

DOES THE CONSTITUTION PROTECT NUDE BATHING AT A PUBLIC BEACH?

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This past March, Scottsdale, Arizona was the site of the 5th Annual NRPA Swimming Pool and Aquatic Conference. One of the conference educational sessions was entitled "Clothing Optional Pools and Beaches." At this session, the government affairs chairman for the American Sunbathing Association provided a brief history of clothing optional recreation both here and abroad. Part of this history involved a situation at the Cape Cod National Seashore which ultimately produced the 1976 *Williams* decision presented herein.

As described in the following paragraphs, the federal court in *Williams* assumed nude bathing was a minor interest, rather than a fundamental right under the United States Constitution. As a result, constitutional challenges to governmental regulation of nude bathing were subject to the rational basis test, rather than the more demanding strict scrutiny test. Under the rational basis test, governmental regulation of nude bathing would be found constitutional as long as there is some rational relationship between the regulatory scheme and the governmental interest involved. In *Williams*, the court found a ban on nude bathing was reasonably related to the government's interest in preserving the environmental integrity of the Cape Cod National Seashore.

On the other hand, had the court found nude bathing to be a fundamental right, any governmental regulation of this conduct would have to pass the strict scrutiny test to be found constitutional. Under the strict scrutiny test, the government would have to demonstrate a compelling state interest in regulating a fundamental right. Further, the government would have to show that the regulatory scheme chosen was the least restrictive means available among possible alternatives. As a result, it would have been very difficult to develop a constitutional regulation which banned nude bathing if such conduct was considered a fundamental right.

Nude Beach Free Speech?

In the case of *Williams v. Kleppe*, 539 F.2d 803 (1976), a group who wished "to enjoy nude bathing at one of the more remote beaches of the Cape Cod National Seashore (Seashore) sought a declaration of unconstitutionality of the regulation of the National Park Service imposing a total ban on such activity." The facts of the case were as follows:

The site of this controversy is a beach known as Brush Hollow on the Atlantic shore of Cape Cod, a three mile expanse between two conventionally operated beaches. For some forty or fifty years this spot, hidden behind some of the highest dunes on the Cape, had been used by individuals, couples, and small groups for skinny dipping. Apparently neither the town of Truro, in which Brush Hollow was located, nor the Commonwealth of Massachusetts sought to suppress this bucolic activity. Nor, after the creation of the Seashore in 1959, did the National Park Service.

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By the 1970's the press of population was increasingly felt. In 1972 Brush Hollow attracted as many as 150 nude bathers in a day. The existence of the only "free beach" on the east coast became a matter for regional and national news coverage. In the summer of 1974 the average count of nude bathers was over 300, on weekends rising to 600, and attaining a peak of over 1200 on one day in August.

As the popularity of Brush Hollow built up, so did the concern of the owners of residential property within the Seashore and near points of access to the beach. Their complaints stimulated the Park Service to appraise alternatives open to it. Significant factors in the study of the Seashore Advisory Commission were the primary emphasis on conservation reflected in the classification of Brush Hollow as a non-managed area and the statutory mandate to consider the interests of owners of private property within the boundaries of the Seashore. [Specifically, the Secretary of the Interior was directed, in developing the Seashore, to "provide public use areas as will not diminish for its owners and occupants the value or enjoyment of any improved property located within the seashore." 16 U.S.C. § 459b-6(b)(2)]

Pursuant to the Congressional mandate that "the seashore shall be permanently preserved in its present state", 16 U.S.C. § 459B-6(b)(1), the Park Service had set aside all Seashore land for conservation except some trails, picnic areas, visitor centers, and six developed beaches. A developed or managed beach had lifeguard protection, bath houses, waste containers, sanitary facilities, parking accommodations, and boardwalk access paths over dunes. Such a beach would be in either a Class I area - High Density Recreation, or Class II area - General Recreation. Brush Hollow was classified as a Class III area, with primary emphasis on conservation, and, while some recreational use was contemplated, the beach was equipped with no organized facilities or services.

The Park Service, after considering other alternatives, including the allowance of nude bathing at other beaches, equipping Brush Hollow as a managed beach, and limiting access to Brush Hollow consistent with its Class III status, adopted the regulation at issue, 36 C.F.R. § 7.67(g), which bars public nude bathing within the Seashore to all persons over ten years of age.

Although the federal district court found that "nude bathing at Brush Hollow is entitled to some constitutional protection," it held that "the regulation withstood constitutional challenge, the conditions prompting the regulation outweighing the right at issue." Williams and the other plaintiffs appealed.

As described by the appeals court, plaintiffs maintained that "they and their predecessors at Brush Hollow beach have, through their long tolerated practice of nude bathing, acquired a substantively protected constitutional right."

