

## **Bound By Oath | Season 3, Episode 7 | The Despotic Power**

**John:** Hello and welcome to Bound By Oath, a podcast on civil rights and constitutional history brought to you by the Institute for Justice's Center for Judicial Engagement. On previous episodes, we have talked about the government's power to regulate property. On this episode, we will turn to the government's power to take property, the power of eminent domain. The power of the government to send you packing if it wants the land where you have your home or your business. It's not a very nice thing. And the Constitution imposes two limits. First, the government must pay fair compensation. And second, the government can only take property for public use. On these episodes, we will focus on that second requirement. It is axiomatic, fundamental, and deeply rooted in our legal tradition that the government cannot use the power of eminent domain to take from Person A merely to give to Person B – even if compensation is paid. In other words, property cannot be taken for private use. However, in 1954, the Supreme Court, in the case of *Berman v. Parker*, ruled unanimously that taking homes and businesses in Washington, D.C., knocking them down, and giving the land to private developers to build other homes and businesses was a public use, and therefore constitutional. Thousands of people lost their livelihoods. 23,000 people lost their homes. On this episode, we will talk about that redevelopment project in Southwest D.C. and how the Court came to hold that it was for a public use.

**Amy Lavine:** There wasn't really a requirement in the legislation that the redevelopment land authority or anybody else had to had to figure out where those people were gonna go.

**John:** And we'll talk about the enormous consequences of the ruling, which greenlit the era of urban renewal.

**Cleveland urban renewal [promotional video](#):** With financial help from the federal government, the city was to buy and clear the land and then rebuild the area. But as it turned out it wasn't quite that simple.

**John:** In the decades after the *Berman* decision, over 1,200 cities<sup>1</sup> across the country used federal money to tear down older neighborhoods and business districts, forcibly displacing hundreds of thousands of people.

**South Norwalk, CT urban renewal [documentary](#):** The federal government had a policy of urban renewal for the declining cities. And urban renewal involved demolition of old buildings – acres and acres of them. It was a total disaster.

**John:** In *Berman*, the Court said that knocking down blighted areas and slums was a public use. But eventually, cities began to use eminent domain to take properties – and sometimes entire neighborhoods – that weren't even arguably blighted. Taking them from A to give to B on the hope that B might pay more in taxes to the city or create more jobs.

**Justice Stevens:** The question in the case is whether a city's taking of private property for the purpose of economic development satisfies the public use requirement of the Fifth Amendment.

**John:** And in 2005, in the case of *Kelo v. New London*, the Court was asked: might that violate the Constitution?

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<sup>1</sup> [Urban renewal directory](#), US Department of Housing and Urban Development, June 1974, at 7: 1,258 cities got funding under [Title 1 of 1949 Housing Act](#), 1949-1974.

**Justice Scalia:** I just want to take property from people who are paying less taxes and give it to people who are paying more taxes. That would be a public use, wouldn't it?

**Justice O'Connor:** For example, Motel 6 and the city thinks, well, if we had a Ritz-Carlton, we would have higher taxes. Now, is that okay?

**Govt lawyer:** Yes, your honor. That would be okay.

...

**Justice Scalia:** That, it seems to me, just washes out entirely the distinction between private use and public use.

**John:** Here at the Institute for Justice, we litigated the *Kelo* case. And I regret to say that – by a vote of 5-to-4 – we lost that one. But we'll turn to that, and how, despite the Supreme Court's ruling, we are winning the overall battle on eminent domain abuse, on the next episode, Episode 8. And we'll take a hard look at what is left of the distinction between public and private use today – or at least what the Supreme Court says is left. But for now, right here on this episode, we'll stick with *Berman v. Parker* and the era of urban renewal. I'm John Ross. Thanks for listening to Bound By Oath.

## **BBO Montage**

**John:** Eminent domain has been with us since the Founding. It is authorized by the Constitution, and it makes an appearance in some of the earliest and most important constitutional cases decided by the Supreme Court. For instance, in the 1795 case of [\*VanHorne's Lessee v. Dorrance\*](#), Justice Paterson wrote that eminent domain was commonly known among the Founders as "the despotic power," the power of the tyrant, and he said that a crucial limit on that power is that of just compensation – to be set by a jury. Taking property without paying for it would be, quote: "a monster in legislation, and shock all mankind." And

Justice Paterson had some things to say about the institution of property itself. Quote: “Men have a sense of property. ... No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.” Then in 1798, in one of the most important early cases about what it means to be a constitutional republic – the case of [Calder v. Bull](#) – Justice Chase declared that a law was not the law merely because it was passed by a legislature. Rather, law must accord with the principles embodied in the Constitution. And if not, it was the duty of the judiciary to strike it down. For an example of legislation that would plainly be unconstitutional, Justice Chase turned to eminent domain. Taking property from A just to give it to B was quote “against all reason and justice.” If the government was going to use eminent domain it had to be for, he said, highways, lighthouses, military fortifications, and quote “other public edifices.” Today, however, just what counts as a public edifice has been stretched, twisted, and browbeaten beyond recognition. Which is perhaps something Justice Paterson, writing in *VanHorne’s Lessee*, foresaw. Quote: “One incroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution eventually destroyed.” We’ll start our story of the destruction of the public use requirement in 1931, when that story converged with another story we know well: the story of zoning. In 1931, President Herbert Hoover convened a conference of experts – planners, real estate developers, academics, philanthropists, government officials, and others – to propose solutions to the nation’s housing problems.

