NOTES

ADOPTION—COURT REFUSES ADOPTION FOR DISBELIEF IN SUPREME BEING—*In re the Adoption of E*, 112 N.J. Super. 326, 271 A.2d 27 (Cty. Ct., P. Div. 1970).

Plaintiffs, husband and wife, (John and Cynthia Burke) applied to the Bureau of Children's Services of the New Jersey Department of Institutions and Agencies seeking to adopt a child, *E* (Eleanor). The Bureau had previously placed a child with the Burkes whose adoption was ultimately approved by the court.[1] In response to the plaintiffs' present request, the Bureau placed *E* in the Burke home and recommended her adoption by them. At the hearing, the court questioned plaintiffs as to their religious affiliations and elicited the response that they did not believe in the existence of a Supreme Being. The court then evaluated what it regarded to be the child's right to choose whether or not to believe in God as against the mere privilege of adoption sought by plaintiffs. As a result, the court denied the adoption, holding that the Burkes' lack of belief in a Supreme Being would not promote the best interests of the child.[2]

In reaching its decision the court construed the best interests of the child doctrine on which it relied as granting to the child the right to believe in God and conferring upon the court the authority to inquire into religious affiliations and beliefs and render a decision on that basis. Not only is the right here granted one that has been heretofore unrecognized, but in addition, the denial of the privilege of adoption is based on grounds at least shunned by—if not recognized as explicitly constitutionally forbidden to—courts as a basis for their decisions. Such judicial construction of the doctrine presents it in a somewhat unprecedented dimension.

The questions posed by this decision are: whether or not a state, through the agency of its court, may constitutionally require traditional religious affiliation and belief in a Supreme Being as a condition to the granting of a statutory privilege, and, whether or not an infant acquires, by virtue of the best interests of the child doctrine, the right to have the opportunity to develop a particular belief. Although ap-

1 *In re* the Adoption of E, 112 N.J. Super. 326, 327-28, 271 A.2d 27, 28 (Cty. Ct., P. Div. 1970). Here the court discusses the prior adoption efforts of the plaintiffs and notes revisions made in the regulations of the Bureau of Children's Services as a result of plaintiffs' earlier suit alleging that former religious requirements violated the New Jersey and Federal Constitutions.

2 *Id.* at 331, 271 A.2d at 30.

parently mutually independent issues, their interrelatedness is the crux of the court's opinion; it is the averment of the infant's right[3] which permits the court to bar the plaintiffs from seeking theirs and, in fact, bars them on grounds generally excluded to governmental authority. This result is wrought through the application of the best interests of the child doctrine.

Generally, the best interests of the child doctrine is a judicial device whereby a court measures all the facts and circumstances surrounding a proposed child placement. Competing claims are evaluated in terms of their contribution to the physical, emotional and moral well-being of the child. Within such guidelines, religion is one of the factors evaluated, and inquiry into religious matters is a common judicial practice,[4] although untested before the Supreme Court of the United States. Decisions, however, are not based on overt religious considerations.[5] The effect of the religious factor, along with others, must be shown to influence the welfare of the child.[6] Where too much emphasis has been placed on religion, decisions have been modified or overruled.[7]

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3 *Id.* at 330, 271 A.2d at 30.

4 *See* Annot., 66 A.L.R.2d 1410 (1959); Annot., 23 A.L.R.2d 701 (1952); Hauser, *Adoption and Religious Control*, 54 A.B.A.J. 771 (1968).

5 *See* note 4 *supra*.

6 Quiner v. Quiner, 59 Cal. Rptr. 503 (Ct. App. 1967) (in post-divorce custody proceeding, mother was originally denied custody because religious practice of "separation" as dictated by her "Exclusive Brethren" belief was deemed not in the best interest of the child; reversed, subject to order that religious practice not alienate child's relation with his father); Levitsky v. Levitsky, 231 Md. 388, 190 A.2d 621 (1963) (an award of custody to a Jehovah's Witness mother was amended to provide for notice to father of hospitalization of child with a bleeding ulcer so that treatment proscribed by mother's religion could be had); T. v. H., 102 N.J. Super. 38, 245 A.2d 221 (Ch. 1968) (custody awarded to father where both parents agreed children should be raised in Jewish faith and mother remarried to a non-Jew and was living in western Idaho where opportunity for affiliation with and education in Judaism was remote as compared with northern New Jersey where facilities were readily available). *But see* 110 N.J. Super. 8, 264 A.2d 244 (App. Div. 1970), where opinion was affirmed on other grounds; *In re* Maxwell's Adoption, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958) (adoption granted to Protestant parents who had care of child from shortly after its birth in 1953 after surrender by Catholic mother, despite statutory requirement of matching religions when practicable and mother's subsequent attempts to recover the child in 1956); *cf.* Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817) (the poet Percy Shelley lost custody of his children because he was deemed to be an atheist).

