Constitutional Law--Equal Protection--Zoning--Snob Zoning: Must a Man's Home Be a Castle?

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NOTES

CONSTITUTIONAL LAW—EQUAL PROTECTION—
ZONING—Snob Zoning: Must a Man's Home Be a Castle?

It is a well-documented fact that a shortage in housing is one of the most critical problems confronting the United States in the 1970's.1 Neither is it a secret that the lack of decent housing strikes with particular intensity at the poor and the black and other minority groups. While the more affluent members of society are able to flee to the wide-open spaces of suburbia, the disadvantaged urban dweller can do little more than watch the central city decay and crumble around him. When, as one study has pointed out, ninety-nine per cent of the vacant land of the twenty largest urban areas is located outside the central cities,2 this problem becomes crucial. Since the people who do move to the suburbs are typically white and those who remain within the central city are generally black, the result of this process tends to be the creation of two economically and racially disparate societies.3

Of course, traditional notions of a truly democratic ethos run directly counter to such a trend. But to millions of Americans living in metropolitan ghettos there exists a far more persuasive reason why suburban areas should be made accessible to minority and low-income groups. The fact is that an ever-increasing number of industrial concerns and businesses are locating plants in suburban areas. The Bureau of Labor Statistics has reported that for the period 1960-1967, sixty-two per cent of all industrial buildings and fifty-two per cent of all commercial buildings were constructed out-

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1. The most well-known exposition of this problem is found in Natl. Advisory Commn. on Civil Disorders, Report (1968) [hereinafter Kerner Report]. In twenty-three cities experiencing racial disorders, "inadequate housing" was high on the list of specific grievances of blacks. Id. at 4. One of the Commission's major recommendations was that the supply of housing should be expanded on a "massive basis"—specifically six million low- and moderate-income housing units by 1968. Id. at 260. See also M. Brooks, Exclusionary Zoning 13 (Am. Soc. of Planning Officials, Planning Advisory Serv. Rep. No. 254, 1970).
3. Kerner Report, supra note 1, at 118-20. The Kerner Report points out that as of 1966, metropolitan areas outside the central city were 96% white. Id. at 118. Furthermore, according to the report the following eleven major cities can expect to become more than 50% black by the indicated dates (Washington, D.C., and Newark, New Jersey, being already in excess of 50% black):

<table>
<thead>
<tr>
<th>City</th>
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<tr>
<td>New Orleans</td>
<td>1971</td>
<td>St. Louis</td>
<td>1978</td>
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<tr>
<td>Richmond</td>
<td>1971</td>
<td>Detroit</td>
<td>1979</td>
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<tr>
<td>Jacksonville</td>
<td>1972</td>
<td>Oakland</td>
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Id. at 216.
side the central cities of metropolitan areas. Moreover, more than fifty per cent of all new jobs created in the 1960's in the standard metropolitan areas were outside the central city. Thus a significant corollary to the inability to move to the suburbs may well be decreased opportunity to obtain desired employment.

It is clear that it is not personal preference that keeps the disadvantaged within the walls of the inner city. Real obstacles preventing the construction of low- and moderate-income housing in suburban areas do exist. Minimum-lot-size requirements—"snob zoning"—constitute one significant obstacle; others include the exclusion of apartments from residential areas and the exclusion of houses with less than a statutorily prescribed floor area. An attack on the legality of snob zoning, then, would represent only one step in the struggle to utilize the land available in suburban areas more fully for housing purposes. Unquestionably, however, an attack on snob zoning would be an important step in that struggle. Whereas the cost of a four-acre lot might be prohibitive for most urban dwellers, the cost of a 6,000-square-foot lot would probably be within the means of many more persons, despite the fact that lot prices may not diminish commensurately with a decrease in minimum lot size. Further, in addition to the effect on one's ability to afford a lot, large-lot zoning may have "significant effects" on the cost of housing as well. For example, builders who might otherwise erect a certain size house on one lot might not do so on a larger lot, following an unwritten rule that the price of a lot

5. Id. at 1-5; KERNER REPORT, supra note 1, at 217. According to NAACP figures, new job openings in the New York City metropolitan area for the years 1952-1966 were in a ratio of seven-to-one in favor of the suburbs over the central city, while in San Francisco the ratio was eight-to-one in favor of the suburbs. Snob Zoning, THE NEW REPUBLIC, Dec. 20, 1969, at 7.
6. M. BROOKS, EXCLUSIONARY ZONING 17 (Am. Soc. of Planning Officials, Planning Advisory Serv. Rep. No. 254, 1970). "When companies move away from a city to a suburb with no living space for blue-collar workers the worker has the option of either travelling to the job from the city or else quitting. In too many instances, civil rights groups say, he's had to quit, and this in turn has contributed to unemployment in city areas." Wall St. J., Nov. 29, 1970, at 13, col. 1.
8. Even if all minimum-lot-size requirements were removed, however, single-family housing may still be not be within the financial reach of the very poor absent extensive governmental subsidy. See KERNER REPORT, supra note 1, at 217. To eliminate effectively the exclusion of the poor and black from suburban housing, any remedial attack requires, inter alia, in addition to the elimination of snob zoning and the creation of a government-sponsored housing subsidy, a reduction of zoning restrictions on minimum floor space and on multifamily dwellings.
9. One acre equals 43,560 square feet.
10. A one-half-acre lot will cost less than a one-acre lot in the same area, but will cost more than half the price of the one-acre lot. See text accompanying note 14 infra.
11. DOUGLAS REPORT, supra note 7, at 213-14.
should be a certain percentage of the total price of the lot plus a completed house. Moreover, snob zoning may result in an increase in the price of land improvements such as streets, sidewalks, gutters, and sewer lines. For instance, in St. Louis County, Missouri, lots of 6,000 square feet had an improvement cost of $1,925 dollars, whereas one-acre lots had an improvement cost of $4,375 dollars. Finally, snob zoning often may have the effect of increasing the price of land available for smaller lots and multifamily units by limiting the amount of land available for these uses.

