The Status of Siblings' Rights: A View into the New Millennium

William Wesley Patton
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INTRODUCTION

In 1991, when Dr. Sara Latz and I began researching our article, *Severing Hansel From Gretel: An Analysis of Siblings’ Association Rights*,\(^1\) there were few sibling statutes, fewer cases defining the ambit of siblings’ association, and no national statistical data existed regarding out-of-home sibling placements based upon findings of abuse or neglect. After two years of compiling a sibling database by contacting hundreds of state and county child protection agencies and surveying hundreds of private adoption agencies, we determined that in 1994 there were approximately 35,000 siblings placed in different out-of-home placements annually.\(^2\) Our research uncovered some other very interesting data regarding siblings. First, the percentage of siblings placed out of the home into different placements was relatively constant in each state that we studied, with a median of approximately forty percent.\(^3\) Second, we found that the longer the siblings remained in different placements, the greater the likelihood that they would never be reunited; whereas, most siblings that were initially placed together, stayed together permanently.\(^4\) Moreover, the Fed-

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2. Id. at 745.

3. Id. at 757-58.

4. Id. at 758. There is also a greater likelihood that siblings will remain together if placed outside the home with relatives rather than with foster parents. “Relatives often express a commitment to care for the children until they come of age and only twenty-three percent of children initially placed with kin experienced another placement within three to five years as compared to fifty-eight percent of children in nonrelative foster homes.” *Sibling Groups in Foster Care: Placement Barriers and Proposed Solutions, in Report to the Legislature at 6 (1997)* (quoted in Rod Kodman, *Re-Victimizing Innocent Victims: How California Violates The Constitutional Rights of Its Abused and Neglected Children*, 4 J. of Juv. L. & Pol’y 67, 84 (2000)). Out of California’s 98,000 children under court supervision sixty percent had siblings, but “forty-one percent were not living in the same foster home . . . [and] [forty-eight percent of siblings in foster care do not live with relatives.” Id. at 87.
eral Adoption Assistance and Child Welfare Act (FAACWA)\(^5\) had a highly negative impact on sibling groups: (1) since permanent planning became the center of the child protection system, the time within which families could reunify has been shortened from three years to one year, and under certain circumstances to six months in many jurisdictions, thus resulting in an increase in parental termination cases; and (2) because the FAACWA lists adoption as the preferred permanent plan, many siblings in sibling groups are separated as there are not enough adoptive homes that want to adopt groups of siblings despite the availability of monetary subsidies.\(^6\) Finally, the law has not kept pace with psychological and sociological studies, which continue to document the importance of sibling association throughout brothers' and sisters' lives.\(^7\) This article charts the progress of the legal sta-

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6. One of the main problems with the FAACWA of 1980 was "that it created a tension as agencies committed to reunification discouraged bonding between foster parents and foster children while at the same time, out of concern for child safety, discouraged contact with the child's biological parents." Megan M. O'Laughlin, A Theory of Relativity: Kinship Foster Care May Be The Key To Stopping The Pendulum Of Termination v. Reunification, 51 Vand. L. Rev. 1427, 1434 (1998). However, the Adoption and Safe Families Act of 1997 created new problems by creating a shortened period within which parents could demonstrate that they were capable of caring for their children; "the time line termination standard risks unfairly biasing decisions against the biological parents." Id. at 1440; see also, 45 C.F.R. § 1356.21(k) (2000). "Almost 500,000 children are on the foster care rolls in the United States. 100,000 will not be returned to their families, but only 20,000 were adopted in 1995." Rod Kodman, Re-Victimizing Innocent Victims: How California Violates The Constitutional Rights Of Its Abused And Neglected Children, 4 J. Juv. L. & Pol'y 67, 79 (2000).

7. For a survey of the post-1991 psychological literature demonstrating the importance of the sibling bond, see Ellen Marrus, "Where Have You Been, Fran?" The Right Of Siblings To Seek Court Access To Override Parental Denial Of Visitation, 66 Tenn. L. Rev. 977, 980-987 (1999). These recent psychological studies support the importance and uniqueness of the sibling bond and mirror earlier studies that demonstrated that the bond's importance increases with the degree of access among siblings. Id. at 982-84. For a very interesting discussion of the factors in early psychoanalytic theory which delayed a focus on the importance of sibling bonds, see Brian Clark, The Sibling Constellation (Penguin Books ed., 1999). "Once the helping professions began to view the individual in the context of the family and as a member of a larger group, psychology became more cognizant of the sibling. Psychological literature on the sibling started to appear from the 1970's." Id. at 90. The resources available to separated siblings to locate one another have been dramatically increasing with the development of search engines on the worldwide-web. For instance, some countries have governmental search sites on-line. See, e.g., Genseek Genealogy, Australia Adoption Information and Notice Board, at http://www.standard.net.au/~jwilliams/adoption.htm. (last visited July 16, 2001); the Canadien Adoptees Registry, at http://www.canadianadopteeregistry.org/. In addition, some states are beginning to open previously closed adoption files which will enable siblings better access to data in locating one another. Brad Cain, O'Connor Rejects Last Appeal to Block Adoption Law, L.A. Daily J., May 31, 2000, at 8. Tennessee, Alaska, Delaware, Kansas, Alabama, and Oregon now permit adult adoptees access to their original birth certificates. Id.
tus of siblings since 1991 and projects future trends in the legal development of sibling association.

II. THE CURRENT LEGAL STATUS OF SIBLINGS

Unlike the period prior to 1991, sibling issues have become preeminent among state and federal bills, statutes, and cases during the last six years. Legislators have begun to recognize the emotional, as well as the financial, importance of recognizing sibling bonds. For instance, in 1999, state legislation considered sibling visitation, siblings’ desire to locate one another after separation, siblings’ rights to recover personal injury and wrongful death damages, tax advantages for brothers and sisters who care for their siblings, and expedited

8. We are beginning to understand the changing demographics of families, including sibling groups, in contemporary American culture. For example, approximately fifty percent to sixty percent of all marriages are likely to end in divorce and half of all new marriages involve at least one previously married partner. Bryan Strong & Christine De Vault, Marriage and Family Experience 528, 562 (6th ed. 1995); William J. Bennett, The Index of Leading Cultural Indicators 13 (1994); Homer Clark, Jr. & Carol Glownsky, Domestic Relations 12 (5th ed. 1995). These remarriages have created bonded relationships among tens of thousands of stepchildren, thus dramatically increasing the number of siblings subject to out-of-home placements in the child dependency system. Cynthia Pill, Stepfamilies: Redefining The Family, in Family Relations 39, 186-193 (1990). These “blended” families often provide the stepchildren a bond which helps to mollify the earlier divorce. Strong & De Vault, supra note 8, at 579, 590; Lawrence Ganong & Marilyn Coleman, A Comparison of Clinical and Empirical Literature on Children in Stepfamilies, 48 J. Marriage & Fam. 309-18 (1986). Therefore, states now have to determine whether siblings and step-siblings will be treated similarly in terms of the right of family association. I thank one of my students, Cynthia Occelli, for her help in researching these step-family statistics.


termination of parental rights and statutory presumptions based upon sibling relationships.13 “Five states have statutes explicitly giving sibling standing to petition the court for visitation.”14 Case law over the last seven years has been no less diverse, as the following analysis will demonstrate.

A. Post-1991 Case Law

In 1990, I argued that siblings have a fundamental right to associate and because their relationship is more similar to a parent/child bond than to any third-party bond, including grandparent/grandchild bonds, the state must prove by clear and convincing evidence that splitting siblings into different placements is a compelling governmental interest and is the least intrusive means of achieving the state’s goal of protecting children.15 However, courts have been very reluctant to recognize a constitutional basis in sibling association, perhaps fearing that the best interests of one of the siblings will be sacrificed if the state cannot meet its burden of demonstrating the necessity of separating siblings into different placements.16

In the Adoption of Hugo,17 the United States Supreme Court recently declined to decide whether siblings have a constitutional right to associate. In Hugo, a four-year-old boy with special needs, due to his mother’s cocaine use, lived in foster care from birth.18 When he was two-years-old, his parents’ rights were severed and the court fol-

13. H.R. 740, 1999 Leg., Reg. Sess. (Cal. 1999) (if a child has a sibling who is under four who is a ward of the court parental reunification services will be provided for only six months rather than one year); S. 1226, 1999 Leg., Reg. Sess. (Cal. 1999) (reunification services for a child under four need not be provided if reunification services for a sibling have previously been terminated); H.R. 1115, 20th Leg., Reg. Sess. (Haw. 1999) (expand definition of group home to accommodate all siblings in a sibling group); S. 232, 1999 Leg., Reg. Sess. (Nev. 1999) (preference for placing siblings together); and H.R. 731, 222d Gen. Assem., Reg. Sess. (N.Y. 1999) (expedited termination of parental rights for a child who has a sibling abused by a parent).

14. Marrus, supra note 7, at 1013. However, most jurisdictions deny siblings standing to seek visitation in custody matters unless “parents are unable to resolve such matters voluntarily, [and then] the court hears the children’s wishes and determines the children’s best interests . . . .” Id. at 995-96.


16. William C. Smith, Common Bonds, Separate Lives: Case Attempts to Create Right of Siblings to Grow Up Together, A.B.A. J., March 1999, at 35. “[N]o state high court has found a constitutional guarantee of sibling association.” Id. State Departments of Social Services do not want the difficult constitutional burden of proof to interfere with the placements of siblings who they argue sometimes do not belong together and because it “may be impossible to find one home for all brothers and sisters.” Id.


18. Id. at 518-19.
lowed the Department of Social Services’ recommendation to place him in the adoptive home of his six-year-old sister. The adoptive mother agreed to reunite the siblings in a stable, permanent placement by adopting Hugo. However, the juvenile court judge ordered that Hugo be placed in the custody of his paternal aunt, who previously raised a special-needs son. The trial court found that Hugo bonded with his prospective adoptive mother, as well as his sister. However, the trial court found that the sibling bond was merely one factor that the court must consider, and was, therefore, insufficient. The Massachusetts Supreme Court affirmed the lower court’s ruling and found that although sibling association is an admirable goal, it is just one factor to consider in making custody decisions. It also rejected the argument that sibling association is a fundamental liberty interest. Subsequently, the United States Supreme Court denied certiorari, demonstrating its continuing disinterest in family association rights.

