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Ostendorf v. Turner, 7 Fla. L.W. 553 (December 16, 1982)

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Florida Constitutional Law—HOMESTEAD TAX EXEMPTION—ALL RESIDENT HOMEOWNERS IN FLORIDA ARE TO RECEIVE THE ENHANCED EXEMPTION,—*Osterndorf v. Turner*, 7 Fla. L.W. 553 (December 16, 1982)

I. INTRODUCTION

On December 16, 1982, the Supreme Court of Florida ruled that section 196.031(3)(e), Florida Statutes, which grants an enhanced homestead exemption of $25,000 to homeowners who have been Florida residents for five consecutive years immediately prior to claiming the exemption, violates the equal protection clause of the Florida Constitution. In *Osterndorf v. Turner*,[1] the court excised the statutory language which required a homeowner to have been a resident for five years before qualifying for the enhanced exemption.[2] The court's decision will enable approximately 361,000 residents statewide to qualify for the enhanced $25,000 exemption which had previously been denied to them.[3] However, the impact of the decision will reach beyond these residents. Initial estimates suggest that $119 million per year will be lost in tax revenues statewide.[4] To make up for these lost revenues, many cities and counties may have to increase their millage rates, thereby increasing the taxes assessed to all residents in the state.[5] In addition, the decision may have some serious implications for several other Florida homestead exemption statutes containing similar durational residency requirements.[6] The *Osterndorf* decision may eventually result in these other homestead tax exemption statutes being declared unconstitutional, thereby indirectly affecting even more Florida taxpayers.

Florida grants to every person who has legal or equitable title in the real property in which they live an "exemption from all taxa-

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1. 7 Fla. L.W. 553 (Dec. 16, 1982).
2. Section 196.031(3)(e), Florida Statutes, states:

> For every person who is entitled to the exemption provided in subsection (1) and who has been a permanent resident of this state for the 5 consecutive years prior to claiming the exemption under this subsection, the exemption is increased to a total of the following amounts of assessed valuation for levies of taxing authorities other than school districts: . . . $25,000 with respect to assessments for 1982 and each year thereafter.

The *Osterndorf* court excised "for the 5 consecutive years prior to claiming the exemption under this subsection" from the statute. *Osterndorf*, 7 Fla. L.W. at 556. *See infra* note 15 and accompanying text.

3. Miami Herald, Dec. 17, 1982, at 1A, col. 6.
4. *Id.*
5. *Id. See also* St. Petersburg Times, Dec. 17, 1982, at 1A, col. 1.
6. *See infra* notes 8, 10, 11 and accompanying text.

tion, except for assessments for special benefits, up to the assessed valuation of $5,000 on the . . . residence."[7] This exemption has been increased to $25,000 for those persons who have been continuous residents of the state for five years. The "enhanced" homestead exemption applies to the taxes levied by the governing bodies of school districts[8] and to other taxing authorities in the state.[9] In addition, Florida law gives an enhanced homestead exemption of $10,000 to homeowners over the age of sixty-five who have been continuous residents of the state for the five years prior to claiming the exemption.[10] An enhanced exemption of $9,500 is given to homeowners who are totally and permanently disabled and have been continuous residents of the state for five years.[11] The court in *Osterndorf* limited the scope of its decision to section 196.031(3)(e), which gives the above-mentioned $25,000 exemption

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7. FLA. STAT. § 196.031(1) (Supp. 1982). Florida is not the only state which grants a homestead tax exemption to all resident homeowners. *See, e.g.*, ALA. CODE § 40-9-19 (1975); CAL. REV. & TAX CODE § 218 (West 1970); GA. CODE ANN. § 48-5-44 (1982); HAWAII REV. STAT. § 246-26 (1976); MISS. CODE ANN. § 27-33-3 (1972); TEX. STAT. ANN. art. 7150.5 (Vernon 1982).

8. FLA. STAT. § 196.031(3)(d) (Supp. 1982). Subsequent to the December 16, 1982, opinion, petitioner Osterndorf filed a motion for rehearing/clarification requesting the court to consider the constitutionality of § 196.031(3)(a), (b), (d), Florida Statutes. The state also filed a motion for rehearing requesting the court to reverse its previous decision and to declare the durational residency requirement constitutional. On February 3, 1983, the court clarified its December 16, 1982, opinion by declaring § 196.031(3)(d) unconstitutional. The court reasoned that subsection (3)(d) clearly had been placed in issue by petitioner Osterndorf's pleadings in the trial court and the appellate court, and therefore could properly be considered upon review by the supreme court. The court also stated that there was "absolutely no basis for distinguishing subsection (3)(d) from subsection (3)(e)" because the wording and the related constitutional provisions of the two subsections were nearly identical. Osterndorf v. Turner, 8 Fla. L.W. 58 (Feb. 3, 1983). Because subsection (3)(d) was indistinguishable from subsection (3)(e), the court declared subsection (3)(d) unconstitutional for the same reasons it had expressed in its December 16, 1982, opinion. *Id.*

9. FLA. STAT. § 196.031(3)(e) (Supp. 1982). No other state grants an enhanced tax exemption to residents based solely upon the duration of residence in the state.

10. FLA. STAT. § 196.031(3)(a) (Supp. 1982). In addition to a general homestead exemption available to all residents, as Florida offers, several states also grant an enhanced exemption to residents over 65 years of age. *See, e.g.*, ALA. CODE § 40-9-19 (1975); TEX. STAT. ANN. art. 7150.5 (Vernon 1982). Several other states, although they do not grant a general homestead exemption to all residents, do grant a general exemption for the elderly. *See, e.g.*, ALASKA STAT. § 29.53.020(6)(e) (1978); KY. REV. STAT. § 132.810 (Supp. 1982); N.Y. REAL PROP. TAX LAW § 467 (McKinney 1972).