**1955 Urban renewal [promotional film](#):** (narrator) Is it possible for a neighborhood overnight to become a slum? Well, perhaps not quite. Although while most of us have been asleep, housing has become our number one social and economic problem. (the devil): Absolutely, and getting bigger all the time.

**John:** As we talked about on Episode Four, Hoover had done much the same thing 10 years earlier when he was the Secretary of Commerce, and that earlier conference had launched zoning onto the national scene. This time, Hoover's committee of experts proposed a different kind of land use legislation. Instead of authorizing the government to tell people what they could and could not do with their property, this legislation would enable officials to take people's property – entire neighborhoods of property – to be rebuilt anew – with, of course, expert guidance from planning and zoning officials.

**Cleveland urban renewal [promotional film](#):** And we see the disintegration of the city and it's core. Men, I think it's clear that the people ... want you to prepare a master plan. A plan that will be an intelligent guide.

**John:** Some of the attendees at Hoover's conference were the very same individuals who had promoted zoning 10 years earlier. Perhaps most notably for our story, Alfred Bettman, the "patron saint of planning lawyers" and one of the main proponents of zoning we talked about on Episode Four, was there. He would spend the next couple of decades promoting what would become known as urban renewal, drafting model legislation, testifying before Congress, and trying to impose order on America's chaotic cities.

**Oklahoma City urban renewal [promotional film](#):** This will be a city designed to never grow old. It'll have the elements of greatness and be soundly planned to serve you.

**John:** In 1932, Hoover's committee on blighted areas and slums released a report, calling such areas, [quote](#): "a civic and social cancer which must be cut out by the surgeon's knife."

**1965 Urban renewal [promotional film](#):** For many slums, they are too far gone. They must be uprooted and replaced.

**John:** Of course, dating back to the common law, municipalities had always had the authority to condemn properties that were nuisances. But it had to be done on a property-by-property basis, and on the basis of a genuine threat to public health and safety. Hoover's committee, on the other hand, proposed large-scale clearances based on the overall characteristics of a neighborhood, much of which had very little to do with dangerous conditions on any individual property.

**Oklahoma City urban renewal [promotional film](#):** Our city's vitality depends upon eliminating the present malignant tumor now existing in downtown before it spreads. This tumor can be removed through a dramatic renewal plan, which is designed to guarantee downtown rebirth.

**John:** And though the problem they sought to solve was a big one, the committee noted that there were reasons for optimism. Perhaps most hearteningly, the land that slums sat on was often prized real estate, near a city center or along a waterfront. And if it could be prised away from its owners, it could be put to better use and become a catalyst for more tax revenues and more jobs.<sup>2</sup>

**1965 Urban renewal [promotional film](#):** But what about rundown urban areas that are not well used that could be used to attract people with higher incomes to expand the tax base and breathe new life into the city?

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<sup>2</sup> Page 10, <https://archive.org/details/slumslargescaleh00presrich/page/10/mode/2up>

**John:** The plan was to make life better for everyone, including the people who would be displaced.

**Cleveland urban renewal promotional film:** For those who have to live in slums ... they lose hope. Urban renewal gives to these people hope. It says to them that we as a community care about your living conditions and we're going to do something about it.

**John:** And during the 1940s, a majority of states passed legislation adopting the committee's proposal. And in 1949, Congress voted to provide federal funding. In his statement signing the 1949 Housing Act into law, President Truman declared that [the objective](#) was a "decent home and a suitable living environment for every American family."

**Cleveland urban renewal promotional video:** With financial help from the federal government, the city was to buy and clear the land and then rebuild the area. But as it turned out it wasn't quite that simple.

**John:** Before city officials could get funding to redevelop a neighborhood, it had to be certified as a slum or a blighted area. But just what did it mean to be blighted?

**Amy Lavine:** In the 1920s and the 1930s, people started talking about the concept of blight in the context of urban planning.

**John:** That is Amy Lavine, a property rights attorney in New York, who, if you check in the show notes, you will see wrote the seminal article on urban renewal in D.C and the case we'll come to shortly, *Berman v. Parker*.

**Amy Lavine:** Blight was a scientific term to describe plant diseases that will invade and take over like in an epidemic way. And so urban planners started using it to describe the way that substandard areas of housing or other building stock would affect the rest of the city.

**John:** In the 1920s, academics and planners began to use the term blight, which had the veneer of science, to describe properties and neighborhoods that were rundown, and, like an invasive plant disease, had to be killed off so that they didn't spread.

**Amy Lavine:** Maybe just a small area, or maybe even a few buildings, that are substandard, and then that blight spreads to the properties around it, and then eventually throughout the urban area.

**John:** What caused blight? Planners argued that deterioration and dilapidation was the natural result of a lack of proper planning and zoning. Neighborhoods with an indiscriminate and chaotic mix of houses, apartments, businesses, and factories were fated to decline. Buildings that were too close to the street. Streets and alleys that were too narrow. Property lines that seemed haphazard. All the ways that cities had developed incrementally and organically in the past without top-down planning.