Therefore, we must face reality. Except in a few older cases and dissenting opinions, it is clear that most lower courts are unlikely to define sibling association as a fundamental liberty interest. Courts have not followed the 1985 opinion in *L., K., C., B., and H.K. v. G. and H.*, which found that “siblings possess the natural, inherent and inalienable right to visit with each other.” In contemporary opinions, even when justices note the constitutional significance of sibling association, they often provide significant limitations. For instance, Justice Baron, in his 1998 concurring and dissenting opinion in *In re Paul C.*, stated that children have “fundamental and constitutionally protected interests in [their] relationships with families to which [they have] emotional ties.” This is similar to the “caring” requirement of *Michael H. v. Gerald D.*, which determined that a biological connection alone is legally insufficient to establish a fundamental right to associate. The dozens of cases involving siblings’ rights between

19. *Id. at 521-22.*
20. *Id. at 524.*
21. The court even refused to elevate siblings’ associational rights to a presumption; “[w]e are not persuaded in this complex area of familial relationships that the judge should have given presumptive weight to the sibling relationship.” *Id. at 524.*
23. *Id. at 222.*
25. *Id. at 377 (1998).*
26. *Michael H. v. Gerald D., 491 U.S. 110, 123 (1989).* See also *S.J. & I.J. v. W.L. & L.L., 755 So. 2d 753, 756 (Fla. Dist. Ct. App. 2000).* The Florida District Court of Appeals held that siblings did not have standing to raise an associational issue since they “had never lived together and rarely visited under a mediated visitation schedule, had not established a familial relation-
1991 and 2000 can be best harmonized and analyzed by grouping them into several specific factual scenarios.

1. Cases Where One Sibling Resides with Parents but the Other Sibling Seeking Visitation Resides Outside the Parents' Home.

A recurring theme in one set of cases concerns the rights of siblings living outside the parents' home to associate with siblings living in the parents' residence. These cases usually involve two different types of separated siblings. The first involves adult siblings who seek, over their parents' objection, to continue contact with minor brothers or sisters. The second line of cases deals with siblings, who have been removed from their parents' home and wish to continue associating. In these cases, the minors might be placed in different foster, prospective adoptive, or adoptive homes. Courts have traditionally hesitated to grant visitation among siblings in contexts where the custodial parent objects. Furthermore, there is much uncertainty regarding courts' power to grant jurisdiction to order such visitation without a finding of parental fault or psychological harm to the siblings if visitation is denied.

One of the most famous sibling visitation cases is *In re Interest of D.W.*, in which parents requested that the state take jurisdiction of their thirteen-year-old allegedly incorrigible son. At the disposition hearing, the court declared the boy a ward of the state and awarded custody to Department of Social Services (Department) “so he could be placed at Boys Town.” At a second disposition hearing, the boy's

ship sufficient to give them a direct legal interest for standing to intervene and set aside the adoption.” *Id.* In his concurring opinion, Justice Gary M. Farmer provided an interesting theory for children's associational rights. He posits association as a reciprocal relationship in which the right can exist only where both individuals have an equivalent associational interest. *Id.* at 757-58 (Farmer, J., concurring).

The right in question is an associational right—i.e., an interest in having some future connection with the adoptee's siblings. An association is a linkage of some kind between two or more people. An associational right is necessarily reciprocal: A has the right to associate in some way with B; it corresponds with a right of B to associate with A. If B has no right to associate with A, A's associational right is meaningless as regards to B. One is useless without the other.

*Id.* at 757. Justice Farmer's analysis of reciprocal associational rights belies any hints by the Supreme Court in *Michael H.* that even though parents have a right to associate with their children, children may not have the equivalent associational right.


28. *Id.* at 409.

29. *Id.* According to the staff at Boys Town, the minor did extremely well, was a “B” student and did not exhibit behavioral problems. *National Broadcast Company, Dateline*, Jan. 1, 1996.
custody was changed from Boys Town to his maternal grandmother.\textsuperscript{30} At a review hearing, the boy’s guardian ad litem requested that the boy have visitation rights with his almost three-year-old sister, who was still living at home.\textsuperscript{31} At a subsequent hearing regarding the request for visitation, the boy’s social worker and his therapist reported that he “was having a great deal of difficulty dealing with the loss of his parents and the lack of contact with his sister.”\textsuperscript{32} The trial court ordered that “(1) D.W. have visitation with his sister for one hour per month, supervised by D.W.’s therapist; (2) D.W.’s parents make their daughter available for said visitation; and (3) the Department give the siblings’ parents forty-eight hours notice of said visitation.”\textsuperscript{33} The Nebraska Supreme Court held that although the trial court had jurisdiction over the boy and his parents, it “lacked personal jurisdiction over the sister.”\textsuperscript{34} The court further noted that the state cannot interfere with the constitutionally protected parent/child relationship unless the court adjudicates the child a ward of the state. “Just because one child in a family is adjudicated as a child coming under the Nebraska Juvenile Code does not provide a juvenile court carte blanche jurisdiction over the adjudicated child’s unadjudicated siblings.”\textsuperscript{35} The supreme court reversed the trial court and vacated the visitation order.\textsuperscript{36}

\textit{In re D.W.} is problematic for several reasons. First, nowhere in the opinion does the court define the nature of siblings’ association rights. We are, therefore, left with the following possibilities: (1) the boy did not have a statutory or constitutional right to associate with his sister; (2) regardless of the boy’s constitutional or statutory right to visit with his sister, the court lacked the jurisdiction to provide him a remedy because it did not have personal jurisdiction over the sister;\textsuperscript{37} or (3)

\begin{itemize}
  \item \textsuperscript{30} \textit{In re Interest of D.W.}, 542 N.W.2d at 409.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{In re Interest of Daniel W.}, 529 N.W.2d 548, 552 (Neb. Ct App. 1995). The son’s parents had refused to be involved in family reunification efforts and the son had not seen his sister since she was six months old. \textit{Id.} at 552.
  \item \textsuperscript{33} \textit{In re Interest of D.W.}, 542 N.W.2d at 409. A guardian ad litem was not appointed to represent the sister’s interests at this hearing. \textit{Id.}
  \item \textsuperscript{34} \textit{Id.} at 410.
  \item \textsuperscript{35} \textit{Id.}
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} Of course, the court’s holding goes well beyond the issue of personal jurisdiction. Suppose that the daughter applied for visitation rights with the son. In that case, even though the court would have personal jurisdiction over the daughter, under its theory, the court could still not grant visitation unless it found the child a ward, otherwise the court would be infringing upon the parents’ fundamental right to parent. Another way the court could avoid the issue is by holding that the child lacks standing to bring a visitation motion. However, both of those views clearly abrogate siblings’ associational rights by finding preeminent the parents’ right to rear their child. The court does not even analyze whether there is a manner of reasonably accommodating both
assuming jurisdiction, the boy's associational right depended upon a finding that visitation was in the sister's best interest. Dependency courts frequently order family counseling, which often includes all family members, even nonadjudicated minors. Of course, it is relatively simple for the court to gain jurisdiction over the sister in \textit{D.W.} If the Department files a petition alleging that the parents' refusal to permit reasonable visitation between the brother and sister will cause the sister unreasonable emotional harm, the court could make the sister a ward of the state and order either sibling visitation or that the sister be placed with the maternal grandmother.

Another way in which courts continue to deny sibling association is by determining that they lack inherent equitable jurisdiction to order such visitation. For example, in \textit{Scruggs v. Saterfiel},\textsuperscript{38} after a girl's mother died, she went to live with her aunt while her half-brother remained with his father. The aunt and girl sought visitation with the girl's half-brother.\textsuperscript{39} The magistrate, who heard the visitation motion and "found that there was no legal basis for the motion as filed," determined that the motion was frivolous, and ordered the aunt and girl to pay five-hundred dollars in attorney fees plus costs.\textsuperscript{40} Although the court of appeals set aside the award of attorney fees and costs, it held that in the absence of a statute, the court lacked jurisdiction to order sibling visitation.\textsuperscript{41} Even though the court noted the legislature's clear statement to preserve the best interests of children's emotional bonds by statutorily creating a grandparent/grandchild visitation statute, it determined that no analogous sibling visitation statute had been promulgated.\textsuperscript{42} "Despite our respect for the preservation of sibling bonds, however, it is not our prerogative to make new laws governing sibling visitation. That decision belongs to the legislature."\textsuperscript{43} The \textit{Scruggs} court did not discuss the legal nature of siblings' association or whether a statute that provides such rights would be constitutional in cases where both siblings were not wards of the court.

\textsuperscript{38} 693 So. 2d 924 (Miss. 1997).
\textsuperscript{39} \textit{Id.} at 925.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.}
The *L.*, *et al. V. G. & H* opinion contrasts sharply with the *D.W.* and *Scruggs* opinions. In *L.*, adult siblings sought visitation with their minor siblings; however, their father and stepmother objected. The parties entered into a "Consent Final Judgment" reviewable for ninety days, which permitted visitation between the adult siblings and the minor siblings twice per month, reasonable telephone access, and exchange of presents. Subsequently, the adult siblings filed a motion to visit with the minor siblings outside of the parents' home, which the parents again opposed. The court first determined that by analogy to post-judgement matrimonial litigation, it had jurisdiction over the visitation issue and the adult siblings had standing as immediate family members to bring the action. The court found that "siblings possess the natural, inherent and inalienable right to visit with each other . . . subject to the requirement that such visitation be in the best interest of a minor child . . ." It noted that parents' objections to sibling visitation are merely one factor to be considered in determining the best interests of the children. Because the court found that the minors would be thrust into an emotional turmoil between the parents and adult siblings, it denied the sibling visitation motion based upon a best interests analysis. However, even though the *L.* court recognized the constitutional basis of siblings association rights, the court did not require a heightened burden of proof, such as a finding by clear and convincing evidence.


The next set of cases concerns the value of continuing the sibling bond when all siblings must be placed in different foster, prospective adoptive, or adoptive homes due to the termination of parental rights. These cases are most interesting because the court is not required to factor in biological parents' fundamental right to rear their child when determining whether to separate siblings or to permit post-termination contact between siblings. There are a number of positions that courts take: (1) because there are no conflicting parental constitutional rights, siblings' constitutional right to association may only be

45. *Id.*
46. *Id.* at 217.
47. *Id.* at 217-18.
48. *Id.* at 222.
49. *Id.*
denied when based upon a compelling state interest and using the least drastic alternative; (2) because no fundamental parental rights are involved, siblings have a presumptive right to stay together or to continue visitation if it is necessary to split them into different post-termination homes; (3) the bond between siblings is only one factor in determining the best interest of the children; and (4) the new prospective custodial parents' preference shall receive presumptive consideration. The following cases illustrate a number of approaches used in determining the value that sibling bonds will have in deciding post-termination placements and visitation orders prior to finality of adoption.

