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Do Siblings Possess Constitutional Rights

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DO SIBLINGS POSSESS CONSTITUTIONAL RIGHTS?

INTRODUCTION

The storybook version of the family portrays sisters and brothers living in one household and being reared together. The reality, however, is that siblings may be separated and prevented from maintaining contact. Parents may divorce and split the custody of the children. Siblings might also be separated by being adopted by different families or by being placed in separate foster homes. Sibling relationships are extremely important to a child's socialization and development. Siblings who are separated may suffer psychological harms.[1]

One true account of siblings who were separated is the story of two brothers named Tony and Sam.[2] A couple adopted both boys, but after six years they returned Tony to an orphanage. They relinquished their parental rights to him because they believed that he had failed to bond with them.[3] The couple kept Sam as their son and objected to him seeing Tony, believing Tony to be a bad influence on him.[4]

Tony approached a social worker in the orphanage and requested that a lawyer assist him in securing visitation rights with his younger brother.[5] In juvenile court, Sam's adoptive parents argued that the state court did not have the power to "supersede parental authority"[6] by ordering visitation between the brothers.[7] They claimed that "[p]arents have a right to decide what's in the best interests of their child, even including visits with his brother."[8] The

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1 William W. Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 491 (1990). Sibling relationships become even more important when children are separated from their parents. Child attachment literature shows that children separated from parents often form suh-families "with one child assuming the parental responsibility for another." *Id.* In such cases, these sibling bonds are even stronger than bonds of other children to their parents. *Id.* Siblings who are separated "may never resolve their feelings of loss, even if there are new brothers and sisters whom they grow to love." *Id.* at 491-92.

2 Sharman Stein, *Adoptive Parents Want to Halt Visits*, CHI. TRIB., May 2, 1990, at C1; Sharman Stein, *Judge Tells Adoptive Parents to Allow Two Brothers to Visit*, CHI. TRIB., Apr. 12, 1990, at D1.

3 Stein, *Adoptive Parents Want to Halt Visits*, *supra* note 2, at C1.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

judge, however, granted Tony's request for visitation and telephone calls with Sam.[9]

What options do children like Tony and Sam have when they are separated from a sibling as a result of an adoption, a placement in foster care, or a custody decision? Does the state offer any procedural vehicles to obtain visitation rights? Does the Constitution provide any protection for sibling relationships? If it does, can a child claim a fundamental right to maintain a relationship with a sibling? Are parental rights stronger than sibling rights? These questions must be answered in order to determine if the legal system offers any remedies for separated siblings.

Although the Supreme Court has recognized that parents possess a constitutional right to maintain relationships with their children,[10] it has not specifically addressed whether siblings have that right as to each other.[11] This Note argnes that siblings possess a fundamental constitutional right to maintain relationships with each other. Additionally, this Note asserts that courts should recognize that the right of siblings to associate with each other is equal to the right of parents to rear their children. When the sibling's rights and the parent's rights collide, the constitutional arguments should cancel each other out. Courts should instead consider the best interests of the children to determine whether to permit visitation.

This Note begins by setting forth the current status of sibling rights and then addresses whether these rights deserve constitutional protection. Part I of this Note evaluates how the states have treated sibling rights. The opinions of the state courts reveal judges' attitudes regarding sibling relationships. This part also examines how the state legislatures have responded to sibling separation and specifically analyzes the sibling visitation statutes of three states.

Part II of this Note turns its attention to the federal courts. This part first focuses on Supreme Court cases which support the right of siblings to maintain relationships. The Supreme Court has indirectly spoken about siblings in cases regarding the rights of the family, but it has not specifically addressed the rights of the sibling as an individual member of the family with independent rights. These cases lay the foundation for the Supreme Court to decide that

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9 *Id.*

10 *See* Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Pierce v. Society of the Sisters of the Holy Names, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

11 *See* Patton, *supra* note 1, at 490 (discussing the fact that courts have not yet held that siblings have a fundamental right to be placed together).

siblings do possess a constitutional right to maintain relationships with each other.

Part II also surveys two lines of federal civil rights cases that consider whether there is a constitutionally protected interest in the sibling relationship. The first line of cases deals with sibling separation in the foster care context. The issue here is whether a sibling can maintain a civil rights action by alleging the deprivation of a constitutional right to associate with a sibling. The second line of civil rights cases involves the wrongful death of siblings. As in the first group, courts must determine whether a plaintiff successfully states a cause of action by alleging that she has been deprived of the right to maintain a sibling relationship.

Finally, Part III undertakes a three part analysis for protecting sibling rights. First, this Note argues that based on federal case law regarding sibling rights, the Supreme Court should recoguize that the Constitution protects sibling relationships under the Fourteenth Amendment's Due Process Clause and the First Amendment's guarantee of freedom of association. Second, this Note contends that the right of siblings to associate with each other deserves the status of a fundamental right that is equal to the parental right to rear their children. This Note concludes by suggesting that when the sibling right conflicts with the parental right, the court should not undertake a constitutional analysis, but instead should determine how the best interests of the children are served.

I
STATES' ATTEMPTS TO DEAL WITH SIBLING SEPARATION

State courts rarely address the constitutional issues involved in sibling visitation. The state court judges, however, make decisions which influence the status of individual siblings. These decisions reveal the attitudes of many family court judges toward the importance of sibling relationships. This judicial attitude may establish the framework for the Supreme Court to decide whether siblings possess constitutional rights to maintain relationships.

State governments regularly make decisions that affect the day-to-day situation of the family. State courts determine the placement of children in custody disputes and decide whether siblings should be separated. State agencies determine the outcome of sibling separation in adoption and foster care cases. Additionally, state legislatures have the power to provide a procedural mechanism to facilitate sibling visitation.

Siblings may be separated from each other through divorce, adoption, or placement in foster care. Although it is virtually im-

possible to place siblings with the same foster or adoptive parents,[12] judges are highly reluctant to separate siblings in divorces.[13] As a rationale for this judicial reticence, one court noted:

> Young brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful. The importance of rearing brothers and sisters together, and thereby nourishing their familial bonds, is also strengthened by the likelihood that the parents will pass away before their children.[14]

Stated another way: "In the final analysis, when these children become adults, they will have only each other to depend on."[15] Another court stressed the importance of sibling relationships in this way:

> Surely, nothing can equal or replace either the emotional and biological bonds which exist between siblings, or the memories of trials and tribulations endured together, brotherly or sisterly quarrels and reconciliations, and the sharing of secrets, fears and dreams. To be able to establish and nurture such a relationship is, without question, a *natural, inalienable right* which is bestowed upon one merely by virtue of birth into the same family.[16]

Thus, courts have recognized the importance of the sibling relationship and are reluctant to disrupt it. When deciding whether to separate siblings or allow siblings to visit each other during custody disputes, courts consider the best interests of the children.[17] The New York Court of Appeals has stated that, "[i]n a custody proceed-

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12 Patton, *supra* note 1, at 492.

13 *See, e.g.*, Vilas v. Vilas, 42 S.W.2d 379 (Ark. 1931); *In re* Marriage of Lovejoy, 404 N.E.2d 1092 (Ill. App. Ct. 1980); Gulino v. Gulino, 303 So.2d 299 (La. Ct. App. 1974); Whiteside v. Whiteside, 696 S.W.2d 871, 873 (Mo. Ct. App. 1985); Boroff v. Boroff, 250 N.W.2d 613 (Neb. 1977); Aberbach v. Aberbach, 301 N.E.2d 438 (N.Y. 1973); New York *ex rel.* Borella v. Borella, 21 A.D.2d 871 (N.Y. App. Div. 1964) *aff'd*, Gutfreund v. Russ, 209 N.E.2d 118 (1965); Lang v. Lang, 9 A.D.2d 401 (N.Y. App. Div. 1959), *aff'd*, 166 N.E.2d 861 (1960); Wiese v. Wiese, 469 P.2d 504 (Utah 1970).

14 Obey v. Degling, 337 N.E.2d 601, 602 (N.Y. 1975); *see also* DAVID FANSHELL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE (1978) (suggesting that the intellectual, psychological and physical development of children in long-term foster care was enhanced by visitation and contact, however minimal, with the biological family); Judy E. Nathan, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633 (1984).

15 *In re* Patricia A. W., 89 Misc.2d 368, 379 (N.Y. Fam. Ct. 1977).

16 L. v. G., 497 A.2d 215, 218 (N.J. Super. Ct. Ch. Div. 1985) (emphasis added).

17 *See, e.g., In re* Wesley L., 72 A.D.2d 137, 140 (N.Y. App. Div. 1977). *See also* Alison M. Brumley, Comment, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 354 (1991) (" 'Best interests' is the governing standard with regard to children in family law cases involving adoption, foster care, and custody after divorce. The inquiry into best interests in general family law cases is a subjective and necessarily indefinite process that can take the child's, the parents', [and] the state's . . . interests into account.") (footnote omitted).

ing arising out of a dispute between divorced parents, the first and paramount concern of the court is and must be the welfare and the interests of the child."[18] A lower New York court observed that:

> The overwhelming motivation of the court in providing for the best interests of [the children] is that they have a meaningful relationship with their [siblings]. Perhaps this would not be as strong if these siblings were not aware of each other and might not have to deal with the reality of being cut off by any action of [a] court giving its imprimatur to this unnatural severance.[19]

Hence, "the best interest of siblings require[s] that they be raised together whenever possible."[20]

The children's best interests "require a showing of compelling reasons before a separation of siblings will be upheld."[21] Courts consider and balance a variety of factors when determining whether separating siblings or allowing visitation will be in the childrens' best interest, although no single factor is controlling.[22] These factors include the inability of one child to get along with a step-parent; the establishment of a particularly close relationship between one child and one parent; geographic proximity and the parents' ability to carry out frequent visitation or temporary custody; whether the children are close in age; whether the siblings are incompatible and, if so, the extent of the incompatibility; whether separation of brothers and sisters has already occurred; and the express wishes of the child regarding his or her primary custody, giving due regard to the maturity and intelligence of the child and the basis of the preference.[23]

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18 Obey v. Degling, 337 N.E.2d at 601; *see* N.Y. FAM. CT. ACT § 651 (Consol. 1987); *In re* Lincoln v. Lincoln, 247 N.E.2d 659, 660 (N.Y. 1969); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925).

