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OPEN BEACHES IN FLORIDA: RIGHT OR RHETORIC?

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I. INTRODUCTION

There is probably no custom more universal, more natural or more ancient . . . not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. . . . We love the oceans which surround our State. We, and our visitors too, enjoy bathing in their refreshing waters. The constant enjoyment of this privilege of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right . . . .

This oft-quoted statement by the Florida Supreme Court reflects the view that one of Florida's most attractive natural resources is its multitude of sunny, sandy beaches. Because Florida is said to have "the finest beaches in the world," it is not surprising that most of the more than 30,000,000 tourists who visit the state annually make use of the beach and seashore recreation areas.

Interstate movement of goods and people is affected significantly by the availability and location of usable beaches. Trains and planes are frequently full of people traveling from the northern states to enjoy Florida's famous beaches. Moreover, commodities in great quantities move toward the great ocean and gulf recreational areas of the Sunshine State.

Although Florida has a coastline of more than 11,000 miles, sandy beaches comprise only 1,435 miles of the coastline. And only 675 of these beachfront miles are publicly owned. This limited amount of beach area poses the practical problem of providing sufficient seashore recreational facilities to meet present and future public needs. Physical accessibility in itself is not a major obstacle to meeting

1. White v. Hughes, 190 So. 446, 449-49 (Fla. 1939).
2. Id. at 449.
5. R. Shevin, Report and Recommendations of Attorney General Robert L. Shevin to the 1978 Constitution Revision Commission 289 (June 1977) [hereinafter cited as Attorney General Report]. These statistics were obtained from the Bureau of Beaches and Shores, Florida Dep't of Natural Resources, which periodically updates the statistics in a report entitled Public Beach, Private Beach: A Review of Florida Beach Resources (Florida Development Commission).
these needs. Increasingly, however, the exclusionary policies of some shorefront municipalities do pose such an obstacle.⁶

A number of Florida municipalities which own, lease, manage, or otherwise control beach and seashore recreational areas have developed both direct and indirect devices to discourage nonresidents of the community from using the municipally owned public beaches. Tourists are turned away. So too are many Floridians who are not fortunate enough to own beachfront property.

Direct exclusionary devices include outright prohibition of non-resident use of the municipal beaches as well as the charging of prohibitive daily user fees to nonresidents of the municipality.⁷ Indirect devices include the absolute prohibition of nonresident use of improvements or parking facilities and the charging of discriminatory fees for the use of such improvements.⁸

In response to these discriminatory practices, and, more importantly, to prevent municipalities from employing them in the future as the public's demand for beaches increases, the Constitution Revision Commission has recommended creation of a new article I, section 20, in the Florida Constitution which would provide in part that "[a]ll publicly owned, leased, or managed beaches and seashore recreational areas shall be open to the public without differentiation as to terms and conditions of use."⁹

The commission has combined this open beaches amendment with the existing natural resources and scenic beauty section, article II, section 7 of the current constitution.¹⁰ It is proposed that the two related provisions be adopted as a new section 20 in the declaration of rights.¹¹

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7. Id.
8. Id. A case involving one Florida municipality which prohibited nonresidents from using its parking facilities upheld the restrictive ordinance against constitutional attack. No. 75-541 (Fla. 6th Cir. Ct. Oct. 13, 1975), aff'd, State ex rel. Shevin v. City of Belleair Beach, 336 So. 2d 1188 (Fla. 2d Dist. Ct. App. 1976). Commissioner Shevin stated to the commission that "There are at least two dozen municipalities in Florida, perhaps more, that maintain private beaches—that maintain beaches owned by the municipalities. In some instances they don't allow nonresidents. In some instances they charge an extremely high figure or fee for use of the beach by a nonresident." Transcript of Fla. C.R.C. proceedings 95 (Jan. 12, 1978) (remarks of Robert Shevin) [hereinafter cited as Transcript].
10. The natural resources and scenic beauty section in the proposed constitution is art. I, § 20. Id.
11. Transcript of Fla. C.R.C. proceedings 5 (Jan. 10, 1978); Fla. C.R.C. Proposal 34. The commission proposal would replace the current § 20, which defines and limits the notion of treason against the state. Commissioner Collins stated that:

Now, it was the position of our committee that this provision should be stricken from the constitution and assigned to its appropriate place in the historic archives of the evolution of the constitutional provisions in Florida. We feel that it is obso-
Attorney General Robert Shevin is a principal proponent of the open beaches amendment. The attorney general submitted a report to the commission which suggested several changes. Among these changes was a proposal to add a clause to the natural resources and scenic beauty section which would provide the public with "a right of access to and use of all governmental beach and seashore recreation areas and all sovereignty lands as defined in Article X, § 11, on the same terms and conditions." In addressing the commission, Shevin stated that the purpose of his open beach proposal was to "set in the constitution a right to the public to use publicly owned beaches and seashore recreation areas" and thus correct "an increasing and very adverse atmosphere toward tourism and toward those residents of the State that are not fortunate enough to live in a coastal area." This proposal was intended to provide the nonresident with a right not only to nondiscriminatory use of municipally owned beach areas, but also to equal access to those beach areas, specifically by requiring nondiscriminatory use of publicly owned parking facilities adjacent to the beaches.