11. FLA. STAT. § 196.031(3)(b) (Supp. 1982). In addition to a general homestead exemption available to all residents, as Florida offers, several states also grant an enhanced exemption to disabled residents. *See, e.g.*, ALA. CODE § 40-9-19 (1975); HAWAII REV. STAT. § 246-31 (1976). A number of other states, although they do not grant a homestead exemption to all residents, do give an exemption to those who are permanently disabled. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-271(8) (1980); KY. REV. STAT. § 132.810 (Supp. 1982); S.C. CODE ANN. § 12-37-290 (Law. Co-op. 1976); W. VA. CODE § 11-6B-3 (Supp. 1982).

from the levies of taxing authorities other than school districts.[12]

A special election was held on October 5, 1980, in which the Florida electorate approved an amendment to the state constitution.[13] Because this amendment[14] was to be implemented by general law, the Florida legislature enacted section 196.031(3)(e):

> (e) For every person who is entitled to the exemption provided in subsection (1) and who has been a resident of this state for the 5 consecutive years prior to claiming the exemption under this subsection, the exemption is increased to a total of the following amounts of assessed valuation for levies of taxing authorities other than school districts: $15,000 with respect to 1980 assessments; $20,000 with respect to 1981 assessments; and $25,000 with respect to assessments for 1982 and each year thereafter.[15]

Osterndorf v. Turner first arose in the Circuit Court of Volusia County, when Richard and Pauline Osterndorf, who had resided there for less than five years, challenged the five-year residency requirement enabling a resident to qualify for the $25,000 exemption granted by section 196.031(3)(e).[16] The Osterndorfs contended that the statute created an arbitrary, capricious and discriminatory classification which violated their rights of equal protection and due process under the federal and state constitutions. After the pleadings were filed, both parties moved for summary judgment. The trial court entered final summary judgment for defendant

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12. *Osterndorf*, 7 Fla. L.W. at 556 n.4.

13. At the June 30, 1980, Special Session of the Florida Legislature, Senate Bill 3-E was passed by the House and Senate creating Chapter 80-418, Laws of Florida. This bill provided for a special election on October 7, 1980, in which the Florida electorate would vote to approve or reject an amendment to article VII, section 6, of the Florida Constitution. *See* Ch. 80-418, 1980 Fla. Laws 1758. The amendment provided for increases in the tax exemption given on the assessed value of real estate for each levy other than those of school districts. These exemptions were to increase from $5,000 to $15,000 in 1980, $20,000 in 1981 and $25,000 in 1982. *See* Fla. SJR 4-E (1980).

14. FLA. CONST. art. VII, § 6(d), in pertinent part, reads as follows:

> By general law and subject to conditions specified therein, the exemption shall be increased to a total of the following amounts of assessed value of real estate for each levy other than those of school districts: fifteen thousand dollars with respect to 1980 assessments; twenty thousand dollars with respect to 1981 assessments; twenty-five thousand dollars with respect to the assessments for 1982 and each year thereafter.

15. FLA. STAT. § 196.031(3)(e). The Florida Legislature actually voted to approve this statute, subject to the voters approval of the constitutional amendment, prior to the October 5, 1980, special election. *See* FLA. H.R. JOUR. 20 (Spec. Sess. June 9-11, 1980); FLA. S. JOUR. 18 (Spec. Sess. June 9-11, 1980).

16. Osterndorf v. Turner, Case No. 81-260, CA-01 Division D (Fla. Cir. Ct. 1981).

Turner, holding that section 196.031(3)(e) was constitutional.[17] The court reasoned that the right to receive an increased ad valorem tax exemption was not a fundamental right[18] guaranteed either explicitly or implicitly by the United States Constitution nor was it a basic necessity of life.[19] The court also stated that the right to the exemption did not impose a significant penalty on the right to travel.[20] Therefore, the court applied a "rational basis," rather than a "compelling state interest," test.[21] In the trial court, the defendant had filed the affidavit of Representative Ralph Haben in order to establish the legislative purposes for the statute.[22] The trial court held that the legislative purpose of requiring new residents to help offset their immediate fiscal impact upon local government's capital outlay, while affording long term residents the increased exemption due to their past tax payments, satisfied the rational basis test.[23]

On appeal, the Osterndorfs asserted that the trial court erred in applying the rational basis test rather than the stricter compelling state interest standard.[24] Appellants also asserted that article VII, section 6, of the Florida Constitution did not authorize the creation of the five-year durational residency requirement found in section 196.031(3)(e).[25] The Fifth District Court of Appeal affirmed

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17. For a summary of the circuit court's decision, see Osterndorf v. Turner, 411 So. 2d 330, 332 (Fla. 5th DCA 1982).

18. For a discussion of various fundamental rights recognized by the United States Supreme Court, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7-12, at 1002-11 (1978).

19. *Osterndorf,* 411 So. 2d at 332.

20. *Id.*

21. *Id.* at 333. For a discussion of the application of the strict scrutiny test when fundamental rights are involved, see TRIBE, *supra* note 18, § 16-6, at 1000-02. For a discussion of the application of the rational basis test, see *Id.* § 16-2, at 994-96.

22. "[Ralph Haben] was a member of the Florida Legislature and a member of the House Committee on Taxation and Finance during all relevant times." *Osterndorf,* 411 So. 2d at 334 n.4. The Florida Supreme Court in *Osterndorf* summarized the contents of Haben's affidavit listing the legislative purposes for the statute as follows:

> (1) that new residents have an immediate fiscal impact upon local government's capital outlay and should pay their own share of this tax burden; (2) that tax savings should be passed on to longer term residents who have in recent years contributed tax dollars that have created a revenue surplus and made the increased tax exemption possible; (3) that the statute would discourage fraudulent homestead exemption applications; and, (4) that the statute would avoid the possibility of excessive immigration of individuals who desire lower taxes but are in need of many governmental services if Florida became too much of a tax haven.

