³ It also recommended rehabilitation to repair deteriorated conditions, and restoration of these buildings to something closer to their 1930s and 1940s appearance.²¹⁴ Though advocates and tenants were cheered by the recognition of Barry

²⁰⁹ *See id.* at 1:36:48–37:53.

²¹⁰ *See id.* at 1:41:47–43:10. Barry Farm is located in Ward 8.

²¹¹ *See* HISTORIC PRES. REVIEW BD., HPRB ACTIONS JANUARY 30, 2020, at 1 (2020) [hereinafter HPRB ACTIONS], <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/HPRB%20ACTIONS%20%20January%2030%20%202020.pdf> [<https://perma.cc/PSW8-BHES>]; HISTORIC PRES. REVIEW BD., HISTORIC LANDMARK CASE NO. 19-07, BARRY FARM DWELLINGS 4 (2020) [hereinafter HISTORIC LANDMARK CASE NO. 19-07], <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Historic%20Landmark%20Nomination%20Staff%20Report%20Barry%20Farm%20Dwellings%20Case%2019-07.pdf> [<https://perma.cc/M9K7-3VUS>]. These buildings are each duplex homes that collectively make up forty housing units. *See* HPRB ACTIONS, *supra*.

²¹² *See* HISTORIC LANDMARK CASE NO. 19-07, *supra* note 211, at 3.

²¹³ *See id.*

²¹⁴ *See id.* Specifically, it called for “removing the applied stucco finishes and the gabled roofs on the end units, restor[ing] missing porches, and replicat[ing] original windows and doors.” *Id.*

Farm’s history, they recognized this designation as far less than what they had originally sought.²¹⁵ In the words of Sarah Shoenfeld, who helped prepare Barry Farm’s nomination, the residents “spent years pushing for something more than *token* recognition of this community’s value.”²¹⁶

III. LESSONS: HISTORIC PRESERVATION AS A SHIELD FROM ERASURE?

The experience of the Barry Farm tenants seeking historic status for their neighborhood provides a compelling picture of the failures of historic preservation law. As discussed in Part I, historic status confers a form of property that has traditionally been denied to poor and nonwhite communities. This Part explores some of the lessons from the Barry Farm case and identifies systemic barriers preventing underserved communities from deriving equal use and enjoyment of historic preservation laws. The first Section below assesses the outcome of the historic preservation review process, and how it fell short of protecting both the residents and the history of Barry Farm. The second Section recommends removing physicality requirements from historic preservation statutes as a means of correcting these failures.

²¹⁵ See Barry Farm Tenant and Allies Association, FACEBOOK (Jan. 30, 2020), <https://www.facebook.com/Barry-Farm-Tenants-and-Allies-Association-232383291025884/> [<https://perma.cc/XUB8-JC84>] (“BARRY FARM IS HISTORIC! Although we did not get all of Stevens Road designated, DC’s Historic Preservation Review Board voted unanimously to designate the bottom part of Stevens Road, SE as historic! The fight is not over and we will continue to need your support”); Jenny Gathright, *Part of Barry Farm Has Been Named a Historic Landmark*, WAMU 88.5 (Jan. 30, 2020), <https://wamu.org/story/20/01/30/part-of-barry-farm-has-been-named-a-historic-landmark/> [<https://perma.cc/95UX-7U3W>] (“[F]ormer Barry Farm residents consider [the designation] just a partial victory”).

²¹⁶ Shoenfeld, *supra* note 162 (emphasis added).

A. A PARTIAL VICTORY

The HPRB decision represents a partial victory for the BFTAA. Although the tenants admittedly succeeded in having a portion of the neighborhood designated, the outcome is a far cry from protecting the thirty-two buildings²¹⁷ for which the tenants had originally sought historic status. The decision bears more resemblance to the DCHA’s proposal of preserving only a single house,²¹⁸ which seemed little better than commemorating Barry Farm with a plaque. Indeed, designating only five buildings seems especially inadequate when one considers that historic districts like Georgetown or Capitol Hill each protect thousands of houses,²¹⁹ while historically African American neighborhoods remain underrepresented on national and local registers across the country.²²⁰

The decision is even less of a victory for a broader conception of historic preservation. Throughout the course of the hearings, development and zoning concerns permeated the discussion. As one tenant put it to the Board, “[i]t’s not really about the historical site”²²¹ The Board members could clearly see that the dispute implicated *far* more than just preservation of a historic site in a traditional sense. Issues of displacement, agency, affordability, and

²¹⁷ See *supra* note 146 and accompanying text.