The open beach proposal was first introduced to the commission by the Executive Committee on November 17, 1977. The committee omitted part of the original Shevin proposal. The committee's proposal read: "The public shall have a right of access to and use of all governmental beach and seashore recreation areas." On January 12, 1978, Commissioner Shevin introduced, and the commission passed, an amended version of the committee proposal.

Transcript of Fla. C.R.C. proceedings 7 (Jan. 10, 1978). The treason section was deemed obsolete "[b]ecause if there was any action of war against the State of Florida, that would be an act of war against the United States proper." Id. at 8.

12. As attorney general of the State of Florida, Shevin was automatically a member of the revision commission. FLA. CONST. art. XI, § 2(a)(1).


14. Id. The existing article II, § 7 reads as follows: "Natural resources and scenic beauty.—It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." Article X, § 11 reads:

Sovereignty lands.—The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

15. Transcript, supra note 8, at 81.


17. Id. at 292.


19. Id.

20. Transcript, supra note 8, at 80. This provision was passed by a vote of 21 to 11. During
Shevin's version altered the original committee proposal in two important respects. First, the words "governmental beach and seashore recreation areas" were replaced with "all publicly owned, leased, or managed beach and seashore recreation areas . . . ." This language in the amended provision made the scope of the proposal clearer and, at least in theory, less susceptible to litigation.

The second change was much more significant. The words "access to" were deleted from the provision. This left the public with the right to use public beaches without discrimination but without a corresponding right of access to such beaches. Commissioner Shevin claimed that to mandate a right of access would have greatly complicated the situation by compelling compensation to landowners whose property might be used to provide that access. Shevin then asserted, "Frankly, I think the provision in its broad terms, speaking only to the use of a public beach, would give the legislature the authority to do as they chose to do with regard to access. They could either provide for it, or they could not provide for it." Following considerable discussion, the amendment was passed by a vote of four to one, the commission thus deciding it would be more appropriate to allow the legislature to deal with the problem of access to public beaches.

Since access was no longer guaranteed, Shevin asserted that the amendment did not provide nonresidents with a right to use public

public testimony before the Florida Constitution Revision Commission, several persons expressed concern that the last phrase of the provision, "on the same terms and conditions," did not make sense and was "ungrammatical." One speaker suggested the language which is now part of the provision. Center for Governmental Responsibility, Public Testimony Before the Florida Constitution Revision Commission, Summaries of Points Raised at Hearings 8 (Feb. 21-23, 1978). The Committee on Style and Drafting later amended the proposal with a minor grammatical change. There was question as to whether "publicly" in "all publicly owned, leased or managed beaches and seashore recreation areas" modified "leased or managed beaches and seashore recreation areas." The answer is that, yes, it does. Fla. C.R.C., Comm. on Style and Drafting, Report to the Florida Constitution Revision Commission 162 (Mar. 6, 1978).

21. Transcript, supra note 8, at 81.
22. Commissioner Shevin stated:
   We have taken out any reference to access by virtue of the fact that, number one, it would very much complicate the situation. And, number two, I had toyed with the idea of putting up a provision to guarantee payment for compensation for any landowner whose land is used by way of access to a public beach.
   Id. at 82.
23. Id. at 82-83.
24. The discussion concerned questions such as whether the lease in the proposal referred to land that is leased by a county for use by the county; whether "beach or seashore" includes any beach that is owned by any unit of government of the state (it does so include) or wildlife areas which reach to and abut the Gulf of Mexico; and the problem of access across privately owned land. Id. at 82-103.
25. Id. at 82-83.
parking facilities adjoining beaches on equal terms and conditions.\textsuperscript{26} He further asserted, "It is not my intent to deal with the question of parking. My attempt is to deal with the question of use of the beach. As long as they did not charge discriminatory fees for the use of the beach, whatever they regulated by way of parking would not be affected by this amendment."\textsuperscript{27}

The suggested amendment thus would appear to give the public the right to use all the public beaches in the state without discrimination, eliminating the problem of direct municipal restrictions on the use of municipal beaches. However, it would not prohibit \textit{indirect} restrictions against nonresidents, such as discrimination in the use of public parking facilities.

