

Urban Renewal and the Story of *Berman v. Parker*

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THE SUPREME COURT'S 1954 DECISION in *Berman v. Parker*¹ serves as the foundation for much of our modern eminent domain jurisprudence. But the story behind the case starts well before 1954. It is a story that has played out in many cities across the nation, just as it did in Washington, D.C., where the case arose. It is the story of urban decay and urban renewal.

Urban renewal was not a new concept prior to *Berman v. Parker*;² Baron Georges Haussman had transformed Paris' *logements insalubres*³ during the latter half of the nineteenth century⁴ and Mussolini had cleared wide swaths of Rome during the 1920s and 1930s, demolishing lower class neighborhoods in the process.⁵ Some American cities had also experimented with urban renewal. Washington itself had cleared an area known as "Murder Bay" in the 1920s and rebuilt it with federal buildings.⁶ But in the years following *Berman v. Parker*, urban

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1. 348 U.S. 26 (1954) (establishing legislative power to consider both health and aesthetics in enacting redevelopment legislation).

2. See Brian Mahler, Note, *Kick Me Out of the Ballgame: The Boston Red Sox, the Bra, and the Taking of Yawkey Way*, 42 NEW ENG. L. REV. 549, 552 (2008) ("Urban renewal has its roots in the rebuilding of Rome during the reign of Augustus at the dawn of the Common Era.").

3. Insanitary housing.

4. See generally Niamh Sweeny, *Haussmannization and the Conquest of Place: Configuring Parisian Global Influence in the Second Empire (1852-1870)*, 2 WORKING PAPERS (2008), available at <http://www.pennworkingpapers.org/articles/2009/12/11/sweeny-haussmannization-parisian-influence-second-empire/>. An 1850 French law authorized the creation of local commissions to determine where insanitary housing existed and to order the owners to take steps to clean up the property. The commissions were also permitted to condemn property if the insanitary conditions were permanent, and after rehabilitation they could sell the property through public bidding. LOI du 22 avril 1850, relative à l'assainissement des logements insalubres [Law of April 22, 1850 regarding the redevelopment of insanitary housing], X, Bull. CCLII, No. 2068 (1850) (Fr.), available at http://lhi-paca.org/IMG/pdf/Loi_relative_a_l_assainissement_1850.pdf.

5. See JOHN DAVID RHODES, STUPENDOUS, MISERABLE CITY: PASOLINI'S ROME 5-7 (2007).

6. FREDRICK GUTHEIM & ANTOINETTE J. LEE, WORTHY OF THE NATION: WASHINGTON, D.C., FROM L'ENFANT TO THE NATIONAL CAPITAL PLANNING COMMISSION 182 (2d ed. 2006).

renewal was undertaken on a vastly larger scale. Hundreds of thousands of Americans were displaced from their homes, and cities were remade with modern architecture and highways. The social impacts of urban renewal were huge, as lower class and often minority families were moved out of center cities to make room for uses that would generate higher tax revenues.

Although *Berman v. Parker* would have lasting and far-reaching effects, the Supreme Court's treatment of the issues was limited. Indeed, *Berman v. Parker* has come to stand for the exceedingly deferential standard of review applied in eminent domain and other land use cases. While it paved the way for the "sacking of [our] cities[,]"⁷ it also established important precedent for a wide range of now commonplace police power regulations, including sign and billboard laws,⁸ scenic landscape protections,⁹ landmark and historical preservation laws,¹⁰ and aesthetic zoning of all sorts.¹¹ Its direction that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive"¹² has been repeated in dozens of cases and included in many constitutional law textbooks.

Yet while *Berman v. Parker* is frequently cited by the courts, it is rarely analyzed in detail and it is almost never set in its proper historical context. In 2005, when the Supreme Court upheld the use of eminent domain for economic development in *Kelo v. City of New London*,¹³ the Court cited *Berman* for numerous propositions. Its short description of the case, however, did not give any intimation of the racial and socioeconomic discrimination that would infuse urban renewal programs around the country in the years to follow. It did not discuss how historic neighborhoods were bulldozed for interstate highways that divide our

7. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 6 (Modern Library 1993).

8. See Jacob Loshin, *Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation*, 30 ENVIRON ENVTL. L. & POL'Y J. 101 (2006).

9. See Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697 (1995); Lisa Healy, Comment, *Trophy Homes and Other Alpine Predators: The Protection of Mountain Views Through Ridge Line Zoning*, 25 B.C. ENVTL. AFF. L. REV. 913 (1998).

10. See Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69 (1997).

11. See Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U.L. REV. 445 (1998); Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251 (2008) (discussing big box restrictions).

12. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

13. 545 U.S. 469 (2005).

cities and fuel the growth of sprawling, unsustainable land development patterns. It did not explain how communities were broken up and scattered, or how many low income families were relocated into public housing projects characterized by concentrated poverty and racial segregation. Justice O'Connor, in her dissent, did address these topics, and her opinion contributed to the wave of anti-*Kelo* sentiment that led to widespread eminent domain reform among the states.¹⁴

Berman v. Parker, in short, has become precedent without context, a mantra invoked to avoid searching judicial review. More attention, however, should be given to the case. The lack of policy guidance from the federal government during the urban renewal era—both from the Court and from Congress—was not recognized as a problem until much damage had already been done. The governmental goals of blight removal and redevelopment were not inherently bad—indeed, many slums, including those involved in *Berman v. Parker*, were rid of true public nuisances as a result of urban renewal projects. But the Supreme Court's extreme deference allowed urban renewal projects to go forward across the country with an astonishing lack of attention to the welfare of the people that the programs were supposed to benefit.

The first part of this article will discuss the historical development of Washington D.C. and the progressive but moralistic movement that helped to create the language and theory of urban renewal. The national public housing and slum clearance policies that preceded and then created the framework for widespread urban renewal are addressed in the second part, which also discusses how those policies were implemented in Washington. Part three gives context to the specific urban renewal plans that were challenged in *Berman v. Parker*, describing the existing community and how the city sought to change it. The litigation is analyzed, within its historical context, in part four, and part five describes how urban renewal actually played out in Washington D.C. The final part considers the broader impacts of the national urban renewal program, and the civil rights reforms that eventually addressed many of its inequitable impacts. The modern incarnation of urban renewal—economic development—and its treatment in *Kelo* are also discussed, highlighting the need to understand the history and consequences of

14. CASTLE COAL., 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *Kelo* (2008), available at <http://www.castlecoalition.org/index.php> (follow "Resources" hyperlink; then follow "Publications" hyperlink; then follow "50 State Report Card" hyperlink).

Berman v. Parker in order to better inform current and future redevelopment policies.

I. Progressive Housing Reform and the City Beautiful

As the national capital, Washington D.C. has long been challenged to fulfill the grand vision crafted for it by George Washington and his city planner, Pierre L'Enfant. L'Enfant's 1792 plan for the nation's capital was ambitious; he wanted "'to give an idea of the greatness of the empire as well as to engrave in every mind that sense of respect that is due to a place which is the seat of supreme sovereignty.'"¹⁵ Washington, in this sense, has always been a model city, intended to shape the growth and future of the country.

Although the district's development lagged behind cities like New York and Philadelphia during the 1800s,¹⁶ by the turn of the twentieth century Washington's leaders had taken up the cause of transforming the city into a metropolis worthy of its iconic status. Inspired by the beaux arts architecture of the 1893 World Columbian Exposition in Chicago,¹⁷ a Senate commission was established to create a new plan for Washington D.C. The members of the commission included lumi-

15. HOWARD GILLETTE, JR., *BETWEEN JUSTICE & BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C.* 6 (Univ. Pa. Press 2006) (quoting Pierre Charles L'Enfant). The L'Enfant plan stood out even more because "the Federal City was from the outset the key component of President George Washington's nationalist formula for the ordering of the new nation." C.M. Harris, *Washington's Gamble, L'Enfant's Dream: Politics, Design, and the Founding of the National Capital*, 56 *WM. & MARY Q.* 527, 527 (1999).

16. In its early years, the municipal government of Washington was highly dependent on federal funding to finance infrastructure and city services, and Congress often "respond[ed] to its own interests alone." GILLETTE, *supra* note 15, at 14. For example, while Congress had provided for street lighting when the capital was located in Philadelphia, it failed to adequately fund street lighting in Washington until 1819. Similarly, "It took a fire in the Library of Congress in 1851, which threatened to burn the highly combustible Capitol dome above it, to move Congress to appropriate \$5,000 to plan for an adequate water supply." *Id.* at 25. As Gillette concludes, "While the close relationship between the capital and the city clearly offered some possible advantages, in practice it retarded growth and stifled development." *Id.* at 26; *see also* ZACHARY M. SCHRAG, *THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO* 13-14 (2006) ("New York, Philadelphia, and Baltimore were all supported by state governments who could invest in their futures. . . . Washington City, in contrast, had no state legislature to boost it, but rather a national legislature reluctant to fund a potential rival to the home cities of its members.").

17. For the epic 1893 Exposition, a great "white city" was built along Lake Michigan, with temporary buildings that had marvelous plaster and lath facades. The New York Times called the fair "the Greatest Exposition the World Has Ever Seen[.]" *Opened by the President: Mr. Cleveland Presses the Magic Button at Chicago*, *N.Y. TIMES*, May 1, 1893. As James Howard Kunstler explains, the fair was intended to "showcase America's manufacturing genius" and it was "a culmination of all the historical [architectural] styles that had paraded through the decades of the nineteenth century." JAMES HOWARD

naires of the burgeoning City Beautiful movement,¹⁸ a movement that sought to elevate human achievement through city planning and beautification, through architecture and street design, and through parks and monuments.¹⁹ The Senate commission members focused their plans for Washington on improvements to the National Mall and on the orderly placement and design of the new government facilities that would be built along it. Their efforts culminated in the 1902 McMillan Plan, which largely shaped the National Mall as it exists today.²⁰

During the early 1900s, as planners and officials were concentrating on park expansion and monument building in Washington D.C., progressive housing reformers were trying to improve the city's inadequate and insanitary stock of affordable housing. The seeming disconnect between the city's monumental ambitions and the realities of its urban poverty were pointed out by historian Howard Gillette:

When Senator McMillan described the "grave problems" facing Washington, he did not identify large numbers of poor living in substandard housing and struggling at inadequate wages. . . . Rather, the "grave problems" that concerned McMillan and his successors over the next quarter century lay, in his words, in "the location of public buildings, of preserving spaces for parks in the portions of the District beyond the limits of the city of Washington, of connecting and developing existing parks by attractive drives." While he added the need of providing for "the recreation and health of a constantly growing population," the commission's perspective remained overwhelmingly shaped by aesthetic rather than social considerations.²¹

Washington's slums, as described by progressives of the period, presented one of the city's most pressing social problems. While slums in

KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* 61-67 (1994); see also Barbara Rubin, *Aesthetic Ideology and Urban Design*, 69 *ANNALS ASS'N AM. GEOGRAPHERS* 339, 343-47 (1979) (including several pictures of the exposition and describing its attractions in greater detail).

18. Commission members included Daniel Burnham, Frederick Law Olmstead Jr., Charles F. McKim, and Augustus Saint-Gaudens. *REPORT OF THE SENATE COMMITTEE ON THE DISTRICT OF COLUMBIA ON THE IMPROVEMENT OF THE PARK SYSTEM OF THE DISTRICT OF COLUMBIA*, S. REP. NO. 57-166, (1902), available at <http://www.library.cornell.edu/Reps/DOCS/parkcomm.htm> [hereinafter 1902 S. COMM. REPORT].

19. The City Beautiful movement was inspired in great part by the monumental architecture of the 1893 Columbian Exposition, but it also had roots in the civic art societies of small towns and cities across the United States. The movement embodied a progressive "belief in the morally uplifting value of beauty" but also recognized that city planning and beautification could have economic benefits by boosting tourism and trade. Jon A. Peterson, *The City Beautiful Movement: Forgotten Origins and Lost Meanings*, in *THE PHYSICAL CITY: PUBLIC SPACE AND INFRASTRUCTURE* 109, 123 (Neil L. Shamsky ed., 1996) (describing the movement and its many facets).

20. See NAT'L PARK SERV., *CULTURAL LANDSCAPE INVENTORY 2006: THE MALL, NATIONAL MALL & MEMORIAL PARKS* 48-55 (2006), available at <http://www.nps.gov/nationalmallplan/Documents/Studies/m2.pdf>, for a detailed history of the National Mall; see also *infra* note 25 and accompanying text.

21. GILLETTE, *supra* note 15, at 110.

other cities often took the form of mid-rise tenement houses,²² most of Washington's poorer residents lived in "alley dwellings."²³ A prominent Washington housing reformer, Charles Weller, described the physical and social isolation of the alleys at the time:

Washington's alley houses . . . do not front toward the outside streets but in the opposite direction. Their inhabitants have no connection whatever with those of the streets and avenues. . . . Resourceful people live for years in attractive residences on the avenues without knowing or affecting in the slightest degree the life of the alley hovels just behind them. Such is the ground plan for some striking social contrasts in the National Capital.²⁴

Progressives at the time may have exaggerated the degree to which the alleys corrupted their residents, but they were hardly ideal places to live. Made up of one or two story structures, the alleys were frequently crowded, dilapidated, and lacking in basic utilities. Sanitation was poor, as many houses had no indoor bathrooms or proper plumbing, and this contributed both to strong odors and to high rates of contagious disease. Yet the alleys had a number of positive qualities that generally went unacknowledged: they were affordable; they offered their residents mixed-income and sometimes racially integrated neighborhoods; and they were located conveniently close to workplaces and markets.

22. See JACOB A. RIIS, *HOW THE OTHER HALF LIVES* (1890), available at <http://books.google.com/> (search "How the Other Half Lives 1890"; then follow "How the Other Half Lives" hyperlink).

23. See James Borchert, *Urban Neighborhood and Community: Informal Group Life, 1850-1970*, 11 J. INTERDISC. HIST. 607, 610 (1981) ("Alley houses in Washington date from the 1850s, when an expanding population and the lack of an adequate transportation system impeded the dispersal of population.").

24. CHARLES FREDERICK WELLER, *NEGLECTED NEIGHBORS: STORIES OF LIFE IN THE ALLEYS, TENEMENTS AND SHANTIES OF THE NATIONAL CAPITAL* 9 (1909), available at <http://books.google.com/> (search "Neglected Neighbors"; then follow "Neglected Neighbors" hyperlink); see *infra* note 25 and accompanying text (illustrating an alley dwelling's layout).



Fig. 1. An illustration of a typical alley layout included in Charles Weller's *Neglected Neighbors*. The lettered "streets" are alleys; actual streets and avenues bordered the square.²⁵



Exact Drawing of "Blagden's Alley" and Surrounding Square Between Ninth and Tenth, M and N Streets, N. W.

[Drawing by Kemp, Stone and Craig]

Explanation.

- | | |
|---|--------------------------|
|  Brick structures | X Stable |
|  Wooden structures | W Warehouse or Work Shop |
| HF High fence | WS Wooden Shed |
| Z Dwellings removed by condemnation since 1905. | |

Measurements

- Alley A to B—30 feet wide by 150 feet long.
- Alley C to D—15 feet wide by 495 feet long.
- Alley E to F—30 feet wide by 265 feet long.
- Alley U to T—30 feet wide by 245 feet long.
- Alley G to H—10 feet wide by 220 feet long.
- Alley W to X—10 feet wide by 67 feet long.
- Alley AA to BB—15 feet wide by 66 feet long.
- Alley CC to DD—10 feet wide by 137 feet long.

Houses 11.5 to 13.6 feet wide and 20 to 25 feet deep, with yards 7 to 19 feet deep, including toilet sheds at rear.

To many of the city's leaders and much of the public, the alley dwellings were anathema. Alley communities were commonly believed to be "centers of disease, vice, crime, and dependency."²⁶ Residents were described as promiscuous, inclined toward alcoholism, and neglectful of their children.²⁷ Even the affordability of alley homes was criticized, as "[t]he cheap alley rents and low standards of living[] simply mean a larger margin for drink, for idleness and for vicious waste of power."²⁸ It was thought that the problems of these congested urban areas, especially the diseases, could spread throughout the city. Weller, for example, told of nursemaids taking "babies from resourceful families" into the alleys and exposing them to tuberculosis, unbeknownst to their parents.²⁹ He also warned of the "democratic little house-fly" that could spread "disease germs from the disregarded plague spots and deposit[] them, with Christian catholicity of spirit, upon the food alike of rich

26. John Ihlder & Maurice V. Brooks, *Use of the Power of Eminent Domain in Slum Reclamation*, 12 J. LAND & PUB. UTIL. ECON. 355, 358 (1936).