19 *In re* Patricia A. W., 89 Misc.2d at 379.

20 Mayer v. Mayer, 397 N.W.2d 638, 642 (S.D. 1986).

21 Henle v. Larson, 466 N.W.2d 846, 849 (S.D. Sup. Ct. 1991). *See also* Jones v. Jones, 724 S.W.2d 615, 619 (Mo. Ct. App. 1986) ("[A]bsent special circumstances, a child should not be separated from its sibling.").

22 D.S.P. v. R.E.P. and D.P., 800 S.W.2d 766, 769 (Mo. Ct. App. 1990). Although state courts make use of the best interest analysis, in a recent article, Francis McCarthy criticized the use of the "best interests" standard.

> [T]he near impossibility of any meaningful content being given to the "best interests" test leads to the recommendation that it be abandoned .... [M]any interventions in the past have resulted in more harm being done to children by the court's action than was done by the harm that the court was seeking to prevent.

Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1022 (1988) (footnotes omitted). While the best interest inquiry is not amenable to discrete analysis or easy computation, there is no simple way to determine what effect sibling separation or sibling visitation will have on the children involved. Judges should be left with the discretion to consider the welfare of children, and the best interest analysis permits this discretion.

23 *See* D.S.P. v. R.E.P. and D.P., 800 S.W.2d 766, 769 (Mo. Ct. App. 1990).

Similarly, in the adoption context, courts have begun to appreciate the importance of maintaining sibling relationships, and have even placed the importance of this relationship above the wishes of adoptive parents. While an adoption usually severs all contacts between the adoptive child and members of his biological family, the New York Court of Appeals has held that a family court can order maintenance contacts between siblings when necessary to protect the child's best interests, even if such contacts are opposed by the adoptive parents.[24]

In addition to state court determinations of whether siblings will be separated, state legislatures may also play a role in defining sibling rights. State legislators may provide procedural vehicles which facilitate sibling visitation after siblings are separated. Indeed, several state legislatures have responded to the separation of siblings by enacting provisions to facilitate visitation.[25]

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24 *See* New York *ex rel.* Sibley v. Sheppard, 429 N.E.2d 1049 (N.Y. 1981); *see also In re* Adoption of Anthony, 113 Misc.2d 26 (N.Y. Fam. Ct. 1982) (allowing a 12 year old adoptee to continue his relationship with his siblings after being adopted by his foster parents). Similarly, an Illinois family court judge ordered a boy's adoptive parents to allow the boy to receive weekly visits and daily phone calls from the boy's brother who lived with foster parents. The attorney for the adoptive parents argued that the court could not intervene in parental rights in this situation, but the judge held that the sibling was entitled to visitation rights. Sharman Stein, *Adoptive Parents Want to Halt Visits*, CHI. TRIB., May 2, 1990, at C1; and Sharman Stein, *Judge Tells Adoptive Parents to Allow Two Brothers to Visit*, CHI. TRIB., Apr. 12, 1990, at D1.

25 Arkansas, California, Louisiana, Nevada, New Jersey, New York and Virginia have provisions which specifically mention "sibling visitation." *See* ARK. CODE ANN. § 9-13-102 (Michie 1991); CAL. FAM. CODE § 3102 (Michie 1993); LA. REV. STAT. ANN. § 9:572 (West 1991); NEV. REV. STAT. § 125A.330 (West 1993); N.J. STAT. ANN. § 9:2-7.1 (West 1993); N.Y. DOM. REL. LAW § 71 (McKinney 1988 & Supp. 1993). For example, Louisiana's visitation statute provides as follows:

> If one of the parties to a marriage dies, the obligation to live together is terminated by an action of separation from bed and board, or the marriage is terminated by divorce, the *siblings* of a minor child or children of the marriage may have *reasonable visitation rights* to such child or children during their minority if the court in its discretion finds that such visitation rights would be in the *best interests* of the child or children and that the siblings have been unreasonably denied visitation rights.

LA. REV. STAT. ANN. § 9:572D (West 1993) (emphasis added). Other states have more general provisions for visitation by "others," "other relatives" or "any person." ALASKA STAT. § 25.24.150 (Michie 1992); CONN. GEN. STAT. ANN. § 46b-59 (West 1986); HAW. REV. STAT. ANN. § 571-46(7) (Michie 1993); MICH. COMP. LAWS ANN. § 722.27 (West 1993); OHIO REV. CODE ANN. § 3109.051 (Anderson 1992); VA. CODE § 20-107.2 (Michie 1993).

For example, Virginia state law provides that:

> Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the custody, visitation, and support of the minor children of the parties. . . . In any case involving the custody or visitation of a child, the court may award custody or visitation to any party with a legitimate inter-

In 1989 New York enacted legislation that provides a procedural vehicle for a person to obtain court permission to visit a sibling.[26] The applying sibling, or one acting on her behalf, must demonstrate to the court that conditions warrant the court's intervention as a matter of equity.[27] Courts must use the "best interests" test to determine whether they should grant visitation rights to a sibling.[28] The statute suggests that courts should focus on the best interests of the child to be visited,[29] but case law suggests that the best interests of all the children involved will be considered.[30]

New Jersey also has a procedural mechanism that allows siblings to obtain visitation rights.[31] In 1988 the New Jersey legislature amended its grandparent visitation statute to include siblings.[32] However, sibling visitation rights are conditioned on the parents be-

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est therein, including but not limited to, grandparents, steparents, former stepparents, blood relatives & family members.

VA. CODE ANN. § 20-107.2 (emphasis added).

26 The New York statute commands that:

> Where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for *visitation rights fokr [sic] such brother or sister* in respect to such child.

N.Y. DOM. REL. LAW § 71 (McKinney 1991) (emphasis added).

27 N.Y. DOM. REL. LAW § 71 cmt. (McKinney 1989) (Section 71 was "enacted for humanitarian purposes and impliedly recognizes that continuing contacts between siblings is a precious part of a child's experience which should not be lost because of animosity between other family members.").

28 *See, e.g.*, LA. REV. STAT. ANN. § 9:572 (West 1991); N.J. STAT. ANN. § 9:2-7.1 (West 1993).

29 N.Y. DOM. REL. LAW § 71 (McKinney 1991).

30 *See, e.g.*, New York *ex. rel.* Noonan v. Noonan, 145 Misc.2d 638, 639 (N.Y. Sup. Ct. 1989).

31 N.J. STAT. ANN. § 9:2-7.1 (West 1993). The statute provides that:

> Where either or both of the parents of a minor child, residing within the State, is or are deceased, or divorced or living separate and apart in different habitats, regardless of the existence of a court order or agreement, a grandparent or the grandparents of such child, who is or are the parents of such deceased, separated or divorced parent or parents, *or any sibling* of the child may apply to the Superior Court, in accordance with the Rules of Court, to have such child brought before such court; and the court may make such order or judgment, as the best interest of the child may require, for *visitation rights* for such grandparent, grandparents or sibling in respect to such child.

Id. (emphasis added).

32 *Id.*

ing deceased, divorced, or living separate and apart.[33] Like New York courts, the New Jersey courts have also used a best interests standard to determine whether to grant visitation.[34]

Arkansas has an even more expansive provision for visitation by brothers and sisters. The Arkansas statute provides that:

> The chancery courts of this state upon petition from any person who is a *brother or sister regardless of the degree of blood relationship* or, if the person is a minor, upon petition by a parent, guardian, or next friend in behalf of the minor may grant reasonable visitation rights to the petitioner so as to allow the petitioner the right to visit any brother or sister, regardless of the degree of blood relationship, whose *parents have denied such access*. The chancery courts may issue any further order which may be necessary to enforce the visitation rights.[35]

The Arkansas statute improves on the New York statute because the New York statute fails to provide a procedural visitation vehicle for step-siblings and adoptive siblings.[36] Although not related by blood, these children may be raised together from birth and may share common bonds and experiences. Courts should be able to determine whether step-siblings and adoptive siblings should be granted visitation rights in order to further the best interests of all the children.

The Arkansas statute is flawed, however, because it conditions siblings visitation on "parents hav[ing] denied such access."[37] The New Jersey statute is deficient in the same manner. It provides a procedural mechanism for sibling visitation only when parents are deceased, divorced, or living separate and apart.[38] In contrast, the

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33 *Id.*

34 Pullman v. Pullman, 560 A.2d 1276 (N.J. Super. Ct. Ch. Div. 1988).

35 ARK. CODE ANN. § 9-13-102 (Michie 1991) (emphasis added).

36 Arkansas grants visitation "regardless of the degree of blood relationship." *Id.* Although a New York court has recognized the right of adoptive siblings to seek visitation, the New York statute itself does not recognize this right. *See* New York *ex rel.* Noonan v. Noonan, 145 Misc. 2d 638 (N.Y. Sup. Ct. 1989). Although section 71 provides a vehicle for siblings and half-siblings to seek visitation, a step-sibling, not related by blood, does not have standing to seek visitation. *Id.* However, New York courts have held that adoptive siblings have the same rights as natural siblings. *See In re* Jeanette H. v. Angelo V., 148 Misc. 2d 721, 722 (N.Y. Fam. Ct. 1990) (concluding that a woman who let her parents adopt her child had no parental rights to visitation but had standing to seek visitation as a sibling); New York v. Simon, 148 Misc.2d 845 (N.Y. Crim. Ct. 1990) (holding that although the petitioner had lost all parental rights to her child by surrendering the child to her parents for adoption, she did not lack standing to seek visitation with her child due to the fact that she was neither of the whole nor the half blood to her adopted brother). In fact, New York law specifically states that "[a]doptive children. . . shall have all the rights of fraternal relationship." N.Y. DOM. REL. LAW § 117.1(g) (McKinney 1991).

