Vouchers, Buses, and Flats: The Persistence of Social Segregation

Paul Boudreaux

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Education Law Commons, and the Public Law and Legal Theory Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol49/iss1/2

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
VOUCHERS, BUSES, AND FLATS: THE PERSISTENCE OF SOCIAL SEGREGATION

PAUL BOUDREAUX*

I. INTRODUCTION

America's laws to help the poor have a split personality. At the same time that we fund costly subsidies for poor people for housing, transportation, and education, we recoil from even simple measures that would encourage the social integration of poor persons with the middle and affluent classes. For example, the Supreme Court's recent decision rejecting the claim that Cleveland's school voucher program unconstitutionally supported religion hid the real flaw—the statutorily imposed inability of poor persons to use these vouchers in public schools outside the central city. This defect, which prevents city students from bringing vouchers to more effective nearby suburban public schools, will probably prevent voucher programs from serving as any kind of large-scale solution to the problem of ineffective urban public schools. This flaw is also emblematic of America's two-faced legal efforts to help the poor.

In this essay, I briefly analyze three areas—school vouchers, public transportation, and housing assistance—in which programs with good intentions fail to achieve their goals. They fail, in large part, because of a taboo against social integration of poor persons into middle-class society. Unless and until American law relinquishes its preference for social segregation, efforts to help the poor will remain hypocritical and inadequate.

II. AMERICA AND SOCIAL INTEGRATION

The United States was established as a nation with a regard for the common person. Before the French Revolution and Marxism posited the superiority in politics of the workers over the wealthy, the American Declaration of Independence asserted, rather boldly for the 1770s, that "all men are created equal." Of course legal equality of any sort for women and African Americans would not come until much later, but the seed was planted. Unlike societies in which one's social background or caste largely

* Assistant Professor, Stetson University College of Law. I thank Professor Michael Allan Wolf for his comments on an earlier draft.

1. See Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002) (holding that Cleveland's voucher program, which has been in use mostly at religiously affiliated schools, does not necessarily violate Establishment Clause).

2. The Declaration of Independence para. 3 (U.S. 1776). For a discussion of how the Declaration of Independence has been idolized, including an argument that it played a smaller role in developing American democratic thought in the eighteenth century than is commonly assumed today, see generally Pauline Maier, American Scripture: Making the Declaration of Independence (1997).
determined one’s rights and chances for success, the United States proved to be a land of relative social mobility. While nations such as France and Germany rejected the idea of republicanism for monarchs or dictators in the nineteenth century, the United States elected, as perhaps its greatest President, a man born in a Kentucky cabin to illiterate parents. And while most of Europe embraced nobility and aristocracies well into the twentieth century, American discourse proclaimed that even those born poor and with no status could achieve success through diligence and hard work.

In the twentieth century, American society progressed from accepting class mobility to actively facilitating the betterment of poor persons through social programs. The high water mark in political rhetoric was the 1960s’ “Great Society” of President Lyndon Johnson, who promised a “War on Poverty.” Much of the war’s emphasis was on helping poor African Americans break out of the cycle of despair in the urban ghettos. Starting with the school segregation lawsuits, “desegregation” became a watchword of American social policy. In the same year that leading politicians jockeyed to succeed Johnson, Congress enacted the Fair Housing

3. See David Herbert Donald, Lincoln 19, 412-21 (1995) (discussing life of Abraham Lincoln). While France rejected its second republic in the 1850s for a monarchy led by Napoleon’s grandson, Louis-Napoleon, who led his nation into a disastrous war against aristocratic Prussia, the United States in 1860 elected as President Abraham Lincoln, who successfully guided the United States through its Civil War and helped secure laws that freed America’s slaves. See id. (discussing Lincoln’s family and his foreign relations with likes of Louis-Napoleon).


6. See Rabin, supra note 5, at 1272-74 (describing development of programs aimed at helping urban poor).


Act of 1968,\(^9\) which, by outlawing discrimination on the basis of race and religion in housing, promised an unprecedented opportunity for social integration in the United States.

In our new century, however, American law no longer acts as a vanguard of progress for the poor. While the nation’s laws still aspire to equal opportunity, the idea of fostering social integration has atrophied.\(^1\) The dominant social change of the past half-century in the United States has been suburbanization—the separation of the majority of Americans from the densities of the city or the back-breaking work of the farm.\(^2\) Suburbanization has enabled middle-class and affluent Americans to cluster themselves in communities of like persons.\(^3\) Adding the social isolation engendered by the automobile and the development of the service and information economies, it is not a stretch to say that today’s more affluent citizenry encounters poor persons less often on a day-to-day basis than ever before.\(^4\) As the poor have disappeared from the sight of the typical suburban American, they have also ebbed from the nation’s political debate. For example, during the last presidential campaign, the closest in more than a century, both George W. Bush and Al Gore spoke much of helping “middle-class families,” but little of helping the poor.\(^5\)

Robert F. Kennedy and Vice President Hubert Humphrey, argued forcefully for expansion of laws to help the poor. After helping push Johnson out of the race, McCarthy lost interest, Kennedy was murdered, and Humphrey narrowly lost the general election to Republican Richard M. Nixon (while Alabama Governor George Wallace gathered large vote totals as a third-party candidate in the South).


14. See, e.g., Frug, supra note 13, at 1047 (“Every American metropolitan area is now divided into districts that are so different from each other they seem to be different worlds.”).