27. See WELLER, *supra* note 24, at 27-36 (concerning "immorality and child life"). Weller gave detailed accounts of the high death rates among infants in the alleys, and explained:

The three months old, fatherless baby whose mother leaves it in the care of Elsie Ranson is treated on the principle that sunlight and fresh air are injurious. It is kept in a dark, unventilated room where it lies always in an uninterrupted, heavy slumber produced by opiates. The babe's weak voice is rarely heard and its bottle of diluted condensed milk, offered at irregular intervals, arouses only a languid interest. On each successive call the visitor finds that the infant's waxen color is enhanced and its stick-like arms more wasted. In many of the better homes even, nursing bottles are found lying around on the floor or anywhere else, partly filled with souring milk and black with appreciative flies. An occasional dash of cold water from the hydrant is always deemed sufficient to cleanse bottles and nipples. . . . Like some cotton-mill operatives of southern communities, who fill their babies' gums with snuff "to make them peaceable", [sic] many alley mothers win relief from annoyance by administering sedatives to their infants.

Id. at 31-32; see also E.R.L. Gould, *The Housing Problem in Great Cities*, 14 Q.J. ECON. 378, 380 (1900), for a discussion of alcoholism:

It is absurd to suppose that immoderate drinking of liquor can be suppressed so long as people are left to live in houses where lack of elementary sanitation saps vitality, while noisomeness and unattractiveness impel a search for outside relief. . . . I am bound to believe that the massing of saloons in low neighborhoods where the worst housing conditions exist is more than simple coincidence.

Id.

28. WELLER, *supra* note 24, at 22.

29. *Id.* at 24; see also GILLETTE, *supra* note 15, at 116, for a discussion of the reformers' knowledge of the transferability of the germs:

In a statement reflecting both the comfortable status of the reformers and an awareness of their own self-interest, the Civic Center annual report for 1907 warned, "These dwellings often house our servants, and a large part of the washing is done there, and thus the filth and disease germs which infest these houses are not confined to their inhabitants, but are carried into our own homes."

and poor, statesman and . . . citizen.”³⁰ While contagious diseases did present a problem in the alleys, the negative perception of the slums was nevertheless infused with prejudice. The urban historian Kenneth Jackson has pointed out that discrimination was so commonplace at the beginning of the twentieth century that “the socioeconomic characteristics of a neighborhood determined the value of housing to a much greater extent than did structural characteristics.”³¹

As early as the 1890s, Congress³² enacted laws intended to improve the Washington alley communities by converting them into minor streets, but these regulatory measures were generally unsuccessful.³³ Housing reformers believed that more stringent legislation permitting the condemnation and demolition of unsafe buildings was necessary. To gain support for their cause, they juxtaposed the slums with the stately government buildings located nearby and reminded the well off of those “democratic house-flies.”³⁴ Echoing the lofty ideals and environmental determinism of the City Beautiful movement, reformers claimed that the slum problem could be solved if only the slums were demolished.³⁵

30. WELLER, *supra* note 24, at 73.

31. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 198 (1987); *see also* WELLER, *supra* note 24, at 37; Borchert, *supra* note 23, at 615-16 (discussing racial attitudes of police who patrolled in Washington alleys).

32. The Constitution grants Congress the authority to “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District[.]” U.S. CONST. art I, § 8, cl. 17. However, because members of the House and Senate are to be elected by voters of the “States” and because Washington is neither a state unto itself nor part of any state, its residents have no constitutional right to congressional representation. U.S. CONST. art. I, §§ 2-3. Currently, Washington D.C. residents do have a nonvoting member in the House of Representatives. Calls for legislation to enfranchise Washington residents have been made since the nineteenth century, but none have yet succeeded. *See generally* DC VOTE, WHAT’S THE ONLY DEMOCRACY IN THE ENTIRE WORLD WHERE THE RESIDENTS OF THE CAPITAL HAVE NO VOTE IN CONGRESS?, *available at* <http://www.dcvote.org/pdfs/LCCRBooklet041607.pdf>.

33. Act of July 22, 1892, ch. 230, 27 Stat. 255 (“provid[ing] for the opening of the Alleys in the District of Columbia.”), *amended by* Act of Aug. 24, 1894, ch. 328, 28 Stat. 501 (“to open, widen, and extend alleys in the District of Columbia.”); *see also* *Martin v. District of Columbia*, 205 U.S. 135 (1907) (rejecting the method of assessing charges on property owners for the widening of alley streets, which led to increased difficulties in eliminating the alley communities). Regulatory measures were generally seen as only marginally useful, because “a new crop of shacks will ripen and need to be harvested every year.” WELLER, *supra* note 24, at 209.

34. *See supra* note 30 and accompanying text.

35. *See, e.g.*, Roger D. Simon, Book Review, 89 AM. HIST. REV. 1176, 1177 (1984) (reviewing M. CHRISTINE BOYER, *DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING*) (“They had a simplistic environmental determinism that led them to focus on parks, playgrounds, tenements, and city plans rather than low wages, unsafe working conditions and unemployment. There was admittedly a large dose of social control in their programs. . . .”). *See also* DAVID SCHUYLER, *THE NEW URBAN LANDSCAPE: THE REDEFINITION OF CITY FORM IN NINETEENTH CENTURY*

Fig. 2. The squalid conditions of the alleys were often juxtaposed against the stateliness of the nearby government buildings. This photo appeared in the 1909 book *Neglected Neighbors*, *supra* note 24, which documented alley life in Washington.



In 1906, reformers succeeded in passing a bill that allowed unfit homes to be taken and destroyed by city authorities.³⁶ But the problem of a “house famine” quickly became apparent and dashed any hope that the law would be effective.³⁷ Public housing did not exist at the time, and the construction of new, affordable housing was left primarily to

AMERICA 6 (1988), for a discussion of the perceived importance of a city’s physical spaces:

A concern for maintaining social order pervades much of the writing of Olmstead and his colleagues. . . . They believed, as did advocates of penitentiaries and other asylums and celebrants of the new culture of domesticity, that the physical spaces humans occupy influence their patterns of behavior. Thus the question of city form was not merely an aesthetic one but involved a statement of political and social ideology.

Id.

36. Act of Apr. 14, 1906, ch. 1626, 34 Stat. 114 (“provid[ing] for the abatement of nuisances in the District of Columbia by the Commissioners of said District, and for other purposes.”).

37. GILLETTE, *supra* note 15, at 119 (quoting George Sternberg, who coined the phrase “house famine”).

philanthropic organizations and limited dividend companies.³⁸ These organizations simply did not have the resources to meet the demand for low cost residential space.³⁹

Housing reformers continued to press their cause. Charles Weller brought the squalid conditions of the alleys to the public's attention in his 1909 book, *Neglected Neighbors*, and in the same year, a 400 page report was issued by the President's Homes Commission, calling for immediate action.⁴⁰ In 1914, Congress passed another bill aimed at eradicating the alley dwellings, purportedly spurred to quicker action by the deathbed request of First Lady Ellen Wilson.⁴¹ The bill required all of the alley houses to be demolished by 1918,⁴² but the outbreak of the First World War prevented its implementation.⁴³

By the end of the 1920s, Washington had established itself as a leader in the young field of urban planning, having enacted one of the country's first zoning ordinances⁴⁴ and created one of its first planning commissions.⁴⁵ Diverse interests came together to make housing reform a

38. In Washington, the Sanitary Improvement Company and the Sanitary Housing Company produced limited amounts of low cost, well-built homes, typically designed as row houses. *See id.* at 115; GEORGE M. STERNBERG, REPORT OF THE COMMITTEE ON BUILDING OF MODEL HOUSES 18-19 (1908), available at <http://books.google.com/search?hl=en&q=Report+of+the+Committee+on+Building+of+Model+Houses&btnG=Search>; then follow "Report of the Committee on Building of Model Houses" hyperlink).

39. In the two years following passage of the 1906 bill, nearly 800 houses were declared unfit for habitation. The Washington Sanitary Improvement Company, however, had built only about 240 houses by 1908. *See* GILLETTE, *supra* note 15, at 115; STERNBERG, *supra* note 38, at 18-19.

40. WELLER, *supra* note 24; WILLIAM H. BALDWIN, REPORT OF THE COMMITTEE ON IMPROVEMENT OF EXISTING HOUSES AND ELIMINATION OF INSANITARY AND ALLEY HOUSES, S. Doc. No. 644 (2d Sess. 1909), available at <http://books.google.com/search?hl=en&q=report+of+the+committee+on+improvement+of+existing+houses&btnG=Search>; then follow "Reports of the President's Homes Commission: Message from the President" hyperlink).

41. GILLETTE, *supra* note 15, at 122.

42. Act of Sept. 25, 1914, ch. 310, 38 Stat. 716 ("provid[ing], in the interest of public health, comfort, morals, and safety, for the discontinuance of the use as dwellings of buildings situated in the alleys in the District of Columbia."); *see also* District of Columbia v. Nash, 20 F.2d 285 (D.C. Cir. 1927).

43. GILLETTE, *supra* note 15, at 122.

44. Act of Mar. 1, 1920, ch. 92, 41 Stat. 500 ("regulat[ing] the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes."); *see also* D.C. Office of Zoning, DC Zoning History, <http://www.dcoz.dc.gov/about/history2.shtm> (last visited Mar. 15, 2010).

45. The National Capital Park Commission was created in 1924 to oversee the creation of new parks and to draft a comprehensive plan for the capital. Act of June 6, 1924, ch. 270, 43 Stat. 463 ("Providing for a comprehensive development of the park and playground system of the National Capital."). The commission's name was changed in 1926 to the National Capital Parks and Planning Commission. Act of Apr. 30, 1926, ch. 198, 44 Stat. 374. It was changed again in 1952 to the National Capital Planning Commission. Act of July 19, 1952, ch. 949, 66 Stat. 781. For ease of reference, the commission will be referred herein as either the planning commission or the NCPC.

prominent issue: “reformers wanted government support to eliminate decrepit housing and replace it with modern, affordable dwellings. Politicians hoped to increase their cities’ tax bases and provide jobs . . . to their constituents. Real estate interests sought to gain access to large parcels of downtown property for profitable redevelopment.”⁴⁶ While their goals may have been different, their solution was identical: get rid of the alleys.

Unlike earlier attempts to address the alley dwelling problem through piecemeal condemnations and street conversions, planners in the late 1920s and early 1930s sought legislation that would authorize the full scale clearance of troubled alley areas.⁴⁷ The term “blight” entered the urban planning lexicon at about this time, offering a “scientific” analogy between patterns of city decay and botanical epidemiology.⁴⁸ Just as the destruction of all possible host plants within a given geographical area was considered to be an appropriate governmental response

46. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 14 (2003).

47. This approach had in fact been recommended by the 1909 report of the President’s Homes Commission. Reports of the President’s Homes Commission. BALDWIN, *supra* note 40, at 13. Massachusetts took a similar approach and adopted a constitutional amendment authorizing the use of eminent domain to clear land in 1915. MASS. CONST. amend. art. XLIII.

48. As law professor Wendell Pritchett has explained:

[S]cholars introduced the “ecological approach” to the field of sociology, and this method of study was crucial to early twentieth century understandings of urban change. Blight, originally used to describe plant diseases, was a part of this broader approach to understanding society. Cities were like living organisms, the Chicago school argued, and, therefore, urban change occurred in natural patterns. Blight arose around the central business district, in areas that were formerly residential. As cities expanded, these areas became mixed use districts, with industry and commerce. The formerly attractive housing was divided into smaller units for the poor, and “parasitic and transitory services” such as flophouses proliferated.

Pritchett, *supra* note 46, at 16-17.

The language of blight also transformed dialogues about housing equity and city planning. As Margaret Farrar explains:

[F]rom its first connotations, blight is primarily an economic disease; these are not just any plants that are overtaken by blight but cash crops, and it is specifically the city’s “prosperity” that is at stake in failing to combat the problem. Indeed, central business districts in urban areas were the principal beneficiaries of urban renewal funding, as rejuvenating downtown businesses and bringing back the consumer class from the suburbs soon became more important than building affordable housing. . . . Whereas reform at the turn of the century had focused (at least ostensibly) on the health of the population (alley dwellers’ propensity to inculcate and spread actual as well as moral disease), by 1940 the “health” of the city had entirely different (that is, economic) connotations.

MARGARET E. FARRAR, *BUILDING THE BODY POLITIC: POWER AND URBAN SPACE IN WASHINGTON, D.C.* 81 (2008).

to outbreaks of plant disease,⁴⁹ planners and sociologists claimed that slum clearance was necessary to prevent the spread of urban blight. Otherwise, as Washington-based architect Louis Justement explained in 1933, “‘existing blighted areas will continue to degenerate into slums and new areas will be developed in the suburbs, constantly draining the population of the older city.’”⁵⁰ Advocates of slum clearance also pointed out that the costs of providing municipal and social services to slum areas often outmeasured the revenues brought in from property taxes.⁵¹

II. The Rise of Public Housing and Slum Clearance Policies

The collapse of the economy during the Great Depression and the paradigm shift of the New Deal brought a new forcefulness to progressive efforts to improve urban housing conditions. In Washington, Congress made a renewed attempt to deal with the city’s substandard housing with the District of Columbia Alley Dwelling Act of 1934.⁵² The stated purpose of the Act was to “eliminate the hidden communities in inhabited alleys,” and it declared that the use of alley dwellings would be unlawful after 1944.⁵³ In addition to this essentially aspirational goal, the act created the Alley Dwelling Authority (ADA), an early sort of local housing authority, and gave it the power to condemn and demolish any property within any block that contained alley dwellings, including properties that were not themselves substandard.⁵⁴ But the Alley Dwelling Act, like previous efforts to solve the blight problem in Washington, was not enough. The appointed director of the ADA, John Ihlder, was reluctant to demolish alley homes until replacement housing was

49. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding a law requiring all cedar trees within a two mile radius to be destroyed in order to prevent the spread of cedar rust to nearby apple trees).

50. GILLETTE, *supra* note 15, at 138 (quoting a 1933 *Washington Post* article).

51. See, e.g., Harold L. Ickes, *Government and Housing*, in *AMERICAN PLANNING AND CIVIC ANNUAL* 80-83 (Harlean James, ed., 1935) (discussing the costs of providing municipal services to slum areas); *id.* at 82 (“There are indirect financial, as well as social and moral costs, which in the aggregate far exceed such differences between taxes collected and cost of services. . . .”); FARRAR, *supra* note 48, at 82-83 (discussing various economic studies of slum areas).

52. District of Columbia Alley Dwelling Act, ch. 465, 48 Stat. 930 (1934).

53. *Id.* § 4(a).

54. *Id.* The ADA was later renamed the National Capital Housing Authority. The ability to condemn property that was not itself necessary for clearing alley dwellings was known as “excess condemnation.” That doctrine, by 1934, had been upheld by several courts. See Gary P. Johnson, Comment, *The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370, 379-81 & nn.55-72 (1981).

secured.⁵⁵ This stance, combined with a general shortage of affordable housing and controversies about the racial segregation of housing projects, delayed demolition of many alley homes.⁵⁶

Washington, of course, was not the only city to struggle with housing problems during the Depression, and as part of the New Deal, Congress began to establish national housing policies that would create jobs, keep real estate and building companies in business, boost municipal assets, and stave off further financial distress. In 1932, Congress passed the Home Loan Bank Act in order to finance home building activities,⁵⁷ and it also established the Reconstruction Finance Corporation (although it would later turn out to be essentially ineffective),⁵⁸ authorizing it to provide loans for private developers of low income housing.⁵⁹ The Public Works Administration, which oversaw numerous public housing projects, was created in 1933,⁶⁰ as was the Home Owners Loan Corporation, which was intended to prevent home foreclosures by facilitating long term debt refinancing.⁶¹ The following year, Congress passed the first National Housing Act, which created the Federal Housing Administration and introduced a program of federal mortgage insurance to make it easier for working people to obtain loans for purchasing or improving residential properties.⁶² The 1934 Act also included some special provi-

55. See GILLETTE, *supra* note 15, at 137.

56. See *id.* at 136-38; see also FARRAR, *supra* note 48, at 77 (noting that only 8% of identified alley dwellings had been rehabilitated by 1945).