**Oklahoma City urban renewal promotional film:** These are the scenes of a disease called blight, which, like a deadly mold, has settled on our downtown and is killing it. The symptoms are obsolete structures, congested traffic, too little parking, worn-out hotels, and low-grade businesses.

**John:** Another primary cause of blight, according to President Hoover's committee, was [quote](#): "social or racial groups antipathetic to earlier inhabitants." ... If left unchecked, they said,

neighborhoods turned into [quote](#) “colonies of immigrants who have selected [an] area ... because they are able through low rents to maintain a village life nearly like that to which they have been accustomed.”

**Cleveland urban renewal [promotional film](#):** The unmistakable signs of deterioration and blight can be seen spreading through the city’s core. And there are hopeless slums – places that no one wants to call home but some must.

**John:** The committee continued, [quote](#): “Like a migrating flock of black birds resting and feeding temporarily, so groups of immigrants as well as individual families and isolated individuals stop in this transitional area on their way up or down the social scale. Each of these waves of people leaves a residue of poverty-stricken, socially unadjusted, maladjusted defectives and delinquents which gradually accumulates into a slum population.” Including quote: “the queer, ... the radical, the ‘Bohemian’ and the criminal.”

**Amy Lavine:** And by using this analogy to blight, they were able to more forcefully suggest that it was absolutely necessary to get rid of the blighted areas before they could damage the rest of the city.

**John:** And for a time, events seemed to confirm the theory that blight could alight on a neighborhood or a few blocks and then spread. First and foremost, this was during the Great Depression, and people obviously had less money to fix things up. Working class people were moving into what had been wealthier neighborhoods, whose previous residents were moving to newly built and carefully zoned suburbs – a process the federal government was actively encouraging through New Deal housing programs. What was not widely known until decades

later, however, was that those programs were explicitly racist.<sup>3</sup> What today we would call integrated neighborhoods, federal appraisers called “infiltrated” neighborhoods where the presence of African Americans, Asians, Jews, Hispanics, Italians, Poles, Hungarians, Greeks, Czechs, Russians, and others was said to reduce property values and make mortgage lending unacceptably risky.<sup>4</sup>

[Local news WSLs-10 - Roanoke](#): If you start at the very beginning, it’s pretty easy to connect the dots. Once neighborhoods like this were declared hazardous, it didn’t matter if it was true or not.

**John**: Although rundown areas certainly existed before the New Deal, the federal government’s policies perversely contributed to and outright caused the very conditions that would later be used to justify eminent domain.

[Local news WSLs-10](#): (historian): Appraisers would say because of Negro residents this area is blighted. It’s already lost. It has no future. ... (reporter) Red lined neighborhoods typically became the first to be destroyed to make way urban renewal projects.

**Amy Lavine**: If you lived in one of these substandard areas you couldn’t get money to fix up your house. It was generally just not possible. So your house deteriorated.

**John**: The first city to receive federal funds to clear its slums and give the land to private developers was Washington, D.C.

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<sup>3</sup> Richard Rothstein, *The Color of Law*, p. 65.

<sup>4</sup> <https://dsl.richmond.edu/panorama/redlining/introduction>

**1965 Urban renewal [promotional film](#):** Not too long ago, in the Southwest section of Washington D.C., the Capitol looked down with shame on its surroundings.

**John:** In 1946, Congress passed the District of Columbia Redevelopment Act. Alfred Bettman, our friend from Episode Four, helped with the drafting.<sup>5</sup> The Act required local officials to produce a comprehensive plan to guide all future development across the city and to produce redevelopment plans for particular areas. The Act invoked the traditional police powers, declaring that blight was a threat to public health and safety.

**Southwest Remembered [documentary](#):** (narrator) When efforts began in the late 40s to clean up inner city slums, Southwest was selected as the first area for redevelopment because it contained the worst slums in the city.

**John:** The first neighborhood that officials turned to was Southwest. 550 acres with 23,000 people, most of them African American, and 1,400 business that stretched from the Capitol south to the waterfront on the Anacostia River. Many of the dwellings there were little more than shacks. People were crowded into small quarters. Unemployment was high. And being that Southwest was so close to the Capitol, proponents of renewal were able to take congressmen on tours of the neighborhood so they could see the conditions firsthand. One doctor at a local hospital liked to point out flies on outdoor latrines and tell congressmen that those were the very same flies that came through open windows on Capitol Hill and alighted on their lunches.<sup>6</sup>

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<sup>5</sup> Daniel Mandelker, The Comprehensive Planning Requirement in Urban Renewal, See FN 63

<sup>6</sup> Southwest Remembered

**Southwest Remembered [documentary](#):** (narrator) Death rates from tuberculosis were two-and-one-half times the rate for the entire city. Other diseases were correspondingly high. Most of the housing had outside toilets, no central heating, and no inside baths.

**John:** However, for all its poverty, much of Southwest was a busy, bustling place. There were markets and restaurants and nightclubs. There were corner stores and barber shops. The city was segregated, and African Americans were not permitted inside some of those businesses. But Southwest was more integrated than other parts of the city.

