

THE LAW OF SPRAWL: A ROAD MAP by Michael Lewyn*

I. Introduction

In the fall of 2004, I taught a seminar on “The Law of Sprawl” at Southern Illinois University (SIU) School of Law. For the purposes of this article, sprawl is development that (1) extends far from traditional urban centers and/or (2) regardless of its location, is built in a way that requires residents and visitors to be highly dependent on automobiles.¹ Critics of sprawl (including environmentalists, urban politicians, public transit advocates, and historic preservation advocates)² assert that sprawl endangers the stability of older neighborhoods, increases auto-induced air pollution and traffic congestion, causes drivers to become obese through lack of exercise, and freezes people too poor or disabled to drive out of civic life.³ On the other hand, defenders of the status quo assert that sprawl is “the way the majority of Americans eagerly choose to live.”⁴

This essay seeks to guide would-be teachers of a course on sprawl and the law, by

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¹See Oliver Gillham, *The Limitless City* 4 (2002) (listing numerous definitions involving these two factors); Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth and the Fifth Amendment*, 138 U. Pa. L. Rev. 873, 874 (2000) (defining sprawl as “automobile-dependent” development that is usually “on the fringe of settled areas”).

²Gillham, *supra* note 1, at 74 (describing these groups as leading sprawl opponents).

³See *infra* Part III-B and accompanying text (describing these arguments, as well as pro-sprawl responses to such arguments).

⁴ See Gillham, *supra* note 1, at 69.

showing how I taught the course and what I learned from the experience. Specifically:

*Part II explains why students should take, and why I taught, a course on sprawl and the law;

*Part III explains how I introduced the course to students;

*Part IV briefly summarizes the substance of the course;

*Part V describes the tools I used to assess student competence; and

*Part VI discusses lessons that I learned from the course.

II. Why Teach About Sprawl?

Before deciding to teach a course on sprawl, I had to decide whether the course was worth offering in a law school environment. Why would law students want to take a course on sprawl? How would they benefit?

Like some other commonly offered law school electives,⁵ a course on sprawl involves the intersection of law and policy,⁶ rather than focusing purely on legal issues or purely on policy issues. However, sprawl affects the daily life of every single student. Sprawl or its absence determines how we move around every day. In the most sprawling cities and metropolitan areas, most students will be unable to get to classes, jobs or shops without driving.⁷

Streets are often so wide, and traffic moves so quickly, that the basic human act of

⁵Cf. Richard Goodman, Zita Lazzarini, Anthony D. Moulton, Scott Burris, Nanette R. Elster, Paul A. Locke & Lawrence O. Gostin, Other Branches of Science are Necessary to Form a Lawyer: Teaching Public Health Law In Law School, 30 J.L. Med. & Ethics 298, 300 (2002) (23 law schools offer courses on AIDS and the law, and 26 offer courses on bioethics.)

⁶ See *infra* Part IV (discussing legal issues related to sprawl).

⁷ See Lawrence M. Friedman, The Eye That Never Sleeps: Privacy and Law in the Internet Era, 40 Tulsa L. Rev. 561, 563 (2005) (“for almost every adult outside of a few large central cities [] the automobile is an absolute necessity.”)

walking outdoors becomes dangerous.⁸ Public transit service is often inadequate; for example, in some cities buses do not run at night.⁹ By contrast, less sprawling regions give residents a variety of transportation and lifestyle options. For example, New York City has both suburbs where driving is virtually universal and prosperous neighborhoods where most households own no cars.¹⁰

In sum, sprawl affects how and whether students get around every day- whether they can safely and comfortably walk outside, or must spend every minute of travel time pushing cars through the streets. In addition, sprawl affects issues less directly related to urban form. For example, sprawl is a race relations issue insofar as people of color are less likely to own a car, and thus suffer more when public transit service is inadequate.¹¹ Thus, a course on “law and sprawl” belongs in the law school curriculum as much as other policy-related electives.¹²

⁸See Surface Transportation Policy Project, *Mean Streets 2004*, Executive Summary, at http://www.transact.org/library/reports_html/ms2004/exec_sum.asp (visited Feb. 2, 2005) (over 4000 American pedestrians per year killed by automobile traffic, and “the most dangerous places to walk are metropolitan areas marked by newer, low-density developments, where wide, high-speed arterial streets offer few sidewalks or crosswalks.”). Cf. Nicole Stelle Garnett, *Ordering (And Order In) The City*, 57 *Stanford L. Rev.* 1, 35 (2004) (“wide residential streets without sidewalks” now common).

⁹ See, e.g., General Information, Metro Transit, www.gometro.org (visited Feb. 2, 2006) (in Oklahoma City, Oklahoma, buses do not run on Sundays or after 7:30 at night); Michael E. Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 *Marq. L. Rev.* 301, 348-50 (2001) (citing other examples of inadequate transit service).

¹⁰See City Data, Scarsdale, New York, at <http://www.city-data.com/city/Scarsdale-New-York.html> and <http://www.city-data.com/housing/houses-Scarsdale-New-York.html> (visited Feb. 2, 2006) (in town 20 miles from New York City, only 103 of city’s 5662 households lacked a car); City Data, 10162 Zip Code Detailed Profile, at <http://www.city-data.com/zips/10162.html> (visited Feb. 2, 2006) (in one New York City zip code with average household income of over \$100,000, 550 of area’s 943 households had no car).

¹¹ See Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 *Fordham Urb. L.J.* 1183, 1190-91 (2004) (24% of African-American households, as opposed to 17% of Latino households and 7% of white households, own no car, so auto-oriented transportation policies disfavor minorities). In addition, sprawl is related to environmental issues such as air pollution and public health issues such as obesity. See *infra* notes 24-28 and accompanying text (noting vigorous public debate over whether sprawl increases pollution and obesity).

A seminar on sprawl and the law may also prepare students for practice and for the bar exam, by enabling them to review materials discussed in other law school courses. Just as a course in conflicts of law gives students an opportunity to review what they learned in torts, contracts and civil procedure,¹³ my seminar discussed cases involving property law,¹⁴ constitutional law,¹⁵ and even environmental law.¹⁶

III. How I Introduced Sprawl To Law Students

Before addressing legal issues related to sprawl, I needed to define the concept of “sprawl” and to introduce my students to the policy debate over the pros and cons of sprawl. I reasoned that if students did not know why sprawl was controversial, they would have no reason to care about sprawl’s causes or alleged cures.

¹² However, I know of only two ABA-accredited law schools (other than SIU) that have offered courses on sprawl. I hope that this article will cause that number to increase. I have the syllabus for one of the courses (a course on suburbanization at Harvard Law School); the Harvard course is far more policy-oriented and less law-oriented than mine was. See Syllabus, Harvard Law School course on suburbanization (on file with author).

¹³ See Lea Brilmayer and Jack Goldsmith, *Conflict of Laws, Cases and Materials* 1-23 (addressing conflicts issues related to torts), 23-40 and 280-303 (addressing conflicts issues related to contracts), 445-564 (reviewing law of personal jurisdiction). (5th ed. 2002)

¹⁴ The casebook that I usually use to teach first-year property casebook includes cases that I assigned in my seminar. See Jesse Dukeminier and James E. Krier, *Property* 960-69, 1193-99 (5th ed. 2002) (covering *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *infra* notes 38-43 and accompanying text (discussing *Euclid*); *infra* notes 59-60 and accompanying text (discussing *Palazzolo*). And conversely, courses on land use law often expose students to sprawl. See, e.g. David L. Callies, Robert H. Freilich and Thomas E. Roberts, *Cases and Materials on Land Use*, Ch. 7 (4th ed. 2004) (discussing various techniques of land use regulation designed to control sprawl). However, a land use course is limited in that it only focuses on one element of the sprawl puzzle - land use regulation. By contrast, my course covered other causes of sprawl, such as transportation, public housing and education policies. See *infra* Parts IV-B, IV-C and IV-D.

¹⁵ See, e.g., Dukeminier and Krier, *supra* note 14, at 962 (*Euclid* addressed Fourteenth Amendment claim), 1193 (*Palazzolo* addressed claim under Takings Clause of Fifth Amendment); *infra* notes 108-14, 130-31 and accompanying text (discussing numerous equal protection and First Amendment issues relating to education).