Moreover, the report prepared by the National Commission on Urban Problems (Douglas Report) has stated: “Large-lot zoning is a common and widespread practice in many major metropolitan areas.” According to that report, twenty-five per cent of the metropolitan communities with populations in excess of 5,000 permit no single-family dwellings on lots smaller than one-half acre. Specific examples may be helpful in understanding the dimensions of this problem. In Connecticut, more than half of the vacant land zoned for residential use in the entire state is zoned to provide for minimum lots of between one and two acres. Of 85,200 acres of vacant land zoned for single-family residential use in Cuyahoga County (Cleveland), Ohio, only thirty-three per cent is zoned to permit lot sizes of one-half acre or less, and seventeen per cent is zoned for lot sizes of two acres or more. Similarly, of the vacant land zoned for single-family residential use in the New York City metropolitan area, ninety per cent requires a minimum lot size of one-quarter acre, and two thirds of this is zoned for one-half acre or larger.

Thus it appears that large-lot zoning is a significant force in preventing a great number of people from gaining access to undeveloped suburban land and its concomitant benefits. This Note will analyze and evaluate the legal theories that may be employed to attack snob zoning in the courts. First, the feasibility of attacking

12. Id. at 214.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id. at 215.
18. Id.
19. Id. at 214-15.
20. At present, much of the attack on exclusionary zoning is directed against those ordinances or laws barring multifamily dwellings. See Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich.), rev’d, 417 F.2d 321 (6th Cir. 1969) (per curiam), cert. denied, 397 U.S. 980 (1970), in which the district court enjoined a proposed referendum on an ordinance of the city council amending the zoning ordinance to authorize a federally approved low-cost housing project, on the grounds that the proposed referendum would impede implementation of federal policy and thus be void under the supremacy clause (U.S. Const. art. VI), and that as the primary motive
snob zoning via the equal protection clause of the fourteenth amendment will be examined. The second part of this Note will delineate alternative judicial responses to snob zoning that are couched in more conventional zoning-law terms.

I. THE EQUAL PROTECTION ATTACK

Perhaps the most far-reaching challenge to minimum-lot-size zoning requirements may be based on the equal protection clause of the fourteenth amendment. 21 The obvious effect of snob-zoning laws is to exclude poor people from certain residential areas solely because they cannot afford the minimum allowable acreage and house. The equal protection clause, it can be argued, does not allow a municipality to enact an ordinance that has this effect. If snob-zoning ordinances did not exist, these same people arguably could move into these areas since they could afford a smaller house on a smaller lot.

In determining whether the above argument will stand up under current equal protection analysis, it should be noted that there exist two quite distinguishable tests for application of the equal protection clause. The traditional analysis—the "rationality" test—is employed typically when a form of economic regulation is under attack. 22 The inquiry under the rationality test is essentially whether behind the referendum was racial prejudice, the referendum would violate the equal protection clause (The court of appeals reversed the decision of the district court because it did not find adequate proof of a discriminatory racial motive.); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), in which the court enjoined defendant municipal corporation from continuing to refuse to issue a building permit for a multiple-family housing project, primarily since the court found that the refusal to re-zone to a high-density-use classification was a direct result of a desire to exclude blacks and other minority groups; Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), in which the court held invalid an ordinance that did not permit apartments anywhere in a township. See also M. BROOKS, EXCLUSIONARY ZONING 18-22 (Am. Soc. of Planning Officials, Planning Advisory Serv. Rep. No. 244, 1970) (discussion of the Ranjet case).

21. It is assumed for purposes of part I of this Note that the only objectionable feature of the snob-zoning statute is in its de facto discriminatory effect against the poor. For a treatment of statutes that are purposefully discriminatory, see text accompanying notes 78-80 infra.

In addition, an initial question of standing might be raised if minimum-lot zoning ordinances are challenged under the equal protection clause. A detailed consideration of standing is beyond the scope of this Note. However, some preliminary considerations of standing are in order. Basically two types of plaintiffs might bring an equal protection challenge: (1) land developers who desire to build housing of a type not permitted in an area by the zoning ordinance, and (2) potential low-income residents who desire to purchase a lot on a large-lot-zoned area but who cannot afford the minimum lot permitted. The latter category would be alleging the direct injury of a statutory denial of an asserted constitutional right, and should have standing on that basis. The land-developer plaintiff, however, would find it more difficult to establish the requisite standing. Such a plaintiff would seem to be asserting the rights of the excluded potential resident, and standing would probably not exist on this basis unless the court found that this was the only practical manner in which the contemplated action could be brought.

the classification drawn by the legislation bears a conceivably reasonable relation to a permissible state objective sought to be achieved by the statute. If such a relation does exist, the statute will be valid; only the “invidious” or “arbitrary” classification is outlawed. Under this approach the courts give great deference to legislative classifications, with the result that in only one case in the past three decades has the Supreme Court struck down economic legislation through use of the rationality test.

The most recent application of the rationality test by the Supreme Court, which resulted in the validation of a state law, is **Dandridge v. Williams**. **Dandridge** involved a challenge to the Maryland “standard of need” which imposed an upper limit on the amount of assistance a family might receive under the Federal Aid to Families with Dependent Children (AFDC) program. The suit was brought by several AFDC recipients with large families who argued the the maximum-grant limitation discriminated against them in violation of the equal protection clause because of the size of their families. The Supreme Court reversed a federal district court decision that had held the grant limitations to be in violation of the equal protection clause. The Court pointed to several valid state concerns—such as providing incentives for family planning and encouraging gainful employment—that the grant limitations were designed to achieve. Although admitting that the Maryland statute contained imperfections that might create hardships for some, the Court saw nothing invidious or irrational in these statutory discriminations. Thus applying the rationality test, the Court found the Maryland statute plainly valid, and concluded with a reminder that the federal courts may not impose upon the states their own views of “wise economic or social policy.”

Applying the approach used in **Dandridge** to minimum-lot-size

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25. Morey v. Doud, 354 U.S. 457 (1957), in which the Court invalidated the Illinois Community Currency Exchanges Act of 1955 which imposed certain restrictions on all currency exchanges handling money orders, except those handling United States Post Office, American Express Co., Postal Telegraph Co., or Western Union Telegraph Co. money orders. The essence of the Court’s holding was that the exceptions would not serve the purpose of the Act (protection of the public), for although American Express’ characteristics may have made it unnecessary for the statute to subject it to regulation presently this might not be so in the future. Moreover, the Court was deeply impressed by the fact that the statute created a “closed class” and thus gave American Express an economic advantage.
29. 397 U.S. at 485. According to the Court, the fact that this Maryland statute was social, and not economic, legislation bearing on the “most basic economic needs of impoverished human beings” was no reason not to apply the traditional “old” analysis. 397 U.S. at 485.
requirements would probably result in those requirements being sustained. The control of population density has long been recognized as a valid state objective,\textsuperscript{30} and many other state concerns—such as water pollution control—could also be set forth in response to an attack on minimum-lot-size requirements. Moreover, zoning laws appear to be an extremely rational way to achieve these objectives, and the discrimination resulting from these laws seems no more invidious than that alleged in \textit{Dandridge}. Thus, the rationality test under the equal protection clause does not appear to provide a sufficient doctrinal basis on which a successful attack against snob zoning can be brought.