**Amy Lavine:** It was predominantly black residents who lived there. But there was a significant population of immigrant Jews. And it was it was really one of the better integrated parts of the city at that time. The first integrated parade in the city was there. And, the accounts of the neighborhoods generally tend to describe an area where there were peaceful relations and people got along.

**John:** Here is one former resident, being interviewed in the early 1980s.

**Southwest Remembered** (former resident 3): In the older Southwest, the residents who had some rather nice incomes were in constant contact with those who didn't have these incomes. And the kids who lived in the poor areas, the poorer homes, could look a few blocks, a few doors up the street and see Dr. So and So, Lawyer So and So, Mr. So and So and feel that the gap wasn't insurmountable. Things went right, that could be me.

**John:** At first, the redevelopment agency concentrated on acquiring what it called Area B, 15 square blocks that had some of the worst conditions. All but 17 percent of the dwellings there were rated by the city as unsatisfactory. But two property owners, Max Morris and Goldie

Schneider, who owned a department store and a hardware store, respectively, refused to sell. By the time their lawsuits reached the Supreme Court, they had been combined and were heard together. Interestingly, Goldie was represented by her son, who was a lawyer, all the way up to the Supreme Court.

**Amy Lavine:** Their main argument was that their properties were not blighted. There was nothing wrong with their properties. They weren't substandard. So how would tearing them down be a public use?

**John:** The department store and the hardware store were not a threat to public health and safety. They were not deteriorated. And yet, they would be taken and given to private developers and replaced by, among other private uses, a new, suburban-style shopping mall. Wasn't that just taking property from A to give to B?

**John:** And in what I personally think is an eerie similarity to the trajectory of zoning, when Max and Goldie's claims arrived in [federal district court](#), the judges took their arguments – and their property rights – seriously. Since the case involved a constitutional question, the court convened a special three-judge panel – rather than the usual single judge. And in an opinion written by Judge Barrett Prettyman, who now has a federal courthouse in D.C. named after him, the panel ruled that there were some major problems with the redevelopment act.

**John:** Judge Prettyman and his colleagues included an extensive discussion of the caselaw on what it meant for a taking to be for a public use. From the early 1800s, all the way up to the New Deal, in countless cases, courts had continuously reasserted and reaffirmed and stated once more for the record that taking from A and giving to B merely for B's private use was unconstitutional. And though you might think that would mean that property could never be

transferred to another private party after condemnation, that's not quite true. At the Founding, private operations like grist mills and canals benefited from eminent domain. Later, eminent domain was upheld for railroads. This was allowed because those operations were like what we now call public utilities or common carriers – any member of the public had a legal right to use those services, sometimes at prices set by the legislature. Which is not say that that definition of public use was uncontroversial. In 1859, the Supreme Court of Minnesota said eminent domain for dams and mills was the quote “extreme limit” of government power,<sup>7</sup> and they might not have allowed even that but for numerous earlier decisions in other states. Meanwhile, Thomas Cooley, a justice of the Michigan Supreme Court, argued in his extraordinarily influential 1868 treatise on constitutional rights, that that definition was too expansive. For Cooley, public use could only mean that the property was owned or possessed by the public after the taking. His argument did not catch on, however, and in the late 1800s, courts began to approve the use of eminent domain for utility companies, power generation, and irrigation. In 1909, another influential legal treatise writer, Phillip Nichols, wrote that quote: “No branch of constitutional law has felt the effect of the mechanical and industrial progress of the last 100 years more than that relating to eminent domain.” Even so, courts continued to insist that there was a line separating public use from private use. In 1876, the [Nevada Supreme Court](#) reasoned that if the public being able to use a facility or service after the taking was the test; then that would mean that hotels and theaters were a public use, which, to the court, clearly couldn't be right. So it articulated a different test that allowed a mining company to seize a narrow strip of land leading to its mine but would not have allowed eminent domain for a hotel. And courts did not always uphold eminent domain. In 1896, the U.S. Supreme Court rejected the taking of two grain elevators owned by a railroad company in Nebraska so that they could be transferred to local farmers. In 1910, the high court of Massachusetts rejected a street-widening project by the City of Boston where the city sought to seize more property than was needed for the street and then

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<sup>7</sup> Miller v. Troost 14 Minn. 369

sell the excess land to be used as warehouses. That was a bridge too far in Massachusetts, though other state courts did approve the practice, which was called excess condemnation.

**John:** By the time eminent domain for slum clearance reached Judge's Prettyman's court, what constituted a public use had begun to expand even further. Many state courts had had the opportunity to weigh in on whether clear cutting entire neighborhoods to create new neighborhoods was a public use. A handful said no. Florida's Supreme Court, for instance, ruled that Daytona Beach's plan to knock down an African American neighborhood and replace it with commercial uses and warehouses, was a [quote](#) "gigantic real estate promotion scheme." But a large majority of state courts went the other way, articulating a new test for what counts as a public use. In the past, the test concerned how the property was put to use after it was taken. But now courts began to hold that a taking itself could be a public use. Meaning, that the clearing of a slum itself was the public use, and, if property was put to private use afterwards, that didn't matter. According to Wendell Pritchett, a law professor at the University of Pennsylvania, this shift was a dramatic expansion of the power of eminent domain.

