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NOW TAKING THE FIELD, THE STATE GOVERNMENT: LANDMARK STATUS OF BASEBALL STADIUMS AS REGULATORY TAKINGS

I. INTRODUCTION

What if I said that a place that is revered by many—a place that has moved millions to tears of joy and pangs of heartache—no longer exists? Every few years, a memorable historic stadium is demolished to make way for a new luxury venue that a team can call home. Yet, for many fans, the modern stadiums lack the charm of the old ballparks. Fans see these replacements as crimes against their cultural history. Communities confront stadium proposals with cries to protect the aging giants. But, there are tremendous costs involved with historic preservation, especially the protection of sports facilities, which stand in contrast to the costs associated with preservation of residential or commercial buildings. Some ballparks' existence relies on the landmark designations implemented to protect them.

In 2004, the City of Chicago granted local landmark status to Wrigley Field¹ against the wishes of the Chicago Cubs² and Major League Baseball's Commissioner, Bud Selig.³ The designation uniquely allowed for some expansion of the stadium, while protecting a majority of Wrigley Field's distinctive characteristics.⁴ Nonetheless, the team and the city remain at odds regarding the landmark designation and the Cubs' attempts to renovate and improve Wrigley Field.⁵

In 2007, when Sam Zell purchased the Tribune Company (owner of

1. Fran Spielman, *City Makes Wrigley Landmark, Allows 200 More Seats*, CHI. SUN-TIMES, Jan. 28, 2004, at 20 [hereinafter Spielman, *City Makes*].

2. Sabrina L. Miller, *Landmark Urged for Parts of Wrigley*, CHI. TRIB., Mar. 1, 2003, at Metro N16 (“The Cubs organization has long opposed landmark designation for Wrigley Field . . .”).

3. Fran Spielman, *Selig Delivers His Pitch for Wrigley*, CHI. SUN-TIMES, Mar. 11, 2003, at 93 [hereinafter Spielman, *Selig Delivers*] (“[W]hile done in the spirit of preservation, [landmark designation] will likely precipitate the loss of Wrigley Field . . . It will be the first step toward the ultimate loss of the ballpark.”).

4. Spielman, *City Makes*, *supra* note 1.

5. Miller, *supra* note 2 (“The Cubs organization has long opposed landmark designation for Wrigley Field . . .”).

the Cubs and Wrigley Field), he announced an intention to sell the team and its historic ballpark.⁶ However, the landmark designation of Wrigley Field complicated and delayed the sales.⁷ Potential buyers are hesitant to deal with a potentially worthless property, be it a stadium without a home team or a team without a viable stadium.⁸

Much of the complication hinges on the interpretation of constitutional law regarding takings. The Fifth Amendment of the United States Constitution provides that “[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁹ The Fourteenth Amendment mirrors the Fifth Amendment and extends the same protections against state action.¹⁰ *Penn Central Transportation Co. v. New York City*, a Supreme Court case on landmark designations as takings,¹¹ is a key precedential decision. Arguably, the landmark status of Wrigley Field does not fall within the permissible landmark designations set forth in *Penn Central*.¹² Therefore, such a landmark designation constitutes a regulatory taking by the City of Chicago and violates the Fourteenth Amendment. Alternatively, should the Wrigley Field owner challenge the landmark designation in court, the court should consider baseball stadiums and their distinctive properties unique so that, even if *Penn Central* controlled, the landmark designation of Wrigley Field should nonetheless be considered a regulatory taking.¹³

Additionally, issues arise regarding the standards of landmark

6. Scott Merkin, *Selig Speaks on Sale of Cubs*, CUBS.COM: NEWS, Apr. 2, 2007, http://chicago.cubs.mlb.com/news/article.jsp?ymd=20070402&content_id=1875509&vkey=news_chc&fext=.jsp&c_id=chc.

7. See Michael Oneal, *Potential Wrigley Purchase by State Holds up Cubs Sale*, CHICAGOTRIBUNE.COM, Dec. 21, 2007, http://www.chicagotribune.com/business/chifri_wrigley_1221dec21,0,4672721.story (“Sam Zell, Tribune Co.’s new chairman and chief executive, indicated Thursday he’s serious enough about trying to sell historic Wrigley Field to the Illinois State Facilities Authority that he’s holding up the sale of the Chicago Cubs to see if the concept has legs.”); see also Carrie Muskat, *Wrigley Field Back on the Market*, MLB.COM: NEWS, June 10, 2008, http://mlb.mlb.com/news/article.jsp?ymd=20080610&content_id=2881746&vkey=news_mlb&fext=.jsp&c_id=mlb (stating that the sale of the Cubs would have to be delayed until after a determination of a possible acquisition of Wrigley Field by the state).

8. Mike Colias & Ann Saphir, *Zell’s Mean Curveball; Potential Cubs Owners Are Steaming Over Plan to Sell Stadium to State*, CRAIN’S CHI. BUS., Feb. 4, 2008, at 2 (“There’s no question this [stadium deal] would take away some luster for bidders[.]”).

9. U.S. CONST. amend. V.

10. U.S. CONST. amend. XIV.

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

12. See *id.*

13. See *id.*

classification and the subjective qualities courts use to determine such classifications. These issues lead to questions regarding the quality of the current precedential system. Nonetheless, without a successful challenge to the landmark status of Wrigley Field, the designation will have numerous implications on the sale of the Chicago Cubs and Wrigley Field.¹⁴

Part II of this Comment gives the historical background of Wrigley Field, including its cultural importance, the business considerations of the aging stadium, and the legal issues that have arisen in its ninety-plus years of existence. Part II also chronicles the designation of Wrigley Field as a Chicago landmark and examines the stadium's disrepair. Finally, Part II discusses the Tribune Company's fundraising attempts and its impending sale of the Cubs and Wrigley Field. Part III provides the history of regulatory takings and the current statutory and case law that creates the modern takings jurisprudence. Part IV applies *Penn Central* and subsequent cases to the Wrigley Field analysis to determine whether a taking has occurred. Part V states that the government should provide just compensation regardless of whether the landmark designation satisfied previous standards due to the unique nature of stadiums and the burdens that a landmark designation imposes on them. Finally, Part VI concludes with a discussion of the landmark status' effect on the sale of the Cubs and Wrigley Field, and looks at two other stadiums that landmark laws greatly affect.¹⁵

14. See Phil Rosenthal et al., *On the Future, Dealmaking and Bad Press*, CHI. TRIB., Apr. 4, 2007, at News C1 ("On the issue of the sale of the Chicago Cubs, Zell confirmed that he may seek to sell Wrigley Field separately. He acknowledged that Wrigley, because of its landmark status, is a tricky, single-use piece of property.").

15. Federal landmark designations require owner approval, making a "takings" argument by the federal government under the Fifth Amendment a nonissue. See *infra* Part VI. Additionally, a takings argument might not be the only assertion the Cubs could make under the Fourteenth Amendment against Chicago's landmark designation. "Sign control ordinances are particularly susceptible to First Amendment attacks" in regards to aesthetic-based regulation, JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 557 (2d ed. 2007), a key justification of landmark preservation laws. See *Penn Cent.*, 438 U.S. at 131–32 (stating that landmark laws exist to preserve a historic or aesthetic interest within a city). However, this is beyond the scope of this Comment.

II. WRIGLEY FIELD

A. Birth of “The Friendly Confines”¹⁶

Wrigley Field was built in 1914 on the grounds of a former seminary, at the corner of Addison and Clark in the community of Lakeview, now affectionately known as “Wrigleyville.”¹⁷ Originally known as Weeghman Park, Wrigley Field housed Federal League baseball from its inception until the league folded in 1915.¹⁸ In response to the league folding, Charles Weeghman purchased the National League’s Cubs and moved the team into his new ballpark.¹⁹ In 1920, Weeghman sold the team to the Wrigley family, and the field was subsequently renamed Wrigley Field in 1926.²⁰ Over the next seventy-five years, many of Wrigley Field’s unique characteristics took shape.²¹ For instance, in 1937, Bill Veeck, a Cubs executive who would later own the Cleveland Indians, planted ivy at the base of the distinctive brick outfield wall.²² This same year, the Cubs installed the original manual scoreboard and constructed the outfield bleachers.²³

In 1968, a Wrigley Company stockholder unsuccessfully sued Philip K. Wrigley for his refusal to install stadium lights to facilitate night games, which were standard throughout the major leagues.²⁴ Thereafter, not much occurred in Wrigleyville until 1981 when the Tribune Company purchased the Chicago Cubs and Wrigley Field from the Wrigley family and began

16. “The Friendly Confines” was a nickname given to the stadium by Cubs Hall of Fame shortstop Ernie Banks. In 1985, the National Park Service conducted a theme study on recreational facilities and their qualifications as federal landmarks. See generally JAMES H. CHARLETON, NAT’L PARK SERV.: DEP’T OF THE INTERIOR, RECREATION IN THE UNITED STATES: NATIONAL HISTORIC LANDMARK THEME STUDY 23–32 (1986) (providing a general overview of Wrigley Field’s characteristics and history before the lights).

17. *Wrigley Field History*, CUBS.COM: BALLPARK, <http://chicago.cubs.mlb.com/chc/ballpark/index.jsp> (last visited Mar. 8, 2009); see generally *Chi. Nat’l League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245, 1248 (Ill. 1985) (providing a basic description of the location of Wrigley Field, as well as the nature of the surrounding neighborhood and inhabitants); CHARLETON, *supra* note 16, at 23–32.

18. *Wrigley Field History*, *supra* note 17.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. See generally *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. 1968) (deciding a stockholder did not have the right to sue a majority owner for negligence and mismanagement comparable to other industry members).

renovations to the old ballpark, which included adding lights.²⁵ The Tribune Company created new administrative offices behind home plate and remodeled the clubhouses throughout the off-seasons.²⁶ In addition, the Tribune Company added or remodeled elevators, private boxes, and press and broadcasting booths.²⁷

B. The Light Fight and the Start of the Cubs' Battle with the Tribune Company

From 1914 to 1988, Wrigley Field fans witnessed hundreds of baseball's most memorable moments, including Babe Ruth's purported "called shot" during the 1936 World Series.²⁸ However, the Tribune Company-owned Cubs began to encounter opposition from the community and the City of Chicago about the addition of lights, setting the stage for multiple other spats between the two sides.²⁹ In 1985, the Tribune Company and the Cubs sought to enjoin the Governor of Illinois from enforcing an amendment to a local ordinance that effectively outlawed night baseball at Wrigley Field.³⁰ The court found the provision valid, forcing the Cubs to negotiate with the city to repeal the ordinance.³¹ The Cubs threatened to leave Chicago—or at least Wrigley Field—if they could not reach a compromise.³² The Cubs claimed that without the lights (a standard fixture in every other ballpark in the major leagues), the team could not play night games, and it would not be economically viable to continue playing in the old ballpark.³³ During negotiations, the "Citizens United for Baseball in the Sunshine (CUBS)," an organization composed of local residents, staged heavy opposition that led to an advisory referendum on the ballot, and voters overwhelmingly opposed installing lights at the stadium.³⁴ Nonetheless, the Cubs organization was able to broker a compromise with the city for a limited night schedule.³⁵ With newly

25. *Wrigley Field History*, *supra* note 17.

26. *Id.*

27. *Id.*

28. *Id.*

29. James Strong, *Neighbors Vote No on Cubs Lights*, CHI. TRIB., Mar. 17, 1988, at C11.

30. *Chicago Nat'l League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245, 1247 (Ill. 1985); *see* CHI., ILL., MUN. CODE §4.156-430 (2008) (listing the current ordinances regarding night baseball).

31. Ted Bauer, *A Brief History of Wrigley Field (Before the Lights)*, ESPN THE MAGAZINE, available at <http://sports.espn.go.com/espnmag/story?id=3518172> (last visited Mar. 8, 2009).

32. *Id.*

33. *Id.*

34. Strong, *supra* note 29.

35. Bauer, *supra* note 31.

erected lights at Wrigley Field, the Cubs played its first home night game in August of 1988.³⁶

The quest for an increased night schedule was one of the many challenges the Tribune Company faced over the next ten years as it attempted to keep Wrigley Field and the Chicago Cubs economically viable. In 2000, as the Cubs organization was proposing adding additional seating to the stadium, “[t]he Commission on Chicago Landmarks [(Commission)] . . . granted preliminary landmark status to Wrigley Field, meaning the panel will review any proposals to remodel or demolish it.”³⁷ This preliminary designation sent the city and the team scurrying to accomplish their respective goals.³⁸ “City Planning Department officials want the special status conferred on the entire ballpark while the Cubs prefer the designation of specific features, such as the distinctive old-fashioned scoreboard, the ivy-covered outfield walls and the neon Wrigley Field sign on the park’s exterior.”³⁹ Landmark status would essentially give the City of Chicago complete control over any proposed renovations. Thus, the Cubs would be forced to negotiate with the City on the extent of the landmark designation or force the Commission to apply a blanket designation to the entire property through a public vote.⁴⁰

During negotiations, the animosity between City Hall and the Tribune Company emerged in the form of political maneuvering and verbal sparring between the two parties. For instance, the City of Chicago and Mayor Daley attempted to force the Cubs’ hand by claiming that a parcel of land adjacent to Wrigley Field, significant in the Tribune Company’s proposed expansion of Wrigley Field, was in fact owned by the city.⁴¹ Even though the company had acquired a deed for the land and paid taxes for twenty years on the property, the City claimed that this land was a street that was never vacated, and, therefore, was not the previous owner’s land to sell.⁴² Since the Tribune Company’s title insurance did not protect it from

36. *Id.*

37. *Cubs*, ST. PETERSBURG TIMES, Nov. 3, 2000, at 3C.

