The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain

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In 1952, the District of Columbia Redevelopment Land Agency (DCRLA) announced a sweeping plan to clear and redevelop the southwest quadrant of the nation's capitol. Max Morris and Goldie Schneider were two business owners affected by the proposal. Schneider operated a successful hardware store that had been in the family for decades; Morris owned a department store. The agency, which had designated the area as "blighted," planned to acquire their buildings, demolish them, and transfer the cleared land to the Bush Construction Company. Schneider and Morris, however, refused to sell.[1] To prevent the government from taking their properties by eminent domain, they filed suit, alleging that taking their buildings would violate the Public Use Clause of the Fifth Amendment to the United States Constitution, which states "nor shall private property be taken *for public use*, without just compensation."[2] Their claims would wind their way to the United States Supreme Court, which concluded in the 1954 case of *Berman v. Parker* that the condemnations were constitutional.[3]

The DCRLA's victory, which set the stage for a nation-wide expansion of the urban renewal program, was the result of a careful, sustained effort by advocates of urban renewal to shape the jurisprudence of eminent domain. From the early 1920s through the 1940s, renewal advocates developed their argument that cities were in crisis and that only major changes in property law could prevent urban decline. They used these claims to secure the right to

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1. *See* George Beveridge, *Suit Challenges Slum Program for Southwest*, EVENING STAR, Dec. 27, 1952, at A12; George Beveridge, *Fund to Press Project B Fight in Court Sought*, EVENING STAR, Nov. 17, 1953, at B1.

2. U.S. CONST. amend. V (emphasis added).

3. Berman v. Parker, 348 U.S. 26 (1954). Morris's and Schneider's cases were originally filed separately, but they were merged by the three-judge panel that considered the constitutional claims. Morris's case was appealed to the Supreme Court while Schneider's case was returned to the trial judge and became moot after the Court's opinion in *Berman*. *See Consolidation of Two Suits Against Project B Ordered*, EVENING STAR, Feb. 10, 1954, at A23.

condemn property and turn it over to others who would use it more appropriately, thereby changing the meaning of the Public Use Clause.

The conflict between Morris, Schneider, and the D.C. government, as well as the battles over urban renewal in general, illuminate a critical tension in American law and politics: the struggle to balance the rights of individual property owners against societal interests in the development, or protection, of scarce resources. It is a long-held axiom that government cannot take the property of one person and give it to another. That principle, however, has frequently been honored in the breach. For two centuries, local, state, and federal governments have used eminent domain in pursuit of public policy goals, often at the expense of the individual property owner but also to the benefit of purely private interests.

While conflicts over "regulatory takings" have been a vital topic for scholarly discussion for the past three decades, eminent domain receives far less consideration.[4] The *Berman* decision is responsible for the relative lack of attention to this issue. Before *Berman*, the judicial system played a significant role in reviewing government condemnations. While courts were generally deferential to public and private uses of eminent domain, judges frequently declared that a particular taking was not in the public interest.[5] *Berman* severely restricted judicial review in cases of eminent domain.[6] Legal scholars from perspectives as diverse as Richard Epstein, Bruce Ackerman, and Margaret Radin today view the Public Use Clause as moribund and argue that government powers of eminent domain are practically limitless.[7] But the law of eminent domain was, before the mid-1900s, subject to great debate—a debate that is being resurrected today.

The urban renewal program played a critical role in the demise of the Public Use Clause. An effort to revitalize the city through the private

4. The literature of regulatory takings is too voluminous to cite. For representative sources, see WILLIAM FISCHEL, TAKINGS, FEDERALISM AND REGULATORY NORMS: LAW, ECONOMICS AND POLITICS (1995); Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967); Andrea Peterson, *The Takings Clause: In Search of Underlying Principles, Part I: A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Andrea Peterson, *The Takings Clause: In Search of Underlying Principles, Part II: Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990); Carol Rose, Mahon *Reconstructed: Why the Takings Issue is Still A Muddle*, 57 S. CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); and William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

5. *See* discussion *infra* pp. 9-13.

6. While *Berman* applied only to federal takings, it has been extremely influential upon state courts. *See* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 426 (1983).

7. *See* BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977); RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162 (1985); MARGARET JANE RADIN, REINTERPRETING PROPERTY 136-37 (1993).

redevelopment of publicly condemned land, urban renewal was promoted by elites as the answer to city decline. Renewal advocates envisioned the creation of a futuristic metropolis, organized according to modern principles of planning. Building this new city required the clearance and redevelopment of large areas of the city. In European cities, such efforts were undertaken by government, but American renewal advocates opposed such centralized power. Instead, they argued that cities could be rebuilt privately, and they proposed the creation of "urban redevelopment corporations." Renewal advocates were a diverse group—they were real estate interests, progressive reformers, urban planners, politicians, and other concerned citizens—and they had divergent goals for the city. But they all agreed that urban revitalization required a broad application of the government's eminent domain powers.

This initiative necessitated a re-imagining of the public use doctrine because a program that took the dwellings and businesses of private owners and transferred them to other private owners to build houses and commercial operations was, at best, legally problematic. While the law of eminent domain in the early twentieth century was far from consistent, many legal professionals believed that taking property and turning it over to others in the manner conceived by renewal advocates conflicted with the Public Use Clause. The relevant precedents stated that eminent domain could be used only where it provided specific benefits to the general public, and critics and supporters alike questioned whether urban renewal met this standard. Before urban revitalization could begin, the law would have to change.

To secure political and judicial approval for their efforts, renewal advocates created a new language of urban decline: a discourse of blight. Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums. A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.[8] To make the case for renewal programs, advocates contrasted the existing, deteriorated state of urban areas with the modern, efficient city that would replace them. Urban revitalization required the condemnation of blighted properties and the transfer of this real estate to developers who would use it more productively.

By elevating blight into a disease that would destroy the city, renewal advocates broadened the application of the Public Use Clause and at the same time brought about a re-conceptualization of property rights. One influential understanding of property defines it as a bundle of rights, the most important being the rights to occupy, exclude, use, and transfer.[9] In the urban renewal

8. On property as rhetoric, see Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, *in* CONSTITUTIONALISM AND DEMOCRACY (J. Elster & R. Slagstad eds., 1988); and Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277 (1998).

9. ACKERMAN, *supra* note 7, at 26-28.

regime, blighted properties were considered less worthy of the full bundle of rights recognized by American law. Property owners in blighted areas were due government-determined fair value for their holdings, while tenants were grudgingly given relocation assistance, but they were not entitled to undisturbed possession. When landowners attempted to fight the condemnation of their properties, state supreme courts from Washington to Maine gave their blessing to the use of eminent domain for urban renewal. In 1954, in *Berman*, the United States Supreme Court also approved the use of eminent domain for such purposes, opening the door to an era of urban reconstruction that continues today (although the nature and scope of urban renewal efforts has since evolved).

The role of the urban renewal program in reshaping the urban landscape is well-documented. Several studies have shown how urban elites promoted redevelopment to reorganize urban areas and to protect and enhance their real estate investments. These scholars have studied the rise of "growth coalitions"[10]—groups of business and political leaders that promoted renewal—and they have examined the political debates over post-war housing policy.[11] Other works have documented the impact of urban renewal in intensifying racial segregation and limiting the mobility of African-Americans.[12] Little work has been done, however, to explain how renewal advocates secured public and judicial support for the expansive use of eminent domain in the program.[13]

In the past two decades, several legal scholars have studied the changing interpretations of the Public Use Clause and the central role of the *Berman* case in this doctrine. Most students have questioned the broad interpretation of the Public Use Clause laid out by Justice William O. Douglas in *Berman* and have argued for a narrower reading. Scholars claim that the courts have given too

10. *See, e.g.*, SCOTT GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION (1965); JOHN MOLLENKOPF, THE CONTESTED CITY (1983).

11. *See, e.g.*, RICHARD O. DAVIES, HOUSING REFORM DURING THE TRUMAN ADMINISTRATION (1966); MARK I. GELFAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965 (1975); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA (1996); JON TEAFORD, ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA (1990); URBAN RENEWAL: THE RECORD AND THE CONTROVERSY (James Q. Wilson ed., 1966).

12. *See, e.g.*, RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA (1996); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960 (1983); ZANE MILLER & BRUCE TUCKER, CHANGING PLANS FOR AMERICA'S INNER CITIES: CINCINNATI'S OVER-THE-RHINE AND TWENTIETH-CENTURY URBANISM (1998); JOEL SCHWARTZ, THE NEW YORK APPROACH: ROBERT MOSES, URBAN LIBERALS AND REDEVELOPMENT OF THE INNER CITY (1993); THOMAS SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996); JUNE MANNING THOMAS, REDEVELOPMENT AND RACE: PLANNING A FINER CITY IN POSTWAR DETROIT (1997).

13. Robert Beauregard has examined the role of rhetoric in the understanding of urban problems. *See* ROBERT A. BEAUREGARD, VOICES OF DECLINE: THE POSTWAR FATE OF AMERICAN CITIES (1993). Robert Fogelson examines the rise of blight rhetoric in his new book, DOWNTOWN: ITS RISE AND FALL, 1880-1950 (2001).

much discretion to legislatures and administrative bodies to use eminent domain and that these powers have been used by interested parties to distort private market negotiations over coveted properties.[14] These studies explore the application of the *Berman* doctrine and its role in the law of eminent domain today, but legal scholars have not analyzed the context in which state courts and the United States Supreme Court broadened their interpretation of the Public Use Clause.

By examining the emergence of the urban renewal program, this Article highlights the role of legal consciousness in shaping urban policy.[15] The elites who promoted urban renewal (with some exceptions) shared an ideology that held private property rights sacrosanct, and they were profoundly skeptical about governmental intervention in the economy. But, at the same time, renewal advocates realized that government power was necessary to secure their goal of urban revitalization. While a small number of urban planners were less reticent about increased government influence over private property, most renewal advocates believed that condemnation would focus on a discrete group of properties that they would systematically select. They did not want to dismantle the protections provided by the Public Use Clause so much as carve out an exception that, they argued, clearly served the public interest. In reality, the initially modest effort to secure legal authority for urban renewal paved the way for wide-ranging powers of condemnation.

The stated goal of the urban renewal program was to provide a means for public/private partnerships in urban development. But renewal programs were controlled by a small number of real estate interests and politicians who used the power of eminent domain to reorganize urban land. Today, the redevelopment agencies they created, like many other "public authorities," remain insulated from political accountability, and they have been criticized as a result.[16] The legal and political history of these urban redevelopment authorities, moreover, contributes to the history of the American administrative state.[17] Most theories of the administrative state posit a publicly-managed

14. *See, e.g.*, Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 289-90 (2000); Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 60-61 (1998); Joseph J. Lazzaroti, *Public Use or Public Abuse*, 68 U. MO. KAN. CITY L. REV. 49 (1999); Mansnerus, *supra* note 6; Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 18 (1981). For less critical views of judicial interpretations of the Public Use Clause, see Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 213 (1978); and Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

15. On the study of "legal consciousness" in history, see Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987); and Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING-CLASS HIST. 56 (1995).

16. *See infra* notes 223-225 and accompanying text.

17. On the rise of the American administrative state, see STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982);

bureaucracy, created as the result of public pressure, that regulates a discrete subset of the economy. Redevelopment agencies, however, complicate these theories because they were created to serve private ends and were controlled by the interests that created them.[18]

The role of blight terminology in restricting racial mobility has also been under-appreciated by legal scholars. 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. *Berman* was decided just six months after *Brown v. Board of Education*,[19] but while *Brown* receives more attention, *Berman* was equally influential in shaping American race relations. The urban renewal program played a crucial role in redistributing urban populations and creating additional obstacles to efforts to achieve integration.

The legal history of the urban renewal program also provides an example of the changing nature of property rights in the United States. Several influential scholars, particularly Joseph Sax, Carol Rose, and Laura Underkuffler, have argued that property rights should be viewed as "evolutionary" doctrines. These scholars, while they differ in their explanations of the process, agree that property does not have a static definition but rather reflects relationships between people, and between government and individuals, that have changed over time. Understanding the evolution of property rights requires an examination of the ways that people conceive of their relationship to property in particular historical contexts.[20]

THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES (Margaret Weir et al. eds., 1988); Michael K. Brown, *State Capacity and Political Choice: Interpreting the Failure of the Third New Deal*, *in* 9 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 187 (1995); Ira Katznelson & Bruce Pietrykowski, *Rebuilding the American State: Evidence from the 1940s*, *in* 5 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 301 (Karen Orren & Stephen Skowronek eds., 1991); and Andrew A. Workman, *Creating the National War Labor Board: Franklin Roosevelt and the Politics of State Building in the Early 1940s*, 12 J. POL'Y HIST. 233 (2000).

18. On the complicated nature of public authorities, see A. Scott Henderson, *Charles Abrams and the Problem of the "Business Welfare State,"* 9 J. POL'Y HIST. 211 (1997); Gail Radford, *William Gibbs McAdoo, the Emergency Fleet Corporation, and the Origins of the Public-Authority Model of Government Action*, 11 J. POL'Y HIST. 59 (1999); and Keith D. Revell, *Cooperation, Capture and Autonomy: The Interstate Commerce Commission and the Port Authority in the 1920s*, 12 J. POL'Y HIST. 177 (2000).

19. 347 U.S. 483 (1954).

20. *See* Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence: An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Laura S. Underkuffler, *On Property: An Essay*, 100

This Article will examine how the interaction of renewal advocates and the courts changed legal conceptions of property in the middle of the twentieth century. Part I outlines the movement for urban renewal in the early twentieth century and surveys the law of takings from the early 1800s to the 1930s. Part II discusses the role of rhetoric in the efforts of renewal advocates to rally public support for urban redevelopment during the 1920s and 1930s. Part III describes the intimate relationship, both political and jurisprudential, between the New Deal public housing program and the expansion of urban renewal. Part IV examines the continued role of blight rhetoric in the lobbying effort to create urban renewal programs during the 1940s. Part V analyzes several early renewal projects and describes the efforts of renewal proponents to create a national urban renewal program. Part VI traces the acceptance of the discourse of blight by state courts and examines the *Berman* case. The Conclusion surveys the post-*Berman* expansion of public and private eminent domain powers and briefly discusses current debates over the public use doctrine.

I. PROGRESSIVE ERA HOUSING REFORM AND THE LAW OF EMINENT DOMAIN

Fears of the "contagion" of the slums captured the attention of reformers throughout the 1800s. Toward the end of the century, the slum became the main focus of Progressive reformers. After Jacob Riis exposed the problem in his best-selling book, *How the Other Half Lives*,[21] hundreds of college educated men and women followed him into the warrens of the poor in American cities. While reformers like Jane Addams looked to use the talents of the poor to rebuild their neighborhoods themselves, others like Lawrence Veiller sought to secure the powers of local government to erase the slums. Veiller pushed New York and other cities to adopt housing regulations that he thought would force landlords to meet minimum maintenance standards and builders to construct modern dwellings.[22] These laws sometimes resulted in better housing, but their impact in improving the slum was minimal.[23]

While there were many nineteenth century attempts to regulate working-class housing, the first serious efforts at "slum clearance" began in New York City at the end of the century. After years of agitation by housing reformers, the state passed the Tenement House Act of 1895, which allowed the city Board of

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YALE L.J. 127 (1990). I am not arguing that these scholars share the same position on the meaning of property and property rights, rather that, in defining property as "evolutionary," these scholars have "historicized" the question. In order to analyze the changing nature of property and property rights, we need to understand the historical context in which these issues were debated.

21. JACOB A. RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK (1904).

22. *See* THE TENEMENT HOUSE PROBLEM (Robert W. DeForest & Lawrence Veiller eds., 1903); Lawrence Veiller, *Housing Reform Through Legislation*, 51 ANNALS AM. ACAD. POL. & SOC. SCI. 68 (1914).

23. *See* ROY LUBOVE, THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890-1917 (1962).