¹⁶ See *infra* notes 86-91 and accompanying text.

A. What Is Sprawl?

In my first class, I began by asking students: what is sprawl? Most student response¹⁷ focused on the dispersion of population from cities to suburbs - not surprisingly, since St. Louis (the large city closest to Carbondale, Illinois, where SIU is located),¹⁸ has been America's most rapidly declining big city over the past half century.¹⁹ But no one focused on the auto-oriented nature of suburban development.

I then pointed out that commentators use the term "sprawl" to designate two very different phenomena, either separately or in combination:

(1) *where* land is developed - that is, the dispersal of population from city to suburb.²⁰

Many of my students were aware of this element of sprawl.

(2) *how* land is developed - that is, development that, regardless of

¹⁷ Not all of my 14 students seemed particularly knowledgeable about sprawl- partially, I suspect, because SIU is located in Carbondale, IL, part of a rural region where sprawl is not a major issue of public discussion. See Association of American Law Schools, The AALS Directory of Law Teachers 2005-06 at 144 (listing SIU address); Barbara Taylor Mattis: An Essay, 77 Neb. L. Rev. 719, 728 n. 12 (1998) (SIU "located in a rural area"). I did a WESTLAW search in the ALLNEWS database to find references to "Carbondale" within 20 words of "sprawl" and found not a single reference since 2004. By contrast, a similar search for St. Louis yielded 39 references.

¹⁸ See supra note 17 (SIU located in Carbondale); City Data, Carbondale, IL, at <http://www.city-data.com/city/Carbondale-Illinois.html> (visited Feb. 2, 2006) (Carbondale 93.9 miles from St. Louis, nearest city with over 50,000 people.)

¹⁹ See Cynthia Todd, "Neighborhood Schools" Debated, St. Louis Post-Dispatch, October 15, 1993 at 1A, 1993 WLNR 666419 (in past four decades, St. Louis "lost a greater percentage of population than any other major American city"); Harry Levins, St. Louis Is Losing Population Faster Than Any Other U.S. City, St. Louis Post-Dispatch, Nov. 19, 1997, at A1, 1997 WLNR 889157 (trend continued in 1990s); William A. McGeeveran Jr., ed., The World Almanac and Book of Facts 2006 at 480 (St. Louis had 856,796 residents in 1950, and 343,279 in 2004).

²⁰ See Gillham, supra note 1 at 4 (citing numerous definitions equating sprawl with growth of suburbs). In metropolitan areas where cities have annexed newly developed or undeveloped land, sprawl may involve not just the growth of actual suburbs, but also the growth of neighborhoods that, although technically within the city limits of a regional core city, are nevertheless far from the region's traditional core. *Id.* at 139 ("Some cities, particularly those in the West and Southwest, have been able to expand their boundaries over time by annexing neighboring suburbs.")

its location, is oriented towards drivers and is not particularly welcoming towards pedestrians. In such “sprawling” areas, population density is usually quite low,²¹ and huge roads and parking lots separate buildings from each other.²²

B. Why Is Sprawl Controversial?

In addition to defining sprawl, I also wanted students to know why sprawl mattered: that is, what are the consequences of sprawl? Why should they care whether policy X does or does not promote sprawl? To help students answer this question, I used Oliver Gillham’s *The Limitless City* as a text, because that book comprehensively discusses arguments on all sides of the sprawl issue.²³ Some of the topics that generated the most student interest were:

*Does sprawl increase traffic congestion and air pollution? Environmentalists assert that sprawl leads to traffic jams and dirtier air, as automobile-dependent development forces more people to drive more places.²⁴ Pro-sprawl²⁵ commentators respond that traffic congestion and pollution tend to be highest in dense urban areas, and accordingly infer that low-density

²¹Id. at 4.

²²Id. (“tall buildings are often separated from one another by large areas of roadways and parking” and are on “huge arterial roads”.)

²³ I supplemented the Gillham book with printouts of cases, scholarly articles, and the occasional newspaper story or opinion article. Most (but not all) of the materials cited in this article were read by my students, often in the order cited.

²⁴Id. at 75-76 (sprawl critics assert that sprawl leads to “endless driving” and thus increases traffic congestion and air pollution.)

²⁵Or more accurately, “anti-anti-sprawl” because the leading critics of the anti-sprawl coalition are primarily interested in preventing anti-sprawl land use regulation. Id. at 74-75 (leading critics of anti-sprawl coalition are housing industry and libertarian policy institutions; both groups motivated primarily by fear of land use regulation which might limit property rights.)

development does not exacerbate either problem.²⁶ Students seemed to be more interested in this issue than in any of the other controversies about sprawl; even students from rural areas had occasionally driven in cities and experienced big-city traffic congestion. Some students seemed to lean towards the “density causes congestion” theory, and emphasized that congestion was highest in downtowns. Other students emphasized that traffic congestion was now obnoxious even in suburbia.

*Does sprawl harm human health? Some commentators have asserted that sprawling development discourages walking, thus causing Americans to exercise less and to be more endangered by obesity and other health problems resulting from sedentary lifestyles.²⁷ Defenders of the status quo assert that sprawl’s impact on physical activity, and thus on health, is minimal.²⁸ Students were less polarized on this issue, but were generally aware that they tended to walk less in more auto-oriented environments.

*Is sprawl socially inequitable? Sprawl has caused jobs to migrate to auto-oriented suburbs inaccessible to people too poor or disabled to drive.²⁹ On the other hand, regulations that limit sprawl by restricting suburban development may reduce the supply of buildable land, thus

²⁶Id. at 93-94 (quoting claims that “congestion and VMT [vehicle miles traveled] generally increase with density.”)

²⁷Id. at 118 (citing Center for Disease Control study suggesting that difficulty of walking in automobile-oriented areas reduces physical activity and thus harms public health).

²⁸See, e.g., Jim Wooten, Suburbs Evil? Evidence Thin, Atlanta Journal-Constitution, June 6, 2004, at E6, 2004 WLNR 6343790 (asserting that health-related differences between most and least sprawling cities are miniscule.)

²⁹See Gillham, supra note 1, at 137 (suburbs account for most or all of regional employment growth in most of America, and carless urban poor often must spend hours or buses to reach suburban jobs); Steven Lubet and Cathryn Stewart, A “Public Access” Theory of Lawyers’ Pro Bono Obligations, 145 U. Penn. L. Rev. 1245, 1254-55 (1997) (“With the flight of jobs to distant suburbs, coupled with the decline of mass transit, many of the urban poor are certainly facing a transportation crisis”); Bullard, supra note 11, at 1190 (noting that low-income Americans more likely to depend on public transit).

increasing housing prices and potentially reducing the access of lower-income households to affordable housing.³⁰ Students saw both sides of this issue; they were aware of the difficulty of life without a car, but were also concerned about housing affordability.

*Does sprawl destabilize neighborhoods? As the middle class moves further out into suburbia, rural areas turn into busy suburbs,³¹ while city neighborhoods and inner suburbs may become deserted by the middle class and turn into slums.³² Because of the decline of St. Louis,³³ many students seemed especially sensitive to this issue.

After briefly discussing each of these issues, I also briefly mentioned some controversies that are more technical and thus less amenable to student debate - most notably controversy about the impact of sprawl on agriculture³⁴ and the fiscal impact of sprawl.³⁵

As we discussed all of these issues, students occasionally suggested that regardless of its effects, sprawl is a natural result of the free market and thus should be immune from government

³⁰Gillham, *supra* note 1, at 176 (growth controls “can restrict the land available for development, effectively driving up market prices”).

³¹*Id.* at 77 (“According to the Sierra Club, more than 20 million acres of rural land were lost to sprawl between 1970 and 1990 alone.”)

³²*Id.* at 139-40 (discussing decline of older cities), 139 (“the prevailing trend in the suburbs is from higher-income occupancy to lower-income occupancy as housing stock ages.”)

³³See *supra* note 19.

³⁴*Id.* at 75-77 (environmentalists point out that the United States is losing farmland to suburban development, while libertarian commentators point out that only 5% of country’s land is developed).