In the Interests of David A. reveals a tragic story of domestic abuse, incompetent parenting, foster care drift, and the separation of extremely bonded siblings into different post-termination homes. Four-year-old David was taken from his parents' home by the Department of Social Services when he was approximately a year-and-a-half-old. His three-year-old brother, Andrew, was taken from his parents at birth and, therefore, never lived with them. During family reunification, David lived in five different foster homes and was sexually abused in one of those placements. David and Andrew "enjoy[ed] each other's company and have a close sibling bond," which developed during their visits with one another. Evidence also demonstrated that David "had a bond and strong attachment to his [then] present foster mother." In determining the post-termination permanent placements for David and Andrew, the court ordered a psychological study of "the nature and extent of each boy's attachment to the foster family and each other." However, the court noted that the possible psychological disruption of separating either of the siblings from the current foster parents was a strong consideration in determining permanent placements. The court did not consider whether the siblings' had a constitutional right to stay together and did not give the sibling bond presumptive consideration. Instead, the court indicated that a best interest standard would be employed to compare the

51. Family reunification is best defined as: "whenever a child is removed from a parent's or guardian's custody, the juvenile court is required to order the social worker to provide child welfare services to the child and the child's parents or guardians for the purpose of facilitating reunification [reuniting] of the family." GARY SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE 2-145 (1997).
52. 1998 WL 910258 at *5.
53. Id.
54. Id.
55. Id.
effects of separating the siblings from one another versus separating the siblings from their different foster parents.56

The court’s analysis in David A. substantially undervalues the sibling bond and right to association by reducing sibling association to a mere variable in a best interest decision. Indirectly, therefore, the court elevates the foster parents’ right to associate to the same level of importance as the siblings’ right to associate. This is a curious result when viewed historically because most cases have determined that foster parents’ right to associate are of a much lower order than those involving biological family relationships. One might distinguish biological parents’ association rights from those of foster parents’ based upon the distinction between vested and expectancy rights; foster parents merely hope that they may one day have a vested and permanent custodial arrangement with the foster child.57 Because bonded siblings already have a vested right to associate, which is not subject to vesting upon a condition subsequent and not subject to a continuing contractual relationship with the state, why should their right to association be treated as merely equal to the foster parents’ rights?

A better analysis in cases where parental rights have been terminated is one that treats the siblings’ association right as fundamental and requires the state to demonstrate by clear and convincing evidence that a compelling state interest of protecting the children’s best interest requires splitting them into different permanent homes. Under this analysis, the state can marshal expert testimony regarding the psychological harm to the children caused by separating one or more of the siblings from their current foster parents with whom they have bonded. Although the court might come to the same conclusion as a court that uses the David, A. best interest test, the fundamental rights analysis requires the state to use a less drastic alternative standard, which might require continued sibling visitation even if the siblings are separated into different permanent placements. Or, as a

56. Id. at *6-8.
57. See Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816 (1979). During the child dependency process, even when foster parents have temporary custody of children, most states do not grant foster parents “party” status. John DeWitt Gregory, Whose Child Is It, Anyway: The Demise of Family Autonomy and Parental Authority, 33 Fam. L.Q. 833, 835 (1999). Therefore, even though foster parents may be due some level of procedural due process before a foster child is taken from them, that level of process is substantially less than that given to parties (parents and children). See, e.g., Cal. Welf. & Inst. Code §§ 315, 315.5, 350 (West 1998). In Worrell v. Elkhart County Office of Family and Children, the Indiana Supreme Court held that former foster parents lacked standing to seek visitation with their former foster children who were placed with new foster parents. 704 N.E.2d 1027, 1029 (1998). The court stated that “[u]nlike parent and step-parent relationships, foster relationships are designed to be temporary . . . [and] is [sic] contractual . . . .” Id.
lesser alternative almost never considered by courts, the siblings might be placed together and the bonded foster parents could be given a right to visit with the sibling.

_In the Matter of Collins_ is an intriguing case, which uses the siblings’ bonding that included foster families as a sword to terminate the father’s rights and separate the siblings into different post-termination placements. This case involved a dysfunctional family that included a father involved in drug abuse and crime, and a mother who could not explain to hospital physicians the numerous bruises on her child. Department of Family Services (Department) could not find a foster family that would care for all three children; therefore, five-year-old Mattie and four-year-old Harry were placed together, and two-year-old Joshua was placed with a different foster family. Although the Department provided several years of reunification services, the mother barely participated. The father was incarcerated for much of the reunification period and once released, his participation was minimal, he continued to drink, allegedly committed domestic violence on several occasions, and was again incarcerated. Finally, the Department filed a termination petition, which was contested only by the father. After determining that the Department clearly made reasonable efforts to reunify the family, the court terminated the father’s parental rights. The court noted that termination was in the children’s best interests, in part, because the children had bonded with their foster families. But what is perhaps most unique about this case is the court’s use of the sibling bond as grounds for terminating parental rights: “As an additional basis to find that termination is in the children’s best interests, the evidence establishes that the two foster families have encouraged visitation between the two children and that they will continue to do so. Thus, even their sibling bonds will not be severed.”

The _Collins_ court’s use of the continuation of sibling bonds after termination as one ground for terminating parental rights is extremely interesting for a number of reasons. First, it raises the issue whether parents can now marshal the absence of post-termination sibling association as a rebuttal to petitions to terminate rights. It seems only fair that if such sibling contact can be marshaled in favor of termination then it should also be permitted to rebut the wisdom of termination. Second, what assurance does the court have that the foster families

59. _Id._ at *1-8.
60. _Id._ at *17-18.
61. _Id._ at *18.
will continue sibling visits? In Collins, there was no court order requiring such visits and although both sets of foster parents indicated a willingness to adopt the children, there was no assurance that visitation would continue after the termination of the father's parental rights or that the foster parents would have, indeed, adopted the children.

Finally, in In re Christina L.,
62 the appellate court noted that the trial court, which terminated the parents' rights to two siblings, committed an error by failing to determine "what steps could be taken to preserve their sibling bonds - such as visitation rights with each other." Christina L. serves as a transition case with the next set of cases that consider sibling bonds as a factor in determining which adoptive family should be selected for children after their parents' rights have been terminated. Although Christina L. determined that post-termination placement of siblings is a necessary component of the termination hearing, the next section illustrates that some courts hold that post-termination placement is outside the ambit of the court's purview during the termination of rights hearing. As discussed below, the determination of when post-termination sibling placements will take place, either at the termination hearing or at some post-termination adoption hearing, may have a dramatic effect upon the continuation of siblings' association.

3. The Sibling Bond As a Variable in Determining the Appropriate Adoptive Family.

This line of cases is concerned with the appropriateness and legality of post-adoptive sibling visitation. These courts are concerned not only with the required timing of such decisions, but also with whether, and under what circumstances, the court can order post-adoption sibling association.

For instance, in Adoption of Vito,
64 although the trial court determined that the biological mother was unfit to care for her son, Vito, the court refused to grant the Department of Social Services' (Department) motion to dispense with the mother's consent to adoption.
65 However, the court further found that Vito had bonded with his foster family and ordered that the Department submit "'a new plan for adoption which provides . . . [for maintaining] post adoption contact between [Vito] and [his biological mother] and [Vito's] [three] biologi-

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63. Id. at 700.
65. Id. at 1191.
The court of appeals determined that the trial court erred in denying the Department's petition to obviate the mother's consent to adoption because the trial court determined that the mother was unfit to care for Vito. The court of appeals determined that the trial courts' concern regarding post-termination visitation was an insufficient reason for denying the Department's motion because "the question of [post-termination] visitation is separate and distinct from the question whether the child's best interests require termination of parental rights." However, the court of appeals concluded that "the judge had authority to order revision of the department's plan to include visitation with Vito's biological mother and siblings."

The distinctions in *Vito* are not merely epistemological. Severing the issues of termination of parental rights from post-termination sibling visitation is a decided advantage for the Department because it is often difficult, if not impossible, for the Department to assure the court at the termination hearing that post-termination sibling association will be guaranteed. If such sibling visitation was a condition precedent to termination, the Department would often not be able to meet its burden because an adoptive family may not yet have been located. However, unlike other courts discussed below, the *Vito* court made a very wise decision in holding that the trial court has jurisdiction at the termination hearing to require the Department to seek a permanent post-termination placement that will further the child's contact with biological siblings, and perhaps with the biological mother, as well. But the *Vito* court also noted the complexity of trial courts' requirements of post-termination visitation. It stated that if a prospective adoptive family is informed of the necessity of sibling association prior to the placement of the child, the trial court can clearly order such visitation. However, the court noted that it would reserve for another day the question of "whether a judge can order postadoption [sic] visitation where a child has been placed with pre-adoptive [sic] foster parents who clearly oppose such visitation with the biological parents." This statement by the court is somewhat ambiguous because it is uncertain to which kind of cases the court is referring. If the court is referring to a case in which a judge orders visitation after an adoption has been finalized, then the court raises a

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66. Id.
67. Id. (quoting a decree of the trial judge (citation omitted)).
68. Id. at 1193.
69. Id. at 1194.
70. Id.
71. Adoption of Vito, 712 N.E.2d at 1194.
case in which the vested and fundamental parental rights conflict with siblings’ right to associate because adoptive parents have equivalent legal rights to biological parents. It might be argued that unless the court has jurisdiction over all siblings who have been placed in adoptive homes, the court lacks the authority to order such post-adoption visitation even if it is in the best interest of the siblings. However, if the Vito court is concerned, instead, with whether the court may order post-adoption sibling visitation prior to the finality of adoption by the prospective adoptive parents who object to such visitation, the court raises an easier issue because the prospective adoptive parents do not have a fundamental right to rear the child at that point. The better approach is to hold that the trial court has jurisdiction to order post-adoption visitation until the adoption has been finalized. Otherwise, if prospective adoptive parents, who have custody based in part on their agreement to permit sibling post-adoption visitation, change their minds, the court would not have the ability to require such visitation. Further, if the court lacks the ability to order post-adoption visitation, children will have no leverage in arguing that one set of prospective parents that is willing to permit continuing sibling contact should be selected as the adoptive parents, rather than another set of prospective parents that rejects continued sibling visits. Therefore, the better approach is to hold that the trial court has jurisdiction to order post-adoption visitation up to the time that the adoption is finalized.

In Los Angeles County Department of Children And Family Services v. Superior Court & Paul C., California took a very different approach to post-termination sibling association. In Paul C., an Oregon family, the G.’s, had adopted one of Mrs. C.’s children eleven years earlier. Subsequently, Mrs. C. gave birth to Paul C.; however, because Mrs. C. tested positive for cocaine, the custody of Paul C. was transferred to a foster mother, Mrs. B., five days later. He remained with Mrs. B. for over a year during which family reunification services took place. The Department of Children and Family Services (Department) received information that the G.’s were willing to adopt Paul C. so that the siblings could be reared together. Paul C.’s foster mother, Mrs. B., with whom he had lived most of his life, was also willing to adopt him. At a review hearing, the Department informed

72. See, e.g., CAL. FAM. CODE § 9305 (West 1998) (providing that adoptees and adoptive parents have a legally identical relationship as natural parents and their children).
73. 72 Cal. Rptr. 2d 369 (Ct. App. 2 Dis. 1998).
74. Id. at 370-74.
75. Id.
the court of the G.'s interest in adopting Paul C. The court ordered the Department to institute an Interstate Compact on Placement of Children with Oregon to determine if placement with the G.'s would be in Paul C.'s best interest. The Department's report indicated that Oregon certified that it would help facilitate the G.'s adoption of Paul C. It also noted that Paul C. was bonded to Mrs. B., who wanted to adopt him but understood the importance of Paul C. being with his half-sibling. Therefore, she agreed to assist with the G.'s adoption.