57. Federal Home Loan Bank Act, ch. 522, 47 Stat. 725 (1932).

58. See JACKSON, *supra* note 31, at 194-95; Stefan A. Riesenfeld & Warren Eastlund, *Public Aid to Housing and Land Redevelopment*, 34 MINN. L. REV. 610, 618 n.62 (1949).

59. See Reconstruction Finance Corporation Act, ch. 8, 47 Stat. 5 (1932); see also U.S. Department of Housing and Urban Development, HUD Historical Background, <http://www.hud.gov/offices/adm/about/admguides/history.cfm> (last visited Mar. 12, 2010).

60. The Housing Division of the PWA was authorized under the National Industrial Recovery Act of 1933, which provided for the "construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects[.]" National Industrial Recovery Act, ch. 90, 48 Stat. 195, tit. I, § 202(d) (1933). See GAIL RADFORD, *MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA* 85-110 (1997). The PWA created about 21,000 units of public housing during its three-year existence. Peter Marcuse & W. Dennis Keating, *The Permanent Housing Crisis: The Failures of Conservatism and Limitations of Liberalism*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 142 (Rachel G. Bratt et al. eds., 2006).

61. Home Owners Loan Act of 1933, ch. 64, 48 Stat. 128.

62. National Housing Act of 1934, ch. 847, 48 Stat. 1246. Congress had previously passed legislation to provide housing for war workers during the First World War. See Housing Act of 1918, ch. 74, 40 Stat. 550. The 1934 Housing Act, however, was the first federal housing policy to be justified under the police power, rather than the war power.

sions for low income mortgages issued by local housing authorities or limited dividend companies.⁶³

The most important of the New Deal housing policies affecting low income housing, however, was the landmark Housing Act of 1937, which was intended, as Congress explained:

to promote the general welfare of the Nation by employing its funds and credit . . . to assist the several States . . . to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . that are injurious to the health, safety, and morals of the citizens of the Nation.⁶⁴

The Act provided federal funding for local housing authorities to use for the construction of public housing, and it formalized the link between slum clearance and public housing development by conditioning funding for new construction on the elimination of an equal number of substandard units.⁶⁵ It did not, however, require the number of new units to equal the number of destroyed units, with the result that more low income housing was typically destroyed than was created.⁶⁶

With federal money on the table, cities across the country established public housing authorities and embarked upon ambitious plans for slum clearance.⁶⁷ Many of these plans required the use of eminent domain

63. *Id.*

64. United States Housing Act of 1937, ch. 896, § 1, 50 Stat. 888. The Act defined a "slum" as "any area where dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to the safety, health, or morals," and it defined "slum clearance" as "the demolition and removal of buildings from any slum area." *Id.*

65.

[N]o annual contributions shall be made . . . in connection with the development of any low-rent-housing or slum-clearance project involving the construction of new dwellings, unless the project includes the elimination by demolition, condemnation, and effective closing, or the compulsory repair or improvement of unsafe or insanitary dwellings situated in the locality or metropolitan area, substantially equal in number to the number of newly constructed dwellings provided by the project. . . .

Id. at § 10(a).

[N]o capital grant shall be made for the development of any low-rent-housing or slum-clearance project involving construction of new dwellings, unless the project includes the elimination by demolition, condemnation, and effective closing, or the compulsory repair or improvement of unsafe or insanitary dwellings situated in the locality or metropolitan area, substantially equal in number to the number of newly constructed dwellings provided by the project. . . .

Id. § 11(a).

66. See Jewel Bellush & Murray Hausknecht, *Urban Renewal: An Historical Overview*, in *URBAN RENEWAL: PEOPLE, POLITICS AND PLANNING* 10 (Jewel Bellush & Murray Hausknecht eds., 1967).

67. See JACKSON, *supra* note 31, at 224 ("By the end of 1938, thirty-three states had passed enabling legislation, and 221 local authorities had been established.").

to acquire properties for demolition and rebuilding, and nearly all of the courts to hear such cases found no objection.⁶⁸ Citing the intent to remedy the cities' severe affordable housing crises, the courts generally found that clearing slum areas to build new low cost housing was a public purpose that benefited the entire community.⁶⁹ Only a handful of courts concluded that government constructed low income housing was not a public purpose for which eminent domain could be used.⁷⁰ Those courts reasoned that the ultimate beneficiaries of public housing projects were the people who would eventually live there—private individuals.⁷¹ This view was not widely followed, and it was foreclosed in Washington D.C. by a 1941 judicial decision that gave significant deference to the Alley Dwelling Authority's condemnation decisions.⁷² By the 1950s, courts across the country had solidly rejected the idea that

68. See Pritchett, *supra* note 46, at 25-26.

69. See *Brammer v. Hous. Auth.*, 195 So. 256 (Ala. 1940); *In re Opinions of the Justices*, 179 So. 535 (Ala. 1938); *Humphrey v. City of Phoenix*, 102 P.2d 82 (Ariz. 1940); *Hogue v. Hous. Auth.*, 144 S.W.2d 49 (Ark. 1940); *Hous. Auth. v. Dockweiler*, 94 P.2d 794 (Cal. 1939); *Willmon v. Powell*, 266 P. 1029 (Cal. Dist. Ct. App. 1928); *People ex rel. Stokes v. Newton*, 101 P.2d 794 (Colo. 1940); *Higbee v. Hous. Auth.*, 197 So. 479 (1940); *Marvin v. Hous. Auth.*, 183 So. 145 (Fla. 1938); *Williamson v. Hous. Auth.*, 199 S.E. 43 (Ga. 1938); *Krause v. Peoria Hous. Auth.*, 19 N.E.2d 193 (Ill. 1939); *Edwards v. Hous. Auth.*, 19 N.E.2d 741 (Ind. 1939); *Spahn v. Stewart*, 103 S.W.2d 651 (Ky. 1937); *State ex rel. Porterie v. Hous. Auth.*, 182 So. 710 (La. 1938); *Matthaei v. Hous. Auth.*, 9 A.2d 835 (Md. 1939); *Allydon Realty Corp. v. Holyoke Hous. Auth.*, 23 N.E.2d 665 (Mass. 1939); *In re Brewster St. Hous. Site*, 489 N.W. 493 (Mich. 1939); *Thomas v. Hous. & Redevelopment Auth.*, 48 N.W.2d 175 (Minn. 1951); *Laret Inv. Co. v. Dickmann*, 134 S.W.2d 65 (Mo. 1939); *Rutherford v. City of Great Falls*, 86 P.2d 656 (Mont. 1939); *Lennox v. Hous. Auth.*, 290 N.W. 451 (Neb. 1941); *Romano v. Hous. Auth.*, 10 A.2d 181 (N.J. 1939); *Simon v. O'Toole*, 155 A. 449 (N.J. 1931); *N.Y. City Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1936); *Wells v. Hous. Auth.*, 197 S.E. 693 (N.C. 1938); *State ex rel. Ellis v. Sherrill*, 25 N.E.2d 844 (Ohio 1940); *Dornan v. Phila. Hous. Auth.*, 200 A. 834 (Pa. 1938); *McNulty v. Owens*, 199 S.E. 425 (S.C. 1938); *Knoxville Hous. Auth. v. City of Knoxville*, 123 S.W.2d 1085 (Tenn. 1939); *Hous. Auth. v. Higginbotham*, 143 S.W.2d 79 (Tex. 1940); *Mumpower v. Hous. Auth.*, 11 S.E.2d 732 (Va. 1940); *Chapman v. Huntington Hous. Auth.*, 3 S.E.2d 502 (W. Va. 1939); *see also Cleveland v. United States*, 323 U.S. 329, 333 (1945) (upholding the Housing Act of 1937 and indicating that public housing would be considered a valid public use).

70. See Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 894-95 (1990) (explaining that the 1937 Act used local public housing agencies in part because of existing federal precedents holding that housing was not a public use).

71. See *United States v. Certain Lands*, 78 F.2d 684, 688 (6th Cir. 1935); *United States v. Certain Lands*, 12 F. Supp. 345, 348 (E.D. Mich. 1935); *see also In re Opinion of the Justices*, 98 N.E. 611, 614 (Mass. 1912) (holding public housing not to be a public use sufficient to support the power of taxation).

72. *Keyes v. United States*, 119 F.2d 444, 448 (D.C. Cir. 1941).

government managed low income housing was somehow a private use insufficient to justify the use of eminent domain.⁷³

The New Deal housing policies resulted in a proliferation of affordable housing construction,⁷⁴ but their legacy was mixed. Support for public housing waned during the war years, both for economic and ideological reasons. Opponents generally included:

- (1) the interest groups—builders, suppliers, mortgage lenders, and real estate associations—who feared that government intervention would disrupt the industry; and
- (2) conservatives, who opposed the cost and contended that government-subsidized housing would be socialistic, unfair competition with private enterprise, and an unwarranted subsidy to families who “have no more right to a free new home than to a free new car.”⁷⁵

The growing stigma for public housing inhabitants was linked to racial prejudices, especially against black people, and a variety of factors converged to severely limit their housing options. Discrimination in public housing often blocked black families from securing subsidized units,⁷⁶ and restrictive covenants and prejudicial real estate practices prevented black families from moving to the suburbs, where federally insured mortgages were easily obtainable.⁷⁷ This compelled many black

73. Federal courts did not follow the Sixth Circuit’s opinion that government constructed low income housing amounted to a private use of land. See *Okl. City v. Sanders*, 94 F.2d 323 (10th Cir. 1938). In Massachusetts, the early view against public housing was clearly rejected in the 1940s. *Allydonn Realty Corp. v. Holyoke Hous. Auth.*, 23 N.E.2d 665 (1939).

74. See Pritchett, *supra* note 46, at 23; Paul R. Lusignan, *Public Housing in the United States, 1933-1949*, 25 CULTURAL RESOURCE MGMT. 36 (2002), available at <http://crm.cr.nps.gov/archive/25-01/25-01-16.pdf> (claiming that 125,000 units of low income public housing were built during the 1930s and 1940s).

75. William H. Ledbetter, Jr., *Public Housing: A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROBS. 490, 495-96 (footnote omitted).

76. Most public housing facilities were segregated, and “[d]uring the early years of American public housing, the entry of blacks into projects was systematically blocked by a variety of discriminatory mechanisms, including legal segregation, racially motivated site selection, racially based tenant selection, and the simple refusal of white tenants to share projects with blacks.” Adam Bickford & Douglas S. Massey, *Segregation in the Second Ghetto: Racial and Ethnic Segregation in American Public Housing, 1977*, 69 SOC. FORCES 1011, 1012 (1991).

77. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that it was a violation of equal protection for courts to order the specific performance of racially restrictive covenants); see also Arthur N. Greenberg & Robert A. Franklin, *Discrimination in Ownership and Occupancy of Property Since Shelley v. Kraemer*, 1 UCLA INTRAMURAL L. REV. 14 (1952-1953) (discussing continuing fears of residential integration, and describing techniques used to ensure racial homogeneity in white neighborhoods after *Shelley v. Kraemer*, such as: options to repurchase used to block home sales to minority purchasers; cash deposit requirements to ensure compliance with racial resale provisions; requirements of neighborhood approval for resales; use of fee simple determinable deeds providing for reverter upon resale to a minority purchaser); Avern Cohn, *Fair Housing Testing*, 41 URB. LAW. 273, 275-78 (2009) (discussing the use of restrictive

and minority families to seek housing in urban areas, but redlining made it difficult to secure financing to buy or repair properties located in neighborhoods characterized by aging housing stocks and racial diversity.⁷⁸ With the Great Migration bringing more black people into northern cities, urban areas grew in population but, without financing for improvements, they became increasingly crowded and physically deteriorated. Eventually, the blight of the alleys and tenements spread to larger areas, and whole city neighborhoods were transformed into slums.⁷⁹ While this trend seemingly fulfilled epidemiology based theories of blight, the effects of redlining and discrimination on urban decay were poorly understood and often ignored.

In Washington, the Alley Dwelling Authority was designated as the city's public housing authority, but it faced particular challenges in building new public housing under the 1937 Housing Act due to the expansion of the federal government, both during the New Deal years and during the war. An influx of federal employees into the city during this time and the need for land for new federal buildings contributed to rising rents and exacerbated housing problems for the city's poorest residents.⁸⁰ After the attack on Pearl Harbor in 1941, the ADA was directed to concentrate on war housing, and public housing construction in the city was all but halted.⁸¹

The ADA was redesignated as the National Capital Housing Authority (NCHA) in 1943, and it lobbied to receive an increase in funding for public housing.⁸² These efforts were opposed by influential real estate and commercial groups.⁸³ They claimed, not incorrectly, that the ADA had been ineffective at eliminating the city's alley dwellings, and some detractors labeled the whole public housing system as socialistic.⁸⁴

covenants in Michigan during this period and *Sipes v. McGhee*, the Michigan case decided as a companion case with *Shelley v. Kraemer*).

78. For a thorough discussion of the racially discriminatory lending practices of government and private entities see JACKSON, *supra* note 31, at 197-218; see also KUNSTLER, *supra* note 17, at 102-04; Cohn, *supra* note 77, at 277-78; Amy E. Hiller, *Spatial Analysis of Historical Redlining: A Methodological Exploration*, 14 J. HOUS. RES. 137 (2003).

79. See FARRAR, *supra* note 48, at 83-84 (discussing distinctions between substandard alleys and slum areas).

80. See GILLETTE, *supra* note 15, at 140.

81. *Id.* at 144-46.

82. John Ihlder, the agency's director, gave tours of the city's most dilapidated areas to politicians, and he warned that the alleys' blight problems had spread throughout the city to nearly 40,000 buildings. *Id.* at 146.

83. *Id.* at 147-48.

84. *Id.*; JACKSON, *supra* note 31, at 192 (quoting Senator Albert Fall of New Mexico).

Downtown commercial interests, moreover, wanted to lure wealthier residents back from the suburbs by building market rate and luxury housing, along with other urban amenities. Planners also joined the calls for a new approach to housing reform, seeing an opportunity to build “new cities for old” and to remedy the problems that they attributed to haphazard development.⁸⁵ Louis Justement, a prominent Washington architect and planner, explained that “[f]rom the standpoint of the poor, it is far more important to develop an over-all plan for stimulating the entire economy—and helping *all* the people—than it is to produce new housing for a selected few among the poorest families.”⁸⁶ These various interests united to support a new type of slum clearance program that would prioritize redevelopment planning and the inclusion of private developers, rather than public agencies, in the task of rebuilding.

When slum clearance legislation was passed in Washington in 1946,⁸⁷ the real estate and business lobbies got most of what they wanted, and the task of rebuilding slum areas was essentially reserved for private enterprises. The planning commission was also given considerable oversight authority, and the role of the National Capital Housing Authority in redevelopment was practically eliminated.⁸⁸ The legislation, known as the District of Columbia Redevelopment Act, required the planning commission to prepare a comprehensive plan for the city prior to designating specific areas for slum clearance and redevelopment.⁸⁹ A redevelopment plan would then be prepared, consistent with the plans for the city as a whole. After the city approved the redevelopment plan, the newly created Redevelopment Land Agency (RLA) was then given the authority to implement it.⁹⁰ Essentially, this entailed assembling parcels of blighted properties, clearing them, and then transferring them at subsidized prices to private redevelopment companies.⁹¹ When Congress allocated funding for local redevelopment programs in the 1949

85. See GILLETTE, *supra* note 15, at 149.

86. LOUIS JUSTEMENT, *NEW CITIES FOR OLD: CITY BUILDING IN TERMS OF SPACE, TIME, AND MONEY* 226 (1946); see also FARRAR, *supra* note 48, at 79-80 (discussing Justement’s *New Cities for Old* and his beliefs about planning).