15. See, e.g., NewsHour: Courting the Middle Class (PBS television broadcast, Sept. 18, 2000), available at http://www.pbs.org/newshour/bb/politics/july-dec00/middle_class.html (discussing how both Bush and Gore courted middle-class voters, nearly exclusively); see also Bush-Cheney 2000 Campaign, Real Plans for Real People: Blueprint for the Middle Class (2000), available at http://www.cnn.com/2000/ALLPOLITICS/stories/09/18/campaign.wrap/finalblueprint.pdf (pledging to help middle-class families through tax cuts and commitment to education);
This is not to say that the United States has abandoned needy persons. Indeed, American laws and policies have created in the past few decades a remarkable range of costly programs to redistribute wealth and provide financial assistance for the poor and the elderly; more than half of the nearly $2 billion federal budget is spent on payments to individuals. What the nation has abandoned—and most likely never truly accepted—is the idea of social integration. While Americans appear willing to be taxed for assistance to the less fortunate, there remains a taboo against laws that encourage poor persons to mix with the more affluent classes. This taboo undermines the effectiveness of social programs in the worlds of education, transportation, and housing.

III. SCHOOL VOUCHERS AND SOCIAL SEGREGATION

Advocates of school vouchers hailed the Supreme Court’s 2002 decision in Zelman v. Simmons-Harris, which upheld Cleveland’s voucher program against a constitutional challenge. Voucher proponents, who include an unlikely alliance of free-market conservatives and poor urban parents, maintain that a competitive marketplace for schools can help improve publicly funded education. While the idea of a single compulsory public school system works well in some areas, voucher proponents maintain the public school idea has plainly failed in many big cities. Hampered by a limited financial tax base and hindered by a large number of poor and/or poorly motivated students, these urban school systems often “perform” far below the median level, as shown by high dropout


16. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 306 (2002) (noting that approximately $1.106 trillion of $1.826 trillion fiscal year 2002 federal budget was spent on payments to individuals). Between 1980 and 2000, about thirty percent was spent on “income-tested” benefits, such as Medicaid, food stamps, housing subsidies and other benefits designed specifically for poor persons. See id. at 343.


20. See id. at 251-54 (setting forth putative advantages of vouchers); see also Editorial, Vouchers Without Politics, WASH. POST, Feb. 12, 2003, at A28 (arguing that students in failing public schools and their parents are helped by vouchers, even if public school union and local politicians oppose them).

21. See Sawhill & Smith, supra note 19, at 251-52 (discussing public dissatisfaction with many public schools).
rates and low test scores. Vouchers offer at least a partial solution, proponents argue. By providing parents with a coupon from the government to pay for education, vouchers offer parents a choice of schools. Just as shoppers compare price and quality before buying a home, car, or groceries, the theory goes, parents may comparison shop for the school that they believe will provide the best education for their dollar. It is free enterprise at work in publicly funded education.

Critics of vouchers, who include many public school teachers and other supporters of public education, argue that the supposed benefits of vouchers are overblown. Funds for the voucher program means less money for public schools. Moreover, critics contend, the market for schools is not like the market for lettuce. Because of the limited monetary value of the vouchers, poor parents may in reality have a choice of only a few private schools—often subsidized religious schools. This phenomenon in Cleveland led to the Zelman suit. By giving parents their pick of schools, critics argue, the government risks a privately spurred segregation of children by race and class—something that the public schools are supposed to guard against, though rarely achieve. 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. With limited “pilot” or test voucher programs, only a small number of students who are highly motivated (or who have motivated parents) can take advantage of them, with the result that many of the best student role models leave the public schools, and the majority of public school students, behind.

22. See id. at 254-60 (discussing history of school voucher idea); see also Zelman, 536 U.S. at 644 (describing sorry experience in Cleveland that warranted voucher system).
24. See Sawhill & Smith, supra note 19, at 251, 254-56 (“[F]amilies will be able to choose from a variety of programs that may be more suited to their child’s interests or learning style than the ‘one-size-fits-all’ public schools.”).
25. See id. at 256-57 (summarizing criticism of vouchers).
26. See id. at 256 (“[A] preoccupation with market solutions will divert resources and political energy from fixing the existing public schools.”).
27. See id. at 256, 263 (noting that most disadvantaged parents will be influenced by convenience and that most private schools have religious affiliations).
29. See Sawhill & Smith, supra note 19, at 264 (discussing fear that voucher system will encourage private segregation by race and class).
30. See id. at 274 (noting that even today’s limited voucher programs are oversubscribed and that many who desire vouchers cannot get them).
Regardless of their supposed drawbacks, however, vouchers are popular with both central city parents and with a majority of citizens. Because many public school systems have been so ineffective, voucher systems seem worth a try. This certainly seemed to be the case in Cleveland. Once a city of nearly a million people of all classes, by the 1990s Cleveland's population had fallen to fewer than 500,000. Like many old cities with a simmering tension between the struggling central city and its more affluent suburbs, Cleveland’s schoolchildren do not go to school with children in the suburbs. In the county of Cuyahoga, which includes Cleveland, there are thirty-one separate school districts—one large Cleveland municipal school district and thirty smaller independent suburban districts.

Poverty in the Cleveland area is concentrated in the central city, where more than one-third of the city’s 90,000 schoolchildren live in poor families. By contrast, in the largest of the suburban school districts—Parma, which is south of the central city and is the fictional home of television’s white working-class hero Drew Carey—less than five percent of the more than 17,000 children live in poverty. At the same time, the region remains racially segregated; in 1998, while nearly seventy-one percent of Cleveland’s students were black and less than twenty percent were white, in Parma more than ninety-four percent of schoolchildren were white, and less than two percent were black.