Health to condemn and demolish buildings declared unfit for human habitation. Progressives hoped that this legislation would eliminate the decrepit tenements that exacerbated the health and social problems in slum areas, but New York's landlords vigorously fought the passage and enforcement of the Act. As a result, its implementation was inconsistent at best.[24]

Housing reformers faced several major impediments to clearing the slums. The administration of a housing regulatory system required the development of detailed building standards for judging dilapidated housing as well as the employment of qualified persons to enforce these standards. Neither were available in the infancy of urban America's regulatory system. The biggest obstacle to redevelopment was the inability of housing administrators to secure title to run-down, but frequently profitable, slum tenements. In the early 1900s, condemnation was a complicated, time consuming process, and conservative judges, as well as entrenched political corruption, frequently prevented housing officials from acquiring the buildings they sought. In addition, the Supreme Court's requirement that condemnors pay fair market value for property taken (not a price determined by the city) inhibited large-scale takings of slum property.

Housing reformers had conflicting views on the best means to eliminate the slum. Most realized that the tenement economy survived because housing was desperately needed by the urban poor. Destruction of tenements required the construction of replacement housing, but because they were strongly opposed to government interference with the private market, most reformers refused to support public housing programs. Veiller, one of the most vocal critics of tenements, consistently asserted that "government housing play[s] no part in the solutions of housing problems. The motto of the American people," he argued, "is to keep the government out of private business and to keep private business out of government."[25] Veiller and other housing reformers supported and organized private associations to purchase slum properties and redevelop them, but they lacked the funds needed to make a major impact.[26] They hoped to secure the power of eminent domain for private redevelopment of the slum, but most legal scholars in the early 1900s believed that this violated the Public Use Clause.[27]

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24. *See* MAX PAGE, THE CREATIVE DESTRUCTION OF MANHATTAN 90-92 (1999).

25. *Id.* at 91.

26. *See* A. SCOTT HENDERSON, HOUSING AND THE DEMOCRATIC IDEAL: THE LIFE AND THOUGHT OF CHARLES ABRAMS 49 (2000); RADFORD, *supra* note 11.

27. One effort that achieved limited success in eliminating slums was the use of what reformers called "excess condemnation." Properties adjacent to those necessary for the construction of government projects were taken and sold to defray the costs of the project. During the construction of the Manhattan and Williamsburg Bridges in the early 1900s, for example, the use of excess condemnation enabled the city to clear 700 tenements (uprooting 50,000 people) on the Lower East Side. Excess condemnation was attacked as an unreasonable extension of the public use doctrine, and some courts limited its application. But most state supreme courts approved the process. These battles were among the earliest

The "Public Menace" of Blight

From the American Revolution through the first half of the twentieth century, the law of eminent domain was full of inconsistencies. Rationalization of the diverse state and federal court rulings about what constituted a valid public use was extremely difficult. The founding fathers, moreover, left little guidance on the meaning of the term. Although the sovereign's right of eminent domain was part of natural law principles adopted by the Constitutional Convention from English law, little evidence exists to explain why the framers included the limitation that condemned land be taken solely for public use. In the first half of the 1800s, every state except North Carolina included a public use clause in its constitution, but they too provided little guidance on the meaning of the phrase. As a result, courts interpreted these clauses on an ad hoc basis. During the nineteenth century, state courts vacillated between support for an expansive use of eminent domain and a fear that condemnation would be abused to the detriment of individual property rights. The United States Supreme Court, moreover, infrequently expounded upon the meaning of the Public Use Clause, and when the Court did consider cases involving condemnation, its principles—private property rights were sacrosanct—conflicted with its approval of a wide variety of condemnations.[28]

In the early Republic, eminent domain was used to support the expansion of the nascent economy, and many state courts adopted a broad interpretation of public use to support the taking of property for mills, dams, or roads, holding that these enterprises provided a "public benefit."[29] Even though condemnations of property for dams or highways frequently provided significant advantages to individual parties, courts concluded that because the facilities resulting from the condemnation could be exploited by a large number of people, they did not violate the restriction that condemned property be for public use. As the Industrial Revolution gathered steam, the use of the power of eminent domain for railroads, utilities, and other types of improvements increased. To support economic development, legislatures across the country granted private corporations the right to condemn property needed for expansion. As with prior condemnations, such takings were approved on the theory that the fruits of the takings would be available to the general public. According to legal historian Harry Scheiber, "'the comfort, convenience and

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efforts of urban reformers to expand the limits of the public use doctrine. *See* SCHWARTZ, *supra* note 12, at 14; Note, *The Public Use Limitation in Eminent Domain, An Advance Requiem*, 58 YALE L.J. 599, 606-07 (1949).

28. *See* Meidinger, *supra* note 14, at 18; *see also* STANLEY K. SCHULTZ, CONSTRUCTING URBAN CULTURE: AMERICAN CITIES AND CITY PLANNING, 1800-1920, at 41 (1989); Berger, *supra* note 14, at 213; Jones, *supra* note 14, at 289-290; Kochan, *supra* note 14, at 60-61.

29. Nineteenth century judges approached questions of eminent domain, economic regulation, and taxation in a similar fashion, seeking to ascertain the nature of the "public interest" in each activity. The interconnectedness of these three areas of law was crucial to the rise of the doctrine of substantive due process. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 6 (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED 54-55 (1993).

prosperity of the people' became a principal justification in the American courts generally for accepting legislative determinations that certain older vested rights in property must be forced to give way to the technological and entrepreneurial agents of progress."[30] Through the Civil War, state courts approved a wide variety of takings.[31]

Towards the end of the 1800s, an increasing number of judges attempted to restrict the use of eminent domain by private parties. Worried about the rise of "class legislation" that favored certain interests over the public good, leading jurists like Michigan Supreme Court Chief Justice Thomas Cooley argued that condemnation should be used only in cases of clear public benefit. In his seminal treatise, *Constitutional Limitations*, Cooley stated that a public use should be found only "where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare."[32] In response to the growing power of corporations to secure public aid for growth, Cooley argued that "the distinction between different classes or occupations, and the favoring of one at the expense of the rest . . . is not legitimate legislation."[33] This restrictive view of the proper application of the government's eminent domain powers placed many laws supporting economic development in question. In the 1877 case *Reyerson v. Brown*, for example, Cooley declared Michigan's Milldam Act of 1873, which allowed private companies to condemn land for the construction of water-powered mills, unconstitutional and stated that private corporations could be given the right of eminent domain only in cases of "extreme necessity."[34]

Concerned that government support for private business would be followed by government regulation of free enterprise, many nineteenth century judges invalidated attempts at public/private cooperation. In their zeal to protect business from government intervention, courts in the late 1800s frequently deprived corporations of public benefits, including financial subsidy and rights

30. Harry Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 329, 370, 386 (Donald Fleming & Bernard Bailyn eds., 1971).

31. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 259-61 (1977); SCHULTZ, *supra* note 28, at 89; Berger, *supra* note 14, at 208-09; Jones, *supra* note 14, at 291; Kochan, *supra* note 14, at 291-92; Meidinger, *supra* note 14, at 24; Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973).

32. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 533 (2d ed. 1871).

33. People v. Salem, 20 Mich. 487 (1870), *cited in* GILLMAN, *supra* note 29, at 56. On Cooley's views regarding "class legislation," see Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court, 1865-1886*, 10 AM. J. LEGAL HIST. 97 (1966).

34. Ryerson v. Brown, 35 Mich. 334, 339 (1877); *see also* Scheiber, *supra* note 30, at 386. The Illinois Supreme Court concurred in this position, declaring that state's Mills and Millers Act of 1872 illegal. *See* Gaylord v. Sanitary Dist., 68 N.E. 522 (Ill. 1903). Harry Scheiber argues that in the West the courts continued to be amenable to a broad interpretation of the Public Use Clause. Scheiber, *supra* note 31, at 244-47.

of condemnation.[35] In 1888, the New York Court of Appeals voided the Niagara Falls and Whirlpool Railway Company's state-granted right of eminent domain. Citing Judge Cooley, the court declared that, while the railroad might provide a means for the public to "fully gratify their curiosity" in seeing the falls, this was not a sufficiently compelling purpose to justify the use of condemnation.[36] The court further argued that while it was cognizant that the legislature had declared such a use to benefit the public, the final determination of what constituted a public use remained the court's prerogative.[37] In the late 1800s and early 1900s, other state supreme courts took similarly restrictive positions on the appropriate uses of eminent domain.[38]

Most nineteenth century battles over the appropriation of land were fought in the state courts, which were generally ambivalent towards expansive interpretations of the Public Use Clause. The United States Supreme Court, when it considered such matters, however, was generally amenable to the use of eminent domain to support economic development. The Court's broad interpretation of the Public Use Clause was at odds with its oft-stated opposition to government intervention in the economy.[39] The 1896 case of *Missouri Pacific Railway v. Nebraska*[40] is one of the few where the Court viewed eminent domain with suspicion. In that case, the Court considered a state act that required the Missouri Pacific Railroad to allow farmers to construct a cooperative grain elevator on its property, declaring that to order the railroad to set aside its own land for such purposes violated the Due Process Clause of the Fourteenth Amendment. Because the grain elevators would provide benefits to the farmers who used them rather than the general public, the Court reasoned, the program was unconstitutional. "[S]o far as it required the railroad corporation to surrender a part of its land to the petitioners," the law was, "in essence and effect, a taking of private property . . . for the private use of [another]," the Court stated.[41]

The Court's statement that the property of one person cannot be taken for the benefit of another was used so frequently in the early 1900s that it became

35. *See* Scheiber, *supra* note 30, at 392.

36. *In re* the Application of the Niagara Falls & Whirlpool Ry. Co., 15 N.E. 429, 432 (N.Y. 1888).

37. *Id.*

38. *See, e.g.*, Minn. Canal & Power v. Koochiching, 107 N.W. 414 (Minn. 1906); R.R. Co. v. Iron Works, 8 S.E. 453, 467 (W. Va. 1888).

39. For a review of the late nineteenth century views of the Supreme Court, see GILLMAN, *supra* note 29, at 6-15; Michael Les Benedict, *Laissez-Faire and Liberty: A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985); David Gold, *Redfields, Railroads and the Roots of "Laissez-Faire Constitutionalism,"* 27 AM. J. LEGAL HIST. 254 (1983); Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

40. 164 U.S. 403 (1896).

41. *Id.* at 417. Later that year, the Court specifically declared that the public use provisions of the Fifth Amendment applied to the states. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896); *see also* Meidinger, *supra* note 14, at 30.

axiomatic, but the principle was frequently honored in the breach. In spite of the strong language the Court used in declaring the Nebraska Act unconstitutional, it was thereafter reluctant to overrule state or federal condemnations. During the early twentieth century, the Justices were amenable to a wide variety of takings, and *Missouri Pacific* is the only case in which the Court invalidated a state-approved condemnation. Unlike other areas of economic regulation in which the Court continued to view legislative acts with suspicion, in a wide variety of cases, it ceded the authority to determine what constituted a public use to the state courts.[42] In 1923, the Court declared that it would regard state court determinations regarding the Public Use Clause "with great respect" and concluded that its review of public use cases was exceedingly limited.[43] Rejecting the view that condemned property had to be available to the general public, the Court also stated that it was "not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in order to constitute a public use."[44] While the Justices never varied from, and stated frequently, their view that property could not be condemned and transferred to another party, their expansive readings of the Fifth Amendment gave encouragement to advocates of urban renewal.[45]

At the same time the Court was approving a wide variety of takings, it handed renewal advocates another tool to control urban development. In the 1926 case of *Village of Euclid v. Ambler Realty Company*, Justice Sutherland ruled that zoning codes were an acceptable government measure to shape urban areas and did not violate the Due Process Clause of the Fourteenth Amendment.[46] Sutherland concluded that zoning was an acceptable method to control public nuisances and within the police powers of local government to protect the health and safety of residents. Many of the leading urban reformers, in particular Alfred Bettman, who wrote a persuasive amicus curiae brief on behalf of the Village of Euclid, would later argue that the Court's opinion

42. For cases considering the public use doctrine, see, for example, *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923) (state could condemn land to build tunnel for railroad); *Block v. Hirsh*, 256 U.S. 135 (1921) (war emergency provided public purpose for statute protecting tenants from eviction); *Hendersonville Light and Power Co. v. Blue Ridge International*, 243 U.S. 563 (1917) (company could condemn land to build power plant for street railway); *Mt. Vernon-Woodbery Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916) (allowing power company to condemn land for electric project). *See also* Berger, *supra* note 14, at 213; Mansnerus, *supra* note 6, at 414.

43. Rindge Co. v. Los Angeles County, 262 U.S. 700, 707 (1923).

44. *Id.*

45. In the small number of cases that involved takings by the federal government, the Court also gave federal agencies similar broad discretion. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896) (Congress could authorize condemnation of Gettysburg Battlefield); Luxton v. N. River Bridge Co., 153 U.S. 525 (1894) (Congress could authorize condemnation of land for construction of bridge); Shoemaker v. United States, 147 U.S. 282 (1893) (D.C. administrator could condemn land for public park).

46. Vill. of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

supported the use of eminent domain for urban renewal.[47]

While the United States Supreme Court accepted the necessity of government coercion in support of economic development in the early twentieth century, in many state courts, particularly those in the Northeast and Midwest (the areas with the largest, oldest cities), the doctrine of public use remained limited. The appellate courts of New York and Ohio continued to hold to a narrow interpretation of the clause and viewed with skepticism state legislative delegations of eminent domain powers to private parties.[48] In 1912, the Supreme Judicial Court of Massachusetts, in an advisory opinion, specifically declared that housing was not a "public use" for which public funds could be spent.[49] The insistence of these courts that it was the judiciary's role to determine what constituted a public use, and their refusal to develop standards by which to define the doctrine, made a large-scale urban renewal scheme a very risky undertaking.

But the conflicting legal precedents were not the only reason that renewal advocates struggled with the law of eminent domain. Equally important, the scheme conflicted with renewal advocates' deeply rooted conceptions of property rights. The principle that one person's property could not be taken and given to another was ingrained in their understanding of American jurisprudence. The Public Use Clause restrained government from abusing private property owners, and it was a constitutional protection against socialism. Renewal advocates navigated a narrow path between the Scylla of continued urban decline, and the Charybdis of increased government influence over private property. They needed a method to secure government assistance while retaining private control over urban redevelopment and to achieve urban redevelopment without drastically altering legal protections for private property in general. The discourse of blight provided a means to achieve their goals.

II. THE DISCOVERY OF BLIGHT

During the 1920s, American cities witnessed a construction boom that surpassed all previous periods of growth. Skyscrapers rose higher than ever, bridges spanned rivers across the country, and public buildings sprouted throughout urban areas. In addition, several million units of housing were built

47. On the importance of *Euclid* in urban law, see Richard Chused, Euclid*'s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 611-13 (2001); and Melvyn Durchslag, Village of Euclid v. Ambler Realty Co., *Seventy-Five Years Later: This is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645 (2001).

48. *See, e.g.*, Little Falls Fibre Co. v. Henry Ford & Son, Inc., 229 N.Y.S. 445, 449 (App. Div. 1928) (prohibiting construction of dam on Mohawk River); Pontiac Improvement Co. v. Bd. of Comm'rs., 135 N.E. 635 (Ohio 1922) (prohibiting condemnation of land where public use was unclear); *see also* WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920-1980, at 28 (2001).