³⁵*Id.* at 124-26 (some commentators point out that when new suburbs developed, governments must pay for new water, sewer and roadway networks; others argue that more compact development requires equally expensive investment in sidewalks, public transit, and repair of existing infrastructure). We also spent little time on the aesthetic debate over the alleged ugliness of sprawl, because aesthetic tastes are not easily debated in a coherent way. See Gillham, *supra* note 1, at 143 (quoting arguments on both sides of issue).

interference. This argument gave me the opportunity to point out that the next few weeks of the course would address this very issue- that is, whether sprawl is a result of consumer choice or (at least in part) a unintended consequence of government subsidies and regulations.

IV. The Substance of the Course: How Law Affects Sprawl

One possible objection to my seminar was that sprawl is “a political rather than a legal issue, and [a law school’s job is] teaching lawyers not politicians.”³⁶ To respond to this concern, I wanted to create a course that showed students how sprawl related to their lives as lawyers as well as to their lives as voters.

My seminar focused on four separate ways in which law has shaped urban and suburban America: zoning law, transportation regulations and spending, public housing law and policy, and constitutional issues related to education. In all of these areas, judicial and legislative decisionmaking has often facilitated sprawl.

A. Zoning

I decided that I should begin our discussion of legal issues by focusing on zoning law and similar forms of land use regulation. The study of zoning law traditionally requires students to focus on judicial opinions (the regular diet of most law school classes).³⁷ So by focusing on zoning law and its consequences, I showed students how closely sprawl and law were intertwined.

³⁶Peter W. Salsich, Jr., *Property Law Serves Human Society: A First-Year Course Agenda*, 46 *St. Louis U. J. J.* 617, 626 (2002) (suggesting that some instructors use similar argument to justify failing to include materials about “exclusionary zoning” [i.e., zoning designed to exclude low-income persons from a city or neighborhood] in first-year property courses). See *infra* note 45 (discussing exclusionary zoning case law).

³⁷For example, the casebook I use when teaching land use has a “Table of Cases” taking up over 20 pages. See Callies, *supra* note 14, at xvii-xxxviii.

1. How Zoning Encourages Sprawl

I began with the Supreme Court's first major decision upholding zoning, *Euclid v. Ambler Realty*.³⁸ In *Euclid*, the Supreme Court upheld a zoning law which excluded "all business and trade structures"³⁹ from residential districts, on the ground that such exclusion was rationally related to community health and safety⁴⁰ and thus did not violate due process.⁴¹ After asking students to describe the court's reasoning, I asked them how Euclidean zoning (that is, zoning based on the type of segregation of land uses allowed by the *Euclid* Court)⁴² affects sprawl. My students quickly realized that if a neighborhood's shops could not be in the same zone as its residences, at least some neighborhood residents might not be able to live within walking distance of the shops.⁴³

Of course, Euclidean zoning alone does not make a neighborhood automobile-dependent: if a compact residential zone is only a block away from a commercial zone, its residents can still walk to shops and offices. So to teach students how zoning relates to sprawl, I also needed to show how zoning reduces density- that is, how zoning can keep residences far away from each other and from commercial zones. To illustrate this

³⁸272 U.S. 365 (1926).

³⁹Id. at 389.

⁴⁰Id. at 391-95 (asserting that such zoning "bears a rational relation to the health and safety of the community" and then listing a wide variety of "rational" justifications for ordinance).

⁴¹ Id. at 397.

⁴²See Garnett, *supra* note 8, at 4 ("Euclidean zoning" is zoning based on the "value judgment that the appropriate way to order different land uses is to separate them from one another into single-use zones.")

⁴³Cf. James Howard Kunstler, *Home from Nowhere* 111 (2000) (under Euclidean zoning, "[y]ou can't allow people to live around shopping. . . Then, put all the workplaces in a separate office 'park' or industrial 'park' and make sure nobody can walk to them either.")

point, I assigned *Agins v. Tiburon*,⁴⁴ in which the Supreme Court upheld a zoning ordinance which required single-family residences to sit on at least an acre of land,⁴⁵ based on the municipality's legitimate interest in avoiding the ill effects of urbanization.⁴⁶ Students quickly grasped how the large-lot zoning upheld in *Agins* combined with Euclidean zoning to prevent people from walking to shops or offices: if every house on a residential zone sits on an acre of land, only the houses closest to a commercial street will be within walking distance of a commercial zone. Similarly, large-lot zoning reduces transit use by reducing the number of people who can walk to train or bus stops.⁴⁷

2. Reforms- Deregulation Or More Regulation?

Later in the semester, we discussed possible reforms to land use regulation. We

⁴⁴447 U.S. 255 (1980).

⁴⁵*Id.* at 257 (zoning code allowed plaintiffs “to build between one and five single-family residences on their 5-acre tract.”). Cf. Andres Duany and Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 *Fordham Urb. L.J.* 1445, 1449 (2002) (noting that similar restrictions widespread). I also assigned a couple of state court decisions condemning such restrictions under state constitutions. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, 67 N.J. 151 (1975), cert. denied, 423 U.S. 808 (1975) (Mt. Laurel I) (holding that such “large lot” zoning violated New Jersey Constitution because policies enacted in order to exclude lower-income persons and were thus not supported by any legitimate state interest); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390, 92 N.J. 158 (1983) (Mt. Laurel II) (implementing and reaffirming Mt. Laurel I). However, the Mt. Laurel cases have had little effect, for two reasons. First, most state courts have not adopted the Mt. Laurel court's view. See Julian Conrad Juergensmeyer and Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, sec. 6.6 (2d ed. 2003) (only “[a] few other state courts” have joined New Jersey in limiting large-lot exclusionary zoning). Second, even courts following Mt. Laurel have required fairly modest zoning reforms, thus ensuring that development remains low-density and thus auto-oriented. See John P. Mueller, *Local Government- The New Jersey Supreme Court Reaffirms the Builder's Remedy as the Solution to Mount Laurel Litigation*, 34 *Rutgers L.J.* 1277, 1278 n. 93 (2003) (even in New Jersey, “affordable housing” developments with four housing units per acre common); Robert H. Freilich, *The Land Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 *Urb. Law.* 547, 552 n. 18 (1998) (areas with less than seven housing units per acre generally too thinly populated to support high levels of transit ridership).

⁴⁶See *Agins*, 447 U.S. at 257 (regulation did not violate Takings Clause of Fifth Amendment because of municipal interest in avoiding “conversion of open space land to strictly urban uses thereby protecting against the resultant adverse impacts, such as air, noise and water pollution [and] traffic congestion”). Ironically, the *Agins* court described these ills as “consequences of urban sprawl”, *id.*, thus suggesting that the line between “pro-sprawl” and “anti-sprawl” government regulation is sometimes a thin one.

⁴⁷See Freilich, *supra* note 45 at 552 n. 18 (low density reduces transit ridership).

began by discussing deregulatory measures, such as the elimination of pro-sprawl regulations⁴⁸ and more vigorous judicial scrutiny of land use regulations.⁴⁹ We also discussed reforms that seek to limit sprawl through increased government regulation rather than through deregulation.⁵⁰ For example,⁵¹ we discussed the urban growth boundary (UGB) system implemented in a few states (most notably Oregon).⁵² UGBs are “lines on maps, surrounding areas already marked by ‘urban-type’ development, within which that type of development is to be channeled and encouraged, and beyond which

⁴⁸See George W. Liebmann, *Modernization of Zoning: A Means to Reform*, at www.cato.org/pubs/regulation/reg19n2f.html (visited August 19, 2004) (suggesting a variety of reforms, most notably elimination of minimum lot size, setback and yard requirements, allowing rental units in all new residential construction, and permission of restaurants and convenience stores in all apartment buildings)

⁴⁹See Bernard H. Siegan, *Keynote Address, Oregon Land Use Symposium*, 14 *Envtl. L.* 645, 655-60 (1984) (proposing a wide variety of changes in constitutional doctrine, some of which might outlaw existing zoning laws; for example, due process clause of 14th Amendment should be interpreted to mean that a person’s property values “should not be diminished without compensation unless the government has an extraordinarily good reason for doing so.”)