[A]t Brush Hollow, tradition, custom and usage have given rise to the reasonable expectation that one may engage in a harmless, healthful activity outside the sight of those who might be offended without fear of harassment, arrest and prosecution, there exists a right of nudity. Plaintiffs do not claim that the right entitles them to be free from

any restraint. They seek only the right to continue their practice in numbers consonant with environmental needs somewhere within the Seashore. They claim that this right, though acquired through prescription [i.e. based upon long-continued enjoyment], is one of the smaller liberties entitled to substantive constitutional protection. Government encroachment is only authorized if the government interest involved is important and cannot be served by more selective or less restrictive measures.

Based upon the following evidence, the United States contended that "the experiences of the summer of 1974 included, in addition to the accession of far greater numbers of nude bathers than ever before, demonstrable damage to the environment, increasing attendance despite attempts of enforcement, record traffic congestion, litter, and trespassing":

(1) Gouges in the top of a dune, cuts into slopes of dunes, injury to vegetation on the slopes of dunes, destruction of roadside pine seedlings, and paths broadened by motorcycle tracks. (2) In the time of maximum attendance, the authorities issued 400 parking tickets, 50 notices for destruction of property, and 30 notices for illegal use of motorcycles. (3) Long lines for parking at beaches, large numbers of automobiles parked at the roadside, jitney traffic to access points and groups waiting to be picked up, noise of motorcycles and busy traffic from 8 a.m. to 6 p.m. (4) Debris on the beach and in underbrush; excrement and flies noticed on warm days. (5) Driveways blocked, private property used as access, vehicles broken into, property stolen, cars (12-13) parked on private lawns, a camper parked overnight, owners verbally abused by trespassers, shrubs destroyed.

In response to these problems listed by the United States, plaintiffs countered that "no attempt was made to enforce littering or trespass regulations; parking restrictions were feebly enforced; no attempt was made to limit access to beaches via stickers; no regulations forbade walking on dunes and vegetation; and signs announcing a nude beach were not utilized." Further, plaintiffs argued that "it would cost the Park Service no more to limit access than to impose a total ban on nude bathing, and that, as yet, no one knows precisely where the danger point of environmental degradation is reached."

On appeal, plaintiffs argued that "their First Amendment rights of free speech and association were implicated and infringed" by the regulation of the National Park Service banning nude bathing at the Seashore. The appeals court, however, agreed with "the district court's conclusion that no rights of free speech can be said to have been involved here."

A distinction must be made between groups concerned with discussing and promoting a pleasurable activity, and those gatherings of people merely desiring to pursue that activity where it can take place. If the latter groupings were considered association, independent of any speech element in the activity, the result would be constitutional double counting: to the particular interest at stake would be added the rights of speech and/or association involved in pursuing the interest.

Plaintiffs argued further that the United States Supreme Court "has afforded a high degree of protection to a number of liberties not specifically enumerated in the Constitution." The appeals court

acknowledged that federal courts "have recognized as a protectible, if minor interest... an individual right concerning one's own appearance and life style."

Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.

Therefore, for the purposes of this case, the appeals court assumed that plaintiffs' "interest in continuity in engaging in a pleasurable activity on public property must be afforded some measure of substantive constitutional protection." Despite such constitutional protection, the appeals court found that the interests of the United States in preserving the environmental integrity of the Seashore outweighed plaintiffs' asserted right to bathe in the nude.

Given this assumption [constitutional protection to engage in pleasurable activity on public property], however, we have no doubt that the evidence presented below supports the district court's conclusion that the defendants' actions was sufficiently justified. In our judgment, the defendants' actions can easily withstand the ordinary, relaxed standard of review, satisfied by a conceived rational relationship. Indeed, the record in this case establishes that barring nude bathing bears a real and substantial relationship to the objectives of the Seashore. There were very real threats to the continued fulfillment of the Seashore's conservation purposes, and the action taken, after consideration of some eight alternatives, served those purposes. Therefore, if the interest asserted by plaintiffs were considered of sufficient importance to justify a form of intermediate review, we would have to hold that the government had discharged its burden and established a rationale which outweighed plaintiffs' interest.

Only if the interest in nude bathing were considered fundamental would plaintiffs prevail. In that event, the opinion of the Seashore Supervisor that alternative approaches would require increased expenditures might be deemed inadequate. And defendants might be under a duty to demonstrate, by more specific data, the infeasibility of more selective solutions to the problems engendered by the nude bathers. We see no basis for imposing such a duty. It cannot be maintained that the asserted interest falls into that narrow category of claims involving, freedom of choice with respect to certain basic matters of procreation, marriage, and family life which the government may not invade absent compelling reason, and without exhaustion of less restrictive alternatives.

As a result, the federal appeals court concluded that personal liberties guaranteed maximum protection under the Constitution "do not encompass the right to bathe in the nude at the Cape Cod Seashore National Park." The federal appeals court, therefore, affirmed the judgment of the district court upholding the regulation of the National Park Service banning nude bathing at Cape Cod National Seashore.