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Constitutional Law--Equal Protection--Constitutionality of Divorce Durational Residency Statute--Mootness--Maintenance of Class Action after Mooting of Named Representative's Claim [Sosna v. Iowa, 419 U.S. 393 (1975)

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Recent Case

CONSTITUTIONAL LAW—EQUAL PROTECTION—CONSTITUTIONALITY OF DIVORCE DURATIONAL RESIDENCY STATUTE—MOOTNESS—MAINTENANCE OF CLASS ACTION AFTER MOOTING OF NAMED REPRESENTATIVE'S CLAIM

Sosna v. Iowa, 419 U.S. 393 (1975).

States have traditionally demanded satisfaction of a durational residency requirement before they will grant divorces to persons who have recently arrived within their borders. Nevada, long reputed as a divorce haven, is no exception. New arrivals must satisfy a six-week waiting period before they can gain access to the divorce courts of that state.[1] Rhode Island is at the other end of the spectrum, demanding two years of residency.[2] The other states vary between these two extremes, one year being the most common requirement.

In recent years, doubts have arisen concerning the continued validity of these statutory residency requirements. On three occasions since 1969, the Supreme Court has invalidated statutes imposing durational residency requirements.[3] In each case it was held that the constitutional right of interstate travel had been infringed by the statutory waiting period. Another series of decisions of the Court suggested that restrictions on access to divorce courts might present denials of due process.[4] In *Sosna v. Iowa*,[5] both lines of authority converged to serve as a basis for challenging the constitutionality of Iowa's one-year divorce durational residency statute.

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1. NEVADA REV. STAT. § 125.020 (1963). Idaho also has a six-week requirement. IDAHO CODE § 32-701 (1963).

It is important to distinguish residence from domicile. Residence is physical presence within the jurisdiction. Domicile requires physical presence coupled with the intention of remaining indefinitely. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 9 (1971) [hereinafter cited as WEINTRAUB]. The word "residence" in divorce durational residency statutes is usually construed to mean domicile. H. CLARK, LAW OF DOMESTIC RELATIONS 314 (1968) [hereinafter cited as CLARK].

2. R.I. GEN. LAWS ANN. § 15-5-12 (1969).

3. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (nonemergency medical services for indigents); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits).

4. Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); *cf.* Ortwein v. Schwab, 410 U.S. 656 (1973) (dictum); United States v. Kras, 409 U.S. 434 (1973) (dictum).

5. 419 U.S. 393 (1975).

In August of 1972, Carol Maureen Sosna, having previously separated from her husband, took her children and left her home in New York for Green Island, Iowa. The following month she instituted divorce proceedings in an Iowa state court. Her actions proved premature, since Iowa law requires that the petitioner in a divorce proceeding must have lived in that state for a minimum of one year before a court has jurisdiction of the request for marital dissolution.[6]

After the court's dismissal for want of jurisdiction, Mrs. Sosna filed a class action in federal court seeking declaratory and injunctive relief. She contended that the Iowa statute had denied her and others similarly situated equal protection of the law by discriminating against newly arrived residents solely because they had exercised their constitutional right of interstate travel.[7] The three-judge district court[8] rejected Mrs. Sosna's claim and found the statute constitutional,[9] but the Supreme Court granted her petition for certiorari.

By the time *Sosna v. Iowa* finally reached the Supreme Court, the plaintiff had not only satisfied the one-year residency requirement, but had obtained a divorce in New York. This required the Court to consider the mootness issue before addressing the constitutionality of the Iowa statute.[10] While the mootness doctrine seemed to prevent Mrs. Sosna from pursuing the case on her own behalf, her representation of the class might be considered still to

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6. IOWA CODE § 598.6 (1971).

7. For a discussion of the history and development of the right to interstate travel, see Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U.L. REV. 989 (1969).

It has been held that the due process clause of the fifth amendment protects the right to international travel. Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

While the Supreme Court has never directly considered the issue, the right to intrastate travel has been recognized. Bell v. Maryland, 378 U.S. 226, 255 (1964) (Douglas, J., concurring); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970).

8. Under 28 U.S.C. § 2281, 1970, a three-judge district court is authorized when a state statute or administrative order is challenged, a state officer is a party defendant, injunctive relief is sought, and it is claimed that the statute or order is contrary to the United States Constitution. 28 U.S.C. § 2284 spells out the procedure to be followed in such a case. *See* C. WRIGHT, LAW OF FEDERAL COURTS 188-94 (1970).

9. Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973).

10. "When all of a plaintiff's current claims against defendant have been extinguished by subsequent events . . . and the plaintiff can make no plausible allegations of future injury, the Court will declare the case moot." Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974). *See* DeFunis v. Odegaard, 416 U.S. 312 (1974); North Carolina v. Rice, 404 U.S. 244 (1971); Powell v. McCormick, 395 U.S. 486 (1969).

present a case or controversy satisfying article III, section 2 of the Constitution. The Court found that its jurisdiction was properly invoked.[11]

The basis of the Court's opinion was the realization that the delays inherent in the appeal process would always prevent a challenge to the constitutionality of the residency requirement if the mootness doctrine were applied mechanically. This immunity to appellate review was overcome by invoking the doctrine of *Southern Pacific Terminal Co. v. ICC*.[12] A case will not be ruled moot when it presents issues which are "capable of repetition, yet [evade] review."[13] The doctrine was applicable, since the Court determined that Iowa would continue to enforce the one-year residency requirement against the members of the class, none of whom was capable of mounting a timely challenge.[14]

Even though the constitutional problem of mootness was resolved, it was still necessary to deal with mootness in the context of the class action provisions contained in rule 23 of the Federal Rules of Civil Procedure. The specific requirements of rule 23 demand that "the representative parties will fairly and adequately protect the interests of the class." This subsection has been interpreted as containing two distinct elements, both of which must be satisfied.[15] The first demands a coincidence of the interests of the representative party with those of the class. A lack of antagonism between representative and class[16] or the absence of a conflict of interest[17] are sufficient to satisfy this element. The second element requires that competent counsel must represent the class.[18]

The Court had little problem in finding that the first element was

11. 419 U.S. at 399. The recent case of DeFunis v. Odegaard, 416 U.S. 312 (1974), is an excellent example of the operation of the mootness doctrine when an individual brings an action solely on his own behalf.

12. 219 U.S. 498 (1911).

13. *Id.* at 515.

14. The Court relied on its implicit holding in Dunn V. Blumstein, 405 U.S. 330, 333 (1972), for the proposition that repeated enforcement of the statute against members of the class is sufficient to overcome the mooting of the named representative's claim.

15. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Note, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 NW. U.L. REV. 1133 (1974).

16. Hansberry v. Lee, 311 U.S. 32 (1940); Phillips v. Klassen, 502 F.2d 362 (1974).

17. Vernon J. Reckler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335 (D. Minn. 1971).

18. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Mersay v. First Republic Steel Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968); 3B J. MOORE, FEDERAL PRACTICE § 2307[1] (2d ed. 1974); VII C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1766 (1972) [hereinafter cited as WRIGHT & MILLER].

met, since it was "difficult to imagine why any person in the class appellant represents would have an interest in seeing Iowa Code 598.6 [the divorce waiting period] upheld."[19] As for the performance of counsel, the Court felt that the interests of the class had been "competently urged at each level of the proceeding . . . ."[20]

Justice White, the lone dissenter from the mootness aspect of the Court's holding,[21] fashioned a two-pronged challenge to the majority opinion. The first prong focused on the constitutional issue embodied in the mootness doctrine. Justice White's position was that since the plaintiff no longer had a personal stake in the outcome of the case, she did not have the standing to continue representing the class. Absent a named member of the class who could direct counsel and ensure that class interests were being properly served, he felt that the case had become one-sided and lost the adversary quality necessary to satisfy the case or controversy requirement of article III.

