

ANCIENT LIGHTS IN WRIGLEYVILLE: AN ARGUMENT FOR THE UNOBSTRUCTED VIEW OF A NATIONAL PASTIME

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I. THE LINEUP: INTRODUCTION

“In our built environment, the value in the view is more than an individual aesthetic one. There are structures which we, individually and culturally, have come to regard as significant. The destruction or defacement of these structures dislocates and dispirits us.”¹

Property views are not generally considered a right incident to land in the United States, and unless acquired pursuant to an express grant or covenant, they generally are not protected in a court of law.² Even at common law, where easements were often recognized in light and air, easement rights in a view were rejected as purely aesthetic in nature. A view was traditionally considered “a matter only of delight and not of necessity,” to which “no action lies for the stopping thereof.”³ Today, however, views have taken on more significance than once recognized. They frequently represent valuable property interests, for which landowners and tenants pay more to acquire.⁴ They also often extend to serve the interests of well more than the individual estate to provide for the needs of entire communities. While both traditional and current jurisprudential thinking would indicate that the law closes the door on any common law rights to a view, courts in the United States have yet to balance the weight of a communal and even national interest in a view within the context of the common law. One lawsuit in northern Chicago concerns a view to a national pastime, and presents a ripe setting to critique the historically universal rejection of any right to a view.

On December 17, 2002, the Chicago Cubs baseball organization filed a lawsuit against the owners of nine clubs whose patrons watch the team’s baseball games from rooftops across the street from Wrigley Field ballpark. The complaint alleged that the rooftop operators violate copyright laws and directly compete with the Cubs for ticket sales. Cubs’ president and CEO Andy MacPhail explained that “[t]he rooftop owners take in as much as \$10 million a year by selling seats to view our games. We do not believe the rooftop operators are entitled to profit from our names, our players, trademarks, copyrighted

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1. John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL’Y 1, 18 (1996-97).

2. Tara J. Foster, Comment, *Securing a Right to View: Broadening the Scope of Negative Easements*, 6 PACE ENVTL. L. REV. 269, 270 (1988).

3. R.G. NICHOLSON COMBE, LAW OF LIGHT 12 (1911) (citing *Aldred’s Case*, 9 Co. Rep. 58b (1610)).

4. Foster, *supra* note 2, at 269.

telecasts and our images without our consent.”⁵ In response, the rooftop owners claimed that “the Cubs sat by and raised no objections while the owners spent millions to upgrade their facilities and obtain licenses to operate. The owners further characterized their rooftops as contribut[ing] to the unique character of baseball at the ballpark.”⁶

The lawsuit arose out of the Cubs’ frustration with nearby residents who had opposed plans to expand the ballpark. The complaint was filed three days after the City of Chicago put in motion a plan to grant Wrigley Field historic landmark status, a designation that would guard against any alterations that could detract from the historical significance of the eighty-nine-year-old ballpark.⁷ The Cubs organization had been working to win approval for plans to expand the park before the landmark proceeding began, but the organization was unable to negotiate a deal with their neighbors, who were concerned about the potential for increased parking, traffic, litter, noise, crime, and other nuisance problems. The rooftop owners, fearing that their views of the Cubs’ diamond would be blocked by a plan to expand the outfield bleacher seating, supported the neighbors in the negotiations.⁸

In January 2004, the Cubs organization and the rooftop owners, with the exception of three holdouts, reached a formal agreement settling the dispute.⁹ The twenty-year agreement required the rooftop owners to pay the Cubs seventeen percent of their gross revenue.¹⁰ Cubs’ estimates place about 1700 fans on the rooftops for each game, and the organization’s cut of about fifteen to twenty-five dollars for each ticket would net the team approximately \$2 million per year.¹¹ As part of the deal, the Cubs are required to compensate the rooftop owners if their views are obstructed from any ballpark expansions over the next eight years.¹² The agreement, coincidentally, coincides with a decision of the Chicago city council to unanimously recommend landmark status for certain features of Wrigley Field.¹³ The plan grants landmark status to Wrigley Fields’ exterior, scoreboard, grandstands and bleachers, and also the brick wall and ivy

5. Ronald Roenigk, *Cubs, Bar Owners Back to Battling in Courts as Landmark Status Moves Forward, Inside*, at http://www.insideonline.com/site/epage/8393_162.htm (Dec. 18-24, 2002).

6. Casey Bukro, *Rooftops Called Wrigley Charm*, CHI. TRIB., Jan. 8, 2003, at 3.

7. Alexia Elejalde-Ruiz, *Take Me out to the Historic Landmark*, BOSTON GLOBE, Jan. 19, 2003, at A.14.

8. *Id.*

9. Gary Washburn, *Rooftop Owners and Cubs OK Deal*, CHI. TRIB., Jan. 30, 2004, at 1.

10. H. Gregory Meyer, *Cubs, Rooftop Owners Cut Deal*, CHI. TRIB., Jan. 12, 2004, at 1.

11. Shamus Toomey & Fran Spielman, *Rooftop Owners Agree to Pay Cubs*, CHI. SUN-TIMES, Jan. 11, 2004, at 3.

12. Meyer, *supra* note 10.

13. Carrie Muskat, *Council Approves Landmark Status*, MLB.com, Jan. 27, 2004, at http://chicago.cubs.mlb.com/NASApp/mlb/chc/news/chc_news.jsp?ymd=20040127&content_id=631178&vkey=news_chc&fext=.jsp.

surrounding the playing field.¹⁴ Notably, the city's plan allows the team to make necessary changes to the park for it to remain economically viable. The designation does not preclude expansion of the bleachers, which would obstruct the current rooftop views, but does not provide for expansion either.¹⁵

While the parties have seemingly resolved their differences, the notion lingers that absent an agreement otherwise, the Cubs organization has a legal right to obstruct the rooftop views. Though the future facts and parties may change, the potential remains for unrestricted rights to block a landowners view, regardless of how publicly important that view may be. This Note uses the situation of the Wrigleyville dispute as a vehicle to advocate a change in the common law's rejection of all legal rights to a view.¹⁶ The Note first establishes the underlying considerations used to deny landowners actionable rights to a view. This analysis necessarily includes an assessment of the historic rejection of a landowner's right to a view in both England and the United States, and the relationship among the development of light, air, and view law. The Note then addresses the cases and commentary attacking the validity of such reasoning in many of today's contexts, as in the circumstances of solar panel rights, from which a more contemporary public policy standard might be derived. The Note opines that public policy has in fact always been the basis for rejecting or accepting property rights to light, air, and view. The Note then applies that standard to a view interest supported by a strong public policy, as in the preservation of history and its aesthetic value. Finally, the Note concludes that the historical value behind the rooftop views should create an actionable right to an unobstructed view of Wrigley Field.

II. COOPERSTOWN: ORIGINS OF LIGHT, AIR & VIEW LAW

“[I]f a man builds a house and stops the *light* coming to my house . . . I shall have the *Assize* it.”¹⁷

A. *The House That Aldred Built: Ancient Lights and the English Common Law*

As with most of the common law in the United States, the American concept

14. *Id.*

15. *Id.*; see also Roenigk, *supra* note 5.

16. While the principle lawsuit sounds in copyright violations, intellectual property law is not within the scope of this Note. Rather, the underlying concern of the parties is whether the Cubs organization may obstruct the rooftop owners' view of the playing field. For authority concerning the copyrighting of sporting events, which further supports the contention that the underlying concern of parties is the obstruction of a view, see *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108, 122 n.19 (Pa. 2003) (noting the “well-established rule that the actual performance of a professional sports game is not protected by copyright”).

17. Dale D. Goble, Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 108 n.54 (1977) (citing Y.B. Mich. 22 Hen. 6, f. 14, pl. 23 (1444)).

of light, air, and view property rights evolved from English common law doctrine, and was only later tailored to fit contemporary needs and interests. Courts in the United States tended to follow the English common law until public policy demands pushed courts to openly reject the ancient standard, though they in fact remained parallel with the common law in respect to view rights, and arguably only reapplied the common law's approach to light and air rights. Today, light, air, and view rights have been notoriously meshed to lead many to believe that they are inseparably connected. Historically, however, rights to light, air, and view were somewhat distinct,¹⁸ and were constructed to serve the slowly developing, and often rural, public needs of the time.

1. *Early Light and Air Law*.—Under the earliest common law, access to light and air was distinguished from easements as natural rights.¹⁹ Natural rights differed from easements in that they came into existence through land possession alone, while easements could only be created specifically through a grant, regardless of their affirmative or negative character.²⁰ Originally, a party seeking to establish the natural right to light or air was required to show that he or she had enjoyed the use “from time whereof the memory of man runneth not to the contrary.”²¹ By the end of the sixteenth century, however, English courts classified light and air as negative easements. Nevertheless, in many cases, even without the necessary easement grant, the right would generally be implied from circumstances where an alleged easement had been enjoyed for a long period of time. “This relaxation was developed in order to give legal validity to what has, by long user, become accepted as a fact.”²² Especially in smaller and tighter communities, most of the population could identify, often for generations, the benefits that certain parcels and their estates enjoyed. Essentially, the courts developed a more workable standard that fostered concrete legal concepts while at the same time permitting more flexibility than had been offered through the notion of natural rights. Thus, from the concept that an easement right might be acquired where traditionally recognized by the community arose the judicially created doctrine of ancient lights.²³

Under the doctrine of ancient lights, “the owner of a house with ancient windows has a right to prevent any owner of adjoining land from doing anything upon his soil which may obstruct the access of light and air to the ancient

18. COMBE, *supra* note 3, at 14. One early court explained that “[l]ight and air are bestowed by Providence for the common benefit of men.” *Embrey v. Owen*, 6 Ex. 353, *quoted in* HUMPHRY W. WOOLRYCH, *A PRACTICAL TREATISE OF THE LAW OF ANCIENT AND MODERN WINDOW LIGHTS* 1 (1864).