49. *In re* Opinion of the Justices, 98 N.E. 611 (Mass. 1912).

during the decade, allowing second generation immigrants to escape the slums. But while these were healthy changes, many urban elites realized that cities would face trouble in the near future. The expansion of the suburbs drew the rich and middle-class out of the city. At the same time, the combination of slowed immigration and economic mobility resulted in increased vacancy rates in working-class districts. The number of residents in the urban core declined, to the joy of housing reformers, but the slums remained, impervious to change.[50]

Throughout the 1920s, renewal advocates hoped that run-down neighborhoods, at least those close to the business and entertainment districts, would provide profit-making opportunities that would result in the private acquisition and clearance of deteriorated structures. However, instead of rebuilding older neighborhoods, developers focused on the outlying areas and the suburbs. The construction of mass transit and improvements in roads made these new units easily accessible, and developers generally avoided the problems that came with inner-city development. In New York City, for example, despite dramatic growth during the decade, some 67,000 substandard buildings remained in the city as of 1930.[51]

The late 1920s brought a convergence of forces that supported the urban renewal movement, and several groups that were formerly antagonists in the battle for city revitalization began to cooperate. Real estate interests, housing reformers, and big-city politicians all hoped to reap benefits through urban renewal, and they formed a tenuous coalition to promote redevelopment. Their goals were widely divergent. Housing 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 (as well as opportunities for graft) to their constituents. Real estate interests sought to gain access to large parcels of downtown property for profitable redevelopment.[52]

The planning profession provided a common language that joined real estate interests, housing reformers, and local government. Planners argued that cities were anarchic and inefficient, and they sought to rationalize the city through the development of strict standards for city growth. Successful city development, they claimed, required a professional analysis of the needs and resources of urban areas. During the construction boom of the 1920s, planners played a major role in the development of suburban communities and, through professional societies like the American Institute of Planners and the American

50. *See* SCHWARTZ, *supra* note 12, at 26.

51. *See* PAGE, *supra* note 24, at 72-73.

52. On the varied goals and interests of urban renewal advocates, see FOGELSON, *supra* note 13, at 346-47; PETER HALL, CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN IN THE TWENTIETH CENTURY 228-29 (1996); TEAFORD, *supra* note 11, at 26-29; and John F. Bauman, *Visions of a Post-War City: A Perspective on Urban Planning in Philadelphia and the Nation, 1942-1945*, 6 URBANISM PAST & PRESENT, Winter/Spring, 1980-81, at 1.

Society of Planning Officials, became intimately involved in the reorganization of urban life.[53]

Herbert Hoover's vocal support for zoning and comprehensive planning was crucial to the growth of the planning profession and to the rise of the urban renewal movement. As Secretary of Commerce, Hoover created a Special Division of Building and Housing, which promoted planning through the development of the Standard City Planning Enabling Act, a model law adopted by many states during the 1920s. The Commerce Department also published and distributed the *City Planning Primer*, which promoted the benefits of zoning and other types of urban planning.[54] In 1931, Hoover convened the Conference on Home Building and Homeownership, an intensive study of the state of American housing. The thirty-one committees of the conference examined every aspect of the problems facing cities and suburbs. Among these groups was the Committee on Blighted Areas and Slums, which promoted its plan for urban redevelopment as "a combination of governmental aid in the clearing of sites and of private enterprise in rebuilding upon them. . . ."[55] This plan would require the passage of "enabling legislation that will permit and facilitate the large-scale condemnation of slum areas," the committee reported.[56]

Urban planners like Alfred Bettman, Harland Bartholomew, and John Ihlder, and real estate interests including Metropolitan Life Insurance President Frederick Ecker and Leonard Reaume, former president of the National Association of Real Estate Boards, were active participants in this conference, and they shaped discussions over the future of American housing. They formed a powerful, nation-wide coalition to fight for slum clearance. The influence of planners also continued to rise as the New Deal established agencies like the National Resources Planning Board (run by urban planner Frederic Delano, President Roosevelt's cousin), which funded the preparation of local and regional plans.

This coalition worked to foster a political climate amenable to the radical reconstruction of urban areas. Led by the planners in the group, they gradually developed a new terminology of city decline, a discourse of blight and renewal.

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53. On the rise of the planning profession, see M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 206 (1983); HALL, *supra* note 52, at 136-75; MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890, at 397-400 (1971); and Robert Beauregard, *Between Modernity and Postmodernity: The Ambiguous Position of U.S. Planning*, 7 ENV'T & PLAN. D: SOC'Y & SPACE 381, 388 (1989).

54. On Hoover's role, see Janet Hutchinson, *Shaping Housing and Enhancing Consumption: Hoover's Interwar Housing Policy*, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH CENTURY AMERICA 81 (John F. Bauman et al. eds., 2000). *See also* Chused, *supra* note 47, at 598-99; Radford, *supra* note 11, at 86.

55. PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOMEOWNERSHIP, 3 SLUMS, LARGE-SCALE HOUSING AND DECENTRALIZATION 25 (John M. Gries & James Ford eds., 1932).

56. *Id.* at xii.

This discourse contrasted the existing, deteriorated state of urban areas with a possible modern, revitalized future. Vital to this effort was the elevation of two terms to public attention: "slums" and "blight." Advocates worked to convince urban residents that these problems would continue to plague cities without government intervention. In book after book, including Mabel Walker's *Slums and Blight* and Edith Elmer Wood's *Slums and Blighted Areas*, as well as in professional journals like *American Planning and Civic Annual*, *Architectural Record*, and *National Municipal Review*, planners developed an increasingly complex lexicon of terms to describe these phenomena and explained why they plagued cities. A slum, according to planners, was an area with run-down buildings, dirty streets, and a high crime rate that was almost exclusively inhabited by poor people. While the popular view of the slums focused on the inhabitants, planners concentrated on the conditions that created such areas. According to the experts, a slum was a district that had an excess of buildings that "either because of dilapidation, obsolescence, overcrowding, poor arrangement or design, lack of ventilation, light or sanitary facilities, or a combination of these factors, are detrimental to the safety, health, morals and comfort of the inhabitants thereof."[57] A slum was a "social liability to the community" because it spawned crime and other problems.[58]

Other urban areas did not meet the definition of a slum, but they were "blighted." The term was first used by the Chicago school of sociology. Founded in the Progressive era, the Chicago school was led by Robert Park, Ernest Burgess, and R.D. McKenzie, and produced an impressive amount of scholarship that focused in particular on the problems of the poor in cities. These scholars 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.[59] 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.[60] The formerly attractive housing was

57. MABEL WALKER, URBAN BLIGHT AND SLUMS 3 (1936).

58. *Id.* at 3 (1935). On the role of discourse in shaping policies towards cities, see CHRISTOPHER MELE, SELLING THE LOWER EAST SIDE: CULTURE, REAL ESTATE AND RESISTANCE IN NEW YORK CITY (2000).

59. *See* LEONARD REISSMAN, THE URBAN PROCESS: CITIES IN INDUSTRIAL SOCIETIES 93-121 (1964); Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, *in* THE CITY 47 (Robert E. Park et al. eds., 1925); Roderick D. McKenzie, *The Ecological Approach to the Study of the Human Community*, *in* THE CITY 63 (Ernest Burgess et al. eds., 1925).

60. Scholars like Homer Hoyt argued that these areas became blighted because property owners expected the central business district to expand. Owners let their properties decline because they thought that they would be demolished after they were bought for redevelopment. HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 364 (1936).

divided into smaller units for the poor, and "parasitic and transitory services" such as flophouses proliferated.[61]

In periods of migration, these areas were "invaded" by ethnic and racial minorities in search of affordable housing. This use of medical terminology by the Chicago school made its analysis appear objective and scientific, but it also reflected the general prejudices of society regarding racial minorities, particularly blacks. In his discussion of Chicago, Burgess noted the "disturbances of metabolism caused by an excessive increase [in population] such as those which followed the great influx of southern Negroes" into the city after World War I.[62] These waves of people caused a "speeding up of the junking process in the area of deterioration."[63] Another study, which acknowledged that many areas occupied by blacks had other unattractive features, concluded that "certain racial and national groups . . . cause a greater physical deterioration of property than groups higher in the social and economic scale."[64] Blight, therefore, may have been a naturally occurring process, but racial minorities were central to the Chicago school's understanding of urban change.

For urban planners and other renewal advocates, the theory of urban ecology became a means of reorganizing property rights within the city. Not surprisingly, planners argued that blight was caused by lack of planning. "Unguided urban growth" and an "indiscriminate mixture of homes, factories, warehouses, junk yards, and stores that has resulted in depressed property values" were responsible for urban blight.[65] Buildings in these areas were "obsolete" because "an excessive amount of land is devoted to streets and alleys."[66] The streets in these districts, which were built for horses, had "now become motor speedways."[67] Population densities in these areas were higher than acceptable under "principles of modern planning."[68] All of these problems were the result of "unplanned urban expansion" without appropriate zoning.[69] To renewal advocates, blight was bad not only because of the damage it caused to residents, but also because it drained urban resources. The increasing costs of police and social services in these areas, combined with the loss of tax revenues as people left the city, placed a significant burden on government.[70]

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61. McKenzie, *supra* note 59, at 76.
62. Burgess, *supra* note 59, at 54.
63. *Id.*
64. HOYT, *supra* note 60, at 314.
65. MEL SCOTT, METROPOLITAN LOS ANGELES: ONE COMMUNITY 108 (1950).
66. ARTHUR HILLMAN & ROBERT CASEY, TOMORROW'S CHICAGO 70 (1950).
67. *Id.*
68. *Id.*
69. *Id.*
70. *See* EDITH ELMER WOOD, SLUMS AND BLIGHTED AREAS IN THE UNITED STATES 19-21 (1935). For discussions of the general chacteristics of slums and blighted areas, see BEAUREGARD, *supra* note 13, at 136-37; MILES COLEAN, RENEWING OUR CITIES 38-39 (1953); JAMES FORD, SLUMS AND

Renewal advocates never developed a systematic process by which to determine when an area was blighted. While they devoted a great deal of study to blighted areas, renewal advocates preferred to define the phenomenon with vague generalities. Hoover's slum committee, for example, declared that "a blighted area is an area where, due either to the lack of a vitalizing factor or to the presence of a devitalizing factor, the life of the area has been sapped."[71] Hoover's committee, however, did concede that in some cases "a slum has become economically profitable because of the high rents that can be obtained for improper use, and is not long blighted according to the definition." Nevertheless, the area was still a problem, the committee argued. In fact, "because of this economic strength, it is a greater danger to the community," they declared.[72]

In popular discussions of the issue, renewal advocates often merged their descriptions of slums and blighted areas. This served useful political and judicial purposes because slums were known problems. Frequently, planners argued that a blighted area was one "on its way to becoming a slum."[73] The fear of the slums provided planners an argument for their attempts to take control of blight. As the term originally described plant diseases, the evocation of blight created a vision of a plague spreading across the city, moving from one neighborhood to the next. The future of the city rested upon the effort to stop its spread. For this reason, renewal advocates asserted, these areas had to be cleared and rebuilt. "We must cut out the whole cancer and not leave any diseased tissue," stated New York City Comptroller Joseph McGoldrick.[74]

Because the term was so poorly defined, blight became a useful rhetorical device—a means by which real estate interests could reorganize property ownership by separating "productive" and "unproductive" land uses. The development of the discourse of blight provided real estate investors with a means to rationalize urban land ownership. In the early 1900s, the majority of rental properties in large American cities were owned by individuals (many of them immigrants). Landlords typically owned just a few properties and frequently did not have the resources to maintain or improve them. These small landholdings were inefficient, developers argued, and they prevented the

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HOUSING 11 (1936); NATIONAL ASSOCIATION OF HOUSING OFFICIALS, HOUSING OFFICIALS YEARBOOK 1936, at 241 (Coleman Woodbury ed., 1936); and WALKER, *supra* note 57, at 4-6.

71. PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOMEOWNERSHIP, *supra* note 55, at 41.

72. *Id.* at 2.

73. WALKER, *supra* note 57, at 4; *see also* GELFAND, *supra* note 11, at 109.

74. Joseph D. McGoldrick, *The Superblock Instead of Slums*, N.Y. TIMES MAG., Nov. 19, 1944, at 54-55, *cited in* Howard Gillette, *The Evolution of Neighborhood Planning: From the Progressive Era to the 1949 Housing Act*, 9 J. URB. HIST. 421, 437 (1983). On the use of language to shape policies towards urban areas, see ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 67 (1995); and MELE, *supra* note 58, at 20-22.

production of modern, large-scale housing and commercial projects.[75] Real estate development was an emerging field in the 1920s, when mortgage bankers and institutional investors expanded their role in housing production dramatically in the suburbs and outlying areas of the city.[76] Many institutional investors saw potential in the urban core, but because they faced insurmountable obstacles to securing title to property in congested urban areas, redevelopment of slum areas stagnated. Eminent domain, therefore, was sought as a necessary means for the efficient accumulation of urban property.

Realtors, developers, and mortgage bankers were served by the National Association of Real Estate Boards (NAREB) in their efforts to secure access to urban land. Formed in 1908 to professionalize the selling of real estate, the NAREB subsequently expanded into many other areas of property development, and by the 1930s, it was one of the most powerful interest groups in the nation. The real estate executives who led the group were instrumental in the creation of new methods of real estate finance and insurance, and as the originators of planned suburban communities, they were vital to the growth of the field of planning. Led by Herbert Nelson during the 1930s and '40s, the group promoted a variety of programs to privately redevelop urban neighborhoods. The NAREB was aided in this effort by its research wing, the Urban Land Institute (ULI), described by its director, Hugh Potter, as "the city planning department of the Realtors of this country."[77] Together, the NAREB and ULI used the language of planning to persuade the public to support the use of eminent domain for private redevelopment.

As real estate interests became increasingly active in the promotion of urban redevelopment, Nelson and other renewal advocates shifted the analysis of blighted areas towards economic concerns. The problem with blighted areas was not only that they might become slums with their concomitant social problems. More importantly, blighted areas were obstacles to the economic growth of the city. "A blighted area is one which has deteriorated from an economic standpoint and therefore become less profitable to the city, the general public and the owners of its real estate. Depreciation has set in and the area is rapidly becoming a liability rather than an asset," argued planner Mabel Walker.[78] Blight prevented the creation of a modern city, and blighted areas were extremely difficult and expensive to cure. The problem, renewal

75. *See* JARED N. DAY, URBAN CASTLES: TENEMENT HOUSING AND LANDLORD ACTIVISM IN NEW YORK CITY, 1890-1943, at 178 (1999).

76. On the rise of the real estate industry, see MARC WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING (1987).

77. Hugh Potter, *The Need for Federal Action in Rebuilding Cities*, *in* 14 AMERICAN PLANNING & CIVIC ANNUAL 175, 175 (Harlean James ed., 1943); *see also* WEISS, *supra* note 76, at 50-51 (discussing conflicts within NAREB between real estate brokers and community builders); Gillette, *supra* note 74, at 434 (discussing role of NAREB and ULI in promoting urban redevelopment efforts).

78. WALKER, *supra* note 57, at 6-7.

advocates asserted, was that property owners often were unaware of the decline of property values in their neighborhood, and there was a resulting "discrepancy between the value placed upon the property by the owner and its value for any uses to which it can be put."[79] Owners, they argued, held on to their properties "in the hope that by some miracle they may eventually get back at least their original investment."[80] These "artificially high values," set by naive (or speculative) property owners, made acquisition and clearance very difficult.[81]

Ethnic prejudice underlay much of the analysis of blighted areas, particularly in New York City, where the majority of owners of apartment buildings and small-scale commercial operations were immigrants. For immigrant Jews and Italians, most of whom lacked formal education, tenement ownership was a popular means of upward mobility, as was the operation of garment factories and other businesses with low capital requirements. The tenements they owned were often the oldest and most decrepit, and immigrant landlords' neglect of these buildings was, according to one scholar, "a central management principal" designed to lower costs and maximize profits.[82] Undercapitalized immigrant businesses also presented problems to urban elites in their efforts to manage the city. While tenements were crucial to the housing of the immigrant masses and small businesses were vital to their economic survival, urban elites blamed apartment and industrial facilities for the creation of blight.[83]

Small-scale, immigrant property owners, renewal advocates argued, were not interested in the broader good of the city. They were speculators, persons whose only goal was to make a fast buck regardless of the damage they did to surrounding property values. "In certain spots," argued ULI President Hugh Potter, "the high prices at which slum areas are held reveal the influence of greed; the properties have been milked for years without repair."[84] Because these immigrant landlords were inefficient and their interests speculative, their

79. *Id.* at 7; *see also* GUY GREER, YOUR CITY TOMORROW 103 (1947).