In certain cases, however, the Supreme Court has employed a more vigorous test, which may be designated the “close-scrutiny” test.\textsuperscript{31} Under this test, the Court subjects the legislative classifications to a more searching scrutiny, and invalidation results when the distinctions are not \textit{necessary}—as opposed to “reasonably adapted”—to effectuate a \textit{compelling}—as opposed to a permissible—state interest.\textsuperscript{32} The close-scrutiny test has been applied only in cases in which the classification attacked has been drawn along lines which are “constitutionally suspect,”\textsuperscript{33} such as race,\textsuperscript{34} or in which it has a chilling effect on a particularly favored right.\textsuperscript{35} Thus the first inquiry that suggests itself is whether snob-zoning laws fall within that category of legislative classifications that bring the close-scrutiny test into play.

At the broadest level, one can argue that whenever a legislative classification is effectively drawn along lines of ability to pay, the close-scrutiny test should apply. Beginning with \textit{Griffin v. Illinois},\textsuperscript{36}

\textsuperscript{30} Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).


\textsuperscript{34} \textit{McLaughlin v. Florida}, 379 U.S. 184, 192 (1964); \textit{Korematsu v. United States}, 323 U.S. 214, 223 (1944).

\textsuperscript{35} The phrase “particularly favored right” is used in this Note because it best comprehends the type of rights that may bring the classification within the close-scrutiny analysis when those rights are infringed upon. The Court apparently is undecided whether the right must be “constitutional” or “fundamental” and “basic.” Arguably, the latter class may be broader than the former. \textit{See Shapiro v. Thompson}, 394 U.S. 618, 658 (1969) (“fundamental”—right of interstate movement); \textit{McDonald v. Board of Elections}, 394 U.S. 802, 807 (1969) (“basic,” “fundamental”—voting); \textit{Levy v. Louisiana}, 391 U.S. 68, 71 (1968) (“basic”—recovery of damages for wrongful death of mother); \textit{Harper v. Virginia Bd. of Elections}, 383 U.S. 665, 670 (1966) (“fundamental”—voting). \textit{But see Dandridge v. Williams}, 397 U.S. 471, 484 n.16 (1970), in which the Court distinguished \textit{Shapiro} as involving the “constitutionally protected freedom of interstate movement” (emphasis added). \textit{See also} notes 55-61 infra and accompanying text.

\textsuperscript{36} 351 U.S. 12 (1956).
and continuing through a fairly discernible line of cases in the criminal procedure context, the United States Supreme Court has held generally that wealth—or ability to pay—as a classifying fact may be constitutionally impermissible under the fourteenth amendment. More recently, in McDonald v. Board of Elections the Court stated that wealth is a factor "which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." Thus, it can be argued that insofar as minimum-lot-size requirements that are embodied in a county or municipal zoning ordinance prevent those unable to afford, for example, a four-acre lot from acquiring a lot upon which to build a house, the state is responsible for creating a classifying fact based upon wealth, and relying on the statement in McDonald, the close-scrutiny test should be apposite.

However, the above argument does not survive a close analysis. In the first place, McDonald did not involve wealth as a classifying fact; the holding in that case was that Illinois' failure to provide absentee ballots for unsentenced inmates awaiting trial was not in violation of the equal protection clause. Thus, the statement in McDonald that classifications based solely on wealth are constitutionally suspect is pure dictum. Moreover, the case cited by the Court in McDonald for the proposition that wealth is a suspect classification was Douglas v. California, a case in which the Court held that a state's failure to appoint counsel for an indigent's first appeal constitutes a denial of equal protection and due process. As in Griffin, the Court's decision in Douglas was made in the context of criminal procedure, and thus the equal protection argument was reinforced by—and perhaps subsumed under—the due process argument. The only other case in which the Supreme Court has invoked the close-scrutiny test to hold an economic classification by wealth unconstitutional under the equal protection clause was Harper v. Virginia Board of Elections, which involved an attack

39. 394 U.S. at 807.
40. The Court felt that it was a fact of no constitutional significance that the Illinois statute involved in Griffin did not on its face discriminate between those with means and those without. It was sufficient that the effect was discriminatory. 351 U.S. 12, 17 n.11 (1956).
on a state-imposed poll tax. Indeed, when presented with the opportunity, the Court has failed to extend the fourteenth amendment's protection of the poor beyond the areas of criminal procedure and voting rights.\textsuperscript{43} Recently, the Court has upheld the Illinois system of public-school finance against claims that the plan discriminated between wealthy and poor school districts;\textsuperscript{44} has refused to hear argument concerning the constitutional validity of a Georgia law requiring a defendant in a summary-eviction procedure to post a bond if he demands a jury trial;\textsuperscript{45} and has dismissed an appeal challenging a Connecticut law requiring a tenant who appeals a summary-eviction judgment to post a bond for the protection of his landlord.\textsuperscript{46} On the other hand, the Court has been steadfast in its consideration of wealth as a suspect classification in the criminal procedure context. For example, in \textit{Williams v. Illinois},\textsuperscript{47} the Court passed on the validity of a state law that provided that if a defendant had not paid any fine that may have been imposed by the time his prison sentence had expired, he would have to remain in jail to work the fine off at a rate of five dollars per day. "Applying the teaching of the \textit{Griffin} case," the Supreme Court concluded that the statutory scheme did constitute an "impermissible discrimination that rests on ability to pay" and held "that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine."\textsuperscript{48}

In sum, it is apparent that statutory discrimination along the

\textsuperscript{43} E.g., Brown \textit{v. Allen}, 344 U.S. 443 (1953), upholding the right of a state to select jurors from a list of taxpayers. It should be noted, however, that \textit{Brown} was not argued on economic equal protection grounds.