19. A great deal of confusion about what constituted a natural right or an easement at the common law ensued from the English courts' lack of clarity in distinguishing between the two. The fact that “assize of nuisance” served as the remedy for infringement of both augmented the confusion. Foster, *supra* note 2, at 276.

20. *Id.* at 275.

21. *Clawson v. Primrose*, 4 Del. Ch. 643, 655 (1873).

22. PATRICK J. DALTON, *LAND LAW* 189 (1972).

23. Foster, *supra* note 2, at 276.

window.”²⁴ In its earliest form, the doctrine permitted an owner of two adjacent lands to convey one parcel and retain an unobstructed flow of light and air to his remaining property, assuming he had previously enjoyed such a benefit for the prescriptive period, usually twenty years.²⁵ The doctrine evolved to allow the landowner to acquire an easement of light and air across the property of an adjoining landowner when such access had been enjoyed for the prescriptive period, regardless of whether the landowner had himself conveyed the servient parcel. The dominant owner could thereby prevent the erection of any structure on the servient estate that would unreasonably block the flow of light and air.²⁶

The proposition that the doctrine’s nature arose from public need is evident in the scope some courts used to limit its extent. “Behind those [ancient] windows there might be a small or a large room, so that a smaller or a larger amount of light might be acquired; or the room might be used for ordinary purposes requiring only an ordinary amount of light, or for extraordinary purposes requiring an extraordinary amount.”²⁷ At a time when the light bulb and central heating were inconceivable, natural light from the sun was a necessary source of both warmth and lighting. Courts of the era recognized this need and generally limited the scope of the nuisance remedy “unless so much light was taken that the house was rendered uncomfortable.”²⁸ The same may be said for the pollution of air.²⁹ The utility nature of the doctrine is also evident in the elimination of the easement through non-use.³⁰ There was no longer a public interest in preserving a right that was not used, especially where the interests once subordinated could prove to be beneficial.

2. *A View Historically Distinguished.*—While English courts recognized common law rights in light and air under the ancient lights doctrine, view rights were rejected well before American jurisdictions considered the issue. As one early jurist observed, “[o]bstructing a beautiful prospect which I have always enjoyed from the windows of my house is, in the view of English law, a mere *damnum*; diminishing by obstruction the quantity of light and air which I receive through ancient windows is *injuria*.”³¹ Although the earliest English courts made little mention of the right to a view, it appears that a view may have also

24. KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 127 (5th ed. 1897).

25. Foster, *supra* note 2, at 276.

26. S. MAURICE, GALE ON EASEMENTS 260-79 (15th ed. 1986); R. MEGARRY & H.W.R. WADE, THE LAW OF REAL PROPERTY 903-06 (5th ed. 1984).

27. 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 340 (2d ed. 1937).

28. *Id.*; see also WOOLRYCH, *supra* note 18, at 2 (“[Lights] worth lies in utility, as opposed to luxury.”).

29. HOLDSWORTH, *supra* note 27, at 341.

30. WOOLRYCH, *supra* note 18, at 106.

31. DIGBY, *supra* note 24, at 88 n.1.

constituted a natural right until the time of *Aldred's Case*,³² in 1611.³³

Aldred's Case was an action brought by William Aldred against Thomas Benton for erecting "a pig-sty so near [Aldred's] house that the air thereof was corrupted."³⁴ In determining the extent of Aldred's injury in order to assess the appropriate remedy, the court drew a clear line between the right to a view, or prospect, and the right to light and air. An action would lie by the owner of property for interference with his right to air or light, but no action would be recognized for the obstructing of a prospect, "which is a matter only of delight and not of necessity" even though "it is a great commendation of a house if it has a long and large prospect. . . . But the law does not give an action for such things of delight."³⁵ The court seemed to distinguish light and air from a view on the ground that light was a right for which "the ancient form of an action on the case was significant."³⁶ The court noted that a nuisance would also lay for an interruption "[t]o the habitation of a man, for that is the principal end of a house."³⁷ In the case of air, as here, if a neighbor burns a substance or produces a smell that overtakes the plaintiff's home "so that none can dwell there, an action lies for it."³⁸ The distinction is that there is no natural need for a view, and the blocking of a view does not render a house uninhabitable. Homes without adequate light or ventilation in the early seventeenth century, as previously discussed, would cause a substantial injury to the owners. The law here seemed to therefore serve the practical and necessary purpose of protecting habitability.

Traditionally, English courts have not only rejected view rights as matters of delight, but also because of the potential burden they create on surrounding estates. Lord Blackburn in *Dalton v. Angus* balanced the public policy of the community in noting that

on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement.³⁹

Such a burden tended to arise from the inability to precisely determine the scope

32. 9 Co. Rep. 57 b, 77 Eng. Rep. (K.B. 1611) 816, *reprinted in* All E.R. Reprint 1558-1774, at 622 (1968).

33. Foster, *supra* note 2, at 276-77.

34. Aldred's Case, 9 Co. Rep. 57 b, 77 E.R. 816, *reprinted in* All E.R. Reprint 1558-1774, at 623 (1968).

35. *Id.* at 623-24. Ironically, the court cites *Ecclesiastes* 11:7, which states "[l]ight is sweet, and it pleases the eyes to see the sun," somewhat acknowledging that it is also a matter of delight.

36. *Id.* at 623.

37. *Id.*

38. *Id.* at 624.

39. *Dalton v. Angus*, 6 App. Cas. 740, 824 (1881).

of the view. The need for light, on the other hand, could be more definitely measured depending on the size of the room “behind those windows” and the amount of light necessary to keep it comfortable.

The notion, though often unfounded, that all easements had their origin in words also led to the requirement that the subject matter of easements must be reasonably definite.⁴⁰ The same held true regardless of the form of the easement at issue. In *Bryant v. Lefever*,⁴¹ it was held that the flow of air in undefined channels could not be the subject-matter of an easement. On the other hand, the right to a flow of air to a window in its natural state was a well-established easement.⁴² The common factor of the scope cases “seems to be that when an easement is being acquired by long user the servient owner should be able to discern easily what rights are being secured against him so that he will be able to resist and nullify them before they become established as legal rights.”⁴³ The channel of a view, however, was difficultly defined, and might easily have extended as far as the eye could fathom. The English common law’s practice towards rights of light, air, and view therefore made sense as more than mere tradition or custom. Rather, it served the practical needs of ensuring continued habitability while at the same time protecting surrounding landowners from burdensome restrictions on development. Minor burdens remained tolerable until the need arose for unbridled development in the booming growth of the United States.

B. The Mighty Fontainebleau Comes to Bat: American Courts and Booming Development

While the American bar originally tended to adhere to the common law, the turn of the eighteenth century brought the decline of the doctrine of ancient lights in the United States. Most American courts today deny all easement rights to light or air by implication, except in limited cases of necessity.⁴⁴ The New York Superior Court was one of the first American courts to reject the ancient lights doctrine, though not the focus of the dispute, in *Parker v. Foote*.⁴⁵ In dicta, the court criticized the doctrine’s applicability to the American vision of rapid growth. Justice Bronson declared for the court:

40. DALTON, *supra* note 22, at 189.

41. 4 C.P.D. 172 (1879).

42. *Wong v. Beaumont Property Trust Ltd.*, 1 Q.B. 173, 180 (1964).

43. DALTON, *supra* note 22, at 190.

44. *Foster*, *supra* note 2, at 278. One may, of course, still obtain an express easement for light and air. See Annotation, Express Easements of Light, Air, and View, 142 A.L.R. 467 (1943); *U.S. v. 0.08246 Acres of Land*, 888 F. Supp. 693, 710 n.22 (E.D. Pa. 1995) (observing that express easements for light, air, and view may be destroyed if character of neighborhood changes); *Lawrence v. 5 Harrison Assocs.*, 742 N.Y.S.2d 826, 826-27 (App. Div. 2002) (construing express easement for light and air). Also, under Louisiana common law, servitudes of light and view may be established by prescription. See *Palomeque v. Prudhomme*, 664 So. 2d 88, 91 (La. 1995).

45. 19 Wend. 309 (N.Y. Sup. Ct. 1838).

There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England [b]ut it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law.⁴⁶

Two considerations have generally substantiated this attitude. First, easements for light, air, and view are negative,⁴⁷ a characteristic that is strongly disfavored. The concept of adverse use requires actionable conduct by the claimant that interferes with the enjoyment of the servient estate's use. The argument suggests that the access of light and air across another's property, as well as the enjoyment of a view, does not intrude upon the use of the servient tenement, and therefore cannot serve as the basis for establishing a prescriptive easement.⁴⁸ This consideration somewhat parallels the English concern for identifying a view easement, as it is difficult to find an intrusion by an indefinable servitude. Second, as in *Parker*, American courts have long expressed concern that recognition of prescriptive rights to light, air, and view would retard development of vacant land. As one court remarked, the doctrine of ancient lights is "not suitable to the conditions of a new, growing and populous country, which contains many large cities and towns, where buildings are often necessarily erected on small lots."⁴⁹

Probably the most recognized authority representing the American rejection of ancient lights is the Florida case of *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*,⁵⁰ an action between two luxury hotels facing the Atlantic Ocean. A proposed addition to the Fontainebleau Hotel shadowed the cabana, swimming pool, and sunbathing areas of the Eden Roc Hotel. Such a shadow, according to the Eden Roc, rendered their beach access wholly unfitted for the use and enjoyment of its guests. The Eden Roc further alleged that the construction would interfere with the easement of light and air enjoyed by them and their predecessors in title for more than twenty years.⁵¹ The *Fontainebleau* court reasoned that the maxim *sic utere tuo ut alienum non laedas* "means only that one must use his property so as not to injure the lawful *rights* of another."⁵²

46. *Id.* at 317.

