CONSTITUTIONAL LAW—DUE PROCESS AND EQUAL PROTECTION CLAUSES—COURT OF APPEALS OF ARIZONA UPHOLDS GRANDPARENT VISITATION UNDER ARIZONA STATUTE

JACKSON V. TANGREEN, NO. 1 CA-CV 99-0542, 2000 WL 1873228 (ARIZ. CT. APP. DEC. 26, 2000)

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I. FACTUAL BACKGROUND

While the legislature may possess certain institutional "advantages" over the judiciary in setting out what the policy of the State should be,[1] the judiciary must determine when that legislative policy exceeds the bounds of its constitutional authority.[2] As a matter of federal constitutional law, state legislative authority is constrained, inter alia, by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] In *Jackson v. Tangreen*,[4] the Court of Appeals of Arizona, Division 1, upheld Arizona's grandparent visitation statute[5] when Christy and Steven Jackson asserted that the policy enacted by the Arizona

1. *Cf.* Troxel v. Granville, 530 U.S. 57, --, 120 S. Ct. 2054, 2075 (2000) (Scalia, J., dissenting) (describing the advantages of state legislatures over federal judges "of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people").

2. *See* Marbury v. Madison, 1 Cranch 137, 5 U.S. 137 (1803).

3. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

4. No. 1 Ca-Cv 99-0542, 2000 Wl 1873228 (Ariz. Ct. App. Dec. 26, 2000).

5. *See* ARIZ. REV. STAT. § 25-409 (2000).

Legislature abridged their fundamental constitutional rights as parents "in the care, custody, and control of their children" and impermissibly distinguished between two-parent and stepparent adoptions.[6] The Jacksons' assertions obliged the court to determine whether Arizona's policy constituted a legislative mistake to be remedied through the political process or whether it constituted impermissible legislative action in violation of constitutional authority as it is constrained by the Due Process and Equal Protection Clauses.[7]

Steven and Christy Jackson are married and have two children: Christy is the children's biological mother, and Steven is their adoptive father.[8] The children were born in 1992 and 1993 during Christy's previous marriage to Robert Thon.[9] The Thons' marriage ultimately ended in divorce, after which Christy retained primary custody of the children.[10] Steven petitioned to adopt the children in February 1998 with the consent of both Christy and Robert.[11] The petition was granted, and the adoption order was entered in August 1998.[12] However, after the adoption was final, the trial court denied the Jacksons' petition to terminate the third party visitation rights originally granted in 1997 to Sandi Tangreen, the children's biological paternal grandmother, pursuant to the grandparent visitation statute.[13] The court of appeals affirmed the trial ruling, rejecting the Jacksons' constitutional challenge on two grounds. First, the court held that Arizona's grandparent visitation statute did not constitute an unconstitutional interference with the Jacksons' fundamental rights as parents under the Due Process Clause.[14] Second, the court held that the statute did not violate the Equal Protection Clause by impermissibly distinguishing between two-parent and stepparent adoptions.[15]

II. DUE PROCESS ANALYSIS

The court's due process analysis rested on two factors arising out of *Troxel v. Granville*, in which the United States Supreme Court held that a state's third party visitation statute impermissibly interfered with parents' fundamental

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6. *See* Jackson v. Tangreen, No. 1 CA-CV 99-0542, 2000 WL 1873228, at *1 (Ariz. Ct. App. Dec. 26, 2000).

7. The judiciary should not be overly eager to abandon its essential role to determine the constitutionality of legislative action in favor of broad deference to legislative will merely out of concerns over the institutional competence of the courts. The judiciary may not always be competent to announce policy; however, it should presume itself competent to determine when the legislature's announced policy exceeds constitutional authority. In *Jackson*, the Court of Appeals came close to abandoning that role by minimizing the Jacksons' constitutional rights out of sheer deference to the Arizona Legislature's will.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.* at *4.