The question arises: Has the Constitution Revision Commission offered a new and needed right to the people of Florida? Or have the people been offered only empty rhetoric?

A look at the relevant case law may help answer this question. Scrutiny of the constitutions and statutes of other coastal states may also prove helpful.

\section*{II. The Case Law}

Very few cases have been reported on the public's right to use municipally owned or operated beaches, and all but one of those reported occurred after 1971.\textsuperscript{28} This suggests that, until recently, exclusionary practices were not widespread among municipalities. In the eyes of local officials, they may not have seemed necessary. But increases in population and increases in the public demand for beachfront recreational areas have inspired a corresponding increase in the use of discriminatory devices to restrict access to public beaches.\textsuperscript{29}

The courts in coastal states have dealt with this problem by advancing three major legal theories to strike down municipal regulations: the public trust doctrine,\textsuperscript{30} the doctrine of dedication,\textsuperscript{31} and

\begin{itemize}
\item \textsuperscript{26} One part of the discussion centered around the situation in Boca Raton. If you live in Boca Raton and pay its ad valorem tax, you get a sticker—free. Commissioner DeGrove asked, "And your view is that the City of Boca Raton could continue to charge out-of-town residents to park?" Commissioner Shevin replied, "Yes." \textit{Id.} at 101.

\item \textsuperscript{27} \textit{Id.}

\item \textsuperscript{28} The one case reported prior to 1972 is Brindley v. Borough of Lavallette, 110 A.2d 157 (N.J. Super. Ct. Law Div. 1954).

\item \textsuperscript{29} \textit{See} Non-resident Beach Fees: Do the Beaches Belong to the People? 13 \textsc{Municipal Attorney} 236 (1972).


\item \textsuperscript{31} \textit{See} Gewirtz v. City of Long Beach, 330 N.Y.S.2d 495 (Sup. Ct. 1972).
\end{itemize}
the equal protection doctrine. These three theories have been used to guarantee equal treatment for nonresidents on public beaches.

A. The Public Trust Doctrine

In 1972, in Borough of Neptune City v. Borough of Avon-by-the-Sea, the New Jersey Supreme Court invoked the public trust doctrine to strike a municipal ordinance which charged higher fees for nonresidents than for residents to use a public beach. This common law doctrine of jus publicum “derives from the ancient principle of English law that land covered by tidal waters belonged to the sovereign, but for the common use of all the people.” The United States Supreme Court announced this doctrine in 1892 in Illinois Central Railroad v. Illinois, holding that title to the foreshore, or wet sand area, passed to the several states to be held in trust for the public to use for navigation and fishing and that the states were duty bound to preserve the land for public use. This case laid the foundation for the general rule that the foreshore cannot be alienated unless the public interest is safeguarded or promoted by the government.

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34. Id. at 51. The land covered by tidal waters is called the foreshore or wet sand area. It is held by the sovereign, not as personal property, but in trust for the public. Thus, the line between private and public ownership usually is placed at the landward boundary of the foreshore. The normal common law rule puts this boundary at the mean high tide line. Note, Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach, 7 SUFFOLK U.L. REV. 936, 942 (1973).