⁵⁰Of course, regulation and deregulation are not mutually exclusive. See Duany and Talen, *supra* note 45, at 1459-60, 1463-64 (discussing “Smart Code”, a model zoning code which allows lodging, office and retail to coexist in urban areas while discouraging development of rural areas).

⁵¹We also discussed more modest solutions, such as growth management plans allowing new suburban development only where adequate roads and schools already exist to serve such development – thus allowing new sprawl as long as local governments support it. See *Golden v. Planning Bd. Of Town of Ramapo*, 334 N.Y.S. 2d 338, 30 N.Y. 2d 359 (1972) (upholding “adequate facilities” ordinance). We also discussed Maryland’s “smart growth” policy, which sought to limit sprawl by directing state infrastructure funding to already-developed areas. See J. Celeste Sakowicz, *Urban Sprawl: Florida’s and Maryland’s Approaches*, 19 *J. Land Use & Envtl. L.* 377, 413-415 (2004). The continued decline of Baltimore, Maryland’s only city with over 200,000 people, suggests that the “smart growth” policy has not yet had any significant impact. See McGeeveran, *supra* note 19, at 480 (Baltimore lost 100,000 residents between 1990 and 2004).

⁵²Although two other states require the creation of UGBs, Oregon’s system is the oldest and thus the scheme most likely to have had significant results for good or for ill. See Michael Lewyn, *Sprawl, Growth Boundaries, and the Rehnquist Court*, 2002 *Utah L. Rev.* 1, 8 (2002) (Portland, Oregon adopted growth boundary in 1980); *id.* at 4 n. 14 (Washington began to require urban growth boundaries in 1994) (“Boundaries”); Callies et. al., *supra* note 14, at 722 (Tennessee cities began to adopt growth plans in 2001). I note that in 2004, Oregon voters passed Measure 37, a law requiring local governments to compensate landowners for reductions in property values caused by government regulation. See *Macpherson v. Department of Administrative Services*, 2006 WL 433953 (Or. Feb. 21, 2006) (upholding Measure 37). However, Measure 37 may not significantly affect Oregon’s planning system, because it applies only to landowners who have possessed the affected parcel of land since 1973. See Dana Tims, *County OK’s Land Use Claims*, *The Oregonian*, April 14, 2005, at B1, 2005 WNL 5894049.

such development is to be discouraged or forbidden.”⁵³ The Oregon UGB has apparently been quite successful in encouraging redevelopment of Oregon’s urban cores,⁵⁴ but is nevertheless quite controversial.⁵⁵ My class discussed objections to UGBs, including principled libertarian arguments⁵⁶ and concerns about whether UGBs make housing less affordable by reducing the supply of land available for housing.⁵⁷

We also addressed the constitutionality of UGBs and similar anti-sprawl regulations under the Takings Clause of the Fifth Amendment, which requires government to compensate landowners if it “takes” their property.⁵⁸ Our Takings Clause discussion focused primarily on *Palazzolo v. Rhode Island*,⁵⁹ in which the Supreme Court held that whether a land use regulation is a “taking” is determined through a balancing test weighing “the regulation’s economic impact on the landowner, the extent to which

⁵³William A. Stoebuck & Dale A. Whitman, *The Law of Property*, sec. 9.31 at 673-74 (3d ed. 2000).

⁵⁴See Lewyn, *supra* note 52, at 23-29 (Portland, Oregon’s largest city, has retained middle-class residents more effectively than core cities of comparable regions). The statistics from my article were the only material from my writings that I assigned in class; I wanted to assign other commentators’ writings wherever possible because I did not want students to be overly focused on my publicly expressed views.

⁵⁵See *infra* notes 56-57 and accompanying text; Lewyn, *supra* note 52, at 35-50 (discussing numerous attacks upon Oregon UGBs).

⁵⁶See Clint Bolick, *Subverting the American Dream: Government Dictated “Smart Growth” is Unwise and Unconstitutional*, 148 U. Pa. L. Rev. 859, 864 (2000) (asserting that UGB forces Oregonians to “live in more crowded cities, smaller houses, and more congested neighborhoods in order to conform to [government’s] vision of what Portland [the state’s largest city] ‘ought’ to be”).

⁵⁷*Id.* at 870-71 (asserting that UGB has raised housing prices in Portland); but see *contra* Arthur C. Nelson & Susan M. Wachter, *Growth Management and Affordable Housing Policy*, 12 J. Affordable Housing and Community Development L. 173, 178-79 (2003) (Portland-area housing price increases no greater than those in other regions without UGBs).

⁵⁸U.S. Constitution, Amend. V (private property may not be “taken for public use, without just compensation”). Although state Constitutions also have clauses restricting takings, state and federal courts generally interpret such provisions identically. See John M. Payne, *The Final Word on Finality in Regulatory Takings Cases*, 19 Real Estate L.J. 356, 362 (1991) (takings-related case law “substantially identical under state and federal constitutions.”)

⁵⁹533 U.S. 606 (2001).

the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”⁶⁰ Under the balancing test, courts have generally deferred to municipal land use regulations, including regulations intended to limit sprawl.⁶¹ So under current case law, it is unlikely that anti-sprawl land use regulations will face significant Takings Clause challenges.

B. Transportation

Unlike zoning regulations governing land use and lot size, other land use regulations are directly related to cities’ attempts to accommodate automobiles. After discussing zoning, we discussed those regulations, as well as transportation financing policies that encourage sprawl.

1. Where Land Use and Transportation Intersect: Parking

Most American cities require landowners to provide tenants, employees, and visitors with significant amounts of off-street parking.⁶² I began our discussion of this issue by examining *Aspen v. Stroud*,⁶³ a case in which the Colorado Supreme Court

⁶⁰Id. at 617.

⁶¹See Dowling, *supra* note 1, at 883 (“courts consistently have rejected takings challenges to efforts to control sprawl”); Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 *Dick. L. Rev.* 327, 337 (1998) (describing balancing test used to decide Takings Clause cases as “deferential”). However, this balancing test does not apply where government completely eliminates, rather than merely reducing, a parcel’s resale value. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 1020 n. 8 (1992) (regulation generally a taking if it “denies an owner economically viable use of his land” but not always a taking if landowner loses 95 percent, rather than 100 percent, of resale value).

⁶²See Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 *Va. Tax Rev.* 587, 638 n. 335 (2005) (because of minimum parking requirements, office parks and shopping centers typically devote more than half their land area to parking and driveways).

⁶³532 P.2d 720, 188 Colo. 1 (Colo. 1975).

rejected a Takings Clause challenge⁶⁴ to a city's minimum parking requirements. In support of its decision, the court wrote that "air pollution [is] related to autoists moving slowly around block after block seeking a place to park . . . clog[ging] the streets, air and ears of our citizens"⁶⁵ and held that the city's law thus reduced pollution by forcing developers to "provide parking facilities so that automobiles may be placed in a stall and stilled."⁶⁶ This analysis seemed persuasive at first to students who grew up in automobile-dependent suburbs and rural areas, and thus assumed that the demand for parking is unaffected by government policy.

But then we read materials criticizing minimum parking requirements on three grounds. First, minimum parking requirements, by increasing the supply of parking, push the market price of parking down to zero⁶⁷ - thus encouraging people to drive (rather than walk or take public transit) to jobs and shops in order to take advantage of free parking.⁶⁸ Second, where land is devoted to parking, it cannot be used for commerce or apartments. Thus, minimum parking requirements reduce population density and job density,⁶⁹ which

⁶⁴Id. at 721, 188 Colo. at 4.

⁶⁵Id. at 723, 188 Colo. at 6.

⁶⁶Id, 188 Colo. at 6. The court accordingly held that the city's ordinance was rational and thus constitutional. Id.

⁶⁷See Richard W. Wilson, Suburban parking requirements: a tacit policy for automobile use and sprawl, 1/1/95 J. Am. Plan. A. 29, 34, 1995 WL 12344761; Richard Shoup, The High Cost of Free Parking 1 (2005) (99% of American auto trips involve free parking).

⁶⁸Id. at 185-91, 212 (cost of average parking space is about \$127 per month; thus, government-mandated parking gives commuters a subsidy of \$5.77 per day (127/22) by encouraging free parking).