**John:** In 1953, Judge Prettyman took a look at those precedents, and said that for things like highways, parks, and government buildings that were contemplated by the redevelopment plan in Southwest and that would be publicly owned after redevelopment that was all obviously public use. And then, when it came to properties that would be turned over to private developers, he applied the new, more expansive test. Removing a slum protected public health and safety; the Redevelopment Act was therefore constitutional. But that was not the end of the matter. Quote:

[Schneider v. D.C.](#): 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.

**John:** Even if the line between public use and private use was not, he wrote, “always etched deeply, it is there.” And Judge Prettyman said he could still discern where the line was. The city could take properties that were dangerous and city officials should be given a generous amount of leeway to take properties that weren’t dangerous, but were in danger of becoming so. But there was a limit to that leeway. For properties the city had labeled blighted merely because they were built before modern planning and zoning, the power of eminent domain did not stretch that far. If property had “faulty lot layout” or “inadequate planning” – if it failed to quote “measure up to [its] maximum potential use in terms of economic, social, architectural, or civic desirability” that wasn’t enough by itself to justify eminent domain. And he took the government to task for its paternalism. Quote:

**Schneider v D.C.:** The purpose of the plan, in addition to the elimination of slum conditions, is to create a pleasant neighborhood.... The Government is to determine what conditions are pleasant, what constitutes the "most appropriate" pattern of land use, what is a good balance of income groups for a neighborhood, ..., how many families of two, how many of four, etc., ... Of course the plan as pictured ... is attractive. ... But as yet the courts have not come to call such pleasant accomplishments a public purpose.

**John:** And, he continued:

**Schneider v D.C.:** The poor are entitled to own what they can afford. The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.

**John:** And then with all of that said, the panel dismissed Max Morris and Goldie Schneider's claims. They had argued that the entire Redevelopment Act had to be struck down. Judge Prettyman said no, the law is constitutional as it relates to slum properties. But you can amend your pleadings and argue instead that the law does not apply to you. Max died four months later. His son-in-law, Samuel Berman, was the executor of his estate, and that's why the case became *Berman v. Parker*.<sup>8</sup> Samuel and Goldie, with financial assistance from an association of business owners in Southwest, appealed to the Supreme Court. As did the government. According to a redevelopment official, Judge Prettyman's opinion meant that there could be no redevelopment program at all.<sup>9</sup> If every property owner could dispute that their parcel was blighted and that had to be adjudicated one-by-one, progress would crawl to a stop. At oral argument in front of the Supreme Court the following year, the solicitor general said Judge Prettyman had engaged in quote "judicial reveries" and he asked the Court to quote "sterilize" the lower court's opinion.<sup>10</sup>

**John:** And in November 1954, only a month after the Supreme Court heard oral argument, it unanimously affirmed the lower court; the redevelopment act was constitutional. But the ruling swept away all the limitations on the power of eminent domain that Judge Prettyman had tried to retain. Justice William Douglas, writing for the Court, said that if Congress and city officials decided that taking and demolishing all of Area B was in the public interest, that decision was entitled to deference. [Quote:](#) "When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." As Justice Sutherland did in the *Euclid* case upholding zoning in 1926, in *Berman*, Justice Douglas based his reasoning not only on deference to legislators but also deference to experts. Quote:

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<sup>8</sup> Evening Star, Mar 6, 1954

<sup>9</sup> John Searles, Evening Star, Nov. 23, 1954

<sup>10</sup> Evening Star Oct. 20, 1954

**Berman v. Parker**: The experts 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.

**John**: And where Judge Prettyman had tried to spell out limits on government power to protect individual rights, Justice Douglas, on the other hand, didn't mention any limits. Instead, he waxed poetic about the government's power to do good things. Quote:

**Berman v. Parker**: The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.

**John**: Moreover:

**Berman v. Parker**: Miserable and disreputable housing conditions may 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 indeed make living an almost insufferable burden. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

**John**: That is some pretty broad language, and it has been applied far and wide outside the context of eminent domain. In zoning cases. In historic preservation cases. In sign code cases. If the government's power to regulate property and take property can be wielded merely to beautify an area rather than protect public health and safety, and government officials are entitled to near-total deference as to what is beautiful, it's hard to see what regulations and takings might still be unconstitutional – although we'll come to that. Anyway, after the Supreme

Court's decision, not only was Area B cleared, but so was just about the entirety of Southwest. And though there were unquestionably some very bad conditions in Southwest, if the residents who had lived there felt like cattle, and that life was an insufferable burden, they did not mention that to the documentary filmmaker Dolores Smith, who interviewed over 30 of them in the early 1980s.

**Southwest Remembered** (former resident 1): Well, there was a real camaraderie down in the Southwest. We were very close. We were very friendly. Very nosy [laughs] everybody knew everybody's business.

**Southwest Remembered** (former resident 2): Everybody knew everyone in the vicinity. Children were free to go in and out of any house and the mothers weren't worried because they knew they were being taken care of.

**Southwest Remembered** (former resident 3): Age has a way of setting a golden haze over everything. ... Nature just seems to make things look a little better in retrospect. ... But it was a friendly place. It was a place where all of us knew each other. ... And there was a lot of helping, caring, and sharing – although not quite as much as some people want you to believe.

