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STATE DURATIONAL RESIDENCE REQUIREMENTS FOR DIVORCE: HOW LONG IS TOO LONG?

State durational residence requirements for divorce by their very nature divide residents into two classes, "old" and "new" residents, distinguishable only by the length of time members of the respective classes have resided in the state.[1] "New" residents are discriminated against, in that they are absolutely prohibited from initiating divorce proceedings.[2] This discriminatory treatment, viewed in the light of recent Supreme Court decisions involving restriction of individual rights,[3] has provoked four recent challenges in the federal district courts to the constitutionality of state residence requirements for divorce.[4] Two district courts have upheld the validity of state statutes requiring individuals to maintain specific periods of residency prior to petitioning for divorce,[5] while two other district courts have declared similar requirements unconstitutional.[6] The latter tribunals found that residence requirements for divorce either infringed upon the constitutionally guaranteed right to travel, violating the equal protection clause,[7] or denied access to the courts to those newly ar-

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[1]*Cf.* Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Every state requires some period of durational residency, varying from six weeks to two years, prior to the maintenance of a divorce action. The residence period is sometimes shortened, *e.g.*, ILL. ANN. STAT. ch. 40, § 3 (1951), or waived, *e.g.*, CONN. GEN. STAT. ANN. § 46-15 (1969), for example when the marriage was performed in the forum state, when the cause of action arises there, or when both parties reside in the state and the respondent is personally served. *See* V MARTINDALE-HUBBELL LAW DIRECTORY *passim* (1973).

[2]*Cf.* Dunn v. Blumstein, 405 U.S. 330, 334 (1972).

[3]Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating one-year residence requirement for voting); Boddie v. Connecticut, 401 U.S. 371 (1971) (invalidating filing fee requirement as applied to indigents seeking divorce); Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating one-year residence requirement for receiving welfare).

[4]Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973), *appeal docketed*, 42 U.S.L.W. 3257 (U.S. Oct. 23, 1973) (No. 73-678); Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973), *prob. juris. noted*, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-762); Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973); Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973).

[5]Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973), *prob. juris. noted*, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-762); Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973) (upholding 1-year and 6-month requirements, respectively).

[6]Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973), *appeal docketed*, 42 U.S.L.W. 3257 (U.S. Oct. 23, 1973) (No. 73-678); Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973) (invalidating two- and one-year requirements, respectively). South Dakota's one-year divorce residence requirement was recently invalidated as well. *See* McCay v. South Dakota, 42 U.S.L.W. 2306 (D.S. Dak. Nov. 15, 1973).

[7]U.S. CONST. amend. XIV: "No State shall . . . deny to any person within its

rived individuals seeking dissolution of their marriage relationship, violating the due process clause.[8] The courts which upheld divorce residence requirements generally concluded either that the infringement of the right to travel caused by the residence requirements was negligible, or that despite the existence of some limitation on the right to travel, the restriction was warranted by counterbalancing state interests.

Determining the constitutional validity of durational residence requirements involves an evaluation of both the state interests and objectives urged in support of the requirements and the individual rights and interests affected by the requirements. In the absence of a clear Supreme Court mandate as to the validity of residence requirements for divorce, courts have drawn on two recent Supreme Court decisions[9] which involved similar residency requirements for receiving welfare aid and for exercising the franchise. In both cases the classifications which resulted from imposition of durational residence requirements were examined under the equal protection clause of the Constitution.[10] The Court's analysis in each case necessitated a determination of the equal protection standard applicable to the particular classification in question.

The Supreme Court has enunciated two tests for determining the validity under the equal protection clause of allegedly discriminatory classifications. Under the "traditional" equal protection test, a classification is valid unless it is "without any reasonable basis, and therefore is purely arbitrary."[11] This lenient standard requires no

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jurisdiction the equal protection of the laws."

[8]U.S. CONST. amend. XIV: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[9]Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

[10]Note 7 *supra.*

[11]Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). The Court there explained four rules pertinent to the application of the traditional equal protection test:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails

precision and is rarely an obstacle to a finding of constitutional acceptability.[12]

However, when a classification is based upon inherently "suspect" criteria, such as race, or infringes upon a constitutionally guaranteed fundamental right, a stricter test must be met. Under this "strict scrutiny" test,[13] the classification must be "necessary to promote a compelling governmental interest."[14] Once it has been established that a statute furthers a compelling state interest, a second requirement must be satisfied: the statute must be "drawn with precision" so as to further the state interest by means least restrictive of the constitutional right.[15]

In both Supreme Court cases upon which the federal district courts examining divorce residency requirements have relied, the Court invalidated residence requirements under the strict scrutiny standard after finding that the requirements impermissibly restricted

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> the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. at 78-79. *See also* McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution . . . .").

[12]*See* San Antonio School District v. Rodriguez, 411 U.S. 1, 104 (1973) (Marshall, J., dissenting). *See also* McLaughlin v. Florida, 379 U.S. 184, 191 (1964) ("Normally . . . the legislative judgment . . . is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious.").

[13]San Antonio School District v. Rodriquez, 411 U.S. 1, 16 (1973).

[14]Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *See also* Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.* at 670.

[15]Dunn v. Blumstein, 405 U.S. 330, 343 (1972). For example, consistent with the custom that courts will ordinarily defer to the judgment of the legislatures in areas of commercial legislation, a state statute which prohibits opticians from fitting or duplicating lenses without a prescription, while exempting sellers of ready-to-wear glasses from such a requirement, need only meet the traditional test of having some "reasonable basis," not wholly arbitrary. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

But when a criminal statute prohibits unmarried men and women of different races from occupying and habitually living in the same room in the nighttime, while not so prohibiting similar activity between members of the same race, the statute must be examined under the strict equal protection standard. McLaughlin v. Florida, 379 U.S. 184 (1964).

the contitutional "right to travel."[16] In *Shapiro v. Thompson*,[17] the Court affirmed three district court decisions and held unconstitutional various state and District of Columbia statutory provisions requiring satisfaction of a one-year durational residence requirement prior to application for welfare assistance. The main justification offered for the waiting period was that it served as a "protective device," deterring indigents from entering the particular jurisdiction, and thereby preserving the fiscal integrity of the state welfare programs. Citing the long history of the constitutionally guaranteed right to interstate travel, the Court dismissed such a proposed state objective as "constitutionally impermissible."[18] Because the denial of welfare assistance penalized exercise of the fundamental right to travel, the Court invoked the strict equal protection test and discounted

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[16]As yet there has been no definitive determination of the particular constitutional provision guaranteeing the right to travel interstate. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Passenger Cases, 48 U.S. (7 How.) 282 (1849). *See also* Aptheker v. Secretary of State, 378 U.S. 500 (1964) *and* Kent v. Dulles, 357 U.S. 116 (1958) (basing protection of the right on the Due Process Clause of Fifth Amendment); Edwards v. California, 314 U.S. 160 (1941) (Commerce Clause); Twining v. New Jersey, 211 U.S. 78 (1908) (Privileges and Immunities Clause of Fourteenth Amendment); Paul v. Virginia, 75 U.S. 168 (1868) (Privileges and Immunities Clause of Art. IV). It is nevertheless agreed that the right exists, and is "fundamental":

> The constitutional right to travel from one State to another . . . occupies a position fundamental to the concepts of our Federal Union. . . . [F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution. . . . Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel . . . [a]ll have agreed that the right exists.