⁶⁹Id. at 133-35. Minimum parking requirements also reduce density indirectly, by forcing developers to spend money on parking that could have been used to build shops or apartments. Id. at 133.

in turn makes commercial and multifamily areas less walkable and more auto-oriented.⁷⁰ Third, minimum parking requirements often ensure that land facing streets is used for parking lots, thus forcing pedestrians to walk through visually unappealing parking lots in order to reach their destinations.⁷¹

One solution to the side effects of minimum parking requirements would be to simply repeal parking laws and allow the free market to respond to parking demand. But a free-market parking policy might be politically infeasible due to concerns about “spillover parking”: that is, the possibility that visitors to shops, offices and apartment buildings might park on adjacent residential streets, thus antagonizing residents of those streets and causing a political uproar.⁷² We discussed one possible solution to this problem: the “parking permit” system upheld in *Arlington County v. Richards*.⁷³ In *Richards*, the Supreme Court rejected an equal protection challenge to a zoning ordinance that prohibited nonresidents from parking in a neighborhood during certain hours,⁷⁴ holding that the ordinance rationally promoted state objectives such as reducing spillover parking.⁷⁵

2. Land Use and Transportation, Part II: Street Design

⁷⁰See supra note 47 and accompanying text (low density means fewer people can walk to residences, offices or offices).

⁷¹Barbara Marshman, San Jose’s Chance To “Get It Right”, San Jose Mercury-News, June 6, 2004, at 1P, 2004 WNLR 2953397 (buildings “are often set back behind wide parking lots that can be unpleasant to walk through”).

⁷²Shoup, supra note 67, at 433 (describing problem).

⁷³434 U.S. 5 (1977).

⁷⁴Id. at 5-6.

⁷⁵Id. at 7.

After discussing parking regulations, we addressed street design, studying both a law review article discussing state and local government's willingness to "widen, straighten, and flatten streets and roads"⁷⁶ in order to accommodate high-speed traffic,⁷⁷ and case law deferring to such bureaucratic decisions.⁷⁸ Because most of my students owned cars, they were of course sympathetic to government's urge to improve traffic flow. But at the same time, they also realized that streets with fast traffic endanger pedestrians⁷⁹ more than streets with slower traffic, and that wide streets may therefore discourage Americans from walking.⁸⁰ Indeed, Carbondale provided an excellent example of this phenomenon: the city's major commercial street, Highway 13, is a very wide street with very fast traffic. One student lived two blocks from a local restaurant, but nevertheless drove to eat there because she did not feel particularly comfortable crossing Highway 13.

In the long run, cities can make streets more pedestrian-friendly by building (or allowing developers to build) narrower streets. But how can existing streets be made safe

⁷⁶Stephen H. Burrington, Restoring the Rule of Law and Respect for Communities in Transportation, 5 N.Y.U. Envtl. L.J. 691, 700 (1996).

⁷⁷Id. at 694 (noting that primary goal of highway departments is typically fast-flowing traffic).

⁷⁸See *Ambrose v. Knoxville*, 728 S.W. 2d 338 (Tenn. App. 1987) (holding that conversion of two-way street to one-way traffic did not unconstitutionally take away neighboring landowners' right to ingress and egress, because allowing damages from "change in flow of traffic" would "completely obstruct the building of roads and highways"). When governments make a street one-way, they effectively widen that street by giving motorists an extra lane or two to drive upon, and thus increase traffic speed. See Richard Stradling, Legislator turns against one-way streets in the capital, *The News & Observer*, August 21, 2001 at B1, 2001 WL 3479103 (suggesting that one-way streets "encourage people to drive too fast and make pedestrians feel as if they're in the front row of a NASCAR race.")

⁷⁹See Burrington, *supra* note 76, at 704 ("the probability of a pedestrian being killed is 3.5% when a vehicle is traveling at 15 miles per hour, but increases more than ten-fold to 37% at 31 miles per hour and increases to 83% at 44 miles per hour.")

⁸⁰Id. at 705 (suggesting that fear of fast traffic reduces walking and bicycling).

for pedestrians? Some cities have tried to solve this problem through a variety of traffic-slowing street devices collectively known as “traffic calming.”⁸¹ Because the merits of various traffic calming measures involve highly technical issues,⁸² this issue provoked little student discussion.

3. Where We Develop: Highway Policy

For the first few weeks of the course, we focused on the “how we develop” element of sprawl: that is, how government regulation makes both cities and suburbs more auto-oriented and less pedestrian-friendly. But transportation policy also affects *where* land is developed: new highways open up land on the urban fringe for development, by facilitating suburbanites’ commutes to the urban core.⁸³ My class discussed the pros and cons of possible transportation policy reforms, including reducing highway spending and expanding public transit to mitigate the impact of sprawl upon nondrivers.⁸⁴ Students were divided on these issues; some emphasized the difficulty of persuading suburbanites to use public transit and the possible improvements in traffic

⁸¹ See Federal Highway Administration, Traffic Calming Measures, at www.fhwa.dot.gov/environment/tcalm/part2.htm (visited August 26, 2004) (listing wide variety of devices, such as speed humps raised across roadways to slow traffic and medians in center of roadways).

⁸² Id. (example of detailed discussion, with links to a variety of technical materials).

⁸³ See Gillham, *supra* note 1, at 36. Cf. Bullard, *supra* note 11, at 1186 (noting that “80% of all surface transportation funds is earmarked for highways and 20% is earmarked for public transportation”).

⁸⁴ See Gerald Frug, *Beyond Regional Government*, 115 *Harvard L. Rev.* 1763, 1814 (2002) (endorsing shift of resources towards public transit because “access to jobs a necessity for residents of poor neighborhoods”); Paul Weyrich, *The Record*, Putting the Mass Back in Transit, *The Record*, June 4, 2000, at O01, 2000 WLNR 1880329 (growth of transit ridership also benefits drivers by taking cars off road and thus reducing traffic congestion); but see Wendell Cox, *Mass confusion over mass transit*, *Washington Times*, May 19, 2001 at A10, 2001 WLNR 367044 (noting that transit’s share of commuters still very small). I note that these issues were especially salient to SIU students, because St. Louis (a city familiar to many of my students) is in the process of expanding its light rail system. See generally *Citizens for Modern Transit* website, at www.cmt-stl.org (visited May 5, 2005) (describing history and possible expansion of St. Louis system); *supra* note 18 (St. Louis is large city closest to SIU).

speed from new highways,⁸⁵ while others emphasized the convenience of expanded public transit.

But even here we discussed more obviously legal issues, such as the impact of the National Environmental Policy Act (NEPA)⁸⁶ upon transportation policy. NEPA provides that federal agencies shall prepare detailed statements about the environmental impact of “any major Federal actions significantly affecting the quality of the human environment”⁸⁷ (including federally funded highways)⁸⁸ and that such statements shall “review all reasonable alternatives to the proposed action.”⁸⁹

My class discussed two cases in which highway opponents asserted that government agencies had violated NEPA by failing to adequately consider expanded public transit as a “reasonable alternative” to highway expansion. In both cases, federal courts held that the government had reasonably rejected transit alternatives because the

⁸⁵In particular, students vigorously debated whether reducing highway construction would increase traffic congestion. See Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 *Northwestern U. L. Rev.* 545, 558-62 (2004) (suggesting that government expansion of roadways may fail to significantly reduce traffic congestion, because when government expands roadways, drivers take advantage of initial improvement in traffic flow by driving more and moving further away from their jobs, thus causing congestion to reappear); but see Wendell Cox, *Induced Traffic: Setting the Record Straight*, at www.heartland.org/Article.cfm?artId=1072 (visited August 27, 2004) (asserting that even if overall vehicle miles traveled increase, new roads cause traffic to flow more smoothly).

⁸⁶42 U.S.C. secs. 4321-4370.

⁸⁷*Id.*, sec. 4332(C).

⁸⁸See *North Buckhead Civic Association v. Skinner*, 903 F.2d 1533, 1537 (11th Cir. 1990) (federal funds would not be made available for highway until environmental impact statement prepared).