The second prong centered on what Justice White considered a dilution of the requirements of rule 23. The thrust of this position was that the case should have been remanded to the district court for consideration of the adequacy-of-representation issue. It should be noted, however, that the district court had already passed on these factors in its original determination of whether a class action could be maintained. Since what constitutes adequate representation is a question of fact dependent on the circumstances of each case,[22] a district court's decision should stand unless an abuse of discretion is shown.[23] Justice White offered no evidence of such abuse to support his position.

A further response to Justice White's criticism of the Court's treatment of rule 23 lies in the fact that the majority's holding, that a class action does not become moot even though the claim of the named representative has been mooted on appeal, is consistent with the theoretical basis of rule 23. The class action device is an outgrowth of the practice of permissive joinder.[24] Thus, properly viewed, a class action involves the separate and distinct claims of each member of the class as well as those of the named representative.[25]

19. 419 U.S. at 403 n.13.

20. *Id.* at 403.

21. Although Justice Marshall, who was joined by Justice Brennan, provided an additional dissent, he directed his arguments to the merits of the case and made no mention of the mootness issue. *Id.* at 418-27.

22. WRIGHT & MILLER § 1765.

23. *Id.*

24. Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 589 n.65.

25. Snyder v. Harris, 394 U.S. 332 (1969).

Underlying *Sosna* is the recognition that the multiple claims belonging to class members still existed after the plaintiff's own claim was mooted.

Although the continued existence of a personal stake in the controversy is not mandated by rule 23,[26] such an interest is necessary in order to meet the constitutional requirements of standing.[27] However, strong policy considerations support a relaxation of standing requirements in class actions where the named representative loses his claim. One such consideration is that a defendant guilty of wrongdoing which affects a number of persons may try to settle with the individual who brings a class action in hopes of being permitted to continue his conduct with respect to the remainder.[28] In *Jenkins v. United Gas Corp.*,[29] the Fifth Circuit Court of Appeals would not dismiss such a case. A contrary holding would have necessitated that each aggrieved person bring an action before the illegal conduct could be put to an end. A defendant's settlement with the class representative parallels the problem posed by *Sosna*, where a durational residency requirement is inevitably satisfied before it can be challenged on the appellate level.

Justice White acknowledged the practical considerations in the standing issue, but questioned whether such considerations justified liberal construction of standing requirements.

> Article III . . . *is* an "awkward" limitation. It prevents *all* federal courts from addressing some important questions; there is nothing surprising in the fact that it may permit only the lower federal courts to address other questions. Article III is not a rule always consistent with judicial economy. Its overriding purpose is to define the boundaries separating the branches and to keep this Court from assuming a legislative perspective and function. The ultimate basis of the Court's decision must be a conclusion that the issue presented is an important and recurring one which should be finally resolved here. But this notion cannot override constitutional limitations.[30]

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26. *See Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, *supra* note 24, at 604.

27. The doctrine of standing requires that the party seeking relief must have "[A]lleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). *See also* Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968).

28. Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. L. REV. 430, 444-45 (1973).

29. 400 F.2d 28 (5th Cir. 1968).

30. 419 U.S. at 418 (White, J., dissenting).

Relying on practical considerations to expand the standing doctrine would appear to produce tension with the proposition that standing is a constitutional requirement and not a doctrine of judicial self-restraint.[31] If standing limitations were self-imposed, there could be no serious objection to the Court's shifting the boundaries of that doctrine in order to accommodate pragmatic considerations. When viewed as a constitutional limitation, however, the Court is bound to enforce standing requirements even if less rigid enforcement would produce more favorable results. The latitude that the Court is willing to allow by relaxing standing requirements can be justified by recognizing that the words "case or controversy" contained in article III are so broad as to make any constitutional limitations in regard to mootness or standing a discretionary exercise of judicial self-restraint.[32]

Having thus decided that the class action was not moot, the Court turned to the right-to-travel issue. The ultimate resolution of the question was provided when Justice Rehnquist, in an opinion joined by five other members of the Court, rejected both lines of authority that seemed to militate toward invalidating the residency requirement and found Iowa's one-year period to be a legitimate exercise of legislative power.

The decision was based on several grounds. Dissolution of the marital status and its concomitant effect on the property rights of spouses, as well as on the custody and support of children, justify a state's insistence on a significant relationship with at least one of the parties to the marriage. A state also has a valid interest in preventing forum-shopping in divorce actions and in the protection of its divorce decrees from collateral attacks by other states. Finally, states have historically been granted deference in regulating divorce.

The *Sosna* decision marked the culmination of a conflict in the courts which began in 1970 when a federal court held Wisconsin's two-year divorce residency statute unconstitutional.[33] In the next four years, 18 other courts were confronted with similar challenges,

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31. It is unclear whether the early decisions of the Court concerning mootness considered it a constitutional or a common law doctrine. Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1675 (1970). The Court's current position is that the mootness doctrine is based on the case or controversy requirement of article III. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972).

32. Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955).

33. Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971).

and divorce waiting periods were invalidated on six of these occasions.[34]

The cornerstone of the challenge to divorce durational residency statutes was *Shapiro v. Thompson*.[35] In *Shapiro*, the Court concluded that both Congress and the states had denied equal protection of the laws to persons deprived of welfare benefits by statutes imposing one-year residency requirements.[36] Neither side disputed that the effect of the one-year waiting period was "to create two classes of needy resident families indistinguishable from each other" except for the length of their residency in the jurisdiction.[37] The controversy centered around the applicable standard of judicial review. In support of the validity of the waiting period, it was argued that a disparity in treatment between classes of residents could be justified by the state's demonstration that a rational basis existed for the distinction.[38] The Court declined to employ this minimal standard of judicial scrutiny, noting that persons moving between states or to the District of Columbia were exercising their constitutional right to interstate travel, and that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest [was] unconstitutional."[39]

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34. After *Wymelenberg*, divorce durational residency statutes were held unconstitutional in Rosado v. Smith, Civil No. 72-3361-W (D. Mass., Feb. 1974); McCay v. South Dakota, 366 F. Supp. 1244 (D.S.D. 1973); Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973); Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973).

The opposite conclusion was reached in Makres v. Askew, 500 F.2d 577 (5th Cir. 1974), *aff'g.* Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973); Mendez v. Heller, 380 F. Supp. 985 (E.D.N.Y. 1974); Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973); Caizza v. Caizza, 291 So. 2d 569 (Fla. 1974); Whitehead v. Whitehead, 53 Hawaii 302, 492 P.2d 939 (1972); Davis v. Davis, 210 N.W.2d 221 (Minn. 1973); Ashley v. Ashley, 191 Neb. 824, 217 N.W.2d 926 (1974); Porter v. Porter, 112 N.H. 403, 296 A.2d 900 (1972); Sternshuss v. Sternshuss, 71 Misc. 2d 552, 336 N.Y.S.2d 586 (Sup. Ct. 1963); Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972); Stottlemeyer v. Stottlemeyer, 451 Pa. 579, 302 A.2d 830 (1973); Place v. Place, 129 Vt. 326, 278 A.2d 710 (1971).

35. 394 U.S. 618 (1969).

36. Statutes from Connecticut, Pennsylvania, and the District of Columbia were involved. Congressional legislation for the District of Columbia is not subject to the constraints of the equal protection clause of the fourteenth amendment. The Supreme Court has ruled, however, that equal protection is guaranteed to persons in the District of Columbia by means of the fifth amendment's due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

37. 394 U.S. at 627.

38. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

39. 394 U.S. at 634 (Court's emphasis). If a legislative enactment restricts the

In its search for this compelling interest, the Court rejected several proposed justifications for the one-year waiting period. The state relied primarily on the argument that the requirement was necessary to protect the "fiscal integrity"[40] of the state welfare program by discouraging an influx of indigents who would use funds otherwise available for long term residents. The Court refused to accept deterrence of indigents as a legitimate state purpose. The Court also found that there was no need for a durational residency requirement to provide an "efficient rule of thumb"[41] for determining residency and preventing fraud, as other methods were already employed to ascertain the legitimacy of a welfare applicant's residency.[42]

A shortcoming of the *Shapiro* decision was the Court's failure to define what it considered to be a penalty on the right to travel. Since all durational residency requirements are penalties to a certain extent, a literal reading of *Shapiro* would result in the invalidation of every such statute. The Court concerned itself with the immediate factual situation before it and failed to delineate a framework of analysis for future right-to-travel cases. The only indication of the Court's awareness of the consequences of its holding was a terse footnote suggesting that some residency requirements might not penalize travel, while others might be supported by compelling interests.[43]

The Court's next right-to-travel decision, *Dunn v. Blumstein*,[44] did little to solve the "penalty" problem created by *Shapiro*. In *Dunn*, a one-year residency requirement established by Tennessee as a qualification for voting was declared unconstitutional. The Court relied upon alternate holdings. First, the Tennessee statute

exercise of a fundamental right, or if its impact falls upon a suspect classification, it is unconstitutional unless the state can demonstrate a compelling interest. A fundamental right is a right guaranteed by the Constitution. San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973). Examples of fundamental rights are the right to privacy (Roe v. Wade, 410 U.S. 113 (1973)) and the right to vote (Kramer v. Union Free School Dist., 395 U.S. 621 (1969)). Statutes discriminating on the basis of race are the best examples of suspect classifications. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

The applicable standard of review in equal protection cases has been thoroughly discussed in *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

40. 394 U.S. at 627.

41. *Id.* at 636.

42. "Before granting an application, the welfare authorities investigate the applicant's employment, housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident." *Id.*

43. *Id.* at 638 n.21.

44. 405 U.S. 330 (1972).

was held to be a restriction on the fundamental right to vote.[45] Second, the Court paralleled *Shapiro* by holding that the one-year waiting period was a penalty on the right to travel.[46] Both findings required the use of the compelling-interest test.[47]

As in *Shapiro*, justifications tendered in support of the waiting period did not survive the Court's inspection. While it was permissible for a state to limit the franchise to bona fide residents, a durational residency requirement excluded some persons who were in fact bona fide residents but who had been in the state for less than a year. Criminal fraud sanctions, cross-checks of registered voters in other states, and objective evidence of bona fide residency such as a driver's license and a place of employment, were viewed as viable alternatives to the one-year residency requirement.[48] Nor did the Court find a compelling interest in Tennessee's claim that residency of one year provided for an informed electorate, since recently arrived residents could conceivably be better informed than lifelong residents.[49]

In *Dunn*, as in *Shapiro*, the Court did not undertake to set out with precision the test for determining what a penalty on travel was. The Court made the sweeping conclusion that "[t]he right to travel is an '*unconditional* personal right,' a right whose exercise may not be conditioned," but the Court did not go on to define the parameters of the right. Therefore, while it is clear that the Tennessee statute was a restriction on the fundamental right to vote, it is uncertain to what extent this was relevant to the finding that travel had been penalized. It can be forcefully argued that the Court found that the right to travel had been abridged only because of the seriousness of the penalty on travel. The fact that the right to vote had been infringed was by itself sufficient grounds for striking down the statute.[50] Additional reliance upon the right to travel was an unnecessary complication.[51]

45. *Id.* at 336-37. In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court qualified *Dunn* by noting that the right to vote, per se, is not a constitutionally protected right. The right emerges only when a state has adopted an elective process for determining who will represent any segment of its population. At that point a citizen has a constitutionally protected right to participate on the same footing with other members of the jurisdiction's populace. 411 U.S. at 34 n.74, 35 n.76.

The Court has upheld very short durational residency requirements for voting. Burns v. Fortson, 410 U.S. 686 (1973); Martson v. Lewis, 410 U.S. 679 (1973) (50 days).

46. 405 U.S. at 338-42.

47. *Id.* at 335.

48. *Id.* at 348.

49. *Id.* at 354-56.

50. *See* note 39 *supra.*

51. An alternative explanation of *Dunn* may be found in those cases which

The Court's most recent right-to-travel decision prior to *Sosna* was *Memorial Hospital v. Maricopa County*.[52] In *Memorial Hospital*, the Court struck down an Arizona statute which required an indigent to have been a resident of an Arizona county for one year in order to be eligible for free nonemergency medical care. Citing *Shapiro* as precedent, the Court ruled that the waiting period was an unwarranted penalty on travel.

The Court acknowledged that its prior decisions in *Dunn* and *Shapiro* failed to clarify the weight of the penalty on travel needed to trigger the compelling-interest test. Conceding that "any durational residency requirement impinges to some extent on the right to travel,"[53] the Court nevertheless left the determination of the "ultimate parameters of the *Shapiro* penalty analysis"[54] to later decisions, thus indicating that the "unconditional personal right" language of *Dunn* was not to be followed. Significantly, the Court observed that the "necessities of life" involved in *Shapiro* and the fundamental right to vote involved in *Dunn* presented a distinct contrast to other conceivable penalties on travel. The medical services involved in *Memorial Hospital* were viewed as falling within the "necessities of life" category controlled by the *Shapiro* decision.[55]

The evaluation of the nature and degree of the penalty on travel undertaken by the Court in *Memorial Hospital* offers little guidance in determining the constitutionality of other types of durational residency requirements. If the penalty of travel is the deprivation of a fundamental right, as in *Dunn*, there is little doubt that the waiting period will be struck down. This would be true, however, even without resort to a right-to-travel analysis.[56] Consequently, uncertainty is injected by *Shapiro* and *Memorial Hospital*, because it was found that travel was penalized by denying rights to newly arrived residents. Even though the statutes affecting those rights would not necessarily be subjected to intense judicial scrutiny, the Court, without clarifying the parameters of the decisions, applied the compelling-interest test because of the right-to-travel issue.

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recognize that it may be unconstitutional to deny an individual a combination of certain rights, even though it might not be unconstitutional to deny one of those rights by itself. For example, in San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court held that wealth discrimination per se is not unconstitutional. It is invalid only when it denies certain rights to the poor.

52. 415 U.S. 250 (1974).

53. *Id.* at 255-57.

54. *Id.* at 257-59.

55. *Id.* at 259.

56. As noted previously, *Dunn* relied upon alternate holdings. The fact that the fundamental right to vote had been penalized was grounds in itself to invoke the compelling-interest test. *See* text accompanying notes 50-51 *supra*.

Viewing this problem in the context of *Shapiro*, it is important to note that even though the Court on several occasions has evidenced a special sensitivity to statutes affecting welfare benefits, there are other instances where such statutes have been upheld by the mere demonstration of a rational basis justification.[57] The pressing importance of finding a resolution to the issue raised by *Shapiro* and *Dunn* is emphasized by considering the difficulties which could arise when an attempt is made to analyze other important but nonfundamental rights in the right-to-travel context. For example, it cannot easily be predicted how the Court would handle a durational residency requirement on public housing, a problem which has arisen in the lower courts.[58] Housing is no doubt a necessity of life, yet the Court has been content to extend limited review to a forcible detainer statute of dubious social value.[59] Similar problems are posed by waiting periods on newly arrived attorneys who wish to be admitted to the bar of their new state of residence.[60]

In *Sosna*, the Court once again bypassed an opportunity to issue a dispositive statement on what constitutes a penalty on travel, imposing instead a limitation on the expansion of the right-to-travel analysis but giving no hint as to how this limit relates to other areas to which the right-to-travel argument may be applied. What is more distressing is the Court's failure to mention what standard of review it was applying to Iowa's divorce waiting period. There is evidence that the Court's scrutiny was limited to a search for a rational basis: "Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or

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57. *Compare* Goldberg v. Kelly, 397 U.S. 254, 264 (1970), where the Court emphasized that "[w]elfare provides the means to obtain essential food, clothing, housing, and medical care," *with* Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971); *and* Dandridge v. Williams, 397 U.S. 417 (1970), in which the Court extended minimal scrutiny to welfare statutes. *Cf.* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 224 (1970), where the author notes in reference to *Dandridge v. Williams, supra*:

> Perhaps the decision was predictable. The Court, in its recent equal protection decisions, while pointing to some important considerations, has failed to articulate an even relatively consistent and objective equal protection and due process standard by which one might reliably determine and judge state duties to the indigent.