United States v. Guest, 383 U.S. 745, 757-59 (1966) [Footnotes omitted].

For discussion of suggested sources of the travel right, see Shapiro v. Thompson, 394 U.S. 618, 666-71 (1969) (Harlan, J., dissenting) (concluding that the right is derived from the Due Process Clause of the Fifth Amendment).

[17]394 U.S. 618 (1969) [hereinafter cited as *Shapiro*].

[18]*Id.* at 629-31. The Court found "weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions." *Id.* at 628. Since *Shapiro*, many defenders of residence requirements have attempted to limit application of its holding on the basis of this dicta, claiming that similar effects were unobjectionable when merely by-products of legitimate state objectives. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234, 237 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971), discussed at note 34 *infra*.

After rejecting the state purpose of deterring indigents from entering the state, alternative justifications of excluding those persons who migrate to states solely to secure larger payments, and limiting benefits to "old" residents who previously contributed to the community through taxes were similarly declared invalid by the *Shapiro* Court. 405 U.S. at 631-32.

other proposed administrative and related state objectives[19] as insufficient to warrant the "invidious classification."[20] In the Court's view the durational residence requirements amounted to an unconstitutional denial of equal protection under the strict scrutiny test.[21]

The concept of the right to travel was substantially broadened by the Supreme Court in *Dunn v. Blumstein.*[22] In *Dunn*, a law professor who was denied voter registration because of his recent arrival in the state successfully challenged Tennessee's one-year durational residence requirement for voting. Relying on *Shapiro*, the Court again applied the more exacting equal protection test.[23] Here strict scrutiny was doubly applicable since the residence requirement infringed upon two fundamental personal rights, the right to vote as well as the right to travel.

Tennessee's contention that the compelling state interest test was appropriate only where there was actual deterrence of the right to

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[19]The claim that the residence requirement facilitated budget planning was unsupported by the evidence; actual reliance was placed on other methods in budget estimation. The contention that the requirement provided proof of residence was rebutted by the observation that residence (*i.e.*, physical presence and the intent to remain), and the one-year requirement were separate and distinct prerequisites, and that the facts relevant to a determination of residence were routinely investigated by welfare authorities. As for prevention of fraudulent receipt of benefits from more than one jurisdiction, far less drastic means were available. Finally, the proposition that the residence requirement encouraged prompt entry of new residents into the labor force was unacceptable, as it was not similarly directed toward long-time residents. 394 U.S. at 633-38.

[20]*Id.*

[21]Significantly, the *Shapiro* majority expressly limited its findings to the realm of welfare:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. *Such requirements may promote compelling state interests on the one hand, or on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.*

Id. at 638 n.21 (emphasis added in latter sentence). The effectiveness of this limitation was questioned by Chief Justice Warren who felt that the decision "reveals only the top of the iceberg. . . . Lurking beneath are the multitude of situations in which States have imposed residence requirements. . . . Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored." *Id.* at 654-55 (Warren, C.J., dissenting).

[22]405 U.S. 330 (1972) [hereinafter cited as *Dunn*].

[23]The Court initially distinguished between residency and durational residency requirements. *Id.* at 334. "Residency" normally means domiciliary residency, *i.e.*, physical presence coupled with the intent to remain indefinitely. A durational residence requirement requires "residency," maintained over a particular length of time. *See* notes 48-50 and accompanying text *infra.*

travel was labelled by the Court "a fundamental misunderstanding of the law."[24] Explaining that *Shapiro* was not premised upon a finding that denial of welfare actually deterred travel, Justice Marshall reiterated that the strict equal protection test would be applicable whenever a classification served to penalize the exercise of the travel right.[25] Since durational residence requirements "impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right . . . ,"[26] they are invalid unless *necessary* to promote a *compelling* state interest. The one-year voting requirement was found to be too imprecise in furthering the state interests of prevention of fraudulent voting and assurance of knowledgeable voters,[27] and was therefore not necessary under the strict test.

Both *Dunn* and *Shapiro* stressed the fundamental nature of the right to travel and the applicability of the strict equal protection test in determining the validity of statutes penalizing the right. However, since these cases were concerned specifically with residence requirements for voting and welfare, extension of their underlying rationale to similar requirements in the divorce realm has not been universal, and inconsistent decisions have resulted.[28] A threshold question is

[24]405 U.S. at 339. Tennessee attempted to confine *Shapiro* to instances in which the specific objective of the residence requirement was to deter travel (*e.g.*, dissuading indigents from entering the state), arguing that the voter residency requirement did not *seek* to accomplish such an objective. The state argued further that strict scrutiny was proper only when evidence of actual deterrence existed. The Court answered that "it is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel." *Id.*

[25]*Id.* at 340. The Court further stated that the right to travel was an "*unconditional* personal right." *Id.* at 341.

[26]*Id.* at 342. The Court arguably referred here to *all* durational residence laws. *See* Oregon v. Mitchell, 400 U.S. 112 (1970): "By definition, the imposition of a durational residence requirement operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration." *Id.* at 238. (Brennan, White and Marshall, JJ., concurring and dissenting).

[27]Maintaining the purity of the ballot box was a legitimate and compelling goal, but less restrictive methods were available. The Court pointed to various provisions of the Tennessee Code dealing specifically with voter fraud. The State's purported fraud investigation rationale was rebutted (registration cut-off was 30 days before election, thus one-year residency requirement does not increase fraud investigation time), and the "conclusive presumption" of nonresidency was found violative of equal protection. 405 U.S. at 345-54. *See* Carrington v. Rash, 380 U.S. 89 (1965). The state purpose of assuring a knowledgeable electorate similarly failed to substantiate the imposition of the one-year waiting period, due in part to impermissible objectives, but primarily to the imprecision of the classification. 405 U.S. at 354-60.

[28]*Compare* cases cited in note 5 *with* those in note 6 *supra.*

whether the traditional or strict standard should be applied to durational residence requirements for divorce.

In state courts,[29] as well as federal district courts,[30] disagreement and confusion surround the process of determining the proper test for evaluating durational residence requirements. Decisions of the Supreme Court have not eliminated the uncertainty. In *Shapiro* the Court purposely restricted its holding to residence requirements for receiving welfare, stating that other requirements "may not be penalties" upon the right to travel.[31] However, Justice Marshall's language in *Dunn* indicates that *all* residence requirements penalize the fundamental right to travel, and therefore must be examined under the compelling state interest test.[32] Even the slightest penalization will purportedly trigger strict scrutiny.[33] Nevertheless, the Supreme Court has summarily affirmed three-judge court decisions upholding a one-year residence requirement for receiving in-state tuition rates,[34] and

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[29]*See, e.g.*, Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972); Whitehead v. Whitehead, 53 H. 302, 492 P.2d 939 (1972).

[30]*See* cases cited note 4 *supra* and notes 34-36 *infra.*

[31]*See* note 21 *supra.*

[32]*See* text accompanying notes 25 and 26 *supra.*

[33]405 U.S. at 340. *See, e.g.*, Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 221 n.8 (D. Hawaii 1973); Shiffman v. Askew, 359 F. Supp. 1225, 1232 (M.D. Fla. 1973).