A diagram of the typical divisions of the beachfront may aid in an understanding of this distinction:

```plaintext
Ocean Water   | Foreshore | Dry Sand Area | Upland
-------------|-----------|---------------|--------
Mean          | Mean      | Extreme       |
Low Tide      | High Tide | High Tide     |
Id. at n.24. Florida, although its law is affected by Spanish grants, also adopts the common law rule.

35. 146 U.S. 387, 435 (1892). In this case the Court held that:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

Id.

36. Id. at 455-56; see, e.g., State v. Gerbing, 47 So. 353 (Fla. 1908). For a general discus-
The Florida courts have also adopted the doctrine of jus publicum but have expanded it beyond its common law usage for fishing and navigation to include the public’s right to use the foreshore for recreational purposes such as bathing and boating. Recognizing the essential nature of the tourist industry to the state, the courts have declared that the state, as trustee of the foreshore property, must preserve and protect the public’s right to use the wet sand area for both bathing and boating.37

Florida has codified the public trust doctrine in both statutory and constitutional form. The “title to all sovereignty tidal and submerged bottom lands . . . is vested in the Board of Trustees of the Internal Improvement Trust Fund” (the Governor and Cabinet) pursuant to the Florida Statutes, section 253.12(1),38 and such land is “held by the state, by virtue of its sovereignty, in trust for all the people” pursuant to article X, section 11 of the current Florida Constitution.

Thus, in Florida, title to the foreshore is vested in the state for the benefit of its people. The public therefore has the right to use the foreshore when the tide is out as well as the water over it when the tide is in. Since the state has legal title to the land, it could prohibit any effort to infringe upon the public’s right to use such land.

The public trust doctrine has not yet been applied in Florida to a municipal ordinance which discriminates between resident and nonresident use of municipal beaches. The New Jersey Supreme Court, though, dealt with precisely this issue in Avon-by-the-Sea. The New Jersey court held that allowing municipalities to discriminate against nonresidents violated the state’s responsibility as trustee to open the beaches to all citizens. Applying the public trust doctrine, the court ruled that although municipalities could validly charge reasonable fees for use of their beaches, they could not discriminate in any respect between residents and nonresidents.39 The court stated:

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37. Brickell v. Trammell, 82 So. 221 (Fla. 1919). This idea has been reaffirmed in Adams v. Elliott, 174 So. 731 (Fla. 1937), and in White v. Hughes, 190 So. 446 (Fla. 1939).
39. 294 A.2d 47. There the municipality attempted to discourage nonresident use of its beaches by charging differential fees for beach use. Seasonal badges (good for two months) were available to residents and taxpayers of Avon for $10 each, whereas only monthly badges at $10 per month, or daily badges at $2.25 apiece were available to nonresidents.
At least where the upland sand area is owned by a municipality and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible. 40

The impact of the court's interpretation of the public trust doctrine in Avon-by-the-Sea, however, is unclear. All prior case law applied the public trust doctrine only to the public's right to use the foreshore. Yet in Avon-by-the-Sea, the court extended the application of the doctrine to the dry sand area, that is, to that strip of beach forming the landward boundary of the foreshore. 41

The New Jersey court apparently combined the doctrine of jus publicum with the common law doctrine of dedication. The court specifically noted that the upland sand area was dedicated to public beach purposes. 42 It thus appears that, at least in certain instances, a combination of the two common law doctrines may prove effective in protecting bathers from municipal ordinances which restrict nonresident use of the entire beach area.

B. The Doctrine of Dedication

The doctrine of dedication mentioned in Avon-by-the-Sea is the second of the three doctrines the courts have used to void municipal ordinances which discriminate against nonresident use of public beaches. This doctrine provides that an owner of an interest in land who deliberately appropriates it to public use reserves no rights in the land other than those compatible with the full exercise and enjoyment of the public uses to which the property has been appropriated. 43 Once the land has been so dedicated, its use cannot be withdrawn from the public unless and until the public ceases using and enjoying its rights in the property. The essential elements of the doctrine are an offer by an owner, either express or implied, to appropriate land or some interest or easement in the land to public use, and an acceptance of such an offer, either express or implied, by the public. 44 The Supreme Court of Florida has generally embraced the dedication doctrine, stating in City of Palmetto v. Katsch that any "appropriate manner in which the owner sees fit

40. Id. at 54.
41. See diagram in note 34 supra.
42. 294 A.2d at 54.
to indicate a present intention to appropriate his lands to public use” meets the requirement of the law.\textsuperscript{45} The Florida courts have not yet applied the doctrine of dedication to strike down ordinances which restrict nonresident use of municipal beaches. However, in 1972, in \textit{Gewirtz v. City of Long Beach}, a New York court did apply the doctrine to invalidate such a discriminatory ordinance.\textsuperscript{46} The ordinance had created a “public” park exclusively for the residents of the City of Long Beach. In striking it down, the court stated that when a municipality creates a public park out of its beach property by local ordinance, “it is difficult to conceive of any method better calculated to express the intent to dedicate” such land for use of the general public.\textsuperscript{47} The court found the necessary intent despite the fact that the ordinance created a public park solely for the residents of the City of Long Beach.\textsuperscript{48} \textit{Gewirtz} thus indicates that under the doctrine of dedication, a court may invalidate any municipal ordinance which opens beaches to the public when such an ordinance limits the “public” to residents of the municipality.