\textsuperscript{45} \textit{Williams v. Shaffer}, 385 U.S. 1037 (1967).

\textsuperscript{46} \textit{Simmons v. West Haven Housing Authority}, 399 U.S. 510 (1970) (per curiam). The equal protection argument would seek to invalidate the law insofar as it operates to deprive those too poor to post the bond of the option of appellate review.

\textsuperscript{47} 399 U.S. 235 (1970).

\textsuperscript{48} 399 U.S. at 241-43. A case very similar to \textit{Williams} is \textit{Morris v. Schoonfield}, 399 U.S. 508 (1970) (per curiam), in which the Court was asked to consider the constitutionality of a Maryland law requiring persons who cannot afford to pay court fines to satisfy the obligation by serving time in jail. \textit{Williams} and \textit{Morris} are distinguishable in that in the latter case the total imprisonment (for the principal offense and for nonpayment of fines) did not exceed the maximum allowed by law for the principal offense (see \textit{Morris v. Schoonfield}, 301 F. Supp. 158, 164 (D. Md. 1969)). The Supreme Court vacated and remanded \textit{Morris} to the district court for reconsideration in the light of \textit{Williams} (decided the same day) and of intervening state legislation. The disposition the Court might have made of \textit{Morris} may be deduced from an examination of the following language from \textit{Williams}:

The State is not powerless to enforce judgment against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

\textsuperscript{399} U.S. at 244.
lines of wealth will not, in and of itself, result in an application of the close-scrutiny test. Further, it is not likely that the Supreme Court will extend the close-scrutiny test to cases involving discrimination on the basis of ability to pay, because to do so would constitute a vast encroachment on, if not an elimination of, the rationality test. The rationality test, as the Dandridge case indicates, still has considerable vitality.49

If, as the foregoing discussion suggests, wealth as a classifying fact is by itself insufficient to bring the close-scrutiny test into operation, some other factor must be responsible. The crucial factor seems to be the particular interest at stake. Arguably it is this factor that accounted for the results reached in Griffin and Harper—wealth as a classifying fact became important only because those cases involved a conflation of discrimination by ability to pay and of infringement upon a favored interest. The Supreme Court’s decision in Shapiro v. Thompson50 supports this analysis. In Shapiro the Court applied the close-scrutiny test to a Connecticut law imposing a one-year residence requirement for welfare recipients. Only in an indirect way did Shapiro involve discrimination by ability to pay. What the Court deemed significant was that the Connecticut statute exercised a chilling effect on the rights of United States citizens to change residence from state to state.51

If it is true that the touchstone of a close-scrutiny analysis is the interest involved, and that the element of economic discrimination is only of secondary importance, the significant inquiry must be whether the interest of the individual who desires to erect a single-family dwelling but who cannot afford a four-acre lot is sufficiently similar to the interest of the indigent criminal defendant,

49. Nor have lower federal courts shown much inclination to extend the close-scrutiny doctrine. In Maya v. De Baca, 286 F. Supp. 606, 609 (D.N.M. 1968), appeal dismissed, 395 U.S. 825 (1969), involving a claim that the New Mexico garnishment law violated equal protection by discriminating against wage earners vis-à-vis those who are not wage earners, the court said that relief of the “economically depressed” was a legislative, not a judicial, chore. Similarly, in Boddie v. Connecticut, 286 F. Supp. 968, 973 (D. Conn. 1968), appeal dismissed, 396 U.S. 938 (1969), it was argued that the Connecticut requirement of filing fees to initiate divorce proceedings was unconstitutional because it discriminated on the basis of affluence, or the lack of it. The court disagreed, stating that civil actions lacked the sanctity of voting and cases involving imprisonment. But cf. Hargrave v. McKinney, 413 F.2d 930, 934 (5th Cir. 1969), in which the court held that a complaint attacking the Florida school district finance scheme as violating equal protection sufficiently alleged a basis of relief on a substantial constitutional question to justify convening a special three-judge district court pursuant to 28 U.S.C. §§ 2281, 2284 (1964). Following criminal procedure and voting, civil procedure would seem to be the next logical area for extension of the close-scrutiny doctrine, despite Williams v. Shaffer, 385 U.S. 1037 (1967) (see text accompanying note 45 supra), and Simmons v. West Haven Housing Authority, 399 U.S. 510 (1970) (per curiam) (see text accompanying note 46 supra). See Lee v. Habib, 424 F.2d 891 (D.C. Cir. 1970).


51. 394 U.S. at 629-30.
the poor person unable to afford a state poll tax, or a person desiring to change his state of residence. In other words, do snob-zoning laws impinge upon a sufficiently favored interest to warrant invocation of the close-scrutiny test? An analysis of this question reveals considerations both for and against an application of the close-scrutiny test in the context of snob zoning.

A traditional notion of American jurisprudence has been that the amount of justice available to a criminal defendant ought not to depend on how much he is able to pay. Likewise, a true democracy is premised on the belief that the opinion of the poorest artisan is as valuable as that of the richest plutocrat. And the right of any citizen to travel freely from state to state has long been deemed an integral benefit of national citizenship. Thus, the interests involved in Griffin, Harper, and Shapiro are all rights possessed by a citizen vis-à-vis the government. The close-scrutiny test has not yet been extended by the Supreme Court to cover interests of a citizen vis-à-vis other citizens, and it is in this area that snob-zoning laws fall.

On the other hand, the interests that have been protected by the close-scrutiny test have been either "fundamental" or "constitutional." It is plausible to assert that the interest involved in equal access to land for residential use is as "fundamental" as the interest involved in Griffin. Griffin involved nothing more than access to an appeal which the Supreme Court admitted the state might constitutionally abolish. Only after the state allowed anyone an appeal, the Court concluded, was it constrained to make it available to everyone, regardless of ability to pay. Viewed in this light, the interest involved in the snob-zoning case compares more favorably with the right held to be "fundamental" in Griffin. Further, few would maintain that equal access to land, at least to the individual, is less crucial than the right to vote, however much we proclaim the value of the latter.