47. *See Rahabi v. Morrison*, 440 N.Y.S.2d 941, 946 (App. Div. 1981) (classifying easement to protect dominant owner's light and air as negative because it restricts actions of servient owner).

48. *See Tenn v. 889 Assocs.*, 500 A.2d 366, 369 (N.H. 1985) (holding that enjoyment of light is not characteristic adverse use); *Parker*, 19 Wend. at 317 ("But in the case of lights there is no adverse user nor indeed, any use whatever of another's property. . .").

49. *Lynch v. Hill*, 6 A.2d 614, 618 (Del. Ch. 1939); *see also Turner v. Thompson*, 58 Ga. 268, 271 (1877) (explaining that doctrine of ancient lights "does not suit a young and growing country, such as ours is").

50. 114 So. 2d 357 (Fla. Dist. Ct. App. 1959).

51. *Id.* at 358.

52. *Id.* at 359.

The court continued that a property owner may put his property to any lawful use, “so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance.*”⁵³ Placing this emphasis on a requisite need for the infringement of a legally recognized right, the court quickly concluded:

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.⁵⁴

The court felt that where no such “useful and beneficial purpose” is served, and public policy demands otherwise, restrictions should come instead through amending the comprehensive planning and zoning ordinance. “[T]o change the universal rule . . . amounts, in our opinion, to judicial legislation.”⁵⁵

While American courts rejected the common law’s approach to light and air easements, they have generally mirrored the historic refusal to recognize a right to a view. For example, in *Pierce v. Northeast Lake Washington Sewer and Water District*,⁵⁶ the Washington Supreme Court rejected a claim for the obstruction of a view of Mount Rainier and the Cascades by a water storage tank, holding that mere infringement upon the personal pleasure and enjoyment of property is not a sufficient basis for compensation.⁵⁷ Yet American reasoning was not an exact replica of the English common law. Rather, American courts placed easement rights to a view on the same level as those of light and air. This is reflected by “modern American commentators’ practice of lumping easement rights to light, air, and view together and in American courts’ identical treatment of these rights as negative easements.”⁵⁸

53. *Id.* (quoting *Reaver v. Martin Theatres*, 52 So. 2d 682, 683 (Fla. 1951)) (emphasis in original).

54. *Id.*

55. *Id.* at 360.

56. 870 P.2d 305 (Wash. 1994) (en banc).

57. *Id.* at 313.

58. Foster, *supra* note 2, at 278-79 (“[T]he current general rule in this country states that a right to view, like a right to light or air, can only arise by express grant or covenant or, in a minority of states, by implication.”).

III. PLAYING UNDER THE LIGHTS: CONTEMPORARY CONSIDERATIONS BRING PUBLIC POLICY FULL CIRCLE

"When one landowner's use of his or her property unreasonably interferes with another's enjoyment of his or her property, that use is said to be a private nuisance."⁵⁹

A. *The Designated Hitter: Prah and "Modern Lights"*

In the era of *Aldred's Case*, the sun was an important source of heat and lighting, and the air inside the home was only as good as the air outdoors. To permit the blocking or pollution of such sources of fundamental need would render a home uninhabitable. At the time *Fontainebleau Hotel Corp.* and much of its progeny was decided, there was a strong sense that the United States was exploding with growth, both within cities and westward. To adequately meet that expansion, social need demanded a policy of unrestricted development. Today, other interests tax the public's attention, and courts have only been able to meet those needs through reexamining *Fontainebleau* and its progeny, just as *Fontainebleau* assessed the legitimacy of the ancient lights doctrine in the context of its time. Increased interest in solar energy has, for example, caused some reconsideration of the traditional American attitude disfavoring prescriptive easements of light, air, and views.⁶⁰

The use of solar energy is not a new concept, but rather is related to the policy underlying the advent of the ancient lights doctrine. In fact, the need for solar energy can be traced to ancient Roman society and their legal writings. Legally enforceable rights to solar energy as both a source of heat and illumination were common in Rome during the second and third centuries A.D.⁶¹ In terms of heat, a severe timber shortage spawned the need for alternative sources of warmth.⁶² The right to solar heat was further associated with the general right to light. Similar to early English society, the sun's light was vital to Roman society where often only dim, smoky oil lamps were available for artificial light.⁶³ An entire section of the Roman civil law prepared under Emperor Justinian, the Digest, is concerned with access to the sun's light and

59. *Prah v. Maretti*, 321 N.W.2d 182, 187 (Wis. 1982).

60. *But see Sher v. Leiderman*, 226 Cal. Rptr. 698, 704 (Ct. App. 1986) ("Though the Solar Age may indeed be upon us, it is not so easily conceded that individual property rights are no longer important policy considerations."); *see also*, Kenneth James Potis, Note, *Solar Access Rights in Florida: Is There a Right to Sunlight in the Sunshine State?* 10 NOVAL.J. 125, 130 (1985) ("Since courts throughout the United States have repudiated the ancient lights doctrine, it is unlikely that this doctrine will ever assist a contemporary solar energy user.").

61. Potis, *supra* note 60, at 127.

62. *Id.*

63. Borimir Jordan & John Perlin, *Solar Energy Use and Litigation in Ancient Times*, 1 SOLAR L. REP. 583, 592-93 (1979).

energy.⁶⁴ The Digest preserves the ruling of the jurist Ulpian, who explained that there was no action for an object blocking the sun where its heat was not wanted. “If, however, that object is so placed as to block the sun’s heat and create a shadow in a space where the sun’s heat is essential . . . , there is a violation of the easement and the action is granted.”⁶⁵ A builder was required to have a servitude over neighboring land if he were not to leave his neighbors a minimum or reasonable amount of daylight.⁶⁶ As the societal right to solar access outweighed the resulting burden on adjoining property, courts would often go so far as to force landowners to tear down a new structure that did not leave a neighbor with a reasonable amount of sunlight.⁶⁷

Newfound concerns questioning the future availability of energy sources have recently caught the public’s attention, causing courts to again address the relationship between the sun’s energy and easements. The Wisconsin Supreme Court directly confronted the rationale of *Fontainebleau* and reconsidered the relationship between public need and ancient lights in *Prah v. Maretti*.⁶⁸ In that case, Richard Maretti planned to build a home adjacent to Glenn Prah’s solar-heated residence. Prah had advised Maretti that if the new home were built on the proposed site it would shadow his solar collectors, thereby reducing the efficiency of and possibly damaging the system. Prah requested that Maretti locate his home several additional feet away from the lot line, but after receiving the necessary city approval, Maretti began construction on the initial site.⁶⁹

The *Prah* court interpreted the maxim that a landowner must not “use the land in a way which injures the rights of others” from a more contemporary perspective than its *Fontainebleau* counterpart, concluding that “the uses by one must not unreasonably impair the *uses or enjoyment* of the other.”⁷⁰ The court recognized that, although American courts had considered the doctrine of ancient lights inconsistent with the needs of a developing country, many jurisdictions protected landowners from malicious obstruction of access to light as in the spite fence cases. “If an activity is motivated by malice it lacks utility and the harm it causes others outweighs any social values.”⁷¹ Thus, even in rejecting ancient lights, American courts had a history of protecting a landowner’s interest in sunlight supported by public policy.⁷²

64. See DIG. 8.2.17 (Ulpian, Ad Edictum 18).

65. Jordan & Perlin, *supra* note 63, at 594 (discussing DIG. 8.2.17 (Ulpian, Ad Edictum 18)).

66. *Id.* at 593.

67. Potis, *supra* note 60, at 127.

68. 321 N.W.2d 182 (Wis. 1982).

69. *Id.* at 185.

70. *Id.* at 187 (emphasis added).

71. *Id.* at 188.

72. See Foster, *supra* note 2, at 285 (“The spite fence exception proves significant because it affords a landowner, having no special easement to view, a superior right vis a vis another individual who wishes to maintain a fence which serves no useful purpose and which obstructs the complaining landowner’s view. It is also significant in that it affords the landowner an action in nuisance against the individual who constructed the ‘spite fence,’ and thereby lends support to the

Armed with a social need standard, the court took issue with the "now obsolete" policy considerations underlying the American reluctance in the nineteenth and early twentieth century to provide broader protection for a landowner's access to sunlight.⁷³ The court first rejected the contention that American case law permits a landowner to use their property as they wish short of physically damaging a neighbor's property, finding that "society has increasingly regulated the use of land by the landowner for the general welfare."⁷⁴ Light easements were also abandoned since, with the advent of artificial light for illumination, sunlight was a personally aesthetic enjoyment.⁷⁵ The court again found that reasoning unfitting for contemporary needs, as "access to sunlight has taken on a new significance in recent years. . . . [S]unlight as an energy source is of significance both to the landowner who invests in solar collectors and to a society which has an interest in developing alternative sources of energy."⁷⁶ Similarly, as in *Fontainebleau*, courts had rejected light, air, and view easements based on the contention that they impeded land development. Yet encouraging

unhindered private development in an expanding economy is no longer in harmony with the realities of our society. The need for easy and rapid development is not as great today as it once was, while our perception of the value of sunlight as a source of energy has increased significantly.⁷⁷

Finally, the *Prah* court specifically confronted the reasoning of the mighty *Fontainebleau*:

The [*Fontainebleau*] court leaped from rejecting an easement by prescription (the doctrine of ancient lights) and an easement by implication to the conclusion that there is no right to protection from obstruction of access to sunlight. The court's statement that a landowner has no right to light should be the conclusion, not its initial premise. The court did not explain why an owner's interest in unobstructed light should not be protected or in what manner an owner's interest in unobstructed sunlight differs from an owner's interest in being free from obtrusive noises or smells or differs from an owner's interest in unobstructed use of water. The recognition of a *per se* exception to private nuisance law may invite unreasonable behavior.⁷⁸

The court concluded that private nuisance law is well equipped to resolve

possibility of a more general action in nuisance for landowners suffering losses of view.").