37 *See supra* note 35 and accompanying text.

38 *See supra* note 31.

New York statute does not impose conditions on visitation. Instead, it permits visitation when "equity would see fit to intervene."[39] The New York approach is preferable because siblings should possess visitation rights regardless of whether the parents have denied access or whether the parents are divorced, separated, or deceased. If the siblings are placed in separate foster homes, they, too, should be entitled to visitation rights. The ideal legislation would modify the Arkansas statute by deleting the requirement that the parents have denied siblings access to one another.

These sibling visitation laws signify that state legislatures have recognized the right of siblings to seek visitation.[40] The import is that some state legislatures are explicitly acknowledging the sibling as an individual member of the family—recognizing siblings as siblings, not just as "other family members."[41] Although presently only seven states specifically mention siblings in their visitation statutes, this is the first step. General acceptance of siblings' rights to maintain relationships with each other will encourage the Supreme Court to recognize the importance of these sibling relationships.

II.
FEDERAL CASES

A. The Supreme Court and Constitutional Rights

The preceding section focused on sibling visitation from the state court perspective. Those cases frequently involved separation of siblings resulting from custody decisions. In that context, the "best interests" standard was the appropriate rule. This section focuses on decisions of the Supreme Court which have recognized constitutional rights for family members. This Note contends that the rationale motivating these decisions is broad enough to support constitutional protection of sibling relationships.

Although the Supreme Court has not specifically addressed the question of siblings' rights to maintain contact with each other, it has addressed issues relating to the fundamental rights of the family. The Supreme Court has found that the Constitution protects the family in general,[42] and, more specifically, that the Constitution

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39 *See supra* note 26.

40 *See* Harley v. Druzba, 148 Misc.2d 564, 566-567 (N.Y. Sup. Ct. 1990).

41 *See supra* note 25 (discussing some state statutes that have general provisions for "other relatives").

42 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

protects marriage,[43] childbirth,[44] and child rearing and education.[45] Additionally, the Supreme Court has recognized that children are afforded constitutional protection[46] under the First Amendment[47] and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[48] While the Supreme Court has not addressed directly whether siblings possess constitutional rights to maintain contact with each other,[49] the principles established by the Supreme Court support such a right.

Siblings' rights to maintain relationships with each other may be protected under the Fourteenth Amendment Due Process Clause[50] and the First Amendment.[51] The Supreme Court has held that certain rights associated with the family can be protected under the Due Process Clause.[52] For example, in *Cleveland Board of Educa-*

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43 Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967).

44 Carey v. Population Serv. Int'l, 431 U.S. 678, 684-86 (1977).

45 Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Pierce v. Society of the Sisters of the Holy Names, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

46 In Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976), the Supreme Court stated: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

47 The Supreme Court protected children's First Amendment rights in Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) (finding that students had the fundamental right to freedom of expression to wear arm bands in school. The Court held that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ."); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that students were not required to participate in flag salutes at school).

48 *See* Parham v. J. R., 442 U.S. 584, 596-97 (1979) (child has a protected liberty interest in being free from arbitrary confinement in a state mental hospital); Goss v. Lopez, 419 U.S. 565 (1975); *In re* Winship, 397 U.S. 358 (1970), *In re* Gault, 387 U.S. 1 (1967) (finding children are entitled to the right of counsel, privilege against self-incrimination, and the right to cross-examination); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (right to equal protection in public education). The Supreme Court also has recognized a child's right to privacy in Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding that a minor woman has a constitutional right to make abortion decisions), and Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (invalidating a New York statute imposing criminal penalties for selling or distributing contraceptives to minors). *See also* Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 441-45 (1988) (noting that the Supreme Court's substantive due process decisions have dealt with child rearing, education, family relationships, procreation, marriage, contraception, and abortion).

49 *See supra* note 11 and accompanying text.

50 The freedom of intimate association is protected by the Fourteenth Amendment rather than the First Amendment. *See* IDK, Inc. v. Clark County, 836 F.2d 1185, 1192 (9th Cir. 1988); Kukla v. Village of Antioch, 647 F. Supp. 799, 806-08 (N.D. Ill. 1986).

51 Roberts v. United States Jaycees, 468 U.S. 609 (1984).

52 *See* Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984); Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965).

tion v. LaFleur,[53] the Supreme Court held that certain school district rules mandating unpaid maternity leave violated a woman's due process rights. The Court stated that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[54]

In *Smith v. Organization of Foster Families*,[55] the Supreme Court attempted to define the scope of the family relationships protected by the Due Process Clause. The Court concluded that the procedures for the removal of foster children from their foster homes did not violate the foster parents' due process rights. The Court enumerated three guidelines to define the breadth of the family protected by the Due Process Clause. First, according to the Court, "the usual understanding of 'family' implies biological relationships. . . ."[56] Second, familial relationships usually involve "emotional attachments that derive from the intimacy of daily association. . . ."[57] Third, the "natural family" has "its origins entirely apart from the power of the State. . . ."[58]

Siblings' rights to associate with each other also may be protected by the associational rights guaranteed by the First Amendment.[59] In its decisions, the Supreme Court has divided the constitutionally protected "freedom of association" into two distinct parts.[60] First, freedom of association means the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[61] Second, freedom of association protects "choices to enter into and *maintain* certain intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional

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53 414 U.S. 632 (1974).

54 *Id.* at 639-40. Similarly, the Supreme Court in Prince v. Massachusetts, 321 U.S. 158, 166 (1944), acknowledged that it has recognized a "private realm of family life which the state cannot enter, nonetheless the family is not beyond regulation. . . ." In that case, a Jehovah's Witness permitted her custodial niece, also a Jehovah's Witness, to sell literature on the street. The Court held that the aunt had violated a state statute which made it unlawful for a person to furnish a minor any article knowing the minor will sell it in violation of the law that no minor should sell newspapers, magazines, periodicals, or any other article in any public place. *Id.*

55 431 U.S. 816, 842-47 (1977).

56 *Id.* at 843.

57 *Id.* at 844.

58 *Id.* at 844-45. The Court was comparing the "natural family" to the "foster family," which derives from a "contractual relation with the State." *Id.*.

59 " '[I]ntimate association' . . . mean[s] a close and familiar personal relationship with another that is in some siguificant way comparable to a marriage or family relationship." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980).

60 Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984).

61 *Id.* at 618.

scheme."[62] In this second sense freedom of intimate association "receives protection as a *fundamental* element of personal liberty."[63]

In *Roberts v. United States Jaycees*,[64] the Supreme Court held that the First Amendment[65] offers certain "highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[66] In *Roberts*, the United States Jaycees, a nonprofit membership corporation formed to promote the development of young men's civic organizations,[67] excluded women from regular membership.[68] Two Minnesota chapters violated the organization's bylaws by permitting women to be regular members.[69] When the Jaycees notified these chapters that it was considering revoking their charters, members of both chapters filed discrimination charges, alleging violation of the Minnesota Human Rights Act.[70] The Supreme Court held that application of the Act did not violate the male members' right to freedom of intimate association or their right to freedom of expressive association. The Court found that the Jaycees did not fall into the category of "highly personal relationships" entitled to protection.[71] However, the Supreme Court held that family relationships do receive protection under the Bill of Rights because "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, exper-

62 *Id.* at 617-18 (emphasis added).

63 *Id.* at 618 (emphasis added). The emergence of the freedom of intimate associate "can be seen in the Court's decisions on such subjects as marriage, the decision whether to procreate, legitimacy of parentage, and parent-child relations." Karst, *supra* note 59, at 627.

64 468 U.S. 609 (1984).

65 The Supreme Court has cited *Roberts* for the proposition that the First Amendment provides a right of freedom of association. *See* City of Dallas v. Stanglin, 490 U.S. 19, 23-24 (1989) ("While the First Amendment does not in terms protect a 'right of association,' our cases have recognized that it embraces such a right in certain circumstances."); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987) ("[T]he First Amendment protects those relationships, including family relationships. . . ."); Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984) (stating that "recent cases have properly recognized that the First Amendment also applies to social and personal associations, including those which do not purport to express and advocate ideas.").

66 *Roberts*, 468 U.S. at 618.

67 *Id.* at 612.

68 *Id.* at 613.

69 *Id.* at 614.

70 *Id.*

71 *Id.* at 620. The Court noted that factors relevant in assessing whether relationships should be protected by the freedom of association include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

iences, and beliefs but also distinctively personal aspects of one's life."[72]

Another case that discusses the scope of family rights is *Moore v. City of East Cleveland*.[73] In that case, the Supreme Court extended the constitutional protection of the sanctity of the family to an extended family in which grandsons lived with their grandmother. The Court acknowledged that it "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[74] Furthermore, the Court stated that "[a]ppropriate limits on substantive due process come . . . from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' "[75] The Court concluded that the protections of the Due Process Clause extend to the sanctity of the family because "the institution of the family is deeply rooted in this Nation's history and tradition [and] [i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[76] The Court explained that the tradition of grandparents sharing a home with their children and grandchildren was "equally venerable and equally deserving of constitutional recognition" as respect for the nuclear family.[77]

B. Civil Rights Actions under Section 1983

Congress has provided a remedy for the deprivation of constitutional rights by state actors who act under the color of state law.[78] In state courts, a sibling may use a state statute as a vehicle for obtaining visitation rights. In federal courts, siblings may use Section

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72 *Id.* at 619-20.

73 431 U.S. 494 (1977) (plurality opinion); *see also* Smith v. Organization of Foster Families, 431 U.S. 816, 847 (1977) (alluding to a liberty interest that foster parents have in relationships with foster children, but found that it was "unnecessary for [them] to resolve the[se] questions definitively" because the decision could be made on "narrower grounds").

74 *Moore*, 431 U.S. at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

75 *Id.* at 503 (quoting Griswold v. Connecticut, 381 U.S. 479, 501) (1965) (Harlan, J., concurring).

76 *Id.* at 503-04 (footnote omitted).

77 *Id.* at 504.