38. Carol Slezak, *Cubs Off-Field Strategy Not Winning, Either*, CHI. SUN-TIMES, Oct. 1, 2002, at 103 (“But ever since the city announced its intention to make Wrigley Field a Chicago landmark, the Cubs have scurried to expand the stadium’s bleacher section—the idea being that once the landmark designation becomes permanent, any changes to the ballpark will be subject to approval by the landmark commission.”).

39. Gary Washburn, *Cubs Still Hoping for Landmark Deal*, CHI. TRIB., Aug. 29, 2001, at Metro N2.

40. *Id.*; see also CHI., ILL., MUN. CODE § 2.120-650 (2008).

41. Gary Washburn, *City Throws a Curve at Plans for Wrigley*, CHI. TRIB., Aug. 24, 2001, at Metro N1 [hereinafter Washburn, *City Throws*]; Editorial, *Stuck on First Base*, CHI. TRIB., Nov. 4, 2001, at C20.

42. Washburn, *City Throws*, *supra* note 41.

competing ownership claims from the City, Chicago's ownership of the parcel forced the Cubs to work with the City over landmark designation before it would negotiate the sale of the land.⁴³ In addition, the Tribune Company and the City began to exchange biting editorials, each claiming bad faith by the other party.⁴⁴ The battle intensified as the Commission on Chicago Landmarks granted permanent landmark status to the stadium,⁴⁵ handcuffing future renovations to Wrigley Field, such as improvements to the bleachers and increases in seating capacity.

C. Permanent Landmark Designation to Wrigley Field

In late 2001, the City of Chicago and the Tribune Company tentatively agreed to a deal that limited the scope of the proposed permanent landmark designation to include, most importantly, "the ivy on the outfield wall, the scoreboard, the marquee in front, [and] the general shape of the facility."⁴⁶ However, the Cubs' attempts to stall the designation led the City to move forward without owner approval and left the issue to a public vote.⁴⁷ Even as the process continued without the Cubs' support, the team attempted to delay every hearing and city meeting at the price of leaving the proposed Wrigley Field renovations in a state of flux.⁴⁸ Cubs president, Andy MacPhail, stated that the designation would greatly hinder the Cubs' ability to keep Wrigley Field economically viable and would ultimately lead to its demise.⁴⁹

Major League Baseball jumped into the fray as well. Commissioner Bud Selig wrote in a letter to the chairman of the Commission on Chicago

43. *Id.*

44. See *Stuck on First Base*, *supra* note 41 ("The city suddenly has great concern for the interests of building owners who rake in some \$7 million a year by holding rooftop parties on game days . . . [and] pay nothing for the entertainment that draws the rooftop crowds Mayor Daley has decided that the Cubs are the enemy."); Alicia Mazur Berg, Letter to the Editor, CHI. TRIB., Nov. 19, 2001, at Commentary N22 ("[T]he Tribune accused the city of unreasonably delaying the plans of its parent company to expand Wrigley Field. But the editorial failed to acknowledge the role of the Tribune Company in creating those delays [T]he city can't approve a project on the basis of press releases and newspaper stories.")

45. Nancy Moffett, *Panel OKs Cubs Park as Landmark*, CHI. SUN-TIMES, Apr. 4, 2003, at 16.

46. Fran Spielman, *Deal Struck on Cubs Park Landmark Status*, CHI. SUN-TIMES, Sept. 5, 2001, at 3 [hereinafter Spielman, *Deal Struck*].

47. Associated Press, *City of Chicago, Cubs Tangle Over Landmark Process*, ESPN.COM, Dec. 14, 2002, <http://assets.espn.go.com/mlb/news/2002/12/14/1476921.html>; see generally CHI., ILL., MUN. CODE § 2.120-650, 670-690 (2008).

48. See Slezak, *supra* note 38; *Cubs Landmark Hearing Planned*, CHI. TRIB., Mar. 7, 2003, at Metro SSW3 (providing examples of the Tribune Company stalling the proceedings).

49. Spielman, *City Makes*, *supra* note 1.

Landmarks that “[n]o city in America has ever used a landmarks designation as an effective means to preserve a ballpark . . . [and] while done in the spirit of preservation, [landmarks designation] will likely precipitate the loss of Wrigley Field.”⁵⁰ The faces of the Cubs organization at the time, players Kerry Wood and Sammy Sosa, also made statements suggesting that Wrigley Field either needed an overhaul or should be abandoned in favor of a new stadium.⁵¹

The public, however, voiced its support for the landmark designation as a means to protect the historical park that baseball fans had grown to cherish.⁵² The Wrigleyville neighborhood was also behind the designation, because without it, the rooftop bleachers’ sightlines could be hindered if the Tribune Company extended the stadium’s bleachers.⁵³ Additionally, local concerns regarding crime and nuisances associated with larger events led to more support for the designation.⁵⁴ Landmark advocacy groups, such as Landmarks Illinois, also threw their support behind the designation in order to permanently protect Wrigley Field from possible destruction.⁵⁵ With public approval being the bar for landmark designation, the city council assigned a permanent designation to Wrigley Field.⁵⁶ However, the

50. Spielman, *Selig Delivers*, *supra* note 3; accord Gary Washburn, *Selig Opposes Wrigley Field as Landmark; That May Bring Demise, He Says*, CHI. TRIB., Mar. 11, 2003, at Metro SSW3 (“Ballparks ‘must be flexible to address the changing desires of fans if they are to remain competitive[.]’”).

51. Paul Sullivan, *A Call for Change at Wrigley; Wood, Sosa Say Old Park Should Adapt with Times*, CHI. TRIB., Mar. 13, 2003, at Sports C6 (“[I]f they want to make the ballpark better, fans have to understand they have to make some changes,” Sosa said.”).

52. See, e.g., Jay Mariotti, *Standing Up to the Bullies*, CHI. SUN-TIMES, Mar. 13, 2003, at 118 [hereinafter Mariotti, *Standing Up*] (stating that a move out of Wrigley Field would “kill the inherent charm of the Cubs” and lead to “all those memories of yesteryear . . . vanish[ing]”).

53. See Associated Press, *Team Wants More Bleachers, Multi-Purpose Addition*, ESPN.COM, June 18, 2004, <http://sports.espn.go.com/mlb/news/story?id=1824589> [hereinafter Associated Press, *Team Wants*]. To note, some editorials and columnists attribute the bleacher expansion as part of the bitter political battle between the Tribune Company and City Hall. Likewise, Mayor Daley’s support for the building owners and the lawsuits against them, which disappeared after the landmark designation and preliminary expansions were approved, is also attributed to this cause. *Stuck on First Base*, *supra* note 41; Berg, *supra* note 44; Mariotti, *Standing Up*, *supra* note 52.

54. Associated Press, *Team Wants*, *supra* note 53. For instance, a 2008 Lake View community survey regarding proposed weekend night games at Wrigley Field cited the need for a greater police presence and traffic concerns. LAKE VIEW CITIZENS’ COUNCIL, LAKE VIEW CITIZENS’ COUNCIL (LVCC) SURVEY RESULTS ON WEEKEND NIGHT GAMES AT WRIGLEY 2 (2008), http://www.lakeviewcitizens.org/files/Weekend_Wrigley%20090508.pdf (last visited Mar. 8, 2009).

55. *Wrigley Field*, LANDMARKS ILLINOIS, http://www.landmarks.org/ten_most_2008_11.htm (last visited Mar. 8, 2009).

56. Moffett, *supra* note 45; Spielman, *City Makes*, *supra* note 1.

City allowed the team to add two hundred seats to the stadium⁵⁷ and increase the number of night games from eighteen to twenty-two by 2004, and to thirty by 2006.⁵⁸

D. Falling Concrete and Chicago's Battle with the Tribune Company

The designation of Wrigley Field as a Chicago landmark did not end the contentious relationship between City Hall and the Tribune Company; it was just the beginning. Years after the Cubs first unveiled the plans for stadium expansion, the team again tried to propose a new expansion of roughly two thousand bleacher seats, despite opposition from the community and the City.⁵⁹ However, any expansion discussions were tabled immediately upon reports to City Hall that concrete began to fall onto the seating areas within Wrigley Field.⁶⁰ Following this incident, the Cubs installed safety netting.⁶¹ Yet, questions regarding the safety of the stadium were raised leading City Hall to lash out at the Tribune Company's management of Wrigley Field with a vengeance.⁶²

As the grievances aired out in public, multiple issues regarding the stadium came to light. A 2001 report on the structural integrity of Wrigley Field cited structural defects and hazardous conditions that required immediate repairs.⁶³ The report led to questions about whether the Cubs made the recommended modifications,⁶⁴ followed by discoveries that the Cubs made repairs and changes without the proper city permits.⁶⁵ While the verbal sparring between Mayor Daley and the Tribune Company

57. Spielman, *City Makes*, *supra* note 1.

58. *Wrigley Night Games Rise From 18 to 22*, ESPN.COM, Feb. 16, 2004, <http://sports.espn.go.com/mlb/news/story?id=1732756>.

59. Associated Press, *Team Wants*, *supra* note 53.

60. Gary Washburn, *Wrigley Faces Checkup as More Concrete Falls*, CHI. TRIB., July 23, 2004, at News C1 [hereinafter Washburn, *Wrigley Faces*].

61. Associated Press, *Indians Expect DH to Recover by Spring Training*, ESPN.COM, Oct. 6, 2004, <http://sports.espn.go.com/mlb/news/story?id=1896370>. [hereinafter Associated Press, *Indians Expect*].

62. *Id.*; Gary Washburn, *Daley Won't Take Lip from Cubs; Mayor Fires Back After Comments from Team Exec*, CHI. TRIB., Aug. 25, 2004, at Metro C3 ("Daley has criticized the handling by the Cubs and Tribune Company of three incidents of falling concrete at Wrigley since June.").

63. Fran Spielman, *2001 Report Found Wrigley Defects; Engineering Firm Said Stadium Needed Immediate Repairs*, CHI. SUN-TIMES, July 30, 2004, at 3.

64. *Id.*; Fran Spielman, *Cubs: City Damaged Wrigley; Team President Says Portions of Stadium "Demolished"*, CHI. SUN-TIMES, Aug. 24, 2004, at 8 [hereinafter Spielman, *Cubs: City Damaged Wrigley*] ("[T]he Cubs made fewer repairs than the ones recommended in the 2001 report . . .").

65. Associated Press, *Indians Expect*, *supra* note 61.

intensified, the City of Chicago imposed heavy monetary fines against the team and required the purchase of retroactive permits.⁶⁶ Even though the team made the repairs necessary to keep the structure in compliance with safety and landmark requirements, the City still cited those violations.⁶⁷ Ironically, local politicians even went so far as to say that if the team was to receive permission to add seats, it should completely rebuild the outfield bleachers rather than remodel them.⁶⁸ Commentators, including a former deputy public works commissioner and the current director of the Infrastructure Technology Institute at Northwestern University, also called for the Cubs to replace Wrigley Field outright.⁶⁹

Before Wrigley Field could be reopened, the State of Illinois and the City of Chicago subjected it to a multitude of inspections.⁷⁰ On the same day the Cubs received approval to reopen Wrigley Field,⁷¹ Cubs President Andy MacPhail accused the City of coming to “the stadium . . . with jackhammers and . . . ‘demolishing significant portions’ of the park.”⁷²

By the end of the 2004, city officials informed the Cubs that the stadium needed a more permanent solution than safety netting, and they voiced their displeasure that supplemental engineering firms had not performed the requested tests.⁷³ As renovation attempts floundered, the Cubs spent the next few years trying various ways to raise funds for

66. *Id.*; Jon Yates, *City Says Cubs Closer to Getting Permits*, CHI. TRIB., Aug. 15, 2004, at Metro C1 (“Daley has repeatedly chastised the Cubs for the way the team handled the falling concrete and for failing to obtain permits for repairs. At one point, he called the team’s handling of the matter a ‘disgrace.’”); Rob Olmstead, *City Again Says Wrigley Is Safe*, CHI. DAILY HERALD, Aug. 24, 2004, at 13 (attributing the escalation of the fight between the Tribune Company and City Hall due to the *Chicago Tribune*’s reporting of multiple scandals in the Daley administration).

67. See Yates, *supra* note 66; CHI., ILL., MUN. CODE § 2.120-910(1) (2008). Section 13.200-100 even makes exception to the requirement of city permits to maintain the structure in the interest of public safety or historical preservation when given authorization by the permit director. CHI., ILL., MUN. CODE § 13.200-100 (2008).

68. Gary Washburn, *Cubs Urged to Rebuild Bleachers; Alderman Cites Age of Stadium*, CHI. TRIB., Aug. 5, 2004, at Metro W3.