87. District of Columbia Redevelopment Act, ch. 736, 60 Stat. 790 (1946).

88. GILLETTE, *supra* note 15, at 150 (“The right of eminent domain . . . was shifted from the NCHA to the new agency [the RLA], thereby depriving the NCHA of the ability to secure its own sites.”).

89. § 6(a), 60 Stat. 790.

90. *Id.* § 7.

91. Private redevelopers were specifically given a preference over public housing agencies in the disposition of redevelopment land. *Id.* § 7(g).

Housing Act,⁹² Washington was poised to begin a process of urban renewal that would continue for decades to come.

By emphasizing the role of private enterprise and linking slum clearance to comprehensive planning, the District of Columbia Redevelopment Act presaged the transformation of United States housing policies. When Congress passed the National Housing Act of 1949, it modified the programs set up under the 1937 Housing Act by conditioning funding for slum clearance projects on affording “maximum opportunity” to private developers and by allowing slum areas to be redeveloped with other than low income housing.⁹³ It also required redevelopment plans to “conform[] to a general plan for the development of the locality as a whole.”⁹⁴ Although this planning provision was less comprehensive than the one contained in the District of Columbia Redevelopment Act,⁹⁵ it nevertheless made slum clearance the first federal program to impose a general urban planning requirement.⁹⁶ Another important change in the 1949 law regarded the old requirement that new low income housing units had to be accompanied by the removal of an equal number of slum units. The provisions were amended so as to exempt low income

92. Ch. 338, § 103, 63 Stat. 413 (1949) (providing for federal grants equaling up to two thirds of the cost of urban renewal projects).

93. *Id.* § 105(a) (requiring, in order to obtain funding contracts, that local public housing agencies demonstrate that “the redevelopment plans for the redevelopment areas in the locality will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the redevelopment of such areas by private enterprise”); *see also id.* § 2 (“The policy to be followed in attaining the national housing objective hereby established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need.”).

94. *Id.* § 105(a).

95. Daniel R. Mandelker, *Kelo’s Lessons for Urban Redevelopment: History Forgotten*, WASHINGTON UNIVERSITY LAW REVIEW, Comments, Nov. 24, 2008, <http://lawreview.wustl.edu/slip-opinions/kelos-lessons-for-urban-redevelopment-history-forgotten/>. Professor Mandelker explains:

Two model urban renewal acts . . . were available in the period before the adoption of federal legislation. One model, drafted by [Alfred] Bettman for the American Society of Planning Officials, required conformance to a general plan and the preparation of community and detailed project plans as a condition to the approval of urban renewal projects.

Id. The second model “provided only that urban renewal project plans must ‘indicate’ their relationship to local land use and related objectives.” *Id.* While the District of Columbia Redevelopment Act was largely based on the Bettman model, the United States Housing Act was closer to the model that deemphasized the planning requirement. *See GUTHEIM & LEE, supra* note 6, at 262.

96. *See* Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967).

housing built on cleared slum sites, therefore allowing redevelopments to proceed at lower densities.⁹⁷

Perhaps anticipating the broad impacts it would have, amendments passed a few years later gave a new name to this privately driven version of slum clearance: “urban renewal.”⁹⁸

III. Urban Renewal Goes Forward in Washington

By the time that the RLA was created in Washington, a few other cities had begun to experiment with urban renewal and private redevelopment.⁹⁹ But urban renewal in Washington was still seen as a national model, as it would provide a test of congressional leadership and would influence future national policies.¹⁰⁰

As required by the 1945 District of Columbia Redevelopment Act, the National Capital Planning Commission (NCPC) completed a comprehensive plan for the city in 1950.¹⁰¹ Other than the city’s original 1792 L’Enfant plan, the 1950 plan was the first attempt to develop a plan for the city as a whole.¹⁰² The NCPC identified the city’s “problem areas” based on factors such as the percentage of homes in need of major

97. At the same time, the “equivalent elimination” requirement was expanded to include loans as well as annual contributions and grants. Riesenfeld & Eastlund, *supra* note 58, at 633.

98. Housing Act of 1954, ch. 649, 68 Stat. 590.

99. As early as 1942-1943, New York State passed urban renewal laws that allowed insurance companies to participate in slum clearance and redevelopment projects. Stuyvesant Town, the massive residential development located on Manhattan’s lower east side, was funded under these laws and built by the Metropolitan Life Insurance Company. See *Murray v. La Guardia*, 52 N.E.2d 884 (N.Y. 1943); see also Dan Fitzpatrick, *The Story of Urban Renewal*, PITTSBURGH POST GAZETTE, May 21, 2000, available at <http://www.post-gazette.com/businessnews/20000521eastliberty1.asp> (describing Pittsburgh’s urban renewal program, which began in 1950). In fact, a redevelopment plan for Southwest Washington D.C. was proposed as early as 1942 by Arthur Goodwillie, director of the Home Owners Loan Corporation. “He deemed the Southwest an appropriate location for the test development because it was close to federal jobs and offered cost savings through the reuse of infrastructure already in place.” Funding was not authorized, however, due to congressional concerns about relocating existing residents. Francesco Russello Ammon, *Commemoration Amid Criticism: The Mixed Legacy of Urban Renewal in Southwest Washington, D.C.*, 8 J. PLAN. HIST. 175, 180-82 (2009).

100. GILLETTE, *supra* note 15, at 155; see also CULTURAL TOURISM DC, RIVER FARMS TO URBAN TOWERS: SOUTHWEST HERITAGE TRAIL 7 (2004) (quoting journalist Neal Peirce), available at http://www.culturaltourismdc.org/usr_doc/SW_Heritage_Trail_brochure.pdf.

101. NAT’L PARK AND PLANNING COMM’N, HOUSING AND REDEVELOPMENT: A PORTION OF THE NATIONAL CAPITAL AND ITS ENVIRONS (1950) [hereinafter 1950 WASHINGTON, D.C., COMPREHENSIVE PLAN].

102. The 1902 McMillan Plan, described above, covered only the National Mall.

repairs or lacking indoor bathrooms,¹⁰³ and consensus was reached that the first of the city's renewal areas would be the Southwest quadrant of the city.¹⁰⁴ This area, located just south of the National Mall, was home to some of the city's most notorious alley dwellings. Much of the housing stock there was considered substandard—cheaper to demolish than to repair and modernize. Out of the entire 550 acre area, 43% of the residences had only outhouses, 44% did not have showers or baths, 70% had no central heating, and 21% did not have electricity.¹⁰⁵ But while its physical attributes may have been lacking, Southwest was home to about 23,000 residents, and it provided a lively cultural hub for many of the city's black residents and immigrant Jews.¹⁰⁶

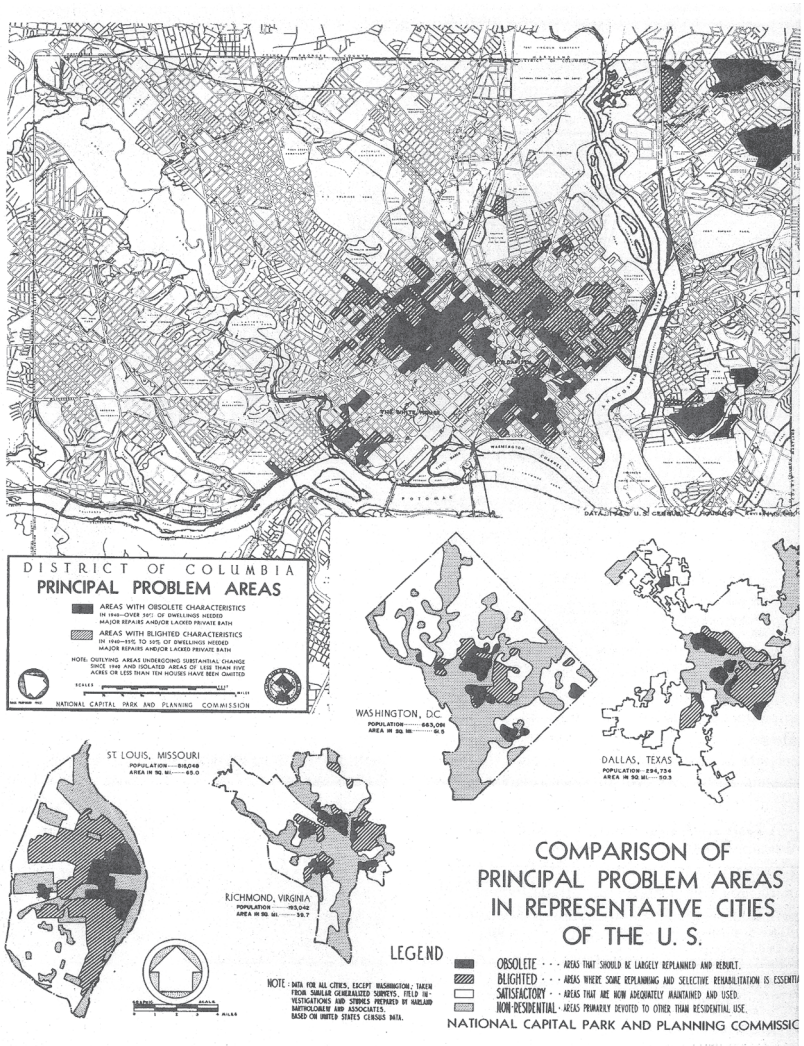
103. 1950 WASHINGTON, D.C., COMPREHENSIVE PLAN, *infra* note 107 and accompanying text (on file with author).

104. See GUTHEIM & LEE, *supra* note 6, at 267; Ammon, *supra* note 99, at 182-83 (describing factors that made Southwest a good candidate for the city's first urban renewal project).

105. NAT'L CAPITAL PLANNING COMM'N, REDEVELOPMENT PLAN: SOUTHWEST REDEVELOPMENT PROJECT AREA B app. C, 2 (1952) (on file with author) [hereinafter 1952 NCPC REDEVELOPMENT PLAN].

106. See generally CULTURAL TOURISM DC, *supra* note 100. Residents of the old Southwest were interviewed for the documentary film *Southwest Remembered*, and they present an image of a diverse and thriving, if poor, city neighborhood. SOUTHWEST REMEMBERED (Lamont Productions 1990).

Fig. 3. This map, included in Washington’s 1950 Comprehensive Plan, depicts the city’s blighted and slum areas in black and dark gray. The diagrams below compare Washington’s slum areas to those in St. Louis, Richmond, and Dallas.¹⁰⁷



107. 1950 WASHINGTON, D.C., COMPREHENSIVE PLAN, *supra* note 101 (on file with author).

When the Planning Commission began the process of designating Southwest as an urban renewal area, it faced two competing visions of redevelopment.¹⁰⁸ One plan proposed “stabilization.” This approach stressed rehabilitation and the preservation of the area’s original street plan, as well as retaining the area’s predominantly low and middle income residential population.¹⁰⁹ Housing advocates and proponents of stabilization viewed the area, located so close to the city’s business and government centers, as an ideal location for workers’ housing.

Business groups and members of the RLA, however, favored an alternative “bolder” redevelopment plan. This plan was advanced by Louis Justement and local architect Chloethiel Smith, and they argued that urban renewal presented an opportunity to completely remake Southwest into what would later be called “a modernist Utopia.”¹¹⁰ The scope of their plans, for some, brought to mind the “famous direction for the architects of the City Beautiful [movement] . . . to ‘[m]ake no little plans; they have no magic to stir men’s blood.’”¹¹¹ Affordable housing was deemphasized in the Justement-Smith Plans, as it would not help to achieve the goals of luring wealthier residents back to the city from outlying suburbs, increasing the city’s tax base, and stimulating the downtown commercial market.¹¹² Some contended that rehabilitating

108. See GUTHEIM & LEE, *supra* note 6, at 266-70 (describing the various approaches); 2 *Radically Different Plans for Southwest Taken Up for Decision*, WASH. STAR, May 29, 1952; *High Income Housing Backed by Architects in Fight on Slums*, WASH. STAR, Oct. 15, 1952.

109. Ammon, *supra* note 99, (discussing the Peets Plan, which typified the rehabilitation approach, and the 1942 Goodwillie proposal, which had also emphasized maintaining the area’s basic neighborhood structure).

110. PAMELA SCOTT, CAPITAL ENGINEERS: THE U.S. ARMY CORPS OF ENGINEERS IN THE DEVELOPMENT OF WASHINGTON, D.C., 1790-2004 245 (2007), available at <http://140.194.76.129/publications/eng-pamphlets/ep870-1-67/c-6.pdf>.

111. FARRAR, *supra* note 48, at 80 (quoting Daniel Burnham). Justement, in his 1946 book *New Cities for Old*, also quoted Daniel Burnham’s famous advice. As Justement explained:

[T]he kind of city planning I have been describing is not a mere facelifting operation such as the building of a new civic center or the removal of slum and blighted areas. I propose that we undertake to build the kind of cities we would like to live in—and I trust that they will be, in many respects, far different from those we now have. For the moment, at least, let us not be too strongly influenced by that which is immediately possible; the city planning that is immediately possible is, in all likelihood, scarcely worth doing. Furthermore, we may find that concessions made for the sake of expediency will jeopardize the ultimate realization of the plan through a loss of public enthusiasm. D.H. Burnham’s often-quoted statement is as true today as it was when it was first made some fifty years ago. . . .

JUSTEMENT, *supra* note 86, at 6.

112. See GUTHEIM & LEE, *supra* note 6, at 268; Sam Zagoria, *Three Agencies Act on Redevelopment Plan for Southwest*, WASH. POST, Dec. 11, 1952.

the area's housing stock while retaining its general demographic character would do nothing to prevent the reappearance of slum conditions. Justement, for example, called stabilization "a half-baked solution" and commented that merely rehabilitating the area would amount to "ceding in perpetuum the best city land to the lowest income families and in all probability creating new slums for the future."¹¹³

The problem with attracting higher income residents to the area was, of course, the permanent displacement of the area's existing low income residents. Understandably, this sparked severe criticism of the plan from residents and their sympathizers. Joseph Curtis, a representative of the Southwest Civic Association, contended that the redevelopment plans amounted to "a mass eviction" and he criticized the plans for failing to include adequate safeguards against discriminatory housing practices.¹¹⁴ John Ihlder, nearly twenty years after taking on leadership of the Alley Dwelling Authority, continued to call for more government investment in affordable housing. Responding to a letter published in the Washington Post by the progressive architect Frederick Gutheim, Ihlder railed against the proposal to decrease the amount of affordable housing in the redevelopment project.¹¹⁵ "Where else in the city," he asked, "does [Gutheim] suggest that the Southwest's displaced low-income families shall be housed?"¹¹⁶ Proponents of large scale renewal responded to these criticisms by referring to the District of Columbia Redevelopment Act, which required the District Commissioners to "satisfy themselves" that adequate comparable housing would be available.¹¹⁷ Under the 1949 Housing Act, the RLA was also required to ensure that "feasible methods" were in place to relocate displaced families to substantially equivalent housing.¹¹⁸

113. Chalmers M. Roberts, *Architects Urge NCPA Housing Plan Be Refused*, WASH. POST, Nov. 21, 1952 (quoting Justement); see also George Beveridge, *Architects Call Southwest Plan 'Unimaginative'; Excessive Low-Income Housing Is Viewed as 'Questionable Asset'*, WASH. STAR, Nov. 21, 1952; Chalmers M. Roberts, *One 'Super-Block' Could Replace Four Blocks of D.C. Slums*, WASH. POST, Feb. 12, 1952 ("[R]ehabilitation is no cure for slums. It is no substitute for slum clearance.").

114. *Public Hearing Speeds First Redevelopment Project*, WASH. POST, Dec. 18, 1952.

115. See John Ihlder, *Southwest Housing*, WASH. POST, Dec. 7, 1952 ("Like others who favor decreasing the number of low-income and moderate-income families who live in the Southwest in order to make the redevelopment of that particular section more profitable to builders, Mr. Gutheim avoids the issue of proper housing for more than 46 percent of the District's population; i.e. those with annual incomes of less than \$3000.").

116. *Id.*

117. § 8(a), 60 Stat. 790 (1946).

118. § 105(c), 63 Stat. 413 (1949).