80. WALKER, *supra* note 57, at 6-7.

81. *See* COLEAN, *supra* note 70, at 79; Alfred Bettman, *Federal and State Urban Redevelopment Bills*, *in* 14 AMERICAN PLANNING AND CIVIC ANNUAL 166, 171 (Harlean James ed., 1943) [hereinafter Bettman, *Federal and State Urban Redevelopment Bills*]; Alfred Bettman, *Urban Redevelopment Legislation*, *in* 15 AMERICAN PLANNING AND CIVIC ANNUAL 51 (Harlean James ed., 1944) [hereinafter Bettman, *Urban Redevelopment Legislation*].

82. DAY, *supra* note 75, at 33, 56.

83. On tenement landlords, see Donna Gabaccia, *Little Italy's Decline: Immigrant Renters and Investors in a Changing City*, *in* LANDSCAPE OF MODERNITY: NEW YORK CITY, 1900-1940, at 235, 245 (David Ward & Olivier Zunz eds., 1992). On the role of small business in immigrant mobility, see SUSAN GLENN, DAUGHTERS OF THE SHTETL: LIFE AND LABOR IN THE IMMIGRANT GENERATION (1990). On efforts to restrict industrial development in Manhattan, see Keith D. Revell, *Regulating the Landscape: Real Estate Values, City Planning, and the 1916 Zoning Ordinance*, *in* LANDSCAPE OF MODERNITY: ESSAYS ON NEW YORK CITY, 1900-1940, at 28 (David Ward & Olivier Zunz eds., 1992).

84. Potter, *supra* note 77, at 175.

property rights were not worthy of the same level of respect. Eminent domain would pay them "fair value" and return the property to those who would use it productively. In 1933, Herbert Nelson called for a "model state law helpfully outlining a legal device for empowering proper units to rule out adverse uses and effectively replan blighted areas."[85] Despite the obtuse wording of his proposal, Nelson clearly envisioned expanded use of eminent domain for redevelopment.

The purpose behind the designation of certain areas as blighted was clear. Renewal advocates believed that the blighted land could be put to a "higher use" under the right circumstances. One planner cited mid-town Manhattan as an example of an area where "the height of the land, the frontage on the river, and the growing transportation accessibility would make it a desirable location, if it were not for the slum characteristics it has acquired."[86] Many blighted areas supported viable businesses and provided affordable housing to working-class persons. The problem with a blighted area, however, was that it was not profitable enough—it did not produce enough tax revenues for the city, and it did not create profit opportunities for those who most coveted the land. As sociologist Scott Greer explained in his 1965 assessment of the urban renewal program, the definition of blight was "simply that 'this land is too good for these people.'"[87]

The changing terminology used to describe cities set the stage for the implementation of urban renewal. Through the creation and explication of the problem of blight, renewal advocates shifted the terms of the debate. The rights of private property remained sacrosanct, but subject to new limitations. Not all property owners were due the same respect. Those who held onto blighted properties were acting against the public interest because their speculation and inefficient management imperiled city residents and taxed the finances of city government. Furthermore, the refusal of these owners to sell their properties at "reasonable prices" prevented the rationalization of urban real estate and the creation of modern cities. "It is a public use," D.C. reformer John Ihlder declared in 1936, "to reclaim a slum or blighted area that is proving a disastrous economic and social liability to its community."[88] To prevent further damage to urban areas, eminent domain was necessary to wrest this land away from these owners and to ensure that it was used more appropriately.

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85. Herbert Nelson, *Urban Housing and Land Use*, 1 LAW & CONTEMP. PROBS. 158, 165 (1934).

86. WALKER, *supra* note 57, at 12; *see also* COLEAN, *supra* note 70, at 79.

87. GREER, *supra* note 10, at 31; *see also* GELFAND, *supra* note 11, at 108; TEAFORD, *supra* note 11, at 6. Hoover's committee on slums and blighted areas from the outset envisioned "the use of former slum sites for the housing of higher income groups." PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOMEOWNERSHIP, *supra* note 55, at 9.

88. John Ihlder & Maurice Brooks, *Use of the Power of Eminent Domain in Slum Reclamation*, 12 J. LAND & PUB. UTIL. ECON. 355, 360 (1936).

III. PUBLIC HOUSING AND URBAN RENEWAL

The Great Depression provided the context for the beginnings of the reconceptualization of the Public Use Clause, as the development of public housing helped to legitimate urban renewal efforts. In 1934, at a time when urban issues were considered particularly pressing, the first volume of *Law and Contemporary Problems* devoted a special section to the question of urban revitalization. Assessing the need to clear slum areas, Coleman Woodbury, then Secretary of the Illinois State Housing Board, asserted that "those who see housing as a major economic activity of the next generation will breathe more easily if and when a few high state courts and the United States Supreme Court clearly recognize housing as a public use." Until then, he concluded, "housing development will go ahead very slowly. . . ."[89]

The Great Depression devastated tenement landlords. Vacancies increased, taxes rose, and new housing regulations increased maintenance costs. Most tenements were bought on credit, and because many had changed hands in the heated real estate market of the 1920s, mortgage payments on many properties exceeded their income. As a result, tenement owners were not able to make their loan payments. Many tenement owners lost their properties at foreclosure, and institutional investors, along with city governments, became de facto slum lords in many cities.[90]

This crisis, however, created new opportunities for renewal advocates. Many tenements were demolished because they were declared unsafe according to recently established minimum standards of occupancy. In addition, the consolidation of tax-delinquent buildings in the hands of corporations and government made the clearance of large areas for redevelopment possible. Property owners became increasingly amenable to condemnation as a means to exit a failing market. Where they once opposed any government regulation, landlords now wanted to be "bailed out" of their troubled investments. In addition, the creation of the Homeowner's Loan Corporation, the Federal Housing Administration, and other federal programs to support the real estate industry further supported the rationalization of the real estate market. Large corporations increasingly supplanted individual investors as owners of apartment buildings. As a result, opportunities for large-scale redevelopment of urban areas expanded.[91]

The acquisition of property by institutional investors also intensified the push for government intervention in the real estate market. During the 1930s, renewal advocates devised a variety of schemes to clear blighted areas. The

89. Coleman Woodbury, *Land Assembly for Housing Developments*, 1 LAW & CONTEMP. PROBS. 213, 215 (1934).

90. *See* DAY, *supra* note 75, at 174-78.

91. *See* Gabaccia, *supra* note 83, at 246.

Urban Land Institute (ULI), for example, proposed the creation of private redevelopment agencies to spur redevelopment through slum condemnation conducted by private corporations. Under the ULI plan, when these bodies garnered the support of 75% of the owners in a designated area, the city could condemn the land and pass it on to the agency.[92] Many government officials, however, opposed such a wholesale transfer of government power to private corporations and raised constitutional complaints over the appropriate uses of eminent domain. In response, the real estate lobby altered its proposal to envision a limited role for government in the redevelopment process and proposed the creation of publicly managed "urban land commissions" to select sites and condemn properties. The public agency, according to the plan, would then have responsibility to dispose of the land to public or private entities.[93] This proposal also languished, however, as renewal advocates continued to face legal and political opposition. A significant urban renewal program would not be implemented until the 1940s.[94]

Violently opposed by real estate interests, public housing became, ironically, the wedge for the expansion of slum clearance. Through the efforts of director Harold Ickes, the Public Works Administration (PWA) implemented the nation's first significant public housing program, and between 1934 and 1937, the PWA constructed more than 21,000 units of publicly-owned housing for the working-class.[95] To secure support for the program, Ickes agreed that slum sites would be given priority for public housing developments.[96] This would enable real estate investors (particularly mortgage companies) to relieve themselves of underperforming properties. Many housing reformers had pushed for working-class housing in the suburbs and outlying areas of cities, believing that these healthier surroundings would improve the social conditions of the urban poor. Development in less densely populated areas would also be cheaper and would allow the construction of more units. But Ickes believed that public housing could provide shelter to the working-class and revitalize slums at the same time. From that point on, public housing and urban renewal would be intimately related.[97]

Despite Ickes's efforts to limit the real estate lobby's opposition, the public

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92. GELFAND, *supra* note 11, at 113-15.

93. *See* BOYER, *supra* note 53, at 252-53; GREER, *supra* note 79, at 107-08; LOUIS JUSTEMENT, NEW CITIES FOR OLD: CITY BUILDING IN TERMS OF SPACE, TIME, AND MONEY 29-30 (1946); URBAN LAND INSTITUTE, A PROPOSAL FOR REBUILDING BLIGHTED CITY AREAS (1943); *Urban Development Principles Restated*, 6 URB. LAND, Mar. 1947, at 3.

94. Land clearance in cities, however, did increase dramatically during the New Deal, as local governments, funded by the Public Works Administration and the Works Progress Administration, implemented public projects like bridges, tunnels, and other government facilities. These projects dislocated thousands of city residents. *See* SCHWARTZ, *supra* note 12, at 46-47.

95. *See* RADFORD, *supra* note 11, at 100-01.

96. *See id.* at 101-02.

97. *See* SCHWARTZ, *supra* note 12, at 25-26; Carol Aronivici, *Housing the Poor: Mirage or Reality*, 1 LAW & CONTEMP. PROBS. 148 (1934).

housing program quickly came under legal attack. In the early battles over the New Deal, as conservative courts struggled to rein in the Roosevelt Administration, the government's eminent domain powers were once again contested. In 1935, a federal district judge in western Kentucky ruled that public housing did not meet the requirements of the Public Use Clause and denied the PWA the right to condemn land for housing projects.[98] Relying on late nineteenth century precedents, the judge construed the Public Use Clause narrowly and concluded that the agency could only condemn property for facilities that provided equal access to all citizens.[99] Public housing, with a limited number of units and a detailed screening process for tenants, did not meet this requirement.

> If the property of the citizen can be condemned and taken . . . simply because the legislative department . . . may determine that the use to which this property is to be put is for the general welfare, the property of every citizen in this country would be subject to the whims and theories of any temporary majority.[100]

The court further commented that a broad interpretation of the Clause would inevitably make the courts the arbiters of public use, denying the right of legislatures to make policy. "The action of the courts in such cases would inevitably reflect the individual views of the judges." Better, he concluded, to have "a fixed and definite guide."[101]

The Sixth Circuit affirmed the holding, concluding that "the taking of one citizen's property for the purpose of improving it and selling or leasing it to another . . . is not, in our opinion, within the scope of the powers of the federal government."[102] While public housing officials wanted to contest the issue in the Supreme Court, President Roosevelt's advisors decided not to pursue the case further. Government officials worried that the case would provide an opportunity for the conservative Supreme Court to gut much of the economic recovery effort. As a result, the federal program was limited to projects that the PWA could build without the use of eminent domain.[103]

The year following the ruling, Congress passed the Wagner Housing Act, which created the United States Housing Authority and replaced federal construction with a system of subsidy for local housing authorities.[104] The Act caused a dramatic expansion in public housing across the nation, as almost

98. United States v. Certain Lands in Louisville, 9 F. Supp. 137 (1935), *aff'd*, 78 F.2d 684 (6th Cir. 1935), *appeal dismissed*, 297 U.S. 726 (1936).

99. *Id.* at 140.

100. *Certain Lands in Louisville*, 9 F. Supp. at 138; *see also* HENDERSON, *supra* note 26, at 71-72; Ira S. Robbins, *The Use of Eminent Domain for Housing Purposes*, *in* HOUSING OFFICIALS YEARBOOK 1936, at 116 (Coleman Woodbury ed., 1936).

101. *Certain Lands in Louisville*, 9 F. Supp. at 139.

102. *Certain Lands in Louisville*, 78 F.2d at 688.

103. *See* HENDERSON, *supra* note 26, at 71; RADFORD, *supra* note 11, at 103.

104. United States Housing Act of 1937, ch. 896, § 11, 50 Stat. 893 (1937) (current version at 42 U.S.C. § 1437 (1994)).

every state approved legislation authorizing the creation of local housing authorities to secure federal funding. The bill also supported the goals of renewal advocates by specifically linking public housing construction to slum clearance and requiring each housing authority to demolish or repair as many "substandard" units as it built.[105]

Public housing was also attacked in state courts, but unlike the Sixth Circuit, most state judges gave wide discretion to local agencies to use eminent domain for public housing. As it did in many areas of twentieth century legal reform, New York led the way in reinterpreting the Public Use Clause.[106] The state had authorized a public housing program before the passage of the Wagner Act, and the newly created New York City Housing Authority (NYCHA) fought the legal battles over eminent domain concurrently with the WPA. In a holding that contrasted distinctly with the Sixth Circuit, New York's Court of Appeals approved the condemnation of properties by the NYCHA. The court relied heavily on the argument that slum clearance was an integral part of public housing production and declared that "slum areas are the breeding places of disease which take toll not only on its denizens, but, by spread, from the inhabitants of the entire city and state."[107] The elimination of these areas through the construction of public housing, the court ruled, constituted a valid public purpose.

Other courts followed New York's direction in approving the use of condemnation for public housing, and slum clearance played an important role in many of these cases. The Supreme Court of Massachusetts stated that if the construction of housing for low-income persons were the "sole object of the statute we might have more difficulty."[108] But the court distinguished the state's public housing act from prior attempts to subsidize housing that it had rejected. An earlier proposed statute, the court argued, "contained no provision for the eradication of the sources of disease and danger. It was not a slum clearance law."[109] Because slums were a "public nuisance," the court concluded that their destruction was a valid use of eminent domain.[110]

In authorizing the condemnation of land for public housing, state courts shifted public use jurisprudence. In most prior cases, courts had examined the

105. *Id.*; *see also* RADFORD, *supra* note 11, at 103.

106. On New York's central role in changing interpretations of the Public Use Clause and other legal doctrines, see NELSON, *supra* note 48.

107. N.Y. City Housing Auth. v. Muller, 1 N.E.2d 153, 154 (N.Y. 1936); *see also* HENDERSON, *supra* note 26, at 72-75; NELSON, *supra* note 48, at 258-59.

108. Allydon Realty Corp. v. Holyoke Housing Auth., 23 N.E.2d 665, 668 (Mass. 1939).

109. *Id.* at 669.

110. *Id.*; *see also* Dornan v. Phila. Housing Auth., 200 A. 834, 841 (Penn. 1934) ("[T]he elimination of unsafe and dilapidated tenements is a legitimate object for the exercise of the police power."). Public housing cases are cited in Stephen A. Reisenfeld & Warren Eastlund, *Public Aid to Housing and Land Redevelopment*, 34 MINN. L. REV. 610, 634-35 (1950). *See also* Meidinger, *supra* note 14, at 33-34.

intended future use of the condemned property and determined whether that use was in the public interest. In *Muller* and its progeny, courts 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. By altering their methods for determining what constituted a public use, courts lessened the importance of the ultimate disposition of the property in their considerations. This shift would be crucial in considerations of the legality of urban renewal.[111]

The approval of local public housing by state courts provided strong precedents for urban renewal advocates who wanted to exercise the powers of eminent domain for the benefit of private developers. Public housing, however, was not identical to the programs promoted by renewal advocates. Unlike renewal efforts driven by private real estate interests, public housing projects would be owned by local government and leased to tenants. While public housing opinions were favorable to the cause, urban renewal required a further expansion of the public use doctrine. World War II-era concerns about the future of American society provided a platform for promoting such change.