53. This assumption underlies provisions in many state constitutions to the effect that the franchise will not be conditioned on property qualifications. See, e.g., Cal. Const. art. I, § 2; Ind. Const. art. I, § 23; id. art. II, § 2.
55. See note 55 supra.
56. 351 U.S. 12, 18 (1956).
57. Learned Hand once referred to the "illusory belief" that his vote determined anything. To Hand, voting served as a force galvanizing the citizenry into feeling as though each individual is a part of a common venture. See L. HAND, THE BILL OF RIGHTS 73-74 (1962). Whereas society may have an interest in seeing one otherwise excluded from the "common venture" of society exercise the franchise, it is doubtful that this individual will attach the same importance to an act that is at best only psychologically gratifying.
However, it can be argued that Griffin, Harper, and Shapiro can be distinguished from the hypothetical snob-zoning case on the ground that criminal procedure, voting, and the right to travel in interstate commerce are all matters covered by the Constitution,\(^58\) whereas housing is not. It is plausible to assert that as between matters falling within an area of constitutional concern and those not, only the former should be beneficiaries of the close-scrutiny analysis. Thus, even if equal access to housing, regardless of wealth, was deemed a “fundamental” right, it is arguable that unless that right is also a matter of constitutional concern it should be dealt with under the traditional equal protection analysis—the rationality test. This is true because an extension of the close-scrutiny analysis to “fundamental” interests would inevitably embroil the courts in the difficult task of delimiting those rights that may be deemed worthy of being labeled “fundamental,” a process not dissimilar from that of the gradual encompassing of various provisions of the Bill of Rights into the fourteenth amendment due process clause.\(^59\) However, the argument would continue, even due process incorporation offers more concrete guidelines than would equal protection incorporation of “fundamental” interests. In the former case there existed at least some limit to the extent of the incorporation: the first eight amendments to the Constitution.\(^60\) In the latter case, however, this built-in limitation is not present—almost any interest may be deemed “fundamental”—and the possibility exists that the judicial branch would be compelled to render value judgments without the aid of any proper guidelines.

One partial reply to the argument that the close-scrutiny test ought to be applied only when the interest at stake is “constitutional,” and not merely “fundamental” may be found in the Su...
The Supreme Court's recent statement that the equal protection clause forbids a state to apportion benefits and services "according to the past tax contributions of its citizens." 61 Such apportionment involves discrimination based on wealth and ability to pay just as do minimum-lot-size requirements. What this similarity may indicate is that whenever a state provides a service it must do so without favoring the interests of the wealthy over those of the less well-to-do. Since the majority of the services rendered by the state concern nonconstitutional matters—for example, garbage removal—it appears that the Court may be willing to extend greater protection to more prosaic interests. And even though snob zoning may not be, strictly speaking, a service extended by the state, the conceptual leap does not seem overly difficult to make. 62

Moreover, it has been asserted that in a series of recent decisions the Supreme Court has elevated the concept of equal access to housing to "a matter of most serious social and constitutional concern," 63 thus being worthy of special judicial regard. The cases cited to support this proposition are Shelley v. Kraemer, 64 Reitman v. Mulkey, 65 and Jones v. Alfred H. Mayer Company. 66 Although it is likely that the racial aspect of these cases was at least equally as important as the housing aspect, 67 they indicate, at the very minimum, an awareness on the part of the Supreme Court of the extreme significance of adequate housing. It is conceivable that this awareness could take the form of an extension of the close-scrutiny test to snob-zoning laws. Since the courts might well apply the close-scrutiny test to snob-zoning laws, it is appropriate at this point to determine what result an application of that test would yield.

Under the close-scrutiny test the focus of judicial inquiry is upon both the state's objective and the means employed to effectuate that objective. 68

61. Shapiro v. Thompson, 394 U.S. 618, 622-38 (1969) (dictum). The Supreme Court's most recent pronouncement bearing on this dispute is Dandridge v. Williams, 397 U.S. 471 (1970), in which the interest was not a "freedom guaranteed by the Bill of Rights" (397 U.S. at 484); Shapiro was distinguished on the ground that that case involved the "constitutionally protected freedom of interstate travel" (397 U.S. at 484 n.16).

62. Of course, there is a problem in determining whether zoning is the type of service the Court was referring to in Shapiro. It may well be that zoning, traditionally regarded as an exercise of the state's police power, is not to be comprehended within the word "service." Moreover, it is likely that the Court, when it referred to the equal protection clause, may have meant a rationality-test equal protection analysis; even under this analysis it is doubtful that the equal protection clause would have permitted a city to schedule garbage collection with reference to the tax base of a given neighborhood.


64. 334 U.S. 1 (1948).


In the context of snob-zoning laws, the Court must examine, first, the state's objective that large-lot zoning is designed to achieve, and, second, whether the zoning requirements are a necessary means of attaining the permissible objective. Since the objectives a state may attain through zoning are delineated by statute, any restriction that serves an objective other than those that are statutorily sanctioned may be dealt with without reference to the equal protection clause. Typically, however, state statutes are framed broadly to allow zoning to further the general health and welfare of the community involved. Despite its lack of specificity, this objective has long been recognized as a valid state concern and would probably be considered a "compelling" state interest for purposes of the close-scrutiny analysis.

Thus, the paramount issue becomes whether large-lot zoning is a "necessary" means of attaining the permissible objective. Because of the paucity of decisions that have been based on the close-scrutiny test, it is unclear when any given measure will be deemed "necessary." Of course, much will depend on the objective sought to be attained. The basic theoretical question would seem to be whether a less restrictive alternative exists that would achieve the same result. If so, the minimum-lot-size requirement should be invalidated. An example or two should clarify this analysis. It is clear that water pollution control is a permissible objective under a state zoning law. And minimum-lot-size restrictions would serve to further the goal of clean water by limiting the number of people —and thus the amount of sewage—who would be allowed to live on a given tract of land. It is also clear, however, that this is not a "necessary" means of controlling water pollution. The problem might also be solved, in a costlier manner perhaps, by providing for proper drainage and sewage disposal methods. Similarly, providing for a "green belt" or open area would qualify as a permissible zoning objective. Although large-lot zoning would result in the preservation of open land, the same result could well be achieved by "cluster zoning." In both of the above examples, the fact that

68. See text accompanying notes 31-32 supra.
69. See text accompanying notes 78-82 infra.
70. See note 81 infra.
72. See Shelton v. Tucker, 364 U.S. 479, 488 (1960): "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgment must be viewed in the light of less drastic means for achieving the same basic objective." See also McLaughlin v. Florida, 379 U.S. 184, 196 (1964); Sherbert v. Verner, 374 U.S. 398, 407 (1963).
large-lot zoning is not a necessary means to achieve the state objective should lead a court to conclude that the minimum-lot-size requirements are unconstitutional.