7 Quiner v. Quiner, 59 Cal. Rptr. 503 (Ct. App. 1967) (*see* note 6 *supra*); Meredith v. Meredith, 434 P.2d 116 (Idaho 1967) (Jehovah's Witness father appealed custody grant to mother on ground that award was based on his religion, court sustained decree because it was based on other grounds); Eaton v. Eaton, 122 N.J. Eq. 142, 191 A. 839 (Ct. Err. & App. 1937) (trial court's finding mother to be unfit because of her atheistic and communist leanings was modified on appeal to finding of unfitness because of alleged acts

Prior to the case here discussed, New Jersey precedent conformed to the prevailing viewpoint.[8] Without explicit recognition being accorded to possible limitations imposed by the first amendment's religious clauses, the New Jersey courts have noted that:

> We think a judicial limitation in the selection of a foster home to one in which the doctrine of a particular denominational and sectarian religious creed is avowed is *normally injudicious.* The more so where the implication is that the foster parents must be devout in their religious feelings.[9]

Because the best interest doctrine in fact reflects and implements the community's current values, its elements fluctuate to express those values. Under this wide latitude, judicial scrutiny may encompass any matter of concern. But always, the polestar is the best interests of the child. This is to be distinguished from the best interests of the state whenever conflict between the two could arise. The potential for this conflict stems from the parens patriae stance of the state vis à vis a child within its jurisdiction which is the basis for its intervention.[10]

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of cruelty). *See* Note, 36 COLUM. L. REV. 678 (1936); Note, 49 HARV. L. REV. 831 (1936); Editorial, N.Y. Times, Aug. 28, 1936, at 16, col. 2; THE NEW YORKER, Aug. 22, 1936, at 9, col. 1; T. v. H., 110 N.J. Super. 8, 264 A.2d 244 (App. Div. 1970) (*see* note 6 *supra*); Welker v. Welker, 24 Wis. 2d 570, 129 N.W.2d 134 (1964) (trial court's award of custody to father because mother was an agnostic was reversed, citing Torcaso v. Watkins, 367 U.S. 488 (1961), Abington School Dist. v. Schempp, 374 U.S. 203 (1963), and Engel v. Vitale, 370 U.S. 421 (1962)).

8 Scanlon v. Scanlon, 29 N.J. Super. 317, 102 A.2d 656 (App. Div. 1954) (modifying a decree awarding custody to a "good Roman Catholic foster home" to an institution whose devotional characteristics were not so qualified); Wojnarowicz v. Wojnarowicz, 48 N.J. Super. 349, 137 A.2d 618 (Ch. 1958) (in awarding custody, religion may be considered, but once custody is determined, court will not interfere with custodian's choice); Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (Ch. 1953) (court refused to enforce antenuptial agreement by wife to raise children as Catholic). *See also* Note, 9 RUTGERS L. REV. 773 (1955), discussing New Jersey decisions embodying religious considerations within a best interest of the child framework.

9 Scanlon v. Scanlon, 29 N.J. Super. 317, 325, 102 A.2d 656, 661 (App. Div. 1954) (emphasis added). *See also* Donahue v. Donahue, 142 N.J. Eq. 701, 704, 61 A.2d 243, 245 (Ct. ERR. & App. 1948):

> Intervention in matters of religion is a perilous adventure upon which the judiciary should be loathe to embark.

Argument might be offered that depriving a young child of a religious affiliation might be detrimental to his acceptance by and adjustment among his peers. This contention appears to be as constitutionally untenable here as it is in instances where cross-racial adoptions were initially rejected because of the burden it would impose on the child. Upon appeal, these adoptions were granted. *See In re* Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955); *In re* Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967).