78 Section 1983, entitled "Civil Action for Deprivation of Rights," provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. 1983 (1988) (emphasis added).

1983, not to obtain visitation, but to seek relief after there has been an alleged violation of a constitutional right.

The importance of these cases is that to state a claim under Section 1983 the plaintiff must allege the deprivation of constitutional right or a violation of federal law.[79] Thus, if a plaintiff alleging the deprivation of a constitutional right to sibling association prevails in a Section 1983 cause of action, then the court has implicitly recognized the existence of that constitutional right.

This Note examines two lines of Section 1983 cases: separation cases and wrongful death actions. In both lines of cases, the plaintiffs allege the deprivation of their right to association with siblings. In the separation cases, plaintiffs demand visitation rights with their siblings, arguing that they possess constitutional rights to association that have been violated by a state social service agent who had separated the siblings. In the wrongful death cases, the plaintiff demands a remedy for the death of a sibling, arguing that a police officer or other state actor deprived him of his constitutional right to sibling association by killing his sibling. In both of these situations, judgment for the plaintiff constitutes an implicit recognition of an associational right of siblings.

1. *Sibling Separation Cases*

Lower federal courts have split on whether siblings have a constitutionally protected right to associate with one another after they have been separated. In the following cases, the plaintiffs brought suit under Section 1983 and claimed that the state had violated their constitutional right to sibling association.[80]

In *Aristotle P. v. Johnson*,[81] a federal district court held that siblings had a right to associate with each other and to develop and maintain their relationships.[82] Although the court acknowledged

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79 *See, e.g.*, B.H. v. Johnson, 715 F. Supp. 1387, 1398 (N.D. Ill. 1989). The plaintiffs must also show that " 'the conduct complained of was committed by a person acting under color of state law.' " *Id.* (footnotes omitted). Plaintiffs must allege facts to show that the unconstitutional acts were done pursuant to a governmental custom or policy. *Id.* (citing Monell v. New York City Dep't. of Social Servs., 436 U.S. 658, 690 n.55 (1978)). "To establish a governmental custom or policy, the plaintiffs must allege facts which indicate problems which are 'systemic in nature' such that knowledge of or deliberate indifference to their occurrence can be imputed to the governmental entity." *Id.* (citing Powe v. City of Chicago, 664 F.2d. 639, 651 (7th Cir. 1981)).

80 Aristotle P. v. Johnson, 721 F. Supp. 1002, 1003 (N.D. Ill. 1989); Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982); B.H. v. Johnson, 715 F. Supp. 1387, 1392 (N.D. Ill. 1989); and Black v. Beame, 419 F. Supp. 599, 602 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 815 (2d Cir. 1977).

81 721 F. Supp. 1002 (N.D. Ill. 1989).

82 The Superior Court of New Jersey has also held that siblings posses natural, inherent and inalienable rights to establish and nurture relationships. L. v. G., 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985).

that the issue of whether siblings possess associational rights had not been decided by the Supreme Court or the Seventh Circuit,[83] the court found that the defendant's policies violated the siblings' rights to freedom of association.[84] Basing its decision on the Supreme Court's holding in *Roberts*, a federal judge in the Northern District of Illinois concluded that sibling relationships are "the sort of 'intimate human relationship' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State.' "[85] The plaintiffs challenged the policies of the Illinois Department of Children and Family Services (DCFS), under which siblings were placed in separate foster homes and denied the opportunity to visit each other.[86] The court held that these policies must be evaluated under a heightened level of scrutiny. State actors could infringe on the children's right to associate only if there was a compelling state interest that " '[could not] be achieved through means significantly *less restrictive* of associational freedoms.' "[87] The children argued that a DCFS policy which permitted and facilitated visitation would be less restrictive.[88]

Similarly, in *Rivera v. Marcus*,[89] the Second Circuit held that the state violated the plaintiff's due process rights by removing her half-brother and half-sister from her home without explanation and placing them in another foster home.[90] The plaintiff, the adult half-sister and foster mother of the two children, had not been permitted to communicate with her siblings and had not been told of their new location or the identity of the new foster parents.[91] The Second Circuit stated that Rivera "possesse[d] an important liberty interest in preserving the integrity and stability of her family."[92] Furthermore, the court held that the two children had a "liberty interest in main-

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83 *Aristotle P.*, 721 F. Supp. at 1003. The court stated that the case was "ripe for settlement" and it was "beyond question that establishing a policy which facilitates sibling visitation would be in the plaintiffs' best interest." *Id.* at 1012.

84 *Id.* at 1006-07.

85 *Id.* at 1005-06 (citing Roberts v. United States Jaycees, 469 U.S. 609, 618). *See infra* notes 118-28 and accompanying text.

86 *Id.* at 1004.

87 *Id.* at 1006 (quoting *Roberts*, 468 U.S. at 632) (emphasis added).

88 *Id.* (court stated that this question would be decided at a later stage in the proceedings).

89 696 F.2d 1016 (2d Cir. 1982).

90 *Id.* at 1025. Rivera specifically challenged the State of Connecticut's procedures for foster care termination, alleging that they violated her due process rights under the Fourteenth Amendment. *Id.* at 1019.

91 *Id.* at 1018.

92 *Id.* at 1024-1025. The court also stated that "custodial relatives like Mrs. Rivera are entitled to due process protections when the state decides to remove a dependent relative from the family environment." *Id.*

taining, free from arbitrary state interference, the family environment that they have known since birth."[93]

In *B.H. v. Johnson*,[94] however, a federal district court held that children who had been removed from their homes by state social services had no Fourteenth Amendment due process right to sibling visitation, and that the state had no obligation to attempt to reunite families.[95] The plaintiffs alleged that the state had violated their due process rights by failing to "insure" sibling and parental visitation.[96] The court noted that while case law recognizes a certain "sanctity and privacy of familial association and the right to be free from improper state intrusion, . . . [the case law imposes no] obligation on the state to make efforts to reunify families that have been separated by legitimate state intervention."[97]

Similarly, *Black v. Beame*[98] held that there is no constitutional obligation on the part of the state to insure "a given type of family life."[99] In *Black*, the mother had voluntarily placed four of her fifteen children in foster care.[100] Nine of the siblings not in foster care brought a Section 1983 action for relief against public officials and child care agency representatives for their failure to provide plaintiffs with aid sufficient to keep their family intact.[101] The basis of the children's complaint was that "the Fourteenth Amendment protection of fundamental rights *requires* the state to provide services they allegedly require to keep their large family together."[102] The court noted that it had "the power to insure that no state agency improperly *interfere* in the Blacks' family life,"[103] however, the court concluded that the plaintiffs "would have the word 'interfere' mean too much."[104]

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93 *Id.* at 1026. The court also stated that "[i]f the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child's long-standing familial relationship." *Id.* The question remains whether the result would have been the same had the sibling not been a care-giver.

94 715 F. Supp. 1387 (N.D. Ill. 1989).

95 *Id.* at 1397-98.

96 *Id.* at 1396-97.

97 *Id.* at 1397.

98 419 F. Supp. 599 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 815 (2d Cir. 1977).

99 *Id.* at 607.

100 *Id.* at 602.

101 *Id.*

102 *Id.* at 605. (emphasis added). The plaintiffs specifically alleged in their complaint that the public officials and welfare and child care agencies "owe[d]" them a constitutional and statutory duty to supply them with the services necessary to stay together. *Id.* at 602.

103 *Id.* at 607 (emphasis in original).

104 *Id.*

The *Aristotle* court, which held that siblings possessed the right to maintain relationships,[105] distinguished *Black*, stating that the relief sought in *Black* was "more expansive" than that sought in *Aristotle*.[106] In *Aristotle*, the plaintiffs complained that state policies denied siblings the opportunity to visit and argued that government policies should instead *facilitate* visitation.[107] In contrast, the plaintiffs in *Black* contended that the State "owed" a responsibility to supply the children with services which would enable the fifteen children to remain together.[108] Additionally, the *Aristotle* court noted that in *Black* the mother had voluntarily placed four children in foster care,[109] whereas in *Aristotle*, the plaintiffs "were involuntarily taken from free society."[110]

In the foster care context, the challenge is to find a middle ground between prohibiting undue state interference in the sanctity of the sibling relationship and not requiring the state to take affirmative steps to reunify families and "insure a given type of family life."[111] *Aristotle* and *Black* suggest that the answer may lie in the choice between facilitating visitation and insuring that families remain together.[112] When children are placed in foster care, state policies regarding visitation should be the least restrictive possible and should facilitate sibling visitation. This does not mean, however, that the state should subsidize the family[113] and pay the expenses

105 *See supra* notes 81-88 and accompanying text.

106 *Aristotle P.*, 721 F. Supp. at 1008-09.

107 *Id.* at 1004 (emphasis added).

108 *Black*, 419 F. Supp. at 602 (emphasis added).

109 *Aristotle P.*, 721 F. Supp. at 1009.

110 *Id.* at 1009.

111 *Black*, 419 F. Supp. at 607.

112 It is unrealistic to expect the state to place siblings in the same foster home all the time. *See supra* note 12 and accompanying text. The alternative—not placing them at all—is not reasonable.

113 Although the government could choose to subsidize sibling visitation, it is has no obligation to do so. As the court in *B.H. v. Johnson* explained, "the Fourteenth Amendment does not obligate the state to provide substantive services for its citizens," and "does not mandate an optimal level of care and treatment." 715 F. Supp. at 1393. The court emphasized that the Due Process Clause provides only that a "state shall not 'deprive' residents of life, liberty and property without due process of the law." *Id.* at 1393. However, the Supreme Court has spoken of the importance of the "family." *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977). So it is not entirely illogical to think that states, although they are not required to do so, would nevertheless want to subsidize the family and provide separated siblings with the means to visit each other. If the Supreme Court determines that there is a fundamental right to maintain sibling relationships, then it would be the state legislatures' role to determine the extent of state involvement. *See* Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974). If states do not subsidize visitation, then the importance of a recognized right of siblings to maintain relationships with each other is diminished. "Concern with the availability of resources is rarely part of the constitutional decision-making process where a recognized constitutional right is violated." *Johnson*, 715 F. Supp. at 1398. If the Supreme Court determines that the right is

for a family to remain intact, thereby insuring a "given type of family life."

