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Eric Alan Isaacson
San Diego Foundation for Change

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Assaulting America's Mainstream Values:
Hans Zeiger's *Get Off My Honor: The Assault on the Boy
Scouts of America*

GET OFF MY HONOR: THE ASSAULT ON THE BOY SCOUTS OF
AMERICA. By Hans Zeiger. Nashville: Broadman & Holman
Publishers. 2005. Pp. 196. \$12.99.

ERIC ALAN ISAACSON*

I. INTRODUCTION

Lieutenant Colonel Oliver L. North's *Foreword* to Hans Zeiger's book
Get Off My Honor: The Assault on the Boy Scouts of America warns that

* A member of the California bar, the author is President of the Board of Directors of the San Diego Foundation for Change and teaches Sunday school at the First Unitarian Universalist Church of San Diego. His article, *Traditional Values, or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations*, which concerns the Boy Scouts of America's religious-viewpoint discrimination against Unitarian Universalists, will appear in the seventeenth volume of the George Mason University Civil Rights Law Journal. That Article, and this Review Article, are based in substantial part on research connected with amicus curiae briefs prepared by the author for filing on behalf of Unitarian Universalist amici in two cases: *Barnes-Wallace v. Boy Scouts of America*, Nos. 04-55732 & 04-56167 (9th Cir. Apr. 29, 2004), and *Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Aug. 19, 2005). The author is deeply indebted to the Reverend Silvio Nardoni and to Susan Kay Weaver as co-counsel and co-authors on those amicus curiae briefs, to John Hurley, Director of Communications of the Unitarian Universalist Association of Congregations, who provided invaluable documents from the Association's files, and to Jordan Budd and Elvira Cacciavillani, both formerly of American Civil Liberties Union of San Diego and Imperial Counties, who introduced him to the litigation concerning government sponsorship of the Boy Scouts of America's discriminatory policies. The author also is indebted, of course, to the Unitarian Universalist clients whom he has represented as amici in such litigation, including: The Unitarian Universalist Association of Congregations; the Unitarian Universalist Legislative Ministry California; the Social Justice Committee and Board of Trustees of the First Unitarian Universalist Church of San Diego, its ministers, the Reverend Dr. Arvid Straube and the Reverend Julie Kain, and its Director of Religious Education, Elizabeth Motander Jones; Elliott Welsh; the Social Justice Committee of the Unitarian Universalist Society of Geneva, Illinois, and its ministers, the Reverend Dr. Lindsay Bates and the Reverend Jennifer Innis; the First Unitarian Church of Cincinnati and its minister, the Reverend Sharon Dittmar; the Social Justice Ministries of All Souls Church, Unitarian, Washington, D.C., and its Director of Social Justice Ministries, the Reverend Louise Green; the Board of Trustees of the Unity Temple Unitarian Universalist Congregation and its minister, the Reverend Alan C. Taylor. The author also is indebted to Dean Daniel B. Rodriguez, as panel moderator, and to fellow panelists, Dean Kenneth W. Starr, Professor Alan E. Brownstein, Professor John C. Eastman, and Boy Scouts of America lawyer George A. Davidson, with whom the author participated in a panel discussion entitled *The Constitution and the Boy Scouts: Equal Access to Government Land and the First Amendment*, a May 18, 2005, event sponsored by the Federalist Society's Civil Rights Practice Group and San Diego Lawyer's Chapter. The views expressed in this Article should, of course, be attributed to the author alone.

one of America's most trusted institutions, the Boy Scouts of America (BSA), is under siege for advancing "what many of us euphemistically call traditional values."¹

Euphemistically?

North's choice of words inadvertently reveals what he and many other so-called "social conservatives" obviously know in their hearts—that the BSA's recent campaign against gay youth and religious liberals is grounded in something other than America's proudest traditions and values.² Hans Zeiger proceeds himself to remove any illusions in this regard—for the book is a spiteful diatribe against the mainstream American values of a pluralistic society that can embrace, honor, and celebrate human diversity.