10 *In re* the Adoption of Children by N.M., 96 N.J. Super. 415, 425, 233 A.2d 188, 193 (App. Div. 1967); *In re* Flynn, 87 N.J. Eq. 413, 100 A. 861 (Ch. 1917).

That such conflict can be a reality is evidenced by historical events,[11] and, while the conflict is more dramatic when it is between the rights of the natural parents and the demands of the state,[12] it is even more pronounced when between adoptive parents and the state.[13] For example, characteristics such as traditional religious beliefs or conventional mores are those which society may seek to promote or preserve. Deviations here will be more easily tolerated when balanced against and restrained by the rights of natural parents to select the ideologies to which they wish to expose their children.[14] But when the state is free from such restraint and able to prefer one ideology, and act upon that preference, the tendency to seek unity and cohesion will limit the tolerance of individual choices, resulting in the assimilation of what is desirable and what may be required.[15]

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11 *See* Note, 14 U. CHI. L. REV. 303 (1947):

> [T]he political implications of allowing a child to be taken from his parents without their consent are disturbing. The state might establish standards of race, religion or education which, if not met by the parents, might justify taking the child. Such extreme disregard of parental rights has in recent years occurred in other countries [for example, Nazi youth groups in Germany].

Id. at 306.

12 *See* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966) (the court denied custody to the father because his bohemian life style did not comport with the security and stability deemed by the court to be beneficial to the child's welfare and afforded by the child's more conservative Iowa grandparents); Eaton v. Eaton, 122 N.J. Eq. 142, 191 A. 839 (Ct. Err. & App. 1937). *See also In re* the Adoption of Children by N.M., 96 N.J. Super. 415, 424-25 n.5, 233 A.2d 188, 193 n.5 (App. Div. 1967).

13 *In re* the Adoption of Children by N.M., 96 N.J. Super. 415, 423, 233 A.2d 188, 192 (App. Div. 1967):

> Deeper and broader considerations, however, are commanded in adoption proceedings where the parent-child relationship is sought to be permanently severed.

14 *But cf.* Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966). *See also* Brown v. Board of Educ., 349 U.S. 294 (1955), whose standard of integration precludes segregated schools even as against Negro parents who may not wish to have their children sent to integrated schools.

15 *See* cases cited note 14 *supra*. *See also* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), where the court held that the use of peyote in pursuit of a religious faith could not be restrained and noted:

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.

Id. at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77. *See* N.Y. Times, Feb. 16, 1971, at 35, col. 6, which reports that Wisconsin will appeal the decision of its supreme court holding that requiring Amish children to attend public school beyond the eighth grade interfered with their religious freedom. The Amish contend that in the public schools they have physical education, science, television—temptation for a different world. The court noted that:

> The Amish religion requires the avoidance of a worldly educational environment

As to the latter, the prime issue is the power of the state to impose such a requirement. Thus while a state may promulgate standards to effectuate both a desirable and fundamentally necessary environment, it is elemental that the state must be restrained to those attributes it itself may afford. There can be no question as to the state's lack of right or authority to provide religious training or affiliation, and therefore even less as to the state's right or authority to demand a specific religious belief,[16] or in fact require it from one who, as an adopting parent, succeeds it in loco parentis.

In this context it is important to note that the court in *In re the Adoption of E* does not dispute the opportunity for moral and spiritual development plaintiffs would provide the infant. In fact it notes the recommendation of the Bureau and its finding that the plaintiffs are persons of high moral and ethical standards.[17] The case does not concern the adopting parents' lack of fitness to provide a home where the moral development of the infant will be fostered, but a case where the state imposes the absolute requirement of a particular religious belief. Conflict with constitutional limitations is evident and anticipated by the court. The challenge presented by *Torcaso v. Watkins*,[18] where the Court struck the provision of the Maryland constitution requiring "a declaration of belief in the existence of God", is distinguished on the basis of the child's immaturity; Torcaso was able to make his own decision, *E* was not.[19] That this distinction can preserve the refusal of adoption is dependent on the validity of its internal logic and the weight of prevailing precedent.

As to the first, the distinction wrought by the court puts the infant in Torcaso's position, while it is more appropriate to compare the plaintiff parents with Torcaso. Both Torcaso and plaintiffs stand restrained because of failure to meet religious requirements. To regard the holding of *Torcaso* as creating the right to have the exposure to a select religious doctrine so that an ultimate choice accepting or rejecting it can be made, strains it beyond application. The child's right to

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and imposes the duty on the adolescent to become mature in a wisdom different from what others may regard as wisdom and in skills and responsibilities which are proper and fitting for a life different from what others may wish to pursue. N.Y. Times, Feb. 16, 1971, at 35, col. 6.