State family service agencies should adopt policies that promote sibling visitation. The state denied visitation to the siblings in *Rivera* and the court found that this violated the siblings' due process rights.[114] In *Aristotle*, the plaintiffs alleged that the state policies permitted parental visits, but none by siblings, even when foster parents expressed their willingness to facilitate sibling visitation.[115] As the court held in *Aristotle*, these policies violate siblings' rights to associate and maintain relationships with each other.[116]

State agencies should facilitate visitation by informing siblings of the location and identity of a sibling in foster care. If siblings are aware of each other's location, then they can maintain relationships with each other. If actual visits are not feasible, then they can remain in contact through the mail or over the telephone. The state agencies should permit foster children to visit their siblings. They should allow visitation in the foster homes if the foster parents agree. A policy of placing siblings in foster homes in nearby vicinities, if possible, would also facilitate visitation.

Thus, although the Supreme Court has not yet recognized that siblings possess a constitutional right to maintain relations with each other, some federal courts have been receptive to recognizing such a right. The *Aristotle* court, relying on the Supreme Court's decision in *Roberts*, held that sibling relationships should be protected from unjustified state interference. The *Rivera* court similarly maintained that siblings had a right to maintain their family environment free from state interference.

2. *Wrongful Death Actions*

Although Supreme Court cases discussing the constitutional rights of family members and federal cases regarding the separation of siblings suggest that sibling visitation deserves constitutional protection, some federal courts considering Section 1983 wrongful death actions have not been receptive to the idea of sibling rights. Section 1983 provides a cause of action when there has been a "deprivation of any rights . . . secured by the Constitution."[117] Wrongful death actions under Section 1983 do not directly address the right of siblings to maintain relationships, nonetheless, the court

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fundamental then states must show a compelling reason to interfere with such right or that they are using the least restrictive means available. *Aristotle P.*, 721 F. Supp. at 1006.

114 *See supra* notes 89-93 and accompanying text.

115 *Aristotle P.*, 721 F. Supp. at 1004.

116 *See supra* notes 105-10 and accompanying text.

117 *See supra* note 78.

must first recognize that the plaintiffs possess a constitutional right before it can allow recovery. If the courts were to recognize that siblings have standing to bring wrongful death actions under Section 1983, this would substantiate siblings' claims to constitutional associational rights.

The lack of receptivity certain courts have displayed toward sibling claims[118] in Section 1983 wrongful death suits is illustrated by *Bell v. City of Milwaukee*.[119] In *Bell*, individuals brought an action for damages under Section 1983 and the Due Process Clause of the Fourteenth Amendment for loss of society and companionship when their sibling was killed by a police officer.[120] The Seventh Circuit reversed the district court's award of damages for the sibling plaintiffs, but maintained a Section 1983 claim by the decedent's parents.[121] The court specifically addressed whether siblings have a "liberty interest in the continued association of a sibling . . . protected from unlawful state interference by the due process clause of the Fourteenth Amendment."[122] Referring to *Moore*, the *Bell* court concluded that "without more analogous precedent we cannot attach a constitutional dimension to the siblings' claim for lost society and companionship."[123]

However, the court "fully recognize[d] the importance of intrafamily relationships generally, including those between siblings."[124] However it expressed concern that "if we were to hold that the federal Constitution entitles the sibling to recover for loss of society and companionship, there could be no principled way of limiting such a holding to the immediate family or perhaps even to blood relationships."[125] Significantly, however, the court stated that:

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118 *See, e.g.*, Sanchez v. Marquez, 457 F. Supp. 359 (D. Colo. 1978). In *Sanchez*, the court stated that:

> [W]here the right to raise, educate and associate with one's own child may rise to constitutional dimension, the right of siblings to have their brother or sister continue living does not. The relationship between a parent and its offspring and the relationship between brother and sibling is not a difference in degree; it is a difference in kind. Though one has a constitutional right to have or not have a child, one does not have a constitutional right to have or not have a brother.

Id. at 363. *But see* Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1189 (10th Cir. 1985) ("Although the parental relationship may warrant the greatest degree of protection . . . we cannot agree that other intimate relationships are unprotected and consequently excluded from the remedy established by section 1983.").

119 746 F.2d 1205 (7th Cir. 1984).

120 *Id.* at 1224.

121 *Id.* at 1248.

122 *Id.* at 1242.

123 *Id.* at 1246.

124 *Id.* at 1247.

125 *Id.*

> [w]e can conceive of potential state statutes severing relationships between siblings (though likely not effecting a severance as irreversible and egregious as the one resulting from the shooting and killing at issue). Such statutes should be stricken as being arbitrary and unreasonable, but this approach is not the equivalent of awarding damages under Section 1983 and the Fourteenth Amendment for the loss of society and companionship of a sibling, state law being entirely subsumed in the process.[126]

The *Aristotle* court, citing this passage, stated: "The *Bell* decision, as this court interprets it, does not stand for the proposition that a liberty interest in a sibling relationship will *never* be protected by the Fourteenth Amendment. The Seventh Circuit was careful to distinguish between awarding money damages and providing other forms of relief."[127] Also, as the *Aristotle* court pointed out, the *Bell* court decided the case under the Fourteenth Amendment, yet did not mention *Roberts*, which was decided only two months prior to *Bell*.[128] Thus, *Bell* does not stand for the proposition that siblings do not have a constitutionally protected interest in their relationships with each other. The *Bell* court merely distinguished between awarding monetary damages to siblings for wrongful death claims under Section 1983 and striking a statue or policy that severed sibling relationships.

In contrast to *Bell*, the later case of *Trujillo v. Board of County Commissioners*[129] provides support for a constitutional right of siblings to maintain relationships with each other. In *Trujillo*, a sister brought an action against state officials alleging that the wrongful death of her brother deprived her of the constitutional right to familial association.[130] The Tenth Circuit held that there was a constitutionally protected interest in sibling relationships.[131] The court stated that "[a]lthough the parental relationship may warrant the greatest degree of protection and require the state to demonstrate a more compelling interest to justify an intrusion on that relationship, we cannot agree that other intimate relationships are unprotected and consequently excluded from the remedy established by section 1983."[132] The court held that the sibling had a constitutionally pro-

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126 *Id.* at 1246-47.

127 Aristotle P. v. Johnson, 721 F. Supp. 1002, 1007 (N.D. Ill. 1989) (emphasis in original).

128 *Id.* at 1006 n.6.

129 768 F.2d 1186 (10th Cir. 1985).

130 *Id.* at 1188.

131 *Id.* at 1189.

132 *Id.* at 1189 (footnote omitted). *See also* Danese v. Asman, 670 F. Supp. 709, 739 (E.D. Mich. 1987), *rev'd*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990) (allowing the plaintiffs to amend their complaint under Section 1983 to allege a deprivation of a constitutional right to freedom of intimate association with their siblings).

tected interest in her relationship with her brother and could therefore state a claim for relief under Section 1983.[133]

The court in *Trujillo* argued that the Seventh Circuit's holding in *Bell*, that a "deliberate deprivation of any intimate associational right other than that of a parent, spouse, or child [is] not actionable under section 1983 . . . is irreconcilable with the analysis of intimate associational rights in *[Roberts v.] Jaycees*."[134] While several courts have subsequently followed *Bell* rather than *Trujillo*,[135] none of the decisions explicitly considered the analysis of *Roberts v. United States Jaycees*.[136] Although the *Bell* court had a legitimate concern that there be some limitations on who is entitled to recover for the loss of society, it does not necessarily follow that by allowing the sibling to bring a Section 1983 action there would be "no principled way of limiting such a holding to the immediate family."[137] *Trujillo* reasoned that since the Supreme Court recognized in *Roberts* that associational rights "extend to intimacy in a variety of contexts,"[138] Section 1983 should provide a means for protecting that intimacy where it occurs. Certain "personal relationships," including family

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133 *Trujillo*, 768 F.2d at 1189. However, the court also stated that intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a Section 1983 claim. Here, there was no allegation of intent so the court affirmed the dismissal of the complaint. *Id.* at 1190. *See also* Beck v. Calvillo, 671 F. Supp. 1555 (D. Kan. 1987) (*Trujillo* controls on the issue that a cause of action can be stated under section 1983 by a sibling for deprivation of familial association, but the allegations did not establish the necessary intent).

134 *Trujillo*, 768 F.2d. at 1190. *See supra* notes 122-23 and accompanying text.

135 *See* McBride v. Lindsay, 718 F. Supp. 24 (N.D. Ill. 1989) (finding that siblings cannot recover under Section 1983 for loss of associational rights under *Bell*); Sanchez v. Marquez, 457 F. Supp. 359, 363 (D. Colo. 1978) ("[W]here the right to raise, educate and associate with one's own child may rise to constitutional dimensions, the right of sibling to have their brother or sister continue living does not. The relationship between a parent and its offspring and the relationship between brother and sibling is not a difference in degree: it is a difference in kind. Though one has a constitutional right to have or not have a child, one does not have a constitutional right to have or not have a brother."); Mow v. Chesseborough, 696 F. Supp. 1360, 1364 n.12 (D. Haw. 1988) ("The Ninth Circuit has not, however, intimated whether this familial liberty interest is sufficiently constitutionally protected to extend to relationships between siblings."). *Cf.* Fletcher v. Conway, 1989 WL 118284 (N.D. Ill. 1989) ("In the absence of law clearly indicating that Bell is wrong, this court is bound to follow Bell[,] [although] *Roberts* and *Rotary* both suggest that the right to enter into and maintain certain intimate human relationships may extend to individuals even outside the family unit." (citations omitted)).

136 *See* Danese v. Asman, 670 F. Supp. 709, 739 (E.D. Mich. 1987), *rev'd*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

137 *Bell*, 746 F.2d at 1247.