Osterndorf, 7 Fla. L.W. at 554.

23. *Osterndorf,* 411 So. 2d at 334.

24. *Id.* at 332.

25. *Id.* at 334.

the trial court's decision, holding that the rational basis standard was the proper test to be applied to this statute because the right to an enhanced exemption was neither a fundamental right nor a basic necessity of life.[26] The appellate court also agreed with the trial court that the legislative purposes for the statute satisfied the rational basis test.[27] In addition, the court ruled that section 196.031(3)(e) did not contravene the language or intent of article VII, section 6, of the Florida Constitution.[28] Recognizing the significant impact which upholding the statute might have on taxpayers and taxing authorities throughout the state, the court certified the following two questions to the Supreme Court of Florida: "(1) Does section 196.031(3)(e), Florida Statutes (Supp. 1980), violate the equal protection clause or the due process clause of either the state or federal constitution? (2) Does section 196.031(3)(e), Florida Statutes (Supp. 1980), violate the provisions of article VII, section 6, of the Constitution of Florida, as amended in 1980?"[29]

The Florida Supreme Court answered both of these questions in the affirmative and reversed the appellate court's decision.[30] The supreme court held section 196.031(3)(e) to be unconstitutional under the equal protection clause of the Florida Constitution.[31] In addition, the court held that article VII, section 6(d), of the Florida Constitution did not give the legislature the authority to enact a law which violates the equal protection clause of the Florida Constitution.[32]

II. THE *Osterndorf* DECISION

The majority opinion discussed several federal and state cases

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26. *Id.* at 333.

27. *Id.* at 334.

28. *Id.*

29. *Osterndorf,* 7 Fla. L.W. at 553 (citation omitted).

30. *Id.*

31. Because the court limited its decision to Florida's equal protection clause, the court did not have to address the statute's constitutionality under the equal protection clause of the United States Constitution. *Id.* at 555.

32. Florida's equal protection clause is found at FLA. CONST. art. I, § 2 which provides:

> *Basic Rights.* All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

involving statutes[33] with durational residency requirements.[34] The court then gave its rationale for holding that section 196.031(3)(e) was unconstitutional. Herein arises the difficulty with comprehending the court's opinion. The rationale given by the court does not refer back to, nor does it cite specifically, any of the cases encompassed within its earlier general discussion of durational residency requirements. Upon close reading of the court's rationale, it is apparent that the court borrowed from some of the reasoning which was expressed in these federal and state cases. An analysis of these cases will unveil the sources of much of the reasoning which the court relied upon in its opinion.

A. *The Rationale for the Court's Holding*

Justice Overton, writing for the majority, stated that section 196.031(3)(e) established "two categories of permanent residents for entitlement to homestead tax exemption."[35] The court recognized that disparity of treatment by a state towards its citizens with respect to taxes is not totally prohibited, but noted that there must be a rational basis for such disparities to exist.[36] In *Osterndorf* the state presented four "rational" bases for the five-year residency requirement.[37] The *Osterndorf* court ruled, however, that

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33. None of these cases involved a statute fashioned like section 196.031(3)(e), granting an enhanced homestead exemption based solely on the length of residency in the state. Indeed, no other state has such a statute. *See supra* note 9. The court's discussion of these cases provided an appropriate comparison of how other courts have dealt with statutory durational residency requirements.

34. A durational residency requirement is a statutorily required period of residency that an otherwise bona fide resident must satisfy before becoming eligible to qualify for certain state benefits.

35. *Osterndorf*, 7 Fla. L.W. at 555.

36. *Id.* The court cited Kahn v. Shevin, 416 U.S. 351 (1974), as authority for this proposition. In *Kahn* the Supreme Court considered the constitutionality of a Florida statute granting a $500 property tax exemption to "widows." The statute was challenged by a widower who had been denied the exemption because the statute was limited expressly to widows. The Supreme Court held that a state tax law is not arbitrary even if it discriminates in favor of a certain class, as long as the discrimination is "founded upon a reasonable distinction." *Id.* at 355 (quoting Allied Stores v. Bowers, 358 U.S. 522, 528 (1959)).

Indeed, the Supreme Court has generally given the state legislatures great leeway regarding tax classifications. "Where taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) (footnote omitted). The Florida Supreme Court has recognized that tax burdens may be "unequal" and that equal protection does not mean "identity of treatment" regarding taxes, as long as the disparity of treatment is not "wholly arbitrary." State v. Andersen, 208 So. 2d 814, 820 (Fla. 1968).

37. *See supra* note 22.

there "is no rational basis for distinguishing between bona fide residents of more than five consecutive years and bona fide residents of less than five consecutive years in payment of taxes on their homes."[38] The court gave the following reasons why each of the four bases offered by the state, and expressed in Ralph Haben's affidavit, failed the rational basis test:

> First, it is constitutionally prohibited for this state to impose different taxes on its citizens based solely on their length of permanent residence in the state. Second, it is not a legitimate state purpose to reward certain citizens for past contributions to the detriment of other citizens. Third, we find five years is an unreasonable period of time to establish bona fide residency and is unnecessary to discourage fraudulent homestead exemption applications. Fourth, the avoidance of possible or excessive immigration of individuals to this state is clearly not constitutionally permissible.[39]

The supreme court failed to explain in any detail, or to cite directly any authority for, these four reasons. This absence of an adequate explanation and supporting authority is the major obstacle to understanding the court's opinion. However, an independent examination of several United States Supreme Court cases, which the *Osterndorf* court discussed only briefly, reveals the sources from which these four reasons were derived.