58. King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970).

59. Lindsey v. Normet, 405 U.S. 56 (1972).

60. The Court has ruled that there are limitations on a state's right to exclude persons from the practice of law. Schware v. Board of Examiners, 353 U.S. 232 (1957). Courts were confronted with judging the constitutionality of bar admission waiting periods in Smith v. Davis, 350 F. Supp. 1225 (S.D. W. Va. 1972) and Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

administrative convenience."[61] These words are not typical of the language which usually heralds application of the compelling-interest analysis. The proposition that a rational basis sufficed in *Sosna* finds additional support in the manner in which *Shapiro*, *Dunn*, and *Memorial Hospital* were distinguished. It was emphasized that Mrs. Sosna

> [W]as not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*. She would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the state.[62]

What the Court seems to be saying is that travel is not significantly penalized, and hence, only a rational basis test is warranted if the newly arrived resident does not suffer irretrievable loss of a benefit during the waiting period. This was the interpretation which Justice Marshall in his dissent gave to the Court's means of distinguishing *Sosna* from prior right-to-travel cases.[63]

Regardless of the standard of review applied, the discomforting factor in Justice Rehnquist's opinion is that the basis for distinguishing *Sosna* from prior decisions will offer no guidance in determining what other durational residency statutes are insignificant penalties on travel requiring only a rational basis justification. By defining "penalty" as an irretrievable loss of a benefit and by placing emphasis on the fact that Mrs. Sosna did not suffer such an irretrievable loss during the waiting period, the *Sosna* decision seems more suited to quantitative rather than qualitative analysis. It is easy to see that in *Shapiro* a set dollar amount of benefits was irretrievably lost, and that voting rights were lost in *Dunn*. Justice Marshall's dissent in *Sosna* displayed concern over the Court's insistence that the irretrievable loss of nonemergency medical care in *Memorial Hospital* was substantially different from the mental peace of mind lost by Mrs. Sosna during the waiting period.[64]

The inability to transform Mrs. Sosna's loss into a dollar

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61. 419 U.S. at 406 (emphasis added).

62. *Id.*

63. *Id.* at 420-21 (Marshall, J., dissenting).

64. This analysis, however, ignores the severity of the deprivation suffered by the divorce petitioner who is forced to wait a year for relief [citations omitted]. The injury accompanying that delay is not directly measurable in money terms like the loss of welfare benefits, but it cannot reasonably be argued that when the year has elapsed, the petitioner is made whole. The year's wait prevents remarriage and locks both partners into what may be an intolerable, destructive relationship.

Id. at 421-22 (Marshall, J., dissenting).

amount as in *Shapiro* or into a discrete act of voting as in *Dunn* foreshadows problems which can develop in reviewing other durational residency requirements. Applying the *Sosna* Court's mode of analysis to a durational residency requirement for public housing, for instance, produces an unclear result. Being forced to live in substandard housing during the waiting period involves an irretrievable loss of dignity which cannot be expressed in tangible terms. Whether this intangible loss is closer to *Memorial Hospital* or *Sosna* is a matter of speculation.

As weak as the majority opinion is in this respect, it nevertheless avoids many of the analytical pitfalls to which the dissent fell victim. Justice Marshall concluded that penalizing travel by delaying access to divorce courts warranted application of the compelling-interest test, since "the interests associated with marriage and divorce have repeatedly been accorded particular deference, and the right to marry has been termed 'one of the vital personal rights essential to the orderly pursuit of happiness by free men'."[65]

In support of its position, the dissent cited *Boddie v. Connecticut*.[66] In *Boddie*, the Court concluded that indigents who were denied access to divorce courts because of their inability to pay court costs had been denied due process of law.[67] Several lower

65. *Id.* at 419-20.

66. 401 U.S. 371 (1971).

67. In the district court, Mrs. Sosna relied exclusively on an equal protection claim. In the Supreme Court, she cited *Boddie* in support of her contention that denial of access to a divorce court was a deprivation of due process. Although *Boddie* found a violation of due process to exist where court access was denied to indigents, that holding was cast in extremely narrow terms. As Chief Justice Burger observed in his concurring opinion in United States v. Kras, 409 U.S. 434 (1973), the interests involved in *Boddie* were developed with "painstaking and precise delineation." 409 U.S. at 450 (Burger, C.J., concurring). The majority in *Kras* cautioned that *Boddie* went "no further than necessary to dispose of the case before us," and did "not decide that access for all individuals is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual." *Id.*

The fact that a divorce waiting period delays court access to persons seeking divorces is not grounds in itself for putting divorce waiting periods within the ambit of *Boddie*. *Boddie* rested on the fact that indigents were denied a meaningful opportunity to be heard. Quoting freely from prior cases, the Court pointed out that "What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner'," 401 U.S. at 378, quoting from Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (*Boddie* Court's emphasis), "for [a] hearing appropriate to the nature of the case. . . . " 401 U.S. at 378, quoting from Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). *Boddie* and the cases relied upon by that decision as precedent dealt with absolute denials of access to the judicial process.

The problem, however, is not so easily solved. A question is presented as to how long a waiting period may be before it results in denying a meaningful opportunity to be heard. While a two-year residency requirement eventually permits access to a divorce court, the spouses are forced to endure a legal relationship which has long

courts confronted with divorce waiting period challenges gave particular attention to the description in *Boddie* of divorce as "affecting fundamental human relationships,"[68] and suggested that this might be equivalent to a statement that divorce is a fundamental right.[69] Dictum to this effect is present in *United States v. Kras*[70] and *Ortwein v. Schwab*.[71] In *Kras*, the Court found that due process was not violated when indigents could not afford court fees necessary for a discharge from bankruptcy. In *Ortwein*, it was held that due process was not violated when welfare recipients challenging a reduction in their payments could not afford to appeal an administrative ruling upholding the decreased payments. In both cases, the Court in distinguishing *Boddie* emphasized that divorce involved a fundamental right and was therefore of greater constitutional significance than the court access sought in *Kras* and *Ortwein*. The implications of classifying divorce as a fundamental right are significant, since *Dunn* can be interpreted as saying that a penalty on travel in the form of a denial of a fundamental right merits the compelling-interest standard.[72]

In determining whether there is a fundamental right to a divorce, it must be emphasized that the phrase "fundamental right" is a term of art in equal protection adjudication, used only in conjunction with those rights which are constitutionally guaranteed.[73] Classifying divorce as a fundamental right on the basis of *Boddie* can only be done by taking the word "fundamental" out of context. The majority opinion in *Boddie* was written by Justice Harlan, an ardent critic of that equal protection analysis which subjected penalties on fundamental rights to the compelling-interest test.[74] Under

since ceased to have significant meaning for them personally. In the end, the Court could conceivably be placed in the position of drawing the line past which a meaningful opportunity ceases to exist.

68. 401 U.S. at 383.

69. *E.g.*, Larsen v. Gallogly, 361 F. Supp. 305, 308 n.5 (D.R.I. 1973); Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 221 n.9 (D. Hawaii 1973).

70. 409 U.S. 434 (1973).

71. 410 U.S. 656 (1973).