138 *Trujillo*, 768 F.2d at 1190.

relationships, deserve constitutional protection,[139] and in general sibling relationships these "highly personal."[140]

Trujillo suggests that some federal courts might be amenable to recognizing that siblings have a right to recover for the lost society and companionship of a deceased sibling. If this sibling right to maintain relationships were generally accepted in the federal courts, it would create an atmosphere in which the Supreme Court could decide that siblings rights are of fundamental status. Even *Bell*, which denied the sibling claim for wrongful death, acknowledged the importance of sibling relationships.[141]

III
THE ARGUMENT FOR CONSTITUTIONAL PROTECTION OF SIBLING RIGHTS

A. Siblings Should Have a Constitutional Right to Continued Association With Each Other

This section argues that the Supreme Court should recognize that siblings have a constitutional right to maintain relationships with each other. Siblings share the type of intimate family relationships that the Supreme Court has recognized as being protected by the Constitution. Thus, while the Supreme Court has not yet recognized the existence of a fundamental right to a sibling relationship,[142] this recognition is consistent with past Supreme Court decisions.

Based on *Smith v. Organization of Foster Families*,[143] siblings, as members of the "family," should be protected under the Due Process Clause from state interference in their relationships.[144] The Supreme Court enumerated three guidelines to define the breadth of familial relationships protected by the Due Process Clause: First, the existence of a biological relationship; Second, the existence of emotional attachments derived from the intimacy of daily association; and Third, the origin of the relationship as entirely apart from the power of the State.

Sibling relationships meet all three requirements established in *Smith*.[145] First, there is a biological relationship between full-

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139 *Id.*

140 In the situation where there was no personal relationship, such as siblings separated at birth or from an early age and who had maintained no contact, it would seem that such siblings do not deserve damage relief under Section 1983.

141 *See supra* note 124 and accompanying text.

142 *See supra* note 11.

143 *See supra* notes 55-58 and accompanying text.

144 Patton, *supra* note 1, at 492.

145 Patton, *supra* note 1, at 492. Patton concluded that "applying the qualities of 'family' as defined by the Supreme Court in *Smith v. Organization of Foster Families*, there is

blooded siblings and half-siblings.[146] Second, most siblings share emotional bonds stemming from daily interaction. Commentators and judges agree about the existence of these emotional attachments.[147] As one judge for the New Jersey Superior Court stated, "nothing can equal or replace . . . the emotional and biological bonds which exist between siblings."[148] Another New York judge commented that "[y]oung brothers and sisters need each other's strengths and association in their everyday and often common experiences. . . ."[149] Third, siblings are family members by birth and not by state decree. Thus, under the *Smith* analysis, sibling relationships should be protected under the Fourteenth Amendment.[150]

Roberts v. United States Jaycees[151] also suggests a basis on which the Supreme Court can recognize that siblings have a constitutional right to associate with each other. In *Roberts*, the Supreme Court held that the Bill of Rights offers certain "highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[152] The Supreme Court held that family relationships receive protection under the Bill of Rights because "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[153] The sibling relationship fits within this characterization of family relationships. Step-siblings and adoptive siblings form the same types of attachments and commitments and also should be protected by the right to free association.[154] Thus, the sibling rela-

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every reason to provide sibling relationships the equivalent constitutional status as the parent-child relationship." *Id.* (footnotes omitted).

146 This analysis does not take into consideration the status of step-siblings or adoptive siblings. However, the *Roberts* analysis encompasses these sibling relationships as well as biological relationships. *See infra* note 154 and accompanying text.

147 Patton, *supra* note 1. The Supreme Court in *Roberts* stated that family members share emotional attachments: "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares . . . distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 619-20. Siblings, as family members, share these "deep attachments."

148 L. v. G., 497 A.2d 215, 218 (N.J. Super. Ct. Ch. Div. 1985).

149 Obey v. Degling, 337 N.E.2d 601, 602 (N.Y. 1975).

150 Adoptive siblings and step-siblings do not fit within this analysis. However, the reasoning in *Roberts* potentially offers protection. *See supra* notes 64-72 and accompanying text. The consequences of whether a right is deemed fundamental and subject to strict scrutiny is discussed *infra* notes 172-73.

151 468 U.S. 609 (1984). *See supra* notes 64-72 and accompanying text.

152 *Id.* at 618.

153 *Id.* at 619-20.

154 *See* Carolyn R. Glick, Note, *The Spousal Share in Intestate Succession: Stepparents and Getting Shortchanged*, 74 MINN. L. REV. 631, 651 (1990) (arguing that children typically do not regard half-siblings any differently than biological siblings) (citing Ganong & Coleman, *Do Mutual Children Cement Bonds in Stepfamilies?*, 50 J. MARRIAGE & FAM. 687, 696

tionship appears to be the type of intimate human relationship that the Constitution protects from "undue [state] intrusion."

At least one federal court has adopted this view. In *Aristotle*, the Northern District of Illinois noted that "[t]he relationship between two family members is the paradigm of such intimate human relationships" protected by *Roberts*.[155] *Aristotle* holds that siblings have a right to associate with each other and to develop and maintain relationships.[156] The court based its decision on *Roberts* and stated that sibling relationships are "the sort of 'intimate human relationship' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State.' "[157]

Moore v. City of East Cleveland[158] also supports extending Due Process Clause protection to sibling relationships. In *Moore*, the Supreme Court extended constitutional protection to members of the extended family.[159] The Court concluded that the Due Process Clause protects the sanctity of the family since "the institution of the family is deeply rooted in this Nation's history and tradition."[160] The Court noted that " 'the traditional relation of the family' is 'a relation as old and as fundamental as our entire civilization.' "[161] If the Constitution protects the extended family, it certainly should protect the immediate family, including siblings, whether they are related by blood or not.[162] The *Moore* Court stated that "[e]specially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home

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(1988)). In *Rivera v. Marcus*, 696 F.2d 1016, 1029 (2d Cir. 1982), the concurring judge stated:

> It is beyond peradventure that the nuclear family is not the only constitutionally protected family unit. With the increasing pressures of modern society and changing social mores, it has become a commonplace to encounter families whose members include stepparents, half-brothers and -sisters . . . and others. . . . [T]he emotional ties which bind such families are no less significant or deep than those which exist within the traditional nuclear structure.

155 *Aristotle P.*, 721 F. Supp. at 1005 (N.D. Ill. 1989). *See supra* notes 142-44 and accompanying text.

156 The Superior Court of New Jersey has also held that siblings posses natural, inherent and inalienable rights to establish and nurture relationships. L. v. G., 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985).

157 *Aristotle P.*, 721 F. Supp. at 1004 (citing Roberts, 468 U.S. at 618). The court, however, upon defendants' motion to certify the issues, acknowledged that *Bell v. Milwaukee* is controlling in some aspects of plaintiffs' claims. *Id.* at 1003.

158 431 U.S. 494 (1977) (plurality opinion); *see supra* notes 73-77 and accompanying text.

159 *Id.* at 505-06.

160 *Id.* at 503 (footnote omitted).

161 *Id.* at 503 n.12 (citing Griswold v. Connecticut, 381 U.S. 479, 496 (1965)).

162 *See supra* notes 73-77 and accompanying text.

life."[163] During those times of adversity, siblings can provide each other with support and a sense of security.[164] Consequently, the Constitution should protect the sanctity of the sibling relationship.

The Second and Tenth Circuits support the finding of a constitutionally protected interest in a sibling relationship. In *Rivera v. Marcus*,[165] the Second Circuit held that the state violated the plaintiff's due process rights when a government agency removed her half-brother and half-sister from her home without explanation and placed them in another foster home.[166] The court stated that the two children had a "liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth."[167] The Tenth Circuit's decision in *Trujillo v. Board of County Commissioners*[168] also provides support for a constitutional right for siblings to maintain their relationships. In *Trujillo*, a sister brought a Section 1983 action alleging that the wrongful death of her brother deprived her of the constitutional right of familial association.[169] The Court found a constitutionally protected interest in sibling relationships.[170]

Based on the three Supreme Court decisions and the federal Section 1983 actions discussed above, the Court should extend constitutional protection to the right of siblings to maintain relationships with each other. Siblings, as family members and as individuals who develop intimate personal relationships, deserve constitutional protection under the Due Process Clause and the Bill of Rights.

B. The Right to a Sibling Relationship Should Be Fundamental

The preceding section concluded that the Supreme Court should recognize that siblings have a constitutional right to association. Once the Supreme Court recognizes the existence of a constitutional right, it must determine whether the right rises to the status

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163 431 U.S. at 505.

164 *See supra* note 1 and accompanying text.

165 696 F.2d 1016 (2d Cir. 1982).

166 *Id.* at 1017. Rivera specifically challenged the State of Connecticut's procedures for foster care termination, alleging that they violated her due process rights under the Fourteenth Amendment. *Id.* at 1018.

167 *Id.* at 1026. The court further stated that "[i]f the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child's longstanding familial relationship." *Id.* This Note argnes that the result should be the same even absent a sibling with care giver status.

168 768 F.2d 1186 (10th Cir. 1985), *cert. denied*, 112 S. Ct. 1175 (1992).

169 *Id.* at 1188.

170 *Id.* at 1189.

of a fundamental right. There are no clear guidelines to identify a right as fundamental—the "nature, scope and source of these rights is unclear."[171] Still, to classify a right as fundamental can have dramatic consequences. The Supreme Court gives fundamental rights extraordinary protection against state interference.[172] For a state to infringe on a fundamental right, it must have a compelling interest and must use means narrowly tailored to achieve its objective.[173]

Fundamental rights are largely judicially created. As one commentator notes, "[t]he text of the Constitution itself . . . actually says very little about rights; yet from the outset the federal courts considered, and sometimes deemed of 'constitutional' status, various claims of 'fundamental right.' "[174] The judiciary has proclaimed that First Amendment rights, the right to vote, the right to privacy or personal autonomy, and the right to travel between states are fundamental rights.[175] Since the 1920s, the Supreme Court has defined fundamental rights in the areas of family relations and privacy by relying on substantive due process analysis, rather than on specific, enumerated constitutional guarantees.[176]

This lack of specific constitutional guarantees, however, has not lessened judicial scrutiny. For example, in *Aristotle*, the court held

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171 Katz, *supra* note 48, at 408-09. *See also* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1426 ("We are not told the basis—in language, history, or whatever else may be relevant to constitutional interpretation—for concluding that 'liberty' includes some individual autonomy that is 'fundamental' and much that is not.").