B. *Discussion of the Durational Residency Requirement Cases*

The *Osterndorf* court began its discussion of several cases addressing the durational residency issue by citing *Shapiro v. Thompson.*[40] In *Shapiro,* the United States Supreme Court heard three appeals challenging state and District of Columbia statutes which denied welfare assistance to residents who had not resided within the states or District for at least a year immediately preceeding application for assistance.[41] In each of these cases, the states or the District of Columbia attempted to justify the one-year requirement "as a protective device used to preserve the fiscal integrity of state public assistance programs."[42] Another argument

38. *Osterndorf,* 7 Fla. L.W. at 555.
39. *Id.*
40. 394 U.S. 618 (1969).
41. These statutes are cited in pertinent part at *Shapiro,* 394 U.S. at 622 n.2, 624 n.3, 626 n.5.
42. *Id.* at 627.

offered for the one-year requirement was that it discouraged indigents from entering the state solely to obtain higher benefits.[43] The final justification given for the requirement was that it was an "attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes."[44]

Because the statutory classifications in *Shapiro* denied welfare assistance to individuals who had not resided in the state for one year, the fundamental right of interstate travel was affected.[45] The *Shapiro* Court decided that when such a fundamental right was infringed, a "*compelling* state interest" test must be applied.[46] The Court held that each of the justifications put forth to support the one-year residency requirement failed to pass this exacting standard. The Court stated that it was "constitutionally impermissible" for the state to attempt to prohibit immigration of indigents into the state.[47] In addition, the Court ruled that a state could not seek to fence out indigents simply because they were seeking higher benefits.[48] Finally, the Supreme Court thoroughly rejected the attempted use of the one-year residency requirement to distinguish between old and new residents on the basis of their contributions to the community through the payment of taxes. The rationale for the Court's position on this last issue was that the reasoning behind such a justification would logically permit a state to apportion all benefits and services according to the past contributions of its citizens.[49] Such an apportionment of state benefits and services

43. *Id.* at 631.

44. *Id.* at 632.

45. *Id.* at 629-630. For a discussion of the fundamental right to travel from one state to another, see United States v. Guest, 383 U.S. 745, 757-59 (1966).

46. *Shapiro,* 394 U.S. at 638. The traditional equal protection standard inquired whether a classification was "without any reasonable basis." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). For a discussion of the various tests used in equal protection analysis, see generally the cases cited at Dunn v. Blumstein, 405 U.S. 330, 335 n.6 (1972).

47. *Shapiro,* 394 U.S. at 631. The Court reasoned that "[i]f a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' " *Id.* (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

48. *Id.* The Court was particularly concerned about instances in which indigents seek out benefits in other states in hopes of making a "new life" for themselves. The Court did not believe that such indigents, who seek to improve their position in life, ought to be regarded as "less deserving" than those indigents who enter a state without taking into consideration a state's benefits. *Id.* at 631-32.

49. The *Shapiro* Court said:

> Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed

would contravene the equal protection clause.

The *Osterndorf* court relied upon *Shapiro* in ruling that the justifications offered by the state for the statutory residency requirement lacked a rational basis. In fact, the court used language almost identical to that used in *Shapiro* to reject the state's reduction of immigration argument. For instance, the *Osterndorf* court stated that it was not "constitutionally permissible" for the state to try to reduce immigration of people into the state.[50] The *Osterndorf* court also held that the five-year residency requirement was an unreasonable period of time to establish bona fide residency and was unnecessary to discourage fraudulent homestead exemption applications.[51] The *Shapiro* Court similarly had ruled that the one-year residency requirement was an unreasonable means of safeguarding against fraudulent welfare claims because a less drastic alternative could have been employed to achieve the same results.[52] In addition, the *Osterndorf* court stated that it was not a legitimate state purpose to reward certain citizens for past tax contributions.[53] In adopting this reasoning, the *Osterndorf* court cited a passage from *Shapiro* which expressed the Supreme Court's concern that a state might attempt to apportion other benefits based upon past tax contributions.[54]

Another case which the court in *Osterndorf* cited in its discussion of durational residency requirements was *Dunn v. Blumstein*. In that case, a Tennessee resident challenged a state statute which required residency in the state for one year, and in a particular county for three months, as a prerequisite to voter registration.[55] The Court in *Dunn* stated that since the right to vote was a fundamental right,[56] and because the one-year requirement impinged on

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> it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

Id. at 632-33.

50. *Osterndorf*, 7 Fla. L.W. at 555.

51. *Id.*

52. *Shapiro*, 394 U.S. at 637. The Court stated that the problem of double payment of welfare benefits could be safeguarded against by "cooperation among state welfare departments." *Id.*

53. *Osterndorf*, 7 Fla. L.W. at 555.

54. *Id. See supra* note 49 and accompanying text.

55. The Tennessee statute which was challenged in *Dunn* can be found in pertinent part at *Dunn*, 405 U.S. at 332 n.1.

56. *Dunn*, 405 U.S. at 336. For discussion of the right to vote as a fundamental right, see Reynolds v. Sims, 377 U.S. 533, 561-562 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

the right to travel,[57] a compelling state interest test should be applied.

The Court in *Dunn* emphasized the difference between bona fide residency requirements and durational residency requirements.[58] The state of Tennessee asserted that one purpose for the one-year requirement was that it established an effective means of ascertaining bona fide residency.[59] Tennessee also asserted that the residency requirement helped assure that the state would have knowledgeable voters.[60] However, the Court rejected both of these purposes because neither furthered a compelling state interest.[61] The *Dunn* Court reasoned that the one-year residency requirement was not a proper means of determining bona fide residency because the requirement was "too imprecise" and thereby excluded residents as well as nonresidents.[62] The Court noted that the state was properly concerned about establishing bona fide residency in order to avoid fraudulent voting practices. However, the Court felt that there were better means available in order to avoid fraud.[63] For instance, the Court pointed out that the state could use criminal penalties to deter voter fraud.[64]

The *Osterndorf* court took note of the distinction made by the *Dunn* Court between bona fide and durational residency requirements.[65] Indeed, the court in *Osterndorf* picked up on the *Dunn* Court's holding that the one-year residency requirement could not be justified as a way of establishing bona fide residency. In *Osterndorf,* the state had argued that the five-year requirement was an effective way of establishing bona fide residency and thereby avoiding fraudulent claims.[66] However, the majority in *Osterndorf* ruled that "five years is an unreasonable period of time to establish bona fide residency."[67] Similar to the Court in *Dunn,*[68] the *Os-*

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57. *Dunn,* 405 U.S. at 338. For a discussion of the right to travel, see *supra* note 45.