72. *See* text accompanying notes 50-51 *supra*.

73. *See* San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973).

74. For example, in his dissent in *Shapiro*, Justice Harlan conceded that interstate travel was a fundamental right. Nevertheless, he did not share the majority's standard of review for the challenged durational residency statute. Under his view, the only inquiry in an equal protection analysis should be that of the challenged statute's rationality, unless a racial classification is involved.

Justice Harlan would have approached *Shapiro* the same way he did *Boddie*, that is, in the context of due process. He developed his standards for this test in Williams v. Illinois, 399 U.S. 235, 260 (1970):

> An analysis under due process standards, correctly understood, is, in my view, more conducive to judicial restraint than an approach couched in

that equal protection approach, once a right is determined to be fundamental and the burden of justification is shifted to the state, it is virtually a foregone conclusion that any statute restricting the exercise of that right will be invalidated.[75] Under Justice Harlan's approach, the analysis should not end once the importance of the right is determined, but rather a multitude of factors should be subject to a balancing test. In view of this criticism, it is obvious that cases which capitalize on *Boddie's* utilization of the word "fundamental" are taking that word out of the context of a flexible due process analysis and placing it in a rigid equal protection frame of reference. It can safely be said that if Justice Harlan had foreseen the consequences of using the word "fundamental," he would have selected a different adjective.

By not classifying divorce as a fundamental right, the *Sosna* majority avoided effecting a dynamic change in current divorce laws in the United States. Since the Court has been explicit in its insistence that any penalty on the exercise of a fundamental right must be justified by a compelling state interest, classifying divorce as a fundamental right would have necessitated strict scrutiny of any statute which restricted one's opportunity to obtain a divorce.

In his dissent in *United States v. Kras*,[76] Justice Marshall demonstrated that he was aware of the implications of affording divorce the protection given to fundamental rights:

> I am intrigued by the majority's suggestion that because granting a divorce impinges on "associational interests" the right to a divorce is constitutionally protected. Are we to require that state divorce laws serve compelling state interests? For example, if a State chooses to allow divorces only when one party is shown to have committed adultery, must its refusal to allow them when the parties claim irreconcilable differences be justified by some compelling state interests?[77]

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slogans and ringing phrases, such as "suspect" classification or "invidious" distinctions, or "compelling" state interest, that blur analysis by shifting the focus away from the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.

75. One commentator has referred to the strict scrutiny test as "strict in theory and fatal in fact." Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, Foreward* to *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 8 (1972). *See also* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 505 (1973).

76. 409 U.S. 434 (1973).

77. *Id.* at 462 n.4 (Marshall, J., dissenting).

If divorce is a fundamental right, the Constitution would require strict scrutiny of each aspect of the complex and varied divorce laws of every state in order to ensure that the individual's fundamental right to a divorce was not subject to unnecessary restrictions.

Even though divorce is not a fundamental right, it is not necessarily devoid of impact, since *Shapiro* and *Memorial Hospital* indicate that the right to travel may be impermissibly penalized by important but nonfundamental rights. Yet apparently a residency requirement for divorce does not involve a right substantial enough to penalize. Why it does not and how this relates to other areas is a matter of guesswork highlighting the shortcomings of current right-to-travel analysis. The Court's result in *Sosna* was current but the Court's opinion neglected to provide a badly needed new test. Rather than relying on arbitrary value judgments the Court should recognize the federalist values in which the right to travel finds its origin: the promotion of national unity balanced against the preservation of limited state autonomy.[78]

The right to travel promotes national unity by ensuring a person's right of free movement between states. However, in dealing with an after-the-fact penalty on travel rather than with a direct restriction upon movement, a new perspective is necessary, since after-the-fact penalities are often the byproduct of a state's good faith effort to regulate internal affairs. Rather than futilely attempting to develop a single formula into which the variables of any right-to-travel case can be inserted, the Court should focus on parameters which distinguish various penalties from each other.

It should be recognized that the type of movement the Court has sought to protect is the right "to [migrate] with intent to settle and abide."[79] Therefore, one relevant inquiry should be whether the benefit withheld by a durational residency requirement is one which cannot be enjoyed unless a person has an intent to settle and abide.

Applying this approach to a durational residency requirement for public housing, it should be obvious that a person who wishes to live in public housing has an intent to settle and abide. The benefit deprived by the waiting period is one which can only be enjoyed by a continuous residency, and therefore, the required length of residency should be ruled unconstitutional. Similar reasoning

78. *Cf. The Supreme Court, 1973 Term*, 88 HARV L. REV. 43, 116 (1974).

79. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). *See* Cole v. Housing Authority, 435 F.2d 807, 811 (1st Cir. 1970) ("travel" defined as "migration with intent to settle and abide").

could invalidate durational residency requirements for practicing particular professions.

Where the benefit subject to a durational residency requirement can be enjoyed without settling and abiding, states have a very real concern that the benefit may be exploited by transients having no desire to remain permanently. The federalist value of preserving limited state autonomy justifies allowing states greater leeway in drawing distinctions between residents and nonresidents in this area, in order to ensure that the states' resources are not exploited.

Another factor to be considered is whether a state has been subject to a pattern of exploitation by transients. If so, the promotion of national unity achieved by removing penalties on travel can only be secured at the cost of either allowing the depletion of state resources, or some other disadvantage. *Sosna* fits into this category; *Shapiro*, *Memorial Hospital*, and *Dunn* do not, since there was no such showing in those cases.

Finally, the Court should weigh the amount of deference which has been traditionally afforded states in legislating in the particular area which is the subject of the durational residency requirement. Although it was not explicitly mentioned in *Sosna*, an undercurrent of the majority's position was that divorce has been the almost exclusive domain of state legislatures,[80] a factor which several lower courts considered significant in upholding the constitutionality of divorce durational residency statutes.[81]

The Court's reluctance to interfere in matters involving divorce legislation is paralleled in other areas of the law.[82] Abstention of this type does not stand for the proposition that tradition is self-justifying. What is significant is that the Court's reluctance to enter these areas rests on a realization that courts are inappropriate forums for the resolution of certain types of disputes. As the Court observed in *Rodriguez* in the context of tax legislation, "we continue to acknowledge that the Justices of this Court lack both the

80. *See* 419 U.S. at 409. Cases affirming the autonomy of the states in divorce legislation include Williams v. North Carolina, 325 U.S. 226 (1945); Maynard v. Hill, 125 U.S. 190 (1888); Pennoyer v. Neff, 95 U.S. 714 (1877); Barber v. Barber, 62 U.S. (21 How.) 582 (1858). *See also* Druen v. Druen, 247 F. Supp. 754 (D. Colo. 1965), where it was held that a suit for divorce is not removable from state court pursuant to 28 U.S.C. § 1441 even though diversity of citizenship and the requisite jurisdictional amount are shown to exist under 28 U.S.C. § 1332.

81. Shiffman v. Askew, 359 F. Supp. 1225 (D. Fla. 1973), *aff'd sub nom.* Makres v. Askew, 500 F.2d 577 (5th Cir. 1974); Ashley v. Ashley, 191 Neb. 824, 217 N.W.2d 926 (1974).

82. *See* Geduldig v. Aiello, 417 U.S. 484 (1974) (social welfare plan); San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973) (state tax legislation); Labine v. Vincent, 401 U.S. 532 (1971) (descent and distribution).

expertise and familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."[83] In other areas of the law where they are similarly ill-equipped, courts should be hesitant to strike down durational residency requirements which impose after-the-fact penalties on travel.

These three factors, an intent to settle and abide, demonstrated exploitation of a state's resources by transients, and traditional deference to states in particular types of legislation, are designed to present a flexible means of determining what penalties on travel are unconstitutional. Concededly, cases may develop in the future for which the proposed test might be inappropriate, but no test can be designed to meet every possible contingency. This test represents an improvement over the vague language contained in right-to-travel cases and offers discernible standards by which to judge alleged penalties on travel.