²¹⁸ See *supra* note 187 and accompanying text.

²¹⁹ See D.C. HPO, *supra* note 2; see also Nick Sementelli, Opinion, *A Suburban Development Tests the Limits of DC Historic District Designation*, GREATER GREATER WASH. (Jan. 7, 2021), <https://ggwash.org/view/80059/a-suburban-development-tests-the-limits-of-dc-historic-district-designation> [<https://perma.cc/KM9H-DJEF>] (“Not only is the present-day neighborhood [of Colony Hill] an example of the kind of wealthier, whiter area that is already over-represented among the city’s historic districts, but *de jure* racial segregation is an explicit part of the history the application seeks to preserve.”).

²²⁰ See AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 40.

²²¹ See *Hearing of October 31*, *supra* note 1, at 58:38 (statement of Paulette Matthews).

marginalization came to the fore in the hearing alongside questions of historic worth. Acting against the initial HPO recommendation and without a clear theory, the HPRB risks the perception that it designated Barry Farm because of ahistorical concerns. This weakens the value of the decision as precedent for future, similar preservation efforts. Had the HPRB and HPO both adopted a robust conception of historic worth that encompasses not only physical continuity, but also social relations, patterns of life, and the connection experienced by residents to their community's past, then the outcome could have been much different. Under such a theory, Barry Farm would have been an easy case, not an outlier.

Furthermore, the Board could have designated all of Barry Farm had the DCHA not taken this option off the table early on by pushing out residents and demolishing buildings. The residents' dispossession helped create urgency in the HPRB hearings and the negotiations; this made the Board less receptive to the tenants' argument for full preservation despite them going on record as early as 2014 raising concerns about Barry Farm being historic.²²² As others have noted, preparing a case for nomination is resource intensive, and greater institutional support needs to be provided to communities to proactively identify and nominate structures for preservation.²²³

Another obstacle to designating all of Barry Farm was the argument that development would "freeze" existing housing conditions. During the designation process, numerous individuals expressed concern that an affirmative vote by the Board would prevent redevelopment *wanted* by

²²² See Courtland Milloy, *Initiative to Revitalize Barry Farm Is Little More Than an Urban Dispersal Plan*, WASH. POST (Oct. 28, 2014), https://www.washingtonpost.com/local/2014/10/28/a5641e80-5ec7-11e4-91f7-5d89b5e8c251_story.html.

²²³ See AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 43–44.

the tenants.²²⁴ This argument fails in several respects. First, the disrepair of Barry Farm homes evidences a need to repair and rehabilitate these homes—which could have occurred with tenants on the premises—not a need to demolish them. As Paulette Matthews put it, “we’ve never fought the redevelopment, never, but it’s sad that we’re fighting the redevelopment.”²²⁵ Second, D.C. historic preservation law includes numerous escape valves to permit renovation and rehabilitation consistent with historic character, including funding for the preservation of existing homes.²²⁶

Following from this last point is the realization that greater resources should be devoted to identifying and rehabilitating structures like the homes of Barry Farm. Although the District of Columbia’s preservation grant program is available to low-income homeowners in historic districts,²²⁷ enduring funding challenges constrain the impact of such programs.²²⁸ The HPO has felt the squeeze of stagnating federal contributions, meaning that a larger percentage of its

²²⁴ See, e.g., *Hearing of October 31*, *supra* note 1, at 1:24:23–24:37 (“I think everybody wants the same thing, which is to bring the tenants back, get the project going, and the delay has just been a killer for everybody involved.”) (statement of Cynthia Giordano); *id.* at 1:32:45–32:57 (“I think his sentiments are, I’m sure, shared by probably everyone in this room, and I know by the Mayor and the administration, that we do want to see this project move forward”) (statement of David Maloney).

²²⁵ *Id.* at 56:36–56:42.

²²⁶ See *supra* Section I.B.3.

²²⁷ The application of this program to Barry Farm would have been complicated considering that the site is owned by the DCHA.