[34]Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). The Minnesota district court upheld a University of Minnesota regulation requiring one year of residence prior to qualification for in-state tuition rates under the traditional standard. The court distinguished *Shapiro* on two grounds: (1) that, unlike the welfare residency requirement, the one-year waiting period for lower tuition rates did not have as its specific objective exclusion of out-of-state students, and (2) that this requirement entailed no denial of the basic necessities of life. The court concluded that the waiting period would not deter persons from entering the state to attend the University, there was no infringement of a fundamental right, and therefore the strict standard was inapplicable. 326 F. Supp. at 237-41.

Although the Supreme Court did not pass specifically on the appropriateness of the equal protection test applied by the district court, it is reasonable to presume tacit approval. Had the Court itself applied the strict standard, it is unlikely that a one-year residence requirement would have been found "precise."

Although *Dunn* was decided subsequent to the affirmation, *Starns* was thereafter reaffirmed in Vlandis v. Kline, 412 U.S. 441, 452 n.9 (1973). In this case, the Court used only a due process analysis in invalidating a Connecticut statute which classified all students who were non-residents at the time they applied for admission to the state university system as non-residents for the entire period of their attendance. In defining the scope of its holding, the Court stated, "[n]or should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement . . . ." *Id.* at 452. Contrasting its decision with the *Starns* case, the Court noted:

> [T]he Connecticut statute prevents a student . . . from ever rebutting the presumption of nonresidence during the entire time that he

a six-month residence requirement for admission to the bar,[35] both of which were measured under the traditional equal protection test.[36] These affirmations by the Supreme Court would seem to weaken the *Dunn* dicta. They indicate that imposition of a residence requirement does not, by its very nature, automatically penalize the right to travel. Apparently, the nature of the underlying right restricted and the consequences of the restriction determine whether the right to travel is penalized by a particular residence requirement, and thus which equal protection test is applicable.[37] Denial or delay of the right

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> remains a student . . . . Under Minnesota's durational residency requirement, a student could qualify for in-state rates by living within the State for a year in student status . . . .

Id. at 453 n.9; *accord*, Hasse v. Board of Regents of the University of Hawaii, 363 F. Supp. 677 (D. Hawaii 1973) (upholding a one-year residence requirement as prerequisite to qualification as resident for tuition and admission purposes, relying on *Starns* and *Vlandis*); Sturgis v. State of Washington, ___ F. Supp. ___ (W.D. Wash. June 21, 1973), *aff'd mem.*, 42 U.S.L.W. 3326 (U.S. Dec. 4, 1973) (No. 73-483) (upholding one-year residence requirement for in-state tuition purposes); Kirk v. Board of Regents of Univ. of California, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970).

[35]Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972), *aff'd mem. sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972). Note however that the requirement here was for only six months. Also, although using the traditional standard of "reasonableness," the district court nevertheless expressed the view that the state's interest was compelling. 339 F. Supp. at 260. *But see* Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) (one-year residence requirement prior to taking bar exam invalidated under strict standard). *See generally* Note, *The Constitutionality of State Residency Requirements for Admission to the Bar*, 71 MICH. L. REV. 838 (1973).

[36]But the Court recently affirmed another three-judge court decision upholding a seven-year residence requirement for qualification as a candidate for state governor, measured at the district level under the strict test. Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd mem.*, 414 U.S. 802 (1973). In this case, however, the district court found the strict standard applicable primarily because the requirement limited the voters in their choice of candidates, and determined that the right to travel was not infringed. 353 F. Supp. at 1214-18. A concurring opinion noted: "I have difficulty, however, with the holding that the . . . so-called 'compelling interest test' applies with all its vigor . . . . Actually what I believe the Court is doing (and quite properly so) is to apply ordinary equal protection standards—weighing the plaintiff's right to hold office against the countervailing right of the bodypolitik to establish reasonable nondiscriminatory standards for those who would aspire to represent it in highest office." *Id.* at 1218 (Campbell, C.J., concurring).

[37]The situation is further confused by indications that the Supreme Court may be deviating from the two-tier equal protection test, see notes 11-15 and accompanying text *supra*, and applying a more stringent version of the traditional test. *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). In declaring invalid an Idaho statute which discriminated on the basis of sex, the Court did not invoke strict scrutiny, but

to vote,[38] or to receive welfare[39] by means of a residence requirement penalizes the right to travel, necessitating implementation of the strict standard. Similar delay of qualification for in-state tuition rates[40] or admission to the bar[41] may not amount to a penalty on the travel right, thereby allowing examination under the traditional equal protection test. The distinction is presumably based on findings that the latter delays do not frustrate immediate needs, nor infringe upon sacred constitutional rights.[42]

Of primary importance, therefore, in deciding which equal protection standard should be applied to test the legitimacy of a particular residence requirement, is determining whether the resultant restriction amounts to a penalty on the right to travel. Alternatively, if one reasons that *all* durational residence requirements, for whatever purpose, penalize the right to travel to some extent, the task becomes one of determining the degree of penalization which requires invocation of the strict equal protection standard.[43] Whichever approach is employed, it would appear that the *effect* of a particular residence requirement on the right to travel must be determined in order to decide which equal protection test is appropriate.[44] In this respect, the nature of the underlying right—be it the right to vote, to receive

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rather used such a reinforced version of the traditional test. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relationship* to the objective of the legislation'. . . ." *Id.* at 76, *citing* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (emphasis added). *But cf.* San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), where the Court returned to the traditional standard of whether a challenged state action "rationally furthers a legitimate state purpose or interest." *Id.* at 55. *See also* Mr. Justice White's concurring opinion in Vlandis v. Kline, 412 U.S. 441 (1973): "[I]t is clear that we employ not just one, or two, but . . . a 'spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause'. . . ." *Id.* at 458 (White, J., concurring).

For a summary of these developments, see San Antonio School District v. Rodriguez, 411 U.S. 1, 98-110 (Marshall, J., dissenting).

[38]Dunn v. Blumstein, 405 U.S. 330 (1972).

[39]Shapiro v. Thompson, 394 U.S. 618 (1969).

[40]Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Vlandis v. Kline, 412 U.S. 441 (1973).

[41]Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972), *aff'd mem. sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972).

[42]*See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

[43]*See, e.g.*, Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972), *aff'd mem. sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972), where the district court, using the traditional test, stated that the six-month residence requirement did not "unduly penalize" the right to travel interstate. 339 F. Supp. at 260.

[44]*Cf.* Note, *The Problem of the "Newcomer's Divorce,"* 30 MD. L. REV. 367, 372 (1970).

welfare, or to obtain a divorce—and the extent to which it is restricted must be considered. Certainly the relative importance attributed to the underlying right restricted by a residence requirement, and the extent to which that right is vested, will largely determine the degree of indirect infringement of the right to travel. Similarly, the extent to which exercise of that underlying right is restrained—whether it is partially qualified or totally prohibited, and the duration of its inhibition—will influence the restrictive effect of a particular residence requirement on the right to travel.