Despite the flaws in the legal analysis of *Sosna*, the reasons underlying a divorce waiting period justify the holding. The majority found several state interests justifying the existence of a divorce durational residency statute. Because of the ramifications of a divorce proceeding, the state has a legitimate interest in ensuring that the divorce-seeking spouse has more than a temporary connection with the state. Property rights must be determined and custody and support problems concerning the children must be resolved. Another reason for the necessary connection between state and spouse is the right of another state to subject the divorce decree to collateral attack. Full faith and credit need not be extended to a divorce decree when the granting state lacks the "nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."[84] Finally, by demanding a connection, the state prevents forum-shopping in divorce actions.

An issue which was not confronted by the majority was whether the state's interests could be satisfied by a finding of domicile instead of the more stringent demands of a durational residency requirement. Rather than insisting upon proof that a waiting period constituted a more effective solution, the Court relied on the "quite permissible inference"[85] that a durational residency requirement

83. 411 U.S. at 41. For example, in *Memorial Hospital* it was shown that one county in Arizona operated without a durational residency requirement and experienced no dire consequences.

84. Williams v. North Carolina, 325 U.S. 226, 229 (1945).

85. 419 U.S. at 393.

was better suited than domicile for accomplishing the state's goals. The best explanation for this is that since the Court was only looking for a rational basis, there was no need to search for less drastic alternatives. It can be demonstrated, however, that regardless of the standard of review applied, a divorce waiting period is a more effective means of promoting state interests than is proof of domicile alone.

The superiority of a durational residency requirement over proof of domicile in the divorce area requires consideration of the problem of forum-shopping. It has been estimated that one in every ten divorces in the United States is a migratory divorce.[86] A result of this phenomenon has been the creation of a dual system of law: one for the immobile, who must abide by the laws of their own state, and another for the more affluent, who are able to finance a trip to a forum with laws more sympathetic to their specific marital difficulties.[87] By imposing waiting periods and thus hindering the migratory divorce patterns of the affluent, the states are able to equalize the impact of the divorce laws on rich and poor.

In *Mon Chi Heung Au v. Lum*,[88] the Hawaii district court concluded that a statutory waiting period was not a permissible means of deterring forum-shopping. The district court was persuaded that instead, "the existence of a myriad of tangible criteria highly relevant to bona fides of domicile"[89] provided a more appropriate means to determine domicile without penalizing travel.[90] Justice Marshall, dissenting in *Sosna*, also felt that proof of domicile was the proper method for controlling forum-shopping.[91]

Several shortcomings to the "tangible criteria" means of deter-

86. H. CARTER & P. GLICK, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY 373 (1970). "Migratory divorce" has been defined as "a divorce obtained by a person traveling to another jurisdiction, which has less stringent divorce requirements than his own, for the purpose of obtaining a divorce decree, with the intention of returning to his normal home once the purpose is accomplished." Note, 44 IOWA L. REV. 765, 765 n.3 (1959).

87. In his dissent in Sherrer v. Sherrer, 334 U.S. 343 (1948), Justice Frankfurter noted that a migratory divorce "offers a way out only to that small portion of those unhappily married who are sufficiently wealthy to be able to afford a trip to Nevada or Florida, and a six-week or three-month stay there." *Id.* at 370. In an accompanying footnote he added: "For comparable instances, in the past, of discrimination against the poor in the actual application of divorce laws, cf. Dickens, Hard Times, c.11." *Id.* at 370 n.18.

88. 360 F. Supp. 219 (D. Hawaii 1973).

89. *Id.* at 222.

90. Alternatives suggested by the court were purchasing or renting living quarters for a period comparable to or in excess of the waiting period, securing a permanent job, registering a car, or obtaining a driver's license. *Id.* at 222 n.14.

91. 419 U.S. at 424.

mining domicile were suggested by the *Lum* court and the *Sosna* dissent. Just as one who fails to satisfy a durational residency statute may well be a bona fide domiciliary, so too might a person who does not register his car, obtain a new driver's license, and so on.[92] Additionally, the ineffectiveness of suggested alternatives to waiting periods as a means of deterring forum-shopping is apparent. Renting temporary housing, registering children in school, resigning club memberships, and other "tangible criteria" of residency hardly present formidable obstacles to a person intent on obtaining a divorce.[93]

Shapiro, *Dunn*, and *Memorial Hospital* rejected waiting periods as permissible means of determining domicile, but each is distinguishable from the *Sosna* problem. In both *Shapiro* and *Dunn*, there was ready proof of viable alternatives, because the states already had at their disposal active factfinding mechanisms designed to ascertain the bona fides of an applicant's residence. In *Shapiro*, investigations were performed by welfare agencies,[94] and in *Dunn*, the task fell to an army of registration personnel.[95] In *Memorial Hospital*, the Court could point to objective evidence that the statute in question was ineffective because, in another situation, residency requirements had been removed as qualifications for indigent medical treatment without dire consequences.[96]

The active factfinding agencies available in the fact settings of *Shapiro* and *Dunn* should be contrasted with the passive role of the

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92. *Cf.* Gunther, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 107-08 n.23 (1971).

93. One divorce manual advises:

> If you try to establish domicile in an "easy" divorce state your intent to live there may be more easily proven if you look for a job there, take out a library card, open charge accounts, and register for a course at the local college or university. All these *seemingly trivial acts* help to document your intent to be domiciled.

F. HAUSSAMEN & M. GUITAR, THE DIVORCE HANDBOOK 149 (1960) (emphasis added).

The consequences resulting from a system which places reliance upon such "trivial acts" have been cogently noted:

> Some say this allegation [domicile] amounts to perjury; others that it is like those allegations made under the common-law forms of action that in time came to be disregarded and did not require proof—a ritual, not a matter of conscience; all are aware that the appearance in the second state is a subterfuge.

A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 1486 (1965).

94. 394 U.S. at 636.

95. 405 U.S. at 346-48.

96. 415 U.S. at 267-68 & n.30. The Court observed that in Pinal County, Arizona, a public hospital had been enjoined from demanding satisfaction of the durational residency requirement in Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971), with no disastrous consequences resulting.

court in an ex parte divorce action, where the court merely confines itself to reviewing the evidence submitted to it by an obviously interested witness. Furthermore, while in *Memorial Hospital* the Court observed that harmful consequences did not result from the removal of the residency requirement in one Arizona county, those states which have removed or shortened their divorce residency requirements provide well-documented examples of increases in forum-shopping, despite the prerequisite of a court determination of domicile.[97]

It has been contended that forum-shopping could be prevented if courts applied a divorce law different from that of the forum.[98] A spouse recently arrived within a state would have immediate access to the divorce courts of that state, but the threat of migratory divorces could be countered by applying the law of the last common domicile. This proposal raises several problems. The first is determining what law is to be applied.[99] It is conceivable that, with a population as highly mobile as that of the United States, no other state would have more significant contacts with the husband and wife than the forum state.

An even more persuasive argument is that applying the law of an alternate forum fails to confront the basic equal protection issue. If one accepts the proposition that a durational residency statute is a penalty on a class of persons who have recently traveled interstate, so too is the practice of applying a dual system of divorce laws: one for established residents, and one for newcomers. This is a denial of equal protection of the laws in its most classic form.

Finally, it is significant that one of the ultimate solutions proposed to the generalized problem of forum-shopping is none other than a durational residency requirement:

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97. P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 103-09 (1959); Note, 75 HARV. L. REV. 549 (1962).