IV. PLANNING A MODERN CITY

During the Great Depression, planners secured a prominent position in discussions over the economic and social development of the country. The Tennessee Valley Authority was only the largest of many significant development projects in which planners played an important role. During World War II, national planning took on still greater urgency, and federal agencies presented numerous post-war plans for the creation of new systems of transportation, sanitation, and the development of natural resources. Through the National Resources Planning Board (NRPB) as well as state, regional, and local planning commissions, planners lobbied for comprehensive programs to reorganize cities, suburbs, and rural areas. "The war has given a new intensity to thinking about the future of cities," argued NRPB Chair Charles Ascher. "Let us not quail before the magnitude of the task."[112]

The movement for comprehensive planning received a boost from

111. Though the Court of Appeals did not cite it, the *Muller* decision is similar in its reasoning to the Supreme Court's decision in *Miller v. Schoene*, 276 U.S. 272 (1928). There, the Court approved a Virginia law that directed owners of red cedar trees to cut them down in order to protect the state's apple orchards from the "cedar rust" disease.

112. Charles Ascher, *Better Cities After the War*, 57 THE AM. CITY, June 1942, at 55. For more on post-war planning and redevelopment efforts, see NAT'L RESOURCES PLAN. BD., NATIONAL RESOURCES DEVELOPMENT REPORT FOR 1943 (1943); NAT'L RESOURCES PLAN. BD., POST-WAR PLANNING (1942); W.E. REYNOLDS, POST-WAR URBAN REDEVELOPMENT (1946); SCOTT, *supra* note 53, at 397-400; *City Planning Merges into National Planning*, 48 THE AM. CITY, Nov. 1939, at 65; and Frederic A. Delano, *Must Urban Redevelopment Wait on Bombing?*, 56 THE AM. CITY, May 1941, at 35.

economists worried that the end of the war would push the economy back into depression. During the conflict, Harvard economist Alvin Hansen and Federal Reserve advisor Guy Greer published several influential reports in which they argued that the nation needed a full-scale plan for post-war conversion to maintain employment levels and prevent economic crisis. Hansen and Greer focused in particular on slum clearance and urban redevelopment as methods to keep workers busy after the war. They recommended that each city and region develop a "Master Plan" for its area.[113] Seconding the proposal, Ascher argued that after the war ended the country could "seize what may be a unique opportunity to remold our cities, to provide a creative, healthful and satisfying living and working environment for a people afforded economic security by full employment."[114] The creation of a modern city, Hansen argued, required "far-reaching changes in state laws" to give cities "adequate legal power . . . to control the use of their land areas." These changes were to be "brought about mainly by the pressure of public opinion."[115]

During the 1940s, renewal advocates took their case to the public. In pamphlets, radio addresses, "futuramas," and other media, they argued that cities could be revitalized through public/private partnerships. These programs, with the use of eminent domain, would provide public benefits by eliminating the decrepit urban core and replacing it with a gleaming modern city. Cities across the country organized commissions to prepare blueprints for the post-World War II era. Some, including Cincinnati, Portland, Dallas, and Detroit, drafted comprehensive plans for their cities. These documents established zoning districts, created stronger building standards, recommended changes in city infrastructure, and sought to create an orderly system for future growth.[116] While some cities approved master plans, others like New York drafted more practical initiatives of public works aimed at renewing slum areas while providing construction jobs. Business leaders, politicians, and planning professionals cooperated in this process, and their efforts were promoted by private coalitions of civic leaders such as the Allegheny Conference in Pittsburgh, the Municipal Housing and Planning Council of Chicago, and the Citizen's Council on City Planning in Philadelphia (CCCP). These groups were controlled by the economic elite of each city, and their goal was to protect their urban investments by securing public support for government-assisted

113. *See* ALVIN H. HANSEN & GUY GREER, URBAN REDEVELOPMENT AND HOUSING (1945).

114. Ascher, *supra* note 112, at 55.

115. Alvin H. Hansen, *The City of the Future*, 32 NAT'L MUN. REV. 68, 70 (1943).

116. For examples of master plans, see ROBERT E. ALEXANDER & DRAYTON S. BRYANT, REBUILDING A CITY: A STUDY OF REDEVELOPMENT PROBLEMS IN LOS ANGELES (1951); EDWARD M. BASSETT, THE MASTER PLAN (1938); CINCINNATI CITY PLANNING COMMISSION, THE CINCINNATI METROPOLITAN MASTER PLAN (1948); DETROIT CITY PLAN COMMISSION, THE DETROIT MASTER PLAN (1951); GEORGE B. GALLOWAY, POSTWAR PLANNING IN THE UNITED STATES (1942); and T.J. KENT, JR., THE URBAN GENERAL PLAN (1964).

redevelopment.[117]

But businessmen were not the only advocates of renewal. Liberal groups were active participants in this project. The CCCP, founded in 1943 to "facilitate citizen participation in city planning and to further the science of city planning in Philadelphia," included in its membership the Association of Philadelphia Settlements, the Central Labor Union, the Inter-racial Committee of Germantown, and the local branch of the NAACP. Civic associations across the country promoted a revitalization program in which local agencies condemned properties, cleared them, and turned them over to private entities for redevelopment. These proposals required significant subsidies to be viable, and city leaders lobbied local, state, and federal governments to fund their programs.[118]

To garner public aid, urban elites took several steps. In New York City, Mayor LaGuardia took to the radio and the stump to promote his postwar public works program. "There will always be a New York City," LaGuardia stated, and, therefore, planning for the postwar period was "of the utmost importance."[119] In several cities, including Chicago and Detroit, renewal advocates sponsored forums and advertising campaigns aimed at eliciting resident backing. One of the most dynamic tactics to rouse public interest was sponsored by the CCCP. In 1947, the group created the "Better Philadelphia Exhibit," a multi-media presentation of its vision for a modern city. Thousands of people paid a dollar each to visit the exhibit at Gimbel's department store. There they saw designs for modern housing, read plans for updated infrastructure, and listened to testimony from public officials in support of Philadelphia's rebirth. The most popular part of the exhibit was a scale model of downtown Philadelphia, a vision of the city in the year 2000 that featured modern buildings, transportation, and residences.[120]

In many cities, advocates published pamphlets to educate the public on the need for urban renewal and comprehensive planning. Two such documents were *Metropolitan Los Angeles*, written by Mel Scott, and *Tomorrow's Chicago*, by Arthur Hillman and Robert Casey.[121] Both pamphlets were supported by local elites—*Metropolitan Los Angeles* was funded by the John Randolph and Dora Haynes Foundation and *Tomorrow's Chicago* by the Metropolitan Housing and Planning Council and the Field Foundation—and

117. *See* TEAFORD, *supra* note 11, at 50.

118. *See id.* at 51-52.

119. N.Y. CITY PLAN. COMM'N, PROPOSED POSTWAR WORKS PROGRAM FOR THE CITY OF NEW YORK ii (1942); *see also* N.Y. OFF. OF THE CITY CONSTR. COORDINATOR, PUBLIC WORKS PROGRAM: PROGRESS REPORT AS OF JANUARY 1, 1949 (1949); NEW YORK ADVANCING (Rebecca B. Rankin ed., 1945).

120. *See* TEAFORD, *supra* note 11, at 52; JOHN BAUMAN, PUBLIC HOUSING, RACE, AND RENEWAL: URBAN PLANNING IN PHILADELPHIA, 1920-1974 (1987).

121. HILLMAN & CASEY, *supra* note 66; SCOTT, *supra* note 65; *see also* MEL SCOTT, CITIES ARE FOR PEOPLE: THE LOS ANGELES REGION PLANS FOR LIVING (1942); Beauregard, *supra* note 53, at 384.

they sought to foster broad support for urban revitalization. Incremental programs of rehabilitation and social services, these pamphlets argued, could not alleviate the structural defects of American cities. The only solution, they concluded, was the clearance of blighted areas and the creation of planned developments that would revitalize the city.

With clearance accomplished, *Metropolitan Los Angeles* envisioned the creation of a region of low-density, single-family houses in well-planned communities. Each would have a combination of professional, commercial, recreational facilities and industry providing employment to area residents. The freeway would support the creation of these small communities by "divid[ing] the area into cells" that would become the "well-organized communities . . . of the future."[122] In Chicago, planners envisioned a central city that, once cleared, would be opened up into "superblocks" one-fourth square mile in area. Each community within the newly organized city would have a school and park in the center, and clusters of high and low-rise apartment buildings would surround the central square. Single-family houses would be grouped around smaller play areas, and shopping and parking would be close by. Neighborhoods would be "linked together by a flowing system of broad boulevards and green spaces." Industrial areas, buffered by "green belts," would be easily accessible.[123] With a master plan "as we build and rebuild, we would leave the right places vacant, and what we build would be where it belongs," argued *Tomorrow's Chicago*.[124] The modern city would be efficient and would enable residents to live more productively.

Renewal advocates argued that government intervention was necessary to make their vision of urban revitalization a reality. Condemnation had to be used to secure properties from people who stood in the way of the modern city. Eminent domain powers and government subsidy were needed because "most blighted properties are valued at far more than their real worth—and at more than private enterprise could afford to pay a development agency for them."[125] Government could also lower acquisition costs through eminent domain and thereby provide incentives for redevelopment. Responding to criticism that such a program would rescue the bad investments of property owners, advocates argued that redevelopment would be "a process of strengthening municipal fiscal structure and of giving us more orderly and livable communities. Incidentally, and as an inescapable by-product of all this, it would 'bail out' distressed property." But this would be "a minute part of its total effect."[126]

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122. SCOTT, *supra* note 65, at 95.
123. HILLMAN & CASEY, *supra* note 66, at 140-41.
124. *Id.* at 146.
125. SCOTT, *supra* note 65, at 110.
126. Potter, *supra* note 77, at 178-79.

With government assistance, these slum and blighted areas could be transformed into new modern communities with amenities that would attract middle-income persons. Renewal advocates envisioned the clearance of areas large enough to construct neighborhood developments "sufficiently large to resemble small towns."[127] These newly created areas of the city would have lower population densities, more community spaces, and traffic patterns organized to support business while protecting residential areas. "In a way, it is a plan to bring suburban advantages to the center of the city," argued *Tomorrow's Chicago*.[128] Urban renewal would counter the lure of the suburbs and place cities in a more competitive position to attract residents.[129]

But none of this would be possible without legal reform. Advocates used these pamphlets and other publicly-disseminated documents to justify the increasing power of the state in the private market. "[S]ome citizens," the author of *Metropolitan Los Angeles* granted, "hold the opinion that planning for a whole metropolitan area is undemocratic—that it smacks of totalitarianism or some other form of control from the top down, in contrast to our ideal of action from the grass roots upward."[130] But planning in the United States, advocates argued, was a democratic process, based on the sanctity of individual rights. "When there is comprehensive planning and control of land use, private-property rights are generally made more secure. Landowners have some protection against sudden and chaotic change in their own areas and those adjoining," concluded *Tomorrow's Chicago*.[131] Public/private cooperation would provide the means to ensure that property values were maintained.

Planning professionals also argued that the completion of a comprehensive master plan provided a public benefit that countered concerns about the abuse of eminent domain powers. "Nothing is unconstitutional until the courts make it so," claimed Alfred Bettman, a leading advocate of master plans and urban redevelopment. Bettman argued that, while some people believed that the urban renewal scheme violated the Public Use Clause, there was no reason to believe that the courts would not approve a "carefully drawn measure, rational in its conceptions, genuine in its details, administered with intelligence and integrity, and which meets a real social and economic evil which, by its very nature, cannot be reached without public action of this nature. . . ."[132] The creation of modern neighborhoods would provide an appropriate application of the Public Use Clause, he asserted.

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127. HILLMAN & CASEY, *supra* note 66, at 72.

128. *Id.* at 73.

129. *Id.*

130. SCOTT, *supra* note 65, at 165.

131. HILLMAN & CASEY, *supra* note 66, at 163.

132. Bettman, *Urban Redevelopment Legislation*, *supra* note 81, at 60; *see also Report of the Committee on Urban Redevelopment*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE ON PLANNING 250 (American Society of Planning Officials, 1941).

While most renewal advocates argued that urban renewal was legally permissible under then-current interpretations of the doctrine, other advocates flatly stated that the primacy of property rights must be superseded and that the narrow interpretation of the Public Use Clause was unsuited to modern urban problems. "[I]t has become clear beyond question," argued Guy Greer, "that the rights of individual property ownership can no longer be considered absolute: they must be modified to avoid destruction of the rights of the community at large."[133] Condemnation would provide owners with the fair value of their property and improve urban neighborhoods for all residents. By making the elimination of blight vital to the survival of the city, advocates avoided questions about who benefited from the condemnation process and who bore the costs. Although many city residents objected to the taking of their properties, the discourse of blight, emanating from seemingly objective professionals, obscured the debate over urban revitalization programs.

The development of the discourse of blight reflected an evolution in the proper uses of eminent domain. Eminent domain in the nineteenth century was used primarily to secure undeveloped land. By the late 1800s, condemnation of improved land was an important part of city building, used for bridges, utilities, transportation, and other types of infrastructure. The use of eminent domain was not new to post-war America, but the urban renewal scheme was nevertheless novel, both in form and scope. It authorized the transfer of land from one group of private owners to another group that would use it for practically the same purposes, and it envisioned the transfer of large amounts of real estate in an effort to reshape the urban landscape. Urban renewal was a major undertaking that required not only vast amounts of funding but also an alteration of the relationship between property owners and the state. By advocating a reinterpretation of the Public Use Clause and cementing the discourse of blight, widely disseminated pamphlets like *Metropolitan Los Angeles* and *Tomorrow's Chicago* were crucial to the adoption of the program. Through their rhetoric, these documents explained the public purpose behind these private transfers and helped mute concerns about the expansive powers that the program created.[134]

V. PUBLIC RENEWAL AND PRIVATE BENEFIT

By the 1940s, renewal advocates had created a detailed program for urban revitalization. The basic tenets of urban renewal held that in order to protect property values and promote the efficient growth of urban areas, cities needed a comprehensive plan for redevelopment. The plan would designate the areas to

133. GREER, *supra* note 79, at 116.

134. For a discussion of these efforts to secure public support, see CHARLES W. ELIOT, CITIZEN SUPPORT FOR LOS ANGELES DEVELOPMENT (1945).

be reclaimed and what types of projects would be built in each district. The actual development would be conducted privately, but the government would be an important partner. To keep acquisition costs down, eminent domain powers, along with government subsidies, were necessary.[135] Throughout the decade, renewal advocates lobbied the public to support their program. As experimental renewal programs began and the discourse of blight turned from theory to reality, the limitations of the terminology became clear. Developers selected properties not because they were run down, but because they were profitably attractive. Moreover, politicians and institutional leaders used redevelopment programs to serve other goals like the restriction of mobility for blacks.

During the 1940s, a majority of states passed redevelopment acts. New York state was the first to pass urban renewal legislation in 1941, followed by Illinois, and by 1948 twenty-five states had similar laws.[136] These laws authorized the creation of locally-chartered organizations with the authority to condemn and clear blighted areas that would then be privately redeveloped. The programs varied in their particulars—some acts authorized the creation of private organizations to condemn properties, while others vested that responsibility in a newly created public agency or in the area's public housing administration. Some redevelopment acts authorized the use of tax incentives to promote revitalization, and one (Illinois) provided grants to subsidize developments. Most demanded the submission of comprehensive plans for the designated areas, and many required that the plans be approved by the local planning commission. Despite these particular differences among redevelopment plans, however, they did share one important requirement: all required that, after land was set aside for public infrastructure, the cleared property be transferred to private developers.

Eminent domain powers were the most significant facet of these redevelopment acts. The District of Columbia Redevelopment Act of 1945 was typical. Passed by Congress after lobbying from several groups, including the American Society of Planning Officials and the Urban Land Institute, it declared that, "owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas . . . are injurious to the public health, safety, morals, and welfare."[137] The legislation further concluded that redevelopment could not be attained by "the ordinary operations of private

135. *See* Bettman, *Federal and State Urban Redevelopment Legislation*, *supra* note 81, at 168.