Initially it would appear that in examining durational residence requirements for divorce the district courts have disregarded the individual effects of the requirements on the travel right. There is apparent agreement among the district courts that under the assumed authority of *Dunn*, divorce residence requirements penalize the right to travel and hence are subject to strict scrutiny.[45] The disagreement as to the validity of divorce residence requirements emanates not from a dispute over which equal protection standard should be applied, but from divergent interpretations and applications of the strict equal protection test. However, application of the strict test may deviate to the extent that a less stringent test is in essence applied, and the strict scrutiny test invoked in name only. This process of qualifying the compelling interest test has occurred as some courts have analyzed the effects of particular divorce residence requirements on the right to travel.

A rigorous application of the "compelling interest" test seemingly dictates the result recently reached in *Mon Chi Heung Au v. Lum*,[46] in which a three-judge district court found Hawaii's one-year divorce residence requirement[47] violative of the equal protection clause. The court first distinguished between domicile and durational residency requirements,[48] each a distinct prerequisite under the statute. A re-

[45]There is considerably less agreement among state courts. *See* Whitehead v. Whitehead, 53 H. 302, 492 P.2d 939 (1972). Decided before *Dunn*, this case applied the traditional test and upheld a one-year divorce residence requirement—since invalidated in Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973)—relying on a finding that the requirement did not "deter" travel. In a recent decision upholding a one-year residence requirement for divorce, the Minnesota Supreme Court cited *Vlandis* and *Starns* (discussed at note 34 *supra*) to support application of the traditional test. Davis v. Davis, 210 N.W.2d 221 (Minn. 1973). *See* Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972); Porter v. Porter, 112 N.H. 403, 296 A.2d 900 (1972).

[46]360 F. Supp. 219 (D. Hawaii 1973).

[47]HAWAII REV. STAT. § 580-1 (1968).

[48]360 F. Supp. at 221.

quirement of domicile[49] was constitutionally unobjectionable since a finding of domicile guaranteed jurisdiction to grant a divorce.[50] But the additional requirement of durational residency unnecessarily discriminated against recently arrived individuals with honest intentions of making Hawaii their home. The resulting infringement of the fundamental right to travel precluded application of the traditional equal protection standard and necessitated strict scrutiny.[51]

After rejecting outright several state purposes offered to justify the waiting period,[52] the court examined more thoroughly the proposed interest in preventing fraudulent assertions of domicile. This interest was held to be clearly compelling. Also, the court interpreted Hawaii's residence requirement as effectively deterring those persons most likely to frustrate the state's interest in restricting the exercise of divorce jurisdiction to valid domiciliaries.[53] However, the statute failed the equal protection test for two reasons: it was not "tailored" with "precision,"[54] and it created an impermissible "conclusive pre-

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[49]Domicile is established by physical presence in a state with the intention of making it one's home. Wymelenberg v. Syman, 328 F. Supp. 1353, 1356 n.5 (E.D. Wis. 1971); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 15, 16 and 18 (1971).

[50]360 F. Supp. at 221. *See* Williams v. North Carolina, 325 U.S. 226 (1945) and note 58 *infra.*

[51]*Dunn*'s suggestion that all durational residence requirements were measurable by the strict standard was given a literal reading. Comparing the previous state court decision concerning the same statute, Whitehead v. Whitehead, 53 H. 302, 492 P.2d 939 (1972), the court observed that

> the traditional standard was used on the rationale that the stricter standard applies only when travel is actually deterred or the penalty on the interstate movement is the deprivation of a right independently fundamental. But these two propositions were specifically rejected by the Dunn court, which then unequivocally stated that "durational residency laws must be measured by a strict equal protection test"
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> . . . .

360 F. Supp. at 221 n.8.

[52]Prevention of impulsive newcomer divorces, allotment of sufficient time for gathering data required for custody decisions, and deference to states with superior interests in the marital relationships were unpersuasive state interests. 360 F. Supp. at 221-23. With respect to all three considerations, durational residence requirements were a "patently blunderbuss approach to problems more susceptible to 'tailored', 'less drastic means.'" *Id.* at 222.

[53]The court mentioned forum shoppers, transients, and persons willing to perjure themselves as to domiciliary intent, but not on the objective matter of length of residence, as those most threatening that interest. *Id.*

[54]In lieu of the residence requirement, an overbroad measure which restricted the rights of valid domiciliaries, the court suggested such indicia as home ownership, existence of permanent employment, and auto registration to substantiate domicile. *Id.*

sumption"[55] of nonresidency.[56]

The question of domicile[57] raised by the Hawaii court is central to the dispute over the validity of divorce residency requirements. Juxtaposed are the state's interest in ensuring that its divorce decrees merit full faith and credit in other jurisdictions,[58] and the bona fide domiciliary's desire to gain access to divorce courts immediately upon arriving in the forum state. Since the validity of domicile may be contested by collateral attack,[59] and due to the subjective nature of domiciliary intent, a state quite predictably will desire substantial proof of that intent. Although a specific durational residence is acceptable as evidence of valid domiciliary intent, the Hawaii court reasoned that since domicile may exist the instant an individual

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[55]*Id.* The c rt cited Carrington v. Rash, 380 U.S. 89 (1965), to illustrate such an impermissible presumption. In that case, the Supreme Court held unconstitutional a provision of the Texas constitution prohibiting members of the armed forces who moved to Texas from *ever* voting in elections in the state, for the duration of their membership in the armed forces.

[56]The court finally labelled its holding a "narrow" one, specifically exempting therefrom state requirements that divorce petitioners produce tangible evidence of genuine domiciliary intent. 360 F. Supp. at 222.

[57]Note 49 *supra.*

[58]"Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil." Williams v. North Carolina, 325 U.S. 226, 229 (1945). "The domicil of one spouse within a State gives power to that State . . . to dissolve a marriage wheresoever contracted." *Id.* at 229-30. *See* Williams v. North Carolina, 317 U.S. 287, 298 (1942); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 71 (1971). Under the full faith and credit clause, U.S. CONST. art. IV, § 1, a divorce decree granted in one state must be honored in all other states, only if the court granting the decree properly had jurisdiction. Williams v. North Carolina, 325 U.S. at 229. "[T]he decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact." *Id.* at 232.

It is not clear whether domicile, although a *sufficient* basis for jurisdiction, is a *necessary* jurisdictional basis for a decree of divorce. *Compare* Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954) (domicile necessary) *with* Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958) (three-month durational residence sufficient) *and* Klandt v. Klandt, 156 N.W.2d 72 (N.D. 1968) (twelve months residence sufficient).