**John:** By all accounts, living in a redevelopment area is an incredibly traumatic experience.

**Southwest Remembered** (former resident 2): Well, it was a pretty bad time of watching your close friends and neighbors move away. ... And then to sit and watch the homes being torn down was just unbelievable pain. ... And the debris that was left – they left

piles of debris when they would tear down the homes ... And then they would set these on fire and they would burn for days and days. ... It was almost like being in a war area.

**John:** The city and the redevelopment agency made a lot of promises to displaced residents that when redevelopment was complete, they would be able to return. And a few were. But the city destroyed far more housing than was rebuilt, and much of the new low-cost housing that was envisioned never materialized. According to an architect who had worked on planning the new Southwest, quote: "When we began ... we started with the misguided belief that the poor belonged there just because they had lived there for many years." But, she said: "We finally realized that we were dealing with a unique 600-acre plot close to the Capitol and adjacent to the water."<sup>11</sup>

**Southwest Remembered** (RLA executive director): I don't think there were any evil intentions anywhere along the line in terms of pulling the wool over people's eyes or telling them things that weren't true. I think there unfolded here in Southwest a development which was different than it was originally conceived.

**John:** The Redevelopment Act required that one-third of the new housing in Southwest to be low-income housing, renting for about \$17 per room per month, which would be about \$200 today adjusting for inflation. But after the Supreme Court came down with its decision, that provision was deleted.

**Amy Lavine:** There wasn't really a requirement in the legislation that the redevelopment land authority or anybody else had to had to figure out where those people were gonna go. There weren't any clear standards or requirements that would make that mandatory, or that would give

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<sup>11</sup> Paul Richard, Architects defended in lack of low-cost housing, *The Washington Post*, Nov. 25, 1965.

any redress to those people if they didn't get relocated. There were a couple of surveys that were done in the years afterwards, and a significant portion of the 5,000 people who were living there dropped off the map. They weren't counted in the surveys.

**John:** And though property owners were entitled to just compensation, the city treated some owners very poorly indeed.

**Southwest Remembered** (narrator): Displaced Southwest residents often were compensated for less than their property was worth. (resident 2): The woman across the street from us – whose husband was dead and she had six children – and they had a nice home that they had kept up. It had about four or five bedrooms which they really needed. And she was put out of her home they gave her \$10,000. And I don't know where she could have gone and gotten another home that would be big enough for her.

**John:** One woman, who had bought her home for \$10,000 a few years before redevelopment, was awarded a mere \$7,000 in just compensation, which was not enough to pay off her mortgage, leaving her in debt for a house she'd been kicked out of. The government's appraisers justified this by saying she had paid too much for the house in the first place. A jury agreed, but in 1957, a federal appeals court ruled that the jurors had not received proper instructions and sent the case back down for retrial. One judge dissented from that ruling and would have left the lowball award undisturbed. That judge was none other than future Chief Justice Warren Burger.<sup>12</sup>

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<sup>12</sup> Washington Daily News, Apr. 22, 1957

**Amy Lavine:** After the Supreme Court decided the case, the Southwest urban renewal area was cleared pretty quickly. Within a few years, they had cleared most of the land and started replacing everything.

**John:** But the pleasant neighborhood that planners had envisioned did not come to pass. There are a few buildings that architects got awards for, but for the most part the neighborhood was a shell of its former self for decades. A highway was built through the neighborhood that cut residents off from the Capitol. The waterfront remained a barren strip for decades.<sup>13</sup> L'Enfant Plaza, which was supposed to be a center of civic life,<sup>14</sup> instead has always been, to paraphrase the urbanist Jane Jacobs, "a promenade without promenaders."

**Amy Lavine:** Most of it was replaced with housing. These were little housing developments, some of them are houses or condos.

**John:** If you like the modernist-style architecture of the 1960s, those developments are fine. One of them is landmarked. They have their admirers.

**Amy Lavine:** A lot of the redevelopment is these apartment towers that then have like green areas around them. There was also the public housing development that was built adjacent to the urban renewal area. And then there were a lot of parking lots. They built a lot of parking lots, and a lot of them were placed on the periphery of this area that separates the residential areas from the waterfront. It's not very easy in most places in Southwest to walk to the waterfront without having to cross very large areas of parking lot.

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<sup>13</sup> George Lardner Jr., Waterfront still bleak in SW renewal effort, *The Washington Post*, Nov. 5, 1965; Penelope Lemov, Southwest: 26 years of renewal, *The Washington Post*, Aug. 13, 1977.

<sup>14</sup> According to a developer it was supposed to be for DC what the Champs Elysees is for Paris; Terms of SW Plan, *The Washington Post*, Feb. 17, 1954

**John:** In 1972, in a letter to the editor, one resident wrote that quote “All of us who live in the Southwest Urban Renewal Area know the drawbacks of a neighborhood with no small stores or restaurants. ... In the twilight, we hurry home along walled residential streets. There is nothing to attract us out of our lairs at night – our sidewalks are deserted except for dogwalkers. We are paying the price of exclusively residential zoning.”<sup>15</sup>

**Amy Lavine:** And then there was the mall, the ill-fated mall, built in the middle, that did not last particularly long.