73. *Prah*, 321 N.W.2d at 189.

74. *Id.*

75. Note that this premise parallels the English common law's concern with view easements. See discussion *supra* Part II.A.2.

76. *Prah*, 321 N.W.2d at 189.

77. *Id.* at 190 (citation omitted).

78. *Id.* at 190 n.13.

property development disputes in the 1980s.⁷⁹

B. Free Agency: A Changing Role for Aesthetics

While the *Prah* court determined that private nuisance law was best structured to meet the balancing needs of both access to solar energy and development, courts generally have not yet been willing to extend nuisance protections to “merely” aesthetic nuisances.⁸⁰ As view rights have long been considered essentially aesthetic in nature, this reluctance to find aesthetic nuisances translates into a barrier to the recognition of view rights as well. Yet the disregard of aesthetic nuisance is entirely inconsistent with the approach courts have normally used to determine whether a landowner has suffered a substantial interference with the use and enjoyment of his or her property. Courts have long recognized the diminution in value standard as adequate in proving and valuing the cost of a nuisance,⁸¹ a showing that can also be clearly evidenced through a view loss. Thus, “[t]he same standard for substantial interference should be applied to aesthetic nuisance cases as well.”⁸² Furthermore, the rationale underlying this unwillingness lacks the contemporary support necessary to maintain its viability. In short, the rule against aesthetic nuisances also needs a contemporary makeover.

Some courts, much like the Florida court in *Fontainebleau*, have based their reluctance to recognize aesthetic nuisances on the separation of powers doctrine, concluding that matters of aesthetics are best left to the judgment of legislative bodies to be controlled through such tools as zoning regulations. Yet the same is true of these courts’ stated concern of protecting development. If the legislatures are in the best position to determine where to leave aesthetics open, the argument would necessarily hold true that they are also in the best position to determine where growth can occur and its respective limits. Additionally, this rationale is severely undermined by courts’ willingness to use aesthetic considerations alone to substantiate a use of state police power.⁸³

79. *Id.* at 191 (Private nuisance law “has the flexibility to protect both a landowner’s right of access to sunlight and another landowner’s right to develop land[,]” especially since it is “more in harmony with legislative policy and the prior decisions of this court than is an inflexible doctrine of non-recognition of any interest in access to sunlight across adjoining land.”). *But see* O’Neill v. Brown, 609 N.E.2d 835, 838-39 (Ill. App. Ct. 1993) (upholding Illinois’ common law policy of favoring growth over ancient lights and rejecting a landowners right to a “solar skyspace easement” for a greenhouse).

80. Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 2 (2002) (“An aesthetic nuisance is a substantial and unreasonable interference with the use and enjoyment of one’s land resulting from unsightly objects or structures on another’s land.”).

81. *Id.* at 9.

82. *Id.*

83. *Id.* at 14; *cf.* Foster, *supra* note 2, at 287.

There are two significant problems with relying on zoning laws and ordinances to

For example, in *Metromedia, Inc. v. City of San Diego*,⁸⁴ the Supreme Court held that a sign ordinance which prohibited certain types of billboards was unconstitutional because the ordinance unnecessarily burdened protected speech. In doing so, the plurality opinion noted that while the ordinance in question was not necessary in promoting the aesthetic values of the city, aesthetics were nevertheless a "substantial government goal."⁸⁵ In his concurrence, Justice Brennan observed:

I have little doubt that some jurisdictions will easily carry the burden of proving the substantiality of their interest in aesthetics. For example, the parties acknowledge that a historical community such as Williamsburg, Va., should be able to prove that its interest in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield. . . . And I would be surprised if the Federal Government had much trouble in making the argument that billboards could be entirely banned in Yellowstone National Park, where their very existence would so obviously be inconsistent with the surrounding landscape.⁸⁶

A second rationale frequently employed by courts to reject aesthetic nuisances, while acknowledging the substantial interference with the use and enjoyment of land based on aesthetic harms, is that such harms can privately be avoided through the use of restrictive covenants.⁸⁷ No one doubts that aesthetic nuisances may be avoided through restrictive covenants. The rooftop owners and the Cubs organization have opted to contract for the view right at issue in the principal lawsuit, suggesting that the market will naturally protect valuable aesthetics. Yet a landowner will not always have the financial means available

protect property views. First, both are subject to modification, and second, even if an adjoining landowner constructs a structure in violation of a building regulation which obstructs an individual's light, air or view, the individual may not be allowed to recover damages for the interference absent an easement for light, air, or view over the adjoining land; the theory being that one cannot recover damages for that to which they have no right.

Foster, *supra* note 2, at 287 (citations omitted).

84. 453 U.S. 490 (1981); *see also* *Welch v. Swasey*, 214 U.S. 91, 106-08 (1909). In *Welch*, dating back to the early twentieth century, the Court found that legislation disproportionately limiting building height throughout Boston was valid as it was enacted "for the safety, comfort, or convenience of the people, and for the benefit of property owners generally." *Welch*, 214 U.S. at 106. The Court explained, "that . . . considerations of an [a]esthetic nature also entered into the reasons for their passage, would not invalidate them." *Id.* at 108.

85. *Metromedia*, 453 U.S. at 507-08.

86. *Id.* at 533-34 (Brennan, J., concurring) (citation omitted); *see also* *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (holding that aesthetics were a substantial governmental interest which might, in appropriate cases, outweigh First Amendment concerns).

87. *Dodson*, *supra* note 80, at 14.

to the rooftop owners to purchase the easement. Additionally, private agreements are equally available for all other nuisances, yet courts do not restrict landowners to only contractual limits on nuisances. The open market could easily provide a natural limit to the interpretation of peace and quiet just as easily as it can prevent the obstruction of a view. To the contrary, however, courts do not require a homeowner to contract for quiet enjoyment with their surrounding neighbors. Furthermore, those who rely on restrictive covenants necessarily assume that nuisance law simply serves the purpose of filling gaps that other areas of the law, such as zoning and restrictive covenants, leave open. "This is simply not the case."⁸⁸ Courts have noted, for example, "that simple compliance with zoning regulations does not preclude private nuisance actions to enjoin activity on land which is a nuisance."⁸⁹

Courts that have failed to address aesthetic concerns have confused the standards for nuisance law because of their preoccupation with avoiding issues of aesthetic beauty. Yet in determining aesthetic nuisances, courts are not asked to render decisions on beauty in order to distinguish reasonable from unreasonable land uses. Rather, courts need only ascertain a reasonable use by determining whether the alleged aesthetic nuisance is out of conformity with existing land use in the surrounding community.⁹⁰ Judicial recognition of aesthetic nuisances is therefore long overdue. Courts and legislatures alike have recognized the role of aesthetics throughout the law, and there is no longer justification for a flat rule prohibiting the reach of nuisance law into aesthetic concerns.⁹¹

C. Instant Replay: Recognizing Public Policy from Aldred to Prah

There are really two vantage points from which one can assess history's treatment of easements to light, air, and view. The first, and seemingly the easiest answer, would be to look upon the respective pronouncements as establishing foundational principles of common law that serve as the basic legal structure around which courts can base future decisions. That is, to say the "law" of historic England with respect to easements was ancient lights but not ancient views, and the American "law" has been that there are no light, air, or view easements. In either instance, the distinguishing case law would serve as only fact-based exceptions to the steadfast rules. A second look, the "instant replay," would suggest that the respective decisions were not the foundation itself, but rather only interpreted the real underlying "law" of nature's easements and applied it to the overarching context of the particular time. The latter view implies a common thread running from the earliest common law to the present. In taking the second look and juxtaposing the major decisions of the respecting periods, it becomes evident that the easier answer is that property rights in light,

88. *Id.* at 15.

89. *Id.*

90. *Id.* at 18.

91. *Id.* at 21.

air, and view have, in fact, consistently been recognized or rejected based on the public policy needs of the respective times.

The *Prah* court recognized that “[w]hat is regarded in law as constituting a nuisance in modern time would no doubt have been tolerated without question in former times.”⁹² In terms of rights in light, air, and views, the change has always hinged on society’s growing needs. The same held true even prior to the English common law, as Roman law enforced solar rights as an important source of light and heat.⁹³ Roman society’s harsh enforcement stemmed from a severe timber shortage. Public policy of the time demanded retribution of an infringement through unblocking the source of the necessity, as monetary remedies would not protect the important need at stake.

Similarly, the early English approach developed from the underlying concerns of contemporary society.⁹⁴ Solar light remained an important source of warmth and room lighting, but nascent concerns of development and growth forced some reconsideration of an absolute right to the sun’s treasures. The balance still weighed heavily in favor of light needs, but limits were placed to reflect the additional interests. The light right was essentially restricted to what was actually required and used by a landowner. Population growth [coupled with more slowly developing technologies would also attune the public’s interest to a policy of preserving unpolluted air. Views were distinguished as lacking societal necessity.