136. *See* JUSTEMENT, *supra* note 93, at 29-30; SCOTT, *supra* note 53, at 424-25; *see also* Bettman, *Federal and State Urban Redevelopment Bills*, *supra* note 81, at 166 (discussing legislation pending in 1943); Thomas Desmond, *Blighted Areas Get a New Chance*, 30 NAT'L MUN. REV. 629, 629-32 (1941) (discussing New York's Desmond-Mitchell Urban Redevelopment Corporation Law).

137. District of Columbia Redevelopment Act of 1945, ch. 736, § 2, 60 Stat. 790 (1946) (current version at D.C. CODE ANN. § 6-301.01 (2001)).

enterprise" and made the legislative determination that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment" was a "public use."[138] Other state acts also emphasized the importance of eminent domain and included specific provisions to convince the courts that their programs were constitutional. When New York amended its act in 1942 to allow insurance companies to invest in housing projects, it declared that the condemnation of blighted areas for the development of housing was a "superior public use," giving urban renewal projects priority even when local governments considered using sites to build schools, parks, or other public works.[139]

Despite much legislative activity, only two major renewal projects commenced in the early 1940s—Pittsburgh's redevelopment of the Golden Triangle, which eliminated an industrial district in the oldest section of the city and replaced it with office buildings, and Metropolitan Life Insurance's Stuyvesant Town, which cleared the east side of Manhattan between 14th and 23rd streets for residential construction. The Stuyvesant project required the uprooting of 11,000 working-class families so that they could be replaced by 8,756 middle-class families. Stuyvesant Town was a harbinger of problems to come as urban renewal expanded its scope. Lewis Mumford called the project "prefabricated blight" and condemned its high density and lack of public amenities (including its lack of schools).[140] Others complained that the project, with rents too high for the working-class residents dislocated by the clearance of the area, added to New York's wartime housing shortage. African-Americans bridled at the comments of Metropolitan Life Insurance Chairman Frederick Ecker, who defended the company's decision to deny admission to blacks by declaring that "blacks and whites just don't mix."[141] But most of New York's political, business, and civic leadership supported the project wholeheartedly, and most housing reformers, though they expressed concern over the dislocation of the poor, also welcomed the development. Desperate to clear blighted areas, these elites argued that tough choices had to be made.[142]

The majority of people uprooted for Stuyvesant Town were white, but soon urban renewal would set its sights on the black ghetto. While race was always central to definitions of blight, after the great migrations of World War II, race played an increasingly important role in city planning. By the mid-1940s, the expanding minority black and Latino ghettos were the main concern of business leaders and urban politicians. In 1950, for example, the Los Angeles

138. *Id.*

139. *See* HENDERSON, *supra* note 26, at 126.

140. Lewis Mumford, *Prefabricated Blight*, THE NEW YORKER, Oct. 30, 1948, at 49, 54.

141. Charles Abrams, *The Walls of Stuyvesant Town*, THE NATION, Mar. 24, 1945, at 328.

142. On Pittsburgh's first project, see JEANNE LOWE, CITIES IN A RACE WITH TIME 126-44 (1965); and TEAFORD, *supra* note 11, at 108. The Stuyvesant Town controversy is discussed in detail in HENDERSON, *supra* note 26, at 122-45; and SCHWARTZ, *supra* note 12, at 84-107.

City Planning Commission designated eleven areas as blighted. All but one of them had a population that was majority Mexican-American or African-American.[143] Chicago, according to city planners, had the largest blighted central areas of any city in the United States, over twenty square miles. The area selected almost completely overlay Chicago's "black belt" on the Southside and included many rapidly changing areas on the Westside.[144]

Because of its increasing concern over the expansion of the black ghetto, Chicago became a leader in the slum clearance movement. While white neighborhoods to the south of the ghetto responded violently to the arrival of black neighbors, Chicago's elites were more subtle in their reactions to neighborhood change. After World War II, business leaders from downtown department stores and financial institutions joined with major nonprofit organizations, including the University of Chicago and the Illinois Institute of Technology (IIT), to respond to the encroachment of the ghetto. These elites were concerned that their investments were imperiled by the growth of black Chicago, and they sought to renew the areas surrounding downtown to make them attractive to middle-income people. "We have two choices, either to run away from the blight or to stand and fight," argued Henry Heald, IIT's president.[145] Rallying behind the slogan "Stand and Fight" and led by Heald, realtor Fred Kramer, and businessman Holman Pettibone, business and institutional leaders embarked on the revitalization of the inner city.[146]

In 1947, pushed by this coalition, Chicago Mayor Martin Kennelly reached an agreement with New York Life Insurance Company to build the "Lake Meadows" development on the near Southside. While much of the proposed clearance area was deteriorated, New York Life created a controversy when it demanded that several well-maintained blocks be cleared because they would afford the project better views of the lake. Even redevelopment advocates acknowledged that the plan ignored "actual slum areas completely" and planned "the demolition of a well-kept Negro area where the bulk of property is resident owned, its taxes paid, and its maintenance above par."[147] Residents argued that the area was not a slum and that they were "being wrongfully ousted from the land where they have invested thousands of dollars in upkeep and improvements."[148] Protesters further asserted that the project was "'Negro clearance' rather than slum clearance" and said, "If it is a slum clearance

143. ALEXANDER & BRYANT, *supra* note 116, at 38.

144. *See* HILLMAN & CASEY, *supra* note 66, at 70; CHI. PLAN COMM'N, HOUSING GOALS FOR CHICAGO 62 (1946). For a fuller discussion of the use of urban renewal in reshaping the racial landscape of American cities, see HIRSCH, *supra* note 12; and SUGRUE, *supra* note 12.

145. METRO. HOUSING & PLAN. COUNCIL, RECLAIMING CHICAGO'S BLIGHTED AREAS (1946).

146. *See* HIRSCH, *supra* note 12, at 102-05.

147. *Id.* at 125.

148. *Citizens Hold Huge Rally to Block Land Grab*, PITTSBURGH COURIER, June 25, 1949.

program, then let's make it that and start where the slums are."[149] Although their complaints delayed the project, these efforts ultimately did not stop the clearance of the area.

The Lake Meadows development was a success in providing middle-class housing to Chicagoans (unlike most renewal projects the new tenants were also black), and the clearance of the area also enabled local institutions like IIT to expand their facilities. At the same time, the project replaced only a small percentage of the units that were demolished and exacerbated the severe housing shortage in the city. Excluded from many areas, poor blacks increasingly relied on the units of the Chicago Housing Authority for shelter. As a result, the hopes of housing officials to maintain integration in Chicago's public projects were dashed. In addition, the dislocation caused by the Lake Meadows project increased pressure on other neighborhoods, heightened tensions between blacks and whites, and accelerated neighborhood decline in other areas of the Southside.[150]

Lake Meadows, Stuyvesant Town, and Pittsburgh's Golden Triangle received national attention as models for urban redevelopment, but they were the only achievements that renewal advocates could claim during the 1940s. Despite the acceptance of the need for redevelopment and the passage of state laws to support such efforts, major obstacles to renewal remained. The condemnation process was cumbersome and many property owners fought their ejection. Because urban renewal laws were untested in most states, struggles over condemnation went all the way to state supreme courts. In addition, renewal area residents, who were typically poor and politically weak, still elicited support in their efforts to save their neighborhoods. Furthermore, the tax credits authorized by most state acts were not enough to excite the interest of private developers. Even though renewal advocates believed slum properties could be put to a "higher use," planning principles (which required lower density development) would result in lower returns in renewal areas.[151]

Therefore, advocates argued, redevelopment required government financing. "Private enterprise will not be able to redevelop property on the basis of the present cost of acquisition unless the excessive valuations are written off by means of either tax exemptions or direct subsidies," argued developer Louis Justement, whose views were seconded by the National Association of Housing Officials and the NAREB.[152] But cities and states lacked the resources for a significant renewal program, and as renewal efforts

149. *Housing Project Hangs Fire: Charges 'Clearance' of Negroes is Aim*, CHI. DEFENDER, May 7, 1949, at 4.

150. *See* HIRSCH, *supra* note 12, at 122-23.

151. *See* GELFAND, *supra* note 11, at 116-17; GREER, *supra* note 79, at 111; JUSTEMENT, *supra* note 93, at 54-59; MOLLENKOPF, *supra* note 10, at 79-80.

152. JUSTEMENT, *supra* note 93, at 54.

stalled, advocates increased their focus on the federal government. National subsidies, they argued, were necessary to revitalize cities. "It is no more than equitable that the credit of the federal government be applied to the reclamation of eroded urban land," argued ULI President Hugh Potter.[153] "The cities need not feel like paupers going hat-in-hand to a source of bounty in seeking the use of such credit for they contain in large measure the sources from which it is drawn."[154] Throughout the 1940s, the NAREB and other lobby groups used such arguments in advocating for the passage of federal legislation to support urban redevelopment.[155]

Several senators agreed. In 1945, Senators Robert Taft, Allen Ellender, and Robert Wagner introduced a comprehensive housing act. Their proposal combined funding for additional public housing with subsidies to lower the costs of acquisition in slum clearance sites. Under Title I of the bill, the federal government would pay two-thirds of the cost of purchasing and clearing renewal areas. While many groups supported the bill, it languished for four years because of NAREB opposition. Real estate interests certainly wanted government aid for renewal efforts, but they were so adamantly opposed to the public housing included in the legislation that they would not support the bill. After his election in 1949, President Truman made urban housing a centerpiece of his "Fair Deal," and the bill finally passed. The Housing Act of 1949 promoted the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of "a decent home and a suitable living environment for every American family" through public and private construction.[156]

The bill was a high point of post-war liberalism, representing the largest commitment in American history to aid the unfortunate through publicly-subsidized housing. But it was vague about how this goal was to be met. The 810,000 units of public housing authorized in the legislation fell far short of the demand, and Congress failed to fund even that low target. By linking urban renewal to the program, the Housing Act of 1949 ultimately displaced many thousands more families than it housed, and the bill had only weak protections for the people dislocated by renewal efforts. These flaws would become evident as the program was implemented, but at the time, the Act was hailed by housing reformers and city planners as a means to restore cities to their central

153. Potter, *supra* note 77, at 177.

154. *Id.*

155. *See* Bettman, *Federal and State Urban Redevelpment Bills*, *supra* note 81, at 166-71; Arthur Binns, *Report of the Committee on Housing and Blighted Areas of the National Association of Real Estate Boards*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE ON PLANNING, 1941, at 153-55 (American Society of Planning Officials, 1941); Nat'l Ass'n of Housing Officials, *Subsidy and Taxation for Urban Redevelopment*, 59 THE AM. CITY, June 1944, at 76.

156. *See* GELFAND, *supra* note 11, at 115; GREER, *supra* note 79, at 112-15.

place in American life.[157]

VI. THE CONSTITUTIONALIZATION OF URBAN RENEWAL

Mid-century saw urban renewal projects planned or underway in cities across the nation. New York remained the leader in urban renewal, with several major developments in progress. In the post-war years, the combination of public housing, highway, and urban renewal projects undertaken by the city's redevelopment czar Robert Moses changed the face of whole neighborhoods. Though the uprooting of residents in clearance areas had been a concern before, the extent of New York's program made relocation a major problem. The City Planning Commission estimated that, between 1946 and 1953, more than 250,000 people were uprooted in the city. Hundreds of apartment buildings, stores, factories, and warehouses were condemned in pursuit of New York's modernization.[158]

Despite the dislocation of thousands across the country, urban renewal was accepted as a necessity by 1950. Commenting on redevelopment plans in the southwest section of Washington, D.C., the *Post* portrayed the issue as one of "Progress or Decay" and stated bluntly that "Washington Must Choose."[159] Only redevelopment, the paper argued, could stop the "headlong flight to the suburbs."[160] The *New York Times*, assessing the nation's largest urban renewal program, stated that change was inevitable and celebrated the efforts of the "municipal surgeons" who performed "a series of operations" to revive the city.[161] Despite the serious impact it had on many residents, urban renewal was widely viewed as the only answer to the decline of the city.

Faced with a clear crisis in cities, only a few policy-makers expressed concerns about the possible abuse of eminent domain powers. New York housing reformer Charles Abrams was one. "In my opinion, under present redevelopment laws, Macy's could condemn Gimbels—if Robert Moses gave the word," Abrams argued.[162] But even Abrams believed that condemnation was necessary—his complaint was that the power was wielded undemocratically. Civil rights activists also struggled to balance competing concerns in the debate over urban renewal. In his 1948 book *The Negro Ghetto*,

157. *See* GELFAND, *supra* note 11, at 154-55; HALPERN, *supra* note 74, at 65; MOLLENKOPF, *supra* note 10, at 79-80; SCOTT, *supra* note 53, at 460-67; TEAFORD, *supra* note 11, at 107.

158. *See* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 965-68 (1974).

159. HOWARD GILLETTE JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 156 (1995) (discussing a series of *Washington Post* articles promoting redevelopment).

160. *Id.* at 156.

161. SCHWARTZ, *supra* note 12, at 252.

162. HENDERSON, *supra* note 26, at 20. In New York, the only group that consistently supported uprooted homeowners and tenants was the leftist American Labor Party. Their influence declined dramatically during the anti-Communist hysteria of the 1950s. *See* SCHWARTZ, *supra* note 12, at 195.

Robert Weaver (later to become the first HUD Secretary) argued that urban renewal presented a "threat or an opportunity" to African-Americans.[163] He worried that the program would be used to entrench racial segregation and prevent blacks from moving into new areas. While Weaver's fears were borne out in the early 1950s, he continued to support the principle of urban renewal, and he argued that areas developed according to "sound planning principles" provided the best hope for the integration of middle-class blacks into society. Weaver's complaints were not with the use of eminent domain, but with the focus of redevelopment officials on the clearance of minority areas and their refusal to support integration in newly developed areas.[164]

Faced with increasing momentum in the urban redevelopment movement, property owners and clearance area residents did not meekly accept the renewal program. Instead, in every city that attempted condemnation, the courts were forced to adjudicate disputes over the implementation of the program. Recent precedents facing litigants clearly favored an expansive definition of a public use.[165] But many of the cases had been about public housing, which benefited only a small number of people but, nevertheless, was a government-owned undertaking. This changed in the late 1940s and early 1950s, when at least seventeen state courts considered the constitutionality of redevelopment statutes.[166] All but three of these courts upheld the right of local authorities to condemn land and turn it over to private parties for renewal. The success of renewal initiatives in state courts depended on a coordinated effort of real estate interests and housing reformers. The NAREB, the National Association of Housing Officials, the National Conference of Mayors, and other pro-redevelopment groups provided assistance to state and local authorities, helped to draft briefs, and submitted their own amicus curiae briefs to the courts. Courts relied heavily on these briefs in writing their opinions, and many of them directly appropriated the language of blight.[167]

Most states had declared slum clearance a public use in public housing cases a decade earlier, so much of the litigation over urban renewal acts centered on two questions: Was the condemnation of blighted properties legal in areas that were not yet slums, and was the transfer of condemned property to

163. ROBERT WEAVER, THE NEGRO GHETTO 322 (1948).

164. Robert Weaver, *Habitation With Segregation*, OPPORTUNITY, June-July 1952.

165. *See* discussion *supra* pp. 25-26.

166. For state cases involving urban renewal, see REISENFELD & EASTLUND, *supra* note 110; and Note, *Eminent Domain in Urban Renewal*, 68 HARV. L. REV. 1422, 1425 (1965).