31. See id. at 251, 278 (discussing shift of public opinion in favor of vouchers).
37. See POVERTY DATA, supra note 35 (asserting that only 784 children in Parma City School District live in poverty).
38. See OHIO DEP’T OF EDUC., FALL ENROLLMENT, BIG EIGHT DISTRICTS (1993-1998) by ETHNICITY, available at http://ode.state.oh.us/www/ims/vitals/big8_fall_ ethnic_enroll.txt (providing demographic information for Cleveland schools);
Not only are Cleveland children far more likely to live in poverty, they are far more likely to attend schools that fail to graduate students with the skills necessary for modern life. As related by the Supreme Court in Zelman:

For more than a generation . . . Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.39

Cleveland's voucher program, enacted by the state of Ohio in 1999, was designed to enable Cleveland schoolchildren to escape the city school system and to "attend a participating public or private school of their parent's choosing."40 Selected poor students in Cleveland receive up to $2,250 to attend either a private school or a suburban public school.41 Private schools qualify for the tuition assistance funds by meeting statewide educational requirements, including an agreement not to discriminate on the basis of race or other factors.42 Any public school system adjacent to Cleveland may receive $2,250 from the state for every Cleveland student that it enrolls, in addition to the standard per-student state funding.43
Through the availability of state tuition funds to attend either a private school or a suburban public school, Ohio’s voucher program would seem on its face to fulfill the goal of offering a real “choice” to selected poor families in Cleveland. The Achilles heel of the Ohio program, however, is that suburban public schools are not required to accept poor Cleveland students; they are free to decline to “participate” in the voucher program.44 Not one of the thirty suburban school districts has chosen to accept Cleveland students, despite the incentive of the $2,250 payment for each student.45 Because the state allows suburban schools to refuse poor Cleveland students, it is not surprising that nearly all of the vouchers are used in subsidized private religious schools in the city—a correlation that led the United States Court of Appeals for the Sixth Circuit to hold the voucher plan an unlawful “establishment” of religion until a five-to-four Supreme Court decision eventually rejected the constitutional challenge.48 The “choice” afforded by the Ohio program was cramped by the unwillingness of the Ohio legislature to require social integration and the unwillingness of the suburban school districts to allow integration. Similar urban voucher programs in other cities also do not require suburban schools to accept poor city voucher holders.

This is not, of course, the first time that American law has missed an opportunity to integrate poor city schoolchildren with more affluent suburbanites. From the perspective of nearly thirty years, it is fair to say that the Supreme Court’s 1974 decision in *Milliken v. Bradley* signaled the end of court-ordered school desegregation as a nationwide means of achieving racial justice, as begun in 1954 by *Brown v. Board of Education*.51 The Supreme Court in *Milliken* held that the federal courts could not order busing across school district lines (lower courts had ordered busing of black Detroit children into suburban schools) without a showing that a district that would receive students had discriminated against black children in the past.52 Thus, suburban districts that had very few black families, such as the suburbs of Detroit in the 1970s, could avoid the

44. See id. at 645-46 (explaining that participating schools are required to accept students as directed by state superintendent).
45. See id. at 647 (stating that only private schools participate in voucher program).
46. See id. (noting that ninety-six percent of vouchers were used in religious schools).
48. See Zelman, 536 U.S. at 663 (reversing judgment of Sixth Circuit).
49. See Sawhill & Smith, supra note 19, at 259 (discussing common aspects of urban voucher programs).
52. See Milliken, 418 U.S. at 744-45 (giving prerequisites for cross-district remedies to be imposed); see also Bradley v. Sch. Bd. of Richmond, 462 F.2d 1058 (4th
introduction portended by Brown.53 A cynical view of history is that the nation (or at least the Supreme Court) was willing to impose integration when it seemed limited to the overtly discriminatory jurisdictions in the South,54 but choked when litigation such as Milliken threatened to bring racial integration to the affluent suburbs of the North.55 In addition to insulating many suburban school districts from integration, Milliken encouraged white families who were skeptical of school integration to move to busing-proof white suburbs—the widespread phenomenon of "white flight."56 In some areas, the combination of busing in the central city and the suburban insulation offered by Milliken has exacerbated social segregation and defeated the promise of Brown.57

Voucher systems of the type in place in Cleveland are similarly flawed. Such programs give with one hand, through vouchers, and take away with the other, by not requiring use of the vouchers in suburban public schools. A more effective means of providing a choice for poor urban schoolchildren would be not merely to subsidize their attendance at a limited number of private schools, but also to require nearby suburban public schools to accept voucher recipients. Such a scheme could be developed without burdening suburban public schools excessively.58 Such a small move toward integration of social classes of students would be a major step toward achieving the ideals of Brown v. Board of Education. Poor urban

Cir. 1972) (reversing district court order requiring metropolitan desegregation), aff'd by an equally divided court, 412 U.S. 92 (1973) (per curiam).

53. See Brown, 347 U.S. at 494 (setting forth sweeping assertion that racial segregation of schoolchildren was unconstitutional, largely based on conclusion that segregation generates sense of inferiority in black children). While the sociologically-based reasoning of Brown had its advantages in the 1950s—chief among which was the ability to order remedies without having to assess on a case-by-case basis the levels of supposed equality under the so-called separate-but-equal system—this approach was largely abandoned sotto voce in Milliken. 418 U.S. 717 (1974). It is ironic that Brown remains perhaps the most famous decision of the twentieth century, considering that its impact was largely nipped in the bud by the far less heralded Milliken fewer than twenty years later.