16 *See* Abington School Dist. v. Schempp, 374 U.S. 203, 215-21 (1963), where the majority opinion reviews prior decisions proscribing governmental performance of a religious function.

17 112 N.J. Super. at 328, 271 A.2d at 29.

18 367 U.S. 488 (1961) (Court struck down provision requiring belief in God as prerequisite to commission as notary public).

19 112 N.J. Super. at 331, 271 A.2d at 30.

prospective religious commitment is not protected by the holding in *Torcaso*. Whether it can rationally be recognized as an interest capable of protection will be discussed subsequently.

The prevailing precedent must next be examined to establish the merits of the court's distinction. By virtue of the first and fourteenth amendments the states are barred from interference with the free exercise of religion.[20] The Supreme Court of the United States has held that state action includes that of its courts,[21] and, while that same Court has recognized certain restraints on religious practices,[22] it has preserved freedom to profess any religious belief, or nonbelief, as inviolate.[23] The case of *Prince v. Massachusetts*[24] is illustrative of the principle and appropriate to the matter here. There the Court sustained a statute forbidding street sales by any minor, even as applied to Jehovah's Witnesses selling religious literature. The majority decision regarded the state's interest in the health and well-being of its children, as reflected in child labor legislation enacted pursuant to the police power, to be paramount to claims of interference with religious freedom.[25] The concurring opinions stressed those aspects of religious freedom embraced by the amendment:

> Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage

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20 Meyer v. Nebraska, 262 U.S. 390 (1923) (*see* particularly Mr. Justice McReynolds' opinion at 399). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

21 Shelley v. Kraemer, 334 U.S. 1 (1948). *See also* Hackett v. Hackett, 40 Ohio Op. 2d 245, 146 N.E.2d 477 (Cty. Ct. 1957), where the court held invalid and unenforceable a provision of an antenuptial agreement requiring all children of the marriage to be raised in the Catholic religion. *But cf. In re* Korte, 78 Misc. 276, 139 N.Y.S. 444 (Cty. Ct. 1912), where the court was "constrained" by virtue of conditional custody agreement between petitioner and Catholic foundling hospital to remove child unless religious indoctrination covenant was complied with, despite court's acknowledgment of constitutional limitations.

22 *See* Reynolds v. United States, 98 U.S. 145 (1878), where the Court sustained a statute prohibiting bigamy even as applied against Mormons who alleged interference with their religious practices. *But cf.* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), where the court noted the interplay between belief and practice and held the use of peyote to be such an integral part of defendant's religious belief that restriction would be warranted only upon a showing of danger to compelling state interest.

23 Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940):

> [T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

See also Murdock v. Pennsylvania, 319 U.S. 105 (1943).

24 321 U.S. 158 (1944).

25 *Id.* at 165.

> in collateral and secular activities . . . [which] may be regulated by the state . . . .[26]

Again, in *West Virginia State Board of Education v. Barnette*,[27] the Court denounced a statute requiring all children, including Jehovah's Witnesses, to salute the flag because it compelled the affirmation of a belief. Mr. Justice Jackson said:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[28]

In more recent pronouncements the Supreme Court has accorded equal standing to ethical nontheistic beliefs and more traditional religious ones, within the framework of the conscientious objector statute requiring belief in a Supreme Being.[29] In construing this statute, the Court's efforts to conform to its own stringent standards compelling nonrecognition of religious orthodoxy or heresy manifest its awareness of the bounds of constitutional proscriptions. Justice Harlan expresses this concern:

> The constitutional question that must be faced . . . is whether a statute that defers to the individual's conscience only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. . . . However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other.[30]

To justify the decision in *In re the Adoption of E* in the face of the preceding legal precedent is difficult viewed either from the vantage of the adopting parents or the infant. Palpably, the prospective parents' right to accept or reject a theistic religion appears inviolable, absent a compelling state purpose which will hereafter be discussed within the framework of the fourteenth amendment. The justification proffered by the court in *In re the Adoption of E* was the child's right to be exposed to a religion where the belief in God was an essential tenet.[31] The court implies that right from the New Jersey Constitutional provision that

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26 *Id.* at 177-78.