Initially, American needs in terms of light, air, and view mirrored that of their English brethren, but then something changed. The social need pendulum swung mightily to favor outright growth.⁹⁵ Air, light, and view easements would have hindered the rapid expansion inward and westward. The notion that utility and public need has always remained the underlying “rule” is evident in the courts’ continuing application of that principle. Even at the pinnacle of the United States’ supposed outright rejection of the common law, in *Fontainebleau*, the court would only permit a light obstruction where the imposing structure “serves a useful and beneficial purpose.”⁹⁶ One of the prevalent exceptions to that holding, the spite fence cases addressed in *Prah*, was little more than a balancing test weighing the purpose of the fences against the social benefits.⁹⁷ When courts decided to re-examine the contemporary relevance of the judicial application, they did so in the wake of the then obsolete unbridled growth rationale. Social welfare necessitated reinstating light easements for solar energy sources.⁹⁸

It is evident that the law of light, air, and view property rights has forever

92. *Prah v. Maretti*, 321 N.W.2d 182, 190 (Wis. 1982) (quoting *Ballstadt v. Pagel*, 232 N.W. 862 (1930)).

93. *See supra* notes 61-67 and accompanying text.

94. *See supra* notes 19-43 and accompanying text.

95. *See supra* notes 44-58 and accompanying text.

96. *See supra* note 54 and accompanying text.

97. *See supra* note 72 and accompanying text.

98. *See supra* notes 73-79 and accompanying text.

been a law of public need, the administration of which has at certain junctures throughout history changed in furtherance of our perception of the most pressing social need. The approach of leading courts has remained constant; they each weighed the benefits of light, air, and view rights in light of the overarching public policy of their time. As a result, rather than presuming the American common law regarding light, air, or view rights to be a general rejection, courts would be better served by a standard evaluating the competing considerations to determine whether public policy weighs in favor of such a right, and rule accordingly.

IV. BRICKS & IVY: THE MEETING PLACE OF HISTORY AND A VIEW

“[T]he category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.”⁹⁹

A. *A Call to the Pen: Extending Contemporary Interests to a View*

At this junction one may begin to note that this inherent public policy standard has generally only applied to permit prescriptive easement rights in light and air, while English and American courts alike have rejected view servitudes. The principle has apparently been stretched to its limits. Yet just as a baseball team refreshes pitchers late in the game to meet its redeveloping circumstances, application of easement and nuisance law needs refreshed to meet the contemporary needs of society. The view right, occupying the same position in the legal lineup, has been awaiting its chance to keep the law at pace with the public need. Where the proper balance is struck, thereby creating a view right that serves a public benefit far outweighing its restrictive costs, courts should not hesitate to extend the standard afforded light and air rights to view rights.

A view from a particular vantage point often enhances the value of that tract of land. “To see the ocean, the mountains, a forest, a lake, or a river from one’s land may be an aesthetic delight. Such a benefit, while intangible, may enhance market value, with buyers willing to pay extra for the view.”¹⁰⁰ Property owners and states alike have shown a desire to preserve land values through the protection of these financially and socially valuable views. Landowners have inundated courts across the country with a variety of lawsuits meant to protect their property views.¹⁰¹ States have recognized the interest by giving careful consideration to view obstruction when compensating individuals in eminent domain proceedings, and have taken zoning regulations “beyond the realm of health and welfare and into the realm of aesthetics and view preservation.”¹⁰²

99. DALTON, *supra* note 22, at 187 (quoting Lord St. Leonards in *Dyce v. Hay*, 1 Macq. 305 (1852)).

100. JACQUELINE P. HAND & JAMES C. SMITH, *NEIGHBORING PROPERTY OWNERS* § 5.06 (1988 & Supp. 2000).

101. Foster, *supra* note 2, at 288.

102. *Id.* at 288-89; e.g., *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d

Yet American courts have generally maintained their refusal to extend judicial protection to view rights. This reluctance stems almost entirely from the American court system's unwillingness to protect access to light and air due to their concern for impeding land development.¹⁰³ There is, certainly, nothing inherently wrong with lumping light, air, and view rights into the same genre. Easements of light and air are quite similar to view access, and the interests often coexist to a great extent. "A structure that blocks sunlight is likely also to obstruct the view, and vice versa."¹⁰⁴ Just as the three rights share common characteristics, they also have historically endured the same treatment.¹⁰⁵ Even English courts, which are generally recognized as distinguishing light and air from a view, originally treated all three as natural rights until view rights were found to lack the public necessity of light and air access.¹⁰⁶ Of course the public policy underlying the United States' refusal to protect the three rights, the need for unbridled growth, has correctly been called into question in recent years "thus opening the door to other kinds of actions for the recognition and protection of rights to light, air, and view."¹⁰⁷

The reasoning underlying the *Prah* court's extension of a private nuisance action to the obstruction of sunlight could likewise protect view obstructions while accounting for competing concerns. In *Tenn v. 889 Associates*,¹⁰⁸ the Supreme Court of New Hampshire considered whether the law of private nuisance provided the appropriate standard for examining a property owner's claim that a neighboring construction would interfere with her interests in light and air. Justice Souter, then a member of the New Hampshire court, explained necessary growth of the nuisance law's reach:

The present defendant urges us to adopt the *Fontainebleau* rule and thereby to refuse any common law recognition to interests in light and air, but we decline to do so. If we were so to limit the ability of the common law to grow, we would in effect be rejecting one of the wise

1117, 1120 (9th Cir. 1979) (noting that the general welfare was promoted by restrictions that decreased population density, that preserved available light and air, and that saved an aesthetic view enjoyed by the entire city). A broader reading often given the takings clause "may even suggest a 'right' to view, running with land ownership, when government's [sic] physically interfere with property owner's land in such eminent domain proceedings." Foster, *supra* note 2, at 284. The Supreme Court, half a century ago, recognized the relationship between aesthetics and the public interest. In determining that a city could condemn private property to rid an area of a slum and develop a more attractive environment, the Court held that, "[t]he concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

103. Foster, *supra* note 2, at 289.

104. HAND & SMITH, *supra* note 100, § 5.06.

105. Foster, *supra* note 2, at 270.

106. See *supra* notes 31-33 and accompanying text.

107. Foster, *supra* note 2, at 289.

108. 500 A.2d 366 (N.H. 1985).

assumptions underlying the traditional law of nuisance: that we cannot anticipate at any one time the variety of predicaments in which protection of property interests or redress for their violation will be justifiable That is, because we have to anticipate that the uses of property will change over time, we have developed a law of nuisance that protects the use and enjoyment of property when a threatened harm to the plaintiff owner can be said to outweigh the utility of the defendant owner's conduct to himself and to the community.¹⁰⁹

Both the *Prah* and *Tenn* courts stressed the necessary and inherent nature of nuisance law to adapt to contemporary needs and fundamentally serve to protect broad land enjoyment.¹¹⁰ Extending private nuisance to view interests would allow courts to apply the public policy standard on a case-by-case basis, balancing the utility of the conduct inhibiting the view against the actual and communal harm caused by such conduct.¹¹¹

Of course, a view across a neighbor's property may have value beyond the oft cited aesthetic significance. In *Justice v. CSX Transportation, Inc.*,¹¹² the Seventh Circuit relied on nuisance law to protect sightlines from an automobile. In that case, a large building coupled with several parked railroad cars obstructed a motorist's view of an oncoming train.¹¹³ In a wrongful death action, the court imposed on the building owner a duty not to obstruct sightlines so as to create an unreasonable risk of injury to highway users.¹¹⁴ Writing for the court, Judge Posner examined the case as a land use conflict between two neighbors. "The neighbor in this case is Jasper County, which owns the road on which Justice was killed. . . . The [defendant] was interfering with the use of a neighbor's land, the county's; the estate of Justice sues in effect as the county's surrogate."¹¹⁵ The court relied on general principles of nuisance and negligence to protect the "neighboring view," explaining that "[t]he law requires a reasonable

109. *Id.* at 370.

110. Foster, *supra* note 2, at 292; *see also* Foley v. Harris, 286 S.E.2d 186, 190-91 (Va. 1982) ("The phrase 'use and enjoyment of land' is broad. It comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself.").

111. *Cf.* Foster, *supra* note 2, at 292-93. *But see* HAND & SMITH, *supra* note 100, § 5.06 ("The *Prah* approach to solar access could be extended to views, but this extension is unlikely. In the solar context, the harm to the user of sunlight is in large part the capital expenditure for solar facilities that are worthless without light. A landowner who has enjoyed a favorable view, however, generally has not incurred a similar expense in reliance upon the continued availability of the view.").

112. 908 F.2d 119 (7th Cir. 1990).

113. *Id.* at 121.

114. *Id.* at 124.

115. *Id.* at 123-24.

accommodation of competing land uses, rather than the surrender of one user to another."¹¹⁶ The concept of granting recognition of view rights in a landowner whose property abuts a public street is a significant exception to "otherwise rigid rules allowing for creation of a right to view in the limited circumstances of an express grant or covenant, and it tends to suggest that courts have gone too far in holding that absent such a grant or covenant no right to view exists."¹¹⁷

Over seventy-five years ago the Supreme Court recognized that "with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."¹¹⁸ View rights are one such problem which may often require additional use restrictions. They often represent valuable interests both aesthetically and to the public's health, safety, and welfare. The *Prah* court's observation is equally applicable here:

Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners' disputes about property development [today] than is a rigid rule which does not recognize a landowner's interest in access [to a view].¹¹⁹

As a result, where a strong public policy supports a right to an unobstructed view, courts should apply nuisance law to protect that interest.