[59]In an *ex parte* proceeding, the absent spouse or another state may challenge the jurisdiction of the granting state. 325 U.S. at 230 (1945). However, res judicata will bar collateral attack by a spouse if both spouses were within the personal jurisdiction of the state, and the issue of domicile was actually litigated, Davis v. Davis, 305 U.S. 32 (1938), or both parties were represented by counsel. Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948). The same may hold merely if the respondent has been personally served. *See* Cook v. Cook, 342 U.S. 126, 127 (1951); Johnson v. Muelberger, 340 U.S. 581, 587 (1951); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 73, comments and cases cited therein (1971).

enters the forum state,[60] a requirement of durational residence forced even bona fide domiciliaries to satisfy an unnecessary prerequisite, and hence was invalid under the compelling state interest test.[61]

Invocation of the strict equal protection test does not automatically mandate a finding that divorce residence requirements violate equal protection. In *Sosna v. Iowa*,[62] a divided three-judge court recently upheld Iowa's one-year durational residence requirement for divorce[63] under a purported application of the compelling state interest test. The majority distinguished *Dunn* and *Shapiro* on the basis that "[u]nlike voting or welfare, the concept of a divorce is not a constitutional right, nor is it a basic necessity to survival."[64] The court emphasized that divorce was a "creature of statute," with absolute power of regulation vested in the state.[65] Such purposes as fostering the re-examination of the marriage, avoiding state interference in marriages in which it had no interest, and preventing Iowa from becoming a "divorce mill" for transients fraudulently asserting domicile, were found sufficient to make Iowa's interest in the requirement compelling.[66] But, unlike the Hawaii court in *Mon Chi Heung Au v. Lum*, which invalidated a one-year requirement as being imprecise,[67] the court here disregarded that part of the strict test requiring "least drastic means" for furthering the compelling interest. Instead, the *Sosna* majority cited a previous state case[68] apparently for the proposition that variations in the duration of residence requirements for divorce did not affect their validity.[69] Again, ensuring domicile was

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[60]360 F. Supp. at 221 n.7; Alton v. Alton, 207 F.2d 667, 671 (3d Cir. 1953) *vacated as moot* 347 U.S. 610 (1954); White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888). *But see* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 16, comment *b* (1971).

[61]*Cf.* Porter v. Porter, 112 N.H. 403, 296 A.2d 900 (1972). In that case the state court upheld a requirement of one year durational residency in a divorce action *if* the defendant spouse was neither domiciled nor served with process within the state. Although the court rested its holding primarily on fairness to the absent spouse, it is clear that the requirement also served as a guard against collateral attack. *See* note 59 *supra*. The New Hampshire court disregarded the right to travel, on the basis that the requirement was distinguishable from that in *Shapiro*.

[62]360 F. Supp. 1182 (N.D. Iowa 1973), *prob. juris. noted*, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-762) (appealed to the Supreme Court pursuant to 28 U.S.C. § 1253).

[63]IOWA CODE ANN. § 598.6 (Supp. 1972).

[64]360 F. Supp. at 1184.

[65]*Id.*

[66]*Id.* at 1184-85.

[67]See text accompanying note 54 *supra*.

[68]Whitehead v. Whitehead, 53 H. 302, 492 P.2d 939 (1972). *See* note 45 *supra*.

[69]360 F. Supp. at 1185 n.8 *citing* Whitehead v. Whitehead, 492 P.2d at 948. The court cited *Whitehead* for its statement that there was no material difference between

the paramount state interest. Although not here expressed in terms of guaranteeing full faith and credit,[70] preventing "divorce mill" status and deferring to other states' interests were also necessary incidents of exercising divorce jurisdiction only over bona fide domiciliaries.[71]

Dissenting in *Sosna*, Chief Judge McManus observed that the majority's distinction between voting and welfare situations and divorce was drawn to justify use of some "unidentified test, less stringent than strict equal protection."[72] The dissenting opinion considered Iowa's interest in not becoming a divorce mill the only truly compelling state interest, and concluded that requiring divorce petitioners to bear the burden of proof of valid domicile was a viable, less restrictive alternative to blanket prohibition.[73]

In both *Sosna v. Iowa* and *Mon Chi Heung Au v. Lum* the district courts recited application of the compelling state interest equal protection standard. Both courts found such a compelling interest in maintaining their respective one-year durational residence requirements so as to verify the true domiciliary status of their divorce

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residence requirements of 90 days and one year. *Whitehead* at 948. The section of *Whitehead* mentioned pertained to the latest draft of the UNIFORM DIVORCE ACT (by the National Conference of Commissioners on Uniform State Laws) which provided for entry of a divorce decree if

> the court finds that one of the parties has been a resident of this State, or is a member of the armed services who has been stationed in this State, for *90 days* next preceding the commencement of this proceeding or the entry of the decree . . . .

Id. at 947 (emphasis added).

The *Whitehead* court had cited the draft for the proposition that despite *Shapiro*, the concept of residence requirements for divorce was still readily accepted. That court then reasoned that if a 90-day requirement was acceptable, so was a one-year residence requirement since the duration of such a requirement was "a matter entirely within legislative discretion." *Id.* at 948. *Cf.* Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972). In upholding Ohio's one-year divorce residence requirement, the court stressed the state's power to oversee the marriage institution, and found that the requirement did not penalize the travel right, was supported by a compelling state interest, and was "least restrictive." 291 N.E.2d at 534-36.

[70]*Cf.* Mon Chi Heung Au v. Lum and text accompanying notes 52-59 *supra.*

[71]That Iowa adheres to a "no-fault" concept of divorce may have contributed to the majority's concern here. *See* IOWA CODE ANN. § 598.5 (Supp. 1972).

[72]360 F. Supp. at 1185 (McManus, C.J., dissenting).

[73]The state interest of encouraging re-examination of the marriage by the spouses was discredited somewhat by the observation that the statute did not impose the one-year requirement when respondent was a resident of Iowa and personally served. Thus, unless personal service was impossible in Iowa, durational residence was required only when the spouses were living in different states, a situation not conducive to reconciliation. *Id.* at 1186-87.

litigants. Yet the courts reached totally contradictory results. The finding in *Mon Chi Heung Au v. Lum* is not startling, given the strict nature of the test and its literal reading by the Hawaii court. Under such an application, a residence requirement no matter how precise may not represent the "least restrictive means" of guaranteeing domiciliary intent, because it can always be eliminated in favor of a requirement that divorce petitioners submit proof of that intent. The Hawaii court applied the strict test dutifully, ignoring the nature of the underlying right to divorce.

On the other hand, the *Sosna* court did look to the nature of that underlying right, distinguishing divorce from voting and welfare: the right to divorce has not yet attained the status of a "fundamental right,"[74] as has the right to vote, nor does it normally present the immediate necessity likely in the right to receive welfare. However, the Iowa majority overlooked the "least drastic means" aspect of the strict equal protection test. The court contended rather that the duration of the residence requirement was of minimal import and subject to legislative determination.[75] In this manner the *Sosna* court ignored the interests of new residents seeking divorce.

A less extreme approach to the analysis of divorce residence requirements was espoused in the recent decision of *Shiffman v. Askew*,[76] in which Florida's six-month durational residency requirement for divorce was found constitutionally sound.[77] Tracing the recognition of the unique status of marriage and divorce in society through the major Supreme Court decisions,[78] the court offered three premises: (1) the field of marriage and divorce is left to individual state regulation; (2) this regulation is vital to implementation of the state's own policies, as well as in avoiding intrusion on the similar rights and regulation of other states; (3) the states have a vital interest in assuring that their divorce decrees are accorded full faith and credit, particularly to protect the personal and property rights of third parties.[79] Acknowledging that under the presumed instruction

[74]*But see* United States v. Kras, 409 U.S. 434, 444-46 (1973), where there are intimations that the right to a divorce may be fundamental. *See* note 113 *infra*.

[75]See note 69 *supra*.

[76]359 F. Supp. 1225 (M.D. Fla. 1973).