Zeiger is a student at Hillsdale College and Eagle Scout whose web site brags that the Republican Party once came *rather close* to having him speak at a national convention.³ Zeiger's web site also claims that *Newsweek's* publication for college students, *Current Magazine*, has named Zeiger "the top young religious leader on the nation's campuses."⁴ While that is not quite true, *Current Magazine* did call Zeiger "one of the *most outspoken* young conservative and religious leaders in the country"—noting that "radio legend Rush Limbaugh" has touted Zeiger's commentary on the air.⁵

1. Oliver L. North, *Foreword* to HANS ZEIGER, *GET OFF MY HONOR: THE ASSAULT ON THE BOY SCOUTS OF AMERICA*, at vii (2005).

2. See COMPACT OXFORD ENGLISH DICTIONARY OF CURRENT ENGLISH 342 (3d ed. 2005) (defining euphemism as "(when referring to something unpleasant or embarrassing) a mild or less direct word used rather than one that is blunt or may be considered offensive"); 5 OXFORD ENGLISH DICTIONARY 436 (2d ed. 1989) (defining euphemism as "1. *Rhet.* That figure of speech which consists in the substitution of a word or expression of comparatively favourable implication or less unpleasant associations, instead of the harsher or more offensive one that would more precisely designate what is intended" and "2. An instance of this figure; a less distasteful word or phrase used as a substitute for something harsher or more offensive."); THE AMERICAN HERITAGE DICTIONARY 468 (2d Coll. ed. 1985) (defining euphemism as "The act or an example of the substitution of an inoffensive term for one considered offensive . . ."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 784 (1981) (defining euphemism as "1: the substitution of an agreeable or inoffensive word or expression for one that is harsh, indelicate, or otherwise unpleasant or taboo: allusion to an offensive thing by an inoffensive expression . . . 2: a polite, tactful, or less explicit term used to avoid the direct naming of an unpleasant, painful, or frightening reality . . .").

3. See HansZeiger.net, About Hans, <http://www.hanszeiger.net/id1.html> (last visited Feb. 5, 2007) (describing himself as a "finalist to speak at the 2004 Republican National Convention").

4. *Id.* (asserting that "*Current Magazine* has recognized Hans as one of America's 15 emerging college students, and as the top young religious leader on the nation's campuses"). Some right-wing web sites repeat the claim. See, e.g., New Media Alliance, Hans Zeiger, http://www.thenma.org/writer_bio_hzeiger.htm (last visited Feb. 5, 2007).

5. The *Current Magazine* article did not identify Zeiger as "the top young religious leader on the nation's campuses," as Zeiger's web site states. See HansZeiger.net, *supra* note 3 (asserting that "*Current Magazine* has recognized Hans as one of America's 15 emerging college students, and as *the top young religious leader on the nation's campuses.*" (emphasis added)). It did, however, call him "one of the most outspoken young conservative and religious leaders in the country and a writer whose col-

Zeiger's web site also says that he has organized and heads a "grass-roots network of Americans" that he styles the "Scout Honor Coalition."⁶ Whether or not this "grassroots network" has any substantial existence beyond Zeiger's imagination and home page, it must be conceded that Zeiger does in fact speak for the social conservatives whose ideology, in recent decades, has come to dominate the BSA and its national leadership.⁷ That ideological domination produced an initial wave of civil-rights litigation in the 1990s when the BSA expelled seven-year-olds whose religious beliefs were not up to snuff,⁸ and barred gay scouts and leaders as neither "morally straight" nor spiritually "clean."⁹ The Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*,¹⁰ of course, sustained the BSA leadership's right to discriminate against children and adults, noting that "the terms 'morally straight' and 'clean' are by no means self-defining," and allowing the BSA's national leadership to define and enforce them however it pleases.¹¹

umns have been picked up" by a variety of newspapers—and read on-air once by "[r]adio legend Rush Limbaugh." See Emily Anderson et al., *The College Vanguard: 15 Students You Don't Know . . . But Will*, CURRENT MAG., Summer 2005, available at <http://www.msnbc.msn.com/id/7502379/site/news-week/page/4/>.