The planning commission eventually adopted a plan that was somewhat of a compromise between stabilization and more drastic renewal. It proposed demolition of nearly all of the area's buildings but called for one fourth of the new units to be affordable to low and moderate income families.¹¹⁹ The redevelopment area was split up into smaller segments, and the first segment to be redeveloped was selected in order to coordinate the urban renewal program with the construction of a new highway.¹²⁰ The 76 acre "Area B," as it was called, contained some of the city's worst slums, was overcrowded, and had low assessment values.¹²¹ The city's director of public health, moreover, had compared the census tract in which Area B was located to the rest of the city and found that death rates from tuberculosis were 136% higher and mortality from syphilis was a staggering 489% above the city average.¹²²

The 1,345 existing dwellings in Area B were home to more than 5,000 people, about 97.5% of whom were black.¹²³ The redevelopment plan, however, made provision for no more than 3,600 people to be housed in the area when redeveloped.¹²⁴ This was partly due to "the application of a sound density standard," but also because the amount of land to be devoted to residential purposes was to be decreased and because no buildings over three stories were to be included in Area B.¹²⁵ To mitigate displacement, the plan did require a third of the new units to be affordable, ostensibly ensuring that "a substantial number of the present low-income families in the area should be able to return after redevelopment."¹²⁶ It would have been "economically feasible" to include more low income housing, or even to build at a higher density,

119. 1952 NCPC REDEVELOPMENT PLAN, *supra* note 105, at 15.

120. *Id.* at 1; Affidavit of John R. Searles, *Berman v. Parker*, 348 U.S. 26 (1954) (on file with author).

121. 1952 NCPC REDEVELOPMENT PLAN, *supra* note 105, at 29; *see infra* notes 135-36 and accompanying text (depicting maps of the Southwest Redevelopment area and Project Area B).

122. *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (1953); David L. Seckinger, Director of D.C. Public Health, Affidavit, *Berman v. Parker*, 348 U.S. 26 (1954) (on file with author).

123. 1952 NCPC REDEVELOPMENT PLAN, *supra* note 105, at 3.

124. *Id.* at 33.

125. *Id.*

126. *Id.* The plan specified that low income units would have a maximum rental of \$17 per room, per month, not including utilities. *Id.* Three hundred and nine of the households living in Area B, or about 23%, had average incomes of less than \$150 per month, making it unlikely that they would be able to comfortably afford a three bedroom rental in the redevelopment, even at the low income rate (\$51 plus utilities). *Id.* app. C at 5. Only 11.5% of the existing units within Area B had rentals of more than \$50 per month prior to redevelopment. *Id.* at 2.

but the planning commission was wary of “hav[ing] too high a proportion of one economic group concentrated in one area.”¹²⁷

In detailing the plan’s relocation provisions, the planning commission and the RLA determined that adequate housing would be available in the city for the 1,345 families that would be displaced.¹²⁸ The commission based this determination on the projected turnover rate for existing public housing units and the likely number of families that would be able to afford housing in the redevelopment project. Additionally, some 500 new public housing units were planned to be constructed on property adjacent to Area B.¹²⁹ (The relocation plan apparently depended on John Ihlder’s agreement to place relocated Southwest residents on a parity with people already waiting for public housing units; however, the relocation plan did not make any mention of the 4,000 people already on that waiting list.)¹³⁰ RLA staff were also assigned the responsibility of helping displaced residents to find alternative accommodations, but the three page relocation plan was not specific about the number of staff to provide relocation assistance, or what types of assistance would be available.¹³¹

Regarding the commercial aspect of the project, the redevelopment plan noted that the existing commercial corridor on 4th Street was marked by “a high proportion of old, severely deteriorated buildings.”¹³² And because of a diversity of ownership and low owner occupancy rates, the planning commission concluded that the best way to “bring about the eventual re-creation of . . . a sound business district” would be to acquire most of the land and build “a new, modern shopping center.”¹³³

127. 1952 NCPC REDEVELOPMENT PLAN, *supra* note 105, at 34.

128. *Id.* app. D.

129. *Id.* The redevelopment plan indicated that 581 new public housing units would be built. *But cf.* Chalmers M. Roberts, *520 Southwest Public Housing Units Planned*, WASH. STAR, Nov. 20, 1952.

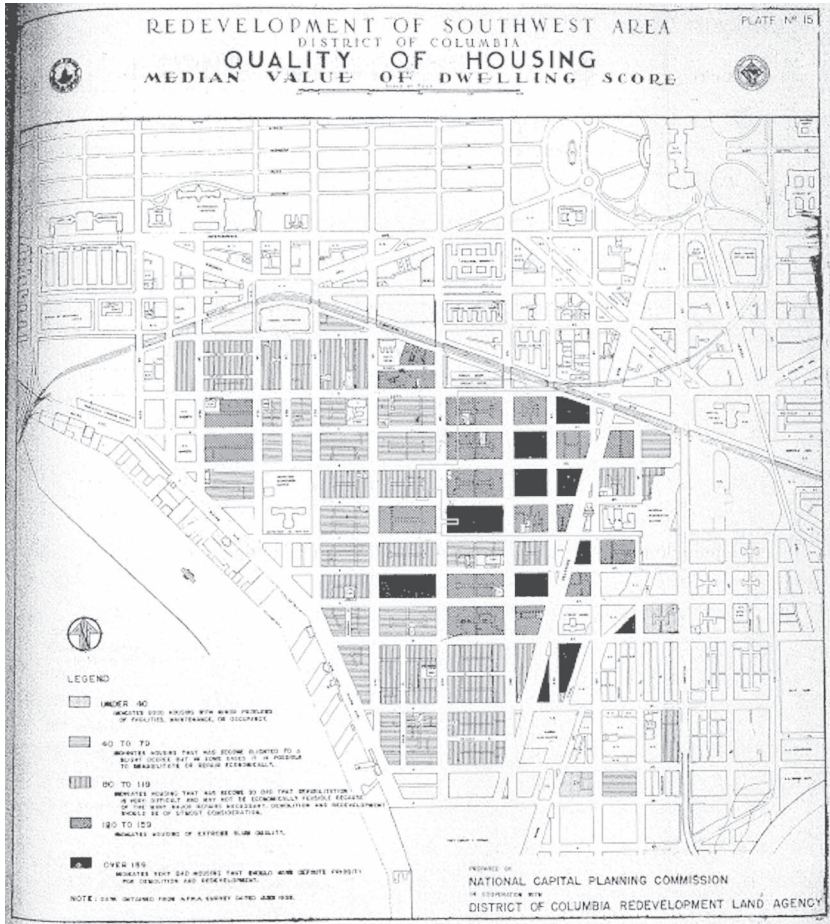
130. *See* Roberts, *supra* note 129.

131. 1952 NCPC REDEVELOPMENT PLAN, *supra* note 105, app. D at 1.

132. *Id.* at 35.

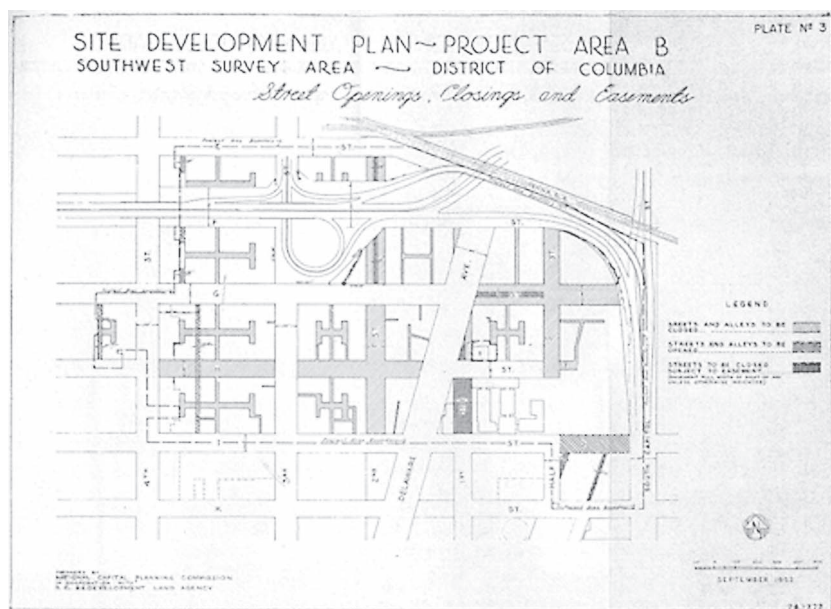
133. *Id.* The redevelopment plan also called for retaining an existing health center, and building a new gym and swimming pool for an area junior high school. *Id.* at 36.

Fig. 4. This map shows the approximately 550-acre Southwest Redevelopment area. The darker shades depict areas with the highest concentrations of substandard housing.¹³⁴



134. *Id.* at plate 15.

Fig. 5. A detailed map of Area B, showing the streets and alleys slated for closure in gray.¹³⁵



IV. Southwest Business Owners Challenge the Constitutionality of Urban Renewal, and Lose

The Area B redevelopment plans received final approval on December 30, 1952.¹³⁶ The first legal challenges to the use of eminent domain were filed just a few days prior, on December 26.¹³⁷

Two of the legal challenges brought against the redevelopment plan were eventually joined and tried in *Berman v. Parker*.¹³⁸ The two cases

135. *Id.* at plate 3.

136. Brief of Appellant, *Berman v. Parker*, 348 U.S. 26 (1954) (1954 WL 72760).

137. *First Legal Challenge Filed Against SW Redevelopment*, WASH. POST, Dec. 27, 1952.

138. Neither *Berman* nor *Parker* were original parties to the suit. Samuel Berman was the executor of Max Morris' estate, and was substituted for Morris when he died during the litigation. Andrew Parker was a member of the RLA, and was substituted for another RLA member, Mark Lansburgh, who also died while the litigation was pending. Order Substituting Party and Correcting Lot and Square Number, filed Dec. 16, 1953, with the District Court for the District of Columbia (*Parker*); Order to Substitute Samuel Berman and Solomon H. Feldman, Executors, as Appellants, filed June 7, 1954, with the Supreme Court of the United States (on file with author).

were brought by Max Morris, the owner of a department store, and Goldie Schneider, who owned a hardware store down the street.¹³⁹ Both stores were located on 4th Street, which was then a lively commercial area with various shops and stores, and neither of the buildings was considered to be substandard or deteriorating. Fourth Street at the time was a hub of black and Jewish life, and one of the few areas in the city, then segregated, that displayed a measure of racial harmony. It was the site of the city's first integrated parade, and the mostly Jewish stores on 4th Street relied on business from black residents.¹⁴⁰

Fig. 6. The 700 block of 4th Street, where Max Morris' department store and Goldie Schneider's hardware store were located prior to redevelopment.¹⁴¹



139. Other suits were filed by Joseph and Mamie Nelson, Sam and Celia Feigenbaum, who owned a store and residence, and Thomas and Rose Bullock, who owned a barber shop and residence. Their suits were dismissed just days before the Supreme Court dismissed *Berman v. Parker*. See *Judge Rules RLA Legal In SW Area Land Deal*, WASH. POST AND TIMES HERALD, NOV. 13, 1954.

140. Linda Wheeler, *Broken Ground, Broken Hearts: In '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999; CULTURAL TOURISM DC, *supra* note 100, at 10 (site 3); SOUTHWEST REMEMBERED, *supra* note 106; Telephone Interview with Larry Rosen (Jan. 11, 2009); see also *infra* note 141 and accompanying text (depicting photo of the 700 block of 4th Street).

141. Photo courtesy of DC Public Library, Washingtoniana Division, Joseph Curtis Collection.

In the suit against the city, the attorneys¹⁴² for Schneider and Morris claimed that it would be unconstitutional for the RLA to use eminent domain to acquire the properties because the takings had no public use.¹⁴³ They argued that taking the properties was unnecessary for the purpose of slum clearance because the properties were not blighted, and, regardless, the redevelopment was intended primarily to benefit the private companies that would take control of their land.¹⁴⁴ In the alternative, the plaintiffs claimed that the District of Columbia Redevelopment Act was unconstitutionally vague because it failed to define either “slum” or “blighted area,” giving the city unfettered discretion to take and redevelop any properties that it wanted.¹⁴⁵

The city had a distinct advantage regarding the primary issue in the suit—whether the taking of the plaintiffs’ land would be for a public purpose, or whether the involvement of private developers would negate the broader benefits of blight removal. Government-managed redevelopment projects had been upheld by nearly all of the state courts that

142. Goldie’s son, Joseph Schneider, was one of the attorneys on the case. *First Legal Challenge Filed Against SW Redevelopment*, *supra* note 137.

143. Brief of Appellant, *supra* note 136:

The taking of the Appellant’s property because the government believes that diverse ownership and lease-hold interest are not conducive to a sound business center may seem attractive and in all probabilities it would enhance the character of the area to place said ownership under a single entity, but it is inconceivable that such pleasant accomplishments can be called a public use or purpose which would validate seizure by the sovereign of private property. The present commercial area in Southwest, including the Appellant’s property, can serve the community equally as well as national chain stores, which the agencies deem preferable for the occupancy of the proposed shopping center.

Id.

144. *See id.* (calling the redevelopment act “a real estate promotional scheme”). Another question raised by the plaintiffs was whether the District of Columbia Redevelopment Act properly authorized the taking of commercial property. Dealing primarily with statutory interpretation, the courts ultimately found that the law was worded broadly enough to encompass commercial property. *Schneider v. District of Columbia*, 117 F. Supp. 705, 712 (D.D.C. 1953), *aff’d* 348 U.S. 26 (1954).

145. *Schneider*, 117 F. Supp. at 711; Brief of Appellant, *supra* note 136:

Nowhere in the Act is there a standard for the factual determination of a blighted area; obsolete lay-out; technological and sociological changes; and other factors. *Quere*. How can the judiciary determine how an administrative body determined a blighted area or obsolete lay-outs or technological or sociological changes or other factors? No standard other than “substandard housing” is defined. . . .

...
The inadequacy of the statutory prescription is demonstrated by the proposed boundary line of Project Area B. There is in the statute no measuring means by which to tell why one property on Fourth Street is to be seized, or can be seized validly, while another property on the same side of the same block, or across the street, or in the next block is not included in the area to be condemned.

Id.

had considered them,¹⁴⁶ and the high courts of more than a dozen states had also upheld the use of eminent domain to transfer urban renewal land to private companies.¹⁴⁷ The New York Court of Appeals had been one of the first courts to approve this type of project in 1943. The case, *Murray v. La Guardia*,¹⁴⁸ involved a project to clear eighteen blighted city blocks in order to build thirty-five new high rise apartment buildings. The court explained that the New York State Constitution declared it a public purpose “to provide for low rent housing *or* for clearance and rehabilitation of substandard areas[.]”¹⁴⁹ The fact that the new apartment buildings were to be built and operated by the Metropolitan Life Insurance Company, rather than by a public housing agency, did not convince the court that the project’s public purpose would be vitiated. As the court explained, “If, upon completion of the project the public good is enhanced it does not matter that private interests may be benefited.”¹⁵⁰

Most of the courts that had considered the issue had followed New York’s lead and shifted their public use analysis away from the end use of the property and “looked instead to the state of the property before condemnation. Since the destruction of tenements and other substandard buildings would eliminate noxious conditions in the area, courts reasoned, eminent domain provided a public benefit.”¹⁵¹ Just as the

146. See *supra* note 74 (listing cases that approved government managed slum clearance and redevelopment projects).

147. See, e.g., Opinion of the Justices, 48 So. 2d 757 (Ala. 1950); *Rowe v. Hous. Auth.*, 249 S.W.2d 551 (Ark. 1952); *Zurn v. City of Chi.*, 59 N.E.2d 18 (Ill. 1945); *Chi. Land Clearance Comm’n v. White*, 104 N.E.2d 236 (Ill. 1952); *Herzinger v. City of Balt.*, 96 A.2d 3 (Md. 1953); *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951); *Redfern v. Board of Comm’rs*, 59 A.2d 641 (N.J. 1948); *Kaskel v. Impellitteri*, 115 N.E.2d (N.Y. 1953); *Murray v. La Guardia*, 52 N.E.2d 884 (N.Y. 1943); *State ex rel. Bruestle v. Rich*, 110 N.E.2d 778 (Ohio 1953); *Foeller v. Hous. Auth.*, 256 P.2d 752 (Or. 1953); *Belovsky v. Redevelopment Auth.*, 54 A.2d 277 (Pa. 1947); *Opinion to the Governor*, 69 A.2d 531 (R.I. 1949); *Ajootian v. Providence Redevelopment Agency*, 91 A.2d 21 (R.I. 1952); *Nashville Hous. Auth. v. City of Nashville*, 237 S.W.2d 946 (1951).