[77]FLA. STAT. ANN. § 61.021 (1971). It was charged that the residence requirement denied equal protection, violated the right to travel, breached the privileges and immunities clause, and denied due process and access to the courts. 359 F. Supp. at 1228-29.

[78]*Id.* at 1229-31.

[79]*Id.* at 1231.

of *Dunn*,[80] the degree of restriction on travel was irrelevant as far as "triggering"[81] strict scrutiny, the court noted:

> [T]he degree of the restriction on travel and the nature of the right qualified by the residency requirement (a suit for divorce or welfare assistance or the right to vote), *must* ultimately be weighed and balanced in relation to the interest served by the restriction. Otherwise, the standard by which to measure the "compelling" nature of such interest would be decimated and the final determination of constitutionality would be made in a sterile vacuum.[82]

The state had a compelling interest in requiring a provable durational residency as objective evidence of domicile to assure the accordance of full faith and credit and to maintain a noninterfering position with its neighbors.[83] The court also observed that in *Dunn*, while the one-year voter residency requirement was set aside, an accompanying 30-day waiting period[84] was effectively approved by the Supreme Court as furthering a compelling state interest. The latter observation and a recent decision in which the Supreme Court upheld under strict scrutiny a 50-day residence requirement for state and local elections in Arizona[85] lent support to the finding that a six-month residence requirement for divorce was valid. Imposition of the requirement resulted in a negligible penalty on the right to travel.[86] The court contended that divorce residence requirements, because of their inextricable relationship with domicile, were peculiarly purposeful.[87] Apparently a balancing of those interests served and those infringed led the court to conclude that the six-month requirement was appurtenant to a "duty" of the forum state.[88]

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[80]See text accompanying note 32 *supra*.

[81]359 F. Supp. at 1232.

[82]*Id.* at 1233.

[83]*Id.* at 1232.

[84]See note 27 *supra*.

[85]Marston v. Lewis, 410 U.S. 679 (1973).

[86]359 F. Supp. at 1235.

[87]The district court attempted to distinguish *Shapiro* and *Dunn*, the latter on the basis of the existence of the 30-day registration cut-off, separate from the one-year residence requirement, see note 27 *supra*; the former on the basis that welfare authorities customarily investigated new applicants. 359 F. Supp. at 1233-34.

[88]The court concluded:

> The state must go slow, it must be careful, and when it undertakes to act, it owes a *duty to other states and other affected parties* to make a record in support of its judgment that will withstand collateral attack and merit full faith and credit. The Florida residency require-

It would appear that the court in *Shiffman v. Askew* did not apply the compelling state interest test as it was explained by the Supreme Court in *Shapiro* and *Dunn*. After invoking strict scrutiny, the court in essence reverted to a less rigorous test. The Florida court examined the nature of the right to divorce and the extent of the restriction on the right to travel, not to determine whether the strict test was initially applicable, but to temper application of that test. There is considerable support for the contention that divorce residence requirements as short as six months burden the travel right so slightly that they need not be examined under the compelling interest test at all.[89] But unless and until the Supreme Court definitively rejects the dicta in *Dunn* that *all* requirements *must* be examined under strict scrutiny, many courts will continue to struggle within the confines of that standard, qualifying its application to reach sound, equitable results. In this light, the Florida court's approach of weighing and balancing the numerous rights and interests affected by a residence requirement for divorce, which does not substantially restrict the right to travel, may represent the most meaningful process through which its validity under the equal protection clause may be determined.

Constitutional objections to durational residence requirements for divorce have not been confined to alleged violations of the equal protection clause. An entirely new ground for attack developed when the Supreme Court ruled in *Boddie v. Connecticut*[90] that a state may not deny individuals access to its courts for the purpose of dissolving their marriages, solely on account of their inability to pay required filing fees. Speaking through Mr. Justice Harlan, the Court found that "given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship,"[91] such a denial was a violation of the due process clause.[92]

> ment . . . is *not a "drastic means" . . . either in terms of the length of the residency period or in its effect upon the right it qualifies.* . . . Time . . . is virtually irrelevant in the case of divorce. The penalty to interstate travel is *de minimis*, and to the extent such penalty does exist, it is justified by a compelling state interest.

Id. at 1235 (emphasis added).

[89]See text accompanying notes 31-42 *supra*.

[90]401 U.S. 371 (1971) [hereinafter cited as *Boddie*].

[91]*Id.* at 374.

[92]Stressing that access to the court here was an "*exclusive precondition* to the adjustment of a fundamental human relationship," and that the *state* required divorce-seekers to resort to its courts, the Court held that a state "may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth

Attempts to extend the *Boddie* rationale to persons precluded by residence requirements from maintaining divorce actions have followed. Initial disagreement arises over the applicability of *Boddie*, where under filing fee requirements a divorce litigant is disadvantaged by indigency, to the realm of residence requirements, where the divorce litigant is disadvantaged by recent arrival.[93] The threshold question then becomes whether due process is denied by the waiting period.

The *Boddie* case is arguably distinguishable from the situation of divorce residence requirements on a number of grounds. A distinction may arise based on a determination that the prohibition declared invalid in *Boddie* was a *total* denial to indigents of access to divorce courts, whereas under residency laws there is only a *limited* durational denial to new residents.[94] That a new resident may be able to sue for divorce in the state of former residence may also be a basis for distinction.[95] A state court[96] has denied application of *Boddie* on the theory that divorce residency requirements are substantive, not jurisdictional, and that failure to satisfy such substantive requirements does not deny access to the courts.[97] In a recent district court case upholding a one-year residence requirement for divorce, the ma-

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Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." *Id.* at 383 (emphasis added).

[93]*Compare* Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973), *appeal docketed*, 42 U.S.L.W. 3257 (U.S. Oct. 23, 1973) (No. 73-678); Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971); Stottlemyer v. Stottlemyer, 224 Pa. Super. 123, 302 A.2d 830 (1973) (dissenting opinion); *with* Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973), *prob. juris noted*, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-762); Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973); Whitehead v. Whitehead, 53 H. 302, 492 P.2d 939 (1972).

[94]*See* Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 220 n.3 (D. Hawaii 1973). The court did not rule on the possible distinction as a due process finding was unnecessary to the decision. The distinction may also be applicable as beteen *long* and *short* durational residence requirements.

[95]Note, *Family Law—The Constitutionality of State Durational Residence Requirements for Divorce* 51 TEXAS L. REV. 585, 590 (1973).

[96]Whitehead v. Whitehead, 53 H. 302, 492 P.2d 939, 947 (1972).