The dedication doctrine is sufficient to restrict differential practices in a municipality only to the extent that the municipality openly manifests its intent to dedicate. The City of Long Beach exhibited such an intent. But, if necessary, \textit{Gewirtz} could be easily circumvented. Other municipalities could carefully draft their ordinances to limit their beaches to residential use only. Dedication to the general public could then be construed only if there had been a previous dedication, either when the property was owned by a private party or when the municipality itself owned it. The irrevocability aspect of the doctrine specifies that once the property has been dedicated to public use, such use cannot be denied later.\textsuperscript{49} Hence, once a municipality openly manifests its intent to dedicate by opening its beaches to the general public, it cannot later limit access to residents only. But if it limits access to residents from the outset, the dedication doctrine cannot be applied to invalidate the ordinance.

The use of the common law doctrine of dedication would not always be effective in prohibiting municipalities from restricting the use of their beaches to residents. The common law requires an intent by the owner to grant the property for public use and an acceptance

\textsuperscript{45} 98 So. 352, 353 (Fla. 1923).
\textsuperscript{46} 330 N.Y.S.2d 495 (Sup. Ct. 1972).
\textsuperscript{47} \textit{Id.} at 505.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 507.
of the property by the public. Although the doctrine may be sufficient to prohibit some municipalities from restricting their beaches, it will have no effect where such beaches have not traditionally been open to the public. Furthermore, this doctrine does not prohibit the imposition of differential fees for residents and nonresidents—it applies only to absolute prohibitions against nonresidents. But still a third theory might be invoked to guarantee nonresidents use of publicly owned beaches—that of equal protection.

C. Equal Protection

In 1954, in *Brindley v. Borough of Lavallette*, a New Jersey court invalidated a municipal ordinance which prohibited persons who were not residents or property owners in the municipality from using the municipal beach, stating that such an ordinance violated the fourteenth amendment to the United States Constitution and article I of the New Jersey Constitution. The court explained that "the law is settled that discrimination against non-residents in an ordinance invalidates it, excepting possible special circumstances which would justify the discrimination." The court said no such special circumstances existed.

At least one Florida court has dealt with, but turned down, a similar equal protection challenge. *State ex rel. Shevin v. City of Belleair Beach* involved a city ordinance which prohibited nonresidents from using parking facilities adjacent to a public beach while permitting residents of the city and their guests to use the facilities. The state challenged the ordinance as violative of the fourteenth amendment to the United States Constitution and of article I, section 2 of the Florida Constitution. The Pinellas County Circuit Court upheld the ordinance, finding that "the discrimination in favor of the residents of Belleair Beach and Belleair Shores is not based upon race, religion, natural [sic] origin, nor an infringement of fundamental rights, and that consequently the restriction . . . is

50. In *Gewirtz*, the city reacted to the court’s striking of its restrictive ordinance by imposing a differential fee on nonresidents for use of the beach.
52. Id. at 159.
53. No. 75-541 (Fla. 6th Cir. Ct. Oct. 13, 1975) (supplemental order).
53.1. Article I, § 2 of the Florida Constitution, the equal protection clause, reads:

Basic rights.—All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.
reasonable, permissible, and constitutional." The Second District Court of Appeal, in an unpublished opinion, affirmed the lower court's holding.

The New Jersey court in *Brindley* and the Florida court in *Belleair Beach* took different views of the equal protection doctrine as it applies to use of and access to public beaches. To determine which court was correct, it might be helpful to examine the tools the courts have used in developing the equal protection doctrine.

The United States Supreme Court has evolved three tiers of judicial inquiry to be used in determining the validity of equal protection claims. The first level of inquiry, the traditional or rational basis standard, is invoked when the legislation being challenged is in either the economic or social welfare area. Under this standard, the court will uphold the legislation if any state of facts supports it.

The second level of inquiry, the strict scrutiny or compelling state interest standard, is invoked when the legislative classification is inherently suspect or when the legislation affects a fundamental right. A presumption of invalidity exists, and the court will strike the legislation unless the state can show that the legislation is aimed at protecting an important governmental interest and is necessary to achieve that interest. This burden has never been met.

In 1971, the Supreme Court developed an in-between approach, the "middle tier" standard. Unlike the other two standards, the middle tier is not outcome determinative. The court probes the asserted state interests to determine their importance and looks to see whether there is a substantial relationship between the legislation and the achievement of those interests. Although it is too early yet to determine clearly what circumstances will prompt the court to invoke this middle tier, the standard will probably be applied in any equal protection case where the legislation does not involve a suspect class, a fundamental right, or an economic or social welfare interest.

For purposes of this discussion we must determine the tier of judicial inquiry which would be used to scrutinize a municipal ordinance restricting the use of municipal beaches to residents.

The rational basis standard will be applied and such an ordinance will be upheld if it is found to involve only an economic or social