54. See Donald, supra note 3, at 170-81 (describing difficulties Lincoln faced while lobbying to free slaves in Kansas). The segregation of Topeka, Kansas, was perhaps chosen for the lead case in the litigation because Topeka is not geographically a "southern" city. Historically, however, Topeka was a very "southern" city in that it was the center of the pro-slavery forces in the bloody internal Kansas battles of the 1850s that helped spark, and were then overshadowed by, the American Civil War. See id.

55. It is possible to reconcile Brown and Milliken. Indeed, the conclusion in Brown that an all-black school provides a "feeling of inferiority" in black children as a matter of law now seems somewhat insulting. Brown, 347 U.S. at 494.

56. See David Rusk, Cities Without Suburbs 147 (2d ed. 1995) (discussing "white flight" phenomenon).


58. The program could limit the number of voucher recipients that any one school would have to accept and could include incentives to use vouchers at a variety of relatively convenient suburban public schools.
children would be able to experience some of the opportunities of the suburban lifestyle and, as adults, might be empowered to break down the barriers of social distrust that impede American society.

IV. PUBLIC TRANSPORTATION AND SOCIAL SEGREGATION

Environmentalists and social critics have long argued forcefully that American social policy favors private automobile use at the expense of public transportation. The billions of dollars that are spent on road construction and foreign policy initiatives to secure petroleum dwarf the funds spent on the infrastructure for subways, buses, and other forms of mass transit. What is recognized less often, however, is the bias in American transportation policy in favor of high-profile, middle-class-oriented systems, such as commuter trains, over more mundane, inexpensive solutions, such as buses, the use of which is often associated with poorer persons. Because only bus systems offer to make a significant nationwide dent in America's automobile-based culture, this bias prevents public transportation from achieving its potential.

The twentieth century was the era of the automobile. Starting in the United States and spreading to other affluent nations, the affordability and comfort of the automobile encouraged middle-class citizens to forgo other means of transportation. With the exception of New York City, with its special history of subways and extraordinary population density, no metropolitan area in the United States claims that more than twenty percent of its commuters ride public transportation to work. Similarly, in


61. The United States policy toward the Mideast has been driven in large part by a desire to secure oil supplies. Secretary of State James Baker said in the first Gulf War of 1991 that a primary reason for the war was to protect Mideast oil supplies. See Duane Chapman & Neha Khanna, World Oil: The Growing Case for International Policy, CONTEMP. ECON. POL'y 1 (2000), available at 2000 WL 12922248 (discussing relationship between international policy and oil prices). Critics of the 2003 war in Iraq argued that it was prompted at least in part by a desire to secure oil. See, e.g., Michael Kinsley, Oil-Fueled Confidence, WASH. POST, Mar. 10, 2003, at A21 (criticizing reasons suggested by American public for war).

62. In the New York, New York, Primary Metropolitan Statistical Area (PMSA), which excludes the New Jersey, Connecticut and Long Island suburbs, 47.3% of commuters ride public transportation to work. See U.S. Bureau of the Census, Public Transportation Data, at http://www.census.gov/population/socdemo/journey/msa50.txt (last visited Sept. 25, 2003) (providing means of transportation data for several metropolitan areas). The second highest total was 19.5%, for the Chicago, Illinois, PMSA. Among the lowest percentages were 0.6% for Fort Worth-Arlington, Texas, and 2.4% for Detroit, Michigan, the fifth largest metropolitan area and the home of the nation's automotive industry. The per-
Europe prosperity has recently enabled more citizens to drive and to forgo public transportation. Thus, despite the favorable rhetoric and the billions of dollars spent on comfortable high-technology subway systems, such as those in the Washington, D.C. and San Francisco Bay areas, widespread use of public transportation appears to be inconsistent with the affluent society.

It does not have to be this way. The most celebrated example of successful modern public transportation is not found in San Francisco or Moscow or Tokyo, but in the city of Curitiba, in southern Brazil. With a user-friendly and computer-assisted bus service, Curitiba has built what some have called the world’s best public transportation system. Curitiba is neither small nor poor; its burgeoning population has reached two million and it is one of Brazil’s most affluent cities, with one of the highest automobile ownership rates in the nation. Yet Curitiba has encouraged its citizens to use public transportation by giving its bus system the attention and priority that no city in the United States has ever tried. Curitiba’s buses are efficient: the buses move on dedicated lanes reserved for bus traffic, run as often as every ninety seconds at certain times of day, and hold priority over other traffic at many intersections. Riding is comfortable: passengers pay for their tickets before boarding, enter from raised waiting tubes that minimize the hassles of boarding and alighting, and ride in long, 270-seat articulated buses that are replaced regularly so that they run smoothly and with minimal noise and pollution. The system is also organized well: the buses are run by private companies, under local government regulation, along a spoke system that facilitates bus travel

63. See Roger Blitz & Juliette Jowitz, Traffic in London Cut by 20%, Says Mayor’s Agency, FIN. TIMES, Mar. 1, 2003, at P4 (reporting on impact of changes on congestion). The automobile traffic problem in London, England, which built the world’s first subway system in the nineteenth century, has become so acute that the city government imposed an extraordinary user fee system in the downtown area in 2003 in order to try to discourage driving. See id.


66. See FED. TRANSIT ADMIN., supra note 65, § 3.0 (describing Curitiba’s transit system).

67. See id. §§ 3.0, 3.2 (describing evolution and functioning of bus system).

68. See id. §§ 3.1-3.2 (explaining bus system).
throughout the metropolitan area. The result is that about seventy percent of Curitiba's commuters ride the bus to work each day. In other words, Curitiba's bus system appears to offer both passengers and environmentalists the amenities that are promised by the best public rail systems. Perhaps most importantly, because it uses existing streets, Curitiba's bus system was built and operates with considerably lower costs than what it would have cost to build and operate separate rail lines.