It has been contended that a durational residency requirement is subject to the same criticism as any other means of proving domicile, that is, if a person is intent on perjuring himself as to his domiciliary intent, he will also lie about length of residency. Fiorentino v. Probate Court, 310 N.E.2d 112, 118 (Mass. 1974). While this appears to be a valid criticism, experience with relaxed durational residency requirements does not support it. As the above-cited authorities demonstrate, divorces have significantly increased in states which have relaxed their durational residency requirements despite the retention of the demand that domiciliary intent be proven. The somewhat perplexing conclusion is that persons seeking migratory divorces appear to be willing to lie about the abstract concept of domiciliary intent, but are hesitant to lie about a concrete factor such as length of residency.

98. Note, *Constitutionality of Divorce Durational Residency Requirements*, 51 TEXAS L. REV. 585, 591 (1973).

99. *Cf.* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 244 (1962).

> Reforms can consist of a very simple development. The requirement of a minimum residence time is today the chief vehicle for correcting the scope of divorce jurisdiction. Uniform drafts have acknowledged its importance and insisted that the minimum should be one or two years. This requirement ought to be freed from the wild-growth tendrils with which it is surrounded, and it should be enforced with the utmost rigidity.[100]

The need to prevent forum-shopping should not be taken lightly. If divorce waiting periods had been invalidated in *Sosna*, states such as Iowa with liberalized divorce laws would be forced to reconsider their positions after the increasing popularity of those states as divorce forums became apparent. Of even greater concern is the deterrent effect such a decision would have on states contemplating much needed reforms in divorce legislation. Furthermore, if faced with the possibility of extensive forum-shopping, states would be hesitant to try experimental programs designed to alleviate the divorce problem.

Another state interest which *Sosna* and the previous lower court cases failed to discuss was the relationship between a required length of residency and a court's jurisdictional power over the spouses in a divorce action. It is the prevailing view in the United States that at least one of the spouses must be domiciled within a state before a court has jurisdiction to issue a binding divorce decree.[101] This is attributable to the fact that divorce has traditionally been viewed as being in the nature of an in rem action, with the marital relationship constituting the res.[102] While the origin of the rule is uncertain,[103] in time it was accepted that the state of domicile of either party was best suited to effect a change in marital status, and domicile emerged as a jurisdictional prerequisite.[104] Viewed

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100. E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 460 (2d ed. 1958).

101. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 191 (1971).

102. *See, e.g.*, Houston v. Timmerman, 17 Ore. 499, 505, 21 P. 1037, 1039 (1889); Ditson v. Ditson, 4 R.I. 87 (1856).

103. Authorities are unsure of the source of the domicile requirement, but it was well established by the time Justice Story's *Commentaries* were published in 1834. Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L.J. 165, 166 (1943); Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222 (1956).

104. If the domicile requirement is satisfied, jurisdiction exists.

> Even though the marriage was not celebrated in the forum, the spouses never lived there as husband and wife, none of the facts upon which the divorce is based occurred in the forum, and even though the other spouse does not appear in the action and there is no other basis for in personam jurisdiction over the absent spouse.

WEINTRAUB, *supra* note 101, at 174.

in this context, a durational residency requirement serves as objective evidence of domicile.

The Supreme Court has never been called upon to decide if domicile is the only constitutionally acceptable contact between a state and the marital relationship which warrants the exercise of divorce jurisdiction.[105] In recognition of this fact, several state courts have upheld divorces where jurisdiction was predicated on residency alone.[106]

The importance of this issue emerges upon recognition of several points. First, since many servicemen are unable to meet the technical requirements of domicile, special statutes have come into existence allowing courts to exercise divorce jurisdiction over servicemen once a durational residency requirement is satisfied, regardless of domicile. Second, domicile has been subjected to increasing criticism as a jurisdictional basis because it is unresponsive to the needs of contemporary society. Durational residency requirements have been suggested as a solution. With these two caveats in mind, it should be noted that other than domicile, a required length of residency provides the only viable jurisdictional basis in divorce actions.

If the *Sosna* dissent had prevailed, a serious problem would have arisen in states which have servicemen's divorce laws. A member of the armed forces is an inherent transient. Since he might be required to relocate upon a moment's notice, a serviceman "develops a habit of looking forward to living in the future in different places . . . which is quite consistent with never settling down in one place as in a chosen home."[107] The legal presumption that where a person actually lives is his domicile cannot arise in the case of a serviceman who does not have a choice of domicile.[108] Because of this, while it is theoretically possible for a serviceman to establish domi-

105. This should not be confused with the Court's holding in Williams v. North Carolina, 317 U.S. 287 (1942), that "each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." *Id.* at 298-99. It is possible that a divorce not based on domicile is valid in the decree rendering state even though it is not entitled to full faith and credit. *Id.* at 302. *See* Rodgers & Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 COLUM. L. REV. 1363 (1967).

106. For instance, a number of state courts have permitted military personnel and their wives to obtain divorces in the state in which the serviceman was stationed. Lauterbach v. Lauterbach, 392 P.2d 24 (Alas. 1964); Wheat v. Wheat, 229 Ark. 842, 318 S.W. 2d 793 (1958); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Wood v. Wood, 159 Tex. 350, 320 S.W.2d 807 (1959).

107. J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 155 (1935).

108. 2A W. NELSON, NELSON ON DIVORCE AND ANNULMENT § 21.25 (2d ed. 1961).

cile in the state where he is stationed, the requisite proof of intent to supplement physical presence is often extremely difficult to produce.[109]

When domicile was viewed as the only permissible jurisdictional basis for a divorce action, servicemen in many states were denied the opportunity to seek a divorce.[110] The only option open to a serviceman confronted by this obstacle would be a return to the state of his legal domicile.[111] The time and expense involved in this decision might prove to be an insurmountable barrier. In addition, his original place of domicile might have less contact with the marriage than the residency state, and it certainly would have less concern with custody and alimony problems.

Many states have reacted to the serviceman's dilemma with special statutes granting jurisdiction in divorce actions over a member of the armed forces after he has lived within the state for a certain period, regardless of domicile.[112] The Supreme Court of Texas stated the case for upholding these statutes:

> The State of Texas is hardly less concerned with the domestic relations of persons required to live in this state indefinitely under military orders, oftentimes for a period of years, with the protection and support of their children and property interests, and the adjustment of their marital responsibilities at stake than it is with similar problems of those who have acquired a domicile here in the orthodox sense. In many cases, if not in the majority, the courts of this state only can deal adequately with these problems and afford appropriate relief.[113]

Were domicile to become the only permissible jurisdictional basis, states would once more be confronted with the problem of military divorces.

None of the jurisdictions in which divorce waiting periods have been overturned has a servicemen's divorce statute. In view of the fact that a national constitution is being interpreted, however, consideration must be given to the problems in all states. Elimination of divorce durational residency statutes would have the consequence of denying many servicemen access to a divorce court. It is difficult

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109. *See* cases cited in *id.* at 345 n.8; Note, 13 Sw. L.J. 233, 236-38 (1959).

110. *See, e.g.*, Harris v. Harris, 205 Iowa 108, 109-10, 215 N.W. 661, 662 (1927).

111. As a general rule, a person does not lose his old domicile until he acquires a new one. R. LEFLAR, AMERICAN CONFLICTS LAW § 10 (1968) [hereinafter cited as LEFLAR].

112. *E.g.*, ALASKA STAT. § 09.55.160 (1973) (serviceman continuously stationed at military base for one year deemed resident in good faith). *See* note 106 *supra.*

113. Wood v. Wood, 159 Tex. 350, 355, 320 S.W.2d 807, 811 (1959).

to see how this can be justified as necessary to prevent penalties on travel.[114]

It is possible to argue that the issue raised by servicemen's divorce statutes could have been solved by making them an exception to the rule that divorce waiting periods are unconstitutional. This contention is viable, however, only if it is assumed that domicile is generally a satisfactory jurisdictional basis for divorce, when in fact a domicile requirement for divorce is out of step with the current mobile society. At the time that domicile was picked as the jurisdictional basis for divorce, the choice rested on a sound foundation.