welfare interest. No social welfare argument could be maintained for upholding such an ordinance. But there is a good argument that a restrictive ordinance involves an economic interest. Since nonresidents do not pay municipal taxes to purchase and maintain municipal beaches, they impose a greater financial burden on the municipality than do taxpaying residents. This economic burden may justify the exclusion of nonresidents from municipal beaches, or at least the charging of higher user fees. If the municipality receives state or federal funding to maintain its beaches, such a nonresident restriction based on an economic interest may not be upheld. But those challenging such restrictive ordinances would probably be well advised to argue against the use of the rational basis standard.

The opponents of restrictive ordinances would much prefer that the court engage in strict scrutiny. And an argument can be made that the strict scrutiny standard should apply to exclusionary ordinances because they infringe on fundamental rights. In Shapiro v. Thompson, the United States Supreme Court applied strict scrutiny to state legislation which required one year of residency for eligibility to receive welfare benefits. The Court stated that such a requirement penalized the fundamental right to interstate travel and therefore violated the equal protection clause.

After Shapiro it might have been argued that any legislation which imposed a residency requirement violated the equal protection clause. In Memorial Hospital v. Maricopa County, however, the Court limited its holding in Shapiro. The Court stated that not all infringements of the right to interstate travel require strict scrutiny. The courts must look to the underlying right which is affected. In order for a residency requirement for beach use to be struck down under strict scrutiny, it must be shown not only that interstate travel is affected, but also that there is an important underlying right which must be protected.

Interstate travel is undoubtedly affected by the residency restrictions imposed by the municipalities, but such restrictions do not appear to affect any other underlying interests. The courts have not interpreted the public's right to use the beaches as a "right" in and of itself. Such rights are found only when a common law doctrine

62. In Shapiro this underlying right was welfare benefits, and in Memorial Hospital it was the indigent's right to medical care.
has been interpreted to grant them. Thus, it is likely that the courts would refuse to employ the strict scrutiny standard.

This leaves the middle tier. To survive an equal protection attack under the middle tier approach, the municipality must show that its residency requirements serve an important governmental interest and that the legislation is substantially related to the achievement of that interest. No clear articulation of a Florida municipality's reasons for differential regulations for residents and nonresidents has been found, but a look at the petitioner's brief in the New York case of Gewirtz v. City of Long Beach reveals some legitimate justifications for such restrictive ordinances.

The City of Long Beach asserted three reasons for excluding nonresidents from its beaches. First, since nonresidents do not pay any local taxes, they impose a greater financial burden on the city in their use of the beach than do residents. This might be considered an important governmental interest, and thus an ordinance would be deemed reasonably related to the achievement of that interest, assuming no federal or state funds were awarded to the municipality to maintain its beaches. But if state or federal funds were used for beach upkeep, then the connection would probably not be considered reasonably related to the achievement of an important governmental interest, and the legislation would be stricken under the middle tier analysis.

The second argument asserted by the City of Long Beach was that its beaches were often so overcrowded that some people had to be excluded, and it was most reasonable to exclude nonresidents. This argument may also fail to meet middle tier scrutiny. Although the protection of the beaches from physical deterioration and protection of users from potential safety hazards caused by overcrowding are important governmental interests, the means chosen to achieve those interests do not bear a substantial relationship to the asserted purpose. The exclusion of nonresidents to effect these goals is arbitrary and thus should be forbidden by the equal protection clause. Less drastic means are certainly available to preserve the beach and

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63. The Florida Supreme Court in White v. Hughes called the public's right to use the foreshore "an American common law right," 190 So. 446, 449 (Fla. 1939), and the New Jersey court in Avon-by-the-Sea called it a "deeply inherent right of the citizenry," 294 A.2d at 53.


66. See Non-Resident Restrictions, supra note 59, and text accompanying note 59.

67. Id.
The city could limit, as many municipalities do, the number of people who may use the beach at any one time. This could be achieved by allowing entrance to the beach area on a first come-first served basis. This would achieve the municipality's legitimate goal but would not involve any form of discrimination.

The third reason offered by the City of Long Beach for its discriminatory practices was that the restriction of nonresidents from beaches was proper because the behavior of these people on the beach was obnoxious in some cases and criminal in others. This argument is the most specious of the three. It can hardly be said that nonresidents alone are responsible for the problems of drugs, pollution, and littering. To deny them all the use of the beaches because of the behavior of a few clearly violates the equal protection clause. The total exclusion of nonresidents bears only a tangential relationship to the mischief being addressed.

Thus, an ordinance totally excluding nonresidents from municipal beaches could not survive a middle tier analysis. The same would hold true for differential fee charges for nonresidents. Unless the municipality could prove that its residents paid more for beach use than nonresidents, or that it was more expensive to maintain the beaches because of the nonresidents' use, such a differential fee would be held to violate the equal protection clause.