Essentially, then, the role of the close-scrutiny analysis would be to examine arguments that attempt to justify large-lot zoning as a means to further an end. The outcome of each individual case may well hinge upon the existence of suitable alternatives for obtaining the statutory objective.

Several conclusions may be drawn from the above discussion. First, in order to bring minimum-lot-size requirements under the close-scrutiny analysis a court must find either that wealth as a classifying fact is constitutionally suspect, as is race, or that the interest represented by equal access to land and housing despite ability to pay is a specially favored interest. Second, if either of these findings is made, a successful attack on a snob-zoning statute will still require a plaintiff to show that the restriction is not necessary to achieve a compelling state interest. At this point in time, and given the relatively recent appearance of the close-scrutiny analysis, any conclusion concerning the constitutional validity of snob-zoning laws must be tenuous at best. The foregoing discussion was designed to set forth the issues and relevant precedents that any court will have to deal with when it is confronted with such a problem.

In the final analysis, the constitutional question regarding large-lot zoning may well be determined by considerations of public policy. The impact of the Court's invalidation of zoning laws would undoubtedly be much greater than the elimination of a simple fee as was done in Griffin or a poll tax as was done in Harper. As a matter of strict logic, if it is held that a four-acre restriction violates the equal protection clause, can it be said that a one-half acre restriction does not? Indeed, it is arguable that a logical extension of the equal protection analysis would demand an end to all zoning for single-family residences since many people cannot afford the expenses attendant upon home ownership, whatever the size of the lot. On the other hand, avoidance of this extreme result⁷⁴

⁷⁴ Though this may be an extreme result, it would be unfair to say that a successful constitutional attack on snob zoning would herald the demise of the system of value. Moreover, the downfall of snob zoning would not imply that all economic distinctions are invalid. This is true because snob zoning involves state complicity in the discrimination, and the ability of a private businessman to charge whatever price the market will bear would not be impaired. Moreover, not even every economic discrimination by the state would necessarily henceforth be constitutionally impermissible. The issue of tuition at state universities is a relevant example. This is the same type of de facto economic discrimination that is involved in snob zoning—tuition costs prevent a disproportionate number of poor people from obtaining a college education. First, it appears that a state might more readily justify the imposition of tuition than large-lot zoning. Furthermore, an elimination of the tuition requirement for those unable to pay would result in a direct subsidy in favor of the economically disadvantaged, which would not be the result if large-lot zoning were eliminated. Admittedly, the effect of Griffin is to subsidize those unable to pay, but Griffin may be distinguished on the ground that the criminal process, unlike a college education, is not something
arguably may be achieved only at the high cost of allowing the courts to draw rigid, and perhaps meaningless, lines with regard to what size lot is constitutional and what size lot is not.

Neither of the above extremes appears desirable. Zoning, including single-resident and minimum-lot-size zoning, can achieve many positive results. Since the question is essentially one of policy and planning—problems peculiarly within legislative, and not judicial, competence— it might be unwise for the courts to delineate an inflexible and universal constitutional maximum. One judicial approach that would avoid either extreme would be for the courts to hold some relatively high lot-size minimums constitutionally permissible if only a small part of the municipal area is zoned for high lot-size minimums and the rest is zoned according to a sliding scale that leaves a substantial part of the municipality open for development of small lots. Such a pragmatic approach would avoid much of the supposed difficulty in deciding whether any given lot-size restriction is per se invalid. However, more long-range planning is necessary if America is to retain any of her natural beauty and at the same time take adequate account of the problems of the economically deprived. This planning can only be accomplished by legislative organs. The crucial question, however, is whether anything can be done while the legislature is deciding to act or if the legislature refuses to act at all. The fact that those who would benefit most by the elimination of large-lot zoning are poor and badly organized may indicate a significant degree of legislative reluctance to deal with the problem. Several alternative responses for the courts are suggested below that would allow the courts to play a significant role in remedying legislative inaction without becoming embroiled in the difficult issues of an equal protection analysis. However, if these solutions prove only partially adequate voluntarily invoked. In the context of criminal procedure the state is involved; however, only a very few defendants would consider themselves beneficiaries of a service. Williams v. Illinois, 399 U.S. 235, 244 (1970), however, seems to cast doubt on extensive subsidization of the indigent even in the criminal procedure context. See note 48 supra.


76. In this regard, it should be noted that Senator Jacob Javits of New York has introduced a bill that would "bar certain Federal subsidies for things like water and sewer facilities for suburbs that maintain 'exclusionary' zoning practices." Wall St. J., Nov. 29, 1970, at 1, col. 6.

One factor determining judicial incompetence to act on a given matter is the extent to which information to which the court lacks access is needed to solve the problem. A rational approach to land utilization obviously depends on a perusal of population statistics, demographic trends, ecological needs, economics, and much more. This information is not readily available to a court. More important, a court does not afford the type of forum necessary to digest this information and arrive at sound policy conclusions. See generally Frank, Political Questions, in SUPREME COURT AND SUPREME LAW 36 (E. Cahn ed. 1954).
and the legislatures fail to respond, it is submitted that it would be both appropriate and necessary for the courts to begin invalidating snob-zoning laws as violative of the equal protection clause of the fourteenth amendment.

II. ALTERNATIVE JUDICIAL RESPONSES

Undeniably, minimum-lot-size restrictions can, and often do, perform valuable functions. For one thing, they serve to maintain the rural nature of the surrounding countryside, an objective that is especially desirable in an era of increasing metropolitanization. Moreover, the elimination of low-density zoning may cast burdens upon an area with which it is unable to cope, given its present state of development, in matters such as fire and police protection, schools, and highway construction. While these may be compelling factors that militate against disturbing the restrictions in areas already developed, they offer no justification for imposing low-density standards on areas that are totally undeveloped.