15. *See id.* at *7.

rights under the Due Process Clause.[16] First, while acknowledging that *Troxel* recognized the fundamental liberty interests of parents in the care, custody, and control of their children, the court concluded that *Troxel* "does not stand for the proposition that nonparental visitation statutes are per se unconstitutional."[17] Second, it found that Arizona's statute satisfied the due process concerns identified in *Troxel* because it was narrowly drawn and required the court "to evaluate 'all relevant factors' . . . to determine if visitation serves the best interests of the child."[18] Thus, the court held that Arizona's grandparent visitation statute did not unconstitutionally interfere with the Jacksons' fundamental rights as parents in the care, custody, and control of their children as guaranteed by the Due Process Clause.[19]

The Jacksons' then claimed that the grandparent visitation statute denied equal protection because it, "impermissibly classifies adoptive parents by the type of adoption" by distinguishing between two-parent adoptions and stepparent adoptions when considering termination of grandparent visitation rights that were

16. *See* Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000). In *Troxel*, the plurality opinion of the Court reiterated the notion that "the interest of parents in the care, custody, and control of their children...is perhaps the oldest of the fundamental liberty interests recognized by this Court" and therefore protected by the substantive component of the Due Process Clause. *See Troxel*, 530 U.S. at –, 120 S. Ct. at 2060.

17. *See Jackson*, 2000 WL 1873228 at *4. While *Troxel* does not stand for such a proposition, the manner in which the court uses this factor in its disposition of Jackson is a troubling example of its abandonment of the duty to examine the constitutionality of legislative action. In finding that the Washington statute in question in *Troxel* was unconstitutional under the Due Process Clause because it was overly broad, the Supreme Court never had occasion to determine the constitutionality of nonparental visitation statutes as a per se matter. *See Troxel*, 530 U.S. at –, 120 S. Ct. at 2064. It simply stated that it would be hesitant to so find. *See id.* Significantly, the Court's hesitation arose from its recognition of the necessity to act with care on a case-by-case basis. *See id.* While the court in *Jackson* goes on to consider the statute's substance more carefully, its use of its first factor in light of language such as "it *refused* to find nonparental visitation statutes unconstitutional per se" in describing the *Troxel* court is imprecise. *See Jackson*, 2000 WL 1873228 at *2 (emphasis added).

18. *See Jackson*, 2000 WL 1873228 at *2–*4 (quoting ARIZ. REV. STAT. § 25-409 (C)). In *Troxel*, the Supreme Court found Washington's third party visitation statute unconstitutional under the Due Process Clause because it allowed "any person" to petition for forced visitation without consideration of the mother's wishes and in spite of the fact that the mother was not denying all visitation to the grandparent in question in that case. *See Troxel*, 530 U.S. at –, 120 S. Ct. at 2063-64. Only grandparents and great-grandparents may petition for visitation rights in Arizona. *See* ARIZ. REV. STAT. § 25-409 (A)-(B); *Jackson*, 2000 WL 1873228 at *2. Visitation rights may only be granted over parental objection where a marriage has been dissolved for more than three months, one of the parents is deceased or missing, or the child was born out of wedlock. *See* ARIZ. REV. STAT. § 25-409 (A)(1)-(3); *Jackson*, 2000 WL 1873228 at *2. The court must also give weight to the parent's visitation decisions in determining the best interests of the child under subsection C. *See* ARIZ. REV. STAT. § 25-409 (C); *Jackson*, 2000 WL 1873228 at *2.

19. *See Jackson*, 2000 WL 1873228 at *4.

granted before the adoption.[20] First, the court determined that rational basis scrutiny was the proper standard of review because there was no assertion that adoptive parents are a suspect class and because, by providing only limited visitation, the grandparent visitation statute did not substantially infringe on the fundamental right to control a child's upbringing.[21] The court, relying on its earlier conclusion in *Graville v. Dodge*,[22] indicated that "the state has a legitimate interest in 'promoting healthy family relationships that enable children to become well-adjusted, responsible adults,' including 'the continuation of caring relationships . . . among grandchildren and their grandparents'" and concluded that a rational basis existed for the grandparent visitation statute.[23] Next, the court examined the rationality of the legislature's decision to distinguish between two-parent and stepparent adoptions for purposes of terminating visitation rights. It determined that the legislature could have rationally concluded that the two classifications warranted differential treatment because of the need for a "clean break with the child's past" in two-parent adoptions and the "diminished need for a clean break in stepparent adoptions."[24] Thus, the court held that Arizona's grandparent visitation