Why is Curitiba's bus system not the model for American public transportation policy? The answer lies, I suggest, in the American bias against bus transportation, which in turn is sparked by the dynamics of social segregation. To highlight this social phenomenon, consider the experience of public transportation in that great hub of the American automobile: Los Angeles, California. Los Angeles poses the greatest challenge for public transportation in the United States—with more than sixteen million people, the Los Angeles area stretches nearly one hundred miles from the beaches of Malibu to the subdivisions blooming in the deserts of Riverside County. Unlike the older cities of the East, which were largely built before the automobile age, most of Los Angeles was built in the twentieth century, with the automobile in mind. Angelenos are legendary for driving from one end of a shopping mall to the other. And drive they must, as the area has not one commercial "downtown," but multiple commercial centers spaced at intervals across the area, connected by a famous freeway system. One result of this dependence on automobiles is poor air qual-

---

69. See id. § 3.2 (describing management and financing of bus system).

70. See id. § 3.0 (summarizing advantages of bus system).

71. See id. §§ 3.1, 3.2. To be sure, the success of Curitiba's public transportation system is not explained solely by the attractiveness of bus lines. For decades, Curitiba's zoning and land use planning laws have encouraged residential and commercial development along the spokes of the major bus lines, as opposed to growth in concentric circles. See id. § 3.1. The major bus lines run in many cases on streets that have been built especially wide to facilitate the dedicated bus lanes. See id. §§ 3.1, 3.2. These attributes might be more difficult to copy in many American metropolitan areas.


73. See generally JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1991) (describing the development of commercial centers in response to suburbs). After studying American habits, especially in the suburbs, Garreau suggested a "law" of society that states, "[a]n American will not walk more than 600 feet before getting into her car." Id. at 117.

74. See id. at 3-15. Los Angeles is not alone in experiencing the phenomenon of multiple commercial centers; nearly every metropolitan area built in the automobile age has been constructed with multiple low-density commercial centers, which Joel Garreau has dubbed "edge cities." See id.
ity, among the nation's worst, as well as the nation's costliest legal efforts to combat air pollution.

The struggle to foster public transportation in Los Angeles has involved not only a battle to entice Angelenos out of their cars, but also a tug-of-war between bus and rail. As recently as the 1940s, a much smaller Los Angeles area enjoyed one of the nation's most extensive trolley systems. Rail was eliminated by the 1950s, however, as the General Motors Corporation purchased most of the region's trolley lines and closed them down in favor of GM-built buses (and perhaps also to encourage automobile sales). When national policy shifted in favor of public transportation after the oil shocks of the 1970s, Los Angeles looked for ways to expand its public transportation. To the surprise of many, the Los Angeles County Transit Authority decided to funnel billions of dollars not into a more extensive bus service, but into the construction of an extraordinarily expensive subway and rail system. Because the area is essentially one big suburb of low-density housing and low-density commercial centers, Los Angeles would appear to be a poor fit for rail transit; a handful of expensive rail lines could never hope to serve more than a small percentage of the city's commuters.

Advocates for Los Angeles's minority citizens, most of whom live in the southern and eastern sections of the county, were outraged by the decision to fund trains instead of buses. A landmark lawsuit brought in

75. See U.S. ENVTL. PROT. AGENCY, OZONE NONATTAINMENT MAP (Aug. 2002), available at http://www.epa.gov/oar/oapps/greenbk/onmapc.html (last visited Sept. 25, 2003) [hereinafter OZONE NONATTAINMENT MAP] (showing classified ozone nonattainment areas); see also 42 U.S.C. §§ 7511-7511d (2000) (describing special requirements for ozone nonattainment areas). For example, Los Angeles is the only area designated as an “extreme” nonattainment region under the national ambient air quality standards for ozone, the pollutant to which Congress has given the most attention under the Clean Air Act. See OZONE NONATTAINMENT MAP, supra.

76. See 42 U.S.C. § 7543(b) (2000) (allowing California to adopt tougher standards for auto exhaust than other states). The sale in California of a large number of “clean fuel” vehicles is required to encourage development of ultra-efficient “hybrid” cars now on the market nationwide. See id. § 7589. For a discussion of the social and financial challenges in trying to improve air quality in Los Angeles, see Dan Tarlock, City versus Countryside: Environmental Quality in Context, 21 FORDHAM URB. L.J. 461, 490-91 (1994).

77. See CHARLES MOORE, LOS ANGELES: THE CITY OBSERVED (1986) (noting that one could ride to base of snow-capped mountains for early lunch, then travel to beach for swim in afternoon and return home by dinner, all without use of car).

78. See MOTAVALLI, supra note 59, at 166 (noting that over one hundred electric trolley systems were replaced with buses between 1936 and 1947).

79. For a critical assessment of the transit authority's decision to favor rail over buses, see Plaintiffs' Amended Complaint at 8-11, Labor/Cmty. Strategy Ctr. v. L.A. County Metro. Transp. Auth., D.C. No. CV-94-05936-TJH (C.D. Cal. 1994), later proceeding, 263 F.3d 1041 (9th Cir. 2001) (resolving dispute over authority of special master to enforce the consent decree).

80. See MOTAVALLI, supra note 59, at 165-67 (discussing inherent cost advantages of bus system in city like Los Angeles).
The 1990s alleged that the transit authority’s preference for rail over bus in effect created a “discriminatory two-tier, separate and unequal system of public transportation—one for poor minority bus riders and another designed to serve predominantly white and relatively wealthy rail riders.”