²²⁸ See generally Patrice Frey, *Why Historic Preservation Needs a New Approach*, BLOOMBERG CITYLAB (Feb. 8, 2019, 11:15 AM), <https://www.citylab.com/perspective/2019/02/tax-credit-historic-preservation-old-town-main-street/581989/> [<https://perma.cc/8AQN-22RM>] (discussing the challenges of financing historic preservation under current federal law).

budget goes to salaries as opposed to special projects each year.²²⁹ Solving the funding problem will likely require persistent work, but historic preservation would benefit from a reorientation of budgetary priorities. In redeveloping Barry Farm, the New Communities initiative anticipated total demolition costs of \$12 million.²³⁰ This figure absolutely dwarfs the \$118,000 disbursed to low-income homeowners through preservation grants in 2018²³¹ and suggests money could be made available.

Of course, one could argue that demolition is needed to increase housing in the District. Indeed, numerous participants in the HPRB hearing stressed the need for more housing at various points.²³² However, to rely on this point to advocate for redeveloping Barry Farm is to conflate *any* housing with *affordable* housing.²³³ By the time of the hearing, the DCHA had offered to provide only 380 replacement units on site, still fewer than the total of the original community.²³⁴ If carried out as presently written, the Barry Farm redevelopment plan will decrease the supply of affordable housing, even as it increases total available housing. For a neighborhood that began as the promise of a home in a hostile world, this would be a tragic end.

²²⁹ See D.C. HPO, *supra* note 2, at 63.

²³⁰ Arcieri, *supra* note 124.

²³¹ See HISTORIC PRES. OFFICE, *supra* note 90.

²³² See, e.g., *supra* note 200 and accompanying text.

²³³ The reality of D.C.'s affordable housing crisis is underscored by the realization that in November 2019, almost 10,000 apartment units stood vacant, see *From Vacant to Virus Reduction*, VACANT TO VIRUS-REDUCTION, <https://v2vr.info/> [<https://perma.cc/27D3-4UMU>] (last visited Mar. 12, 2021) (citing GOV'T OF THE DIST. OF COLUMBIA, OFFICE OF THE CHIEF FIN. OFFICER, OFFICE OF REVENUE ANALYSIS, DISTRICT OF COLUMBIA ECONOMIC AND REVENUE TRENDS: DECEMBER 2019, at 9 (2020)), while the City's point-in-time survey counted a little over 6,000 people who remained unhoused, see *id.*

²³⁴ See *supra* note 198 and accompanying text.

B. LOOKING BEYOND PHYSICALITY

The struggle to preserve Barry Farm speaks broadly to the challenges facing historic places associated with poor or nonwhite communities. So long as historic preservation actors like the HPO remain bound by a narrow conception of physical integrity, properties like Barry Farm will face uphill battles towards preservation. Tellingly, no party denied Barry Farm’s historic nature, yet the tenants still faced stiff opposition on the road to designation. This opposition came from the Housing Authority, with its mandate to raze and rebuild, and from the HPO, with its requirement to focus on physical and architectural integrity. This meant that a concededly historic place could be completely erased by redevelopment, despite its historic worth.

As shown in Section I.B.2, the District shares a narrow physicality requirement with many other state historic preservation regimes.²³⁵ Of the states with their own historic preservation programs apart from the National Register, virtually all of them require the survival of physical features either explicitly or implicitly.²³⁶ If the historic preservation review authorities in any of these states were to evaluate a property like Barry Farm, the parties seeking designation would face the same barriers that confronted the BFTAA. Properties that have suffered systemic isolation and deprivation will likely have considerable difficulty showing the persistence of the physical features necessary to attain historic status.²³⁷ In response, one might be tempted to

²³⁵ *See supra* Section I.B.2.

²³⁶ *See supra* notes 75–79 and accompanying text.

²³⁷ *See* BRENT LEGGS, KERRI RUBMAN & BYRD WOOD, NAT’L TR. FOR HISTORIC PRES., PRESERVING AFRICAN AMERICAN HISTORIC PLACES 4 (2012) (“African American heritage is often found in small, unadorned structures. For the most part these are not as grand or visually impressive as traditionally recognized places such as the homes of political leaders or wealthy industrialists. Many are in poor condition or have been extensively altered.”); *see also id.* at 15 (“Designating African American sites can be difficult. Many of these sites lack extensive documentation and may have been altered over time.”). This systemic neglect has often been

presume that Barry Farm is a unique case—the rare instance of a public housing neighborhood with a long history associated with a relatively poorer, Black community. Not only is this empirically wrong,²³⁸ but also the far better presumption is that the legacy of erasure of Black, Indigenous, and poor communities from the law has resulted in their corresponding erasure from real, physical space.²³⁹ As a consequence, mainstream legal institutions remain inept at preserving and protecting historic meaning associated with these communities.