69. David F. Schulz, *Replacing Wrigley Field*, CHI. TRIB., Aug. 11, 2004, at Commentary C25.

70. Jon Yates, *City Sets Deadlines for Wrigley*, CHI. TRIB., Aug. 22, 2004, at Metro C1.

71. Gary Graves, *Wrigley Field Cleared for Use*, USA TODAY, Aug. 24, 2004, at 3C.

72. Spielman, *Cubs: City Damaged Wrigley*, *supra* note 64.

73. *Official: Cubs Need Better Plan to Fix Concrete at Wrigley*, CHI. TRIB., Dec. 22, 2004, at 7; Fran Spielman, *Engineers Say Nets at Wrigley Should Remain in Place; Buildings Chief: “I need to Convince Myself What They’re Saying is Correct”*, CHI. SUN-TIMES, Dec. 21, 2004, at 8. Even with the proposed study, the City was unhappy with the lack of a permanent solution. Gary Washburn, *City Urges Better Wrigley Repairs*, CHI. TRIB., Dec. 22, 2004, at Metro C1. There were also fears that more concrete could fall. Fran Spielman, *Wrigley concrete OK for now; But Engineers Say More Pieces Could Fall, Recommend Nets*, CHI. SUN-TIMES, Jan. 11, 2005, at 50.

Wrigley Field.

E. The Tribune Company's Fundraising Efforts and Attempts to Sell the Chicago Cubs and Wrigley Field

Over the next few years, as the Cubs attempted to expand the Wrigley Field bleachers, the Tribune Company looked for new ways to raise funds as it faced financial difficulties from salary increases that outpaced revenue from the small stadium.⁷⁴ As expected, the Cubs faced opposition from the City and the public in its fundraising attempts.⁷⁵ “In 2002, Cubs executives signed a deal with Sears . . . to wallpaper the dugouts with [its] logo. [In 2004], the team added lighted signage under the scoreboard and along both the right- and left-field upper decks that included advertisers”⁷⁶ But the proposed installation of a rotating advertisement on the landmarked brick behind the plate, common in almost every other stadium, led to the opposition claiming that it would detract from the unique character of the ballpark.⁷⁷

The Cubs also could not benefit from the common revenue stream of corporate sponsorship in the form of naming rights, which cost the team up to \$10 million in potential revenue per year.⁷⁸ Although the stadium got its name from its former owner, the chewing gum company of the same name, the Wrigley Company does not use the field in any of its advertising, nor does it pay the Cubs anything for the stadium name.⁷⁹ Because the façade that welcomes Cubs fans to Wrigley is protected by the landmark designation, the Cubs organization does not have the ability to alter the sign

74. See, e.g., Jim Kirk, *Signs Pointing to an End of an Era; Ads May Hit Bricks Behind Home Plate*, CHI. TRIB., Sept. 3, 2004, at Business C1 (discussing the revenue possibilities for the Tribune Company from adding signage in Wrigley Field).

75. See *id.* (“It is likely to draw complaints from nostalgia buffs who worship Wrigley’s sun-splashed, ivy-covered outfield walls, as well as the familiar bricks behind home plate.”).

76. *Id.*

77. Jay Mariotti, *Wrigley Bricks No Place for Ad Space; Wrigley Field, Though Decaying Like a Pair of Dentures, Remains Baseball’s Most Beautiful Piece of Landscape*, CHI. SUN-TIMES, Sept. 8, 2004, at 159 (“Wrigley Field, though decaying . . . , remains baseball’s most beautiful piece of landscape. And why it would be the height of greed and arrogance if the Cubs . . . have the audacity to install a rotating . . . advertising board on the fabled brick behind home plate The Cubs can’t sell Wrigley’s timeless charm in one breath, then tatter one of its most distinctive, old-fashioned elements with a 2004 billboard.”).

78. Mary Ellen Podmolik, *This Field by Any Other Name . . . ; Would be Risky for Potential Corporate Sponsors, Experts Say*, CHI. TRIB., Mar. 4, 2008, at News C1.

79. See David Sterrett, *Wrigley Unlikely to Pay for Name; Zell Challenge Aside, Gum Maker Would Get Little from Cubs Tie-In*, CRAIN’S CHI. BUS., Feb. 4, 2008, at 2 (stating new owner Sam Zell called out the Wrigley Company for benefitting from free advertisements).

to accommodate any other sponsor.⁸⁰ One of the only options the team has to generate money via naming rights is to petition the Wrigley Company for financial support for a distinction that the company already enjoys, a proposal that the company would likely reject.⁸¹ Additionally, other sponsors would be wary to rename Wrigley Field because they may fear the possible community and public relations backlash that could result from renaming the park.⁸²

Over the years, the Tribune Company began to suffer heavy financial burdens, and in 2007, the real estate mogul Sam Zell bought the company.⁸³ To pay off a collection of debts the company had incurred, Zell announced his intent to sell both the Cubs and Wrigley Field, separately, if needed.⁸⁴ Although Zell stated that he was “probably a good enough real-estate man not to get left with the old maid,”⁸⁵ even he acknowledged that Wrigley is a difficult property to sell due to its status as a single-use property.⁸⁶ Over the next year, Zell reiterated his desire to sell naming rights to the stadium⁸⁷ and fielded a multitude of high-priced offers to purchase the Cubs.⁸⁸ Additionally, he bartered a failed attempt to sell Wrigley separately to the State,⁸⁹ a deal which would have brought both stability and its own share of burdens.⁹⁰ The pending sales have thus far

80. Podmolik, *supra* note 78 (“[L]everaging Wrigley will be more difficult because in 2004 the city granted landmark status to . . . the marquee sign at Clark and Addison, . . . limiting a sponsor’s ability to use[it].”).

81. See Sterrett, *supra* note 79 (“[I]t makes little business sense for [the] Wrigley [company] to pay millions of dollars a year for naming rights at Wrigley Field that probably wouldn’t boost gum sales.”); Podmolik, *supra* note 77 (“I don’t even think of Wrigley gum when I think of Wrigley Field[.]”).

82. Podmolik, *supra* note 78; Editorial, *Take Zell, Tribune Out of the Ballgame*, CHI. SUN-TIMES, Feb. 29, 2008, at 33 (chastising new Tribune Company owner Sam Zell for suggesting the sale of the naming rights of Wrigley Field).

83. Rosenthal, *supra* note 14.

84. Merkin, *supra* note 6; Rosenthal, *supra* note 14.

85. Rosenthal, *supra* note 14.

86. *Id.*

87. See Sterrett, *supra* note 79 (“Mr. Zell recently suggested Wm. Wrigley Jr. Co. ‘step up’ and pay for having its name on the ballpark”); Jay Mariotti, *Don’t Buy What Sam’s Zelling; Trib’s Owner’s Talk of Unloading Wrigley to State and Profiting Off Naming Rights Show that He Just Doesn’t Get the Allure of the Cubs*, CHI. SUN-TIMES, Jan. 22, 2008, at 59 (admonishing Zell for suggesting selling the naming rights of Wrigley Field).

88. See generally Associated Press, *Bidders for Cubs Narrowed to Five*, MLB.COM: NEWS, Aug. 26, 2008, http://mlb.mlb.com/news/article.jsp?ymd=20080826&content_id=3370279&vkey=news_mlb&fx=xt=.jsp&c_id=mlb&partnerId=rss_mlb [hereinafter Associated Press, *Bidders*] (providing an update of the sale process).

89. Muskat, *supra* note 7.

90. See Colias & Saphir, *supra* note 8 (discussing the burden of being saddled with decades

remained up in the air, and the landmark designation will have an effect on the ultimate fate of these deals.⁹¹

III. REGULATORY TAKINGS AND LANDMARK PRESERVATION LAWS

A. Regulatory Takings Before Penn Central

Prior to *Penn Central*, takings jurisprudence was not based on the Constitution; rather, nineteenth-century takings principles most commonly invoked “state constitutional law, natural law, and common law,” even though some state constitutions did not have compensation clauses.⁹² Nonetheless, “state courts recognized [regulatory] devaluative takings to be compensable [from] an early stage in American legal history.”⁹³ Early cases were more supportive of property owners by not requiring a complete economic value and “award[ing] compensation for the taking of any discrete property right.”⁹⁴ Additionally, early cases did not distinguish a difference between a regulatory taking and a physical invasion, regardless of the size or effect of the government’s burden on the property owner.⁹⁵ It was not until 1870 that the Supreme Court delved into the realm of regulatory takings, thereby echoing the previous state decisions that supported compensation for devaluative takings.⁹⁶ However, the Court quickly made an about-face regarding devaluative takings,⁹⁷ leaving the regulatory takings doctrine for dead in the federal system until 1922.⁹⁸

In 1915, the Court continued to ignore regulations that devalued property, even when the devaluation was almost a complete deprivation.⁹⁹

of rent payments); Editorial, *Home Field Disadvantage; Sam Zell's Scheme to Sell Wrigley Field to the State is Nothing More than a Foul Ball that Benefits Only His Cash-Strapped Tribune Co.—at Your Expense*, CHI. SUN-TIMES, Mar. 13, 2008, at 36 [hereinafter *Home Field Disadvantage*] (discussing the tax burden that could ensue from the proposed deal); Fran Spielman, *Wrigley Deal: Stability—But at a Price; It Would Keep Stadium Where It is, But Taxpayers Would Pay More in the Long Run*, CHI. SUN-TIMES, Feb. 29, 2008, at 12 [hereinafter Spielman, *Wrigley Deal*].

91. Associated Press, *Bidders*, *supra* note 88; Muskat, *supra* note 7; Oneal, *supra* note 7; Rosenthal, *supra* note 14.

92. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1229–30 (1996).

93. *Id.* at 1259.

94. *Id.* at 1259, 1290.

95. *Id.* at 1289.

96. *Id.* at 1214, 1267–74.

97. Kobach, *supra* note 92.

98. *Id.* at 1285.

99. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394, 410–12 (1915).

The Court based this on the ground that the state was exercising its police power to protect the health and safety of its residents.¹⁰⁰ However, in 1922, the Court in *Pennsylvania Coal Co. v. Mahon* reintroduced the stance that “a regulation [that] goes too far . . . will be recognized as a taking.”¹⁰¹ In that case, the Court found a taking even though the statute only restricted the petitioner from coal mining on his land.¹⁰² Nonetheless, the case was mostly confined to its facts in regards to devaluative regulatory takings until *Penn Central*.¹⁰³ The aforementioned police power, in terms of promoting the “general welfare,” was the justification the Court used, in deciding *Penn Central*, to validate landmark designation laws.¹⁰⁴

Pre-*Penn Central* landmark designation cases also supported property owners.¹⁰⁵ In *Lutheran Church in America v. City of New York*, New York’s high court ruled that a regulation under the same Landmarks Preservation Act at issue in *Penn Central* constituted a taking.¹⁰⁶ The court based its holding on the fact that the city attempted to force the owner to retain the property in its current state even though the building was wholly inadequate for its continued use as an office building.¹⁰⁷ An Illinois appellate court, in *Illinois ex rel. Marbro Co. v. Ramsey*, reversed a commissioner’s denial of a demolition permit for a landmarked building, drawing into question the commission’s authority and the appropriateness of continuing to protect a building falling into disrepair.¹⁰⁸ These cases led to the culmination of landmark preservation law and takings jurisprudence.¹⁰⁹

100. See, e.g., *id.*

101. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

102. *Id.* at 414.

103. *Id.* at 414–15; see generally *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

104. Sara Jane Herrin, Comment, *Historic Preservation in Illinois*, 1979 S. ILL. U. L.J. 449, 452 (1979); Michael P. Morrison, *U.S. Supreme Court Validates Landmark Laws*, 67 ILL. B.J. 664, 664 (1979).

105. See, e.g., *Lutheran Church in Am. v. City of New York*, 316 N.E.2d 305 (N.Y. 1974); *Illinois ex rel. Marbro Co. v. Ramsey*, 171 N.E.2d 246, 247–48 (Ill. App. Ct. 1960).

106. *Lutheran Church in Am.*, 316 N.E.2d at 307, 312.

107. *Id.* at 312.

108. *Illinois ex rel. Marbro Co.*, 171 N.E.2d at 247–48.

109. See discussion *infra* Part III.B.

B. *Penn Central and Subsequent Jurisprudence*

In 1978, the Supreme Court ruled in *Penn Central Transportation Co. v. New York City* whether historic preservation laws, namely New York's Landmark Preservation Law, constituted a regulatory taking under the Fifth and Fourteenth Amendments.¹¹⁰ Penn Central, the owner of New York's Grand Central Terminal, challenged the city's comprehensive landmark preservation ordinance after the state landmark commission designated the terminal as a landmark.¹¹¹ Under the state's landmark law, any alteration to the exterior of the landmarked structure required pre-approval by the state commission.¹¹² The burdened owner could, however, "transfer development rights to contiguous parcels on the same city block."¹¹³

Following the landmark designation, Penn Central entered a fifty-year lease with a company that wished to construct a skyscraper in the airspace above the terminal, which could have provided between \$1 million and \$3 million a year to Penn Central.¹¹⁴ When the companies applied for permission to construct the building, the commission denied the project because it would damage portions of the terminal below, despite the fact that the plans satisfied the local zoning ordinances.¹¹⁵ In response, Penn Central filed suit claiming that New York had "taken" its property in violation of the Fifth and Fourteenth Amendments.¹¹⁶

Penn Central became the leading case regarding "regulatory takings" (government intervention analogous to a physical taking by the government) requiring compensation.¹¹⁷ Although no precise rule existed as to whether the regulation was a taking,¹¹⁸ the Court ruled for the city and held that the landmark preservation scheme was acceptable in the factual situation presented.¹¹⁹ The Court first delved into the justification for landmark preservation statutes, stating that a "large number[] of historic structures, landmarks, and areas [were] destroyed without adequate consideration of either the values represented therein or the possibility of

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

111. *Id.* at 115.

112. *Id.* at 111-12.

113. *Id.* at 113-14.

114. *Id.* at 116.