Over the objection of the Department, the court granted Paul C. a vacation with the G.'s and ordered Los Angeles County to provide the airfare. The Department argued that because Mrs. B. had already begun the adoption process, she had a statutory priority in the adoption proceedings. Subsequently, Mrs. C.'s parental rights were terminated, and the court ordered adoption as the permanent plan. The trial court agreed that the Department, not the court, generally has jurisdiction to determine the appropriate adoptive family. However, the court found that the dilatory nature of the Department's treatment of the Interstate Compact led Mrs. B. to change her mind and oppose the G.'s adoption of Paul C.

The court of appeals in Paul C. indicated that the sole issue before the court was not who should adopt Paul C., Mrs. B. or the G.'s, but rather “with whom shall Paul be placed pending the adoption decision?” The court of appeals determined that under the Family Code, the Department has the exclusive discretion to decide where the child shall live pending finality of adoption, and that the trial court may overrule the Department only if it determines that there has been an abuse of discretion. Because the court of appeals determined that the Department did not abuse its discretion in finding that Paul C. should remain with Mrs. B. pending finality of the adoption, it found that the trial court abused its discretion by placing Paul C. with the G.'s. The court of appeals refused to consider several constitutional challenges to the statutory scheme because those issues, including the question of whether siblings have a constitutional right to association, had not been litigated in the trial court. However, Justice Baron, in his dissent, argued that the constitutional issues were dispos-

76. CAL. FAM. CODE § 7900-7912 (West 1998).
77. Id. at 372.
78. Id. at 372-73.
79. Id. at 373-374.
80. Paul C., 72 Cal. Rptr. 2d at 374.
81. CAL. FAM. CODE § 8704 (West 1998).
82. Paul C., 72 Cal. Rptr. 2d at 374-75.
83. Id. at 375-76.
itive: "Paul has fundamental and constitutionally protected interests in his relationships with families to which he has emotional ties, and hence a due process right to a meaningful voice in decisions that affect these interests." Justice Baron found that the Family Code violated Paul C.'s right to due process of law because it did not provide him with a mechanism for challenging the Department's post-termination, pre-adoption placement. Justice Baron determined that Paul C. had a "fundamental interest in dwelling with his sibling, and in the decision to place him with one of the loving families that wish to adopt him. He is therefore entitled to independent judicial review of the Department's transfer request . . . ." The consequence of the Paul C. decision is that children in California do not have standing to argue their best interest during the period between the termination of parental rights and the finality of adoption. The Paul C. decision further subverts siblings' associational rights to the discretion of the Department. The Department can, therefore, stack the deck against the child's stated preference by placing the child with the prospective adoptive parent chosen solely by the Department. The custody and bond with those prospective adoptive parents will almost assuredly result in a finality of the adoption by creating a statutory priority for the Department's chosen adoptive home. The California approach in Paul C. strips the trial court of the authority to consider the best interest of children whose parents' rights have been terminated. The approach taken by Massachusetts in Vito is preferable because the trial court retains jurisdiction over the placement of the child until the finality of adoption, and all parties, rather than only the Department, will have input on the appropriate pre-adoptive and adoptive placement.

84. Id. at 377.
85. Id. at 378-79.
86. Id. at 382.
87. There is a significant difference between a case in which the trial court merely substitutes its judgement for the Department's regarding the child's best interest and a case in which the trial court hears evidence from all parties and then decides on an appropriate placement. The former may, as the Paul C. majority noted, violate California Welfare & Institutions Code section 366.26(i) and Family Code section 8704; however, the latter does not. By holding that the minor did not have a right to a hearing on the pre-adoptive placement the court of appeal made it almost impossible for the trial court to determine whether the Department abused its discretion regarding that placement.
88. See Cal. Fam. Code § 8708 (West 1998) (setting forth a presumption for adoption with a relative if one exists, or if not, then with current foster parents if the child has been in their care for at least four months).
However, the harshness of the Paul C. approach has been partially ameliorated by In re Cliffton B., which held that the twenty-month-old and ten-year-old siblings were provided incompetent representation after they were removed from their parents’ home and placed in separate foster homes with reduced sibling visitation. By holding that the incompetence of counsel was a reversible error, requiring a new hearing on post-termination sibling visitation, the court importantly noted:

the maintenance and strengthening of the fraternal bond during these months [between the selection of a permanent plan for each child and the termination of parental rights] may have a significant influence on the willingness of the prospective adoptive parents to continue sibling contact and on the visitation plan SSA is required to formulate in its final adoption report.

Because the court in In re Cliffton B. recognized that zealous and competent representation of siblings’ post-termination sibling visitation rights were required by the children’s attorneys during the pre-termination hearings, it is less likely that the decision in Paul C. of limiting the trial court’s jurisdiction to change post-termination sibling visitation will have much effect. If the Department suddenly deviates from its position regarding the post-termination sibling visitation that it agreed to in pre-termination permanent planning, then under Paul C., the court would have jurisdiction to determine whether the Department abused its discretion. Therefore, at the hearing, the Department would be required to substantiate its changes in post-termination sibling visitation.

Other states have given trial courts much greater power than California has granted to decide the appropriate post-termination and adoptive placements, as well as visitation rights among siblings. For instance, in Adoption of Lars, the court determined that although adoption law is a statutory creation, courts have equitable power to determine post-termination placements and post-adoption visitation conditions, which may be imposed upon the adoptive parents. The Lars court noted that a court may consider the willingness of the prospective adoptive parents in granting post-adoption visitation as a factor in determining which adoptive parents to select in the best interests of the children. A Connecticut court, in In the Interest of

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89. 96 Cal. Rptr. 2d 778 (2000).
90. Id. at 786.
91. Id.
93. Id. at 1190-91.
94. Id. at 1192.
Shamika F.,\textsuperscript{95} used its equitable jurisdiction after terminating parental rights to order that the current "foster parents, who have expressed a willingness to adopt these children [three bonded siblings], be given first consideration in such adoption."\textsuperscript{96}

Although American courts have been reluctant to determine that siblings' association is a fundamental constitutional right, the trend is for courts to treat sibling bonds as an extremely important variable in determining their best interest. However, perhaps the most important new development since 1991 is courts' willingness to consider post-adoption sibling visitation even in the absence of statutory authority and in the face of opposition by the Department and/or the prospective adoptive parents.

B. Post-1991 Sibling Statutes

There is no single trend in the statutory treatment of siblings' rights to associate. Although almost all states have at least one statute recognizing the importance of sibling bonds, some states, such as South Carolina, did not pass a sibling statute until 1998.\textsuperscript{97} Although every state currently considers sibling association among emotionally bonded children an important governmental interest, most state statutes do not create a right to sibling visitation;\textsuperscript{98} rather, they posit the sibling bond as merely one variable in a best interest test to determine where children should be placed once separated from their parents.\textsuperscript{99} Some states require "reasonable efforts" to place siblings together,\textsuperscript{100} while others create a presumption that sibling visitation is in the children's best interest.\textsuperscript{101} In addition to the creation of sibling visitation


\textsuperscript{96} Id. at *6.


\textsuperscript{100} See, e.g., Haw. Rev. Stat. Ann. § 587-53(f)(2) (Michie 1999) (stating that "[e]very reasonable effort has been or is being made to place siblings or psychologically bonded children together . . .").

\textsuperscript{101} See, e.g., N.Y. Soc. Serv. Law, § 358(a)(11)(b) (McKinney 1992) (providing that "[p]lacement or regular visitation and communication with siblings or half siblings shall be pre-
statutes, three other statutory developments constitute emerging trends: (1) granting siblings standing to raise visitation issues; (2) pre-adoptive sibling visitation; and (3) post-adoptive or permanency plan visitation.

1. Standing

Prior to 1991, statutes did not address siblings' standing to bring visitation issues before the court. Today, there are a variety of such statutes.\footnote{Most state courts have adopted a "'no [sibling visitation] statute - no standing-no right to visitation' rule." Joel V. Williams, Sibling Rights To Visitation: A Relationship Too Valuable To Be Denied, 27 U. Tol. L. Rev. 259, 287 (1995). See also, Marrus, supra note 7, at 999-1003 (discussing the lack of sibling standing in family law courts).} Some states, such as Maryland, specifically grant siblings standing: "[a]ny siblings who are separated due to a foster care or adoptive placement may petition the court, including a juvenile court with jurisdiction over one or more siblings, for reasonable visitation rights."\footnote{MD. CODE ANN., FAM. LAW § 5-535.2 (1999).} Another approach is to permit standing only if the child has attained an age that the legislature considers sufficiently mature to permit the child to have the capacity to make a reasoned choice among alternatives. For instance, Massachusetts provides that "[a]ny child who has attained the age of 12 years, may request visitation with siblings who have been separated and placed in care or have been adopted in a foster adoptive home other than where the child resides."\footnote{See also, N.Y. Soc. Serv. LAW § 71 (McKinney 1999).} New York provides siblings an opportunity to visit, but only if "equity" demands such a result and "a proper person on his or her behalf" petitions the court.\footnote{MD. CODE ANN., FAM. LAW § 5-525.2(a) (1999).}

Although the trend of providing children standing to petition for sibling visitation is a step in the right direction, standing may be illusory absent a requirement that the sibling be notified of the right to visit and/or the right to have counsel represent the sibling in court. For instance, how is a very young child going to learn that he or she has a sibling residing elsewhere? We cannot presume that as the minor matures, the foster parents will necessarily inform the child of his or her siblings, or that the foster parents will even know that such

\footnote{MD. CODE ANN., FAM. LAW § 5-525.2(a) (1999).}

\footnote{MASS. GEN. LAWS ch. 17, § 26(5) (1999).}

\footnote{N.Y. SOC. SERV. LAW § 71 (McKinney 1999).}
sibling's rights exist. In addition, if court's do not continue the appointment of counsel for children after the termination of parental rights, but before a permanent plan for adoption or guardianship is finalized, the child will not have an attorney to advocate for sibling association.