A key aspect of this ineptitude is the physicality requirement, which excludes from consideration properties that have suffered from systemic isolation and neglect. To the extent that government and society can isolate and cut off these communities from important resources, they make it all the more difficult to identify and preserve the historic value of these communities down the road. Fortunately, in the District of Columbia and in many states, the physicality requirement is encoded in regulation, not in statute. This means that change can come through the comparatively less burdensome process of changing agency rules, as opposed to legislatures having to pass new historic preservation laws.

Removing the physicality requirement from D.C. regulations leaves integrity defined as “[a]uthenticity of a property’s historic identity, evidenced by the survival of . . . *characteristics*

intentional in the country’s history. *See* AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 19–26 (providing an overview of the larger urban, societal, and legal forces that have contributed to the disinvestment of Black communities).

²³⁸ *See* AFRICAN AM. CULTURAL HERITAGE ACTION FUND, *supra* note 2, at 70–79 (collecting examples of spaces associated with Black history).

²³⁹ *See generally* K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977 (2020) (reviewing JEDEDIAH PURDY, *THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH* (2019)) (reflecting on Jedediah Purdy’s examination of erasure of minority groups in American history).

that existed during the property’s period of significance.”²⁴⁰ Doing the same for the national guidance documents leaves “[t]he property must retain . . . the *essential . . . features* that enable it to convey its historic identity.”²⁴¹ This new definition of integrity permits a broader application of historic preservation that still constitutes a meaningful test.²⁴² Barry Farm still retained the ability to express its historic worth in ways besides just the physical buildings. The whole arrangement of the neighborhood, its relation to the larger city, and the pattern of life in the neighborhood all spoke, to varying degrees, to its historic roots.

Critics might worry this proposed change to historic preservation law produces an entirely standardless test, which could result in the designation of virtually any neighborhood. In response to this argument, it is worth recalling that removing the physicality requirement from the integrity definition does not change the other elements of historic preservation law. In the District, for instance, applicants would still have to meet the “significance” and “passage of time” elements.²⁴³ Moreover, the rest of the integrity requirement would remain intact. A property would still need to reflect the qualities that make it historically significant, but applicants would have greater freedom to show this integrity through other, non-physical features.

²⁴⁰ D.C. Mun. Regs. tit. 10-C, § 9901 (2020) (emphasis added).

²⁴¹ U.S. DEP’T OF THE INTERIOR, *supra* note 72, at 46.

²⁴² A key result of removing the physicality element is to give greater discretion to the actor making the historic designation decision. It is therefore essential that the make-up of such actors reflect the diversity of the communities they represent. Had the HPRB drawn its members exclusively from Georgetown, for example, the Barry Farm result would likely be more disappointing still.

²⁴³ *See supra* notes 67–68 and accompanying text.

The practical consequence of removing the physicality requirement from the definition of “integrity” in the District, for example, would be to shift additional discretion to the HPRB. This would allow the Board—in cases where a property faced systemic neglect and isolation from the wider society but bears an important historical legacy—to confer historic status on the property. So long as the historic preservation actors are properly constituted to reflect the diversity of the larger community, there is good reason to think these actors should be trusted with this additional discretion. The Barry Farm case is illustrative. The HPRB was, in many respects, representative of the different cross sections of the District, yet it was hamstrung by the language of D.C. preservation law.

Most importantly perhaps, without the physicality requirement the HPO would not need to stretch the “integrity” definition to its outer limit to justify a favorable preservation decision in instances of significant alteration or systemic neglect.²⁴⁴ Indeed, the HPO’s reversal in the Barry Farm case conveys the message that the integrity rules were relaxed for the BFTAA,²⁴⁵ instead of forthrightly acknowledging that the rules themselves are discriminatory. Removing the physicality requirement would mean that applicants would no longer have to anchor their nomination to an artificial physical integrity element. In instances where a place’s physical features have been degraded over time, applicants would have a greater range of pathways by which to show integrity. For instance, in the case of neighborhoods, testimony that centers on the

²⁴⁴ Some might argue that this shows that the integrity definition is already sufficiently flexible. The HPO only reached this reinterpretation following directives from the Board and from sustained pressure by the BFTAA. Unlike a court, the HPO is not bound by its own precedent. Leaving the physicality requirement in place presents the same obstacles for future communities like Barry Farm. Removing the physicality requirement entirely rebalances the preservation rules.