Following the District Court’s opinion in *Schneider v. District of Columbia*, but prior to the Supreme Court’s decision in *Berman v. Parker*, a number of other state courts upheld redevelopment laws calling for the involvement of private developers. See, e.g., *Redevelopment Agency v. Hayes*, 266 P.2d 105 (Cal. Ct. App. 1954); *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365 (Conn. 1954); *Crommett v. City of Portland*, 107 A.2d 841 (Me. 1954); *Papadinis v. Somerville*, 121 N.E.2d 714 (Mass. 1954); *State ex rel. Dalton v. Land Clearance for Redevelopment Auth.*, 270 S.W.2d 44 (Mo. 1954); *Velishka v. City of Nashua*, 106 A.2d 571 (N.H. 1954); *Hunter v. Norfolk Redevelopment & Hous. Auth.*, 78 S.E.2d 893 (Va. 1953); *David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 893 (1954).

148. *Murray v. La Guardia*, 52 N.E.2d 884 (N.Y. 1943).

149. *Id.* at 887.

150. *Id.* at 887-88.

151. Pritchett, *supra* note 46, at 26.

courts found that the greater good to be accomplished through redevelopment justified the private benefits received by developers, many state courts had also held that non blighted property could be condemned if deemed necessary for the redevelopment of an entire area.¹⁵²

There was *some* precedent, however, favoring the *Berman v. Parker* plaintiffs. The high courts of both Florida and Georgia had enjoined the use of eminent domain by redevelopment authorities for lack of a public use.¹⁵³ These courts found that slum clearance, by itself, was insufficient to give a project a public use; the end use of the property, not just the elimination of blight, had to advance a public purpose. In the Georgia case, the city of Atlanta sought to redevelop a 139 acre blighted residential area and replace it not with new housing (affordable or otherwise), but with private manufacturing and industrial uses.¹⁵⁴ The court held that the project could not be supported under the state constitution, explaining that “The property is to be sold to people who could have no interest in acquiring the property other than as a means to make money. If the property of one individual can be taken from another for this purpose, where does the power of eminent domain stop?”¹⁵⁵

The district court decision in *Berman v. Parker* also lent support to the plaintiffs’ arguments. The three federal judges assigned to the case held that the redevelopment law was constitutional, but with several important caveats.¹⁵⁶ First, while Judge E. Barrett Prettyman’s opinion found slum removal to be a public use because it would eliminate conditions that were detrimental to the public’s health and safety,¹⁵⁷ the court questioned the need to condemn property titles, in addition to substandard buildings, in order to remove slums and prevent their re-establishment. Could not they, the court wondered, simply remove the buildings, without taking actual ownership of the property? Was there something intrinsically slum-inducing about the bare land itself, or the people who lived there? Certainly, if the land was needed for a road, a

152. See, e.g., *Hogue v. Hous. Auth.*, 144 S.W.2d 49 (Ark. 1940); *Riggin v. Dockweiler*, 104 P.2d 367 (Cal. 1940); *Stockus v. Boston Hous. Auth.*, 24 N.E.2d 333 (Mass. 1939); *Velishka v. City of Nashua*, 106 A.2d 571 (N.H. 1954); *Foeller v. Hous. Auth.*, 256 P.2d 752 (Or. 1953); *Hous. Auth. v. Higginbotham*, 143 S.W.2d 79 (Tex. 1940); *Chapman v. Huntington Hous. Auth.*, 3 S.E.2d 502 (W. Va. 1939).

153. *Adams v. Hous. Auth.*, 60 So. 2d 663 (Fla. 1952); *Hous. Auth. v. Johnson*, 74 S.E.2d 891 (Ga. 1953). Later, the Supreme Court of South Carolina would adjudge the taking of blighted residential property for a light industrial redevelopment project to be unconstitutional. See *Edens v. City of Columbia*, 91 S.E.2d 280 (S.C. 1956).

154. *Hous. Auth. v. Johnson*, 74 S.E.2d 891 (Ga. 1953).

155. *Id.* at 893.

156. *Schneider v. District of Columbia*, 117 F. Supp. 705, 715 (D.D.C. 1953).

157. *Id.* at 724.

school, or a park, there would be a public use, but would the same be true if slum property was taken and transferred to a private developer?¹⁵⁸ Without expressly answering these questions, the court held that more had to be shown than the existence of a slum:

Some further necessitous circumstance must exist to validate such a seizure. It must be either that the clearance of the slum is impracticable without taking the title to the land or that proposed restrictions which can be imposed only through the medium of a resale are fairly calculated to prevent recurrence of slum conditions. Ordinarily the seizure of the fee title to land would seem to be neither necessary nor reasonably incidental to the clearance of a slum. But we readily see that there could be circumstances—such, for example, as an obdurate landlord or an impoverished homeowner—in which the seizure of the title, with compensation therefore, ought in reason accompany the condemnation of the buildings.¹⁵⁹

Next, the court differentiated between slums and blighted areas, slums being those places that “breed disease and crime,” whereas blighted areas were those merely characterized as “backward, stagnant, not properly laid out, economically Eighteenth Century—anything except detrimental to health, safety or morals.”¹⁶⁰ The court believed that while urban renewal was an appropriate response to slum conditions, the same was not true for areas that fell short of that mark. As the court explained, “The poor are entitled to own what they can afford. The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.”¹⁶¹ Rejecting the moral and ideological foundations of the City Beautiful movement,¹⁶² the court also asked:

Is a modern apartment house a better breeder of men than is the detached or row house? Is the local corner grocer a less desirable community asset than the absentee stockholder in the national chain or the wage-paid manager? Are such questions as these to be decided by the Government? And, if the decisions be adverse to the erstwhile owners and occupants, is their entire right to own the property thereby destroyed?¹⁶³

Judge Prettyman concluded that substandard properties taken by eminent domain must be disposed of in a manner specifically intended to advance the public health, safety, and welfare; although the clearance of slums was a public use in itself, for the redevelopment of other property it was not enough for the government to use the land in an efficient, cost effective, or well-meaning way.¹⁶⁴ The plans for Southwest, which

158. *See id.* at 711-14.

159. *Id.* at 717-18.

160. *Id.* at 719.

161. *Id.*

162. *See supra* Part I.

163. *Schneider*, 117 F. Supp. at 719.

164. *Id.* at 718-20.

authorized the taking of nonslum properties like those owned by the plaintiffs, had to meet this standard. With its lack of robust safeguards to protect the area's low income families¹⁶⁵ and its paternalistic goals,¹⁶⁶ Judge Prettyman held that the redevelopment plan did not fulfill the public use requirement.

Of course the plan as pictured in the prospectus is attractive. In all probability it would enhance the beauty and the livability of the area. If undertaken by private persons the project would be most laudable. . . . But as yet the courts have not come to call such pleasant accomplishments a public purpose which validates Government seizure of private property. . . . One man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed.¹⁶⁷

Although the district court's opinion was favorable to Morris and Schneider, it dismissed their claims on procedural grounds.¹⁶⁸ Both sides appealed, the plaintiffs hoping to obtain an injunction against seizure of their properties and the RLA seeking to have the district court's restrictive reading of the District of Columbia Redevelopment Act overturned. The Supreme Court took the case.¹⁶⁹

The Supreme Court Justices unanimously held that the District of Columbia Redevelopment Act was constitutional and that the RLA could go ahead with its plans to redevelop Area B via the efforts of private enterprise.¹⁷⁰ Compared with the district court's opinion, which was

165. *Id.* at 724 ("No acute housing shortage is to be met. In fact the plan provides for no more residents than presently occupy the area. No pressing economic condition, apart from the slums, is sought to be dealt with by this plan. No purpose of housing for the needy—low-rent housing—is the motivation.")

166. *Id.*

In sum the purpose of the plan, in addition to the elimination of slum conditions, is to create a pleasant neighborhood, in which people in well-balanced proportions as to income may live. The Government is to determine what conditions are pleasant, what constitutes the 'most appropriate' pattern of land use, what is a good balance of income groups for a neighborhood, how many poor people, how many moderately well-to-do people, how many families of two, how many of four, etc., should be provided for in this neighborhood, and what the proper development of a community should be.

Id.

167. *Id.*

168. The plaintiffs had challenged only the facial validity of the statute, and not the validity of the RLA's implementation of the statute as applied to them. Because the court did not overturn the statute, but only held that it had to be implemented in a manner intended to effectuate the public health, safety, and general welfare, the redevelopment plan stood.

169. Although the plaintiffs were designated as the appellants, the RLA, on appeal, explained that "Although it upheld the District of Columbia Redevelopment Act against appellants' initial challenge, the three-judge district court declared and suggested severe limitations which we believe to be unwarranted and which have not been adopted by the highest courts of the seventeen states which have sustained comparable redevelopment legislation." Brief of Appellee, *Berman v. Parker*, 348 U.S. 26 (1954) (1954 WL 72761).

170. *Berman v. Parker*, 348 U.S. 26, 33-36 (1954).

lengthy and nuanced, Justice Douglas' opinion for the Court skimmed over the case's constitutional questions with artful rhetoric and elegant language. This was not altogether unexpected, as the Court at that time still adhered to a New Deal philosophy that counseled against scrutinizing Congress' economic and social legislation.¹⁷¹ But the Justices' hesitance to question the legislative determinations included in the redevelopment law also allowed them to avoid giving serious and considered answers to the constitutional questions raised by Judge Prettyman.

The Court began its opinion by noting that Congress' intention, as set forth in the District of Columbia Redevelopment Act, was to eliminate substandard housing conditions in the District. Famously, the Court concluded that:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.¹⁷²

The lower court's fears that individual rights would be jeopardized if government were given reign to determine how a community should look were dashed by the Supreme Court in language strongly reminiscent of the City Beautiful movement:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.¹⁷³

The Court also found it to be of little importance that the Act called for the participation of private companies. In the Justices' opinion, the public purposes of the Act—removal of blight and aesthetic improvement—justified the means.¹⁷⁴ Congress could have reasonably concluded that the goals of slum clearance would be better served by private developers than by government agencies, and, as the Court explained, it was not the role of the judiciary to question that determination.¹⁷⁵

171. See Pritchett, *supra* note 46, at 46.

172. *Berman*, 348 U.S. at 32.

173. *Id.* at 33 (citations omitted).

174. *Id.* at 33-34.

175. *Id.*

On the next point, the Court held that the Act contained adequate standards, although it did not explain why it disagreed with the district court, which had held that the law's failure to include a definition of "blight" rendered it unconstitutionally vague.¹⁷⁶ The Supreme Court's response, contained in a footnote, was that the law provided sufficient standards in its definition of "substandard housing conditions," even if it did not define either "slum" or "blighted area." The general standards listed in the definition for substandard housing conditions—"lack of sanitary facilities, ventilation, or light, . . . dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors"—were adequate, and it was no matter that the law did not suggest to what degree those characteristics had to be present.¹⁷⁷ Nor was it important that the law did not explain the circumstances in which nonblighted property could be taken for redevelopment; as the Court emphasized, "the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."¹⁷⁸

In short, the Supreme Court's opinion in *Berman v. Parker* repudiated the precautionary foundations of the district court's decision. The redevelopment law would not be upheld on slender grounds, but was to be treated with deference and interpreted broadly. This was not simply the result of Justice Douglas' lofty writing style; the Justices were remarkably unanimous in believing that the district court's decision had

176. In the district court opinion, Judge Prettyman had pointed out the fact that the plan for Area B seemed to randomly include some properties on 4th Street and not others. He wrote that:

We have in the statute no measuring means by which to tell why one property on Fourth Street is to be seized, or can be seized validly, while another property on the same side of the same block, or across the street, or in the next block is not included in the area to be condemned. Congress cannot confer undescribed authority to regulate a business; a fortiori it cannot confer undefined power to seize in full ownership businesses and properties.

Schneider v. District of Columbia, 117 F. Supp. 705, 721 (D.D.C. 1953).

The Supreme Court explained:

The District Court below suggested that, if such a broad scope were intended for the statute, the standards contained in the Act would not be sufficiently definite to sustain the delegation of authority. We do not agree. We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums.

Berman, 348 U.S. at 35 (citation omitted).

177. *Berman*, 348 U.S. at 26 n.1.

178. *Id.* at 35-36.

“unduly restricted the Act.”¹⁷⁹ In fact, Justice Burton asked Justice Douglas to rewrite his first circulated draft, explaining in a note to him that:

While I believe I agree with the statements you make in the Redevelopment case it seems to me that the specific interpretations made by Prettyman will cause much trouble and confusion unless treated more specifically. Therefore, unless you or someone else does it, I shall probably want to attempt it in a concurrence.¹⁸⁰

Professor Benjamin Barros, who republished this message in an essay discussing the Justices’ conference notes for the case, explained that the Court’s focus was to “link . . . the permissible scope of eminent domain [to] the broad scope of the police power.”¹⁸¹ Applying the “virtually limitless scope of the police power”¹⁸² to the power of eminent domain was consistent with the Court’s gradual acceptance of a broad interpretation of the Public Use Clause.¹⁸³ But it also gave the government an

179. D. Benjamin Barros, *Nothing “Errant” About it: The Berman and Midkiff Conference Notes and How the Supreme Court got to Kelo With its Eyes Wide Open*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 57 (Robin Paul Malloy ed. 2008).

180. *Id.* at 64 & n.38.

181. *Id.* at 66.

182. *Id.* at 64.

183. While *Berman v. Parker* is often considered the be the foundation of modern Supreme Court jurisprudence on eminent domain, many earlier cases adopted broad interpretations of the government’s condemnation powers. *See, e.g.*, *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546 (1946) (upholding the Tennessee Valley Authority’s (TVA) condemnation of land to transfer it to the National Park Service, even though the condemnation was necessitated by a dam project that would flood the only road going to the village and the TVA decided to condemn the village, rather than build a new road, for financial reasons); *Brown v. United States*, 263 U.S. 78 (1923) (holding that the TVA could condemn extra land to relocate the owners of property that would be flooded by a dam project); *Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co.*, 243 U.S. 563 (1917) (upholding the condemnation of water rights for a hydroelectric project, and further holding that it was immaterial whether the company would make a profit); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916) (upholding the condemnation of downstream property owners’ water rights for the purpose of building a dam because “to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is.”); *O’Neill v. Learner*, 239 U.S. 244, 253 (1915) (upholding a Nebraska judgment that permitted the condemnation of property for a drainage ditch and explaining that “when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect.”); *Strickley v. Highland Boy Gold Mine*, 200 U.S. 527 (1906) (upholding the condemnation of a right of way for a mining company’s cable line); *Clark v. Nash*, 198 U.S. 361 (1905) (deferring to the state court’s decision and upholding a Utah statute that allowed an individual to condemn a portion of his neighbor’s property to enlarge a drainage ditch); *see also Millheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 719 (1923) (upholding an assessment that would be used to build a privately owned tunnel, because, “The test of the public character of an improvement is the use to which

extraordinary amount of discretion. So much had been acknowledged by Judge Prettyman.

With the Supreme Court's decision in the case, the plaintiffs' claims were dismissed and the RLA was given a green light to proceed with the redevelopment of Southwest Washington. The litigation had not considered, however, the possibility that the project would be a failure. Whether the RLA had developed effective strategies to help displaced residents find new housing was never brought up. Nor was there any discussion about the likelihood that the renewal project would have a disproportionate impact on black residents, even though *Brown v. Board of Education* had been decided only a few months earlier.¹⁸⁴ And no consideration was given to the possibility that then prevalent conceptions of "well-balanced" communities might themselves become obsolete within a few years.¹⁸⁵ All of these issues would come to haunt attempts at urban renewal over the next two decades, and Southwest Washington proved to be a typical example.