Stung by the criticism, the transit authority eventually entered into a consent decree that shifted hundreds of millions of dollars from the rail project to the bus system.

The Los Angeles County bureaucracy preferred rail to bus, the plaintiffs had complained, because of class and race. Put bluntly, buses are associated with the poor and dark; public rail transportation is associated with the more affluent and white. In the 1990s, more than eighty percent of Los Angeles bus riders were Latino, African American, or Asian, and more than sixty percent were persons who lived in poverty. Indeed, across the nation, the poor ride buses more often than others; outside of transit-reliant New York City, thirty-eight percent of bus riders are persons who live in poverty—a number that is more than three times the percentage of poor persons in the nation as a whole. A recent study in Richmond, Virginia concluded that the city bus system was politically unpopular because it is viewed as “an inefficient social welfare program designed to accommodate the needs of the urban underclass.”

As one transportation writer has noted, some middle-class commuters shun urban buses because of a perception that buses are for “losers” in American society.

In contrast to the perception in Los Angeles that bus riders usually are poor and people of color, the Los Angeles rail system promised middle-class commuters a more “glamorous” public transportation alternative. In addition to being quieter, faster and often more comfortable, trains are usually more expensive, both for the rider and especially for the


83. See MOTAVALLI, supra note 59, at 104-05, 166-67 (discussing perceptions of race and class among Los Angeles transit riders).

84. See id. at 104.

85. See id. at 165-66 (asserting New York City’s transit riders cover broader socioeconomic range).

86. See id. at 167 (citing study sponsored by Greater Richmond Chamber of Commerce); see also Edwin Slipes, Jr., The Road to Nowhere, STYLE WKLY., Feb. 7, 1997 (citing study and acknowledging role of race in city bus planning).

87. See Bob Schildgen, Ode to the Bus, SIERRA, Jan./Feb. 2002, at 47, 48, 51 (discussing negative perception of bus riders).

88. See MOTAVALLI, supra note 59, at 165 (referring to more “glamorous” idea of train travel). This is not to say that the Los Angeles rail system does not attract poor persons. By many accounts, the rail system as eventually built (and now expanded into areas other than the affluent “Westside”) attracts its share of poor persons and racial minorities; the train system is not a “cappuccino express.” See id. at 102.
governments that finance them. Indeed, it was the expense of the Los Angeles rail system, combined with a perception that the planned rail lines were skewed toward the more affluent west side of the area, that spurred the bus riders organization to allege in court that the financial focus on rail was motivated by race and class discrimination.

Los Angeles is not the only city in which a preference for rail has backfired. In Detroit, cradle of the automobile, millions of dollars were wasted in the 1980s on a tiny monorail system that was dubbed the "train to nowhere"—a debacle from which the automobile-reliant city is now just emerging. It is also telling that the two metropolitan areas where extensive regional rail transit systems were fairly recently built from scratch, despite having enjoyed extensive bus systems for decades, are the San Francisco Bay area (with the Bay Area Rapid Transit) and the Washington, D.C. region (with Metrorail)—two of the most affluent and white-collar-oriented areas in the nation.

The attraction of rail over bus is explained in large part by the continuing appeal of social segregation. Expensive but limited rail systems, such as those in Los Angeles, have been preferred because they offer middle-class and affluent citizens the prospect of riding in a more exclusive environment, away from the poor people who ride the bus. A more effective national public transportation policy, especially for the sprawling metropolitan areas built during the automobile age, would rely far more on efficient bus systems like that of Curitiba, which reserves lanes and stops other traffic for buses. The reluctance to accept social integration hobbles the effort to get Americans to ride public transportation.

V. HOUSING ASSISTANCE AND SOCIAL SEGREGATION

Because one's residence is literally "home," it is not surprising that the desire for social segregation has also been felt acutely in housing law and policy. After all, if affluent citizens can segregate themselves from poor persons through housing, segregation in education and transportation will likely follow. Beyond the well-documented phenomenon of land...

89. See id. at 105 (discussing "built-in" cost advantages of buses); see also generally Schildgen, supra note 87 (describing discomfort of bus passengers).


91. See MOTAVALLI, supra note 59, at 167-68 (discussing Labor/Community Strategy Center litigation).

92. See id. at 175 (discussing Detroit's debacle and plans to build hybrid rail-bus system).

use laws that segregate rich from poor. 94 I focus here on the drawbacks of the federal rental assistance system—popularly called the “section 8” program—that is the nation’s chief policy effort to help poor persons with housing.

In addition to segregating themselves through choice, for decades affluent citizens have used zoning and other coercive laws to discourage the poor from moving close to them. 95 While governments cannot legally prohibit people of limited income from living in certain neighborhoods, 96 laws can make it difficult for low-cost housing (which attracts low-income residents) to be built in areas where they are not wanted. Indeed, today’s most popular technique for limiting dense residential development in suburbia—the zoning requirement that only houses with large lots may be built—is motivated as much by a desire for social segregation as it is by more public-spirited reasons such as controlling “sprawl” or preserving “open space.” 97 Federal law does not prohibit localities from effectively “zoning out” the poor through restrictive land use ordinances. 98 Only a few states require localities to consider the housing needs of the poor—most notably New Jersey, which requires all localities to accept a “fair share” of low-cost housing. 99 In most states, local governments are free to

94. See generally, e.g., CHARLES M. HAAR, SUBURBS UNDER SIEGE (1996) (focusing on effort against exclusionary zoning in New Jersey).