D. Summary

None of the three possible theories which courts may advance to strike down legislation differentially affecting nonresident use of the beaches—public trust, dedication, or equal protection—has been totally effective in protecting the public's right to use the dry sand

68. Under this rationale, out-of-state residents could challenge the ordinance also on commerce clause grounds. U.S. Const. art. I, § 8, cl. 3. Since the state is asserting a health and safety interest and there are less drastic means available for the achievement of these interests, the legislation violates the commerce clause because it interferes with the flow of commerce among the states, i.e., travel, lodging, food, etc. See Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

69. The fact that such a technique can be employed successfully to prevent overcrowding is demonstrated by the operation of the Cape Florida State Park beach facility on Key Biscayne, Florida, where the number of people using the beach is regulated through the distribution of entrance tickets. Once 4,000 tickets are sold, the access road to the beach is closed, and no further entry can be gained to the beach until 3 p.m., when beach use has diminished considerably. The figure of 4,000 was chosen because that is the total number of people which the park authorities felt the park could reasonably accommodate at any one time. This procedure has proved significant in preserving the beach, which could easily be destroyed by overcrowding.

70. See Non-Resident Restrictions, supra note 59, and text accompanying note 59.

areas of publicly owned beaches. The public trust doctrine is the least effective because it grants the public only the right to use the limited area of the foreshore. This doctrine is of little use to the public without the additional right of access to the sandy beach area beyond the reach of the ocean tide.

As has been shown, the public trust doctrine may be combined with the doctrine of dedication to extend to the public the right to use that area of the public beach which a municipal entity grants for public use. Some courts have extended the dedication doctrine to include public beach areas exclusively granted to residents of the municipality. However, this doctrine still does not fully protect the public's right to use all public beaches. That right is only available where there has been either extensive public use or dedication of the land with requisite intent.

The equal protection doctrine appears to have the greatest potential for vindicating the public's right to use all public beaches. But it too has limitations. Application of the equal protection doctrine is most obviously limited when the municipality pays to purchase and maintain its beaches wholly from local tax funds and does not receive any state or federal aid for such purposes. Given such facts, a court could find an economic regulation and thus uphold the ordinance by an application of the rational basis standard. A discriminatory ordinance would be less likely to survive the middle tier standard. But there is no guarantee that, even when applying the middle tier analysis, the court would not uphold the ordinance as being reasonably related to the achievement of an important governmental interest.

All this leads to the inescapable conclusion that the right of the general public to use the beaches of Florida on equal terms with municipal residents cannot be preserved by reliance on litigation under current law. The outcome of such litigation would be doubtful at best. Instead, the right of public use of public beaches should be placed either in the Florida Statutes or in the Florida Constitution.

III. Statutes and Constitutions

Most states have no laws which expressly deny to municipalities the power to exclude nonresidents from local beaches. An exception to this general rule can be found in the California statutes:

72. New York, in fact, has a statute which expressly grants the "suburban towns" of the state the right to exclude nonresidents from their self-supporting beaches. N.Y. TOWN LAW § 143 (McKinney Supp. 1977).
Any beach or seashore recreation area owned, leased, operated, controlled, maintained or managed by a city or county which is open to the use of residents of such city or county shall be open to all members of the public upon the same terms, fees, charges and conditions as are applicable to the residents of such city or county.\footnote{73}{CAL. PUB. RES. CODE § 5162 (West 1972).}

The California provision and the one proposed by the Florida Constitution Revision Commission are very similar. Florida's proposed provision is broader in scope in that it encompasses all public beaches, including state-owned and controlled beaches. California's provision addresses only those beaches owned and controlled by either a city or a county.

California's provision also is more specific. It makes California's beaches available to the public "upon the same terms, fees, charges and conditions as are applicable to the residents," rather than merely upon the same "terms and conditions of use." However, Commissioner Shevin's report and the transcripts of the commission debates clearly indicate that the effect of the two provisions is the same. The similarities between them may reflect both states' dependence on tourism for economic well-being.

The California statute has been in effect since 1968. So far, it has fostered no litigation. This may be an indication that the statute is serving its purpose without any significant impact or defiance.

In the 1978 session of the Florida Legislature, Representative William Sadowski introduced a bill similar to the proposed constitutional amendment.\footnote{74}{Fla. HB 772 (1978).} House Bill 772 provided that any beach or seashore recreation area owned, leased, operated, or otherwise controlled by a Florida governmental entity shall be open to all members of the public on the same basis as it is open to residents. The bill died in the House Committee on Natural Resources.\footnote{75}{Legislative Information Division, Joint Legislative Management Committee, Statistics, Interim Last Action Report and Passed Bill Report, Florida Legislature, 1978 Regular Session 49 (June 6, 1978).} The reluctance by the legislature to provide by statute for public access to public beaches makes the argument for a constitutional provision even more compelling.