V. The Missteps of the RLA and the Difficulties of Renewal

As one of the first large scale urban renewal projects in the country, the redevelopment of Southwest Washington was something of an experiment, not only in the legal sense, but also in terms of its architecture, urban planning, and public financing. While aspects of the project can be singled out for praise or scorn, it is more difficult to pass judgment on the project as a whole.¹⁸⁶

it is to be put, not the person by whom it is to be operated."); *Block v. Hirsch*, 256 U.S. 135 (1921) (upholding a statute that allowed a tenant to continue the terms of his lease against the will of his landlord because the preservation of housing was a public use).

184. *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided on May 17, 1954. *Berman v. Parker*, 348 U.S. 26 (1954), was decided on November 22, 1954.

185. While the courts did not consider this question, planners had, and they had concluded that urban renewal was an inherent aspect of proper city planning. As Justement explained:

Let us remember that, although the growth of the city may be reaching its limit in population and area, human inventiveness and the desire for improvement will not stop. Let us not insult our grandchildren by believing that the average building we build today will be good enough for them. Occasionally—far too rarely—a structure will be designed which we instinctively feel to be so appropriate and beautiful that we and our children and theirs will wish to see it preserved. Occasionally some building will possess great historic interest and we may wish to preserve it for that reason. But these will be exceptions. The city is a living, growing organism and the buildings that compose it must be constantly renewed in order to preserve the entire organism.

JUSTEMENT, *supra* note 86, at 6.

186. See generally Ammon, *supra* note 99.

The first of Area B's alley slums was demolished in 1955,¹⁸⁷ and the first new building, part of the modernist Capitol Park Apartment development, was completed in 1959.¹⁸⁸ The same year, about 500 units of public housing were completed in the Greenleaf Gardens development, which, although not technically part of the renewal program, was located adjacent to Area B.¹⁸⁹ The distinctive (if decidedly retro) River Park townhouses, also adjacent to Area B, were completed in 1962,¹⁹⁰ and a number of other developments were built over the following years both within Area B and throughout the larger Southwest renewal area.¹⁹¹ The redevelopment projects quickly succeeded in attracting higher income residents back to the city, and it was confidently claimed that the new Southwest was a "pioneer" in beauty and a "bundle of boons."¹⁹² In 1959, President Eisenhower even showed off the new neighborhood to Nikita Khrushchev to demonstrate the success of the urban renewal plan.¹⁹³ The Southwest redevelopment project was awarded the American Institute of Architects' first Citation for Excellence in Community Architecture in 1965,¹⁹⁴ and in 2003, the Capitol Park development received landmark status.¹⁹⁵

187. *First Block Cleared in SW Project*, WASH. POST, Apr. 21, 1955.

188. Cultural Landscape Found., Capitol Park, Washington, DC, <http://www.tclf.org/content/capitol-park-washington-dc> (last visited Mar. 13, 2010); Capitol Park II Condominiums, Archives, <http://capitolparkii.org/information/archives.html> (last visited Mar. 13, 2010). Interestingly, while the most widely promoted goal of urban renewal was to rid the city of its alley communities with their interior pathways and residences hidden from the street, the Capitol Park complex includes a number of interior-facing dwellings; see also Ammon, *supra* note 99, at 187 (describing Capitol Park).

189. See D.C. Hous. Auth., Greenleaf Gardens, <http://www.dchousing.org/regions/rockcreek/greenleaf.html> (last visited Mar. 13, 2010). The Syphax Gardens public housing development was completed in 1960. Again, while not technically part of the renewal project, its nearly 200 units provided needed low income housing for Southwest residents. See D.C. Hous. Auth., Syphax Gardens, http://www.dchousing.org/regions/rockcreek/syphax_gardens.html (last visited Mar. 13, 2010).

190. See David Morton, *Heart of Glass*, WASH. CITY PAPER, Sep. 5-11, 2003, available at <http://tmh.floonet.net/articles/heartofglass.html> (explaining that architect Charles Goodman was commissioned to build River Park by an aluminum company, leading him to design the development's peculiar aluminum barrel roofs and perforated screens); Ammon, *supra* note 99, at 175-76; *infra* note 197 and accompanying text (depicting photo of River Park).

191. See Penelope Lemov, *Southwest 26 Years of Renewal*, WASH. POST, Aug. 13, 1977.

192. Wolf Von Eckhardt, *New Southwest a Bundle of Boons*, WASH. POST AND TIMES HERALD, Oct. 28, 1962, at E2.

193. Annys Shin, *Brave Old World*, WASH. CITY PAPER, May 2, 2003, available at <http://www.washingtoncitypaper.com/display.php?id=26176>.

194. Ammon, *supra* note 99, at 206.

195. Supporters of the landmark designation acknowledged that it had less to do with the building's aesthetic qualities than it did with its symbolism as a relic of the urban renewal era. Shin, *supra* note 193.

Fig. 7. The Capitol Park development.¹⁹⁶



Fig. 8. The River Park development.¹⁹⁷



196. Cultural Landscape Found., *supra* note 188.

197. Author's personal photograph.

But the modernist architecture and progressive planning concepts that pervaded the redevelopment would soon become anachronistic.¹⁹⁸ The 1960s saw a growing historic preservation movement and the emergence of new ideas about urban planning. Superblocks, which had been created by the closure of several streets in Area B, became disfavored, and planners began to see the positive effects of having a diversity of housing types, building ages, and ground floor uses. While the Southwest redevelopment did include a mixture of housing types,¹⁹⁹ much of it was isolated either in idyllic semi-gated enclaves like the Capitol Park and River Park townhouses, or in high rise apartment buildings of the radiant city variety.²⁰⁰ This did not include the public housing, which was concentrated in pockets throughout Southwest. There were almost no ground floor commercial spaces²⁰¹ to help create pedestrian traffic or to promote contact among residents of the new housing developments. Walking was further impeded by the parking lots generously laid out to accompany the new developments.

The Southwest urban renewal project succeeded in attracting higher income residents back to central Washington, and it is still popular today.²⁰² Its socioeconomic character has also changed since the 1970s, and is now characterized by a much more diverse community, both racially and economically.²⁰³ The area has many appealing qualities; it is quiet and provides river access, there are small parks and plenty of open areas, it is located close to the National Mall and various federal buildings, and there is ample parking. But its cul de sacs do not feel urban, and there are few shops or basic services. The waterfront, which in many places is cut off from the rest of Southwest by vast parking lots,²⁰⁴

198. See generally Amanda Murphy, *Renewing Urban Renewal: A Case Study in Southwest D.C.*, BLUEPRINTS, 26 Winter 2007-08, available at <http://www.nbm.org/about-us/publications-news/blueprints/renewing-urban-renewal.html>.

199. See Ammon, *supra* note 99, at 193-96 (describing several of Southwest's housing developments).

200. The radiant city concept was pioneered by Le Corbusier, one of the most influential of the early modernists. In a radiant city, "People would live in hygienic, regimented high-rise towers, set far apart in a parklike landscape. This rational city would be separated into discrete zones for working, living and leisure." Witold Rybczynski, *The Architect Le Corbusier*, TIME, June 8, 1998, available at <http://www.time.com/time/magazine/article/0,9171,988492,00.html>.

201. Some small scale commercial uses had been planned for Area B, but were never built. Ammon, *supra* note 99, at 190.

202. See *id.* at 206.

203. *Id.* at 207 (explaining that one reason for this increased diversity is that the modernist buildings in Southwest are less susceptible to the gentrification pressures that now characterize neighborhoods with older buildings).

204. Water Street was constructed parallel to Maine Avenue during the original redevelopment and was intended to facilitate parking along on the waterfront. Today,

has failed to become a vibrant city asset. In a city full of landmarks and museums, tourists have few reasons to visit Southwest. Meanwhile, the few alleys in Washington that were not destroyed have become fashionable and gentrified, showing how rehabilitation might have given Southwest a very different future.²⁰⁵

So while redevelopment may have removed the slums and brought higher tax generating uses to Southwest, the level of its ultimate success can be debated. It merits pointing out, however, that one of the largest failures of the project was its commercial component,²⁰⁶ which necessitated the destruction of the shops along 4th Street, including the ones at issue in *Berman v. Parker*. These businesses were replaced by the Waterside Mall, which had been envisioned as “a hundred-store complex with rooftop restaurant terraces.”²⁰⁷ No more than twenty-six stores ever materialized,²⁰⁸ and by 1977 the mall had been labeled “a disaster.”²⁰⁹ After the Environmental Protection Agency moved its offices away from the site, use of the facility dwindled, leading to a decision to demolish the mall.²¹⁰ The newest Southwest redevelopment plans call for 4th Street to be reopened,²¹¹ a situation that might be described as ironic if commentators ever connected it to the facts underlying *Berman v. Parker*.

however, the street is perceived as impeding pedestrian access to the water, and it will be removed as part of the new Southwest redevelopment. D.C. OFFICE OF PLANNING, THE ANACOSTIA WATERFRONT FRAMEWORK PLAN 48 (2003), available at http://planning.washingtondc.gov/planning/frames.asp?doc=/planning/LIB/planning/project/anacostia_waterfront/framework-pdf/6_Transportation.pdf&planningNav_GID=1708.

The excessive paved surfaces are primarily due to the redundancy of Water Street, an access road that runs along the water’s edge parallel to Maine Avenue. The existing waterfront is isolated by vast amounts of surface parking, making it feel unsafe at night and unwelcoming during the winter. The removal of Water Street creates opportunities for new development that connects the rebuilt Maine Avenue to the waterfront[.]

Id.

205. See *infra* note 212 and accompanying text (depicting renovated alley homes in Foggy Bottom); see also Ammon, *supra* note 99, at 206 (“With the benefit of hindsight, it seems possible that if the rowhouses that Goodwillie had identified as ‘basically sound brick buildings’ and ‘well worth saving’ had been selectively rehabilitated, they might well have followed the path of neighborhoods like Georgetown. There, historic homes are prized, and prices and rates of tenure are both higher.”).

206. See Ammon, *supra* note 99, at 190 (“The commercial properties earned the most blame.”).

207. *Id.*

208. *Id.*

209. Penelope Lemov, *Southwest 26 Years of Renewal*, WASH. POST, Aug. 13, 1977.

210. See Dana Hedgpeth, *Waterfront Project to House D.C. Agencies*, WASH. POST, Dec. 5, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR2006120401310.html>.

211. See *id.*

Fig. 9. Renovated alley houses in the Foggy Bottom neighborhood.²¹²



Beyond the architectural and design merits of the Southwest redevelopment, the RLA's conduct in the years following *Berman v. Parker* was criticized by many Southwest residents and business owners. Homeowners frequently complained that the RLA's assessments of fair market value for purposes of paying just compensation were significantly undervalued.²¹³ The District of Columbia Court of Appeals agreed, and in 1956 Judge Prettyman enjoined the RLA from using its inappropriate appraisal techniques.²¹⁴ Business owners, too, were often unhappy with RLA condemnation awards, as just compensation did not include payment for the loss of business goodwill.²¹⁵ It was later estimated that

212. Author's personal photograph.

213. See A.C. Hagan, Testimony Before Columbia Plaza Public Hearing (May 24, 1960) (on file at District of Columbia Public Library, Washingtoniana Division).

214. *Riley v. D.C. Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1956).

215. See, e.g., *Mitchell v. United States*, 267 U.S. 341 (1925) (holding that farmer condemnees were not entitled to compensation for the loss of their business because the government's intent was condemn the land, and not the business); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 675 (1923) ("Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation.").

the mortality rate for small businesses displaced by the Southwest redevelopment was 62%.²¹⁶

The affordability of the housing ultimately built in the redevelopment area was also a subject of controversy. Urban renewal proponents and city officials had pushed to redevelop the area with luxury housing since the project's inception; the RLA's director had even stated in 1952 that "[t]he point is definitely not rebuilding housing for the people now living there."²¹⁷ It was not until years after *Berman v. Parker* was decided, however, that the city finally made it clear that most of the residents of the old Southwest would be permanently displaced. In 1959, the requirement that one third of Area B's new housing had to be affordable was removed from the redevelopment plans.²¹⁸ Less than a year later, the District Commissioners recommended removing the low income housing requirement from the plans for the rest of the 550 acre Southwest urban renewal area.²¹⁹ Although a limited amount of moderate income housing was ultimately included in the redevelopment,²²⁰ and several public housing projects were built nearby, by 1970, the socioeconomic characteristics of Southwest Washington D.C. had changed dramatically. Wealthy and well educated people moved into the condos and townhouses that old Southwest's residents could not afford, and the racial composition went from nearly all black to mostly white.²²¹

Residents had been led to believe since the program's inception that Area B would include at least 300 units for middle and low income households, and that 25% of the units in the rest of the project would be affordable.²²² They viewed the removal of the affordability requirements as "a breach of faith" and questioned whether it was really intended to serve any public interest. Representing the Southwest Citizens Association, Albert Headley summed up the community's reaction:

216. Sarah Ellis, Petition to Congress (on file at District of Columbia Public Library, Washingtoniana Division).

217. *Latest Plan Would Tear Out Southwest Slums for Ultramodern and Costly Community*, SUNDAY STAR, May 11, 1952.

218. See Julius Duscha, *Searles Sees No Low Rent In Southwest*, WASH. POST AND TIMES HERALD, Aug. 29, 1959; *Low Rent Housing Lifted From SW Renewal Plan*, WASH. POST AND TIMES HERALD, Aug. 28, 1959.

219. James Carberry, *\$7000 Income Debated For Southwest Housing*, WASH. POST, Apr. 23, 1960, at C18.

220. Ammon, *supra* note 99, at 202.

221. *Id.* at 196-98.

222. Albert J. Headley, Representative of Southwest Citizens Association, Statement before the District Commissioners (July 17, 1959) (on file at District of Columbia Public Library, Washingtoniana Division).

It has been stated that economics necessitates ending the present rent restriction. This program was conceived to eliminate slums and to provide decent and sanitary housing within the range of all income groups. We submit that the solution offered while expedient for the government agencies involved and the private developer, it certainly was not the intent of the Congress of the United States when the law was enacted. The only advantage accrues to the agencies and the developer since it promises the advancement of this project without further delay and insures a larger margin of profit for the developer. This is a far departure from the original goal of redevelopment.²²³

The RLA's relocation efforts were also criticized, although the agency's records paint a happy ending. According to the RLA, displaced residents were assisted in finding at least one "suitable" replacement unit.²²⁴ And:

In the spirit of approaching "relocation as a human problem as well as a problem of shelter," the RLA even went so far in some instances as to procure inexpensive or free furnishings for families' new homes, discounted medical services for ailing family members, and hasty marriage licenses for couples who had been living together, but whose new housing required official documentation of their union.²²⁵

A 1956 report claimed that relocation efforts were a success, finding that nearly all of the 515 families that were tracked eventually moved into standard housing.²²⁶

That report, however, made no speculation as to what may have happened to the other 800 households that were forced to leave Area B, and non-RLA accounts tell a very different story about displacement from Southwest. Some people claimed that the city's simultaneous redevelopment of other neighborhoods limited rehousing options, causing overcrowding in remaining low income areas while leaving large

223. *Id.*

224. Ammon, *supra* note 99, at 202 (citing several RLA documents from 1959 and 1960).

225. *Id.* (citing several RLA documents from 1959 and 1960).

226. See George B. Nesbitt, *Dispersion of Nonwhite Residence in Washington, D.C.: Some of its Implications*, 32 LAND ECON. 201, 209 (1956).

[T]he clearest index of the facility which racially freer housing patterns have provided renewal activity is the orderly and expeditious manner in which a thousand nonwhite families were relocated from the city's first redevelopment area, Southwest Project B. Of the total, 515 families relocated in standard private housing were distributed in each quadrant of the city, as follows: in the Northwest, 91; the Northeast, 106; the Southwest, 181; and the Southeast, 137. The private housing resources for this relocation operation, acclaimed by the Administrator of the Housing and Home Finance Agency as the "most successful undertaking of its kind yet carried out in any American city," were located within the dispersion pattern described herein.