95. The commentary on the phenomenon of using zoning to exclude certain classes of residents—called “exclusionary zoning”—is voluminous. See, e.g., Harold A. McDougall, From Litigation to Legislation in Exclusionary Zoning Law, 22 HARV. C.R.-C.L. L. REV. 623 (1987) (asserting legislature will not react to need for low-income housing without judicial prompting); Henry A. Span, How the Courts Should Fight Exclusionary Zoning, 32 SETON HALL L. REV. 1, 4 (2001) (concluding courts should be used to draw attention to controversies surrounding exclusionary zoning laws and describing need for local legislation to create solutions).

96. See Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring) (stating poverty can never be basis for legal discrimination). Although the Court has refrained from making poverty a “suspect class” under equal protection scrutiny, a classification that on its face discriminated against the poor would be unlikely to withstand legal scrutiny.


98. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269-70 (1977) (holding restrictive land use law is not violation of Equal Protection guarantee unless it is motivated by purpose of discriminating against suspect category, such as racial minority); see also City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 123 S. Ct. 1389 (2003) (applying Arlington Heights to reject challenge to local government’s requirement that zoning change be subject to popular referendum).

99. See S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 718-33 (N.J. 1975) (holding localities must use land use regulations to make variety of housing options available). In response to the epic Mount Laurel litigation, New Jersey codified the requirement, with some exceptions. See N.J. STAT. ANN. §§ 52.27D.310-329 (West 2003). For the final chapter in the dispute that led
enforce the desire for social segregation through restrictive zoning laws, a practice upheld most recently by the U.S. Supreme Court in the 2003 case *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, involving a suburb of Cleveland. Social segregation remains a pervasive aspect of America's residential land use laws.

Segregation in housing law persists even in programs designed specifically to help the poor. Most poor persons who seek public housing do so through their local public housing authorities ("PHA"), regulated by the U.S. Department of Housing and Urban Development. Plans to build public housing projects in suburbs have led to contentious litigation in which middle-class communities have fought tooth and nail to keep public housing, and thus the poor, out of their communities.

Less obvious have been the social segregation effects of the chief federal program to help poor persons find housing in the private market—the Housing Choice Voucher Program. Because all rental assistance plans are authorized through section 8 of the National Housing Act of

to the ground-breaking litigation, see Ronald Smothers, *Ending Battle, Suburb Allows Homes for Poor*, N.Y. TIMES, Apr. 12, 1997, at 21 (reporting Mount Laurel board voted unanimously for zoning ordinance).

100. See, e.g., Bd. of Supervisors of Fairfax County v. DeGroff Enter., Inc., 198 S.E.2d 600, 602 (Va. 1973) (holding unconstitutional under state law county zoning law requiring certain developers to set aside percentage of development for low-cost housing). The Virginia Supreme Court had held that minimum-lot-size laws were an unconstitutional use of the local police power years earlier. See Bd. of County Supervisors v. Carper, 107 S.E. 2d 390 (Va. 1959) (holding statute was unreasonable and arbitrary).


102. See generally Frug, supra note 13, at 1047 (assessing social separations in American communities).


104. See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976) (affirming district court order requiring HUD and Chicago public housing authority to institute program to place public housing tenants in predominantly white suburban neighborhoods). Other lawsuits over the placement of public housing units have proven to be among the most contentious in American civil rights history, as localities have fought fiercely to avoid the siting of largely African American public housing facilities in predominantly white neighborhoods. See, e.g., United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987) (holding defendant liable for intentional racial segregation). For a brief discussion of some of the legal issues surrounding desegregation of public housing and the opposition from middle-class communities, see David Callies et al., *Cases and Materials on Land Use* 582-88 (3d ed. 1998).

105. See 24 C.F.R. §§ 982-983 (2003) ("In the HUD Housing Choice Voucher Program . . . HUD pays rental subsidies so eligible families can afford decent, safe and sanitary housing.")
they are usually referred to as "section 8" programs. Like school vouchers, federal housing vouchers help poor persons pay for private rentals by guaranteeing the landlord that the housing authority will pay a specified amount of the rent. Subsidized housing was an idea that was slow to come to federal law; starting in the 1970s, however, housing policy shifted from an emphasis on publicly run units to the idea of rental subsidies—a change that was consistent with the national policy shift toward free market solutions in law and policy during the past few decades.

Like many programs that rely on private initiative, the section 8 scheme has proven to be both useful for government and popular with citizens. For local authorities, section 8 subsidies have removed the burden of building public housing—those notoriously inefficient buildings that have become known derisively in many cities as "the projects." For poor persons, section 8 assistance offers the promise of social desegregation. Because they are not limited to living in often-dilapidated public housing, vouchers offer the poor the chance to live next door to middle-class families, send their children to middle-class neighborhood schools, and immerse themselves in middle-class society. In part because of the advantages of what is called the "portability" of housing vouchers, demand has far outstripped supply; in 1999, the national average wait for a voucher after application was twenty-eight months. In Miami, Florida, the typical wait was more than six years.

The promise of social desegregation is stymied, however, by the reality of the details. Most notably, the usefulness of vouchers is limited because landlords are not required to accept them. Although the Fair Housing Act prohibits owners of apartment buildings from discriminating on the basis of race, sex, religion, national origin, or familial status, it does not require them to accept voucher holders. As a result, voucher holders often face discrimination in the private rental market. This has led to widespread dissatisfaction among voucher holders, who report that they are unable to find suitable housing.


109. See Peterson, supra note 103, at 140-42, 153-54 (discussing benefits of vouchers vis-à-vis federally funded public housing); see also Housing Choice Voucher Guidebook, supra note 108, at 1-1 to 1-4 (discussing history of federal housing policy).