58. *Dunn,* 405 U.S. at 343-344. For a description of a durational residency requirement, see *supra* note 34.

59. *Dunn,* 405 U.S. at 349.

60. *Id.* at 356.

61. *Id.* at 360.

62. *Id.* at 351.

63. *Id.* at 353.

64. *Id.* Additionally, the residency requirement failed because of its "crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise" of the right to vote. *Id.* at 357-58.

65. *Osterndorf,* 7 Fla. L.W. at 554-55. *See supra* note 58 and accompanying text.

66. *See supra* note 22.

67. *Osterndorf,* 7 Fla. L.W. at 555.

68. *See supra* note 63 and accompanying text.

terndorf court believed that the five-year period was "unnecessary to discourage fraudulent homestead exemption applications."[69]

In another case cited by the *Osterndorf* majority, *Memorial Hospital v. Maricopa County*,[70] the Supreme Court struck down an Arizona statute requiring one year's residency in a county as a condition to an indigent's receiving free nonemergency medical care. In that case, the county asserted several justifications for the one-year residency requirement. The first reason was that the requirement was intended to "insure the fiscal integrity" of the county's free medical care program.[71] Second, the one-year requirement attempted to inhibit the immigration of indigents into the state.[72] Third, the requirement sought to protect the state's longtime residents who had made past contributions to the community.[73] The fourth reason offered for the requirement was that it facilitated the determination of bona fide residency, and thereby discouraged fraud.[74] The Supreme Court rejected each of these asserted justifications.

Some of the Court's reasons in *Memorial Hospital* for rejecting the justifications put forth by the state were pertinent to the *Osterndorf* decision. The Court in *Memorial Hospital* ruled that any attempt to prohibit immigration into the state was "constitutionally impermissible."[75] The *Osterndorf* court similarly employed this reasoning by ruling that the attempt to avoid immigration of individuals into the state was "clearly not constitutionally permissible."[76] The *Memorial Hospital* Court also ruled that a state could not protect its longtime residents because of their past tax contributions to the community.[77] This reasoning was adopted in the *Osterndorf* court's statement that "it is not a legitimate state purpose to reward certain citizens for past contributions to the detriment of other citizens."[78] In *Memorial Hospital*, the Court rejected the use of the "one-year waiting period . . . [as] a convenient rule of thumb to determine bona fide residence."[79] In addi-

69. *Osterndorf*, 7 Fla. L.W. at 555.
70. 415 U.S. 250 (1974).
71. *Id.* at 263.
72. *Id.* at 263-64.
73. *Id.* at 266.
74. *Id.* at 268.
75. *Id.* at 263-64.
76. *See supra* note 50 and accompanying text.
77. *Memorial Hospital*, 415 U.S. at 266.
78. *See supra* note 54 and accompanying text.
79. *Memorial Hospital*, 415 U.S. at 267.

tion, the Court rejected the one-year requirement as a means of preventing fraud.[80] The *Osterndorf* court followed this reasoning by ruling that five years was an "unreasonable period of time to establish bona fide residency" and was "unnecessary to discourage fraudulent homestead exemption applications."[81]

The foregoing analysis of *Shapiro, Dunn,* and *Memorial Hospital* is helpful in revealing the source of some of the court's reasoning in *Osterndorf*. However, this analysis also raises an important question. In *Shapiro, Dunn,* and *Memorial Hospital,* the Supreme Court found that the durational residency requirements in issue denied residents either a fundamental right or a basic necessity of life. For this reason, the Court applied a "compelling state interest" test in evaluating the constitutionality of these durational residency requirements. The question then naturally arises whether the testing of a durational residency requirement would result in a similar outcome to that enumerated in *Shapiro, Dunn,* and *Memorial Hospital* when neither a fundamental right nor a basic necessity of life is at stake. Perhaps for this very reason, the court in *Osterndorf* cited *Sosna v. Iowa*[82] in its discussion of durational residency requirements.

In *Sosna,* the Supreme Court upheld an Iowa statute[83] requiring one year's residency before a person could receive a divorce in the state. The appellants in *Sosna* asserted that the one-year residency requirement was unconstitutional because it established two classes of persons within the state and discriminated against those who had recently exercised their right to travel.[84] The Supreme Court rejected these assertions, holding that a state has a significant interest in requiring that those seeking a divorce from its courts be "genuinely attached to the State."[85] The Court reasoned that the Iowa residency requirement assured such genuine attachment, thereby providing a more "reasonable" ground than the "budgetary considerations" or "administrative convenience" which were of concern in *Shapiro, Dunn,* and *Memorial Hospital.*[86] Although not

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80. *Id.* at 268.
81. *Osterndorf,* 7 Fla. L.W. at 555. *See supra* notes 67, 69 and accompanying text.
82. 419 U.S. 393 (1975).
83. The Iowa statute can be found in pertinent part at *Id.* at 395 n.1.
84. *Id.* at 405.
85. *Id.* at 409.
86. *Id.* at 406. This characterization by the *Sosna* Court, in attempting to distinguish the Iowa statute from the statutes considered in *Shapiro, Dunn,* and *Memorial Hospital,* may not have been completely accurate in stating the justifications given for the statutes in those cases. *See supra* notes 42-44, 59, 60, 71-74 and accompanying text.