115. *Id.* at 116-17.

116. *Penn Cent.*, 438 U.S. at 119.

117. Jerold S. Kayden, *Historic Preservation and the New Takings Cases: Landmarks Preserved*, 6 *FORDHAM ENVTL. L. REV.* 779, 779 (1995).

118. *Id.* at 124.

119. *Penn Cent.*, 438 U.S. at 138.

preserving the destroyed properties for use in economically productive ways.”¹²⁰ Additionally, the Court stated that there existed a “widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all,”¹²¹ specifically in the city setting.¹²²

The Court reviewed three economic factors to determine whether the regulation constituted a taking: (1) whether a physical invasion had occurred; (2) whether the regulation resulted in a complete economic deprivation; and (3) whether the regulation interfered with investment-backed expectations.¹²³ Finally, the Court analyzed whether the “state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted,”¹²⁴ thereby satisfying the requirement that the restriction was “necessary to the effectuation of a substantial public purpose.”¹²⁵

Some commentators argued that Penn Central’s attempt to invalidate the landmark designation failed because of strategic blunders on its part with regard to the economic aspect of the analysis.¹²⁶ However, previous cases had found constitutional backing for private property owners in similar situations.¹²⁷ There was no contention that a physical invasion occurred in this case,¹²⁸ and, seemingly, many of the concessions that Penn Central made may have lead to its downfall.¹²⁹ Penn Central did not contest that New York City had a legitimate purpose in protecting landmarks, nor did it dispute the fact that the terminal remained “capable of earning a reasonable return.”¹³⁰

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

121. *Id.*

122. *See id.* at 109, 129 (“The city believed that comprehensive measures to safeguard desirable features of the existing *urban* fabric would benefit its citizens in a variety of ways The New York City law is typical of many *urban* landmark laws States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a *city*”) (emphasis added).

123. *Id.* at 124; *see also* Kayden, *supra* note 117, at 780.

124. *Penn Cent.*, 438 U.S. at 125 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

125. *Penn Cent.*, 438 U.S. at 127 (citation omitted).

126. *See, e.g.*, Kayden, *supra* note 117, at 780.

127. *Penn Cent.*, 438 U.S. at 127–29; *see, e.g.*, *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (providing constitutional support for regulatory takings that do not result in a complete economic deprivation).

128. *Penn Cent.*, 438 U.S. at 124 (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program”) (citation omitted).

129. Kayden, *supra* note 117, at 780.

130. *Penn Cent.*, 438 U.S. at 129 (citation omitted).

Also, the Court stated that investment-backed expectations were not in the air rights above the terminal, but rather in the operation of the terminal as a railroad station.¹³¹ Even more damaging to Penn Central's case were the transferable development rights (TDRs) afforded to owners of the landmarked property.¹³² Due to the number of properties owned by Penn Central surrounding the Terminal, the transferable rights were valuable enough to "mitigate [the] financial burdens the law has imposed," specifically where a taking had not occurred.¹³³ Penn Central's two arguments that a taking occurred were seriously rebuked by the aforementioned considerations.¹³⁴ The Court rejected Penn Central's request to have the parcel viewed as discrete segments prior to its determination regarding whether there had been a complete economic deprivation,¹³⁵ though Justice Rehnquist dissented.¹³⁶

Penn Central also lobbied for the Court to recognize that an incomplete diminished value of the terminal was a taking by itself, but the Court refused to accept this as well.¹³⁷ The Court rejected the argument that diminution of property value by itself was not a taking in the historic-district setting, and should not apply in this situation because it applied only to select properties.¹³⁸ The Court contended that such a ruling would undermine "all comparable landmark legislation in the Nation."¹³⁹ In addition, landmark designation laws were distinguishable from "reverse spot" zoning schemes because they "embodie[d] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city," thereby satisfying the rationale for landmark preservation schemes.¹⁴⁰

Subsequent cases from the Court regarding regulatory takings provide more protections for private property owners, yet *Penn Central's*

131. *Id.* at 136 ("[T]he law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel . . . [W]e must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment.").

132. *Id.* at 137.

133. *Id.*

134. *Id.* at 119, 135–37.

135. *Id.* at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.").

136. *Penn Cent.*, 438 U.S. at 141–43 (Rehnquist, J., dissenting).

137. *Id.* at 131.

138. *Id.*

139. *Id.* at 131–32.

140. *Id.* at 132.

precedential value is not likely to dissipate anytime soon.¹⁴¹ Initially, *Agins v. City of Tiburon* provided an outcome-determinative version of the economic factors set forth in *Penn Central*, setting a two-part test that determines that a taking has occurred when the regulation does not substantially advance legitimate state interests or denies economically viable use to property owners.¹⁴² However, in the recent case *Lingle v. Chevron U.S.A. Inc.*, the Court stated that a determination of whether a regulation substantially advances a legitimate state interest cannot alone result in a taking.¹⁴³

Furthermore, the Court in *Lucas v. South Carolina Coastal Council* acknowledged the possibility of another method for private property owners to show economic harm is a taking, even without a complete deprivation of economically viable use.¹⁴⁴ The Court approved the *Agins* test regarding to complete “denial of all economically viable, beneficial, productive, or feasible use.”¹⁴⁵ Moreover, the Court suggested the possibility of a regulatory taking even without complete economic harm by engaging in an ad hoc determination of the economic factors affected by the regulation.¹⁴⁶ For the first time, the Court analyzed and questioned the “parcel as a whole” rule it adopted in *Penn Central*.¹⁴⁷ “Although the Supreme Court [subsequently] rejected this view . . . , it has since been championed by the United States Court of Appeals for the Federal Circuit in *Loveladies Harbor, Inc. v. United States*.”¹⁴⁸ The Supreme Court did not review the *Loveladies Harbor* decision, seemingly satisfied with their determination of the relevant parcel.¹⁴⁹ Finally, *Lucas* distinguishes between regulations that protect society from nuisances and regulations that

141. Kayden, *supra* note 117, at 779.

142. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Penn Cent.*, 438 U.S. at 138 n.36). However, “*Agins* fails to define exactly what is meant by economically viable use.” Kayden, *supra* note 117, at 780–81.

143. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (overturning part of the *Agins* test by finding no taking by a rent control statute that did not actually lower gas prices, the intended effect of the regulation).

144. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (“Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, ‘the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations’ are keenly relevant to takings analysis generally.”) (citation omitted).

145. Kayden, *supra* note 117, at 781 (citation omitted); accord *Lucas*, 505 U.S. at 1015–16.

146. *Lucas*, 505 U.S. at 1016 n.7, 1016–17.

147. *Id.* at 1016 n.7, 1017.

148. Kayden, *supra* note 117, at 782 (citation omitted).

149. *Id.* at 782 (citation omitted).

promote a benefit in the name of the state's police power.¹⁵⁰ The distinction causes landmark designation laws to hypothetically lose the protection of acting as an exercise of a state's police power as a justification for enforcing the state's aesthetic-based law.¹⁵¹

Other cases have tapered the effect of the *Penn Central* decision.¹⁵² *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission* provide guidance regarding exactions in permits.¹⁵³ In *Nollan*, owners of beachfront property brought suit to invalidate a condition in their land permit requiring an easement across the beach for public access.¹⁵⁴ In *Dolan*, a plumbing supply store tried to avoid dedicating a portion of the property to improve the public storm drainage system and building a bike path to comply with city restrictions.¹⁵⁵ In both instances, the Court found that the conditions amounted to takings because the exactions did not substantially advance the intended legitimate state interests.¹⁵⁶ Specifically, the Court in *Dolan* implemented a "rough-proportionality" test stating that the nature and extent of the exaction must be roughly proportional to the state interest asserted.¹⁵⁷

Nonetheless, the *Lingle* decision narrowed *Nollan* and *Dolan*, and recharacterized those decisions without disturbing their holdings.¹⁵⁸ The Court emphasized that the exactions would be a physical taking per se if the government had just ordered the property owners to turn over their property rights rather than make them a condition of the permit grant.¹⁵⁹ These rulings did not imply that there were no legitimate interests; rather, the previous decisions were partially based on the fact that the exactions

150. *Lucas*, 505 U.S. at 1023–26.

151. See Kayden, *supra* note 117, at 782 (referring to a hypothetical hierarchy of police power justifications set forth by the California Court of Appeal when determining if an inverse condemnation regulation is a taking). The police power/noxious use justification is likely not at issue with stadiums because landmark designation is not a regulation that deals with a public nuisance; rather, it is based on historical preservation. *But see* Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (showing a valid regulatory application of police power resulting in the property owner's inability to use the property for its most beneficial use).

152. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

153. See *Dolan*, 512 U.S. *passim*; *Nollan*, 483 U.S. *passim*. *But see* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1516–21 (2006) (criticizing the *Dolan* and *Nollan* decisions and the Court's inconsistent decision regarding exactions in regards to takings jurisprudence).

154. *Nollan*, 483 U.S. at 827–28.

155. *Dolan*, 512 U.S. at 379–80.

156. *Dolan*, 512 U.S. at 385–95; *Nollan*, 483 U.S. at 834–39.

157. *Dolan*, 512 U.S. at 391.

158. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546–48 (2005).

159. *Id.* at 547.

did not advance the same interests that would authorize denial of the permits.¹⁶⁰ *Lingle's* overturning of the *Agins'* "substantially advance[s] [a] legitimate state interest" factor did not affect the previous decisions in that sense, but altered the value that would be placed on the state's interest.¹⁶¹

Two recent cases further shaped the *Penn Central* regulatory takings doctrine.¹⁶² In *Palazzolo v. Rhode Island*, a landowner acquired property that was already burdened by a regulation designating certain portions of the property as protected wetlands.¹⁶³ The *Palazzolo* court made two distinctions on the constitutional aspects of the case.¹⁶⁴ First, the Court ruled that passage of title from one owner to another with the burdening regulations in place does not preclude a landowner from making an otherwise valid takings claim.¹⁶⁵ In addition, the Court stated that "[a]ssuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest."¹⁶⁶

The next case, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, dealt with temporary regulations that deprived owners of complete economic value during the period the regulation was in effect.¹⁶⁷ The Court reasoned that finding a regulatory taking for every temporary restriction would be a major burden on the government that would be expensive, encourage hasty decision making, and create logistical problems in applying a state's police power.¹⁶⁸ The Court also reaffirmed its support for *Penn Central* and the "parcel as a whole" inquiry regarding economic deprivation instead of "adopt[ing] *per se* rules in . . . cases involving partial regulatory takings."¹⁶⁹ The Court concluded that a temporary restriction of a fee simple interest was a "strand" in the bundle,

160. *Id.*

161. *Id.* at 547–48 (second alteration in original) (providing that the states' interests test is no longer a valid takings test on its own and states' interests should only be a factor in one of the four other categories, discussed *infra*).

162. See generally *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

163. *Palazzolo*, 533 U.S. at 614–15.

164. *Id.* at 629–31.

165. *Id.* at 629–30.

166. *Id.* at 630. This was not the case here, however. The landowner still was able to build a substantial residence on an 18-acre parcel of land. *Id.*

167. *Tahoe-Sierra Pres. Council*, 535 U.S. at 334–35.

168. *Id.*

169. *Id.* at 326–27. Nonetheless, the Court did support consideration of the investment-backed expectations and acknowledged that without "a 'complete elimination of value,' or a 'total loss,' . . . the kind of analysis applied in *Penn Central*" would still be required. *Id.* at 330 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

which courts must analyze as if it were merely a permanent partial deprivation of economic value.¹⁷⁰

In the most recent case, *Lingle v. Chevron U.S.A. Inc.*, discussed supra, the Court provided guidance for reviewing new cases.¹⁷¹ The Court categorized takings according to whether a regulation results in: (i) a permanent physical invasion;¹⁷² (ii) a complete economic deprivation;¹⁷³ (iii) a condition on land use that goes beyond the regulation's design;¹⁷⁴ or (iv) when it substantially impacts property interests without completely depriving an owner of viable economic use.¹⁷⁵ When the regulation does not fall into the first three categories, the regulation must be analyzed under *Penn Central* standards.¹⁷⁶

C. Federal Laws and Statutory Protections for Historic Landmarks

In 1966, in the interest of promoting the national policy towards preservation "for public use historic sites, buildings, and objects of national significance,"¹⁷⁷ Congress established the National Historic Preservation Act (Act).¹⁷⁸ The Act's goal is to maintain objects of cultural value in order to benefit the public interest.¹⁷⁹ In order to achieve this goal, the legislature also enabled the Secretary of the Interior to "maintain a National Register of Historic Places" to oversee the country's historic landmarks.¹⁸⁰

Federal landmark law is not at issue in the case of takings, despite landmarking's effects on economic value and transferability.¹⁸¹ Under the

170. *Tahoe-Sierra Pres. Council*, 535 U.S. at 342.

171. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

172. See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (stating that permanent physical invasions result in regulatory takings).

173. See supra text accompanying notes 144–50.

174. See supra text accompanying notes 153–57.

175. See supra text accompanying notes 123, 131.

176. Supra text accompanying notes 123, 131. The *Penn Central* analysis essentially has been championed as the balancing test required to make a successful partial taking claim. See Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43 (2004) (reviewing partial takings and the *Penn Central* balancing test).

177. 16 U.S.C. § 461 (2008).