> This contact point was chosen because the domiciliary state was viewed as the one with the principal interest. And the choice was a good one for at that time domicile was a legal term of established meaning and stability. When a person was a domiciliary of a place, he was a member of that community and there were permanent attachments and connections.[115]

The stability of early 19th-century family life presented a sharp contrast to today's society. Yet the domicile requirement remains, even though its underlying rationale has vanished. As one commentator noted:

> [D]omicile is a patently deficient test in our suitcase society. A nebulous intention to create a new home, either permanently or indefinitely, requires nothing more than a "mental flash." A domiciliary may have arrived yesterday. He may be gone tomorrow. He may in fact, never have appeared on the scene at all. The growth of an itinerant and mobile population has seriously undermined the utility of a concept requiring a settled connection with a place called home.[116]

The *Restatement (Second) of Conflicts* is representative of the discontent with domicile. In a change of position from the First Restatement, domicile is no longer considered to be essential to divorce jurisdiction. Instead, a court has jurisdiction in a divorce action "if either spouse has such a relationship to the state as would

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114. If divorce is a fundamental right as some courts have contended, then a serviceman may have a constitutional right to demand that divorce jurisdiction be predicated on a durational residency requirement, lest he be denied access to a divorce court because of his inability to establish a domicile. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 337 (1972).

115. Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 13 (1955).

116. Rodgers & Rodgers, *supra* note 105, at 1388.

make it reasonable for the state to dissolve the marriage."[117] It is unclear what reasonable relationships are envisioned. As the Comment to that section points out, there is a lack of authority on the subject. The Reporter suggests that a one-year residency requirement would be most appropriate.[118]

While domicile is still the most widely accepted basis for divorce jurisdiction, there is no reason to assume that the status quo will perpetuate itself. The growing awareness of the shortcomings of domicile, reflected by the position of the *Restatement (Second) of Conflicts*, offers a strong argument for allowing the states flexibility in choosing what should be the jurisdictional basis for a divorce action.

Other than a durational residency requirement, there are no viable alternative jurisdictional bases. Consider, for example, the alternative of conferring divorce jurisdiction on the state of the marriage. Since the validity of a marriage is determined by the law of the state of celebration, it could be argued that the state retains a special interest in the marital status of the husband and wife. Until recently, New York adhered to this position. The state was viewed as having a permanent basis for divorce jurisdiction if the spouses had been married in New York, even though they had since ceased to be domiciled there.[119] The validity of this practice was affirmed in *David-Zieseniss v. Zieseniss*:[120]

> In what must certainly be a large percentage of cases, the place where a marriage takes place is the place where the parties establish their home and the place where the children are born; and even where they both thereafter leave that place and go their respective ways in different places, the fact that they were married in a particular place seems to me to supply a nexus between those persons and that place which is at least as intimate and permanent as the domicile of either one of them in any other State would supply between them and that place.[121]

The nexus found by the *Zieseniss* court is in many cases a substantial fiction. The spouses often leave the state of celebration years before a divorce is even considered. It has been observed that the marriage ceremony may be the only contact a state has with the spouses because the site of marriage is often selected "in

117. RESTATEMENT (SECOND) OF CONFLICTS § 72 (1971).

118. RESTATEMENT (SECOND) OF CONFLICTS, Reporter's Note § 72, at 221-22 (1971).

119. L. 1962, c. 313, § 7 (1963); *as amended* N.Y. DOM. REL. LAW § 230 (McKinney Supp. 1974-75). Site of the marriage is a jurisdictional basis in annulment proceedings. R. LEFLAR, AMERICAN CONFLICTS LAW 559 (1968).

120. 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

121. *Id.* at 844, 129 N.Y.S.2d at 656.

jest, fortuitously, or without reasonable purpose."[122] More significantly, if the husband or wife has moved a considerable distance from the state of marriage, great difficulty and expense could accompany an attempted return. In view of the extreme mobility of American society, divorce jurisdiction based on the site of marriage would pose a cumbersome jurisdictional prerequisite.

Justice Marshall's dissent suggested the alternative to domicile of personal service. He could envision no reason for imposing a durational residency requirement if both parties were before the court. This procedure would be superior to a domicile requirement insofar as it would eliminate the need for an inquiry into the intent of the spouse. Nevertheless, Professor Ehrenzweig has persuasively argued that personal jurisdiction is particularly inappropriate in divorce actions:

> Such a jurisdiction has become an anachronism even as to money claims, and would be monstrous, in the law of divorce. It could, on the one hand, trap a defendant on a pleasure or business trip in a state with a hospitable divorce law; and on the other hand, force the plaintiff to hunt his opponent all through the country to serve him with process.[123]

There can be little doubt that forum-shopping would be encouraged by this alternative. A husband and wife seeking a divorce, but prevented from doing so because of the stringent laws of their own state, could make a short trip to another state with more favorable laws. One party could serve the other with process, and both could return to their home state until another brief appearance was required on the day of the trial. While this may be attractive to persons able to afford the cost of a trip to a more favorable jurisdiction, it would result in a dramatic increase in the existing inequities for the less affluent with limited mobility who do not have the same choice of laws.[124]

A final alternative might be to confer jurisdiction on the state

122. Sumner, *supra* note 115, at 15. *But see Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 972 n.374 (1960).

> There is one situation, however, in which the state of marriage may have a substantial interest in the stability of the marriage, and that is when the wife's family resides there, in which case the wife may well return to that state after the divorce, and might have to be supported by the state or its residents if no provision is made for her support incident to the divorce. *Id.*

Nevertheless, this hardly strengthens the case for the state of marriage, as it predicates jurisdiction on what is at best a contingency.

123. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 71, at 237 (1962).

124. For a discussion of forum-shopping see notes 86-100 *supra* and accompanying text.

where the offenses took place leading to the divorce. States have traditionally declined to view divorce as merely the termination of an incompatible relationship. Instead, a finding of fault is insisted upon, and a divorce action necessitates a search for a "guilty" spouse who has committed "offenses" justifying a severing of the marital bonds. Consequently, states at one time favored divorce jurisdiction of that state within whose boundaries the offenses were committed.[125] One example of this outdated practice is provided by a Colorado statute which, before its amendment in 1973,[126] permitted waiver of a one-year residency requirement when the grounds for the action were "adultery or cruelty, where the offense was committed within this state."[127]

As is the case with the site of the marriage and the personal presence bases, the site of the guilty act does not present a viable alternative basis for divorce jurisdiction. A system of fault jurisdiction necessarily limits the grounds for divorce to discrete acts which can be traced to a particular place and time. Alcoholism, mental cruelty, and other grounds for divorce of a continuing character whose origin cannot be pinpointed to a specific jurisdiction would be eliminated.[128] Additionally, it would be impossible to implement such a jurisdictional system in a state which recognizes "no-fault" divorce. Consider, for example, the Iowa statute of this type which provides for dissolution of the marriage "to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."[129] If a search for fault is necessary, a spouse suing for divorce on this ground would be permanently denied access to a divorce court.

A consequence of *Sosna* is that the states will be allowed a high degree of flexibility in dealing with the jurisdictional basis for divorce actions. In effect, the Court has reaffirmed the principle that matters of divorce policy are state concerns, leaving *Boddie v. Connecticut* as the sole exception to the rule. While this result is admirable, it is unfortunate that the contours of the right-to-travel doctrine still remain to be defined. *Sosna* is persuasive evidence that there is a need for a new direction for the right to travel.

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125. EHRENZWEIG, *supra* note 123, at 238.
126. COLO. REV. STAT. ANN. § 14-10-106 (1973).
127. C.L. § 5597 (1963).
128. NELSON, *supra* note 108, at 356.
129. IOWA CODE ANN. § 598.5 (Supp. 1973).