expressly stated in the opinion, the Court apparently applied the rational basis test. The Court also noted that a state has an interest in protecting its divorce decrees from collateral attack.[87] In this way, the Court in *Sosna* applied a different test and arrived at a different result than it had in *Shapiro, Dunn,* and *Memorial Hospital.*

The application of this lesser standard, producing a different result than the compelling state interest test, was also employed in another case cited in *Osterndorf.* In *Starns v. Malkerson,*[88] the Supreme Court affirmed a lower court's decision that a regulation promulgated by the Board of Regents of the University of Minnesota requiring one year's residency in order to qualify for in-state tuition was not a violation of the equal protection clause.[89] The decision, which the Supreme Court affirmed, stated that the right to in-state tuition was not a fundamental right like that at stake in *Shapiro.*[90] Therefore, the exacting standards of the "compelling state interest" test did not apply. Instead, the district court in *Starns* asked whether the statute had some "rational relation to a legitimate state interest."[91] The court decided that the durational residency requirement satisfied the rational basis test because it was a "rational attempt by the State to achieve partial cost equalization between those who have and those who have not recently contributed to the State's economy."[92] However, the court's decision in *Starns* was later questioned by the Supreme Court in *Vlandis v. Kline.*[93]

In *Vlandis,* the Supreme Court struck down a Connecticut statute which created an irrebuttable presumption of nonresidency if a person listed an out-of-state address in his application to the state university.[94] Although the Court struck down the statute on due process grounds, it stated that "to apportion tuition rates on the basis of old and new residency . . . would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment."[95] This footnote, which was cited by the *Osterndorf*

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87. *Sosna,* 419 U.S. at 409.
88. 326 F. Supp. 234 (D.C. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971).
89. *Id.* at 235.
90. *Id.* at 238.
91. *Id.* at 237.
92. *Id.* at 240. Compare this with the rejection of the "contribution" rationale expressed in *Shapiro, supra* note 49 and accompanying text.
93. 412 U.S. 441 (1973).
94. *Id.* at 442-43.
95. *Id.* at 450 n.6.

court,[96] suggests that even when the more lenient "rational basis" test is applied to a statutory durational residency requirement, equal protection problems may arise.

Both *Sosna* and *Starns* demonstrate the different treatment the Supreme Court has given durational residency requirements which do not infringe upon any fundamental right or basic necessity of life. The Fifth District Court of Appeal in *Osterndorf* acknowledged this distinction, noting that because the right to an enhanced tax exemption was not a fundamental right or a basic necessity of life, it was to be subjected to the rational basis standard.[97] The supreme court in *Osterndorf,* however, did not belabor the distinction.[98] Instead, the *Osterndorf* court followed the recent Supreme Court decision of *Zobel v. Williams.*[99]

In *Zobel,* two residents of Alaska challenged a state statute which provided that earnings from the state's mineral fund be paid to residents based upon the number of years a particular person had been a resident of the state since 1959.[100] Alaska tried to justify the statute as an attempt to apportion benefits in recognition of "contributions of various kinds, both tangible and intangible, which residents have made during their years of residency."[101] The appellants argued that a compelling state interest test should have been applied to the Alaska statute. On the other hand, the appellees argued for application of the rational basis test. The Supreme Court stated it did not need to decide if the stricter standard should be applied because the Alaska statute failed even the "minimal [rationality] test."[102]

The Court in *Zobel* held that the stated purpose for the Alaska statute, *i.e.,* to reward citizens for their past contributions to the state, was not a "legitimate state purpose."[103] In rejecting the "past contributions" argument, the Court followed *Shapiro.*[104] Similar to the reasoning in *Shapiro,* the Court in *Zobel* was con-

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96. *Osterndorf,* 7 Fla. L.W. at 555.

97. *Osterndorf,* 411 So. 2d at 333.

98. *Osterndorf,* 7 Fla. L.W. at 555. The court reasoned that since the five-year requirement failed even the rational basis test, it need not decide if the strict scrutiny standard would be applicable. For the source of this reasoning, see *infra* notes 102, 107 and accompanying text.

99. 102 S. Ct. 2309 (1982).

100. 1959 was chosen because that was the year Alaska became a state. *Id.* at 2311.

101. *Id.* at 2313 (quoting Williams v. Zobel, 619 P.2d 448, 458 (Alaska 1980)).

102. *Id.* at 2313, 2315.

103. *Id.* at 2314.

104. *See supra* note 49 and accompanying text.

cerned about the apportioning of state benefits and services based upon past contributions to the community. The Court apparently did not want to open the door to the apportionment of other rights by allowing Alaska to apportion dividend benefits based on past contributions. Interestingly, amidst its discussion of apportionment of benefits, the *Zobel* Court asked: "Could States impose different taxes based on length of residence?"[105] Although this was a rhetorical question, the context in which the Court posed it suggests that the answer is clearly *no.*[106]

The *Osterndorf* decision relied heavily upon the reasoning employed in *Zobel.* Like the Court in *Zobel,* the *Osterndorf* court stated that it did not need to decide whether to apply the compelling state interest test because the statute failed even the rational basis test.[107] The *Osterndorf* court, like the *Zobel* Court, also rejected the "past contributions" objective of the statute as not being a legitimate state interest.[108] The *Osterndorf* court apparently shared the *Zobel* Court's concern that state benefits might be apportioned based upon length of residence. Such concern by the *Osterndorf* court was particularly focused upon the apportionment of taxes based on the length of residency.[109] In addition, like the *Zobel* Court,[110] the court in *Osterndorf* believed that no valid state interest was rationally served by the distinction made in the statute between citizens of the state based on the length of residency.[111] Because the *Osterndorf* court did not want any "second

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105. *Zobel,* 102 S. Ct. at 2314. The *Osterndorf* court quoted the paragraph in which this question was asked. *See Osterndorf,* 7 Fla. L.W. at 555.