²⁴⁵ Lending support to the pernicious accusation that Barry Farm received special treatment.

residents' continued connection to the history of a place or how the residents represent that history should be sufficient.

Aside from removing the physicality requirement, greater funding for preservation efforts associated with Black, Indigenous, and poor communities is another important piece of the solution. Currently, the National Park Service administers a grant program to support the surveying and documenting of properties associated with communities that are underrepresented on the National Register.²⁴⁶ However, the available funds are only a small fraction of the overall federal preservation budget, and the Park Service allocated no money to the program in its 2020 and 2021 fiscal year budget requests to Congress.²⁴⁷ Such lapses are unacceptable. The federal government should provide greater funding to identify and protect spaces associated with marginalized communities; in the meantime, removing the physicality requirement from existing regulations would eliminate a key impediment to these communities obtaining historic designations for themselves.

²⁴⁶ See *Underrepresented Community Grants*, NAT'L PARK SERV., <https://www.nps.gov/preservation-grants/community-grants.html> [<https://perma.cc/8DVV-QEQ5>] (last visited Feb. 19, 2021).

²⁴⁷ See MARK K. DESANTIS, CONG. RESEARCH SERV., R45800, *THE FEDERAL ROLE IN HISTORIC PRESERVATION: AN OVERVIEW* 18, 24 (2020). The Park Service did the same for the African American civil rights grant programs. *See id.*

Of course, some of these places are still preserved under current laws,²⁴⁸ but if state and local preservation authorities approach the task the way the HPO approached Barry Farm, then they risk preserving only a certain kind of history. As Gans might put it, “élite” history.²⁴⁹

IV. CONCLUSION

Historic preservation has greatly expanded since its origins. But so long as historic preservation efforts remain committed to identifying structures worth saving in poor communities because these structures appeal to “universal” senses of aesthetic merit, historic preservation will continue to fall short of its full potential. Indeed, this sets up a perverse form of interest convergence where majoritarian concerns dictate which structures can be preserved.²⁵⁰

²⁴⁸ See, e.g., *Underrepresented Community Grants*, *supra* note 246 (listing latest recipients of underrepresented communities grants). For a recent corrective, see DeNeen L. Brown, *Emmett Till’s Brutal Murder Changed America. Now His Home Is a Historic Landmark.*, WASH. POST (Jan. 28, 2021, 9:36 AM EST), <https://www.washingtonpost.com/history/2021/01/28/emmett-till-home-chicago-landmark/> (“More than 65 years after Emmett Till packed his bags to visit relatives in Mississippi, the red brick Victorian house where he grew up has been designated a historic landmark by the Chicago City Council.”). *But see* John Freeman Gill, *Preserving New York’s Ties to the Underground Railroad*, N.Y. TIMES (Jan. 8, 2021) (discussing the difficulties of preserving two homes in New York City ostensibly connected to the underground railroad due, in part, to integrity concerns).

²⁴⁹ See Gans, *supra* note 27.

²⁵⁰ Cf. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education And The Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”). In his classic piece, Bell explains how certain sociolegal outcomes, such as the ruling in *Brown v. Board*, result from white interests converging temporarily with those of Black communities. See *id.* Similarly, without changes to historic preservation law, structures in Black and other nonwhite communities are only likely to be preserved when they also appeal to majoritarian, white interests and tastes. For commentary on the wrong approach to preservation, see Shapiro & Meyer, *supra* note 51 (“The streets would flood with architects’ tears if the Chrysler Building were to fall. But there is no reason to preserve run-of-the-mill gas stations, which has happened.”).

Indeed, the HPO's search for "decorative flourishes" speaks to this dynamic, a dynamic fostered by the narrow physicality requirement in existing historic preservation laws.