172 *See, e.g.*, Brumley, *supra* note 17, at 341; Daniel J. Langin, *Bowers v. Hardwick: The Right of Privacy and the Question of Intimate Relations*, 72 IOWA L. REV. 1443, 1446-47 (1987); McCarthy, *supra* note 22, at 980; Cynthia A. Rucker, *Texas Adoption Laws and Adoptees' Rights of Access to Confidential Records*, 15 ST. MARY'S L.J. 153, 162 (1983).

173 *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986); Moore v. East Cleveland, 431 U.S. 494 (1977); and Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Brumley, *supra* note 17, at 341; Henkin, *supra* note 171 at 1426; Langin, *supra* note 172, at 1447; McCarthy, *supra* note 22, at 985; and Rucker, *supra* note 172, at 163.

174 David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 504 (1991).

175 *See, e.g.*, Brumley, *supra* note 17, at 342; McCarthy, *supra* note 22, at 981 (stating that the Court has found the following rights to be fundamental: marriage and procreation, Skinner v. Oklahoma, 316 U.S 535 (1942); abortion and contraception, Roe v. Wade, 410 U.S. 113 (1973) and Griswold v. Connecticut, 381 U.S. 479 (1965); and childbirth and child-rearing, Meyer v. Nebraska, 262 U.S. 390 (1923) and Zablocki v. Redhail, 434 U.S. 374 (1978)).

176 Katz, *supra* note 48, at 408. Katz further states tbat the Warren Courts recoguition of fundamental rights to migrate and resettle, to vote, and to access to the ballot, in the absence of textual support from the Constitution, "buttressed the view that an unwritten Constitution protected other unspecified but important interests." *Id.* at 416.

McCarthy points out that the development of the fundamental rights of parents to the "care, custody, and management of their children has come entirely in the case law of the Supreme Court [and not from the Constitution itself,] . . . [and] what has developed is a patchwork of decisions that leave many questions unanswered." McCarthy, *supra* note 22, at 985. One of these questions is whether siblings, as family members, possess fundamental rights to maintain relationships.

that the challenged policies of the Illinois government, which denied visitation to siblings in different foster homes, had to be evaluated under a heightened level of scrutiny.[177] The court explained that this meant that the state actors could infringe on the children's right to associate only if there was a compelling state interest that "[could not] be achieved through means significantly *less restrictive* of associational freedoms."[178]

Although there are no delineated gnidelines for determining what constitutes a fundamental right, commentators argue that the Supreme Court relies on history and natural law, as well as on similarity to a previously recognized fundamental right, in evaluating whether a constitutional right is fundamental. Alison M. Brumley argues that although the Supreme Court has not clearly articulated the source and limits of fundamental rights, the Court has "explicitly relied on several principles to identify these rights, such as 'the traditions and conscience' of society and basic values that underlie our society."[179] In addition, Brumley asserts that parental rights are recognized as fundamental because of the "natural law presumption that parents have innate affection for their children."[180] Other commentators share Brumley's view. For example, Francis Barry McCarthy points out that historically courts have relied on natural law to explain the existence of "fundamental rights."[181] McCarthy also asserts that, even today, the Supreme Court traces the origin of fundamental rights to tradition because tradition represents the "core values of the highest esteem."[182]

Under these natural law principles, the Supreme Court should recognize sibling rights as fundamental because siblings naturally share emotional bonds and innate affection.[183] Furthermore, sibling rights should attain fundamental status because of their role in history and tradition.[184] The Supreme Court in *Moore* noted that " 'the traditional relation of the family' is 'a relation as old and as fundamental as our entire civilization.' "[185]

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177 *Aristotle P.*, 721 F. Supp. 1002, at 1006 (quoting *Roberts*, 418 U.S. at 623).

178 *Id.* (emphasis added).

179 Brumley, *supra* note 17, at 341.

180 *Id.* at 342.

181 McCarthy, *supra* note 22, at 983.

182 *Id.* at 984.

183 As a New Jersey court reasoned, "nothing can equal or replace . . . the emotional and biological bonds which exist between siblings." L. v. G., 497 A.2d 215, 218 (N.J. Super. Ch. Fam. Div. 1985).

184 *See supra* notes 159-62 and accompanying text.

185 *Moore*, 431 U.S. at 504 n.12 (quoting *Griswold*, 381 U.S. at 496.). The Court also stated that the protections of the Due Process Clause extend to the sanctity of the family because "the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503-04. Justice Powell stated that "[t]he tradition of . . . a household . . .

The sibling right should also be fundamental because it extends from an already recognized fundamental right to family privacy. According to Katherine D. Katz, the Court has recognized that:

> the key to determining whether an interest is "fundamental" is not in comparisons of relative societal significance, nor by weighing whether the interest is as important as a recognized fundamental right. Rather, the answer lies in assessing whether "there is a right . . . explicitly or implicitly guaranteed by the Constitution." The Court seemed to be saying that it would not expand 'implicit rights' beyond those *already recognized*.[186]

Furthermore, Katz contends that this "supposition [was] borne out by subsequent events."[187] Katz cites Justice Powell's opinion in *Moore v. City of East Cleveland*.[188] Katz explains that Justice Powell was willing to use substantive due process review to recognize the existence of a fundamental right "because of the Court's *long recognition* of 'freedom of personal choice in marriage and family life.' "[189] Because the Court already had recognized fundamental rights in the family context, they could extend protection to a family consisting of a grandmother and her grandsons in *Moore*.[190] Similarly, the Supreme Court should find that the sibling relationship deserves protection as a fundamental right because the Court has recognized the "implicit right" of freedom of personal choice in family life.[191] In *Moore*, the Supreme Court acknowledged that members of the extended family have a fundamental right to associate with each other.[192] If the Constitution affords fundamental status to members of the extended family, it certainly should provide members of the immediate family, such as siblings, the fundamental right to maintain relationships.[193]

Additionally, the sibling right deserves fundamental status as part of the broad category of family rights. According to McCarthy, the Supreme Court's decisions can be interpreted as recognizing a broad category of "family" rights of which parental rights are a subsection.[194] Sibling rights could also be recognized as a subcategory.

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with parents and *children* has roots equally venerable and equally deserving of constitutional recognition." *Id.* (emphasis added).

186 Katz, *supra* note 48, at 417-18 (emphasis added).

187 *Id.* at 418.

188 431 U.S. 494 (1977) (plurality opinion).

189 Katz, *supra* note 48, at 417-18 (emphasis added).

190 *Id.*

191 *See supra* notes 73-77 and accompanying text.

192 431 U.S. at 505-06.

193 *See supra* notes 158-164 and accompanying text.

194 McCarthy states "[I]t may be that what really is involved are 'family' rights and not 'parental' rights. In other words, it might be that parental rights are only found after and are derived from 'family' Rights." McCarthy, *supra* note 22, at 993. Many commen-

William W. Patton agrees that there is every reason to provide sibling relationships protection as a fundamental right.[195] David E. Engdahl insists that our Nation has a "noble heritage of *unwritten* fundamental . . . rights, [and] [a]ny attempt at limitation to certain 'enumerated' constitutional rights [is] unhistorical [and] intolerable."[196]

The Supreme Court should recognize that the right of siblings to associate with each other is a fundamental right. Because the Supreme Court has recognized that family rights are fundamental, siblings, as family members, should receive similarly stringent constitutional protection. History and natural law also support treating sibling rights as fundamental.

C. Reconciling Conflicting Fundamental Rights

The prior section argued that siblings possess a fundamental constitutional right to associate with each other. This section addresses the special problem that may arise if the Supreme Court does recognize a "fundamental sibling right." The problem is how to reconcile this "fundamental sibling right," with a "fundamental parental right."[197] The Supreme Court has held that parents have a

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tators have argued that a family rights analysis rather than a parental rights analysis is the appropriate method in illegitimacy and adoption cases. *Id.* at 1006 (footnote omitted). McCarthy, however, concludes that "[w]hen family rights can be equally advanced by such disparate groups as parents, children, foster parents, grandparents, and stepparents, . . . [one] conclusion[] [that] can be reached . . . [is that] the term 'family rights' and its associated ideas are too imprecise or ambiguous to be helpful in any careful analysis." *Id.* at 1008.

195 Patton, *supra* note 1, at 491-92 (arguing that sibling rights should be provided the same constitutional protection as the parent-child relationship).

If the Supreme Court finds that siblings do have a fundamental constitutional right to maintain relationships, the question then becomes whether there are any accompanying obligations. For example, the Ninth Circuit concluded that sibling income should not be included when computing Medicaid eligibility, even though parental and spousal income is included. Sneede v. Kizer, 728 F. Supp. 607 (N.D. Cal. 1990), *aff'd*, No. 90-15141 (9th Cir. filed Dec. 13, 1991) (citing Vance v. Hegstrom, 793 F.2d 1018 (9th Cir. 1986)). If the Supreme Court were to establish that siblings have fundamental rights to maintain relationships, perhaps sibling income should be included when determining Medicaid eligibility. If one sibling is handicapped, the other sibling might have a duty of care or support. This is logical because an intimate association protected by the Constitution "is normally seen to generate moral duties of a material kind, whether or not those duties are also enforceable by law." *See* Karst, *supra* note 59.