2. "Pre-Adoptive"/Permanency Planning Sibling Contact

Legislators have begun to realize that sibling association must be addressed at intake rather than being postponed until parents have been found unfit because the initial out-of-home placement may be determinative of the quality and duration of the sibling bond. For instance, California requires the court to determine sibling visitation issues at the first detention hearing, which normally occurs within one judicial day of the Department taking the children into protective custody. In addition, instead of placing the entire burden of visitation on the siblings and their temporary guardians or foster parents, some states are beginning to assist in the micro-management of sibling visits. For instance, New Jersey has not only created a right to sibling visitation, it has also defined the right to include "the provision or arrangement of transportation as necessary." Finally, it is becoming clearer that the Department has a duty to investigate and foster sibling registries which permit adult siblings to locate one another are an inadequate remedy since they do not provide children the means of locating one another during the several years in which they may be separated into different out-of-home placements. See, e.g, Ark. Code Ann. § 9-9-504 (Michie 1999); Colo. Rev. Stat. § 19-1-307 (1999); Fla. Stat. Ann. § 63.165 (West 2001); Ga. Code Ann. § 19-8-23 (1999).

106. Sibling registries which permit adult siblings to locate one another are an inadequate remedy since they do not provide children the means of locating one another during the several years in which they may be separated into different out-of-home placements. See, e.g., Ark. Code Ann. § 9-9-504 (Michie 1999); Colo. Rev. Stat. § 19-1-307 (1999); Fla. Stat. Ann. § 63.165 (West 2001); Ga. Code Ann. § 19-8-23 (1999).

107. See In re Jesse C., 84 Cal. Rptr. 2d 609, 613-15 (Cal. 1999). The appellate court upheld the discretion of the trial court to terminate the child/attorney client relationship upon a finding that the minor would no longer benefit from the appointment of counsel even though the child had not yet been permanently placed in an adoptive home or long-term guardianship. Id. Since the California Legislature has recently created a means of post-adoption sibling visitation, under Jesse C., there may no longer be an attorney available to assist siblings in regaining or keeping contact. Id. See Welf. & Inst. Code § 16002 (1998). See also, William Wesley Patton, Searching For the Proper Role of Children's Counsel in California Dependency Cases; Or, the Answer to the Riddle of the Dependency Sphinx, 1 J. Center Children Courts 21, 34-35 (1999). Attorneys in Los Angeles who are appointed to represent children are mandated to "explore and argue for appropriate visitation orders between the child . . . [and] siblings . . . [and] [w]hen appropriate, the attorney shall seek an order allowing the child to have an after-court visit with siblings . . . ." Los Angeles County Superior Court Rules, Rule 17.16 (West 1999).


110. N.J. Stat. Ann. § 9:6B-4(f) (West 1999). But see, Cal. Welf. & Inst. Code § 16501.1 (11)(g) (West 2001) (providing that "[n]othing in this section shall be construed to require or prohibit the social worker's facilitation, transportation, or supervision of visits between the child and his or her siblings."
ling visitation during concurrent planning; the initial case plan must consider how to facilitate sibling association irrespective of whether the children are reunited with their parents or permanently placed outside their home. Therefore, even though courts and legislators have not delineated sibling association as a fundamental right, the Department, in a growing number of states, has been mandated to consider sibling bonds and to continue sibling contact at every stage of the dependency process.

3. Post-Adoption/Permanency Planning Sibling Association

Prior to 1991, almost all courts denied post-adoption sibling visitation for one of two reasons: (1) many jurisdictions had “closed” adoption schemes in which the child’s new address and the identity of the adopting parents were confidential; and (2) it was considered wiser to allow the adopting parents control over who should have access to the new adoptive family unit rather than having the court impose additional relationships. However, it is in this area of post-adoption sibling contact that dependency law has quickly and radically evolved.

It is interesting to note that recent post-permanency planning sibling association statutes are devoid of policy language that recognizes the overriding interest of adoptive parents’ rights to control the selection of those with whom the adoptive sibling will or will not have association. For instance, there is no discussion of balancing the rights


112. The future of closed adoption schemes is currently in doubt since adoptees are gaining ground in receiving access to their natural parents’ names. For instance, Alabama, Alaska, Tennessee, Delaware, Kansas, and Oregon permit adult adoptees access to their original birth certificates which usually contain their birth parents’ names. Justice Rejects Block on Adoption Law, L.A. Times, May 31, 2000, at A14. The day that the Oregon law went into effect “[m]ore than 2,200 adoptees already . . . [had] paid $15 and filed applications with the state Health Division to get their original birth certificates.” Cain, supra note 7, at 8.


115. “[C]ourts have begun to emphasize the sibling relationship and to place it above the wishes of adoptive parents.” Troy D. Farmer, Protecting The Rights of Hard To Place Children In Adoption, 72 Ind. L.J. 1165, 1172 (1997). However, the final draft of the Uniform Adoption Act “authorizes enforceable open adoption orders only in the limited category of stepparent adoption.”
of the adoptive parents with the siblings' rights to have contact. Instead, most statutes merely use a best interest of the sibling standard in determining whether, and under what circumstances, communication will continue. For example, Florida requires the state "[t]o make every possible effort" to have siblings adopted into the same adoptive home or if that is not possible, "to keep them in contact with one another" after the adoption. Florida goes even further by declaring that siblings have a right to post-adoptive association, and it further provides the court with jurisdiction to determine "the nature and frequency of the communication or contact" between siblings.

But some states have gone further in assuring that sibling association receives preeminent consideration as an integral component of permanency planning. These states make continued sibling contact a discrete variable in determining which parents will be granted adoption. These statutes are of critical importance because they, in effect, require the Department to locate prospective adoptive parents who are willing to permit continued association among brothers and sisters. For instance, Illinois requires that in "determining which prospective adoptive family to select the court shall consider the value of preserving sibling ties." West Virginia assures that even if siblings are separated into adoptive homes at different times, they will be able to not only continue contact, but possibly be placed in the same adoptive home by requiring the Department to notify the siblings' adoptive parents of the availability of his brother or sister for adoption.

Adoptions. Section 4-113 of the UAA authorizes the judicial creation and enforcement of post-adoption visitation rights for the former parent, as well as certain other persons, based upon a determination of the adopted stepchild's best interests." Margaret M. Mahoney, Open Adoption In Context: The Wisdom And Enforceability Of Visitation Orders For Former Parents Under Uniform Adoption Act § 4-113, 51 FLA. L. REV. 89, 90-91 (1999). The UAA drafters stated that the "purpose of the open adoption law is to increase the number of stepparent adoptions by providing an incentive to noncustodial parents to consent to such procedures." Id. at 97.

117. FLA. STAT. ANN. § 63.022(1) (West 2001); FLA. STAT. ANN. § 39.811(7)(b) (West 1999). "Effective May 14, 1998, if a birth parent's parental rights have been terminated . . . the court may order continued contact between the child and any siblings not included in the adoptive proceeding." Cynthia Swanson, Adoption, Paternity, and Other Florida Family Practice, APF FL-CLE-2-1 (1998). Several states now require the court and Department to consider sibling association as part of the permanent placement plan. See, e.g., ARIZ. REV. STAT. ANN. § 8-525.01(H) (West 1999) (sibling visitation must be considered in a long-term guardianship); ARK. CODE ANN. § 9-27-338(e)(3) (Michie 1997) (permanent planning must consider the reasons for sibling separation and "the efforts . . . to reunite the siblings as soon as possible . . . .")); Mass. Title XVII § 23(A) (1999) (court must periodically review post-adoptive sibling visitation); VT. STAT. ANN. tit. 15 § 4-112(a) (2000).
119. W. VA. CODE § 49-2-14(d) (1999). California requires that "[w]here a child is being considered for adoption, the department or licensed adoption agency shall . . . [consider whether]
West Virginia has tipped the scales toward keeping sibling association alive after adoption proceedings by shifting the burden of proof onto any party who opposes post-adoption sibling visitation and elevating the standard of proof to clear and convincing evidence. West Virginia is the first state to elevate sibling association rights to the equivalent fundamental nature of parent/child associational rights, which also require proof by clear and convincing evidence before terminating parent/child relationship.

Today, there is a continuing trend both in judicial opinions and legislative action to recognize the importance of the sibling bond. But where do we go from here?

III. Sibling Association in the Next Millennium

It is unlikely that the United States Supreme Court will soon declare sibling association a fundamental liberty interest. The Court recently declined an opportunity in the Hugo case to determine this issue. Unfortunately, the Supreme Court has no satisfactory methodology to determine conflicting fundamental rights among several groups of individuals. Rather, it views these conflicts as zero-sum games, in which recognizing one set of fundamental rights subtracts from another group’s. Historically, whenever children’s constitutional placement would permanently separate the child from other siblings who are being considered for adoption or who are in foster care and an alternative placement would not require the permanent separation . . .” Cal. Fam. Code § 8710 (West 1999).

In our earlier article, Dr. Latz and I argued that a compelling state interest analysis with proof by clear and convincing evidence is the appropriate standard for determining sibling association separation. Patton & Latz, supra note 1, at 797-800.

Many states now provide a variety of enforcement mechanisms to assure post-adoption visitation, such as contempt, incarceration, compensatory and punitive damages, fines, “make-up” visits, mandatory counseling, and/or community service. Mahoney, supra note 103, at 136-37.

Although two courts have found a constitutional basis for sibling visitation, even in those cases, the courts’ analyses are different from the fundamental rights analysis applied to parents’ rights to associate with their children. Aristotle P. v. Johnson, 721 F. Supp. 1002, 1006 (N.D. Ill. 1989); James M. v. Maynard, 408 S.E.2d 400, 410 (W. Va. 1991). Those courts merely analyzed the best interest of each sibling to continue contact and neither case required a demonstration by clear and convincing evidence that such visitation should not take place. Aristotle P., 721 F. Supp. at 1006; James M., 408 S.E.2d at 410. Judges have great difficulty simultaneously recognizing the child as an individual and as a group member. “Judges who decide abuse and neglect cases should view the child as a member of a family, not as an isolated member of society . . . . However, judges should be very self-conscious in thinking about children as members of families. They should not allow their attention to stray from the welfare of the children, and should be made aware of the danger of slippage occasioned by the parent-centered nature of family law jurisprudence.” James G. Dwyer, Children’s Interests In A Family Context–A Cautionary Note, 39 Santa Clara L. Rev. 1053, 1073 (1999).

Supra notes 18-20 and accompanying text.
rights have been balanced against parents’ or a state’s compelling interest, children have lost.\textsuperscript{125}

Even though the Constitution may never provide protection for siblings, there are at least two current statutory trends that when viewed together will substantially increase the number of siblings who remain together after the termination of their parents’ rights: (1) concurrent planning and (2) kinship adoption.