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20. *See id.* at *5. Arizona's grandparent visitation statute provides that visitation rights granted pursuant to it automatically terminate when the child is adopted or placed for adoption, except in the situation of an adoption by the spouse of a natural parent if the natural parent remarries. *See* ARIZ. REV. STAT. § 25-409 (F); *Jackson*, 2000 WL 1873228 at *4. Even despite the fundamental interests implicated by parenthood, *see Troxel*, 530 U.S. 57, 120 S. Ct. 2054, the court demonstrated its deference to the legislature by initially setting out and operating from two principles: that adoption was statutorily created and that adoption is "entirely subject to legislation." *Jackson*, 2000 WL 1873228 at *4.

21. *See Jackson*, 2000 WL 1873228 at *6 (citing Graville v. Dodge, 195 Ariz. 119, 985 P.2d 604 (Ariz. Ct. App. 1999) (upholding constitutionality of the grandparent visitation statute before *Troxel*)). The court's rejection of a heightened standard of review is further evidence of its disposition toward deference to the legislature. *See Jackson*, 2000 WL 1873228 at *6 (dismissing Justice Thomas's assertion that strict scrutiny should be applied when a fundamental right is invoked in the due process context, *see Troxel*, 530 U.S. at --, 120 S. Ct. at 2068 (Thomas, J., concurring in the judgment)).

22. 195 Ariz. 119, 985 P.2d 604 (Ariz. Ct. App. 1999).

23. *See Jackson*, 2000 WL 1873228 at *7 (quoting *Graville*, 195 Ariz. at 125, 985 P.2d at 610). Of course, the rationality of a state interest in "promoting healthy family relationships" is rather dubious on its face where the measure by which the state hopes to bolster that interest spawns litigation among family members and calls into question the presumed ability of fit parents to make decisions in the best interest of their children. *See Troxel*, 530 U.S. at --, 120 S. Ct. at 2061. And while the court dismissed Justice Thomas's assertion that such cases invoke strict scrutiny, it ignored his further elaboration in the context of *Troxel*: "Here, the State of Washington *lacks even a legitimate governmental interest*—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Troxel*, 530 U.S. at --, 120 S. Ct. at 2068 (Thomas, J., concurring in the judgment) (emphasis added). Thus, while it may have been reasonable for the court to determine that the State of Arizona's stated interest was rational, it should by no means have been a foregone conclusion.

24. *Id.* at *7–*8. Once again, questions as to the true rationality of the state's assertions arise. Where the default adoption policy of the state is to place the adopted child and the new parent in the same position "as though the child were born to the adoptive parent in lawful wedlock," ARIZ. REV. STAT. § 8-117 (A); *Jackson*, 2000 WL 1873228 at

statute, allowing for the continuation of Sandi Tangreen's visitation after Steven Jackson's adoption of the children, did not violate Jackson's right to equal protection even though Sandi's grandparent visitation rights would have been terminated had two individuals without a biological connection to the children chosen to adopt them.[25]

Until further review by higher courts or reconsideration of its policy determination by the Arizona Legislature, court-ordered grandparent visitation is the law in Arizona under the circumstances set out by the grandparent visitation statute. The court of appeals has determined that that statute passes constitutional muster under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

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*4, is it truly rational to deny a stepparent the same status incident to adoption as would accompany a two-parent adoption? The court's imprimatur as to the rationality of a legislative determination of a diminished need for a clean break in the context of stepparent adoptions notwithstanding, Robert Thon gave up his parental rights when he consented to the adoption of his children by Steven Jackson. *See Jackson*, 2000 WL 1873228 at *1. The Jackson children therefore have two legally wed parents. *See id.* The state's unwelcome interference in the Jackson family in order to promote healthy family relationships by mandating visitation by a biological paternal grandmother after the biological father has relinquished his legal rights to an adoptive father is nothing if not irrational. As the court has passed on so concluding, the Jacksons must proceed to their elected legislators who perhaps now are in a better position to see the problems with their policy determination.

25. *See id.* at *7.