⁸⁹*Associations Working for Aurora’s Regional Environment v. Colorado DOT*, 153 F.3d 1122, 1130 (10th Cir. 1998) (Associations), citing 40 C.F.R. sec. 1502.14.

proposed transit alternative would provide little congestion relief.⁹⁰

I asked the class whether congestion relief was the only factor relevant to choosing between highway and transit options. Students pointed out that even if a new or widened road was more likely than a transit improvement to reduce congestion,⁹¹ the transit option might be preferable if it would increase the mobility of people too young, old, poor or disabled to drive. Thus, the courts' narrow focus on congestion virtually assured judicial approval of highway construction.

C. Housing

The housing issue that provoked the most significant class discussion⁹² was public housing policy. I assigned materials showing that the federal government has encouraged public housing for the poor to be located in cities (as opposed to suburbs).⁹³ Students pointed out that this concentration of public housing in cities encouraged middle-class urbanites to move to suburbs, because poverty-packed public housing is not

⁹⁰ See *Associations*, 153 F.3d at 1129 (“defendants reasonably rejected the mass transit alternative on the basis that it would not ameliorate the congestion problem”); *North Buckhead Civic Association*, 903 F.2d at 1542 (11th Cir. 1990) (transit alternative would “would provide little relief for the congestion in the existing street network.”)

⁹¹Of course, this is not necessarily the case. See *supra* note 85 (noting vigorous debate over whether highways in fact reduce congestion in long run).

⁹²I also spent a few minutes discussing the anti-urban lending policies of the Federal Housing Administration (FHA), which insures home-related loans. See Gillham, *supra* note 1, at 36. Between the 1930s and the 1960s, the FHA used loan criteria that excluded most urban neighborhoods by favoring low-density, racially segregated neighborhoods. See Gillham, *supra* note 1, at 36-37, 134-36; Michael H. Schill and Susan M. Wachter, *The Spatial Bias of Public Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. Pa. L. Rev. 1285, 1309-10 (1995). However, FHA standards provoked little class discussion, perhaps because the FHA's most discriminatory policies ended in the 1960s. Gillham, *supra*. at 135.

⁹³Schill & Wachter, *supra* note 92, at 1292-3 (federal government allowed suburban governments to veto public housing, and federal law “mandated that one unit of substandard housing be eliminated for each unit of public housing constructed. Because most suburbs had little substandard housing, even those that wished to participate in the public housing program were sometimes excluded.”)

the most appealing neighbor.⁹⁴

We discussed the pros and cons of the HOPE VI program, which authorizes local public housing agencies to demolish public housing projects and to create mixed-income communities in their place.⁹⁵ Undoubtedly, HOPE VI makes neighborhoods near public housing more appealing by making them less homogeneously poor.⁹⁶ But not without a significant social cost; HOPE VI projects often reduce the amount of low-income units available on a site,⁹⁷ and the displaced poor must find someplace else to live.⁹⁸ Class materials also included a case rejecting a displaced tenant's claim that the demolition of a public housing project pursuant to HOPE VI was racially discriminatory.⁹⁹

Another possible reform is expansion of the "Section 8" housing voucher

⁹⁴Id. at 1307 ("public housing generates a negative spillover effect in urban neighborhoods" in that neighborhoods near public housing have unusually high poverty even after researchers controlled for other poverty-related variables). See also Lewyn, *supra* note 9, at 309 (public housing projects tend to have unusually high crime rates).

⁹⁵See Ngai Pindell, *Is There Hope for HOPE VI?*, 35 *Conn. L. Rev.* 385, 391-93 (2003) (describing HOPE VI generally, and noting that HOPE VI developments include not only low-income units but market-rate units as well).

⁹⁶See Sean Zielenbach, *Catalyzing Community Development: HOPE VI and Neighborhood Revitalization*, 13 *J. Aff. Housing and Community Dev. L.* 40, 48-50 (2003) (in a sample of neighborhoods affected by HOPE VI projects, income and education levels increased and poverty declined to a greater extent than in relevant cities as a whole).

⁹⁷See Pindell, *supra* note 95, at 395 ("Former housing residents are displaced from their homes [by HOPE VI redevelopment] and are not likely to be able to acquire housing in the redeveloped site.").

⁹⁸And if the displaced poor move en masse to one neighborhood or set of neighborhoods, those neighborhoods may be destabilized just as public housing destabilized urban neighborhoods in the past. See *supra* note 94 and accompanying text (noting adverse effect of public housing upon nearby neighborhoods).

⁹⁹*Reese v. Miami-Dade*, 242 F. Supp. 2d 1292 (S.D. Fla. 2002), *aff'd* on other grounds, 2003 WL 22025458 (11th Cir. July 14, 2003). (rejecting claim that HOPE VI-related displacement constituted racial discrimination in violation of civil rights legislation and Equal Protection Clause). The court held that there was no evidence of discriminatory intent, *id.* at 1304, and that there was also no evidence of discriminatory impact because nearly everyone affected by the demolition would be African-American, and thus the demolition did not favor other ethnic groups over African-Americans. *Id.* at 1304-05.

program,¹⁰⁰ which provides low-income families with subsidies to rent private apartments.¹⁰¹ Often, voucher recipients are clustered in a few low-income areas,¹⁰² because landlords may refuse to accept Section 8 vouchers¹⁰³ and the federal government does not fund enough vouchers to house all eligible renters.¹⁰⁴ If Section 8 spending was increased and landlords were required to accept Section 8 vouchers, Section 8 recipients might be spread evenly throughout suburbia, poverty might be less concentrated in cities, and urban neighborhoods might be more desirable. However, the cost of fully funding vouchers for all eligible urbanites would be \$94 billion annually.¹⁰⁵ Moreover, government provision of subsidized housing to all poor people might have unintended consequences: if all households earning less than X amount of dollars could use Section 8 vouchers to move to a middle-class neighborhood, households might be tempted to earn less in order to qualify for Section 8- obviously an unwelcome result, and one which would further inflate program costs.¹⁰⁶

D. Education

I began our discussion of education by mentioning an assumption that students

¹⁰⁰The “Section 8” program is authorized under Section 8 of the National Housing Act of 1937. See 42 USC sec. 1437f (codifying Section 8); *People to End Homelessness v. Develco Singles Apartments*, 339 F.3d 1, 3 (1st Cir. 2003).

¹⁰¹ *Id.*

¹⁰² See Howard Husock, Testimony Before House Financial Services Subcommittee on Housing and Community Opportunity, June 17, 2003, 2003 WL 56335361.

¹⁰³ See Mark A. Malaspina, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 *Yale L. & Policy Rev.* 287, 311-17 (1996) (discussing reasons why landlords refuse Section 8 tenants).

¹⁰⁴ See Thaddeus J. Hackworth, *The Ghetto Prison: Federal Policy Responses to Racial and Economic Segregation*, 12 *Geo. J. on Poverty L. & Policy* 181, 183 (2005).

¹⁰⁵ *Id.*

¹⁰⁶ Cf. Husock, *supra* note 102 (suggesting that current Section 8 program already yields such side effects).

universally shared: that urban schools are consistently undesirable, and that any parent who could afford private schools or suburban schools would prefer either to most urban public schools.¹⁰⁷ I then explained that the purpose of my next few assignments was to help the class understand how this state of affairs came about.

We began with the case of *Martinez v. Morales*.¹⁰⁸ In *Martinez*, the Supreme Court upheld state-mandated¹⁰⁹ residence requirements for public schools, holding that such laws further “the substantial state interest in assuring that students provided for its residents are enjoyed only by residents . . . [and] thus does not violate the Equal Protection Clause of the Fourteenth Amendment.”¹¹⁰ Thanks to the sort of state laws upheld in *Martinez*, schooling is generally tied to residence: that is, urban children attend urban schools, and suburban children attend suburban schools.¹¹¹ Because urban children tend to be from poorer households than suburban children,¹¹² the practical impact of *Martinez* is that urban schools tend to have more children from low-income households

¹⁰⁷See, e.g., Gillham, *supra* note 1, at 63 (“White, middle-class families with children apparently are still put off by problems with urban schools”); Vicki Been, Comment on Professor Jerry Frug’s *The Geography of Community*, 48 *Stanford L. Rev.* 1109, 1110 (1996) (author’s friends generally move to suburbs to avoid urban public schools and to avoid paying for private school tuition).