Although there is no specific statutory guarantee of equal access to and use of municipally owned beaches to nonresidents in Florida, one of the state's natural resource programs may eventually lead to the same result. In order for a municipality to qualify for state funds
to restore or maintain a beach under the Beach and Shore Protection Act, it must provide the public with permanent access to the beach and adequate parking facilities nearby. Furthermore, the Act prohibits the spending of public funds on an erosion control project "where adequate public access to, and use of, the restored beach is not available." As more municipalities apply for state funds under the program, this statute should eliminate, at least indirectly, many of the barriers that now stand in the way of nonresidents who wish to enjoy municipally owned beaches and their parking facilities.

IV. THE EFFECT OF THE PROPOSED AMENDMENT

The most notable effect of this proposed revision is that it would grant the public the right to use all the public beaches of the state on equal terms and conditions. The public would be given not only the right to use the foreshore, which is already granted by article X, section 11 of the current constitution, but also the right to use the sandy beach area owned by a municipality or other state governmental entity. The amendment would prohibit such entities from imposing direct restrictions on the public's use of the beaches.

The constitutional provision also would affect the fisc of both state and local governments, although the Florida Senate Appropriations Committee reported that its fiscal impact would not be significant. The striking of discriminatory ordinances could help increase both in-state and out-of-state tourist use of beaches which are now restricted. This would certainly increase revenues to cities and the state, some of which could be used to improve or preserve the beach areas—thus again benefiting the public at large.

Since the increase in the number of people using the beaches in a particular area may result in additional beach-related expenses, the proposal would afford the municipality the opportunity to make up for such costs by imposing beach user fees—so long as those fees were levied on all users equally. The municipality could also nondiscriminatorily limit, on a first come-first served basis, the number of people who could use the beach at any one time.

The major defect of the proposed constitutional provision is not

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77. Id. § 161.091(1)(e).
78. Since the amendment was transferred from art. II, § 7 to the declaration of rights article, this may give the public's interests even further protection. This transfer indicates the commission's intent to treat the provision as an inherent right of the public.
80. Transcript, supra note 8, at 85.
apparent from the wording of the proposal. This defect may be found in the statement by Commissioner Shevin that the public's right to use the public beaches on equal terms and conditions would not extend to the use of parking or other facilities adjacent to such beaches. Shevin maintained that the proposed amendment deals only with use of the beach and that a municipality could charge differential fees to nonresidents for parking.

Thus, a municipality still could effectively deter nonresidents from using municipal beaches. Municipal parking facilities adjacent to the beach are usually the most convenient and are often the only available parking areas within a short walking distance of the beach. Charging differential fees for the use of such facilities would discourage nonresident use just as the present discriminatory ordinances do. Nonresidents would have an express constitutional right to use the beaches, but, practically speaking, they would have to pay more than residents to exercise that right.

Commissioner Shevin stated early in the commission proceedings that policies imposing differential parking fees or totally excluding nonresidents from parking facilities "appear to be unconstitutional." Yet the commission proposal seems to condone such practices. Conceivably, the "plain meaning" of the proposal could be read as granting the right to equal use of parking facilities. The right of the public to use the beaches on "equal terms and conditions" possibly could be determined to imply a corresponding right of access to the beach. But this seems doubtful. More likely, the courts would look to the commission debates in a search for intent, find the disclaimers by Commissioner Shevin, and quote them as evidence that the commission did not intend to abolish discriminatory parking fees.

V. Conclusion

Two conclusions may be derived from this discussion. First, nonresidents are entitled to use the public beaches of Florida without discrimination. This right should include not only the foreshore but the sandy beach area as well. The proposed constitutional amendment would provide the public with such a right.

Second, once the public is given the right to use the entire public beach area, it also should be provided with nondiscriminatory access to that area, at least so far as access by way of publicly owned

81. Id. at 94, 100-01.
82. Id. at 100-01.
property is concerned. Nonresidents should be treated no differently than residents in the use of parking facilities adjacent to beaches. Permitting discrimination would only foster discontent. In short, the proposed amendment should be extended by judicial interpretation or future amendment to encompass parking facilities.

The spirit of the revision proposal is admirable. The proposal, if adopted, would certainly do much to open Florida's long and lovely shoreline to public use. In practice, though, the constitutional promise of a right to use could be reduced to empty rhetoric. This would be avoided only if the courts extended the scope of the amendment to include the public's right to equal use of publicly owned parking facilities adjacent to the beaches. Without such an extension, the fair share of the seashore which the people are seeking will not be assured.