B. The National Pastime: A Policy of Preserving History and Its Aesthetic Value

"[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."¹²⁰

It is not suggested that a right to a view should extend to a landowner whenever there is significant value invested in the view and relied upon by the owner. The standard advocated here is not one of balancing the potential value neighboring owners stand to gain or lose from the blocking of a view. Rather,

116. *Id.* at 124.

117. Foster, *supra* note 2, at 281. *But see* HAND & SMITH, *supra* note 100, § 5.06 (arguing that the public county should not be endowed with uncertain common-law property rights to limit visual obstructions since it can impose building restrictions and setbacks to achieve the public interest in protecting sightlines).

118. *Village of Euclid v. Ambler Realty Co.*, 72 U.S. 365, 386-86 (1926) (continuing that the application of constitutional guaranties "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation").

119. *Prah v. Maretti*, 321 N.W.2d 182, 190 (Wis. 1982).

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

the interest should only be protected where society stands to suffer a great public loss from restricting such views. A landowner would still need to demonstrate a public policy strong enough to outweigh the neighboring interests in creating any view impediment. One such interest recognized consistently by courts and legislatures alike, the public policy of preserving history and its aesthetic value, provides an example of a societal need sufficiently compelling to impose the protection of a view.

The preservation of historical value is in no way a new concept in American law. Stretching its roots back to the late nineteenth century, the preservation of historically and culturally significant sites, buildings, and structures as an established national policy has been proclaimed since the early twentieth century.¹²¹ Though the policy has continually existed, the nation's preoccupation with expansion and development somewhat clouded the public's interest until the latter part of the twentieth century.¹²² Today, however, with the declining need for unhindered expansion and development, the American public has become increasingly more protective of historical structures and communities.¹²³ What has always been an important public policy has in many contexts evolved into a strong public need.

The early American ideal of historic preservation can be characterized as an aspiration of "patriotism and civic education."¹²⁴ The government's initial involvement took the form of specific acts, passed by Congress, designating particular spaces as national monuments to prevent the destruction of national treasures.¹²⁵ As requiring such individual acts proved more and more cumbersome, Congress passed the Antiquities Act of 1906,¹²⁶ giving the President the administrative authority to designate historical sites and properties.¹²⁷ The 1906 Act, however, was limited to federal lands and served only to protect national landmarks and structures "from destruction by individual looters and exploiters."¹²⁸

Ultimately, the Antiquities Act proved to be too limited for the purposes of historic preservation, even in the growth-focused circumstances of its time. The

121. Joe P. Yeager, *Federal Preservation Law: Sites, Structures & Objects*, 8 WIDENER L. SYMP. J. 383, 383 (2002). Preserving historical property can be defined as "protecting and encouraging the restoration of historically significant buildings and city districts from haphazard destruction and over neglect." *Id.*

122. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 474 (1981).

123. Yeager, *supra* note 121, at 384 ("In short, there seems to be something for everyone in historic preservation."); Rose, *supra* note 122, at 476.

124. Mark D. Brookstein, Note, *When History is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1853 (2001) (citing Rose, *supra* note 122, at 479-80).

125. Yeager, *supra* note 121, at 387.

126. 16 U.S.C. §§ 431-433 (2000).

127. Yeager, *supra* note 121, at 387.

128. *Id.* at 388.

federal government therefore enacted the Historic Sites, Buildings, and Antiquities Act of 1935,¹²⁹ which sought to enlarge the scope of historic preservation.¹³⁰ The 1935 Act expanded the federal commitment to preservation and protection of historic treasures regardless of their location, and for the first time declared a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."¹³¹ The buildings and structures needed only to be "nationally significant and *preserved for [a] public benefit*" to be protected.¹³² Congress supplemented the 1935 Act with the National Trust for Historic Preservation Act of 1949,¹³³ which created a non-profit corporation to serve as a collection point for public efforts and donations in preserving the national historic interest.¹³⁴

As concerns for historic preservation matured, a second theme developed which shifted concentration from largely patriotic significance to a focus on aesthetic issues and recognizing the significance of areas and communities rather than merely structures.¹³⁵ This era witnessed the arrival of "historic districting for aesthetic and [even] economic purposes"¹³⁶ and is embodied in the passage of the National Historic Preservation Act of 1966.¹³⁷

Congress enacted the National Historic Preservation Act as a response to the "destruction of [many] aging, but historically significant, buildings [in] the economic boom following World War II."¹³⁸ Of course, "historic preservation has always been a thorn in the side of developers and private landowners."¹³⁹ The Act's legislative history captures the tension between urban development and preservation, a common theme in most American property rights issues:¹⁴⁰

[M]any [significant structures] which are worthy of protection because of their historical, architectural, or cultural significance at the community, State or regional level have little protection given to them against the force of the wrecking ball. . . . It is important that they be brought to light. . . . Only thus can a meaningful balance be struck between preservation of these important elements of our heritage and

129. 16 U.S.C. §§ 461-467.

130. Brookstein, *supra* note 124, at 1856.

131. Yeager, *supra* note 121, at 388-89 (citation omitted).

132. *Id.* at 389 (emphasis added).

133. 16 U.S.C. § 468.

134. Yeager, *supra* note 121, at 390. "The National Trust continues to be a public spokesman for historic preservation and is easily the most visible proponent of conservation and legal issues surrounding historic preservation law." *Id.* at 390-91.

135. Brookstein, *supra* note 124, at 1857.

136. *Id.*

137. 16 U.S.C. §§ 470 to 470x-6.

138. Yeager, *supra* note 121, at 391.

139. *Id.* at 384.

140. Brookstein, *supra* note 124, at 1860.

new construction to meet the needs of our ever-growing communities and cities.¹⁴¹

Yet the growing strength of the public interest tipped the balance in favor of preservation. Congress declared in the Act that “the spirit and direction of the Nation are founded upon and reflected in its historic heritage” which “should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”¹⁴² They continued, “the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.”¹⁴³ The overarching effect of the 1966 Act was to broaden the preservation scope to include properties of state and local importance and to add districts and cultural values as objects deserving protection¹⁴⁴

A third and still emerging stage of historic preservation has shifted the focus “to consideration of how the physical environment relates to the community and the individual’s place within that community.”¹⁴⁵ This new characterization stresses the “‘sense of place’ that older structures lend to a community, giving individuals interest, orientation, and sense of familiarity in their surroundings.”¹⁴⁶ The roots of this posture are evident in the legislative history of a 1980 amendment to the National Historic Preservation Act:

First and foremost . . . the goal of historic preservation is to provide the citizens of our nation with an understanding and appreciation of their cultural origins and heritage. It is to foster a long-range perspective of our human use of the land and its resources, of the development of our communities and politics, of our technologies and arts. It is directed toward protection and enhancement of modern remnants of our architectural and engineering traditions—for our immediate appreciation and use—and of the heritage information that is inherent in our prehistoric and historic resources—which serve to tie us to the lessons and achievements of the past. Historic preservation does not inhibit appropriate development. It is, rather, a partner, one that has proven its effectiveness.¹⁴⁷

Professor John Nivala has captured this growing recognition in discussing the community importance of what he calls our “built environment.”¹⁴⁸ Nivala explains that our communities’ structures “engage[] more than our aesthetic

141. H.R. REP. NO. 89-1916 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3307, 3309.

142. 16 U.S.C. § 470.

143. *Id.*

144. Yeager, *supra* note 121, at 391.

145. Brookstein, *supra* note 124, at 1862 (citing Rose, *supra* note 122, at 489).

146. Rose, *supra* note 122, at 480.

147. H.R. REP. NO. 96-1457 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6384.

148. Nivala, *supra* note 1, at 1.

sense. It engages all of our senses, it awakens our memories, it fuels our aspirations. This built environment is more than just depiction; it is representation. We ascribe personal and cultural meanings to the significant structures of our built environment."¹⁴⁹ He reasons that society's preservation needs are more extensive than considering individual monuments, buildings, and structures. Rather, "[w]e need, individually and culturally, an environment" that serves as our "orientation and identification, individually and culturally," and "which is not simply well organized but poetic and symbolic as well."¹⁵⁰

Nivala premises the importance of preserving a well built environment on its "connect[ion] with the people who inhabit it. These structures meet the inhabitants' basic biological needs for light and air, for seeing and hearing, their cultural needs for strong integrative symbols, and their individual psychological need for a sense of place."¹⁵¹ What gives a structure environmental significance "depends not only on its relationship to other structures but also its relationship to those who come together in that environment,"¹⁵² because although "a building has physical boundaries, its meaning and value depend on its relationship to the city outside them."¹⁵³ Our cities are more than mere aggregations, they are "creations 'of imagination, a collectivity of associations assembled over time in response to human need and aspirations,'" associations that can be "kept intact by preserving their physical hosts,' the structures which can be viewed."¹⁵⁴ Thus, a particular place is "a qualitative, 'total' phenomenon which we cannot reduce to any of its properties, such as spatial relations, without losing its concrete nature out of sight."¹⁵⁵

Of course, not all structures and their "places" merit such recognition. Significant structures are those that "define the very character of our surroundings. It is not because the structure is singularly beautiful, but because it has contributed to 'the actual beauty of the strong, finely detailed, self-assured place.'"¹⁵⁶ Nivala recognizes a two-fold inquiry into determining what places should be protected:

The standards governing selection "should address two considerations: validity of the claim that an environmental feature has actually become an icon in the community mind; and the likelihood that it is amenable to regulation by the land use tools employed in aesthetic regimes." The

149. *Id.* at 2.