Several approaches may be followed in attacking minimum-lot-size requirements imposed upon heretofore undeveloped areas. One argument that courts have been particularly sympathetic to is that the restrictions are nothing more than ill-disguised attempts to bar "undesirables"—white or black—from an area, to segregate generally economic classes, or to avoid the burdens of future growth. In short, whenever the primary purpose of a minimum-lot-requirement appears to be founded in a desire to discriminate or to exclude potential entrants, the requirement ought to, and more than likely will, be held invalid.

Thus, in Board of County Supervisors of Fairfax County v. Carper, the Supreme Court of Appeals of Virginia held that two-acre minimum lot sizes were invalid because the practical effect of the restriction would be to prevent low-income persons from living in the area. The court held that in enacting the zoning ordinance, the zoning board had intended that it have this exclusionary effect. The evidence that was most significant was that before the two-acre restriction was imposed, applications for subdivisions had been numerous, whereas after the enactment of the ordinance, there had been no such applications. Similarly, in National Land Investment Company v. Easttown Township Board of Adjustment, the Supreme Court of Pennsylvania invalidated a four-acre minimum-

77. See Flora Realty & Inv. Co. v. City of Ladue, 862 Mo. 1025, 1035, 1040-41, 246 S.W.2d 771, 775, 779, appeal dismissed, 344 U.S. 802 (1952).
lot-size requirement because its “primary purpose” was to exclude newcomers, thereby enabling the community to escape the burdens of growth.80

These are obvious results given the statutorily permissible ends that zoning may achieve. For if the basic justification of zoning is that it is to enhance the general welfare of the area zoned,81 a court should not uphold a zoning ordinance that is primarily designed to achieve other ends. Of course, a corollary to this line of reasoning is that if the zoning ordinance is otherwise well grounded as serving to promote health, safety, and welfare, it will not be held invalid because discrimination or exclusion results.82

Another problematical aspect of current zoning laws that is easily capable of a judicial solution is the fact that each zoning jurisdiction, whether county or local, is allowed to pursue whatever zoning policy it desires, in disregard of nearby zoning jurisdictions.83 “General welfare” is typically interpreted as referring solely to the needs of the area doing the zoning.84 Thus, a small municipality that zones vacant land on the outskirts of an overcrowded metropolis need not consider the housing problems in the larger city in order to fulfill the general-welfare requirement. The remedy for this situation lies in a broader interpretation of the term “general welfare.” It would be desirable if zoning bodies themselves would break down the artificial boundaries that have made each munic-

80. That the exclusion of newcomers was the primary purpose seemed clear from the relative weakness of the town’s attempted justifications of the requirement, which were held unsound by the court: (1) ensurance of proper sewerage and protection of the town from water pollution; (2) an inadequacy of township roads; (3) preservation of the rural, “historical” character of the area. 419 Pa. at 532-33, 215 A.2d 608-10.

81. See, e.g., MICH. STAT. ANN. § 5.2681(3) (1969): “The provisions of the zoning ordinance shall be based upon a plan designed to promote the public health, safety, morals and general welfare . . . .”; N.Y. VILLAGE LAW § 175 (McKinney 1966): “For the purpose of promoting the health, safety, morals, or the general welfare of the community, the board of trustees of a village is hereby empowered, by ordinance . . . to impose regulations and restrictions on building sizes, types, and uses, etc.” See Euclid v. Ambler Realty Co., 372 U.S. 365, 387 (1926).


83. See text accompanying notes 86-94 infra.

84. See, e.g., City of Little Rock v. Sun Bldg. & Dev. Co., 199 Ark. 233, 124 S.W.2d 582 (1939); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 84 (1954); Gruber v. Mayor and Township Commn., 59 N.J. 1, 186 A.2d 469 (1962); Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955). In those cases in which a court states that conditions in surrounding zoning districts must be considered, it is usually for the purpose not of ameliorating the conditions per se, but of determining whether these conditions render a certain restriction of the principal zoning jurisdiction unreasonable. For example, in Pioneer Trust & Sav. Bank v. Village of Oak Park, 408 Ill. 428, 97 N.E.2d 302 (1951), one of the reasons for invalidating an Oak Park ordinance limiting the permissible height of apartment buildings to thirty-five feet (2½ stories) was the fact that in an area directly across the street from the property in question the village of River Forest allowed apartment buildings of fifty feet (three stories) in height.
ipality or county a veritable sovereignty for planning purposes. In the absence of this voluntary remedy, it might not be beyond the competence of the judiciary to examine a given restriction and invalidate it if it appears blatantly to disregard the pressing needs of contiguous or nearby areas.85

There are judicial precedents exemplifying this approach. In Borough of Cresskill v. Borough of Dumont,86 the New Jersey supreme court rejected the argument that a village owes no duty to an adjoining municipality in deciding whether to approve a change in zoning from a residential to a business district. To allow such a proposition, the court said, "would be to make a fetish out of invisible municipal boundary lines and a mockery of the principle of zoning."87 The court's determination in Dumont was aided by an expression of legislative policy to the effect that municipal planning boards should pay regard to "neighboring territory" and the "environs" of the municipality.88 However, the Dumont result seems both desirable and defensible—given the advantages of regional zoning—even without the expressions of legislative policy that were present in that case. Moreover, if a zoning statute itself evinces no such express policy, it would be entirely appropriate for a court to look to subsequent legislative enactments for a policy favoring cooperation with neighboring areas.89

However, in Beshore v. Town of Bel Air,90 the Maryland court of appeals limited the Dumont result to the situation where one zoning area merged imperceptibly into the other. In other words, where there is a definite demarcation between two contiguous areas, the Dumont regional-zoning approach might be inapplicable. Thus, it appears that in general the courts have not imposed on zoning boards a requirement of looking beyond the municipal borders. Nevertheless, both legislatures and courts should realize that ulti-

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87. 15 N.J. at 247, 104 A.2d at 446.
89. An example of the use of subsequent pronouncements of legislative policy in interpreting a statute is provided in United States v. Hutcheson, 312 U.S. 219, 235-36 (1941). In that case, the Supreme Court decided whether a violation of the Sherman Act and Clayton Act existed by referring to the public policy expressed in the subsequently enacted Norris-LaGuardia Act. The policies expressed in the Norris-LaGuardia Act were given determinative effect, even though that Act was not aimed expressly at the situation involved in the Hutcheson case.
mately no one can be insulated from the urban crisis. As was stated by the Supreme Court of New Jersey, "Although municipalities . . . have not yet been compelled to recognize values that transcend municipal lines, they certainly should be encouraged to consider regional needs and be supported by the courts when they do so for sound reasons." In this respect, the now-famous dictum from the classic zoning case, *Euclid v. Ambler Realty Company*, is apposite: "It is not meant by this . . . to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."