110. See Peterson, supra note 103, at 141-42 (discussing disillusionment with public housing).

111. See Housing Choice Voucher Guidebook, supra note 108, at 13-1. Portability improved in the 1990s, when administrative hurdles and local residency preferences were loosened at most PHAs. See Peterson, supra note 103, at 160.

112. See Peterson, supra note 103, at 154-55.

113. See id. at 145.
of race, religion, sex or national origin, federal law does not prevent discrimination against housing-subsidy recipients. While lenders of credit may not discriminate on this basis, there is no such restriction in housing law. Accordingly, landlords may refuse to rent to voucher recipients, either because of concerns over their worthiness as renters or because they do not want to integrate their building with persons of a poor social class.

In part because of landlords' reluctance to rent apartments to section 8 recipients, getting a voucher is no guarantee of getting an apartment. According to a recent study of the success rates of prospective tenants, only sixty-nine percent of recipients were able to use their vouchers in large metropolitan areas. For certain areas, the rates are even lower. A 2000 study reported a success rate of only fifty percent for suburban St. Louis County, Missouri (contrasted with a seventy percent rate for the central city), while a California group maintains that less than half of subsidized renters in Los Angeles are able to use their subsidies. The difficulties of finding a landlord who will accept a voucher are exacerbated when market rents rise sharply, as many holders have discovered in recent years.


For an argument that housing rentals should be governed by the requirements of the Equal Credit Opportunity Act, which outlaws discrimination in the granting of "credit" on the basis of receiving public assistance, see Brian S. Prestes, Comment, Application of the Equal Credit Opportunity Act to Housing Leases, 67 U. CHI. L. REV. 865 (2000). For an argument that the prohibition against source of income discrimination should be applied because existing discrimination categories do not provide adequate protection for section 8 recipients, see Kim Johnson-Spratt, Note, Housing Discrimination and Source of Income: A Tenant's Losing Battle, 32 IND. L. REV. 457, 462, 465 (1999).


See Fredrick Kunkle, Housing Vouchers No Magic Key; Rising Rents, Dwindling Choices Thwart Low-Income Residents, WASH. POST., Aug. 5, 2002, at A1 (discussing difficulty of finding affordable housing and landlords who will accept section 8 vouchers in affluent suburban county of Fairfax, Virginia). Vouchers usually pay for seventy percent of the fair market rent for inexpensive housing in an area. See Peterson, supra note 103, at 145 (explaining formulas).
Indeed, the U.S. Department of Housing and Urban Development (HUD) has found that as section 8 vouchers have become popular and more portable to suburban areas, recipients have faced growing opposition in suburban communities. A recent HUD-sponsored brochure advises PHAs on how to address “perceptions” that section 8 tenants are “high-risk neighbors.” In part because of community objections and in part because many landlords refuse to rent to subsidized tenants, HUD has acknowledged that voucher recipients have become excessively concentrated in a few neighborhoods—social segregation that the section 8 program was supposed to ameliorate.

Once again, a major federal program fails to achieve its potential because of a reluctance to accept integration. More than half of the federal budget for housing and community development goes to subsidizing housing under section 8—more than $17 billion in fiscal year 2003. Yet despite the fact that federal housing law is supposed to actively encourage racial desegregation, the rental subsidy program fails to prohibit discrimination against the recipients of subsidies. This flaw ensures that most middle-class families will never have to live near a family on public assistance. It also helps ensure that housing law fails to provide most poor families with the opportunity to live in a middle-class neighborhood.

VI. CONCLUSION

Our expensive federal programs to assist the poor and needy are continually stymied by a reluctance to foster class integration. As fiscal conservatives remind us, simply spending money does not resolve social problems; the rules and incentives of policy often count for more. Thus,


121. See id. at 4 (discussing problem of “significant concentrations” of subsidized units, which helps defeat effort to “deconcentrate” assisted housing).

122. The current Bush administration has proposed transforming the section 8 Housing Choice Voucher Program from a federally run system to a block-grant program in which state and local governments would have the primary say in how to use the funds and set the details; the plan would be called “Housing Assistance for Needy Families,” which echoes the “welfare” law change in the 1990s from the federally-oriented system to a state-oriented “Temporary Assistance for Needy Families.” See U.S. Dep’t of Hous. and Urban Dev., Executive Summary 3 (2003), available at http://www.hud.gov/about/budget/fy04/execsummary.cfm (content updated Feb. 23, 2003).


in the 1990s, the federal “welfare” assistance law was revamped to encourage, among other things, more recipients to seek employment.125 The Achilles heel of many of our social programs is the unspoken taboo against enabling the poor to mix with the more affluent classes, either at school, in transit, or at home. A guiding principle of American social policy towards the poor appears to be, “Take some money but please do not come near us.”

Rejecting integration entrenches fear and distrust among social classes and undermines the effectiveness of many prominent programs. School vouchers are unlikely to give poor students a real choice unless the vouchers can be used not only in a limited number of private schools, but in suburban public schools as well. Public transportation will never be widely attractive or effective unless it fits the automobile-shaped geography of many American cities—something that only the derided bus can provide. Similarly, housing subsidies will never enable poor persons to experience the opportunities of wealthier Americans unless landlords are prevented from discriminating against them. Such changes would require middle-class and affluent Americans to have to rub shoulders, perhaps sometimes literally, with poor persons. Whether Americans are ready to accept this hardship—to put their feet where their money is—will determine whether our social policies for the poor are truly effective or merely lip service.