[97]*Id.* The argument seems unreasonable, since whether a question of jurisdiction or of substance, failure to satisfy a durational residence requirement for divorce results in denial of a judicial remedy. *See* Larsen v. Gallogly, 361 F. Supp. 305, 307 (D.R.I. 1973). Most states label residence requirements as not jurisdictional. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 70, comment *d* and Reporter's Note (1971). *Compare* White v. White, 138 Conn. 1, 81 A.2d 450 (1951) (durational residence requirement as jurisdictional); *with* Myers v. Myers, 210 S.W.2d 832 (Tex. Civ. App. 1948) *and* Hammond v. Hammond, 45 Wash. 2d 855, 278 P.2d 387 (1954) (durational residence requirement not jurisdictional).

jority apparently chose to ignore the *Boddie* analogy.[98]

On the other hand, should it be determined that *Boddie* is solid precedent with regard to durational residence requirements for divorce, a "countervailing state interest of overriding significance"[99] would be necessary to justify the denial of due process. Such a determination has been made by two district courts, each declaring unconstitutional their respective states' two-year durational residency requirements for divorce.[100] In a decision by a Wisconsin district court, the exclusive nature of the remedy of divorce was decisive.[101] Stressing the inadequacies of the alternatives to dissolution, the court determined that the two-year waiting period constituted a denial of due process. Because legal separation did not break the ties of the marriage bonds, it was not a meaningful alternative.[102] Annulment was unsatisfactory because although voiding the marriage status, it required totally different grounds than for divorce.[103] After examining four state interests[104] urged in defense of the requirement, the court found that whether judged by the equal protection "compelling interest" test or by the due process "countervailing interest of overriding significance" formula, Wisconsin's residence requirement for divorce was unconstitutional.[105]

In *Larsen v. Gallogly*,[106] a district court recently employed both equal protection and due process arguments in striking down another

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[98]Sosna v. Iowa, 360 F. Supp. 1182, 1188 (N.D. Iowa 1973), *prob. juris. noted*, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-762) (McManus, C.J., dissenting). The apparent oversight may actually have been an intention to limit *Boddie* on the basis of language in Mr. Justice Harlan's opinion, to the effect that persons were denied judicial redress "solely" on the basis of poverty. However, in a recent decision the Supreme Court denied the extension of *Boddie* principles to the situation of an indigent who was unable to pay filing fees for bankruptcy proceedings. United States v. Kras, 409 U.S. 434 (1973). The decision should detract from any argument that *Boddie* was decided solely on the basis of financial status, and thus rebut any such attempted limitation.

[99]401 U.S. at 377.

[100]Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1972), *appeal docketed*, 42 U.S.L.W. 3257 (U.S. Oct. 23, 1973) (No. 73-678); Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971).

[101]Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971).

[102]*Id.* at 1355.

[103]*Id.*

[104]The interests proposed were: (1) to deter those with marital problems from entering the state; (2) to maintain marital stability; (3) to assure residence; (4) to protect the state's reputation. *Id.* at 1355-56.

[105]*Id.* at 1356.

[106]361 F. Supp. 305 (D.R.I. 1973), *appeal docketed*, 42 U.S.L.W. 3257 (U.S. Oct. 23, 1973) (No. 73-678).

two-year residence requirement for divorce.[107] In addition to finding a penalty on the right to travel, the court interpreted *Boddie* as mandating that once a state makes available a divorce remedy, every state citizen must be given a "meaningful opportunity to be heard."[108] Since the residency requirement deprived the petitioner of such an opportunity, due process was denied. Reciting then that the more rigorous of either the due process or strict equal protection standards must be met by the statute, the court analyzed the proffered state interests and found that the equal protection standard was not met.[109]

The two district court decisions extending the *Boddie* due process analysis to invalidate divorce residence requirements may have inadvertently avoided, due to the nature of the requirements involved, the possibility of a distinction which may be drawn between the facts of *Boddie* and those of future cases involving shorter residence requirements. Although a two-year waiting period for newly arrived residents is so overbroad as to be considered akin to a total denial of access to the courts, a shorter residence requirement may not be interpreted as denying the opportunity to be heard at a meaningful time. The court in *Larsen v. Gallogly* specifically suggested that a shorter requirement might be permissible.[110] The applicability of a *Boddie* due process argument to divorce residence requirements will thus probably depend upon the length of the particular requirement.[111]

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[107]R.I. GEN. LAWS ANN. § 15-5-12 (1956).

[108]361 F. Supp. at 308, *citing* Boddie v. Connecticut, 401 U.S. at 377. *See generally* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[109]Distinguishing between domicile and durational residency, the court discredited proposed state interests in assuring proper use of state tax monies, preventing the state from becoming a "divorce-mill," and ensuring valid jurisdiction so as to protect against collateral attack. The two-year residence requirement was an overbroad means of accomplishing those ends. A domicile inquiry at the divorce hearing and enactment of statutes containing sanctions for perjury were suggested as alternative guarantees of domicile. 361 F. Supp. at 309-10. The argument that the residence requirement encouraged persons to re-examine their marriage relationship was not even "rational," and secretly-obtained divorces were already guarded against by statutes requiring notice to respondent spouses. *Id.* The court held that no state interest of overriding significance or of a compelling quality was shown. *Id.* at 310.

The court did not determine whether the strict equal protection standard or the due process standard presented the more demanding test, noting that the distinction between the two tests was "vague," and "muddy." *Id.* at 308-09. *See, e.g.*, 401 U.S. at 383 (Douglas, J., concurring); *Id.* at 386 (Brennan, J., concurring in part) (both asserting that the equal protection clause could have controlled that decision). *See also* United States v. Kras, 409 U.S. 434 (1973) and text accompanying note 98 *supra*, where the Court returned to equal protection analysis of bankruptcy filing fees and indigents.

[110]361 F. Supp. at 309.

[111]*See, e.g.*, Davis v. Davis, 210 N.W.2d 221 (Minn. 1973). In upholding a one-year

The imposition of residence requirements for divorce precipitates a conflict between basic constitutional principles. The right to travel interstate without penalization, and the right to judicial redress of grievances—particularly the adjustment of fundamental human relationships—are well recognized, as is the right to be free from unwarranted discriminatory classifications.[112] Indeed, recent Supreme Court dicta implies that there may be a fundamental right to divorce.[113] But equally acknowledged are the principles that a state may control objects of its creation, particularly marriage and its dissolution,[114] and may take necessary measures to ensure the validity of its judicial decrees.[115]

The conflict may be resolved by examining the nature of the rights and interests affected by particular residence requirements to determine the degree of penalization of the right to travel. Clearly, strict application of the compelling state interest equal protection test should result in the invalidation of most residence requirements for divorce. However, even the strict test is not insurmountable[116] and the

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residence requirement for divorce the court countered a due process argument with the observation that access to the courts was "only temporarily delayed." *Id.* at 227.

[112]See notes 11-15 and accompanying text *supra.*

[113]*See* United States v. Kras, 409 U.S. 434 (1973). Distinguishing *Boddie* from the situation of bankruptcy, the Court stated:

> The denial of access to the judicial forum in *Boddie* touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution.

409 U.S. at 444. The Court further noted that

> [b]ankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated.

Id. at 446. Mr. Justice Marshall questioned the implications of the Court's language. *Id.* at 462 n.4 (Marshall, J., dissenting).

[114]"Marriage, as creating the most important relation in life, as having to do more with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." Maynard v. Hill, 125 U.S. 190, 205 (1888). Marriage is recognized as one of the "basic civil rights of man . . . . Fundamental to the very existence and survival of the race." Skinner v. Oklahoma *ex rel* Williamson, 316 U.S. 535, 541 (1942). *See also* Loving v. Virginia, 388 U.S. 1 (1967); Meyer v. Nebraska, 262 U.S. 390 (1923); Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877). But this power of the state over the marital status of its residents is not unlimited. 388 U.S. at 7-12.