Another possible judicial approach to the problem of snob zoning is for the court to consider the nature of the uses to which contiguous land within the same zoning area is put. For example, in *Lasalle National Bank v. City of Highland Park*, the Illinois supreme court invalidated a minimum-lot-size requirement of three acres because the nature of the uses to which the surrounding land was put made it extremely unlikely that there would be a market for three-acre lots. In a subsequent case the same court held unconstitutional, as violative of the due process clause of the fourteenth amendment, a 20,000-square-foot minimum as applied to plaintiff's property, where the surrounding area included an airbase, cemeteries, and a light industrial district, with a railroad in close proximity. The court reasoned that because of the existence of these nonresidential uses, any adverse effect of higher density had already occurred. The result of these two Illinois decisions seems eminently sound, both from the standpoint of the local zoning area and that of the general welfare. For it is clear that the main justification for low-density zoning—the desire to maintain quietude and a rural character—is no longer present when the surrounding area has been developed in a light-industrial or high-density-residential manner.

92. *Kunzler v. Hoffman*, 48 N.J. 277, 287, 225 A.2d 321, 326 (1966). Whereas the cases supporting the broader view have arisen generally in the context of applications for use variances, the policy behind the argument is also applicable to larger aspects of zoning such as density restrictions.
93. 272 U.S. 365 (1926).
94. 272 U.S. at 390.
95. 27 Ill. 2d 350, 189 N.E.2d 302 (1963).
96. On one side was a golf course; on two other sides were residential districts with 20,000-square-foot-minimum restrictions. On the fourth side was a parcel of land owned by a religious order which had been granted a variance to allow the construction of a temple and a parking lot. 27 Ill. 2d at 351-52, 189 N.E.2d at 303-04.
98. 28 Ill. 2d at 500-01, 192 N.E.2d at 910.
Thus, when the public need for the allowance of high-density zoning is greatest (because of the jobs created by the newly arrived suburban industry), the justification for low-density zoning may well be at its lowest point.

A final judicial approach to the snob-zoning problem—one involving not a small degree of daring and initiative—would be for the court to approve the density requirements set by a zoning ordinance for a particular area, but allow the area to be developed in the fashion of "cluster zoning." Cluster zoning allows a municipality or county to achieve the same low density as large-lot zoning without requiring large lots. At the same time, the aggregation of residential structures into a more compact area, with the remaining land set aside for the common use of the area, helps reduce road and utility costs. The net result of a cluster-zoning plan is to preserve the large-lot "country estate" atmosphere, which in turn adds to the general welfare by maintaining green-belt areas, and, at the same time, to open up the area for lower-income people and reduce development costs. Moreover, often the natural features of the terrain will render cluster zoning more economical than any other plan. A further advantage of this method of lot siting is that it allows a zoning board to be flexible in its plans and to engage in a good deal of creativity. The cluster can assume almost any shape desired and this fact assumes particular aesthetic importance when the structures themselves have become standardized, as is the case with most residential housing developments.

A judicial decision to allow cluster zoning would essentially be one of compromise. The situation might arise when a developer has submitted a plan for proposed development that includes lot sizes smaller than are required by the zoning ordinance. If the

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101. J. Rosenthal, Cluster Subdivisions (Am. Soc. of Planning Officials, Planning Advisory Serv. Rep. No. 135, 1960). Rosenthal has identified two primary characteristics of the "true" cluster subdivision. The first identifying trait is a grouping of several houses together on a tract of land, set off from other similar clusters. The second characteristic is the presence of a large undeveloped area held for the common enjoyment of the various clusters. Id. at 2.

102. Id. at 17.

103. Id. at 5.


106. In most cases, the economic advantages to the developer of bringing a cluster-zoning suit may not be clear, and for that reason, he would have no incentive to bring the suit of his own initiative. One possible procedure would be for a group representing potential residents of the area—for example, the NAACP—to approach a landowner developer and ask him to submit a plan to the zoning board that provides
plan is refused by the appropriate zoning body, a court could follow one of two courses on appeal. It could invalidate the density requirements on one of the grounds discussed above. Alternatively, if the density forecast by the developer is the same as that required by the zoning requirement, the court could reverse the zoning board on the ground that the restrictions of large-lot zoning are unwarranted since the goals of large-lot zoning can be achieved at least as well by cluster zoning. Hence, large-lot zoning would, under the circumstances, be unreasonable, and therefore invalid.

The cluster-zoning approach is offered only as an alternative to the other judicial approaches discussed, and it should be used only when the circumstances allowing for their application are not present. Cluster zoning itself has several drawbacks. Although such an approach will result in decreased lot minimums for the area involved, the density requirements for that area will remain the same. Consequently, under widespread application of the cluster approach it is possible that insufficient land will be devoted to housing, and that a concomitant inordinate amount of land will be utilized for open areas. In the long run, the cluster solution will not promote the most efficient use of land for housing purposes. Given an ever-increasing population, coupled with an outward migration from the greater metropolitan areas, the ultimate solution to the problem of snob zoning must be higher-density guidelines.

Indeed, it must be recognized that the preferable solution is through the legislative, rather than the judicial, process. As stated earlier, the expertise and resources required for land-use planning that takes into account ecological needs and demographic trends are essentially within the legislative grasp. In the interim, and until legislatures or existing zoning bodies begin to react more positively to the needs of a larger portion of society than a privileged few, the courts should not hesitate to face the challenge and enter the fray to secure more equal access to land for those who are presently denied such access because of snob zoning.

for minimum lot sizes lower than those allowed by the ordinance. When and if the plan is refused by the board, the interest group—who would have the most immediate concern in having the plan approved—would bear the costs of any litigation.

107. See notes 78-100 supra and accompanying text.
109. See note 76 supra and accompanying text.
110. It should be noted at this point that even if the equal protection challenge to large-lot zoning is successful, it is possible that private parties will be able to achieve much the same result as the large-lot zoning ordinances through the use of private restrictive covenants. If this result does develop, potential residents arguably could challenge these covenants by utilizing the doctrine announced by the Supreme