**John:** The suburban-style shopping mall was still under construction well into the 1970s; only a portion of it was ever completed,<sup>16</sup> and it has since been torn down. It was supposed to have 100 stores and restaurants, but it at its peak never had more than 26.<sup>17</sup> And though in the last few years Southwest has finally seen the return of people and neighborhoods, it took over 50 years. And it took hundreds of millions of dollars in government subsidies, including, according to [The Washington Post](#), \$95 million worth of land leased for free to private developers just recently. All of which is pretty consistent with what happened elsewhere in the country after *Berman*.

**Amy Lavine:** *Berman* really made it clear across the country that urban renewal and redevelopment was allowable, and that it was public use. And, it paved the way for urban

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<sup>15</sup> Washington Post, Nov. 29, 1972

<sup>16</sup> Martha Hamilton, Developer seeks to abandon final stage of Waterside Mall, *The Washington Post*, Apr. 21 1977.

<sup>17</sup> Barbara Bright-Sagnier and Claudia Levy, Aid sought for Waterside Mall, *The Washington Post*, Mar. 3, 1974; Francesca Russello Ammon, Commemoration Amid Criticism: The Mixed Legacy of Urban Renewal in Southwest Washington D.C., *Journal of Planning History*, Vol 8. No. 3, 2009.

renewal to go forward across the country. And it did. Most cities of any decent size, urban renewal was undertaken with gusto.

**San Francisco urban renewal [documentary](#):** (narrator) Some 6,000 people lived in the pathway of Phase A1. ... Not a single house was deemed worth saving. ... This neighborhood was San Francisco's little United Nations. ... one of the most diverse neighborhoods in the country. ... (resident 1) My aunt and uncle had spent from 1943 to 1950 with their eyes on the prize of owning property in a very good section of the Western Addition. Where it would be our community, our culture, our people, our church, our lodge, our clubs. ... (resident 2): They took our house down. What did they make? A parking lot out of it. That's all they did. Just paved it over and it's a parking lot. ... (resident 1): There was a long period of time before the property was actually demolished. And until the property was actually leveled my uncle would drive every morning, come back and park in front of the property and maybe read the newspaper. ... (govt official) They demolished and land stayed vacant for years. Years.

**John:** Over 1,200 cities participated in urban renewal, displacing hundreds of thousands of people, tearing down integrated and minority and working class neighborhoods and replacing them with – like in Southwest – disappointing results.

**Buffalo urban renewal [documentary](#):** (city councilor) After 2,200 families were removed from here, it was planned for replacement of 1,200 housing units, of which I understand only 580 have been constructed. .... (city councilor 2) Urban renewal as far as the city of Buffalo is concerned has been a failure ... a complete, complete failure. ... They were given at that particular time the promise that if they moved out that they would

have the opportunity of moving back. Well, you can't move back into vacant land like we're standing on now. And actually the city has broken that promise.

**John:** In 1964, Martin Anderson, a finance professor at Columbia University, published a book called *The Federal Bulldozer*, arguing that the benefits of urban renewal to cities' tax bases was a myth; in fact, cities had lost hundreds of millions of dollars in tax revenues. And though officials were telling the public that private investment was flocking to redevelopment areas, in fact much of what was built was highly subsidized with government loans – in addition to the free land.<sup>18</sup> Here is the urbanist Jane Jacobs, an opponent of urban renewal and the author of the book *The Death and Life of Great American Cities*.

**Jane Jacobs:** What these people did not understand ... is how valuable communities are in the cities. They thought of people as statistical, replaceable cogs somehow. And they didn't understand how precious and how long a time it takes to grow a community.

**John:** As it turned, the deference that Justice Douglas said was due to local officials was wildly misplaced. Officials routinely exaggerated how bad the communities they were tearing down actually were. Buildings that were rundown but not representative of an area would be featured prominently in the news. For example, Charlotte, N.C., where 17,000 African Americans were forced out of their homes. Residents said there were shanties and shacks, but also really nice homes and businesses and that their neighborhood was safe and collegial.<sup>19</sup>

**Charlotte urban renewal [documentary](#):** (historian): What we learned was that I think without exception folks said what was put in the news or what was presented – that they

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<sup>18</sup> Martin Anderson, *The Federal Bulldozer*, 11

<sup>19</sup> [Charlotte Observer](#), Brooklyn: How a black community was erased from Uptown Charlotte

were rundown, that it was slum ... that it wasn't their experience at all. ... And the middle class homes or that were maybe low-income but people took care of the property they weren't shown at all. And so they felt that there was almost a half a truth and then a lie that was mixed in there to help justify the forced removals.

**John:** In other instances, officials didn't just exaggerate. They outright lied. For example, in Boston's West End, where the city displaced 20,000 people, mainly Italian and Polish immigrants.

**Jane Jacobs:** The destruction of the West End was utterly built on lies ... An architect who was involved in that ... who had been employed in making a report on the West End and making photographs told me – this was some years later – that they had had to go into crawl space that nobody ever went into and take pictures to try to document that the place was dilapidated. Well, these were the kind of technical lies that the whole thing was built on.