\textbf{A. Concurrent Planning and Sibling Association}

It is yet to be determined whether concurrent planning, by itself, will be beneficial or detrimental to siblings’ rights. Unfortunately, the first major study of concurrent planning did not address its effects on siblings.\textsuperscript{126} One possibility is that concurrent planning will exacerbate the percentage of children whose parents’ rights are terminated, thus freeing siblings for permanent placements outside the home,\textsuperscript{127} but not necessarily in the same placement. The percentage of parents whose rights are terminated under concurrent planning statutes varies drastically from state to state and sometimes even county to county within a state. For example, in New Jersey only “[ten percent] of the children involved in Concurrent Planning go home,”\textsuperscript{128} whereas in Colorado, the percentage of children returning home varied from thirty percent to forty-eight percent among counties.\textsuperscript{129} In North Dakota, for “those children with a filed TPR [termination of parental rights], about eighty percent of parents voluntarily terminated their rights.”\textsuperscript{130} “The Concurrent Planning process may be perceived as a

\textsuperscript{125} Parham v. J.R., 442 U.S. 584 (1979). The Supreme Court held that parents, or the state if a child is in its custody, presumptively represent the child’s best interest even if the child disagrees with the parents’ or state’s determination of the child’s best interest. Mathews v. Eldridge, 424 U.S. 319 (1976). Thus, if a court engages in a balancing test to determine due process, the deck is always stacked against the child’s stated preference if it conflicts with the parents’ or state’s views on the child’s best interest. When one adds courts’ traditional suspicion of young children’s reasoning ability, it is almost impossible for children’s stated preferences to be treated equally with that of adults.

\textsuperscript{126} Lorrie L. Lutz, Concurrent Planning: Tool for Permanency Survey of Selected Sites (2001).

\textsuperscript{127} In addition to concurrent planning mandates, state statutes now expedite the time within which families can cure the problems which led to court jurisdiction, and some states have stripped reunification service from parents who commit an increasing number of specific acts of child abuse. See Cal. Welf. & Inst. Code § 361.5 (a)(2) (West 1998) (providing a maximum of six months of reunification services if the child is under three years old and section 361.5 (b) provides that “[r]eunification services need not be provided to a parent or guardian described . . . when the court finds, by clear and convincing evidence, any of the following” types of abuse (listing twelve specific fact situations)). Id. at § 361.5(b).

\textsuperscript{128} Id., supra note 114, at 22.

\textsuperscript{129} Id. at 23.

\textsuperscript{130} Id.
fast track toward adoption unless social workers are carefully supervised and the case review process is rigorous and objective so that it can truly become a fast track to good practice." The other possibility is that because permanency planning begins with the initial dependency hearing, the court and Department have more time to find a permanent placement willing to adopt or care for the sibling group if parental rights are terminated.

The Federal Government has not only mandated that states implement concurrent planning in order to receive economic assistance, it has also specified that "children under eight and their older siblings . . . " are a concurrent planning special target group. We are, therefore, likely to see many creative sibling concurrent planning statutes promulgated within the next few years. For example, a California bill would expedite the placement of a sibling group into permanent placements if one sibling is under three and another sibling is over three by stopping reunification services after a maximum of six months. The bill is interesting because group sibling status effectively becomes a state sword, limiting the natural parents' opportunity for reunification without the state having to prove that there is an actual prospective adoptive family willing to adopt the sibling group.

B. Kinship Care and Adoption

There are several reasons for states' recent emphasis on relative foster placements and relative adoptions. First, a focus on relative care mirrors contemporary American family structure in which "[r]oughly four million children under the age of eighteen live with a family

131. Id. at 24.
134. So far, most state statutes have merely mandated that sibling contact be considered as part of the concurrent permanent plan in order to meet federal requirements. See Miss. CODE ANN. § 43-15-13(7)(h) (2000) (requiring that concurrent planning shall consider the placement of siblings together); CAL. WELF. & INST. CODE § 361.3(a)(4) (West 1999) (requiring "[p]lacement of siblings and half-siblings in the same home, if that placement is found to be in the best interest of each of the children . . . "). See also, Ark. CODE ANN. § 9-27-338(a)(3) (Michie 1999).
135. California Assembly Bill 740 (Steinberg, Feb. 24, 1999).
136. The Federal government now provides "an additional $6,000 per additional foster child with special needs" that is adopted. Robert M. Gordon, Drifting Through Byzantium: The Promise And Failure of the Adoption And Safe Families Act of 1997, 83 Miss. L. REV. 637, 651-52 (1999). Because large sibling groups are defined as "special needs" children, the monetary supplement should help in placing more siblings together in permanent family arrangements. Id.
member other than a parent.”137 From 1988 to 1995, for instance, kinship foster care increased forty percent.138 Second, like concurrent planning, the Federal Government has focused on relative care as a new placement preference.139 Third, children placed outside the home with relatives experience less foster care drift, and relatives are more willing to keep large sibling groups together than are foster parents.140 Finally, kinship care is often cheaper than other forms of temporary foster placements.141 There are, therefore, many reasons for the new infatuation with relative care. However, even though kinship care may increase the number of siblings who remain together while being placed temporarily or permanently outside the natural parents' home, there is a danger that those children will be more at risk than other foster or adopted children because of the lowering of standards and mandatory periodic review of kinship care households.142

There is a positive synergistic relationship between concurrent planning and kinship adoption, which bodes well for increasing the quantity and quality of sibling association. Because concurrent planning forces the Department to look for an alternative permanent placement immediately, and since most states now give a priority to kinship placement, more siblings will be placed in the custody of relatives at a time when psychological bonding is paramount. Because more relatives are willing to adopt sibling groups than other foster parents and there is more stability in kinship care than in other foster care, it is

137. O’Laughlin, supra note 6, at 1448.
138. Wilder v. Bernstein, 49 F.3d 69, 71 (2nd Cir. 1995). One study in Texas showed that in the past year the state “doubled the number of children living with relatives.” Lutz, supra note 114, at 23.
139. “The Secretary may award grants to public and private nonprofit entities in not more than 10 States to assist such entities in developing or implementing procedures using adult relatives as the preferred placement for children removed from their home . . . .” 42 U.S.C. § 5106(3)(B) (1994). And the Federal government has determined to study “the nature, scope, and effects of the placement of children in kinship care arrangements, pre-adoptive homes, or adoptive homes . . . .” 42 U.S.C. § 5113(b)(6) 1994.
140. O’Laughlin, supra note 6, at 1451.
141. Some states pay relatives less than other foster parents to care for the children. Note: The Policy Of Penalty In Kinship Care, 112 HARV. L. REV. 1047, 1053 (1999). Other states reduce the number of court review hearings for children placed in relative care. See Md. CODE ANN., CTS. & JUD. PROC. § 3-826.1(f)(ii) (1999) (providing that in a permanency plan the court “is not required to hold a review hearing every 6 months if the court . . . grants guardianship of the child to a relative . . . or determines that the child shall be continued in permanent foster care or kinship care . . . .”; and Okla. STAT. ANN. tit. 10 § 7003-5.5(c)(8)(i)(2) (West 1999) (providing that kinship guardian agreements need not be periodically reviewed if the parties and court agree).
142. Megan O’Laughlin has noted that even though kinship care may mollify the harsh consequences of expedited permanent planning, it may put more children at risk than those placed in traditional foster placements. O’Laughlin, supra note 6, at 1448, 1451.
more likely that sibling groups will permanently remain together even if their parents' rights are terminated.

C. Sibling Visitation After Troxel v. Granville

At common law, grandparents did not possess a legal right to visit their grandchildren. However, in the 1970's, through the lobbying efforts of several grandparent organizations, many states promulgated "grandparent visitation statutes" that gave grandparents derivative or independent statutory rights to associate with their grandchildren. However, as grandparent visitation statutes began to conflict with parents' rights to determine which third parties should be permitted to have extended contact with their children, several states questioned the constitutional vitality of such statutes. Court battles among extended family members over association with children began to take both an emotional and financial toll on parents, children, and grandparents. By 1999, several states had declared their grandparent visitation statutes unconstitutional. The Georgia Supreme Court

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143. 530 U.S. 57 (2000).
145. For an interesting history of the genesis of a grandparent visitation statute which the court overruled as unconstitutional, see Beagle v. Beagle, 678 So.2d 1271, 1272-73 (Fla. 1996). See also, Brooks v. Parkerson, 454 S.E.2d 769, 771, n.2 (Ga. 1995). “The first Grandparents' Visitation Statute was in this state [Georgia] in 1976, allowing the trial court, in its discretion, to grant reasonable visitation rights to a grandparent whenever the court had before it a question concerning the custody or guardianship of a child.” Id.
146. Parents have argued that permitting third party standing to seek visitation with children over the express rejection by parents harms families by depleting family resources. For instance, in one California grandparent visitation case the parent “incurred over $80,000.00 in fees and costs in trial court and over $30,000.00 on appeal in order to prevail in defense of her parental ‘autonomy’.” Jeffrey W. Doeringer, Grandparent Visitation: Dead or Alive?, 42 ORANGE COUNTY LAWYER 32, 38 (April 2000) (discussing Troxel, 530 U.S. 57).
147. In another case a mother successfully fought a lawsuit brought by her ex-husband's parents who wanted monthly visitation with her child. After a five year court battle which cost the single mother $130,000 plus $5,000 for separate legal counsel for her daughter, the mother was left "angry and resentful" as she asked "[w]hy should any parent be put through this?" David G. Savage, Fractured Families at Core Visitation Issue, L.A. TIMES, May 22, 2000, at A1.
148. In contrast, several state courts found grandparent visitation statutes constitutional, especially if the issue was considered with other custody questions which were already pending in the court. See, e.g., Clinebell v. DCFS, 711 So. 2d 194 (Fla. Dist. Ct. App. 1998); Gaffney v. Menrath & Gaffney, 1999 WL 34601 (Ohio App. 1 Dist. Jan. 29, 1999); McGuire v. Morrison, 964 P.2d 966 (Okla. Ct. App. 1998); In re Santoro, 578 N.W.2d 369 (Minn. Ct. App. 1998); Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995); Campbell v. Campbell, 896 P.2d 635, 643 (Utah Ct. App. 1995). See Graville v. Dodge, 985 P.2d 604, 616 (Ariz. Ct. App. 1999) (determining that because grandparent visitation statutes do not substantially infringe parental rights, the rational basis test should be used). The court stated that because of the instability of the modern nuclear family, the legislature's "attempt to strengthen intergenerational ties as an alternative or supplementary
voided its statute because "the state may only impose . . . [grandparent] visitation over the parents' objections on a showing that failing to do so would be harmful to the child." 149 The court determined that it was "irrelevant" that it might be better or more desirable for the child and grandparents to continue association. 150

In 1998, the Florida Supreme Court also determined that its grandparent visitation statute violated independent state constitutional privacy protections, because the statute did not require the state to prove harm to the child and that grandparent visitation was a compelling state interest. 151 But it was the Washington Supreme Court's opinion invalidating its grandparent visitation statute that prompted the United States Supreme Court to grant certiorari in Troxel v. Granville. 152 The Washington court determined that its grandparent visitation statute was unconstitutional because it did not require a demonstration of harm or threat of harm to the child, and it did not require the state to demonstrate that such visitation was a compelling state interest and that it was narrowly drawn. 153 The United States Supreme Court was expected to bring closure to the issue of grandparents' versus parents' privacy and associational rights to children in Troxel v. Granville; however, Troxel raises more questions than it answers. The Troxel case does provide several clues regarding how the Supreme Court might decide sibling association issues.