150. *Id.* at 5-6.

151. *Id.* at 12.

152. *Id.* at 8.

153. *Id.* at 54.

154. *Id.* at 13 (citing JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* 86 (1989)).

155. *Id.* at 10 (citing CHRISTIAN NORBERG-SCHULTZ, *GENIUS LOCI: TOWARDS A PHENOMENOLOGY OF ARCHITECTURE* 7-8 (1980)).

156. *Id.* at 8 (quoting PAUL GOLDBERG, *THE CITY OBSERVED, NEW YORK: A GUIDE TO THE ARCHITECTURE OF MANHATTAN* 55 (1979)).

standards governing protection “should take into account the distinctive features of the icon in question and should be drawn to prevent or minimize associational dissonance between that icon and prospective aliens.”¹⁵⁷

The only places that merit protections are those that have achieved significant status. “[T]hey must be landmarks.”¹⁵⁸ There remains, also, the ever present cost-benefit analysis, ensuring that “self-interest does not waste a resource that benefits everyone or creates a situation that, by its disruption, harms the greater number.”¹⁵⁹

When a place does have the aura of significance, its preservation can prove exceedingly valuable to society. The preserved built environment “serves as both a record of the past and our pronouncement to the future.”¹⁶⁰ Whether individual or social, “once that certain construct ‘establishes itself in an actual place, it has a peculiar way of muddling categories, of making metaphors more real than their referents; of becoming, in fact, part of the scenery.’ Those constructs are a key to understanding ourselves and our position in our culture.”¹⁶¹ Such structures provide society with stories about “their own making, . . . the historical circumstances under which they were made, and . . . they also reveal truth.”¹⁶² Respecting these places “recognizes the power of our past—its ideas, values, and culture—to inform our present ideas, values and culture,”¹⁶³ without which “our built environment loses ‘those qualities which allow for man’s sense of belonging and participation.’”¹⁶⁴

Nivala concludes that “we cannot develop an individually and culturally sustaining identity in a constantly recreated environment.”¹⁶⁵ The societal importance of preservation is evident:

The structures—new and old—of our built environment affect our well being by encouraging, supporting, and enriching our ‘vivid sense of the present, well connected to future and past, perceptive of change, able to manage and enjoy it.’ Those structures of our built environment make sense only in relation to each other, ‘in combination, . . . in context, [and] in time.’ Our built environment cannot be a static environment because it is inhabited; it must respond to the changing and expanding needs of the inhabitants without destroying their sense of place. To conclude that ‘[o]ur past is inextricably linked to our future’ does not

157. *Id.* at 29 (quoting COSTONIS, *supra* note 154, at 84).

158. *Id.* at 30.

159. *Id.* at 24.

160. *Id.* at 54.

161. *Id.* at 10 (quoting SIMON SCHAMA, *LANDSCAPE AND MEMORY* 61 (1995)).

162. *Id.* at 14 (quoting NORBERG-SCHULTZ, *supra* note 155, at 185).

163. *Id.* at 4.

164. *Id.* at 8 (quoting CHRISTIAN NORBERG-SCHULZ, *ARCHITECTURE: MEANING AND PLACE: SELECTED ESSAYS* 181 (1988)).

165. *Id.* at 53.

mean that the past is a burden on that future. Preservation is not paralysis.¹⁶⁶

Preservation today should therefore focus not on individual structures, but rather in “the management of change in our built environment,”¹⁶⁷ and recognize the effect the experience of an entire “place” can have on our social well-being.

A great deal of historical protection has grown out of state and local efforts. State and local governments are more attuned to the significance of both historic buildings and districts, and often offer greater protection from the destruction of significant places by imposing civil and even criminal penalties against violators.¹⁶⁸ Take, for example, the policies of the State of Illinois, the setting of the principal lawsuit:

It is hereby found and declared that in all municipalities the movements and shifts of population and the changes in residential, commercial, and industrial use and customs threaten with disappearance areas, places, buildings, structures, works of art and other objects having special historical, community, or aesthetic interest or value and whose preservation and continued utilization are necessary and desirable to sound community planning for such municipalities and to the welfare of the residents thereof. The granting to such municipalities of the powers herein provided is directed to such ends, and the use of such rights and powers for the preservation and continued utilization of such property is hereby declared to be a public use essential to the public interest.¹⁶⁹

More locally, the City of Chicago requires that “[c]onstruction work on landmarks requires a city permit and must be approved by the Commission on Chicago Landmarks to ensure it does not detract from the significant historical and architectural features of the building or district.”¹⁷⁰

Of course, the judiciary also has had its say in elevating the societal importance of, and community need for, historic preservation. The courts have, in general, long determined that the government has broad authority over land use, as long as the proposed use benefits the public.¹⁷¹ The more specific question of whether the government’s protection of historic places “constitutes a valid public purpose was at the heart of the first significant preservation legal case.”¹⁷² In *United States v. Gettysburg Electric Railway Co.*, the Supreme Court held that preservation of a historic battlefield by Congress constituted a public

166. *Id.* at 41-42 (citations omitted).

167. *Id.* at 39.

168. Yeager, *supra* note 121, at 385.

169. 65 ILL. COMP. STAT. 5/11-48.2-1 (2004).

170. City of Chicago Department of Planning & Development, Landmark Designation Program, available at <http://www.egov.cityofchicago.org> (last visited Feb. 25, 2005).

171. Yeager, *supra* note 121, at 400.

172. Christopher J. Duerksen, *Is Preservation a Valid Public Purpose*, in 2 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 19:3 (4th ed. 2004).

purpose.¹⁷³ In a case to condemn private land for the creation of a national battlefield, the Court rejected a constitutional challenge which claimed the taking was not a public purpose, finding that there existed fundamental implication of necessity. “Thus, for the first time, the Supreme Court ruled that preservation of a historic site was a valid exercise of government power”¹⁷⁴

Virtually every state court taking up preservation challenges has also rejected the argument that there was not a public need.¹⁷⁵ The Massachusetts Supreme Court, for example, held half a century ago that the establishment of a historic district was justified as an act for the promotion of the public welfare.¹⁷⁶ The court further opined that more weight should be “given to aesthetic consideration.”¹⁷⁷ In an extension of the validation of visual protection, “the Massachusetts Supreme Court noted the rationale that tourists wanted to see the area as it had always looked.”¹⁷⁸

In the much publicized *Penn Central Transportation Co. v. City of New York*,¹⁷⁹ the Supreme Court finally “laid to rest the notion that aesthetic considerations alone are not a proper basis for the use of the government’s police power in a preservation context,” thus settling that preservation facially serves a valid public purpose.¹⁸⁰ Justice Brennan, writing for the Court, recognized the positive effects that the preservation of aesthetic qualities can have on the community at large. “[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.”¹⁸¹ One commentator explained the significance of Brennan’s opinion:

While Justice Brennan clearly refers to aesthetics in the sense of quality and beauty, by including the word ‘cultural,’ a broader reading of aesthetics is implied. What is important in preserving cultural heritage rests in preserving the particular aesthetic that an area may have. While this may include exquisite architecture, it is not limited to such, and may encompass the preservation of an aesthetic that makes the area culturally

173. 160 U.S. 668, 680-81 (1896).

174. Duerksen, *supra* note 172. Note, though, that “[p]reservation and aesthetic regulation did not begin to stand on its own two feet until a 1954 U.S. Supreme Court decision, *Berman v. Parker*, an urban renewal case, announced strong support for government action based on aesthetics.” *Id.* (citing *Berman v. Parker*, 348 U.S. 26 (1954)); *see also supra* note 102.

175. Duerksen, *supra* note 172.

176. Opinion of the Justices to the Senate, 128 N.E.2d 557, 562 (Mass. 1955).

177. *Id.* at 561.

178. Rose, *supra* note 122, at 507; *Opinion of the Justices to the Senate*, 128 N.E.2d at 562 (“[T]hat the sedate and quaint appearance of the old island town has to a large extent still remained unspoiled and in all probably constitutes a substantial part of the appeal . . .”).

179. 438 U.S. 104 (1978).

180. Duerksen, *supra* note 172.

181. *Penn Cent.*, 438 U.S. at 108.

or historically significant. A factor thus emerges that considers the particular aesthetic of the area where the historically or culturally significant activity took place.¹⁸²

The Court therefore decided that preservation control on Grand Central Station did not amount to a "taking" even though the owners lost millions of dollars in leasing arrangements.¹⁸³

In short, preservation serves an important and necessary public purpose of "strengthen[ing] local community ties and community organization."¹⁸⁴ Preservation should not be "merely about preserving buildings or structures, but [should also be] concerned with preserving a historical essence or importance."¹⁸⁵ While society may not be able to "designate every square inch of an area where a significant activity took place," it is possible to determine the "focal point, or axis" around which communities find their important ties and sense of awareness.¹⁸⁶ Such an important public need would serve as the basis for preserving an unobstructed view that carried the requisite social significance.

C. Rounding Third: The Historic Value and Preservation of the Rooftop Views

The table has been set. The epoch of light, air, and view property rights have been reconsidered, revealing a consistent underlying theme of adhering to public policy. A strong public policy has also been identified in this country's concern for historic preservation. What then of the forum used to reexamine the treatment of light, air, and view rights: the competing interests of the Chicago Cubs baseball organization and the Wrigleyville rooftop owners? The concluding question remains as to whether the views from the rooftops are historically significant enough that preventing their obstruction is a strong public interest. As the rooftop views are an essential part of Wrigley Field, which is a historical enshrinement representing the best of baseball, and in light of baseball's fundamental importance to American society, the answer appears to be affirmative.