Id.; see also DANIEL THURSZ, *WHERE ARE THEY NOW?: A STUDY OF THE IMPACT OF RELOCATION ON FORMER RESIDENTS OF SOUTHWEST WASHINGTON* (1966).

tracts of cleared land sitting vacant in anticipation of renewal.²²⁷ At congressional hearings, the director of a nonprofit social services center testified that housing was not available for many of the evicted Southwest residents. She claimed that the RLA did not adequately plan for relocation, especially for those people who could not simply “get[] in line at Public Assistance.”²²⁸ A 1966 study that tracked some dislocated families, while mostly positive, nevertheless found that a quarter of the displaced residents had failed to make any friends in their new communities within five years.²²⁹

Area B made up only a fraction of Washington’s urban renewal areas. Area B itself comprised less than 15% of the 560 acres that were eventually razed in Southwest Washington D.C.²³⁰ More than 20,000 residents and 1,500 businesses were ultimately displaced from Southwest alone.²³¹ Urban renewal went forward in other sections of the city too, ultimately impacting tens of thousands of residents.²³²

VI. The Death of “Urban Renewal,” and the Birth of “Economic Development”

While federal housing and slum clearance policies may have been crafted with the intent of ameliorating the lives of low income families,²³³ by the mid 1960s a growing number of people from both sides of the political spectrum had come to the conclusion that urban renewal was a social failure. It had become clear that when an area was designated for redevelopment, it usually had less to do with improving housing conditions than it did with opening prime real estate for higher value uses

227. *Southwest Unit Assails RLA on Relocation*, WASH. STAR (date unknown) (on file with author); Letter from Sarah Ellis, Capitol Hill Southeast Citizens Association, to Board of Commissioners (Oct. 28, 1965) (on file at District of Columbia Public Library, Washingtoniana Division) (“Much of Southwest was cleared out twelve years too soon. Northeast Project One was cleared out at least five years too soon and still stands vacant. Northwest Project One already has houses standing empty with all windows broken, while entire families are huddled elsewhere in misery. Urban renewal has caused deep and unnecessary agony among the poor in Washington, D.C.”).

228. *Hearing on H.R. 8697*, 86th Cong. 2 (1960) (statement of Mary Cavanaugh) (on file at District of Columbia Public Library, Washingtoniana Division).

229. Ammon, *supra* note 99, at 203.

230. *Id.* at 185.

231. *Id.*

232. See GILLETTE, *supra* note 15, at 172-89.

233. By some accounts, federal housing policies, many of which grew out of New Deal programs, were intended more to stimulate the economy than to aid poor persons directly. See JACKSON, *supra* note 31, at 190-218. It is also clear that federal mortgage policies were implemented in a discriminatory manner until the mid 1960s, casting additional doubt on the intended purposes of the early United States Housing Acts. *Id.*

and wealthier people, and neither liberals nor conservatives were happy with the results. The economist Martin Anderson typified the conservative view, recommending the repeal of the program in order to allow free enterprise to address the country's housing needs without subsidies or the use of eminent domain.²³⁴ On the other side of the spectrum, the liberal urban theorist Jane Jacobs offered a scathing indictment of the urban renewal program in her 1961 book *The Death and Life of Great American Cities*:

But look what we have built with the first several billions [of dollars spent on urban renewal]: Low income projects that become worse centers of delinquency, vandalism and general social hopelessness than the slums they were supposed to replace. Middle-income housing projects which are truly marvels of dullness and regimentation, sealed against any buoyancy or vitality of city life. Luxury housing projects that mitigate their inanity, or try to, with a vapid vulgarity. Cultural centers that are unable to support a good bookstore. Civic centers that are avoided by everyone but bums, who have fewer choices of loitering places than others. Commercial centers that are lackluster imitations of standardized suburban chain-store shopping. Promenades that go from no place to nowhere and have no promenaders. Expressways that eviscerate great cities. This is not the rebuilding of cities. This is the sacking of cities.²³⁵

Additionally, more often than not, the designation of urban renewal areas was based on racial factors.²³⁶ So much was made clear by the author and civil rights activist James Baldwin, who made headlines in 1963 when he appeared on national television and explained that urban renewal "means moving the Negroes out. It means Negro removal. . . . The federal government is an accomplice to this fact."²³⁷ The massive expansion of the federal highway system in the 1950s also led to the displacement of thousands of people, and the neighborhoods that were cleared for city highway systems were almost inevitably poor and pre-

234. MARTIN ANDERSON, *THE FEDERAL BULLDOZER* (1964).

235. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 6 (Modern Library 1993).

236. See Note, *The Federal Courts and Urban Renewal*, 69 COLUM. L. REV. 472, 474 n.10 (1969); Pritchett, *supra* note 46, at 6:

Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This "scientific" method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.

Id.

237. *The Negro and the American Promise* (WGBH television broadcast 1963), available at http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04_qry.html; see also Jack Gould, *TV: Challenge on Racism: James Baldwin Puts Problem Squarely in the Laps of All Americans*, N.Y. TIMES, May 30, 1963.

dominantly nonwhite.²³⁸ Relocation assistance was “ruthless” in its inadequacy,²³⁹ and the destruction of entire neighborhoods caused immeasurable psychological and social upheaval for residents.²⁴⁰ To make matters worse, the low income housing built to replace demolished units (when it was built),²⁴¹ was typically located in high rise public housing “projects” that were ripe to evolve into new ghettos.²⁴² All of this came to a head during the spring of 1968, when riots erupted in response to Martin Luther King’s assassination, not only in Washington, but in cities around the country. There could be little doubt that the paternalism and inequity of urban renewal played a significant role.²⁴³

The federal urban renewal program was not expressly intended to exacerbate residential segregation or marginalize the poor, but it may as well have been, a fact that is evident in the public housing “projects” that remain standing in many American cities.²⁴⁴ With the 1949 United States Housing Act, Congress, for the most part, left it up to each state to devise its own policies regarding the designation of redevelopment areas, the relocation of displaced persons, and the siting of public housing developments and highways.²⁴⁵ The lack of strong policy guidance from the federal government cleared the way for some cities to intentionally pursue segregationist goals through their redevelopment plans, or to simply ignore how the results of such plans would be impacted

238. See Pritchett, *supra* note 46, at n.221 (“a 1969 report by the National Commission on Urban Problems estimated that the highway program uprooted 32,400 families a year during the early 1960s.”).

239. Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, in *URBAN RENEWAL 467-68* (Bellush, ed., 1967) (noting that between 1949 and 1964, only .05% of federal urban renewal funding was spent on relocation).

240. See generally MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (2005).

241. Curtis W. Berner, Note, *Enjoining Urban Renewal—Inadequate Relocation Facilities: Western Addition Community Organization v. Weaver*, 21 *HASTINGS L.J.* 433, 436 (1969-70); *The Federal Courts and Urban Renewal*, *supra* note 241, at 472-73.

242. See generally ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960* (Univ. of Chi. Press 1998) (1949).

243. See, e.g., James Coates, *Riots follow killing of Martin Luther King Jr.: The city erupts*, *CHI. TRIB.*, Apr. 5, 1968, available at <http://www.chicagotribune.com/news/politics/chi-chicagoday-kingriots-story,0,4609945.story>; Neely Tucker, *The Wreckage of a Dream*, *WASH. POST*, Aug. 24, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A27044-2004Aug23.html> (discussing the Washington D.C. riots); *Six Weeks that Shook Morningside*, *COLUMBIA COLLEGE TODAY* (Spring 1968) (exploring in detail the Columbia University riots, which were catalyzed by a development proposal); *Lanside Library Special Collections*, Baltimore '68: Riots and Rebirth Overview, <http://archives.ubalt.edu/bsr/index.html> (last visited Mar. 13, 2010).

244. See generally Chris Farrell & Laurie Stern, *American Radio Works, After the Projects: The Uncertain Future of Public Housing*, <http://americanradioworks.publicradio.org/features/housing/> (last visited Mar. 13, 2010).

245. 1949 United States Housing Act, ch. 338, 63 Stat. 413.

by discriminatory forces operating in the private sector. It also made it easier for interest groups like the real estate and building lobbies to influence redevelopment patterns. As Benjamin Ginsberg concluded in one of the few essays to discuss *Berman v. Parker* in the context of Southwest Washington D.C.:

[F]ederal programs which parcel out policy-making powers in accord with the tenets of interest group liberalism, destroy political responsibility, create privilege supported by the symbols and power of national authority, and ultimately come to have a conservative impact by legitimating already existing power relationships. Expansion of the role of government made large scale redevelopment possible in the District of Columbia, while limitation of the role of law and policy made segregation possible.²⁴⁶

Congress eventually recognized the institutional failures of the urban renewal program and enacted important changes. The Civil Rights Act of 1964 provided a cause of action to challenge discrimination in public housing and federally funded programs.²⁴⁷ In 1966, Congress passed the Widnall Amendment to the Housing Act, which required that a “substantial number” of residential units in redevelopment areas had to be affordable.²⁴⁸ Finally, the Fair Housing Act was enacted in 1968 to eliminate discrimination in both public and private housing accommodations.²⁴⁹ At the same time, the courts became more receptive to attacks on urban renewal plans during the 1960s and 1970s, eventually allowing plaintiffs to challenge them on equal protection grounds.²⁵⁰ Additional public housing reforms were enacted by Congress in the 1990s to deconcentrate poverty in public housing projects and to improve housing choices for people receiving assistance.²⁵¹ Reversing the negative consequences of urban renewal, however, is a task that will persist for years to come.²⁵²

246. Benjamin Ginsberg, *Berman v. Parker: Congress, the Court & the Public Purpose*, 4 POLITY 48, 74 (1971) (footnote omitted).

247. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. III, 78 Stat. 241 (Desegregation of Public Facilities); *id.* tit. VI (nondiscrimination in federally assisted programs).

248. 80 Stat. 1281 (1966).

249. Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (1968). The Act not only prohibited discrimination in the terms and conditions of home sales and residential leases, but it also made redlining illegal.

250. *See Berner, supra* note 241.

251. *See generally* U.S. Department of Housing and Urban Development, Public Housing Reform Overview, <http://www.hud.gov/offices/pih/phr/about/>; U.S. Department of Housing and Urban Development, Hope VI, <http://www.hud.gov/offices/pih/programs/ph/hope6/index.cfm>.

252. *See generally* SUSAN J. POPKIN ET AL., A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHALLENGES (2004) available at http://www.urban.org/UploadedPDF/411002_HOPEVI.pdf.

Although urban renewal projects like the one involved in *Berman v. Parker* are thus a thing of the past, eminent domain continues to be used today for similar redevelopment projects. These projects are labeled as “economic development” initiatives rather than as “urban renewal” plans.²⁵³ They tend to be smaller, involve the displacement of fewer people, and “[i]nstead of promising to rebuild cities, they focus on more practical aspects such as job creation.”²⁵⁴ Today, state and local governments are also more aware of the discriminatory impacts of redevelopment than they were in the 1950s and 60s, and they have taken steps to improve the fairness of the redevelopment process by making it more transparent and by improving relocation assistance programs.

Economic development takings, like urban renewal takings before them, have until very recently been almost universally sanctioned by the courts. The Supreme Court itself found no basis upon which to invalidate the taking of nonblighted land for economic development purposes in the 2005 case *Kelo v. City of New London*.²⁵⁵ Like many of the state courts that had found economic development to be a public purpose prior to *Kelo*, the Supreme Court relied heavily on *Berman v. Parker*. But while *Berman v. Parker* has been cited as justifying economic development takings, the courts have typically failed to consider either the context in which *Berman* was decided or the long term consequences of the federal urban renewal program.²⁵⁶ This is not necessarily a bad thing; eminent domain is merely a tool, and the fact that it was used unwisely in the redevelopment projects of the 1950s and 1960s does not mean that it will always be abused in the contemporary economic development setting.

Still, many people see the failures of urban renewal as a persuasive reason to counsel prudence and caution in granting the government such broad powers of eminent domain, and *Berman*'s legacy supports this viewpoint. Justice Sandra Day O'Connor has been among the jurists to make this argument. In her dissent to the Supreme Court's decision in *Kelo*, she refused to concede that economic redevelopment is any different than urban renewal, and she warned of its possible effects:

Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. . . . If ever there were justification for intrusive judicial review of constitutional provisions that protect “discrete and insular minorities,” surely that principle would

253. Pritchett, *supra* note 46, at 48.

254. *Id.*

255. *Kelo v. New London*, 545 U.S. 469 (2005).

256. Pritchett, *supra* note 46, at 5.

apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse.²⁵⁷

Kelo inspired a popular backlash of unforeseen dimensions, with nearly all of the states quickly acting to reform their eminent domain laws.²⁵⁸ Although the real story of *Berman v. Parker* has mostly been lost, neglected by the courts and the public alike, the media was quick to recognize the irony when, in 2009, the private developer involved in *Kelo* abandoned its New London redevelopment plans.²⁵⁹ It seems likely that this story will continue to impact eminent domain policy for years to come, even as the *Berman v. Parker* story will likely remain esoteric to much of the public.

More attention, however, should be paid to *Berman v. Parker*. The lack of policy guidance in the federal urban renewal program was not recognized as a problem until much damage had already been done, and *Berman v. Parker*'s extraordinary form of legislative deference allowed urban renewal projects to go forward across the country with an astonishing lack of attention to the welfare of the people that the program was supposed to benefit. In Southwest Washington, affordability requirements were removed from the redevelopment plans even though they were one of the most important justifications for the redevelopment. The advice of public housing officials was ignored. Vast swaths of cleared land ended up lying vacant while housing options for low and moderate income residents dwindled. A black neighborhood was appropriated for wealthier white residents. A tour of Southwest today does not convey these injustices, but the fact that it has matured into a functioning residential area does not diminish the harm that was caused in the process.

The Supreme Court's opinion in *Kelo v. New London*, like its earlier decision in *Berman v. Parker*, contains very little policy guidance. Justice Kennedy's concurrence suggests that eminent domain should not go forward in the economic development context without a carefully developed plan, and it points out certain indicia of projects with primarily private benefits.²⁶⁰ But even Justice Kennedy does not explain what policies economic development plans should advance or how those

257. *Kelo*, 545 U.S. at 521-22 (O'Connor, J., dissenting) (citation omitted).

258. See generally *THE CASTLE COAL.*, *supra* note 14.

259. See, e.g., Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES, Nov. 12, 2009.

260. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

plans should assure that their goals are fulfilled. Redevelopment under *Berman v. Parker* proceeded under the aegis of a redevelopment plan, yet it failed in many ways. A similar legacy has, and will likely continue, to follow *Kelo*.²⁶¹

Economic development need not be a failure, and there is no need to ban the use of eminent domain to achieve economic development goals. Although abuses exist and oversight is often poor, economic development *can* work and be an effective tool to promote the public welfare.²⁶² Policy makers should look to the reasons why some plans fail and others succeed, and why some state policies result in more eminent domain abuse than others. This knowledge should be incorporated into substantive regulations, and the legacy of urban renewal provides us with many examples to learn from.

261. A prime example is the Atlantic Yards redevelopment project in Brooklyn discussed in Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 *URB. LAW.* 287 (2010).

262. The Melrose Commons redevelopment in the South Bronx is a prime example. The original renewal plans called for displacement and land clearance in this rundown area, but when residents discovered these plans in the early 1990s, they formed the Nos Quedamos Committee (meaning "we stay"). Bringing together homeowners, tenants, businesses and organizations, the coalition identified the community's concerns and brought them to the table. With the cooperation of local officials and agencies, Nos Quedamos became a partner in the planning process, the original plans were scrapped, and new plans were developed through working sessions and community meetings. Some of the key elements to the plans that finally emerged were that involuntary displacement would be limited as much as possible, diverse and mixed income housing would be encouraged, and existing street patterns would be retained. Today, the redeveloped area includes about 2,000 units of mixed income housing, ground floor retail, and multi-use parks. Many buildings were retained and rehabilitated, rather than torn down, and the new buildings incorporate green design features. See Sustainable Communities Network Case Studies, Urban Renewal in Melrose Commons, http://www.sustainable.org/casestudies/newyork/NY_af_melrose.html (last visited Mar. 13, 2010); Planners' Network, Melrose Commons: A Case Study for Sustainable Community Design, <http://www.plannersnetwork.org/publications/melrose.htm> (last visited Mar. 13, 2010). Another example is the Dudley Street Neighborhood Initiative. See Civic Practices Network, Dudley Street Neighborhood Initiative Creates an Urban Village, <http://www.cpn.org/topics/community/dudly.html> (last visited Mar. 19, 2010).