167. See, for example, the cases cited in *Berman v. Parker*; Brief for the District of Columbia Land Redevelopment Agency and National Capital Planning Commission, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53); and Supplemental Brief for the District of Columbia Land Redevelopment Agency and National Capital Planning Commission, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53). Additional cases are also discussed in Daniel Mandelker, *Public Purpose in Urban Redevelopment*, 28 TUL. L. REV. 96 (1953); and Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504 (1959).

private parties allowed under the Public Use Clause? Renewal advocates argued that clearance of slums and blighted areas was imperative and that a comprehensive program was necessary to prevent further urban decline.[168] The courts agreed. Following the lead of renewal advocates, judicial opinions frequently merged slums and blight into one phenomenon, ignoring the argument that urban renewal was more about private redevelopment than about slum clearance. To many courts, urban problems were so severe that it was inappropriate for judges to restrict the use of condemnation to solve them. The Pennsylvania Supreme Court stated that if urban renewal was rejected, cities would "continue to be marred by areas which are focal centers of disease, constitute pernicious environments for the young, and, while contributing little to the tax income of the municipality, consume an excessive proportion of its revenues because of the extra services required for police, fire, and other forms of protection."[169] The future of the city, the court concluded, rested on the ability of government to eliminate slums and blight. Slum clearance, the court reasoned, "certainly falls within *any* conception of 'public use' for nothing can be more beneficial to the community as a whole than the clearance of [areas] characterized by the evils described in the Urban Redevelopment Law."[170]

Considering the argument that the transfer of property to private parties violated the Public Use Clause, courts recapitulated the argument of renewal advocates that removal of blight was the object of redevelopment acts and that the subsequent disposition of the property did not vitiate the public benefits provided by clearance. That private property cannot be taken for private use "is too well settled to require citation of authority," the Massachusetts Supreme Court stated. "But the plaintiff's argument, we think puts the cart before the horse."[171] The purpose of the act was to clear slums, and any ancillary impacts were not significant. The Pennsylvania Supreme Court agreed. Redevelopment acts were "directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and after that is accomplished the public purpose is completely realized," the court reasoned.[172] Even though private developers were central to the program, the court concluded that it was "not the object of the state to transfer property from one individual to another; such transfers, so far as they may actually occur, are purely incidental to the accomplishment of

168. For a representative argument by a redevelopment authority, see Appellee's Brief, Belovsky v. Redevelopment Auth., 54 A.2d 277 (Pa. 1947), *in* SUPREME COURT PAPER BOOKS (Supreme Court of Pennsylvania, 1948).

169. Belovsky v. Redevelopment Auth., 54 A.2d 277, 282 (Pa. 1947).

170. *Id.*

171. Papadinis v. City of Somerville, 121 N.E.2d 714, 717 (Mass. 1954) ("[W]e are of the opinion that the main purpose of the plan is slum clearance and that the disposition of the land by sale thereafter is incidental to that purpose. Once the public purpose contemplated by the statute has been achieved the authority is not obliged to retain the cleared land as unproductive property.").

172. *Belovsky*, 54 A.2d at 282.

the real or fundamental purpose."[173] The Illinois Supreme Court similarly held that

> when rehabilitation has been accomplished by the acquisition of the land and the removal of the structures, and after holding and using it for some appropriate public purpose, if there is any surplus land left, which is not needed for any of these purposes, it may be sold, leased or exchanged as provided therein.[174]

By conflating the two steps—slum clearance and redevelopment—courts made the dramatic expansion of eminent domain powers appear unexceptional.

Not all state courts agreed that urban renewal was an appropriate governmental function. The Supreme Court of Florida declared that the condemnation of private homes for private commercial redevelopment was unconstitutional and concluded that "if the municipalities can be vested with any such power or authority, they can take over the entire field of enterprise without limit so long as they can find a blighted area containing sufficient real estate."[175] The Georgia Supreme Court shared this view and rejected the attempt of the Housing Authority of Atlanta to condemn industrial and residential property in order to create a modern industrial park. Acknowledging that other state courts had held differently, the court stated that it could not "subscribe to the doctrine that the power of eminent domain may be resorted to . . . every time there may be some public benefit resulting. To hold so would be to cut the very foundation from under the sacred right to own property."[176] South Carolina's Supreme Court also invalidated that state's urban renewal act,[177] but these were the only objections. By 1954, a large body of state law had approved the urban renewal scheme.

Notwithstanding the Sixth Circuit's opposition to public housing and urban renewal programs, federal precedents also favored renewal advocates. The Supreme Court had long given wide latitude to the use of eminent domain, and during the 1930s, the judicial underpinnings of the public use doctrine began to collapse. Although the 1934 case of *Nebbia v. New York*[178] was not about the Public Use Clause, it did set the tone for dramatic changes in Supreme Court jurisprudence with respect to judicial review of economic regulation, thus laying the foundation for the *Berman* decision. In considering New York State's attempt to regulate the price of milk, Justice Roberts declared that the Court's role in assessing legislative regulation of the economy was very

173. *Id.* at 283.

174. People *ex rel.* Tuohy v. City of Chicago, 68 N.E.2d 761, 766 (Ill. 1946); *see also* David Jeffrey Co. v. City of Milwaukee, 66 N.W.2d 362, 375 (Wis. 1954) ("The fact that the property may not long remain in the ownership of the city does not in itself indicate that the use will not be a public use and that the city may not be invested with the power of eminent domain in acquiring it.").

175. Adams v. Housing Auth., 60 So. 2d 663, 668-69 (Fla. 1952).

176. Housing Auth. v. Johnson, 74 S.E.2d 891, 894 (Ga. 1953). This opinion was reversed by amendment to the Georgia State Constitution in 1954. *See* Mansnerus, *supra* note 6, at 456; Note, *supra* note 166, at 1425.

177. Edens v. City of Columbia, 91 S.E.2d 280 (S.C. 1956).

178. 291 U.S. 502 (1934).

limited. Prior to *Nebbia*, the Court required that businesses be "affected with the public interest" to be subject to regulation. Roberts, however, declared that the states were "free to adopt whatever economic policy may reasonably be deemed to promote the public welfare."[179] *Nebbia* had no direct impact on Public Use Clause jurisprudence, but, by questioning the necessity for a judicial investigation into the nature of government regulation, the case undermined the meaning of the Public Use Clause. If all legislative enactments were presumed to serve the public interest, then the Fifth Amendment limitations on the power of eminent domain were empty.

In cases involving eminent domain, the Supreme Court continued to grant wide deference to the legislature. In 1946, the Court allowed the Tennessee Valley Authority to condemn property for an electric power project. The land owners argued that the property was not necessary for the completion of the power dam, but the Court stated that "it is the function of Congress to decide what type of taking is for a public use and the agency authorized to do the taking may do so to the full extent of its statutory authority."[180] In the aftermath of that decision, the Court's deference to the legislature caused at least one legal commentator to write a "requiem" for the public use doctrine, but this scholar may have missed its passing by a decade.[181]

It was in this context of expanding state approval for urban renewal and broadened federal authority for eminent domain in other contexts that the federal courts considered the issue of urban renewal. In 1952, the District of Columbia Redevelopment Land Agency (DCRLA) proposed a massive clearance project that would lead to the reconstruction of almost the entire southwest quadrant of the city. During its twenty-year duration, this project dislocated over 20,000 impoverished black residents and replaced their homes with office buildings, stores, and predominantly middle-income housing. As part of this initiative, the DCRLA condemned a department store owned by Max Morris. All the parties agreed that his property was not "blighted," but the agency argued that the parcel was necessary to "replan" the area.[182]

When Morris filed for an injunction against the taking, Judge E. Barrett Prettyman, in a long and complex opinion for the three-judge panel that heard the case, held that the District of Columbia's redevelopment law was constitutional. The condemnation of property to eliminate or prevent slums, which were "injurious to the public health, safety, morals and welfare," was a valid purpose under the Constitution, the court ruled, and the agency could take

179. *Id.* at 537. For an assessment of the importance of this case, see CUSHMAN, *supra* note 29, at 80-81.

180. United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 551-52 (1946).

181. Note, *The Public Use Doctrine: An Advance Requiem*, 58 YALE L.J. 599 (1949).

182. *See* Schneider v. D.C. Redev. Land Agency, 117 F. Supp. 705 (D.C. 1953); Brief for the District of Columbia Redevelopment Land Agency and National Capital Planning Commission at 13-14, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53); LOWE, *supra* note 142, at 205.

land in such circumstances even if it was to be transferred to private parties.[183] But the court sought to place limitations on the DCRLA's right to condemn: "These extensions of the concept of eminent domain . . . are potentially dangerous to basic principles of our system of government. And it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights."[184] Prettyman concluded that the government cannot seize property merely because it is in a slum. The condemnation was authorized only "to the extent that the taking is reasonably necessary to the accomplishment of the asserted public purpose."[185] Interpreting the Redevelopment Act in this manner, the court upheld the law.

The taking of "blighted" land, however, presented greater difficulties for the court. Judge Prettyman took issue with the DCRLA's definition of blight and declared that the condemnation of land for aesthetic purposes was not valid. Prettyman's opinion critiqued the basic philosophy of modern planning. Some people, he argued, "prefer single-family dwellings, like small flower gardens, believe that a plot of ground is the place to rear children, prefer fresh to conditioned air, sun to fluorescent light."[186] However, "in many circles," the opinion continued, "such views are considered 'backward and stagnant.'"[187] He questioned: "Is a modern apartment a better breeder of men than is the detached or rowhouse? Is the local corner grocer a less desirable community asset than the absentee stockholder in the national chain. . . ?"[188] It was not the government's prerogative, Prettyman declared, to determine who was correct in such matters. "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."[189]

The DCRLA's view of its authority, the court concluded, was overly broad. The agency argued that it had the right to select any area for clearance as long as a slum existed within its boundaries. Since the statute did not define blight or explain what would constitute an appropriate land usage and allowed the DCRLA to determine such factors on a case-by-case basis, Prettyman concluded that the authority granted by the act would amount to an "unreviewable power to seize and sell whole sections of the city."[190] In so concluding, the opinion critiqued the expansion of government power into private life envisioned by the Redevelopment Act. The purpose of the DCRLA's plan in Southwest Washington, the court argued, was "to create a

183. *Schneider*, 117 F. Supp. at 718-19.
184. *Id.* at 716.
185. *Id.* at 718-19.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 721.

pleasant neighborhood," and if such a scheme were "undertaken by private persons the project would be most laudable."[191] However, "as yet the courts have not come to call such pleasant accomplishments a public purpose." [192] To do so would run "squarely into the right of the individual to own property and to use it as he pleases."[193] The rights of private property are subject only to necessary government intervention. "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. . . ."[194]

Because the court held the law constitutional but placed numerous restrictions on the DCRLA's condemnation powers, both parties appealed, asking the Supreme Court to define the limits of the Public Use Clause. The DCRLA desired the broadest possible interpretation of the clause, while the appellants argued that unlimited authority would imperil the basic rights of property owners. In its briefs to the Supreme Court, the DCRLA asserted that the condemnation of Morris's property was necessary to prevent the further decline of Southwest Washington. That purpose, the agency argued, was well within the police power of Congress, which authorized the agency to "promote the public health, safety, morals and welfare of the District of Columbia by eliminating and preventing slums and to use eminent domain for that purpose."[195] The agency further asserted that prior attempts at urban renewal had failed to revitalize cities and a comprehensive program was necessary. "Because it was not satisfied with earlier efforts to solve the problem of . . . blighted areas . . . Congress discarded the piecemeal or individual structure approach and sought to attain its goal by replanning and redevelopment [of] the whole of substandard areas."[196] Relying on several state cases, the agency further argued that the clearance was the "public purpose" and the subsequent sale was "purely incident to the basic program."[197] In the alternative, the DCRLA argued that the public purpose continued even after the property was no longer publicly owned because the property would be subject to strict regulations after its sale.[198]

Morris's attorneys argued that the taking violated the Fifth Amendment. They claimed that the program was not one of slum clearance but simply a real estate promotion that transferred property from one private entity to another.[199]

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191. *Id.* at 724.

192. *Id.*

193. *Id.*

194. *Id.*

195. Brief for the District of Columbia Redevelopment Land Agency and National Capital Planning Commission at 19, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53).

196. *Id.* at 32.

197. *Id.* at 29.

198. *Id.* at 30 (citing Velishka v. City of Nashua, 106 A.2d 574 (N.H. 1954)).

199. Brief for Appellant Berman at 10, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53).

The agency, their brief insisted, believed that "diverse ownership and leasehold interests are not conducive to a sound business center and that single ownership of the commercial area would enhance the character."[200] While they conceded this argument might be true, they maintained that "such pleasant accomplishments cannot be called a public use or purpose which would validate seizure."[201] The appellants also argued that the law was void because the renewal legislation had no "standard for the factual determination of a blighted area."[202] In fact, despite three pages of terms relevant to the legislation, the District's Urban Renewal Act had no definition of blight. In response, the redevelopment advocates argued that the standards were delineated by the terms themselves. "Adequate and specific standards," argued the DCRLA, "are set out in the following language: 'technological and sociological changes,' 'obsolete lay-out,' 'substandard and blighted areas,' . . . 'comprehensive planning and replanning,' 'lack of sanitary facilities, ventilation or light,' 'delapidation, overcrowding, faulty interior arrangements.'"[203]

Although the parties debated in detail the technical definition of blight and the legal rationale for urban renewal efforts, none of the briefs in the *Berman* case even mentioned the fact that the project would uproot thousands of poor blacks and would reshape Washington's racial landscape. The fact that both parties ignored this aspect of the case is particularly poignant because *Berman* was argued just four months after the Supreme Court's monumental declaration on American race relations in *Brown v. Board of Education*.[204] *Brown* began an era in which the Court rewrote much of the constitutional jurisprudence regarding individual rights. *Berman* was a minor case in the context of these major changes to American law, and it therefore receives little attention in analyses of the Warren Court.[205] But the two cases were intimately related. The urban renewal program that the Court approved allowed cities to redistribute their populations, increasing residential segregation and thereby making the integration of schools far more difficult.

Justice William O. Douglas did make note of the racial makeup of the population in the renewal district, but he did not attach any significance to that fact. After noting that the renewal area was seriously deteriorated (64.3% of the dwellings were beyond repair, 57.8% had outside toilets, 60.3% had no baths,

200. *Id.*

201. *Id.*

202. *Id.* at 13.

203. Brief for Renah F. Camalier and Louis W. Prentiss, Commissioners of the District of Columbia Redevelopment Land Agency at 9, Berman v. Parker, 348 U.S. 26 (1954) (No. 476-53).

204. 347 U.S. 483 (1954). *Brown* was decided in May of 1954 while *Berman* was argued in September.

205. Lucas Powe, for example, does not cite the case in his political history of the Warren Court. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

and 83.8% lacked central heating) as well as 97.5% "Negroes," the Court unanimously approved the condemnation and granted redevelopment authorities broad discretion for urban renewal.[206] The authority bestowed by the police power of Congress as administrator of the District, Douglas asserted, "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[207]

Public safety and health are well within the police power, Douglas stated, and the urban renewal program sought to improve them. Directly appropriating the language of planners, he argued that

> miserable and disreputable housing conditions do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. . . . They may also be an ugly sore, a blight on the community which robs it of charm. . . . The misery of housing may despoil a community as an open sewer may ruin a river.[208]

Douglas upbraided the lower court for substituting its policy preferences for those of the legislature and declared that Congress has the authority to "determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[209] If democratically elected officials decide that such improvements are worthy, Douglas stated, there is "nothing in the Fifth Amendment that stands in the way."[210]

Slums and blighted areas were a threat to the health of cities, and both were within the purview of urban renewal. "The experts," Douglas stated,

> concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole . . . . to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks . . . the lack of light and air, the presence of outmoded street patterns. . . .[211]

Douglas agreed that the commission had the authority to include a large area in the renewal district so as to avoid the "piecemeal approach." The "public purpose" having been decided, the means of executing the project were "for the Congress and Congress alone to determine."[212] Therefore, the Court concluded, it was within Congress' authority to decide that the "public end may be as well

206. *Berman*, 348 U.S. at 30, 36.
207. *Id.* at 32.
208. *Id.* at 32-33.
209. *Id.* at 33.
210. *Id.*
211. *Id.* at 34.
212. *Id.* at 33.

or better served through an agency of private enterprise. . . ."[213]

Douglas also rejected the argument that the standards for determining the redevelopment area were inadequate for it was, he argued, "the need of the area as a whole which Congress" addressed and the goal of eliminating "not only slums" but "also the blighted areas that tend to produce slums" was an acceptable delegation of authority.[214] In conclusion, the Court declared, the rights of property owners were "satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[215]

That Douglas would take such a strong position in support of the urban renewal program is unremarkable. Douglas and the rest of the Court viewed urban renewal as a government initiative to improve the economic and social conditions of cities. By the time *Berman* was argued, the Court had a more than twenty-year record of restraint in considering such measures.[216] *Berman* was consistent with the New Deal Court's philosophy that legislatures were best suited to determine the appropriate uses of government power in the area of economic regulation. The DCRLA and other redevelopment agencies, run by planning experts, would apply professional standards to determine which areas required redevelopment and would implement the program in an equitable fashion for the benefit of the city.