178. National Historic Preservation Act, 16 U.S.C. §§ 470–470(a)(2) (2008).

179. *Id.*

180. *Id.*

181. See generally NationalParkService.gov, National Historic Landmarks Program, Questions & Answers, <http://www.nps.gov/nhl/QA.htm#7> (last visited Nov. 30, 2008) [hereinafter Questions & Answers] (explaining that landowners are able to prevent a landmark designation by objecting to the Secretary of the Interior; therefore, designations only occur with owner consent).

federal standards, if a landowner objects to the landmark designation, the Secretary of the Interior cannot designate the property.¹⁸² For instance, in 1986, the National Park Service conducted a theme study on recreation in the United States and determined that Wrigley Field was eligible for designation as a national landmark.¹⁸³ Nonetheless, because the owners of Wrigley Field objected to the designation, the landmarking did not occur.¹⁸⁴

Federal laws also encourage states and municipalities to employ their own landmark programs.¹⁸⁵ However, courts and commentators have been critical of the standards of the municipal laws regarding landmarks.¹⁸⁶ They maintain that there is a lack of set standards among city landmark procedures, which lead to differing and confusing laws countrywide.¹⁸⁷ Additionally, they argue that lax standards make it far too easy for the public or municipalities to preserve structures with little to no historical value, imposing a burden on landowners.¹⁸⁸ Finally, many of the decisions regarding landmarked buildings are left to the subjective will of politicians that may bend to political pressure.¹⁸⁹

In Chicago, the Illinois Municipal Code provides a right of landmark protection and designation to the municipalities.¹⁹⁰ The Municipal Code of Chicago highlights certain distinct factors that affect the landmarking of local structures.¹⁹¹ For instance, the Commission on Chicago Landmarks (Commission) consists of nine members, eight of whom the mayor

182. *Id.*

183. CHARLETON, *supra* note 16, at 23–32.

184. E-mail from Patty Henry, Historian, National Park Service, to author, (Oct. 20, 2008, 12:52 PST) (on file with author).

185. See Mark D. Brookstein, Note, *When History is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1847, 1865, 1878–80 (2001).

186. See *id.* at 1847, 1873–76.

187. See *id.* at 1880 (“[I]f more concrete guidelines were developed, it would be easier for a reviewing body to determine whether a local commission applied the correct criteria.”).

188. See, e.g., Associated Press, *Dilapidated Denny's Apparently a Historical Landmark*, SAN DIEGO UNION TRIB., Mar. 21, 2008, available at http://www.signonsandiego.com/uniontrib/20080321/news_lz1n21nowread.html [hereinafter Associated Press, *Dilapidated Denny's*] (discussing owners of a boarded-up, decaying Denny's from demolishing the building).

189. See, e.g., *Illinois ex rel. Marbro Co. v. Ramsey*, 171 N.E.2d 246, 246–47 (Ill. App. Ct. 1960) (reversing a denial of a demolition permit from a commissioner after delays were imposed to allow the city to find a way to preserve the building); *Landmarks Preservation Council v. City of Chicago*, 531 N.E.2d 9 (Ill. 1988) (deciding the case on standing grounds, but displaying landmark advocacy groups' displeasure with decisions of the Landmarks Commission).

190. 65 ILL. COMP. STAT. 5/11-48.2 (2008).

191. See generally, CHI., ILL., MUN. CODE § 2-120 (2008).

appoints.¹⁹² The Commission has the sole power to oversee applications for alterations and any other work required regarding the landmarks, and it also oversees the hearings and recommendations regarding landmarking buildings within the city.¹⁹³

When designating a landmark, the Commission must take into account vaguely defined standards.¹⁹⁴ For example, a landmark location must be a “site of a significant historic event which may or may not have taken place within [the location].”¹⁹⁵ Unlike the federal designation process, however, the Commission need not consider owner consent in its regulatory takings analysis.¹⁹⁶ Rather, the City may designate a landmark and burden the property owner against its will merely by convening a public hearing and soliciting a recommendation from the Commission.¹⁹⁷ Under these standards, the designation of Wrigley Field as a landmark would be a regulatory taking pursuant to the Fourteenth Amendment.

IV. WRIGLEY FIELD AS A REGULATORY TAKING UNDER *PENN CENTRAL*

Landmark preservation laws reflect a legitimate exercise of state legislative power to promote the general welfare.¹⁹⁸ In *Penn Central*, the Supreme Court established constitutional protections that guide and control federal, state, and municipal historical preservation statutes.¹⁹⁹ Nonetheless, the circumstances surrounding Wrigley Field’s landmark designation indicate a municipal regulatory taking, entitling the Tribune Company and successive owners to “just compensation” under the standards enumerated in *Penn Central*.²⁰⁰

192. § 2-120-590 (2008). This, for instance, may be an example of the aforementioned politicking that could go on under the guise of a landmark preservation scheme. See, e.g. sources cited *supra* notes 43, 64.

193. § 2-120-610 (2008).

194. § 2-120-620 (2008).

195. *Id.*

196. Compare § 2-120-650 (2008) with Questions & Answers, *supra* note 181.

197. § 2-120-650, -670, -690.

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

199. See *id. passim*.

200. See *id.* According to the Court’s recent reiteration, the landmark inquiry, while not a complete deprivation but affecting primary investment-backed expectations, would be analyzed under *Penn Central*. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005).

A. Legitimate State Interests

In *Penn Central*, the Court refused to provide a rigid standard for determining the invalidity of a regulation as a taking.²⁰¹ Instead, the Court provided different standards to help determine whether the regulation effectively accomplished the goals of historic preservation.²⁰² One justification for landmark preservation laws is that aesthetically pleasing sites provide societal benefits.²⁰³ The Court in *Penn Central* made multiple references to the benefits that landmarks provide to both the *city* and *urban* setting,²⁰⁴ including economic benefits, stimulation of business and industry, and promotion of tourism.²⁰⁵

Wrigley Field is located in a residential, almost suburban, neighborhood in Chicago.²⁰⁶ Therefore, in suburban contexts, some of the Court's justifications in *Penn Central* for the validity of preservation laws in urban communities are lost.²⁰⁷ However, the Court also described communal benefits afforded to the surrounding neighborhoods of landmarked locations.²⁰⁸ Nevertheless, a recent Lakeview Citizens' Council survey of community residents reflects the community's belief that promoting tourism to Wrigley Field through weekend evening games

201. *Penn Cent.*, 438 U.S. at 124.

202. *Id.* at 109, 124, 129.

203. *See, e.g., id.* at 108. *But cf.* First English Evangelical Lutheran Church of Glendale v. County of L.A., 210 Cal. App. 3d 1353, 1370 (1989) ("When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights.") (citation omitted).

204. *See Penn Cent.*, 438 U.S. at 109, 129 ("The city believed that comprehensive measures to safeguard desirable features of the existing *urban* fabric would benefit its citizens in a variety of ways The New York City law is typical of many *urban* landmark laws States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a *city*") (emphasis added).

205. *Id.* at 109 (reviewing the New York City statute that specifically evaluated the urban qualities of the environment to justify the enactment of the statute and stating "the standing of [New York City] as a world-wide tourist center and world capital of business, culture, and government' would be threatened if legislation were not enacted to protect historic landmarks").

206. *See* Encyclopedia of Chicago, Lake View, <http://www.encyclopedia.chicagohistory.org/pages/715.html> (last visited Oct. 28, 2008) (discussing the history of the community, resistance to its annexation to Chicago, and the previous fifty-year attempt to fight off urban development); *see also* Chicago Nat'l League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245, 1248 (Ill. 1985) (providing a basic description of the Wrigley Field location as well as the nature of its surrounding neighborhood and its inhabitants).

207. *See Penn Cent.*, 438 U.S. at 109.

208. *Id.* at 108–09.

negatively impacts the neighborhood.²⁰⁹

Despite Wrigley Field's negative effects on the community, many local residents support the landmark designation, though not because of the benefits that landmarking typically provides the public.²¹⁰ Rather, many local residents support the landmark designation due to the economic benefits it affords them personally.²¹¹ Since the designation prohibits the Cubs from altering Wrigley Field, local illegitimate "rooftop bleacher" corporations, for example, enjoy the benefits of professional baseball without compensating the Tribune Company.²¹²

Some sports economists contend that a ballpark's negative externalities, such as crime and noise, do not injure the Wrigley community because they have been internalized through reduced property values caused by the minimal amount of original tenants around Wrigley.²¹³ However, this theory ignores the increase in value of the property adjacent to Wrigley due to these "rooftop bleachers."²¹⁴

Notwithstanding the economic benefits the ballpark provides for some residents, the landmark designation fails to achieve its purported goal: to "safeguard desirable features of the existing urban fabric."²¹⁵ By supporting the landmark designation, Lakeview residents are able to stunt the growth and expansion of Wrigley Field,²¹⁶ an urban vestige in the heart of a residential neighborhood.

Arguably, the landmark designation also does not further legitimate state interests, as Wrigley Field's landmarking may have been triggered

209. LAKE VIEW CITIZENS' COUNCIL (LVCC), SURVEY RESULTS ON WEEKEND NIGHT GAMES AT WRIGLEY (2008), http://www.lakeviewcitizens.org/files/Weekend_Wrigley%20090508.pdf.

210. See, e.g., Liam Ford, *City to Mull Objections to Cubs Plan*, CHI. TRIB., Oct. 26, 2001, at Metro N4.

211. Associated Press, *Team Wants*, *supra* note 53; Associated Press, *Cubs, Rooftop Club Owner Reach Agreement Through 2023*, ESPN.COM, May 4, 2008, <http://sports.espn.go.com/mlb/news/story?id=3380955> [hereinafter Associated Press, *Cubs, Rooftop Club Owner*].

212. See generally Ford, *supra* note 210 ("Nearby building owners who have capitalized on their rooftop views into Wrigley have said the height of the new [proposed] bleachers would block . . . views into the park from the outside."); *Stuck on First Base*, *supra* note 41 ("The city suddenly has great concern for the interests of building owners who rake in some \$7 million a year by holding rooftop parties on game days . . . [and] pay nothing for the entertainment that draws the rooftop crowds . . .").

213. MICHAEL LEEDS & PETER VON ALLMEN, *THE ECONOMICS OF SPORTS* 228 (2d ed. 2005).

214. See Associated Press, *Team Wants*, *supra* note 53; Associated Press, *Cubs, Rooftop Club Owner*, *supra* note 211.

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

216. See *id.*

primarily by the feud between Mayor Daley and the Tribune Company.²¹⁷ By applying a landmark designation, the City of Chicago acquired more control over the property, creating a roadblock in the Tribune Company's path.²¹⁸ Despite their factual nuances and *Lingle's* modification of "legitimate state actions," *Nollan* and *Dolan*, for example, imposed heightened pressure on the government to show a connection between the legitimate state interest and the regulation.²¹⁹ If this standard is applied to Wrigley's landmark designation, Mayor Daley's questionable intent could lend support for a takings finding.²²⁰ Additionally, the City's attempt to force the Cubs' hand by withholding property surrounding the stadium thought to be owned by the Cubs could be an act of bad faith.²²¹ This is especially true if the tax issues related to the property were not settled with the team and if the City was unfairly and arbitrarily singling the team out in this designation.²²²

B. Economic Deprivation

Applying *Penn Central's* economic factors to determine the validity of a regulation more readily suggests that Wrigley Field is a regulatory taking. In *Penn Central*, part of the determination as to whether an economic deprivation constituted a "taking" were factors such as whether or not a physical invasion had occurred, whether the regulation resulted in a complete economic deprivation, and whether the regulation interfered with investment-backed expectations.²²³ As later cases indicate, the strength of

217. See generally *Talk of the Nation: Feud Between Chicago Mayor Richard Daley and the Chicago Tribune over Wrigley Field* (National Public Radio radio broadcast Aug. 25, 2004) (contending that Mayor Daley's actions regarding Wrigley Field are primarily motivated by animosity toward the Tribune Company) (transcript on file with the *Loyola of Los Angeles Entertainment Law Review*).

218. See Washburn, *Cubs Still Hoping*, *supra* note 39.

219. *Dolan v. City of Tigard*, 512 U.S. 374, 385–91 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–37 (1987). *But see* *City of Monterey v. Del Monte Dunes, Inc.*, 526 U.S. 687, 702 (1999) (reiterating that the Court had yet to extend the "rough-proportionality test" from *Dolan* and *Nollan* beyond exactions); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (stating that the *Agins'* "substantially advancing state interests" test was not the driving force behind the rulings in *Nollan* and *Dolan*, nor a stand-alone test for takings determinations).

220. *But cf.* Kayden, *supra* note 117, at 783 (arguing to the contrary that *Dolan* and *Nollan's* increased scrutiny will not make landmark preservation laws more difficult to uphold).

221. See Washburn, *City Throws*, *supra* note 41; *Stuck on First Base*, *supra* note 41.

222. Washburn, *City Throws*, *supra* note 41; *Stuck on First Base*, *supra* note 41; *see also* *Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992) (stating that a bad faith action by the government to unfairly single out and burden a single property owner constitutes an unconstitutional taking).

223. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

the complete economic deprivation rule has wavered as the courts, while still applying precedent, have begun to question the “parcel as a whole” rule.²²⁴

The first factor of the *Penn Central* inquiry pertains to the character of the government action, focusing on whether a physical invasion occurred.²²⁵ For Wrigley Field, the discussion primarily focuses on the burdensome regulation, rather than a distinct physical invasion.²²⁶ Yet the facts indicate that a physical taking occurred,²²⁷ or at least lend support for the Cubs in the “ad hoc” inquiry of the three factors.²²⁸

For instance, while facing reviews of the park for structural soundness, city officials inspecting the foundation may have damaged the park.²²⁹ Although the Seventh Circuit ruled that the denial of demolition permits and prevention of physical development of the property under Chicago landmark preservation laws did not constitute damage on its own,²³⁰ an actual physical invasion by the City that constitutes damage to the property would be a taking, no matter how minute.²³¹

Regarding the second aspect of economic effect, no party in the dispute would claim that the landmark designation of Wrigley Field results in a complete economic deprivation of the parcel as a whole.²³² However, subsequent courts have been more willing to consider complete deprivation of a segment of a parcel or, in the alternative, that a taking could occur when the property as a whole suffers partial economic deprivation.²³³

224. See, e.g., *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (finding a partial taking when the government denied a group of builders development permits); *The State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (stating that the inability to mine coal from the property, thus restricting profits, was a taking that withheld complete economic value of the coal aspects of the property).

225. *Penn Cent.*, 438 U.S. at 124.

226. See, e.g., *Spielman, Selig Delivers*, *supra* note 3 (stating that landmark designation “will likely precipitate the loss of Wrigley Field It will be the first step toward the ultimate loss of the ballpark”).

227. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982); see *infra* text accompanying notes 230–32.

228. *Penn Cent.*, 438 U.S. at 124.

229. *Spielman, Cubs: City Damaged Wrigley*, *supra* note 64.

230. See generally *Int’l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998) (stating that the denial of permits to renovate landmarks alone is not “damage” equitable to a taking); 65 ILL. COMP. STAT. 5/11-48.2-5 (2008).

231. *Loretto*, 458 U.S. at 434–35.

232. See *Penn Cent.*, 438 U.S. at 130–31.

233. See, e.g., *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1180 (Fed. Cir. 1994) (finding support for partial takings when the government denied a group of builders development permits); *The State ex rel R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (“Although contiguous tracts of property are typically considered as a single relevant parcel for purposes of a

Additionally, the Court contradicted itself by asserting that property is not divisible in the sense that it looks to economic deprivation of the parcel as a whole—however, the Court in *Penn Central* ruled that air rights are divisible from the investment-backed property rights of the train station on the ground.²³⁴ Thus, the loss in income due to many of the restrictions placed on the stadium should be enough to be considered a taking.²³⁵

For instance, because of the inability for the Cubs to advertise on the protected ivy-covered outfield walls, the team foregoes a significant source of revenue every year that other stadiums in the league benefit from.²³⁶ Naming rights are another example of a standard source of income for most professional teams that the Cubs cannot benefit from.²³⁷ Revenue from an increased schedule of night games to a level equal to that of the rest of the league would also allow the Cubs to become more financially competitive.²³⁸ Finally, because they are unable to freely alter the stadium, the Cubs suffer from a restricted revenue stream from gate receipts since the Cubs operate in one of the smallest parks in the league.²³⁹

takings analysis, factual nuances may dictate a more flexible approach. These factual nuances may include the claimant's investment-backed expectations.") (citations omitted); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (stating that, "[a]ssuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest[.]" thereby enabling property owners to at least argue that the court is willing to somewhat deviate from "complete" economic loss and that some economic value alone is not sufficient).

234. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 64 (1985) (discussing the restriction on the use of airspace above the landmark in *Penn Central*).

235. *Compare* MARTIN J. GREENBERG, THE STADIUM GAME 299–314, 320–24, 334–49 (2d ed. 2000) (providing examples of revenues that the Cubs are precluded from obtaining) *with Loveladies Harbor*, 28 F.3d 1171 (showing support for partial takings) *and R.T.G.*, 780 N.E.2d 998 *and* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

236. GREENBERG, *supra* note 235, at 334–49.

237. *Supra* text accompanying notes 77–81; *see, e.g.*, Podmolik, *supra* note 78.

238. *See, e.g.*, Ballparks of Baseball—Attendance Figures, <http://www.ballparksofbaseball.com/1980-89attendance.htm> (last visited Dec. 2, 2008) (displaying a 400,000-person increase at Wrigley Field from 1988 to 1989, the first full season with night games and lights); Ballparks of Baseball—Attendance Figures, <http://www.ballparksofbaseball.com/2000-03attendance.htm> (last visited Dec. 2, 2008) [hereinafter 2000s Attendance] (marking a slight increase in attendance when the team added four additional night games, *supra* text accompanying note 58, even though ending 30 games under .500 and playing markedly worse than the previous season). *See also* *Wrigley Night Games*, *supra* note 58 ("The Cubs are the last major league team to play the majority of their 81 home games in the afternoon The Cubs had been pushing for more night games, saying they would generate more revenue."). Although not directly a result of the landmark designation, city ordinances restrict the amount of night games that the Cubs are allowed to play due to the residential location of Wrigley Field; the City uses its control over any adaptations of the park as leverage in forcing its will upon the Cubs.

239. *See* 2000s Attendance, *supra* note 238 (showing that in 2003, when the Cubs were five

In addition, if the Court extends the rules set forth in *Nollan* and *Dolan* regarding exactions, the City of Chicago's stadium improvement approval requirements become analogous to the requirements for the easement and bike path in those respective cases.²⁴⁰ In order to receive approval to make changes, even in a reduced capacity, the City required the Cubs to dedicate extensive financial resources to alleviate community concerns regarding crime and traffic.²⁴¹ The City also required the Cubs to broker an agreement with neighboring rooftop bleacher associations.²⁴² An extension of the *Nollan* and *Dolan* rules would not only expand the argument regarding the extent and character of the government action, but also acts as an additional drain on the financial situation of the Cubs and the Tribune Company, and is thereby an economic deprivation.²⁴³

Regarding investment-backed expectations, the *Penn Central* Court noted that "the New York City law [did] not interfere in any way with the present uses of the Terminal," and that, without the approval of the proposed skyscraper, the use of the terminal could remain exactly the same as it had been for the previous sixty-five years.²⁴⁴ This is contrary to the restrictions placed on Wrigley Field.²⁴⁵ The ballpark's ability to provide baseball to the public remains the primary investment-backed expectation of the Tribune Company; the landmarking hinders the ability of the Cubs to host games in a suitably sized and maintained environment which affects the return on the Tribune Company's investment. Additionally, the *Penn Central* Court eliminated the need for the company to build above the

outs from the World Series, they were outdrawn by a Los Angeles Dodgers team who missed the playoffs, but played in a much larger stadium). Additionally, the Cubs suffer from existing in a dual-team market. Beyond the diehard fans, a casual fan merely taking in a baseball game is able to find a suitable replacement product to the Cubs by attending a game of the cross town rival, the White Sox. Even if similar demand existed, a higher supply of seats provided at the White Sox game would lead to lower ticket prices. Since there is a higher amount of comparable seats available, the casual baseball fan is drawn to a White Sox game. See generally Nate Silver, *Lies, Damned Lies: Neighborly Baseball*, BASEBALL PROSPECTUS, Apr. 12, 2006, <http://baseballprospectus.com/article.php?articleid=4965&mode=print&nocache=1227634268> ("[T]here is something of a substitution effect. That is, the commodity is not Dodger Baseball or Angel Baseball, but Baseball, Period [T]he secondary team in a two-team market . . . tends to benefit more from the primary team doing well than the other way around The White Sox benefit a bit when the Cubs are doing well because of the spillover effect from a crowded Wrigley Field").

240. See *supra* notes 152–56 and accompanying text. But see cases cited *supra* note 219.

241. *Wrigley Night Games*, *supra* note 58.

242. *Id.*; Associated Press, *Skybox on Waveland was Last Defendant*, ESPN.COM, Apr. 9, 2004, <http://sports.espn.go.com/mlb/news/story?id=1778748>.

243. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978).

244. *Id.*

245. Spielman, *Deal Struck*, *supra* note 46.

terminal when it acknowledged the company's ability to transfer air development rights to neighboring buildings that Penn Central owned.²⁴⁶

Wrigley Field, however, cannot be developed in this way for two reasons. First, the Tribune Company cannot transfer any rights because it does not own other buildings in the surrounding neighborhood—even property it thought it owned was “claimed” by the City during this struggle.²⁴⁷ Second, even though Illinois and Chicago provide for transferable development rights (TDRs) programs,²⁴⁸ zoning restrictions in the residential neighborhood would likely bar any possible upward expansion.²⁴⁹ These restrictions would bar expansion even if the team had other properties, a significant distinction from the urban neighborhood of *Penn Central*.²⁵⁰ These problems reflect issues regarding TDRs that some commentators have discussed, issues that may arise in areas with multiple sellers of TDRs, such as historic districts.²⁵¹

To note, the decision in *Palazzolo* allows property owners who knew of the burden of a landmark status before acquiring the property to challenge the regulation as a taking.²⁵² This ability does not affect the current owners of Wrigley Field, yet may help strengthen their case, and it may be very important for the new owners when the property changes hands. Additionally, the District of Columbia Court of Appeals stated that requiring an unwilling private party to bear all the expense of landmark preservation is unconscionable, and forcing such parties “to spend substantial sums of money to preserve landmark structures—with little or no public assistance—could rise to the level of an unconstitutional taking.”²⁵³ The court also feared that the stifling costs associated with

246. *Penn Cent.*, 438 U.S. at 137.

247. Washburn, *City Throws*, *supra* note 41.

248. *See generally* CHI., ILL., MUN. CODE § 2-120-850 (2008) (providing for TDRs in cases of economic hardship on the landmarked owner); 65 ILL. COMP. STAT. 5/11-48.2.1 to 2.7 (2008) (displaying Illinois extensive TDR program).

249. *See* CHI., ILL., MUN. CODE § 17.2-0311 (2008).

250. *See Penn Cent.*, 438 U.S. at 136-37; *see generally* § 17.2-0311 (requiring height restrictions in residential neighborhoods). *But cf.* *St. Bartholomew's Church v. The City of New York*, 914 F.2d 348, 357 (2d Cir. 1990) (rejecting an argument that while “in *Penn Central*[,] the property owner continued to enjoy valuable, transferrable rights to develop the airspace above the Terminal,” the appealing property owner's development rights in the current case have lesser value, although not completely eliminated).

251. *See* Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867, 897-99 (1984) (claiming that TDRs become greatly devalued when the burdened property owner is unable or restricted from selling or transferring the rights to contiguous parcels).

252. *Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (2001).

253. *Citizens Comm. to Save Historic Rhodes Tavern v. D.C. Dep't of Hous. & Cmty. Dev.*, 432 A.2d 710, 718 (D.C. 1981) (echoing the Illinois Supreme Court's hesitation to force an

landmark preservation could discourage parties from purchasing and maintaining landmarks.²⁵⁴

As stated *supra*, the early history of the takings doctrine also provides support for a devaluative regulatory taking.²⁵⁵ Even beyond the Supreme Court's first decision regarding regulatory takings, preceding *Pennsylvania Coal Co. v. Mahon* by fifty years,²⁵⁶ early state decisions protected the rights of owners who faced even a moderate devaluation of their property.²⁵⁷ The cases decided before *Penn Central* that dealt with landmarked properties also support the stance that landmarking Wrigley Field would be a taking.²⁵⁸ These cases questioned the propriety of protecting structures that were in disrepair and unusable under the regulations, an argument that is applicable to Wrigley due to the poor structural integrity of Wrigley Field.²⁵⁹

Additionally, "*Maher* indicated a requirement for the maintenance of a historic building could raise an as-applied takings problem," a situation that may present itself more and more as Wrigley Field ages.²⁶⁰ Nonetheless, an argument for a devaluative taking must be based on the assertion that the regulation affects the Cubs' ability to work with and modify the parts of the stadium that the team already benefit from and use.²⁶¹ The regulation has to affect the team's ability to use the stadium as it currently stands and prevent it from being in complete disrepair.²⁶² Prospective advantages and profits do not hold weight on their own in modern takings jurisprudence.²⁶³

The Supreme Court's use of the *Penn Central* analysis in coal mining

unwilling party to bear the burden of landmark preservation to a takings argument); *see also* *Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992) (reiterating the Supreme Court's hesitance to label regulations as non-takings that completely devalue property and exist solely to unfairly single out an owner to bear a public burden by themselves).

254. *Rhodes Tavern*, 432 A.2d at 718.

255. *Supra* text accompanying notes 92–96.

256. *See* sources cited *supra* note 104.

257. *See, e.g., Woodruff v. Neal*, 28 Conn. 165 (1859) (stating that even a cow grazing off of a public highway onto private property as allowed by municipal license was a taking requiring compensation).

258. *See, e.g., Lutheran Church in Am. v. City of New York*, 316 N.E.2d 305 (N.Y. 1974); *Illinois ex rel. Marbro Co. v. Ramsey*, 171 N.E.2d 246, 247–48 (Ill. App. Ct. 1960).

259. *See Lutheran Church*, 316 N.E.2d 305; *Marbro Co.*, 171 N.E.2d at 247–48; Washburn, *Wrigley Faces*, *supra* note 60.

260. DANIEL R. MANDELKER, *LAND USE LAW* 11–38 (5th ed. 2003).

261. *See generally Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (showing the Court's refusal to find a taking when a landowner only loses prospective advantages—in this case, the property rights above the terminal).