¹⁰⁸461 U.S. 321 (1983).

¹⁰⁹*Id.* at 323 (quoting Texas statutes denying school admission to minor not residing in school district).

¹¹⁰*Id.* at 328.

¹¹¹See Kern Alexander & M. David Alexander, *The Law of Schools, Students and Teachers in a Nutshell* 9 (1995) (“Most state laws require children to attend school in the district in which the student resides.”)

¹¹²See Bob Herbert, *1 in 4 Kids Are Growing Up Poor*, *Denver Rocky Mountain News*, Dec. 21, 1996, at 62A, 1996 WNL 660043 (36% of children in cities live in poverty, as opposed to 17% of suburban children).

than suburban schools.¹¹³

We also discussed the effect of school desegregation case law upon urban school enrollment, studying Supreme Court cases holding that:

*where urban school districts had maintained a segregated school system in the past, those districts were constitutionally required to take integrate their schools;¹¹⁴ while by contrast

*heavily white suburban school districts which had never a significant number of African-Americans to discriminate against had no affirmative obligation to integrate their schools.¹¹⁵

Because African-Americans tend to be poorer than whites,¹¹⁶ the courts' attempts to impose racial integration upon urban schools ensured that even urban schools in relatively affluent neighborhoods would sometimes be more poverty-stricken than their suburban counterparts.

I asked students whether this “poverty gap” between city and suburban schools was relevant to schools’ desirability to middle and upper-class parents. Students

¹¹³ See Peter D. Enrich, *Race and Money, Courts and Schools: Tentative Lessons from Connecticut*, 36 *Ind. L. Rev.* 523, 543 (2003) (“bleak pattern” of concentrated poverty “repeats itself in urban schools in many parts of the country”)

¹¹⁴ See *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 201, 209-10 (1973) (prohibiting school systems from “structuring attendance zones . . . [to keep some] schools predominantly white” and holding that racially identifiable schools generally violate equal protection where intentional segregation had occurred in past); Molly G. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 *Harv. L. Rev.* 1334, 1338 (2004) (federal courts affirmatively required urban school districts to redraw attendance zone boundaries to facilitate integration).

¹¹⁵ See *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (suburban schools in Detroit had no affirmative obligation to desegregate because they had never engaged in racial discrimination); *Id.* at 804 (Marshall, J. dissenting) (in some Detroit-area suburban schools, less than 2% of students black).

¹¹⁶ See McGeeveran, *supra* note 19, at 84 (throughout past half century, African-Americans have been poorer than whites).

suggested that most parents prefer homogenously middle-class schools, because parents perceive that students from lower-income households have more discipline problems¹¹⁷ and achieve less in school than middle- and upper-class children.¹¹⁸ It logically follows that residence requirements and school desegregation, by ensuring that urban schools are packed with poverty, make urban schools less desirable to middle-class parents than suburban schools.

My class focused on the advantages and disadvantages of two possible solutions to this problem:¹¹⁹ school financing litigation and school vouchers. The first solution seeks to change the school financing system. Generally, American public schools are financed with local property taxes.¹²⁰ As a result, low-income school districts with a small tax base have less money to spend on education than do high-income suburban

¹¹⁷Hoots v. Pennsylvania, 118 F. Supp. 2d 577, 611 (W.D. Pa. 2000) (“The Court is well aware of the disheartening correlation between race and poverty on the one hand, and disciplinary problems in children . . . on the other, which plagues contemporary America.”); Joseph Lintott, Teaching and Learning in the Face of School Violence, 11 Geo. J. on Poverty L. & Policy 553, 555 (2004) (school violence “more likely in poor, urban communities” than in suburbs).

¹¹⁸See Reed v. Rhodes, 1 F. Supp. 2d 705, 739 (N.D. Ohio 1998) (“children reared in lower socioeconomic status [households] tend to be less intellectually prepared for school which ultimately impacts on the child’s achievements”); James Traub, What No School Can Do, at <http://www.augsburg.edu/education/edc480/noschool.html> (visited June 29, 2005) (“You could have predicted the fourth-grade test scores of all but one of [New York] city’s 32 districts merely by knowing the percentage of students in a given district who qualified for a free lunch . . . In other words, good schools aren’t doing that much good, and bad schools aren’t doing that much harm.”)

¹¹⁹We also spent a smaller amount of time on a third solution: requiring suburban schools to take their “fair share” of low-income students. See McUsic, supra note 114, at 1336 (asserting that “social science research [shows] . . . that the best educational results are attained when poor children are included in a predominantly wealthier school.”) Students questioned whether this solution would be practical in a large metropolitan area where suburbs sprawled for dozens of miles, and thus might be located far away from poor urban cores. See Giles Whittell, Jobless in Seattle as slump bites, The Times, Dec. 5, 1998, at 18, 1998 WNLN 6126745 (asserting that Seattle’s “suburbs sprawl for 60 miles”); Alan Thein Durning, Pedestrian Paradise, Sierra, May 15, 1997 at 36, 1997 WNLN 3849951 (Portland’s suburbs “sprawl over hundreds of square miles”).

¹²⁰See C.M.A. McCauliff, Distant Mirror or Preview of Our Future: Does Locke v. Davey Prevent American Use of Creative English Financing for Religious Schools?, 29 Vt. L. Rev. 365, 378 (2005).

districts.¹²¹ In numerous states, schoolchildren have sued to eliminate this inequality, usually under state constitutional provisions requiring that public schools provide students with “some measure of equality[with other students or] . . . a certain minimum level of education”.¹²² But even where urban school districts spend more than their suburban counterparts, such spending has failed to make urban schools palatable to suburbanites. For example, in Kansas City, Missouri, court-ordered spending¹²³ caused Kansas City to spend three times as much on schools as some suburban school districts¹²⁴ - yet test scores in Kansas City did not improve relative to those of students in other Missouri school districts,¹²⁵ and the percentage of whites in Kansas City schools actually *decreased* from 25% in 1992 to 14% in 2004.¹²⁶ Thus, school finance equalization is unlikely to reduce sprawl.

Another alternative to current school assignment policies is some form of voucher system. Under voucher systems, urban schoolchildren can escape low-prestige urban

¹²¹Id. at 400; McUsic, supra note 114, at 1348-49.

¹²²Id. at 1346.

¹²³See *Missouri v. Jenkins*, 515 U.S. 70, 74-79 (1995) (briefly describing background of desegregation litigation that led to Kansas City’s enormous expenditures).

¹²⁴Id. at 99 (Kansas City schools spent between \$7665 and \$9412 per pupil, while suburbs spend between \$2854 and \$5956 per pupil).

¹²⁵See McUsic, supra note 114, at 1352-53.

¹²⁶See Celebrating 50 years of preparing teachers, *Kansas City Star*, November 3, 2004, at 10, 2004 WNL 4543508 (by 2004 only 14% of city students white) (no author listed); Elizabeth Levitan Spaid, “Magnets” Attract in Kansas City, *Christian Science Monitor*, June 15, 1992, at 12, 1992 WNL 979212 (in 1992, 25% of city students white). Thus, Kansas City schools probably became even more dominated by low-income students, because in Kansas City blacks are generally much poorer than whites. See Mark Kind & G. Scott Thomas, Study shows big gap in household income between black, white, *Kansas City Business Journal*, Jan. 3, 2003 at www.bizjournals.com/kansascity/stories/2003/01/06/story4.html (visited Aug. 16, 2005) (median white household income was \$49,785 while median black household income \$29,378).

public schools by using public funds to attend other schools.¹²⁷ A voucher plan could allow students to attend private schools,¹²⁸ or could be limited to public schools.¹²⁹ Under either version, vouchers would make cities more competitive with suburbs by encouraging families to live in cities without sending their children to unpopular urban public schools.¹³⁰

After studying the hypothetical benefits of vouchers, we examined the effects of the actual voucher plan upheld in *Zelman v. Simmons-Harris*.¹³¹ In that case, the Supreme Court upheld a voucher system in Cleveland, Ohio against an Establishment Clause challenge.¹³² After discussing the Court's Establishment Clause analysis, I asked the class to focus on the facts of the case, asking students the following questions:

*Was the voucher program likely to help middle-class families who could afford to move to suburbia? Students saw that the program was essentially limited to low-income families, because families with incomes below 200% of the poverty line were

¹²⁷See Lewyn, *supra* note 9, at 372 (“Under a voucher system in its purest form, money spent on schooling [would] go directly into the pockets of families with school-age children, who could spend their voucher wherever they pleased--in either public or private systems.”) (citations omitted).