106. The *Zobel* Court inquired whether anything would prevent the state's "contribution" reasoning from leading to a "sliding scale" for tuition or limiting access to public facilities or becoming eligible for student loans, civil service jobs, etc. The implied answer is that nothing would stop such apportionment of state benefits and services. Indeed, a state could divide its citizens into "expanding numbers of permanent classes." *Zobel,* 102 S. Ct. at 2315 (footnote omitted). The result could be that these classes would be differentiated for tax purposes based upon length of their residency. As the *Zobel* Court stated, "[s]uch a result would be clearly impermissible." *Id.* (footnote omitted).

107. *Osterndorf,* 7 Fla. L.W. at 555. *See supra* note 102 and accompanying text.

108. *Osterndorf,* 7 Fla. L.W. at 555. *See supra* note 103 and accompanying text.

109. *See supra* notes 105, 106 and accompanying text.

110. *Zobel,* 102 S. Ct. at 2315.

111. *Osterndorf,* 7 Fla. L.W. at 555. Such belief was expressed in *Osterndorf* by the court's statement that there was "no rational basis for distinguishing between bona fide residents" based solely on length of residency. *Id.*

The Florida Supreme Court's concern about distinguishing between otherwise bona fide members of a group can be seen in one of the state cases cited in the court's discussion of durational residency requirements. In Florida State Board of Dentistry v. Mick, 361 So. 2d 414 (Fla. 1978), the court struck down a statute which imposed a "discriminatory license fee . . . on some members of a [dentistry] profession to which all admitted members have al-

class citizens" in Florida, it declared section 196.031(3)(e) unconstitutional.[112]

The dissent in *Osterndorf* disagreed with the position expressed in the majority opinion because the dissent believed that the statute's durational residency requirement did have a rational basis.[113] Justice Alderman, writing the dissenting opinion, stated that the parameters of the rational basis test were recently restated in *In Re Greenberg*.[114] In that case, the Florida Supreme Court held that in order to satisfy the rational basis test, the statute need only bear some reasonable relationship to a legitimate state purpose.[115] That the statute incidentally resulted in some inequality or was not drawn with mathematical precision, did not make the statute invalid.[116] The dissent opined that the legislative purpose of requiring new residents to offset their immediate impact on local government's capital outlay was a rational basis upon which the state could base the durational residency requirement.[117] The dissent further stated that *Zobel* was different than *Osterndorf* because the Alaska statute clearly had no rational basis while the Florida statute did satisfy that standard.[118] However, the dissent did not explain why there was no rational basis for the Alaska statute while there was such basis for the Florida statute. Here lies the weakness of the dissent's treatment of the majority opinion. Because the majority relied so heavily upon the recent *Zobel* decision, the dissent should have explained more precisely why the Alaska statute differed in such a way as to make *Zobel* "inapposite" in deciding the constitutionality of section 196.031(3)(e).[119]

As a corollary of finding the enhanced homestead exemption granted by section 196.031(3)(e) unconstitutional, the *Osterndorf* majority ruled that article VII, section 6(d),[120] of the Florida Constitution did not authorize the Florida legislature to pass a statute which violated the equal protection clause.[121] In arriving at this de-

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ready been deemed qualified." *Id.* at 416. In that case, the court held that the statute was unconstitutional because it distinguished among otherwise bona fide members of the group based upon no apparent purpose or reason.

112. *Osterndorf*, 7 Fla. L.W. at 556.
113. *Id.* at 556 (Alderman, J., dissenting).
114. 390 So. 2d 40 (Fla. 1980), *appeal dismissed*, 450 U.S. 961 (1981).
115. *Id.* at 42.
116. *Id.*
117. *Osterndorf*, 7 Fla. L.W. at 556 (Alderman, J., dissenting).
118. *Id.*
119. *Id.*
120. *See supra* note 14.
121. *Osterndorf*, 7 Fla. L.W. at 555.

cision, the court probably considered several principles which were encompassed within a case which the court considered in its general discussion of durational residency requirements. In *Sparkman v. State ex rel. Scott*,[122] the Florida Supreme Court considered a statute which required a one-year residency in the state before a person could qualify for the homestead exemption provided for in article X, section 7, of the Florida Constitution.[123] The court ruled that the statute was invalid because it materially restricted and altered the provisions of article X, section 7.[124] Such a change in the provisions of the state constitution, by means of legislative enactment, would clearly be improper.[125] In a similar way, the *Osterndorf* majority believed that section 196.031(3)(e) was materially different than the constitutional authority which it was supposed to enact. "The statute in issue, not the constitutional provision, effectively establishes two categories of permanent residents for entitlement to homestead tax exemption."[126]

Because section 196.031(3)(e) was enacted to implement article VII, section 6(d), of the Florida Constitution, rather than striking down the whole statute, the *Osterndorf* court simply excised the language of that statutory section which went beyond the purpose of article VII, section 6(d). This meant leaving the statute itself intact, but striking the durational residency language which said "for the 5 consecutive years prior to claiming the exemption under this subsection."[127]

The *Osterndorf* court's decision to excise the durational residency requirement rather than strike down the whole statute, raises an interesting point. The Florida Supreme Court has stated in the past that an invalid statutory provision is not severable unless it can be concluded that the legislature would have enacted the law even without the invalid provision.[128] The court in *Osterndorf* does not provide any supporting evidence indicating that

122. 58 So. 2d 431 (Fla. 1952). The *Osterndorf* court actually stated that it did not "need to apply *Sparkman*," although a close reading of that case suggests that the *Osterndorf* court had *Sparkman* in mind in ruling that article VII, section 6(d), of the Florida Constitution did not give authority to the legislature to enact a statute which violated Florida's equal protection clause. *Osterndorf*, 7 Fla. L.W. at 555.