262. *See generally id.*

263. *See generally id.*

taking cases is an appropriate analogy for landmarked stadiums. The Court has historically been lenient in its regulatory takings jurisprudence, finding takings through the same balancing test where others' claims have failed, even in cases of partial takings or otherwise valid police power.²⁶⁴ Recent takings cases have also given some support to coal miners claiming that their property rights have been abrogated by regulations barring specific mining on the property.²⁶⁵ It seems that the investment-backed expectations hold more weight in these situations, a standard that would be appropriate for stadiums that exist as single-use facilities, discussed *infra*. Under the standards set forth in *Penn Central*, in conjunction with the fact-based inquiry the *Penn Central* Court encouraged, the designation of Wrigley Field as a municipal landmark should be a regulatory taking, or at least a partial taking, in violation of the Fourteenth Amendment.²⁶⁶

V. STADIUMS ARE UNIQUE AND REQUIRE COMPENSATION DESPITE CURRENT TAKINGS JURISPRUDENCE

The *Penn Central* Court promoted factual, "ad hoc" inquiries into what constituted a regulatory taking, refusing to set a strict rule.²⁶⁷ In doing so, if an entity were able to make a case compelling enough based on the facts, it could likely convince the Court of its entitlement to just compensation outside the bounds of current regulatory takings jurisprudence. As such, the issue of landmarking stadiums in a highly

264. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413–14 (1922). Although other similar situations where the state exercised its police power were found to be valid, see, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the Court seemed to be more protective of the property rights and investment-backed expectations of coal miners over other property owners. See *Pa. Coal*, 260 U.S. at 412–13. Even in attempts to quash a potential strike, government control over a coal mine was a taking, contrary to other strike situations. *U.S. v. Pewee Coal Co.*, 341 U.S. 114, 115–16 (1951).

265. See, e.g., *R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (stating that restrictions on coal mining were a taking because the only reason for the land purchase was abrogated); *Machipongo Land & Coal Co. v. Dep't of Env'tl. Prot.*, 799 A.2d 751, 770 (Pa. 2002) (remanding the case for determination of where the property boundaries were, while stating that the coal in the area at issue had been rendered valueless). *But see* *Keystone Bituminous Coal Ass'n.*, 480 U.S. 470, 498 (1987) (stating that the devaluation of coal was not severable from the other aspects of the property).

266. See *Chipchase*, *supra* note 176, at 66–67 ("Where the economic impact is severe, but short of a total deprivation of economically viable use, and the governmental action is either extreme or poorly founded, the claimant should prevail without demonstrating interference with investment-backed expectations. Conversely, where the economic impact is less pronounced and the governmental action is reasonable and well purposed, a landowner will need to demonstrate that the restriction truly frustrated well-defined plans and expenditures in order to succeed on her claim.").

267. *Penn Cent.*, 438 U.S. at 124.

unique industry should be considered a taking, based on the facts surrounding professional baseball and stadiums, and independent from previous precedent that weighs against such a finding.

The business of baseball has historically been looked at as a unique entity by both the legislators and the judicial officers who have afforded Major League Baseball an antitrust exemption found nowhere else in American society.²⁶⁸ Some of the justifications for this special treatment arise from the historical nature of the game.²⁶⁹ However, in many ways, the industry is not a traditional economic market.²⁷⁰ Amusements, generally seen as a luxury item, have a highly elastic demand, which thereby makes them more subject to the demands of their fan base.²⁷¹ As such, their owners must be able to respond better to fans' wishes or risk losing them; owners need to be fluid and able to adjust to meet the needs of a fan base that demands the most state-of-the-art amenities and expects their teams to keep up with others in the league.²⁷² Additionally, as a place of public assembly, baseball stadiums are subject to higher safety standards than private residences or traditional businesses.²⁷³ For instance, the dangerous situation of falling concrete at Wrigley Field and the bureaucratic mess in trying to remedy that situation are not challenges that a landmarked private residence would likely face, or be so integral to its existence.²⁷⁴

268. See Philip R. Bautista, Note, *Congress Says, "Yoooo're Out!!!" to the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Collective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445, 450 (2000) (providing a history of baseball's antitrust exemption).

269. *Flood v. Kuhn*, 407 U.S. 258, 260–64 (1972).

270. See *id.* at 282 (“[T]he aberration is an established one, and one that has been recognized . . . in . . . a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century . . . and . . . survived the Court’s expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball’s unique characteristics and needs.”).

271. See, e.g., John Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSP. 95, 105 (2000) (discussing the substitution effect that occurs when a new stadium moves to town, which occurs conversely when the public becomes dissatisfied by the stadium, and how the money becomes rearranged through the economy).

272. Spielman, *Selig Delivers*, *supra* note 3 (“[T]he designation . . . ignores the ‘ever-changing economics’ of baseball . . . ‘Changes to Wrigley Field apparently will now be subject to the subjective tastes and individual notions of designers, preservationists and community leaders who cannot be expected to understand the competitive nuances of professional baseball,’ Selig said. ‘Every change to Wrigley Field impacts both preservation issues and the ability of the Cubs to field a winning team. If one favors preservation at the expense of operating competitiveness, stadiums become albatross and are replaced.’”).

273. See CHI., ILL., MUN. CODE §§ 4.156, 8.4 (2008).

274. Washburn, *Wrigley Faces*, *supra* note 60.

Accordingly, a poor landmark designation can have a more drastic effect on the sustainability of a stadium and a sports franchise than on other properties, such as office buildings or train stations, that rely less on their venue and more on the services they provide.²⁷⁵ The standards for designation vary from community to community. This inconsistency can lead to poor designations.²⁷⁶ Due to these lax standards, a large number of buildings become designated and unusable, and thereby fall into disrepair because they are unable to be destroyed or modified.²⁷⁷ These buildings become huge financial burdens on their owners and often are abandoned, which creates a negative urban value and detracts from the public worth and aesthetic value.²⁷⁸ This result contradicts the landmark purposes asserted in *Penn Central*.²⁷⁹

Although the Wrigley Field case is the first attempt to protect a baseball stadium through landmark designation,²⁸⁰ poor landmark designations have burdened stadiums before.²⁸¹ For instance, plans to build a new stadium and revitalize downtown San Diego resulted in problems with landmark preservationists, specifically regarding two buildings in the proposed stadium district.²⁸²

Following a settlement between the City of San Diego, preservation groups, and the Padres, one of the buildings, the Western Metal Supply Company building,²⁸³ was adaptively reused²⁸⁴ in the Petco Park design at a burdensome cost of millions of dollars.²⁸⁵ The other building, the Showley

275. Siegfried & Zimbalist, *supra* note 271.

276. *See, e.g.*, Associated Press, *Dilapidated Denny's*, *supra* note 188.

277. *See, e.g., id.*

278. *Id.*

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

280. Spielman, *Selig Delivers*, *supra* note 3 (quoting Commissioner Bud Selig stating, "No city in America has ever used a landmarks designation as an effective means to preserve a ballpark.").

281. *See Jonathan Heller, Preservation Proves a Hit; 2 Historic Buildings Gaining Renewed Leases on Life in Downtown Baseball Project*, SAN DIEGO UNION-TRIB., Nov. 13, 2002, at B-1 [hereinafter Heller, *Preservation Proves*].

282. *Id.*

283. SAN DIEGO PADRES, SAN DIEGO PADRES 2007 MEDIA GUIDE 464 (2007), available at http://pressbox.mlb.com/pressbox/downloads/y2007/sd/petco_park.pdf (stating the Western Metal Supply Company building was protected because it had "ties to the Old West").

284. Adaptive reuse is the process of converting an old building that has been protected and modify its features to make it suitable for use once again while still protecting the essential historically significant features. *See generally* Lisa B. Goodman, *Preserving Urban Estates: A Case Study*, 18 DEL. LAW. 8, 9 (2000) (discussing the adaptive reuse of some commercial or industrial properties).

285. Heller, *Preservation Proves*, *supra* note 281; SAN DIEGO PADRES 2007 MEDIA GUIDE, *supra* note 283, at 466; *see also* Suzy Hagstrom, *A Ton of Bricks and Ten Pounds of Baloney*,

Brothers Candy Factory (Showley Factory), had to be lifted off the ground and moved 280 feet away, also at a huge cost of \$3 million and multiple delays.²⁸⁶ The Showley Factory, which was slated for demolition in 2000, had not been used as a candy factory since the 1950s.²⁸⁷ In fact, the building was used as a warehouse and cheap housing in the deteriorating downtown area until preservationists intervened and asked for protection from demolition.²⁸⁸

Regardless of the questionable benefits and the costly remedies afforded to the aforementioned historic structures,²⁸⁹ these methods are not applicable to stadiums.²⁹⁰ For instance, unlike a generic building with distinct aesthetic qualities, such as one that can be converted into an office or a restaurant, a stadium is a single-use structure that has no practical use outside of being a stadium.²⁹¹ The Western Metal Supply Company building, which was an industrial building that was converted into rooftop seating and a team store for Petco Park, is one example of a convertible building.²⁹² Furthermore, with respect to Wrigley Field, even if moving the park in a manner similar to the Showley Factory were possible from an engineering standpoint, it would still be fiscally impractical and physically impossible given the neighborhood surrounding the park.²⁹³

For better or worse, sports teams and their stadiums are burdened by local government at a variety of levels, so much so that some cities have unsuccessfully tried to invoke eminent domain merely to prevent a team from moving to a more profitable destination.²⁹⁴ Even beyond the political

SAN DIEGO WEEKLY READER, Oct. 7, 1999,
<http://www.sandiegoreader.com/news/1999/oct/07/ton-bricks-and-ten-pounds-baloney/>
(criticizing the agreement and its conservation effects).

286. Jonathan Heller, *How Sweet It Is! Historic Candy Factory Off on Landmark Haul*, SAN DIEGO UNION-TRIB., Sept. 23, 2003, at B-1 [hereinafter Heller, *How Sweet*].

287. Heller, *Preservation Proves*, *supra* note 281; *see also* GREENBERG, *supra* note 235, at 569 (“This [urban renewal from Petco Park] will completely revitalize an extremely derelict part of San Diego.”).

288. Heller, *Preservation Proves*, *supra* note 281; *see also* GREENBERG, *supra* note 235, at 569 (“This [urban renewal from Petco Park] will completely revitalize an extremely derelict part of San Diego.”).

289. *See* Heller, *Preservation Proves*, *supra* note 281.

290. *See* Rosenthal, *supra* note 14 (explaining that Wrigley Field is a single-use type of property).

291. *See id.* (“[Zell] acknowledged that Wrigley, because of its landmark status, is a tricky, single-use piece of property. ‘Unless they’re going to let us build a couple of high-rises adjacent to first, second and third [bases], it is somewhat a single-purpose structure,’ Zell said. ‘Wrigley Field is just Wrigley Field.’”).

292. SAN DIEGO PADRES 2007 MEDIA GUIDE, *supra* note 283, at 464.

293. *See generally* Heller, *How Sweet*, *supra* note 286; *supra* text accompanying note 206.

294. ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND

fighting over Wrigley Field, it is questionable why the landmarking of stadiums is so directly tied to municipal governments²⁹⁵ when cities benefit extensively from the economic effects of stadiums.²⁹⁶ For instance, even though the proposed sale of Wrigley Field to the state likely signaled a relaxing of the landmark designation for which Mayor Daley fought so hard,²⁹⁷ Daley only jumped on board when he realized that a state-funded renovation of the field could bring in millions of dollars of economic growth and tax revenue for Chicago.²⁹⁸ Additionally, a new stadium—and most likely the renovation of an old one—redevelops the urban core when placed in a downtown environment, as occurred in San Diego.²⁹⁹

As discussed above, a stadium is beneficial for a city; it is also one of the most critical economic aspects of professional sports ownership.³⁰⁰ Historically, a majority of sports revenue comes from ticket sales and other stadium-related income.³⁰¹ Statistical data show that during the time period after a team moves into a new stadium, when the quality of the stadium experience generally improves, attendance increases by about six and a half percent.³⁰² Additionally, signage and other in-stadium advertising, such as naming rights, are a significant part of the economic benefits of stadium and team ownership.³⁰³ It is wholly unfair for a municipality to take away

PUBLIC POLICY 140 (paperback ed. 2004) [hereinafter ZIMBALIST, *BASEBALL ECONOMICS*]. The threat of a move is much less likely with a team that exists in a large media market like Chicago. This threat is often used to force public funding for a new stadium. *Id.* at 124; accord MICHAEL LEEDS & PETER VON ALLMEN, *THE ECONOMICS OF SPORTS* 185 (2d ed. 2005).

295. See CHI., ILL., MUN. CODE § 2-120-580 (2008).

296. See, e.g., GREENBERG, *supra* note 235, at 569; ZIMBALIST, *BASEBALL ECONOMICS*, *supra* note 294, at 130 (providing examples of municipal benefits to stadiums, urban redevelopment in this case).

297. See Spielman, *City Makes*, *supra* note 1; Andrew Herrmann, *State's Plan to Buy Wrigley Lands It on Endangered List*, CHI. SUN-TIMES, Apr. 3, 2008, at 16.

298. See Kari Lydersen, *Cheering News for the Cubs?: After Squabbles With Owners, Mayor May Back Park's Sale*, WASH. POST, Jan. 7, 2008, at A3 (stating that the mayor understands the economic importance of the Cubs and that the assurance that a sale to the Illinois Sports Facility Authority would not increase taxes to finance the renovation may have won over the mayor).

299. See GREENBERG, *supra* note 235, at 569. Although Wrigley Field is not “downtown,” the theory that the stadium’s surrounding area benefits from government subsidies is likely equitable to the surrounding businesses in the residential neighborhood of Lake View. ZIMBALIST, *BASEBALL ECONOMICS*, *supra* note 294, at 130.