The irony is that, at the same time it was deciding *Berman*, the Court was deciding *Brown*, which reflects a distrust of government (particularly local government) to protect the interests of minority groups and to treat all citizens equally. Douglas's opinion in *Berman* reflects a faith in the political system's ability to operate in a non-discriminatory manner.[217] Urban renewal, however, was an economic development program with profound racial implications that were ignored by all the parties to the litigation. The reality of urban renewal was that redevelopment was used to reshape the racial and economic geography of cities. Such was the case in Southwest Washington where, of the 5,900 units of housing that were constructed on the site, only 310 could be classified as

213. *Id.* at 33-34.

214. *Id.* at 35.

215. *Id.* at 36.

216. In *United States v. Carolene Products*, 304 U.S. 144 (1937), the Court stated that it would grant legislatures wide latitude in reviewing economic regulation. Justice Stone stated that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. at 152. Douglas's approach to the urban renewal program is consistent with *Carolene Products*. On the Court's jurisprudence regarding economic regulation, see CUSHMAN, *supra* note 29; GILLMAN, *supra* note 29, at 200-05; and Martin Shapiro, *The Supreme Court's "Return" to Economic Regulation*, *in* 1 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 91 (Karen Orren & Stephen Skowronek eds., 1986).

217. This is not to argue that the Court has not considered the discriminatory impact of regulatory programs. The Court has maintained its authority to review administrative determinations for fairness. *See* Shapiro, *supra* note 216, at 138-39. The Court's increasing attention to administrative law in the past half century is evidence of this effort. *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS ch. 7 (3d ed. 1999).

affordable to the former residents of the area.[218] By the 1960s, the formerly black neighborhood was majority white.[219]

The rhetoric of blight enabled urban elites to craft and implement these broad powers of condemnation. In the decade following *Berman*, urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods, and helped entrench racial segregation in the inner city. Racial motivations were often submerged under the labels of "slum clearance" or "neighborhood revitalization," but a primary goal of postwar urban renewal was to channel minority settlement into certain areas and to uproot minority communities in other areas. In cities across the country, urban renewal came to be known as "Negro removal."[220]

CONCLUSION

The Supreme Court's decision in *Berman* affected a dramatic expansion in the government's powers of eminent domain and provided judicial legitimation for urban renewal efforts. Throughout the 1950s and into the 1960s, American cities undertook massive redevelopment projects that cleared large areas surrounding the central business district. These projects resulted in the dislocation of more than one million people.[221] The majority of these families were minorities. Across the nation, inner city neighborhoods were designated as blighted, properties condemned, and land turned over to private parties.

Berman, however, was a pyrrhic victory for renewal advocates because the urban renewal program came under attack only a few years after the ruling. By the early 1960s, critics were questioning the basic philosophy of urban renewal. They argued that, despite the investment of billions of dollars, cities had not been revitalized, and they complained that the dislocation caused by the program had resulted in the creation of more slums. The movement against urban renewal was led by Jane Jacobs, whose best-selling critique of urban redevelopment, *The Death and Life of Great American Cities*, argued that the diversity of cities was central to their survival. Jacobs assailed principles of modern planning and argued that most redevelopment projects did "not rest

218. *See* GILLETTE, *supra* note 159, at 163-64.

219. *See id.* at 164. For a discussion of the *Berman* opinion as part of Douglas's jurisprudence, see VERN COUNTRYMAN, THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS 376-77 (1974). On Douglas's views on civil rights, see Drew S. Days III, *Justice William O. Douglas and Civil Rights*, *in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 109-19 (Stephen L. Wasby ed., 1990).

220. *See* HALPERN, *supra* note 74, at 68-69; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 56 (1993).

221. No report has documented the exact number of people dislocated from urban renewal, but 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. Raymond A. Mohl, *Planned Destruction: The Interstates and Central City Housing*, *in* FROM TENEMENTS TO THE TAYLOR HOMES 227 (John Bauman et al. eds., 2000).

soundly on reasoned investment of public tax subsidies, as urban renewal theory proclaims, but on vast involuntary subsidies wrought out of helpless site victims."[222]

By the mid-1960s, critics from across the political spectrum declared the urban renewal program a prime example of government overreaching. Liberals argued that it exacerbated racial discrimination,[223] while conservatives stated that it wasted government resources and interfered with the private market.[224] The rise of the historic preservation movement also put a harsh light on large-scale demolition projects that destroyed important landmarks like New York's Pennsylvania Station. As a result of these critiques, the federal urban renewal program was greatly curtailed, and urban planners became increasingly circumspect about their ability to create a wholly modern city.[225] The dream of erasing the antiquated city and building a completely modern replacement is no longer the planning profession's primary focus. [226]

Condemnation, however, remains a powerful tool of government policy. In recent decades, state and local governments have undertaken a wide variety of initiatives that transferred condemned property to private entities in the name of housing, commercial, or industrial development, and the urban redevelopment corporations created in the 1940s continue to wield great power over city land use. In light of past failures, private interests and government bodies are more circumspect in promoting the benefits of eminent domain. Instead of promising to rebuild cities, they focus on more practical aspects such as job creation. The reason for using the power of condemnation—the desire to secure coveted property without private market negotiations—however, remains the same.[227]

The most famous eminent domain case of the last two decades involved the construction of a General Motors plant in Detroit. The project, in the city's racially-diverse, working-class neighborhood of Poletown (which all parties agreed was not blighted), required the acquisition and clearance of a site that had over 1,000 buildings housing more than 4,200 people. In contesting the use of eminent domain, neighborhood residents faced not only General Motors but the city's African-American mayor and all of the area's major labor

222. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 5 (1993).

223. *See* GREER, *supra* note 10; URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, *supra* note 11.

224. *See* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962 (1964).

225. Criticisms of urban renewal led to many reforms of the condemnation process to protect the interests of property owners and tenants. On changes in the urban renewal program and the planning profession, see THOMAS, *supra* note 12, at 179-84. The urban renewal program was terminated by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (1994).

226. *See* THOMAS, *supra* note 12, at 180-81.

227. William Nelson, in his analysis of condemnation in New York City, argues that it has been a particularly effective means to subsidize private development projects that receives little public attention. *See* NELSON, *supra* note 48, at 260-61. On debates over urban development, see BERNARD J. FRIEDEN & LYNNE B. SAGALYN DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES (1989).

organizations and non-profit institutions. Both government and labor leaders desperately wanted the project, which they hoped would stem the flood of job loss in the city. To keep General Motors from building elsewhere, the city spent over $200 million to acquire and prepare the property, which it sold to the company for $8 million.[228]

The residents' fight against condemnation went all the way to the Supreme Court of Michigan, which approved the redevelopment plan.[229] Relying on *Berman*, the court declared that it would not restrict the ability of state and local government to respond to the economic problems facing the city. If the legislature concluded that government support for this kind of economic growth was important, the public use requirement was met.[230] "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental," the court ruled.[231] Other courts have granted similar deference to governmental programs that involve the transfer of land to private developers.[232]

The concept of blight remains integral to redevelopment efforts. While many courts have expanded the Public Use Clause to encompass any initiative that brings economic growth, most states still require that a redevelopment agency determine that an area is blighted before condemnation can occur.[233] Legislatures have created long lists of criteria that redevelopment agencies are required to use to determine whether an area is blighted. These criteria, however, remain vague and subject to broad interpretation by redevelopment authorities, to which courts have granted great deference.[234]

The United States Supreme Court has also further enunciated its principle of broad deference to legislative determinations of public use. In 1984, the

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228. The Poletown project is examined in THOMAS, *supra* note 12, at 161-66; Kochan, *supra* note 14, at 69-72; and Mansnerus, *supra* note 6, at 418-21.

229. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

230. *Id.* at 459.

231. *Id.* Note the similarity of the *Poletown* court's reasoning with the state cases discussed in footnotes 171-174 and accompanying text.

232. *See, e.g.*, Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth., 190 N.E.2d 402 (N.Y. 1963) (approving the condemnation of private businesses to build the World Trade Center); Karesh v. City Council, 247 S.E.2d 342 (S.C. 1978) (allowing condemnation for convention center and garage); Hogue v. Port of Seattle, 341 P.2d 171 (Wash. 1959) (approving condemnation of agricultural lands for private port facility); *see also* Mansnerus, *supra* note 6, at 418 n.43, 421 n.65 (citing additional cases). Thomas Merrill argues that state courts have been more skeptical about condemnation programs than federal courts. Merrill, *supra* note 14, at 96-97. In a survey of over 200 cases decided between 1954 and 1986, Merrill found that state courts rejected a condemnation on the basis that it was not a public use in fifteen percent of the cases. *See, e.g.*, Baycol Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975) (rejecting attempt to condemn property for shopping mall).

233. For an examination of current definitions of blight, see Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389 (2000).

234. Mansnerus, *supra* note 6, at 426. Many courts have declared that they will approve blight designations "absent fraud or abuse." Others impose a standard of "clear error." Luce, *supra* note 233, at 409-13.

Court approved a program by the state of Hawaii to condemn the property of large landholders and sell it to other residents.[235] Justice Sandra Day O'Connor ruled that the public use requirement was "coterminous with the scope of the sovereign's police powers" and further stated that the Court would accept any use of eminent domain that was "rationally related to conceivable public purposes."[236] The Supreme Court's restraint in this area has led many commentators to complain that the Court has abdicated its responsibility to protect property owners from government abuse.[237] Legal scholar Richard Epstein has argued that the Court has entirely read the phrase "public use" out of the Fifth Amendment.[238]

In response to the courts' continued deference to legislative determinations of public use, scholars and legal advocates have given increased attention to the Public Use Clause in the past decade. Several recent law journal articles have critiqued the current interpretations of the doctrine. These scholars argue that eminent domain is used by "rent seeking" groups that want to avoid private market negotiations. They also claim that eminent domain is abused by public authorities that are controlled by private developers, and they argue for a stricter application of the Clause.[239]

Legal advocates have also taken an increasing interest in the use of eminent domain. The Institute for Justice, based in Washington, D.C., has established an Eminent Domain Law Project that assists clients fighting the condemnation of their properties. The organization has taken on cases in several states, including New York, New Jersey, New Mexico, Mississippi, and Connecticut, representing clients such as a woman fighting the condemnation of her Atlantic City home for a casino owned by Donald Trump and a group of African-American farmers battling the efforts of the state of Mississippi to condemn their property for the construction of an automobile plant.[240] In the Atlantic City case, the condemnees succeeded in convincing the trial judge that the transfer of their property to Trump Casino violated the Public Use Clause.[241]

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235. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

236. *Id.* at 240, 241.

237. Kochan, *supra* note 14, at 115; Mansnerus, *supra* note 6, at 424.

238. EPSTEIN, *supra* note 7, at 161-63.

239. *See, e.g.*, Jones, *supra* note 14, at 306 (suggesting that courts use "strict scrutiny" in assessing the use of eminent domain); Kochan, *supra* note 14, at 110-11 (proposing the creation of "political filters" to increase the cost to private parties of using condemnation to acquire property); Mansnerus, *supra* note 6, at 444 (arguing for a requirement of "true rational basis," by which courts would review uses of eminent domain). *But see* Merrill, *supra* note 14, which concludes that state courts have done a fairly good job of balancing interests in eminent domain cases.

240. Inst. for Just., Litigation Backgrounder, *Saving the Skin of Property Owners in Connecticut* (2001); David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20; Laura Mansnerus, *There Stays the Hotel and the Neighborhood*, N.Y. TIMES, Dec. 31, 2000, § 1, at 21.

241. Casino Redev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998); David M. Herszenhorn, *Widowed Homeowner Foils Trump in Atlantic City*, N.Y. TIMES, July 21, 1998, at B1.

The judge's decision, however, rested on defects in the condemnation process and did not attempt to reinterpret the Public Use Clause. Therefore, while the anti-eminent domain effort has increased the cost of condemnation to specific developers and delayed the process in several cases, the initiative has yet to significantly alter interpretations of the Public Use Clause. These efforts have, however, raised public attention to the issue of condemnation, and increased political opposition to eminent domain has helped defeat recent urban redevelopment initiatives in Baltimore and Pittsburgh.[242]

American cities have witnessed dramatic political and demographic changes since the 1950s. African-American mayors lead many urban areas, and blacks and other minorities play a major role in the political structure of most large cities. The housing shortages that most cities experienced in the post-World War II era are no longer a concern. Instead, policy-makers face a glut of abandoned, vacant buildings. Urban policies that supported segregation in the 1940s and 1950s are a fait accompli in the modern era, and many cities have reached what sociologists call "hyper-segregation."[243] In this context, urban redevelopment policies have a very different impact on city residents. Community members are generally more concerned with the lack of government involvement than with fears of eminent domain.

Policymakers continue to argue that land clearance is crucial to the rebirth of the city, and the rhetoric of blight continues to shape urban policy. The city of Philadelphia, for example, is currently considering a major "Neighborhood Transformation Initiative," which aims to clear large areas of the city's most dilapidated housing in the hope that the cleared land will attract private development. While the city's African-American mayor never uses the term, Philadelphia's newspapers make constant reference to the "blight problem," and several articles have discussed the need to stop the disease of blight before it afflicts other neighborhoods.[244] In Detroit, the clearance of the city's more than 10,000 abandoned structures has brought about greater use of the city's eminent domain powers. Community activists have argued that government condemnation is crucial to the solution of this problem. "Blight is like a cancer," argued one activist in the summer of 2002. "Our theory has been we can eliminate it before it spreads."[245]

In the abstract, the goals of these initiatives are widely accepted and praised. The taking of fire-ravaged buildings that serve only to shelter drug

242. David Nitkin & Joe Nawrozki, *Condemnation Bill Defeated: Baltimore County Plan to Renew East Side Loses by 2 to 1*, BALT. SUN, Nov. 8, 2000, at 1A; James Zambroski, *Revitalization Plan Back to Square One*, PITTSBURGH TRIB.-REV., Nov. 23, 2000.

243. On the increasing segregation of American cities, see MASSEY & DENTON, *supra* note 220.

244. *See, e.g.*, Jennifer Lin, *Keeping Blight at Bay*, PHILA. INQUIRER, Nov. 25, 2001, at A24; Monica Yant Kinney, *Growing a Leafy Antidote to Decay*, PHILA. INQUIRER, Nov. 29, 2001, at B1.

245. Jodi Wilgoren, *Detroit Urban Renewal Without the Renewal*, N.Y. TIMES, July 7, 2002, § 1, at 10.

dealers does not elicit much sympathy. But most city neighborhoods do not present such an easy case as Detroit. In many poor areas, residents struggle to build community in the midst of abandonment. Blight, while sometimes obvious, remains in the eye of the beholder. Only when specific properties are identified for redevelopment will the public benefits of renewal meet the resistance of property owners and renters. While land in urban areas may be less valuable today than it was fifty years ago, the competition over the property within American cities will continue to implicate and shape the public use doctrine.