123. *Sparkman*, 58 So. 2d at 431-32.

124. *Id.* at 432.

125. *See* State *ex rel.* West v. Butler, 69 So. 771, 777 (Fla. 1915).

126. *Osterndorf*, 7 Fla. L.W. at 555.

127. *Id.* at 556. *See supra* note 2.

128. Barndollar v. Sunset Realty Corp., 379 So. 2d 1278, 1280 (Fla. 1980); *See also* State *ex rel.* Limpus v. Newell, 85 So. 2d 124, 128 (Fla. 1956).

the legislature would have enacted the statute regardless of the inclusion of the five-year requirement. Perhaps the court did not engage in such a discussion because to do so would be mere speculation. However, the Florida Supreme Court has also stated that a court cannot vary the intent of the legislature in order to make a statute constitutional.[129] It seems more probable that the Florida legislature, in passing section 196.031(3)(e), did not intend the enhanced homestead exemption to be given to those people who had been residents for less than five years. Therefore, the *Osterndorf* court's excision of the durational residency requirement, leaving the rest of the statute intact, grants the exemption to a group which the legislature did not intend to receive the exemption. For this reason, the *Osterndorf* court should have invalidated the statute altogether and thereby let the legislature reenact an exemption statute consistent with the *Osterndorf* decision.

Because the *Osterndorf* court merely excised the durational residency requirement from the statute, all Florida residents who own the home in which they live are given the $25,000 tax exemption. This will mean lower taxes for about 361,000 residents of Florida.[130] However, these residents will not receive refunds for taxes paid in past years because the *Osterndorf* court held that its decision was prospective only.[131] The court based this decision regarding a refund on *Gulesian v. Dade County School Board.*[132] In that case, the court held that the Dade County School Board did not have to refund money paid by citizens pursuant to an excessive millage rate because of the heavy financial and administrative burden which would result to the school board.[133] The court in *Gulesian* also noted that the excess taxes were levied in good faith reliance on a "presumptively valid" statute.[134] The court in *Osterndorf* did state, however, that residents who have filed timely lawsuits challenging the five-year requirement may receive refunds.[135] Therefore, the Osterndorfs will receive a refund.[136]

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129. State v. Keaton, 371 So. 2d 86, 89 (Fla. 1979). *See* Beebe v. Richardson, 23 So. 2d 718, 719 (Fla. 1945). *See also* Deltona Corp. v. Florida Public Service Comm'n, 220 So. 2d 905, 907 (Fla. 1969).

130. *See supra* note 3 and accompanying text.

131. *Osterndorf,* 7 Fla. L.W. at 556.

132. 281 So. 2d 325 (Fla. 1973).

133. *Id.* at 326-27.

134. *Id.* at 326.

135. *Osterndorf,* 7 Fla. L.W. at 556.

136. *Id.* The court remanded the case for further proceedings to determine the refund which the Osterndorfs should receive. *Id.*

In addition to the impact which the *Osterndorf* decision will have upon taxpayers who were formerly denied the $25,000 exemption, the decision may affect some of Florida's other homestead exemption statutes which contain a durational residency requirement. As mentioned previously,[137] Florida grants enhanced homestead exemptions to persons over sixty-five, to those who are permanently disabled, and for all residents subject to levies by school districts. Each of these statutes hinges upon a five-year residency in the state in order to qualify for the exemption. While the *Osterndorf* decision probably would not effect the state's right to grant an enhanced exemption to those over sixty-five or to those who are permanently disabled,[138] the decision does suggest that the state cannot distinguish between those who fit these classifications and have been residents for five years and those who likewise fit the classifications but have not been residents for five years. In its February 3, 1983, clarification opinion, the court declined both parties' request to consider the constitutionality of subsections (3)(a) and (3)(b) because petitioner Osterndorf had not claimed in the trial court entitlement to the exemptions provided in those subsections. Therefore, the court had no jurisdiction to decide the constitutionality of subsections (3)(a) and (3)(b).[139] The court also stressed the fact that the constitutional language on which subsections (3)(a) and (3)(b) are based is different than the language on which subsections (3)(d) and (3)(e) rest.[140]

III. Conclusion

Despite the *Osterndorf* opinion's structural ambiguity, the court properly ruled that section 196.031(3)(e) established two categories of permanent residents for tax exemption purposes and that this classification was without any rational basis. The court was correct in stating that such "disparate treatment of resident homeowners cannot be allowed if our equal protection clause is to have any real meaning."[141] By ruling that the five-year requirement was unconstitutional, the court effectively assured that there will be no "second class citizens" in Florida. Such a stance by the court is to be

137. *See supra* notes 8, 10, 11 and accompanying text.

138. With respect to these classifications, the state has a better argument that there is a rational basis for these exemptions, *i.e.*, to aid the elderly and disabled who often live on a low, fixed income.

139. *Osterndorf*, 8 Fla. L.W. at 58.

140. *Id. See supra* note 8.

141. *Osterndorf*, 7 Fla. L.W. at 555.

applauded. However, the court should not have merely excised the five-year requirement out of the statute, but should have struck the statute in its entirety. As the decision stands, local governments may be significantly affected financially because the decision allows all resident homeowners to receive a $25,000 enhanced exemption. If the court had struck down the statute in its entirety, local governments would not be faced with the substantial revenue losses caused by the decision. The Florida legislature could then reenact the $25,000 exemption for *all* residents, if indeed it desired to grant such an all-inclusive exemption. By approaching section 196.031(3)(e) in this way, the *Osterndorf* court could have avoided the problem of second-guessing whether the legislature would have passed this statute without the five-year requirement. Such an approach would also have avoided the possible serious tax consequences on local governments while at the same time giving Florida's equal protection clause the high regard which it deserves.

D. MICHAEL LINS