196 Engdahl, *supra* note 174, at 505.

197 *See, e.g.*, Robert B. Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459, 460 (1982) ("The Supreme Court's recent extension of constitutional protection to children as individuals, and its subsequent recognition of their right to privacy, has, however, assured the Court the eventual task of reconciling the rights and interests asserted by children in actual or potential conflict with those of their parents."). *See also* McCarthy *supra* note 22, at 1011 ("[T]here is considerable tension between the ideas of children's rights and parental rights."). Stated in intimate association terms, difficulty arises when there are two com-

fundamental right to their relationships with their children.[198] If siblings have a fundamental right to maintain relationships with each other, what happens when these two rights conflict? If siblings are separated and seek visitation, but the custodial parent of a sibling contests visitation, how does a court resolve this dispute between fundamental rights? This section argues that when a sibling right conflicts with a parental right, courts should abandon constitutional analysis and look to the best interests of the children to resolve the conflict.

Commentators agree that such a conflict poses difficult problems. McCarthy argues that a conflict between children and parents "will . . . confound any constitutional analysis and serve to negate any claims of rights."[199] He believes that "courts that are called upon to perform the necessary balancing when parent, child, and state are in conflict are being asked to perform an impossible task."[200] Both McCarthy and Brumley agree that while parents possess fundamental rights with respect to the custody and care of their children, the fundamental status is problematic when it conflicts with the child's rights.[201]

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peting parties each with her own freedom of association concerns. *See* Karst, *supra* note 59, at 645. According to Karst, a custody dispute between spouses is "problematic precisely because our notions of the values of intimate association are engaged on both sides of the contest." *Id.* When "the values of intimate association are engaged on both sides of the contest . . . such cases are decided not on the basis of specific rules of law, but by the sort of discretionary whole-person evaluation appropriate for intimate associations." *Id.* at 645-46. *See generally* Harvey Wingo & Sharon N. Freytag, *Decisions Within the Family: A Clash of Constitutional Rights*, 67 IOWA L. REV. 401 (1982).

198 Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that parents have a fundamental right to the custody and companionship of their children). The rights to conceive and to raise one's children have been deemed "essential" (Meyer v. Nebraska, 262 U.S. 390, 399 (1923)), the "basic civil rights of man" (Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)), and "[r]ights far more precious than property rights" (May v. Anderson, 345 U.S. 528, 533 (1953)).

The fundamental status of rights means that the state must provide parents with due process of law before separating the parent from the child, even temporarily, in order to protect the parents' liberty interests. *See, e.g.*, Lassiter v. Dep't of Social Serv's, 452 U.S. 18, 27 (1981); Little v. Streater, 452 U.S. 1, 13 (1981) (parent-child relationship accorded protection under due process clause whether legitimized by marriage or not); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Stanley v. Illinois, 405 U.S. 645 (1972). McCarthy says that although the Supreme Court "has been very selective in its recognition of what interests, or even rights, are to be characterized as fundamental," McCarthy, *supra* note 32, at 981, it has held that the parent-child relationship rises to constitutional protection as a fundamental right. McCarthy questions whether even parental rights are fundamental, but determines there is no "definite answer." McCarthy, *supra* note 22, at 1030. He concludes that "it would simply be better to recognize that parents have a constitutional right in their children, albeit an ordinary liberty interest." *Id.* at 1031.

199 McCarthy, *supra* note 22, at 1006.

200 *Id.* at 1032-33.

201 *Id.* at 1006; Brumley, *supra* note 17, at 334, 343.

The Supreme Court addressed such a conflict between fundamental rights in *Planned Parenthood of Central Missouri v. Danforth*,[202] which involved a dispute between a parent's fundamental right to control their children and a minor child's right to make a private decision regarding abortion. The Court prohibited the state from imposing an absolute requirement of parental consent for a pregnant minor's decision to have an abortion.[203] In doing so, the Court rejected the asserted interest in promoting parental authority and held that the parental interest in the child's decision is at most equal to the minor's right to privacy.[204] This decision illustrates the Supreme Court's view that the parents' fundamental right to raise their children does not outweigh the child's fundamental right to privacy.

Brumley and McCarthy both offer the same two alternative views of parental rights to support the conclusion that parental rights are not fundamental when asserted against a child's rights. One view is that parental rights are only fundamental when they are asserted against the state but not when asserted against the child's interests.[205] The second view is that parental rights are more accurately termed "family rights," and the family rights are possessed by the family as a unit—both by parents and by children. Therefore, the parental interests are no stronger than the child's interests and not entitled to special deference.[206] Patton also concluded that "applying the qualities of 'family' as defined by the Supreme Court in *Smith v. Organization of Foster Families*, there is every reason to provide sibling relationships the equivalent constitutional status as the parent-child relationship."[207]

Brumley argues that when a minor sues in federal court on an issue usually within the traditional scope of parental authority, courts should not allow the opposing parental views to interfere with the child's pursuit of a legal claim. She contends that when a dispute places the legal rights of the parents and child in conflict,

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202 428 U.S. 52 (1976). *See generally* Michael J. Perry, *Substantive Due Process Revisited: Reflections on (And Beyond) Recent Cases*, 71 NW. U. L. REV. 417, 451-59 (1976) (discussing the reasoning of the *Danforth* decision).

203 428 U.S. at 74.

204 *Id.* at 75.

205 Brumley, *supra* note 17, at 343-44; McCarthy, *supra* note 22, at 1016.

206 Brumley, *supra* note 17, at 345. McCarthy, *supra* note 22, at 1016. McCarthy cautions that this approach requires a characterization of children's rights as being of equal magnitude as parental rights, and a separation of the children's interests from the state's. *Id.* This was the major point of Justice Douglas' dissent in Wisconsin v. Yoder, 406 U.S. 205, 241-49 (1972) (Douglas, J., dissenting) (argning that a child's rights "should be considered . . . [and] the State may well be able to override the parents' . . . objections" to mandatory school attendance).

207 Patton, *supra* note 1, at 492 n.69 (footnotes omitted).

the family structure is "fracture[d]" and the child should be able to assert her own constitutional rights independent of the parents' consent.[208] Brumley maintains that when a child asserts a constitutional right "previously extended to children," the conflict of rights between the child, the parents and the state has "already been settled in favor of the child."[209] Brumley recommends that when a court is faced with a conflict between parental rights and a child's rights, the court should subordinate the interests of the state and the parents to the child's interests.[210]

Such a bypass originated in *Bellotti v. Baird*.[211] In *Bellotti*, the Supreme Court suggested a judicial procedure which permitted a minor to avoid getting parental consent for an abortion if the child could either demonstrate her maturity and an understanding of the nature and consequence of her decision or show that an abortion was in her best interest.[212] Brumley supports using this procedure to determine whether a court should permit a child to bring a legal action without parental consent.[213] Brumley contends that if the child demonstrates an understanding of the nature and consequences of the decision to bring a suit, or if it is in the child's best interests to bring the legal claim, the court should permit the child to do so.[214] Brumley argues that a child's mature decision or best interests are more important than parental concerns.[215]

The "best interests" prong of the "Bellotti bypass" should be applied in the sibling visitation context. Assuming that the Supreme Court recognizes a minor's right to associate with a sibling, a minor should be granted sibling visitation if visitation is in the best interest of all of the children concerned.[216] In deciding whether to grant sibling visitation, a court should not have to determine whether the sibling's decision to seek visitation is a product of mature deliberation. The court should not grant visitation solely based on one sibling's mature decision to seek visitation because the interests of other minor children are also involved. Instead, the court should consider the best interests of all of the siblings.

Assuming that siblings' rights in maintaining a relationship are fundamental, when this right directly conflicts with a fundamental

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208 Brumley, *supra* note 17, at 345.
209 *Id.* at 339.
210 *Id.* at 341.
211 443 U.S. 622 (1979).
212 *Id.* at 643-44.
213 Brumley, *supra* note 17, at 348-50.
214 *Id.* at 338.
215 *Id.* at 340.
216 *See supra* notes 18-23 and accompanying text (discussing New York courts consideration of the best interests of all of the children when deciding whether to grant visitation).

parental right, courts should not undertake a fundamental rights analysis. Instead, courts should give equal weight to those rights and balance the other factors that are involved in order to reach a decision. If a child seeks visitation with a sibling, and a custodial parent opposes the visitation, the court should not allow the parental rights to trump the sibling rights. In such a conflict, the court should apply a "best interests" analysis and weigh the specific facts to decide whether visitation should be granted.[217]

CONCLUSION

Although state courts and some federal courts have discussed the issue of sibling rights, there is no clear consensus about whether siblings have a constitutional right to maintain relationships with each other. Some state courts have recognized the importance of the sibling relationship and some state legislatures have offered protection to the sibling relationship by enacting statutes that establish procedures for siblings to obtain visitation rights.[218] Federal courts have addressed the constitutional rights of siblings against the backdrop of Section 1983 actions. In both sibling separation cases and wrongful death actions brought pursuant to Section 1983, some federal courts have recognized that siblings do possess constitutional rights to contact with one another.

The Supreme Court should recognize that siblings possess a constitutional right to maintain relationships with each other. The amenability to sibling rights displayed by lower courts, combined with prior Supreme Court decisions recognizing the constitutional rights of families,[219] supports the future recognition of a sibling right by the Supreme Court. Additionally, the Court should recognize that this right is fundamental. In light of this determination, a state must show a compelling state interest before interfering with sibling relationships, and state agencies should be required to implement policies that have the least restrictive effect on siblings' association rights and which facilitate visitation. Furthermore, when this sibling right conflicts with a parental right in a sibling visitation dispute, the sibling right should not be overpowered by the parental right. When these two fundamental rights oppose each other, a court should not undertake a constitutional analysis. Instead, the

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217 In the sibling visitation context, the difficulty of assessing the child's maturity in the "Bellotti bypass," *see supra* notes 211-15 and accompanying text, is avoided because all of the visitation statutes use the best interest standard. The "best interests" analysis should take into account both (or all) of the siblings involved. *See supra* note 22 and accompanying text.

218 *See supra* note 25.

219 *See supra* note 42.

court should balance the best interests of the children involved to determine whether to grant visitation rights to the siblings.

Barbara Jones