Rather, as numerous scholars have already argued, the preferences of the local community should play a far greater role in defining what is worth preserving. The Board's decision offers hope that community preferences will receive greater attention in the historic preservation process moving forward. Unfortunately, the entire process is still an uphill struggle for local communities. As Barry Farm tenants have noted, the DCHA and partner organizations did not provide accommodations or concessions on affordable housing or historic preservation until the BFTAA fought them on these points.²⁵¹ This speaks to a structure still biased against poor and nonwhite communities. As an initial measure, D.C. should remove the physical characteristics requirement from its regulation. But far more will be required, including a full reevaluation of the District's priorities.²⁵²

Almost seventy years after Newsom penned his critique of historic preservation,²⁵³ Black, Indigenous, and poor communities still face displacement. In the case of Barry Farm, the DCHA did not use preservation law to displace the community, but neither could the community use preservation law to shield itself from redevelopment. One can't help but think that Barry Farm should have been an easy case. The neighborhood still retained numerous aspects that spoke to

²⁵¹ *See Hearing of October 31, supra* note 1, at 57:13–57:30 (“Everything that they’re doing that’s historical was never in their plan originally. Never. That’s why, you know, they’ve got to squeeze stuff in. . . . Prior to that, because we went to court, the other things were not incorporated in their plans.”) (statement of Paulette Matthews).

²⁵² For instance, the push to build new, mixed- and high-income developments needs to be more properly balanced with funding for the protection and preservation of homes for those already living in the city.

²⁵³ *See supra* notes 18–22 and accompanying text.

its history. Perhaps most importantly, the people of Barry Farm carried with them a sense of the history of their community, at least until they were forced to leave. Instead, the Barry Farm tenants had to wage a prolonged fight to ultimately keep only some buildings, while still suffering the shattering of their community and the loss of their homes. Dislocation and disruption are familiar themes in the story of Barry Farm; sadly, with historic preservation laws structured as they are, these aspects of the community’s legacy also remain intact.

Appendix A.²⁵⁴

Property	HPRB Decision	HPO decision	Year	Concur
Barry Farm	Defer	No		No
Folger Shakespear Library	Deny (concur with HPO)	No	25-Jul-19	Yes
Sadler Homestead	Deny	No	27-Jun-19	Yes
Scottish Rite Temple	Denied amended boundary	No	23-May-19	Yes
INTELSAT	Nominate	Yes	25-Apr-19	Yes
American Theater	Nominate	Yes	25-Apr-19	Yes
Holy Redeemer College	Nominate	Yes	28-Mar-19	Yes
Ross Lee Hardy School	Designate	Yes	28-Mar-19	Yes
Safeway Grocery Store	Deny	No	7-Mar-19	Yes
Capital Traction Company Union Station,	Nominate	Yes	24-Jan-19	Yes
Washington Animal Rescue League Animal Shelter	Nominate	Yes	20-Dec-18	Yes
Folger Shakespeare Library amendment	Support (Amend)	Yes (Amend)	20-Dec-18	Yes
Wardman Park Annex	Support (Amend)	Yes	15-Nov-18	Yes
Henry B.F. MacFarland Junior High	Designate	Yes	14-Oct-18	Yes
Petworth Branch Library	Designate	Yes	14-Oct-18	Yes
Theodore Roosevelt Senior High School	Designate	Yes	14-Oct-18	Yes
Bloomington Historic District	Nominate	Yes	26-Jul-18	Yes
St. Paul’s Methodist Episcopal Church South	Deny	Yes (Designate)	24-May-18	No
Kingman Park Historic District	Designate	Yes	3-May-18	Yes
Langston Golf Course	Designate	Yes	22-Mar-18	Yes
Municipal Center Indiana Avenue	Designate	Yes	22-Feb-18	Yes
Harrison Street Flats	Deny	Yes	22-Feb-18	No
Potomac Electric Power Company Substation No. 13,	Designate	Yes	1-Feb-18	Yes
Potomac Electric Power Company Substation No. 5,	Designate	Yes	1-Feb-18	Yes

²⁵⁴ Data collected from *HPRB Meeting Agendas and Reports*, DC.GOV: OFFICE OF PLAN., <https://planning.dc.gov/page/hprb-meeting-agendas-and-reports> [<https://perma.cc/RR72-FY2F>] (last visited Feb. 19, 2021).