In Troxel, an unmarried couple had two daughters when separated, and the father moved back into the paternal grandparents' home where he often visited with the two children. After the father committed suicide, the mother informed the paternal grandparents that she was going to limit their visitation to "one short visit per month." 154 The paternal grandparents brought suit to obtain additional visitation with the two children. 155 The trial court granted the visitation motion, but the court of appeals reversed, holding that the paternal grandpar-

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149. Brooks, 454 S.E.2d at 773.
150. Id. at 773-74.
152. The Washington Supreme Court case was originally titled Smith v. Stillwell, 969 P.2d 21 (1998). However, the writ of certiorari was filed as Troxel v. Granville, 530 U.S. 57 (2000). Washington Revised Code Section 26.10.160(3) provides that "[a]ny person' to petition a superior court for visitation rights 'at any time,' and authorizes that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.'" Troxel, 530 U.S. at 60 (quoting WASH. REV. CODE ANN. § 26.10.160(3) (West 1997)).
154. Troxel, 530 U.S. at 60.
155. Id. at 67.
ents lacked standing. The Washington Supreme Court disagreed and held that the Washington visitation statute granted grandparents standing; however, the court held that the statute “unconstitutionally infringe[d] on the fundamental right of parents to rear their children” because the trial court did not find harm or potential harm to the children and because the statute was overbroad by permitting “any person” to seek such visitation.

In Troxel, the United States Supreme Court issued a plurality opinion finding that the Washington visitation statute was unconstitutional. The Troxel plurality noted that parents’ liberty interest in rearing their children “is perhaps the oldest of the fundamental liberty interests recognized by this Court.” However, the plurality refused to “define . . . the precise scope of the parental due process right in the visitation context” because it held that the Washington visitation statute was unconstitutional as applied to the Troxel family. Instead, the plurality found the Washington visitation statute “breathtakingly broad” and determined that it was constitutionally infirm for several reasons. First, the statute provided that “any person” could seek visitation “at any time.” However, the plurality never articulates why the breadth of potential visitation applicants or the liberality of such visitation schedules, at least without a showing of additional constitutional infirmities, violates parents’ liberty interest. Rather, the plurality focused upon two other objectionable aspects of the visitation statute: (1) the parent’s decision regarding visitation was not given “any presumption of validity or any weight whatsoever;” and

156. Id.
157. Id. at 69.
158. Id. The plurality opinion was written by Justice Sandra Day O’Connor and was joined by Chief Justice William H. Rehnquist and Justices Stephen G. Breyer and Ruth Bader Ginsburg. Justices David H. Souter and Clarence Thomas wrote separate concurring opinions, and Justices Anthony M. Kennedy, John Paul Stevens, and Antonin Scalia wrote separate dissenting opinions.
159. Troxel, 530 U.S. at 65.
160. Id. at 73. Douglas W. Kmiec has criticized the plurality for failing to delineate the constitutional boundaries of visitation statutes: “Such judicial timidity fails to supply any meaningful guidance to state legislatures now forced to review the adequacy of their visitation laws.” U.S. Supreme Court Undermine Parental Rights in ‘Troxel,’ L.A. DAILY J., June 29, 2000, at 6.
161. Troxel, 530 U.S. at 57, 67.
162. Id.
163. Id. In his concurring opinion Justice Steven Souter describes the interrelationship of the overbreadth of potential third party visitors with the weakness of the best interest standard: “It would be anomalous, then, to subject a parent to any individual judge’s choice of a child’s associates from out of the general population merely because the judge might think himself more enlightened than the child’s parent.” Id. at 79 (Souter, J., concurring).
164. Id. at 67. The plurality noted with approval that section 3104(e) of the California Family Code provides a “rebuttable presumption that grandparent visitation is not in the child’s best
(2) the parent’s wishes could be overruled if the judge merely determines that visitation with a third party is in the child’s best interest. It appears that the plurality would approve a visitation statute that is more narrowly drafted and provides sufficient weight to the parents’ decision. The plurality left for a different day the question of whether a finding of “harm or potential harm to the child” is a “condition precedent to granting visitation.”

The other justices’ opinions in *Troxel* were extremely divergent. Justice Souter found the Washington visitation statute facially unconstitutional because of its overbreadth and its almost unlimited judicial discretion to overrule parental choice. Justice Thomas concurred and not only stated that parents have a fundamental right to rear their children, but that he “would apply strict scrutiny to infringements of fundamental rights.” Justice Scalia dissented arguing that the foundation of parental rights rests within the “unalienable rights” in the Declaration of Independence and in the “other [r] [ights] retained by the people,” which as established in the Ninth Amendment “shall not be construed to deny or disparage.” Justice Scalia did not determine whether “parental rights constitute a ‘liberty’ interest for purposes of procedural due process” or whether a parent may assert a child’s “First Amendment rights of association or free exercise.” Instead, he opined that since parental rights are not expressly mentioned in the Constitution, state courts, rather than federal courts, are more appropriate forums for defining the ambit of those rights.
Kennedy’s dissent argued to remand the case to the Washington Supreme Court to determine whether, in this case, the parent’s constitutional right to rear her child was violated. He indicated that, under some circumstances, a best interest test may be constitutional and a demonstration of harm is not always a prerequisite to order visitation over parents’ objections.\textsuperscript{174} Perhaps most interesting is Justice Kennedy’s willingness to consider the possibility that third party association rights might be so strong that they are “not necessarily subject to absolute parental veto.”\textsuperscript{175} “In light of the inconclusive historical record and case law,” Justice Kennedy stated that he “would be hard pressed to conclude the right to be free of such review [court review of disputed visitation issues] in all cases is itself ‘implicit in the concept of ordered liberty.’”\textsuperscript{176}

It is Justice Stevens’ dissent, however, which provides the greatest support for children’s independent associational rights. Although he would not overrule the Court’s historic finding that parents presumptively act in their children’s best interest, he recognized the fallacy of applying that presumption in individual cases: “[E]ven a fit parent is capable of treating a child like a mere possession.”\textsuperscript{177} Therefore, he disagreed with the Washington Supreme Court, which required a showing of parental fault before approving third party visitation. Justice Stevens rejected both the Washington Supreme Court’s and the plurality’s characterization of third-party visitation issues as “a bipolar struggle between the parents and the State over who has final authority to determine what is in a child’s best interests . . . [because] [t]here is at a minimum a third individual, whose interests are implicated in every case to which the statute applies - the child.”\textsuperscript{178} Justice Stevens indicates that children’s associational interests must be balanced with other family associational interests in determining the child’s best interest.\textsuperscript{179} He widened the associational issue from merely holding that parents’ decisions presumptively outweigh a child’s or third party’s to an issue of Due Process of the Fourteenth Amendment, in which case states may “consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.”\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{174} Troxel, 530 U.S. at 94.
\item \textsuperscript{175} Id. at 98.
\item \textsuperscript{176} Id. at 100 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
\item \textsuperscript{177} Id. at 86 (Stevens, J., dissenting opinion).
\item \textsuperscript{178} Id.
\item \textsuperscript{179} Id. at 88.
\item \textsuperscript{180} Id. at 91.
\end{itemize}
Because the Supreme Court, in *Troxel*, chose not to decide whether, or under what circumstances, the Constitution controls third party visitation, some have argued that the decision is a victory for “non-traditional families, such as gay partners with one biological parent . . . because it doesn’t close the window on existing case law that recognizes the rights of former partners of biological parents.” However, it is uncertain what effect *Troxel* will have on sibling visitation case law and statutes.

1. Pre-Termination of Parental Rights

The *Troxel* plurality made it clear that third-party visitation issues are not simply a best interest of the child analysis and that the state, which has jurisdiction to order such visitation over the objections of the child’s parent, must at least afford the parents’ wishes a presumptive value. Consider the following Arkansas sibling visitation statute:

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.

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181. David Pike, *Supreme Court Re-Establishes Parents’ Rights*, L.A. DAILY J., June 6, 2000, at 1, 9 (quoting Professor Joan Hollinger). The *Troxel* opinion was so general and amorphous that all sides to the controversy claimed victory: “The decision also was hailed by advocacy groups on both sides of the political spectrum. While conservatives saw it as protecting family values, liberals saw it as preventing interference in nontraditional families.” *Id.* at 9.

182. *Troxel* “reaches little further than invalidating one state statute which granted exceedingly broad powers to the courts in an area of protected fundamental interests. The definition of the ability of legislatures to act in this area will have to wait for yet more cases in order to clear the quagmire.” Ronald W. Nelson and Overland Park, *Troxel v. Granville: The Supreme Court Wades into The Quagmire Of Third-Party Visitation*, 12, No. 6 Divorce Litigation 101 (June 2000).

183. *Troxel*, 530 U.S. at 70.

184. Ark. Code Ann. § 9-13-102 (Michie 1999). Although this sibling visitation statute is a domestic relations law rather than a child dependency law, its text illustrates the purest form of sibling rights legislation that I have been able to locate. It therefore serves as a vehicle for determining the constitutional/unconstitutional cusp of *Troxel*. None of the justices in *Troxel* differentiated the ambit of parents’ due process rights according to the nature of the proceeding in which visitation orders are mandated. *Troxel*, 530 U.S. at 70. Therefore, as long as there is sufficient state action in a domestic relations action, there is no reason to believe that any of the *Troxel* justices would analyze the parents’, child’s, third-party’s or state’s rights and interests differently than in a state-initiated dependency case. However, there is a possibility that some justices might consider that a domestic relations case, which is usually initiated by a party, not
The Arkansas sibling visitation statute is somewhat less invasive than the Washington grandparent visitation statute considered in *Troxel*. First, unlike the Washington law, which permitted any third party to seek visitation with a child, the Arkansas code is limited to visitation among brothers and sisters. Therefore, the facial overbreadth of the Washington statute does not exist in the Arkansas statute. Second, unlike the Washington statute, which permitted any visitation that is in the best interest of the child, the Arkansas statute only permits "reasonable visitation rights." The constitutional vitality of sibling visitation statues modeled on the Arizona law will depend upon how courts define "reasonable visitation." If it is simply an alternative for "best interests," then under *Troxel*, such statutes will fall because they do not give any presumptive weight to the parents’ decision. However, if courts interpret "reasonable visitation" as visitation in the siblings’ best interests after a finding by clear and convincing evidence or after the parental preference is rebutted, then such sibling visitation statutes will probably survive a *Troxel* attack.185

The Arkansas sibling visitation law is unique because it treats all siblings equally, whether or not they are related by blood. This means that blood siblings, adopted siblings, and step siblings have equal association rights under the statute. However, depending upon which *Troxel* opinion is applied, the distinctions among the three types of sibling groups may be dispositive on the question of the ambit of sibling association. For instance, the plurality may not be troubled that blood related and adopted siblings are treated identically because they are treated identically by all states; an adopted child becomes the legal equivalent of a child birthed by the adopting parents.186 Because blood related and adopted children share an identical legal status in the family, the plurality would probably find that visitation between them is less likely to "place a substantial burden on the traditional state, is insufficient state action in implicate the Fourteenth Amendment's Due Process Clause. The determinative fact would therefore be who moved to permit the sibling visitation in the domestic relations case. If a party or a non-party brought the visitation motion there would not be sufficient state action. However, if the court already had entered a visitation order and on its own changed that order to permit visitation with a third party, then *Troxel* should apply.