[115]*See* text accompanying notes 79 and 83 *supra.*

[116]*See, e.g.*, Marston v. Lewis, 410 U.S. 679 (1973); see text accompanying note 85 *supra.* That the test is not exact has been admitted; in *Dunn*, Justice Marshall said

recent district court cases demonstrate the need for looking to the extent of the restriction on the right to travel resulting from a given requirement. Without such an inquiry, once it is determined that any penalization of the right to travel exists, residence requirements of vastly differing degrees may be treated alike.

From the standpoint of Supreme Court precedent, it would appear that the arguably broad implications of *Dunn*[117] have not negated the express limitation of *Shapiro*,[118] and that these cases do not mandate a finding that all divorce residence requirements are unconstitutional on equal protection grounds. Similarly, the *Boddie* due process argument does not require that divorce residence requirements of all durations be invalidated. It is necessary, then, to distinguish between acceptable and unacceptable requirements.

One possible approach would be to invoke the traditional equal protection test for residence requirements which are of such short duration as not to penalize the travel right substantially, while applying the compelling state interest test to requirements which do sufficiently penalize the right.[119] Alternatively, the strict standard could be applied to all residence requirements for divorce, but with a less demanding requirement of necessity, a more relaxed interpretation of "least drastic means."[120] Whatever the method applied, when all considerations are weighed courts should recognize that some residence requirements for divorce are constitutionally permissible. The interests of states in maintaining relatively short durational residence requirements simply outweigh the slight penalization or restriction imposed upon the divorce-seeking newcomer. These state interests include, primarily, preserving the integrity of the marriage institu-

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of the strict equal protection test: "[L]egal 'tests' do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes." 405 U.S. at 342-43. Chief Justice Burger remarked in the same case: "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, because it demands nothing less than perfection." *Id.* at 363-64 (Burger, C.J., dissenting).

[117]See text accompanying notes 32 and 33 *supra.*

[118]*See* note 21 *supra.*

[119]Such a suggestion has been made to test the validity of state residence requirements for bar admission. Note, *The Constitutionality of State Residency Requirements for Admission to the Bar*, 71 MICH. L. REV. 838 (1973).

[120]This is essentially what the Florida court did in *Shiffman*, in balancing the degree of restriction on the travel right and the nature of the right to a divorce against the interests served by the six-month requirement. *See* text accompanying notes 76-88 *supra.*

tion and assuring valid jurisdiction to insulate the state's divorce decrees from collateral attack.[121]

Of these state interests, preservation of marriages and furtherance of reconciliation between spouses are probably not sufficient to justify imposition of a blanket residence requirement. Such purposes may be accomplished via waiting period or counseling requirements applicable to all divorce litigants. Opponents of divorce residence requirements argue further that the admittedly legitimate state interests of preventing forum shopping and "divorce-mill" reputation, respecting the rights of sister states, ensuring fairness to absent spouses and third parties, preserving the integrity of a state's judicial system, and even assuring that petitioner's rights and interests are finally and conclusively determined, may all be accomplished merely by a finding of domicile, without the added requirement of durational residency.

If conclusive proof of domicile could effectively be obtained without extreme burden, the latter assertion would be persuasive. The argument for divorce residence requirements would then be substantially rebutted. But the alternative indicia of domicile[122] are of questionable reliability,[123] and the administrative burden of ascertaining the validity of domiciliary intent would be large, if not prohibitive. Assorting and investigating the information offered would alone require some durational delay period.

In addition, were residence requirements to be totally barred, methods might be devised whereby the alternative proof requirement for domicile could be circumvented, statutory perjury sanctions notwithstanding. Divorce petitioners would be encouraged to perjure themselves in attempting to make certain that their claims would be heard. Implementation of such innovative measures as no-fault divorce laws might be curtailed, for fear that vast numbers of divorce-seeking non-residents would flock to the no-fault states, fraudulently claiming domiciliary intent. New conflicts and discriminations would

[121]The other corollary interests usually offered in support of residence requirements include: encouragement of re-examination and reconciliation by the spouses; fairness to absent defendant-spouse; protection of possible third parties (children, heirs, etc.); avoidance of intrusion on the rights and interests of other states; prevention of forum-shopping, "quickie-divorces," and "divorce-mill" status—in general, preservation of the state's reputation. *See generally* Note, *Family Law—The Constitutionality of State Durational Residence Requirements for Divorce*, 51 TEXAS L. REV. 585 (1973).

[122]Factors which might be examined to determine domicile include home ownership, employment, voter registration, driver's license, auto registration, bank accounts, membership in clubs and organizations. Note, *The Problem of the "Newcomer's Divorce,"* 30 MD. L. REV. 367, 380 (1970).

[123]*See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 20, Special Note (1971).

develop between divorce seekers themselves, precipitating new inequities.[124] Alternatively, the administrative burden might prove to be so large that the proof requirement would simply fall into disuse.

It is clear that the duration of the divorce residence requirement is critical to its constitutional acceptability. Although the choice of an acceptable duration is necessarily arbitrary and subject to the objection voiced by Mr. Justice Blackmun in the *Dunn* case,[125] lines must nevertheless be drawn somewhere.[126] The conclusions of the well-reasoned judicial decisions[127] and the determinations of legislatures[128] may be of assistance. The Supreme Court has recently expressed its willingness to respect legislative judgments drawing lines for limited durational residence requirements.[129]

The degree to which state durational residence requirements for divorce are constitutionally valid will ultimately be judicially determined. Although a two-year requirement is clearly overbroad, a requirement of six months durational residence prior to institution of a divorce action places little or no penalty on exercise of the right to travel and should be found neither violative of the equal protection clause nor a denial of due process. Because the decree of divorce has such a potential impact and effect on so many rights and interests

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[124]For example, would treatment be the same for residents of four months, one of whom owns his home and is gainfully employed, the other who rents monthly and who just lost his job, even though both claim the intent to remain?

[125]With respect to the approval of the 30-day requirement, it was said: "[I]f 30 days pass constitutional muster, what of 35 or 45 or 75?" 405 U.S. at 363 (Blackmun, J., concurring).

[126]*Id.* (Burger, C.J., dissenting).

[127]For example, in Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973), the court emphasized that the *length* of the six-month requirement was satisfactory; *see* note 88 *supra*. Similarly, the court in Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973), *appeal docketed*, 42 U.S.L.W. 3257 (U.S. Oct. 23, 1973) (No. 73-678) found duration a possible turning point. See text accompanying note 108 *supra*.

[128]Wisconsin has replaced the statute declared invalid in Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971), with a six-month residence requirement, as yet unchallenged. WISC. STAT. ANN. § 247.05 (Supp. 1973). *Compare* the most recent draft of the UNIFORM MARRIAGE AND DIVORCE ACT § 302 (1973), requiring only that domicile exist at commencement of the divorce action and be maintained for 90 days next preceding the findings by the court.

[129]In Marston v. Lewis, 410 U.S. 679 (1973) the Court stated:

> In the present case, we are confronted with a recent and amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists. The Constitution is not so rigid that that determination and others like it may not stand.

Id. at 681. *See* Shapiro v. Thompson, 394 U.S. at 655-77 (Harlan, J., dissenting).