27 319 U.S. 624 (1943).

28 *Id.* at 642.

29 Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); *see* Note, 2 SETON HALL L. REV. 198 (1970).

30 398 U.S. at 356.

31 112 N.J. Super. at 330, 271 A.2d at 30.

> No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment . . . . [32]

Ostensibly, this relates to persons who in fact have a conscience, faith and judgment. It is somewhat anomalous to impress it on an infant of less than two years of age.

Additionally, analysis of decisions dealing with the rights of infants does not support the court's position. Although the ambit of children's rights is more prevalently framed in tort actions, such cases provide some insight into the validity of the position of the New Jersey court. For example, if the court's position is to be sustained, it necessarily follows that either an adopted or natural child could bring an action to enforce its right to have a specific religious belief or seek redress for the denial of such a right. The dilemma presented by such action was considered in *Zepeda v. Zepeda*,[33] where an illegitimate child sought damages against his natural father for the stigma of illegitimacy. Considering this unique claim, the court examined the possible theories on which it could be sustained:

> The plaintiff further complains of being deprived of the normal home that might have been his and of equality with the legitimate child he might have been. A legitimate child has the natural right to be wanted, loved and cared for. . . . However, a legitimate child cannot maintain an action against his own parents for lack of affection, for failure to provide a pleasant home, for disrupting the family life or for being responsible for a divorce which has broken up the home. An illegitimate child cannot be given rights superior to those of a legitimate child . . . .
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> . . . Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.[34]

Other cases illustrate the perplexing nature of an action for "wrongful life." In *Gleitman v. Cosgrove*,[35] the New Jersey Supreme Court rejected the claim of a child who sought redress for birth defects

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32 N.J. CONST. art. I, par. 3.

33 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

34 *Id.* at 255, 260, 190 N.E.2d at 856, 858.

35 49 N.J. 22, 227 A.2d 689 (1967).

allegedly caused by negligent medical care rendered to his mother prior to his birth. The thrust of the child's claim was that his life should have been aborted. In reaching its decision the court was able to distinguish the case before it from precedent which had allowed recovery for negligently caused prenatal injury.[36] The basis of the distinction is the causal relation, the lack of which compelled the majority of the court to view the child's claim as a choice between non-birth and birth with disability.[37] That the court could not determine this choice is understandable.

Recent decisions invalidating criminal abortion statutes shed light on this area from a different direction. The essence of these decisions focuses on the penumbral liberties inherent in the Bill of Rights,[38] but another element is implicit in their holdings:

> [W]e hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.[39]

The court here came close to the crux of the dilemma: What rights of the very young or unborn can be recognized and effectively protected?

Compounding the complexity is the more precise viewpoint of the court in *In re the Adoption of E,* the judicial acknowledgment of a superior and preferred religious doctrine, belief in a Supreme Being. Constitutional limitations aside, this view contravenes express judicial

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36 Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

37 49 N.J. at 28, 227 A.2d at 692.

38 Babbitz v. McCann, 310 F. Supp. 293, 299, *appeal dismissed,* 400 U.S. 1 (1970); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969); People v. Belous, 71 Cal. 2d 954, 967, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969). *See also* Clark, *Religion, Morality and Abortion: A Constitutional Appraisal,* 2 LOYOLA U. L. REV. 1 (1969).

39 Babbitz v. McCann, 310 F. Supp. at 301; *cf.* Hackett v. Hackett, 4 Ohio Op. 2d 245, 146 N.E.2d 477 (Cty. Ct. 1957). Speaking of a child's religious right the court said:

> [U]nder the mandate of separation of church and state, if the child's religious welfare is neglected the state may not intervene to protect it. A judge convinced that a child will die if it does not receive an immediate blood transfusion can constitutionally direct the giving of the transfusion over the parent's objection. A judge equally convinced that the parent's refusal to baptize his dying child will deprive the child of eternal salvation is constitutionally without power to take any legal action. *It serves no useful purpose to speak of a legal right which the Constitution prohibits the state from recognizing or enforcing.*

Id. at 247, 146 N.E.2d at 480, *citing* Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333 (1955) (emphasis added). *See also* Gleitman v. Cosgrove, 49 N.J. at 56, 227 A.2d at 707 (Weintraub, C.J., dissenting in part).

recognition of the philosophical and legal morass necessitated by such a viewpoint. "The courts do not as yet profess definitely to know which denominational religious creed charts the most propitious avenue to salvation."[40] Thus, if the right established by the court is to be recognized, it is foreseeable that it portends the right to be raised in the "right" religion. It is thus apparent that the right relied on by the court to justify its intervention into religious matters is too tenuous to be recognized.