185. *Troxel*, 530 U.S. at 70. The Plurality in *Troxel* noted with approval the California statute which creates a rebuttable presumption that grandparent visitation is not in the child’s best interest if opposed by the child’s parents and also approved of the Nebraska and Rhode Island statutes which required a finding of clear and convincing evidence. *Id.* (discussing the application of Neb. Rev. Stat. § 43-1802(2) (1998) & R.I. Gen. Laws § 15-5-24.3(a)(2)(v) (Supp. 1999)).

186. Cal. Fam. Code § 9305 (West 1998) (providing that "[a]fter adoption, the adoptee and the adoptive parent or parents shall sustain towards each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship").
parent-child relationship” than other third party visitation motions.\textsuperscript{187} However, although step-children may live together in the same family, they are not necessarily legally related; only if a step-parent adopts a child of the step-parent’s spouse will the siblings be legally related.\textsuperscript{188} Therefore, the plurality might uphold a state statute providing sibling visitation rights for blood related siblings and adopted siblings, but not for non-adopted step-siblings because disagreements among the parties (i.e. the birth mother and father of one sibling, and the birth mother and father of the step-sibling) might create great discord among the families.\textsuperscript{189} Therefore, the nature of the sibling relationship may be dispositive on the level of constitutional protection.

2. Post-Termination of Parental Rights

Once parents’ rights have been terminated, the plurality fears that third-party visitation will interrupt the traditional parent/child relationship in which parents have a fundamental right to rear their child. None of the individuals, such as foster parents, guardians, or prospective adoptive parents, who seek visitation with the children post-termination have a fundamental constitutional right of association.\textsuperscript{190} Therefore, \textit{Troxel} will have little impact on post-termination visitation cases.

However, does \textit{Troxel} give any clues as to how the Court will treat conflicts among parties in post-termination, but pre-adoptive visitation disputes? For instance, how will the court analyze a conflict between two siblings who want to be placed in the same adoptive home, and the Department, which may want to place the more adoptable

\textsuperscript{187} \textit{Troxel}, 530 U.S. at 64.

\textsuperscript{188} \textit{CAL. Fam. Code} § 9000 (West 1998) (providing that “[a] stepparent desiring to adopt a child of the stepparent’s spouse may for that purpose file a petition in the county in which the petitioner resides.”) The stepparent adoption can only take place with the consent of the birth parent or after the birth parent’s termination of parental rights. \textit{See}, e.g., \textit{CAL. Fam. Code} § 9003(a) (West 1995). Some courts have held that stepparents who do not adopt the children of the stepparent’s spouse have no right to visit stepchildren after divorce from the natural mother. \textit{See}, e.g., Kogon v. Ulerick, 405 S.E.2d 441 (Va. Ct. App. 1991); O’dell v. O’dell, 629 So. 2d 891 (Fla. Dist. Ct. App. 1993); B.J. v. J.D., 950 P.2d 113 (Alaska 1997). \textit{But see}, Spells v. Spells, 378 A.2d 879 (Pa. Super. Ct. 1977). \textit{See also}, Bryce Levine, \textit{Divorce and the Modern Family: Providing In Loco Parentis Standing to Sue For Custody of Their Stepchildren in a Dissolution Proceeding}, 25 Hofstra L. Rev. 315 (1996). Since there will never be two legal mothers or two legal fathers, stepparent adoptions do not violate the plurality’s fear of visitation orders which “place a substantial burden on the traditional parent-child relationship.” \textit{Troxel}, 530 U.S. at 64.

\textsuperscript{189} Such a distinction which does not give non-adopted step-children an association right is problematic since it will harm millions of children. Today approximately one-sixth of all children live in stepparent families and over one-third of all children will spend some time in a step family. Bryan Strong & Christine De Vaulet, \textit{Marriage and Family Experience} 528, 562 (6th ed. 1995).

\textsuperscript{190} \textit{Troxel}, 530 U.S. at 65-66.
sibling into a prospective adoptive home in which the adopting parents object to post-adoption sibling association? The central question is whether the Court will treat siblings who are free from parental care because of termination differently than other third parties seeking custody or visitation with one or both of the siblings. The Troxel plurality's approach was historical; it concluded that parents had a fundamental right to rear their children because “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.” If the plurality were to accept the overwhelming historical and psychological evidence concerning the role of siblings in the care and upbringing of one another, as well as the evidence of the importance of that relationship until death, the Court might be willing to elevate sibling association rights above all other associational rights except those of parents.

Further, it is likely that Justice Stevens would join the plurality in finding siblings’ association rights greater than those of third parties. Because Stevens rejected the presumption that a fit parent will necessarily make decisions in children’s best interest, he is also likely to reject a presumption that the state necessarily makes decisions in siblings’ best interest. Justice Stevens saw the heart of a parent’s right to rear his or her child as “tied to the presence or absence of some embodiment of family.” Therefore, Justice Stevens is likely to ac-

191. For a lengthy analysis of a similar issue, see supra notes 108-116.
192. Troxel, 530 U.S. at 65 (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)).
193. For a detailed discussion of the historical and psychological aspects of sibling visitation, see Patton & Latz, supra notes 1-2. In his Troxel dissent Justice Scalia refused to extend unenumerated parental association rights to third party visitation issues. Troxel, 530 U.S. at 92 (Scalia, J., dissenting). However, he left for another day whether such unenumerated association rights might “constitute a 'liberty' interest for purposes of procedural due process . . . .” Id. at 92 n.1. Therefore, Justice Scalia might require a minimal due process showing before siblings are placed into an adoptive home which will not permit post-adoption sibling visitation.
194. Troxel, 530 U.S. at 91 (Scalia, J., dissenting). In Troxel Justice Stevens defined the visitation issue as more than “a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual whose interests are implicated in every case to which the statute applies – the child.” Id. at 86.
195. Troxel, 530 U.S. at 88 (Scalia, J., dissenting). In his Troxel dissent Justice Kennedy also noted that children may have a right to associate with other third parties who have provided care over time: “Cases are sure to arise—in which a third party, by acting in a care giving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.” Id. (Kennedy, J., dissenting). Certainly, siblings who have associated for any length of time and who have nurtured one another fit Justice Kennedy’s definition of those having associational interests. Justice Kennedy indicated that states may be entitled to provide some third parties association rights over the objections of parents where the state can demonstrate severe psychological harm to the child. Id. at 99. See Z.C.W. v. Lisa W., 71 Cal. App. 4th 524, 528 (1999) (holding that “absent any legislative or case authority granting a
cept psychological literature that defines the sibling bond as an important and integral family unit deserving constitutional definition and protection. Stevens was clear regarding children’s individual associational interests: “But presumptions notwithstanding, we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination or visitation by a ‘person’ other than a parent.”196 It is this notion of independent children’s association rights that can form the basis for constitutionally treating siblings and other third parties differently when considering custody and visitation between siblings.

Many courts have used the distinction between inherent or individual association rights versus derivative rights to distinguish the ambit of different groups’ rights. For instance, in Pier v. Bolles, a mother petitioned for a modification to a paternal grandparent visitation court order after the father relinquished his parental rights.197 The Pier court noted that grandparent visitation was “statutorily derived” and “a grandparent’s ability to seek visitation in the first instance is premised upon the relationship between the grandchild and his or her parent. Once the parental relationship is terminated, the statutory basis on which a grandparent can seek visitation is likewise extinguished.”198 As with siblings, the Court could hold that siblings’ have an inherent or “unalienable” right to associate, whereas all non-parent third parties merely have a non-constitutional means of pursuing association.199 The Court might then require either that the state prove a compelling state interest in separating the siblings or a showing by clear and convincing evidence that sibling association is not in the children’s best interest. Therefore, the Court would functionally treat siblings’ post-termination association rights similarly to parents’ pre-termination rights.

nonparent visitation rights over the objection of the biological parent and in the absence of any showing of detriment to the child, we cannot grant those rights here [to a non-de-facto parent].”)

196. Id. at 90.


198. Id. at 6. The Pier court held that once a grandparent had received a court order to visit a grandchild, the relinquishment of parental rights by a parent does not extinguish the visitation order. Id. However, a grandparent would lack standing to bring a new visitation order subsequent to the parent’s relinquishment. Id. at 7-8.

199. Troxel, 530 U.S. at 91 (Scalia, J., dissenting) (stating that “a right of parents to direct the upbringing of their children is among the ‘unalienable Rights’ with which the Declaration of Independence proclaims ‘all Men . . . are endowed by their Creator’”).
IV. CONCLUSION

At present, siblings' associational rights lack constitutional legitimacy, in part, because courts have seldom agreed to address the issue, and, in part, because courts fear the consequences of recognizing siblings' constitutional rights. What will happen if children's associational rights are equivalent to parents' rights to associate with their children? How will courts decide cases where parents refuse to permit siblings that are separated into different placements from visiting one another without creating dysfunctional families? Such questions are red herrings because the same issues must be answered in cases in which siblings possess statutory rights of association. For now, siblings must continue looking to legislatures and courts to define the ambit of sibling association. However, as in any area of political debate, siblings need to better publicize their social importance and legal plight. Unfortunately, most siblings lack the ability to galvanize the public unlike other groups that have been effective in garnering a national day of recognition that maximizes public exposure in raising the nation's consciousness of that group's importance. Some recent examples of special interest national recognition days are Women's Day, Secretaries' Day, and Take Your Daughter to Work Day. The closest analogy is National Grandparents' Day, which not only provides merchants with another captive consumer audience, but also spotlights the importance of grandparents within this society. Advertisements in magazines and on radio and television magnify the media's coverage of these social groups and give them both legitimacy and symbolic social value. The time is ripe for a National Siblings Day.

200. Courts should not fear granting siblings a fundamental right to associate since the Court can use an identical analysis for resolving conflicting familial associational rights which it uses in any other case which involves conflicting fundamental rights. In reaching an outcome the Court can balance the various family member's associational rights, consider any state compelling interests, and make a reasoned determination under the facts as it must do in any case involving conflicting fundamental rights.