**John:** The city said that the West End had high rates of crime, vacant properties, alcoholism, and various diseases, but according to the Boston College professor Marc Fried, that was all just a lie. In fact, what the city had done was describe a few dilapidated blocks and the residents of a few low-rent boarding houses as if they were representative of the entire community.<sup>20</sup>

**Jane Jacobs:** Another architect ... he told me that it was a crime the buildings that were torn down. He said that they had beautiful workmanship in them, lots of them. And they couldn't be reproduced now. He said I almost wept to see what was going to come down.

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<sup>20</sup> Professor Marc Fried & former resident Joe Lo Piccolo, [spoken remarks](#) around 9:15, The Tragedy of Urban Renewal in Boston's West End

So I said why did you cooperate in that? And he said, well, somebody was going to do it. It was going to be done and it might as well be me. And I could do it better than other people.

**John:** A blight designation also turned out to be a self-fulfilling prophecy, as people and investors fled from areas threatened by eminent domain. Such as South Norwalk, Connecticut.

**South Norwalk, CT urban renewal [documentary](#)** (developer): Basically you had a mixture of industry, housing, offices, retail. ... It was an active neighborhood. Redevelopment basically in other words scared a lot of the people out of the area. ... Major companies ... would not renew leases. So actually in the hope of redevelopment, redevelopment also caused areas to go blight.

**San Francisco urban renewal [documentary](#):** (urban planner) Once an agency comes in and says this is an area that's blighted, well if you own a house or are a landlord, you're not going to put a whole lot of money into that because it's blighted and something is going to happen here.

**John:** In 1974, Congress finally pulled the plug on federal funding of urban renewal. However, *Berman* was still good law and state laws permitting eminent domain were still on the books, so the redevelopment machine rolled on. Which is a story we will pick on the next episode when we discuss the 2005 case of *Kelo v. New London*. *Kelo* involved the clearance of a neighborhood where there was not even the pretense of blight. The City of New London, Connecticut just thought it could put a neighborhood of modest, well-maintained homes and a smattering of businesses to a higher use than the people who lived and worked there.

## Conclusion

**John:** But before we go, one final word on *Berman*, which, as scholars like Wendell Pritchett and Amy Lavine have noted, was decided just months after the Supreme Court issued its other big opinion of 1954: *Brown v. Board of Education*. In *Brown*, the Court repudiated segregation in public schools and overturned the doctrine of separate but equal that dated back to the 1896 decision *Plessy v. Ferguson*. *Brown* marked the beginning of the Court's turn away from Jim Crow. However, ironically, in *Berman*, the Court gave local officials a powerful tool to impose segregation, knocking down minority and integrated neighborhoods. And often times relegating their inhabitants to, in the words of Jane Jacobs: "Low-income projects that become worse centers of delinquency, vandalism and general social hopelessness than the slums they were supposed to replace."<sup>21</sup> *Berman* allowed officials to impose, in the words of the writer James Baldwin, negro removal.

**James Baldwin:** A boy last week, he was 16, in San Francisco, told me on television ... he said, I got no country and I got no flag. ... They were tearing down his house. Because San Francisco is engaging ... in something called urban renewal. Which means moving negroes out. It means negro removal. That is what it means. And the federal government is an accomplice to this fact.

**John:** How do we make sense of the fact that the very same Court that struck a blow against segregation in public schools upheld urban renewal? Sadly, dating back to decisions like *Euclid* and *Berman*, property rights are in a bit of a constitutional blind spot. But we propose that property rights are civil rights and that they deserve the protections that the Founders intended for them. To protect minorities of all stripes, including minorities of one. People like Max Morris

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<sup>21</sup> Jane Jacobs, *The Death and Life of Great American Cities*, at 4

and Goldie Schneider, even if they are standing in the way of the government's idea of progress. For that reason, Ilya Somin, a law professor at George Mason University, has [proposed adding \*Berman\* – and \*Euclid\*](#) – to the so-called anti-canon of constitutional law – the quasi-official list of cases like *Plessy v. Ferguson* and *Dred Scott* that all feature, per Professor Somin, bad reasoning, terrible real world effects, and the promotion of discrimination and oppression. To *Berman's* addition to the list, we say hear, hear. I'm John Ross. Thanks for listening.

## Credits

Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Kais Ali and Charles Lipper at Volubility Podcasting. We relied mightily on the scholarship of Amy Lavine, Wendell Pritchett, Francesca Russello Ammon, and Jim Ely. We borrowed from several documentary filmmakers, including Dolores Smith, who produced the film [Southwest Remembered](#). As well as Pablo Frascioni and Nancy Salzer's [documentary](#) on urban renewal in [South Norwalk](#), Connecticut. And Ron Wofford's film from [Buffalo](#), New York. PBS produced documentaries on urban renewal in [San Francisco](#) and [Charlotte](#). You also heard from urban renewal promotional materials produced by [Oklahoma City](#), [Cleveland](#), the [federal government](#), and the [American Institute of Architects](#). Jane Jacobs' remarks about [Boston's](#) West End were preserved by the West End Museum. Links to all of the them can be found in the script, which can be found this on episode's webpage. If you want to learn more about redlining, the University of Richmond has a website called Mapping Inequality: Redlining in New Deal America that we borrowed from. The theme music is by Patrick Jaicomo. Audio from the Supreme Court comes from Oyez.