300. See ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME*, 50–51 (rev. ed. 1994).

301. See *id.*

302. RODNEY D. FORT, *SPORTS ECONOMICS* 385 (2d ed. 2006).

303. GREENBERG, *supra* note 235, at 299–314, 320–24, 334–49; FORT, *supra* note 302, at 78; LEEDS & VON ALLMEN, *supra* note 294, at 210 (“One can generally identify venues belonging to the current era of sports facilities by the corporate names they bear.”); Sterrett, *supra*

such an important part of an owner's investment and control in the property. Regulations that apply restrictions on a property owner should be considered a taking regardless of a lack of neatly fitting standards.

VI. EFFECT OF LANDMARKING ON THE SALE OF THE CUBS AND WRIGLEY FIELD

No court has determined that the City of Chicago's landmark classification of Wrigley Field is a regulatory taking; therefore, any Cubs and Wrigley Field sales will occur with the landmark designation in place.³⁰⁴ This landmark designation will have an immediate effect on the sale of Wrigley Field, in the sense that any potential sale will be discounted based upon the buyer's knowledge that an estimated \$400 million from twenty years of naming rights is unavailable to the purchaser.³⁰⁵ Still, as long as the landmark law is valid, the Cubs and its suitors have no real legal recourse regarding the situation.³⁰⁶ The Court emphasized long ago that the Fifth Amendment provides no compensation for an otherwise lawful action, even when there is a consequential injury or an economic depreciation that reduces the property's value to nearly nothing.³⁰⁷

A combined sale of the Cubs and Wrigley Field would effectively require the new owners to stay at Wrigley Field for a long time and find a way to renovate the property, lest they be left with an oversized, expensive statue.³⁰⁸ Separately, the antiquated stadium carries little value without an agreement from the new Cubs owner to remain in the stadium for the long term.³⁰⁹ Furthermore, the Cubs' popularity has historically been tied to Wrigley Field; therefore, the team may lose some fans if it moves to a new home.³¹⁰ Indeed, the popularity of the two entities seems to be inextricably tied together.³¹¹ However, if the team and stadium are sold separately and a new team owner is willing to leave Wrigley Field—thereby alienating

note 79 ("Mr. Zell could fetch \$5 to \$6 million a year for naming rights to the park.").

304. See Moffett, *supra* note 45.

305. Spielman, *Wrigley Deal*, *supra* note 90.

306. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923).

307. *Id.*

308. Spielman, *Wrigley Deal*, *supra* note 90 (stating that any sale of the stadium to the State would require the new Cubs owner to sign an ironclad thirty-year lease).

309. See Rosenthal, *supra* note 14 (stating that Wrigley Field is a single-use property, the value of which implicitly would be greatly depreciated if its sole tenant departed).

310. See Tyler Heun, *Fan Poll: What Are the Top 5 Stadiums in Major League Baseball*, BLEACHER REPORT, <http://bleacherreport.com/articles/27912-fan-poll-what-are-the-top-5-stadiums-in-major-league-baseball> (providing a poll of the most popular stadiums in Major League Baseball).

311. See *id.*

some of the outspoken fan base³¹²—a state-of-the-art facility with modern amenities could offset that loss and provide greater revenue.³¹³ Nevertheless, the premise of selling the team and stadium separately has upset some bidders, who prefer to control any possible Wrigley Field overhaul and avoid being stuck with a lease.³¹⁴

An economics professor who specializes in sports stadiums recently stated, “[a]t some point, Wrigley Field is going to fall down, be it economically or physically . . . [a]nd a new owner [will have] to figure out what they’re going to do with it.”³¹⁵ Nevertheless, before the ultimate fate of the landmark-designated ballpark can be determined, the Chicago Cubs and Wrigley Field first must be sold.³¹⁶ Recent discussions to sell the park to the State of Illinois³¹⁷ fell through,³¹⁸ much to the relief of advocacy groups,³¹⁹ the fans, and the community of “Wrigleyville.”³²⁰ Adding to the

312. See, e.g., Ed Koska, Letter to the Editor, *Baseball’s Cathedral*, CHI. TRIB., May 21, 2005, at Commentary C23 (comparing a state-of-the-art facility with Wrigley Field, but still preferring the “ancient cathedral”); see generally Associated Press, *Illinois Governor Says Cubs Should Play at Wrigley “Forever”*, ESPN.COM, Mar. 27, 2008, <http://sports.espn.go.com/mlb/news/story?id=3316340> (“Illinois Gov. Rod Blagojevich said Thursday he’ll do all he can to keep the team playing at Wrigley Field as billionaire owner Sam Zell looks to sell both the team and the ballpark.”).

313. See generally Spielman, *Selig Delivers*, *supra* note 3 (stating Major League Baseball’s opposition to landmark designation because of stadiums needs to be fluid to change); see *supra* text accompanying note 303.

314. Colias & Saphir, *supra* note 8 (“There’s no question this (stadium deal) would take away some luster for bidders . . .”).

315. Wayne Drehs, *New Owner Can Transform “Lovable Losers” . . . for \$1 Billion*, ESPN.COM, Sept. 21, 2007, <http://sports.espn.com/mlb/news/story?id=3029964>.

316. Editorial Note: During the production process, the Tribune Company picked the Ricketts family as the winning bidders in its attempt to sell Wrigley field. The agreement provides that the Cubs and Wrigley Field are to be sold together for approximately \$900 million, and will include a twenty-five percent stake in the regional cable network. Doug Miller, *Tribune Picks Winning Bidder For Cubs*, MLB.COM, Jan. 22, 2009, http://mlb.mlb.com/news/article.jsp?ymd=20090122&content_id=3764850&vkey=news_chc&xt=.jsp&c_id=chc.

317. Associated Press, *Reports: Illinois Sports Agency in Talks with Cubs to Acquire Wrigley Field*, ESPN.COM, Dec. 13, 2007, <http://sports.espn.com/mlb/news/story?id=3153685>.

318. Muskat, *supra* note 7.

319. Herrmann, *supra* note 297; see also Landmarks Illinois, *A Special 11th Designation* (2008), http://www.landmarks.org/ten_most_2008_11.htm (last visited Oct. 1, 2008) (making special note of Wrigley Field and its possible state acquisition in the group’s yearly list of the ten most threatened Illinois sites).

320. *Home Field Disadvantage*, *supra* note 90; Editorial, *Lights Out on a Bad Idea*, CHI. SUN-TIMES, June 11, 2008, at 29; Mike Cahill, Letter to the Editor, *Nice Job Protecting Wrigley*, CHI. SUN-TIMES, June 19, 2008, at 24. Additionally, Wrigleyville residents opposing the renovations by the Tribune Company would likely be no more reticent to the State’s renovations than the Tribune Company’s renovations, especially now that the brokered deal with the Tribune Company regarding the rooftop bleachers has continued to hold and the bleacher renovations

furor, Barack Obama's election as President will likely slow the sales of professional sports teams due to his proposed tax hikes.³²¹ Even though the combined sale of the Cubs, Wrigley Field, and a partial stake of a cable company could garner as much as \$1 billion, Sam Zell and the Tribune Company have a multitude of issues to resolve regarding the Cubs and Wrigley Field.³²²

Still, Wrigley Field is not the only venue facing this issue,³²³ and the debate regarding stadium designations will not disappear anytime soon.³²⁴ Recently, Yankee Stadium, a place many regard as "the cathedral of baseball," faced the wrecking ball,³²⁵ and despite its clear historic nature, was replaced with a billion-dollar stadium across the street.³²⁶ Many fans questioned the destruction of over eighty years of history.³²⁷ This event probably would not have occurred had the stadium been designated a landmark.³²⁸ Nonetheless, historian Patty Henry says the National Historic Landmark Program had "'troubles with [Yankee Stadium]'s integrity.' Landmark status would have protected Yankee Stadium from its planned demolition But major renovations from 1974–75 drastically changed

have been completed without blocking their view. Associated Press, *Wrigley Honored With Landmark Preservation Award*, ESPN.COM, Sept. 7, 2006, <http://sports.espn.go.com/mlb/news/story?id=2578345>; Associated Press, *Cubs, Rooftop Club Owner, supra* note 211.

321. Lester Munson, *Change Is Coming to Sports, Too, Under Obama*, ESPN.COM, Nov. 5, 2008, <http://sports.espn.go.com/espn/news/story?id=3683722> ("Obama's campaign promises about capital gains and inheritance taxes . . . will complicate the sale and transfer of team ownerships. Wayne Huizenga, the owner of the Miami Dolphins, . . . will attempt to complete the sale of his team . . . before the end of 2008 to avoid Obama's promised increase in the capital gains tax.").

322. Wayne Drehs, *New Owner Can Transform "Lovable Losers" . . . for \$1 Billion*, ESPN.COM, Sept. 21, 2007, <http://sports.espn.go.com/mlb/news/story?id=3029964>.

323. Winnie Hu, *Yankees Win, 44-3 and 45-2, as Council Approves Stadium*, N.Y. TIMES, Apr. 6, 2006, at B1.

324. See, e.g., John Jeansonne, *And Somehow, This Shrine Is Not a Landmark*, NEWSDAY, Sept. 21, 2008, at H10.

325. See, e.g., Podmolik, *supra* note 78 ("Yankee Stadium is the cathedral of baseball . . . , 'Randy Levine, the Yankees' president, said recently."); Jon Blau, *Cathedral Leaves Lasting Mark on Fans*, MLB.COM, Sept. 21, 2008, http://mlb.mlb.com/news/article.jsp?ymd=20080921&content_id=3522722&vkey=news_nyy&fx=xt=.jsp&c_id=nyy ("For Yankees fans, every game of baseball at Yankee Stadium is like a family gathering and a religious experience. The Cathedral has served as both their church and home.").

326. Hu, *supra* note 323.

327. See, e.g., Andrew Wolf, Op-Ed, *Save Yankee Stadium*, N.Y. SUN, July 18, 2008, at Opinion 6 (reflecting one fan's desire to save the ballpark).

328. Jeansonne, *supra* note 324 ("[T]he New York City Landmarks Preservation Commission, which could have stopped this year's scheduled tear-down of the 85-year old walls, repeatedly has rejected landmark designation . . .").

the stadium from the 1923 original and cost it historic significance.”³²⁹

Boston’s Fenway Park, the oldest park among current Major League Baseball venues, also has faced, and will continue to face, issues regarding protection in the name of historic preservation.³³⁰ However, in contrast to the situation in Chicago, the Boston Red Sox were not subject to a battle with its home city, and committed itself to a \$200 million renovation of Fenway Park before applying for National Historic Landmark status.³³¹ While the pending designation may limit the Red Sox owners’ flexibility for future renovations, the team is committed to remaining in Fenway Park and will likely be able to recoup much of its spending by making the major renovations before the National Park Service designates Fenway Park as a landmark.³³² Additionally, by making the necessary renovations to keep Fenway Park economically viable, the Red Sox’s long-term commitment to Fenway Park likely will enable it to benefit from increased input on how the development unfolds in the high-traffic area surrounding the stadium in downtown Boston.³³³ Finally, the owners of Fenway Park will still be able to renovate an adjacent building located behind Fenway Park’s centerfield wall by adding stories that could accommodate hundreds of additional seats on the roof (to allow a view similar to the rooftops surrounding Wrigley Field, except owned by the team) and allow for more team office space, enabling the team to increase stadium capacity in order to keep up with other teams’ facilities.³³⁴

By opting for renovation instead of a complete overhaul, the Red Sox succeeded in balancing economic viability and historic preservation where the Yankees could not.³³⁵ Likewise, the Red Sox applied that balance toward an amicable partnership with the government in a way that the Cubs could not.³³⁶ While the Red Sox’s stock rises, the Cubs enter a sea of uncertainty regarding its stadium, ownership, and place in Chicago.³³⁷ Just

329. Jane Lee, *Preserving Sports Sites Difficult; Few Facilities Pursue Federal Landmark Status*, USA TODAY, July 26, 2007, at 3C.

330. News Services, *Red Sox Seek Landmark Status for Fenway*, WASH. POST, Aug. 25, 2005, at E6.

331. In contrast to Chicago’s landmark preservation program, federal protection of Fenway Park would make the Red Sox eligible to receive “rehabilitation tax credits,” equaling a return of roughly twenty percent of any expenditures to rehabilitate historic structures. Chris Reidy, *Sox Seek Landmark Status for Fenway*, BOSTON GLOBE, Aug. 24, 2005, at D1.

332. *Id.*

333. *Id.*

334. *Id.*

335. Jeanssonne, *supra* note 324.

336. Reidy, *supra* note 331.

337. See generally Associated Press, *Bidders*, *supra* note 88 (stating the progress of the sale of the Cubs and Wrigley Field).

like on the field,³³⁸ the Cubs are a victim of unfortunate circumstances preventing the team's attempts to stay competitive—economically or otherwise—with the rest of the franchises in Major League Baseball—compliments of the City of Chicago's preservationist proclivities.

Bryan Steinkohl*

338. The Chicago Cubs will enter the 2009 season without winning a World Series title in 100 years or a National League pennant since 1945. It is the opinion of some members of the public that this drought can be attributed to a curse on the Cubs that has led to a variety of miscues and failures on behalf of the team. Tom Van Riper, *Curses! 13 Super Sports Superstitions*, FORBES.COM, Apr. 15, 2008, http://www.forbes.com/2008/04/15/sports-baseball-soccer-biz-sports_cx_tvr_0415superstitions.html.

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