Conceding *arguendo* that such a right may exist, the court must next resolve the conflict between that right and those of the plaintiffs and surmount the constitutional proscriptions attendant by virtue of the equal protection clause of the fourteenth amendment. Within that clause, the state's power to restrict even constitutionally impressed rights is recognized. But such power is limited by the judicially evolved doctrine of rational classification which requires action consistent with the legitimate interests of the state or a compelling state need, and means reasonably directed to the achievement of that need by restrictions within classifications neither arbitrary, unreasonable or unjust.[41] The test measures areas "where a state legislature, or a state court, is alleged to have *unjustly discriminated* in favor of or against a particular individual or class of individuals, as distinguished from the rest of the community . . . ."[42] The principle can be generally characterized as compelling strict judicial scrutiny of the classification upon which the state focuses in the exercise of its police power. In more specific areas, as in cases of classification based on alienage, race or religion, the Supreme Court has viewed with great concern the fundamental nature of the right allegedly invaded in pursuit of the protection of a state interest.[43]

In these cases, involving distinctions not drawn according to race,

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40 Scanlon v. Scanlon, 29 N.J. Super. 317, 326, 102 A.2d 656, 661-62 (App. Div. 1954). *See also* Hackett v. Hackett, 4 Ohio Op. 2d 245, 146 N.E.2d 477 (Cty. Ct. 1957); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872):

> In this country the full and free right to entertain any religious belief . . . which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. *The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.*

Id. at 728 (emphasis added).

41 Takahashi v. Fish & Game Comm., 334 U.S. 410 (1948); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-80 (1911).

42 Holden v. Hardy, 169 U.S. 366, 383 (1898); *accord*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

43 *See* Welsh v. United States, 398 U.S. 333 (1970); Loving v. Virginia, 388 U.S. 1, 9 (1966); United States v. Seeger, 380 U.S. 163 (1965); McLaughlin v. Florida, 379 U.S. 184, 192-94 (1964); *In re* Adoption of a Minor, 228 F.2d 446 (D.C. Cir. 1955); *In re* Gomez, 424 S.W.2d 656, 659 (Tex. Civ. App. 1967).

> the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.[44]

While cases dealing with religion are not generally framed in fourteenth amendment equal protection terms, the analogy between racial and religious classifications is warranted on the basis of the underlying similarity between the "rational classification test" applied in fourteenth amendment matters and the "primary public purpose test" devised to measure state actions which contravene the religious clauses of the first amendment. The effect of the confluence of these two amendments on the decision here will be discussed subsequently. At present, it is sufficient to note that from either vantage, religious distinctions are as constitutionally suspect as are racial ones.[45]

Measuring the case in point within fourteenth amendment parameters requires an analysis of the competing interests and rights. The state's interest in seeking to promote the development of socially acceptable moral conduct is evidently within the range of a compelling state need and thereby justifies state regulation. The fitness of plaintiffs to promote the moral development of the child is not at issue. Next to be considered is the class selected and the reasonableness of the means directed towards achieving the desired public morality.

As noted by the court, there is at present no requirement of religious qualifications for adopting parents.[46] Formerly, religious qualifications were impressed by the Bureau of Children's Services under administrative rulings.[47] Each applicant was required to designate his religious affiliations and to submit a reference from a religious leader of his affiliated sect. In addition, children without known religious commitments were assigned a religious affiliation.[48] These practices were abandoned by the state agency

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44 Loving v. Virginia, 388 U.S. 1, 9 (1966).

45 Welsh v. United States, 398 U.S. 333 (1970); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

46 112 N.J. Super. at 329, 271 A.2d at 29, *citing* N.J. STAT. ANN. §§ 9:3-17 *et seq.* (1960). *But see* N.J. STAT. ANN. § 9:3-25 (1960), which makes religious matching a consideration in appointment of next friend and N.J. STAT. ANN. § 30:4C-26 (1964), where religious matching is a factor in foster home placement.