¹²⁸*Id.* at 372-78 (discussing pros and cons of allowing use of vouchers to support private school attendance).

¹²⁹*Id.* at 378-79 (discussing pros and cons of “public schools only” voucher plan).

¹³⁰See Jonathan Rauch, *Reversing White Flight*, *The Atlantic Monthly*, October 2002, at 32, 32 (vouchers would encourage families “to move to an undesirable public-school district and send[] their children to a private school” thus helping “to revitalize and integrate poor neighborhoods.”)

¹³¹536 U.S. 639 (2002).

¹³²*Id.* at 648-63. The Establishment Clause of the First Amendment prohibits government action “respecting an Establishment of Religion.” U.S. Const., amend. 1. This clause has been interpreted to mean that states may not enact laws that “have the purpose or effect of advancing or inhibiting religion.” *Zelman*, 536 U.S. at 648-49 (citation omitted).

given priority for vouchers.¹³³ Thus, Cleveland’s voucher plan did nothing to encourage middle-class families to stay in the city of Cleveland.

*Why was Cleveland’s voucher program limited to the poorest families? Students suggested that a program assisting only the poorest students might cost taxpayers less than a program which would also assist middle-class families. This comment brought out a practical problem with vouchers: a truly universal voucher program might be more expensive than the status quo.¹³⁴

V. How I Monitored Student Progress

At SIU, seminars are traditionally considered “paper courses”- that is, courses centered around a long paper. My course was no exception; I expected students to turn in a paper of at least 25 pages. The paper could be on any topic related to sprawl.

In addition to requiring a final paper, I monitored student progress by requiring three preliminary assignments:

*an outline of the paper midway through the semester, to ensure that students had at least thought of a topic, and that two students were not planning to write about the same topic;

¹³³Id. at 646. Even if middle- and upper-class Clevelanders had been eligible for vouchers, they might not have been likely to use them in great numbers, because some educational options available to suburbanites were not covered by the city’s voucher plan. Suburban public schools refused to participate in the voucher plan, id. at 647, and the voucher grants were limited to \$2,500, below the tuition of many Cleveland-area private schools. Id. at 686, 705 (Souter, J., dissenting). Given the limited usefulness of city-offered vouchers, many well-to-do Clevelanders might still have preferred suburban public schools to living in the city and choosing from the voucher plan’s limited menu.

¹³⁴See Paul Boudreaux, *Vouchers, Buses and Flats: The Persistence of Social Segregation*, 49 *Vill. L. Rev.* 55, 59 (2004) (“The weightiest criticism of school vouchers is that their tremendous cost makes it unlikely that a government will ever be able to provide them to the entire school population.”). It is not clear, however, that costs would be so “tremendous” if a voucher plan was limited to public schools and suburban schools were required to accept vouchers, so that urban students could move to suburban public schools but not the most expensive private schools. Under such a plan, government might have to spend more on transportation, but would not have to pay for private school tuition. But cf. supra note 118 (transportation difficulties could make it impractical for urban students to attend schools of most far-flung suburbs).

*an 20-minute oral presentation about student papers two-thirds of the way through the semester. The oral presentations ensured that students knew enough about their papers to talk about them long before the end of their research. After each presentation, I not only gave the students written feedback, but reserved a few minutes for other students to comment about the presentations; and

*A rough draft due a few weeks before the end of the semester, to ensure that students actually followed up on my comments.

The papers were generally reasonably adequate, though their topics varied tremendously. I gave students wide latitude regarding topic choice, demanding only that topics: (a) not parrot an already-published work of scholarship, and (b) have something to do with sprawl. The best papers focused on regional issues, addressing issues such as the impacts of Wal-Mart and of highway bypasses upon the small towns of southern Illinois.¹³⁵

In addition to the paper, I gave a short midterm exam in order to ensure that students understood the assigned readings. The test informed students about a hypothetical developer's plan to build a compact, pedestrian-friendly neighborhood, and asked (a) how several zoning ordinances (all quoted in the examination) affected its plans and (b) whether any of the ordinances were unconstitutional.¹³⁶

¹³⁵Other topics included: the costs and benefits of the St. Louis light rail system, state courts' interpretation of statutes governing school residency requirements, an empirical analysis of the relationship between states' growth management efforts and the frequency of regulatory takings claims in those states, traffic calming, municipally owned public parking, highway congestion pricing, recent regulatory takings case law, farmland preservation in Illinois, environmental law as a barrier to New Urbanist development, the relationship between sprawl and obesity, the relationship between sprawl and pollution, and exclusionary zoning.

¹³⁶Nearly every student saw that most of the ordinances were probably constitutional given the courts' general policy of deference to municipal land use decisions. See *supra* Parts IV-A and IV-B (discussing

V. Lessons Learned

Students were generally quite satisfied with the course. SIU's evaluation form asks students to rank courses and professors on a 5-point scale (ranging from "very poor" to "very good") as to a variety of factors, including "Professor's Choice of Course Content."¹³⁷ Every single student ranked course content in the top three categories (that is, "satisfactory", "good", or "very good.") The only substantive student criticism was that I could have discussed possible paper topics earlier in the semester – a deficiency easily eliminated with a short lecture or handout.

I might have been able to create more stimulating discussions if I had been more aware of the students' backgrounds - so the next time I teach a seminar on sprawl, I will try to get a better sense of the students' background and interests at the start of the semester, perhaps by handing out a survey at the start of the semester asking about students' background (urban, rural, or suburban) and about their preexisting knowledge and views (if any) about sprawl and related issues. I would share the results of my survey with the class, so students would have a better idea about other students' backgrounds and attitudes.

Because I was not as technically proficient in the fall of 2004 as I am now, I did not use classroom technology as effectively as I could have. In particular, I failed to use visual aids in situations where pictures might have been more effective than words. For example, I think my students would have discussed traffic calming more intelligently if I

case law).

¹³⁷The evaluation form also asked about my knowledge of the course, my organization of the course, my in-class performance, my relationship with students, and my overall teaching ability. However, course content is the issue most relevant to other persons who might teach the course, so I need not discuss the other issues.

had used websites or a slide show to explain the various types of traffic calming devices¹³⁸ rather than relying upon xeroxed pictures in handouts.

Finally, the limited amount of time available in one semester required the omission of certain issues that have received scholarly attention and are at least somewhat relevant to sprawl. For example, I did not teach about the relationship between tax policy and sprawl,¹³⁹ or the use of eminent domain for urban redevelopment.¹⁴⁰ And if I teach the course in a large city, I would like to bring in more guest speakers to discuss sprawl-related issues from an insiders' perspective.¹⁴¹

VI. Conclusion

The purpose of my sprawl seminar was twofold: First, to inform students about the nature and causes of suburban sprawl - what it is, why it is controversial, why it occurs, and what (if anything) might be done about it. Second, to show students how sprawl was relevant to them not just in their capacity as citizens, but in their capacity as lawyers. By assigning a variety of materials on land use regulation, transportation regulation, housing policy, and education, I was able to meet both goals.

¹³⁸See supra notes 81-82 and accompanying text (discussing traffic calming).

¹³⁹See, e.g., Mann, supra note 62, at 634-40, 647-50, 654-57 (asserting that tax deductions for work-related parking fringe benefits, sales taxes on vehicles, and interest on home mortgages encourage driving and sprawl, and suggesting a wide variety of tax reforms).

¹⁴⁰See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (upholding city's taking of private land in order to benefit large regional employer, where city's goal was to revitalize its ailing downtown). But see Gillham, supra note 1, at 41-45 (such "urban renewal" historically counterproductive because it destabilized neighborhoods and destroyed existing businesses).

¹⁴¹Because SIU is in a small town with very little sprawl-related controversy, see supra notes 17-18, the only guest speaker I hosted was the city's planning director.