Baseball's place in the heart of our nation has been well documented and needs little validation here. The Supreme Court itself declared over thirty years ago that "[b]aseball has been the national pastime for over one hundred [and fifty] years and enjoys a unique place in our American heritage."¹⁸⁷ Courts of all level and jurisdictions have elaborated on baseball's central place in our society. One of the more recent explanations of baseball's importance by a court was that

182. Brookstein, *supra* note 124, at 1858.

183. Rose, *supra* note 122, at 477.

184. *Id.* at 479.

185. Brookstein, *supra* note 124, at 1854.

186. *Id.* at 1855.

187. Flood v. Kuhn, 407 U.S. 258, 266 (1972). *But see* Keslar v. Police Civil Serv. Comm'n, City of Rock Springs, 665 P.2d 937, 946 n.1 (Wyo. 1983) (Brown, J., dissenting) ("For many years baseball was thought to be the national pastime. I now believe it to be litigation.").

“[b]aseball is as American as turkey and apple pie. Baseball is a tradition that passes from generation to generation. Baseball crosses social barriers, creates community spirit, and is much more than a private enterprise. Baseball is a national pastime.”¹⁸⁸ Whether or not a fan of the game, its extreme public importance is evident, and what is essential to baseball would likewise be a necessary part of baseball’s social magnitude.

If baseball is the nation’s pastime, then Wrigley Field is its time capsule. Baseball parks are themselves an important element of the game. A ballpark is “above all else . . . personal. It’s about relationships, with teams and the communities they serve, and memories, of special places at special times. [They are] stages upon which the game’s greatest moments have been acted out, the context around which its greatest accomplishments can be measured.”¹⁸⁹ Built in 1914, and one of the few remaining “old time” ballparks, most commentators universally agree that there is no equal to Wrigley Field.¹⁹⁰ Wrigley’s appeal is derived from its unchanging character:

While baseball’s oldest ballparks close their gates one after another, their proud structures humbled by the years, their nostalgia outdone by luxury boxes, Wrigley Field remains a time capsule of the game. It looks the same as it did on that day in 1932 when Babe Ruth called his famous home run, and will stay that way well into the next century.¹⁹¹

Wrigley field is uniquely historic, with its significance grounded upon its unparalleled and unvarying atmosphere.

“Baseball, more so than any other sport, is about experiencing the ballpark as much as the ball game[,]”¹⁹² and the rooftop views of Wrigleyville are as much a part of Wrigley Field as Wrigley Field is a part of baseball. In their response to the principal lawsuit, the rooftop owners pointed out that the rooftops have

188. *Metro. Sports Facilities Comm’n v. Minn. Twins P’ship*, No. CT 01-16998, 2001 WL 1511601, at *1 (Minn. Dist. Ct. Nov. 16, 2001).

189. RON SMITH, *THE BALLPARK BOOK: A JOURNEY THROUGH THE FIELDS OF BASEBALL MAGIC* 1 (2003).

190. See e.g., Joe Mock, *Wrigley Collection*, Baseballparks.com, at <http://www.baseballparks.com/WrigleyHistory.asp> (2005) (“[T]here has never been—nor will there ever be—the equal of this great edifice.”). In 2003, ESPN.com ran a series rating Major League Baseball’s thirty ballparks. As per Wrigley Field, columnist Jim Caple wrote that of all the places “to take foreign visitors anywhere in the United States for the very best experience this country can provide . . . three places [] are quintessentially American: Disneyland, the Yosemite Valley and Wrigley Field. . . . [Wrigley Field is] the happiest place and most beautiful location in baseball.” Jim Caple, *Wrigley’s More than a Breath of Fresh Air*, ESPN.com, at <http://espn.go.com/page2/s/baseballparks/wrigley.html> (2005). Sports Illustrated has named Wrigley Field as the sixth greatest venue in the world, calling it a “national treasure.” Mock, *supra*.

191. Mock, *supra* note 190 (quoting Associated Press article *Glorious Wrigley*, available at www.baseballparks.com/wrigleyquotes.asp).

192. IRA ROSEN, *BLUE SKIES, GREEN FIELDS: A CELEBRATION OF 50 MAJOR LEAGUE BASEBALL STADIUMS* 1 (2001).

historically been a part of the Wrigley Field experience, a contention affirmed even by the Cubs' management.¹⁹³ Commentators agree that "the surrounding neighborhood is part of the Wrigley experience."¹⁹⁴ Recognizing the rooftops' importance to the stadium, in 1937, then owner and chewing gum giant P.K. Wrigley instructed builders to design bleacher expansion so it would not interfere with the views between the rooftops and the inside of the ballpark.¹⁹⁵ He recognized then that the value of Wrigley Field's atmosphere included the allure of fans sneaking a bird's eye view from across Waveland and Sheffield Avenues. The importance of that ingredient to Wrigley Field, baseball, and ultimately our American heritage, has only grown in magnitude in this era of the new ballpark.

Clearly, Wrigley Field is a historic place deserving the public's protection. The City of Chicago has taken the initial steps to preserve the structure for future generations.¹⁹⁶ Yet, as has been explained, a structure's attachment to the community and its surroundings is an important part of the value society places on its built environment. As Professor Nivala described, although "a building has physical boundaries, its meaning and value depend on its relationship to the city outside."¹⁹⁷ The rooftop views were an important element of the Wrigley experience almost a century ago, and remain so today. Thus, they merit protection, if need be, through the sanction of the courts.

A century ago, a child could often sneak into a ballpark, climb a tree, or peer from across a building to catch a cheap glimpse of a game that belonged to them as much as to the adults paid to play it. Today, the north side of Chicago remains the only place to experience such a historic view. Of course, those sitting atop the Wrigleyville rooftops are no longer children with empty pockets, but the seats are now occupied by prosperous businesses charging top dollar for the "cheap seats."¹⁹⁸ While that abuse is no reason to permit the destruction of such historic views, it does raise an issue that has plagued many preservation situations. Through "maintenance costs and foregone income potential . . . [t]he cost of landmark preservation is being borne by landmark owners, not by society as a whole."¹⁹⁹

One equitable device, advocated by many commentators, allows courts to offset "economic hardships incurred by private landowners as a result of resource protection programs" through the transfer of development rights.²⁰⁰ This doctrine

193. Elejalde-Ruiz, *supra* note 7, at A14.

194. Sean McAdam, *When to Leave Sacred Ground*, ESPN.com, at <http://sports.espn.go.com/mlb/columns/story?id=1719986> (Jan. 27, 2004).

195. Elejalde-Ruiz, *supra* note 7, at A14.

196. *See supra* notes 13-15 and accompanying text.

197. Nivala, *supra* note 1, at 54; *see supra* note 154 and accompanying text.

198. *See* discussion *supra* Part I. Note that the fact that thousands of people a year line up to pay extreme prices for the rooftop views further augments the notion of their significance.

199. Gary L. Tygesson, *Allocating the Cost of Historic Preservation: Compensation for the Isolated Landmark Owner*, 74 NW. U. L. REV. 646, 648 (1979) (footnote omitted).

200. John J. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1062 (1975).

permits the transfer of development potential "from the host parcel to other parcels whose total development rights are thereby proportionally augmented."²⁰¹ The parties in the principal lawsuit to some extent utilized this doctrine in their settlement terms. Yet landowners may not always come to such agreements. The aforementioned agreement only guarantees the views for eight years, and still permits the Cubs organization to obstruct the views during that period at a cost.²⁰² Thus, courts may be needed to preserve such views, and the transfer of development rights doctrine is another tool available to remedy inequities that may impede a court's recognition of the social value and need.²⁰³

IV. THE CLOSER: CONCLUSION

In 1988, Wrigley Field became the final Major League Baseball venue with artificial lights. The same setting now provides an appropriate forum to reassess the doctrine of ancient lights. While American courts have generally refused to recognize property rights in light, air, and views, that rejection has been nothing more than a cost-benefit analysis weighing the underlying social policies of the era. Identical considerations also buttressed the English common law development of the ancient lights doctrine and the sister property interests in air and views. The changes in this arena of the law were merely reflections of the changes in the public's current and significant needs. The basis for the American rejection of such rights, essentially the potential of unbridled growth, has now been called into question and undermined by more contemporary and pressing public interests. As public policy has in fact always been the root of rejecting or accepting property rights to light, air, and views, courts should not allow important public interests in these particular rights to be stifled by archaic concerns.

Where society places value in a view, an opening of light, or a fresh current of air, which outweighs the interest of a landowner attempting to block the view, courts should equitably adapt the scope of nuisance law. Such a strong public policy exists in the form of historic preservation. Recognized and protected as a national policy by courts and legislatures alike, preservation law has shifted its focus to the protection of more than merely significant historical structures, but also to the community and surroundings that provide a structure with a sense of place and supply society with a historical feeling of identification. The rooftop views are precisely the sort of extension the new public attitude seeks to protect. They are an identifying mark of a dying element of a national pastime. Those views represent baseball's past, and their obstruction would prove a greater loss

201. *Id.*

202. *See supra* notes 10-15 and accompanying text.

203. For a thorough discussion of transfer of development rights, see John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975).

to society than the rival revenue gains. With such an important interest at stake, courts should not hesitate to create an actionable right to an unobstructed view of Wrigley Field. In doing so, they will be in accord with *Aldred*, *Fontainebleau*, and *Prah*, in rectifying property rights in light, air, and views, with the weight of social interests.