47 State of New Jersey, Bureau of Children's Services, *Changes in Policy with Regard to Religion* (undated).

48 *Id.*

> because of the belief in separation of church and state and the belief that the agency representing the state should not be showing preference for any religious denomination in this way.
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> . . . [It is] the agency's belief that the matter of a family's religion is between the family and the church and the state does not *need* to interject itself into this area. . . . [T]he social worker . . . will evaluate the family's ability to offer moral and ethical training to a child . . . .[49]

Thus the court has departed from both legislative and administrative confines in the matter of qualifications imposed on adopting parents and has set up qualifications resting solely on religious beliefs. The rationale offered for this action is that plaintiffs seek merely a privilege as distinguished from a right.[50] Implicit in the court's reasoning is the notion that adoption is merely a privilege and hence the doctrine of rational classification is not constitutionally mandated. To so hold departs from the confines of the fourteenth amendment as well. That fact is recognized by an opinion cited by the court itself to support its position that because adoption was not recognized by the common law, it is therefore a creation of statute subject to state regulation.[51] It is unnecessary to dispute the validity of this widely held position[52] for, whether adoption is a right or privilege, the fourteenth amendment equal protection rational classification requirement is not relaxed. In 1963, the Supreme Court said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a *benefit or privilege.*"[53] *Brunt v. Watkins,* cited by the court in support of its position, recognizes this as well:

> [N]o person is entitled to adopt another as of right. . . . So long as the procedure for adoption affects all persons alike who are similarly situated and is suitable to accomplish the paramount purpose for which adoption laws are enacted . . . it will be adjudged due process.[54]

In abandoning their religious qualifications, New Jersey's legislature and administrative agency have recognized the constitutional lim-

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49 *Id.* (emphasis added).

50 112 N.J. Super. at 330, 271 A.2d at 29.

51 *Id.* at 329-30, 271 A.2d at 29, *citing* Brunt v. Watkins, 233 Miss. 307, 101 So. 2d 852 (1958).

52 *See* Huard, *The Law of Adoption: Ancient and Modern,* 9 VAND. L. REV. 743 (1956), for an historical survey of the custom and practice of adoption prior to statutory recognition.

53 Sherbert v. Verner, 374 U.S. 398, 404 (1963) (emphasis added).

54 233 Miss. at 313-14, 101 So. 2d at 856.

itations of their authority. It would be incongruous to now permit the state, through its courts, to undo this.

There is an alternate approach which compels the same conclusion that the distinction between right and privilege is irrelevant. That conclusion stems from the confluence of the first and fourteenth amendments when, as in this case, the focus of state action is wholly on religious grounds:

> The implementation of the neutrality principle of these cases [*Welsh v. United States, United States v. Seeger*] requires, in my view . . . "an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that [all groups that] could be thought to fall within the natural perimeter [are included]." . . .
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> . . . The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification that this Court has condemned.[55]

Thus, in the present instance, the nature of the disqualifications barring the plaintiffs is paramount to a determination of whether adoption is a right or a privilege. The plaintiffs' failure to meet the court's standard was wholly for religious reasons. That such a standard must fail negates the need to distinguish between right or privilege in the present case.

In conclusion it may fairly be stated that the legal theories on which the court relies are not adequate to sustain its position. The right conferred upon the child is legally nonexistent; the adoption sought by plaintiffs can only be restrained by means properly within the state's power and directed towards a class whose makeup is free of constitutionally proscribed considerations. For failure to comport with these restraints the decision must fail. But, a position contrary to that taken by the court does not compel hostility toward religion. Rather, it is consistent with the principle that

> we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.[56]

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[55] Welsh v. United States, 398 U.S. 333, 357-58 (1970) (Harlan, J., concurring).

[56] Everson v. Board of Educ., 330 U.S. 1, 59 (1946) (dissenting opinion of Mr. Justice Rutledge, *citing* J. MADISON, REMONSTRANCE, par. 8, 12).

Such a position allows for cultivation of the concept that "[w]e are a religious people whose institutions presuppose a Supreme Being."[57] But, it is one thing to acknowledge this presupposition and quite another to demand conformity to it.

Lorraine S. Gerson

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57 Zorach v. Clauson, 343 U.S. 306, 313 (1952).