6. See HansZeiger.net, Scout Honor Coalition, <http://www.hanszeiger.net/id11.html> (last visited Feb. 5, 2007).

7. *New York Times* editor Peter Applebome writes that the BSA in recent years "has come to be dominated by religious groups and the conservative voices of the nation's culture wars." PETER APPLEBOME, SCOUT'S HONOR: A FATHER'S UNLIKELY FORAY INTO THE WOODS 240 (2003); see JAY MECHLING, ON MY HONOR: BOY SCOUTS AND THE MAKING OF AMERICAN YOUTH 219 (2003) (noting the "increasing influence of the religious right in the national offices of the Boy Scouts"); Madhavi Sunder, *Cultural Dissent*, 54 STANFORD L. REV. 495, 546 (2001) ("The association's move toward the right emerged only in recent history in reaction to post-1960s politics.").

8. *Sherman v. Cmty. Consol. Sch. Dist.*, 8 F.3d 1160, 1162-63 (7th Cir. 1993) (children expelled from Scouting "because of their refusal to abide by the provision in the Scout oath which requires belief in God"); *Welsh v. Boy Scouts of Am.*, 787 F. Supp. 1511 (N.D. Ill. 1992) (exclusion from Cub Scouting of a seven-year-old child and his father when they objected to the Cub Scout Promise and Declaration of Religious Principle or "Boy Scout creed"), *aff'd*, 993 F.2d 1267 (7th Cir. 1993); *Randall v. Orange County Council*, 952 P.2d 261 (Cal. 1998) (seven-year-old twins expelled from Cub Scouts because they would not confess a belief in God); see also *Seabourn v. Coronado Area Council*, 891 P.2d 385 (Kan. 1995) (rejecting would-be adult leader's challenge to BSA rule barring atheists).

9. See, e.g., *Dale v. Boy Scouts of Am.*, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196, 1202-03 (N.J. 1999) (holding that the BSA's expulsion of an Eagle Scout and assistant scoutmaster, James Dale, violated New Jersey civil rights laws, despite the BSA's objection that the presence of the terms "'morally straight' and 'clean' in the Oath and Law, respectively, constitutes a rejection of homosexuality"), *rev'd*, 530 U.S. 640, 652 (2000) (holding that the BSA's associational rights overrode New Jersey's civil rights laws when the BSA expelled Dale pursuant to a 1991 position paper stating "that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed").

10. 530 U.S. 640 (2000).

11. Chief Justice Rehnquist wrote for the Court:

The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean."

A second wave of litigation followed, when many public institutions refused to subsidize and sponsor the BSA's discrimination on the basis of religious beliefs and sexual orientation. The BSA and its affiliates filed suits unsuccessfully challenging the governmental entities' right to distance themselves from its discriminatory policies.¹² When other public entities—including the federal government—chose to *continue* underwriting the BSA's open discrimination, citizens filed further suits challenging taxpayer-funded governmental support for the BSA and its flagrantly discriminatory policies.¹³

When Zeiger characterizes all withdrawals of taxpayer funding for the BSA leadership's discriminatory policies as open assaults on the BSA's "honor," his words may be worth noting, as he speaks for many besides himself. For whom he speaks may be seen in his book's endorsements of lavish praise—from social conservatism's leading intellectuals. Praise from Edwin Meese, III, for example, President Reagan's Attorney General, who today is a Distinguished Fellow in Public Policy and Chairman of the Center for Legal and Judicial Studies of the Heritage Foundation.¹⁴ Attorney

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

Dale, 530 U.S. at 650 (citations omitted).

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message.

Id. at 661 (citing *Hurley v. Irish-Am. Gay Group of Boston*, 515 U.S. 557, 579 (1995)).

12. See *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (upholding Connecticut's State Employee Campaign Committee's decision to terminate the BSA's thirty-year participation in its workplace charitable campaign); *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (upholding the City of Berkeley's decision not to subsidize a BSA-affiliate's use of a public marina). Nongovernmental civic organizations' widely publicized decisions to stop funding the BSA apparently have produced no similar litigation.

13. See generally *Winkler v. Chi. Sch. Reform Bd. of Trs.*, 382 F. Supp. 2d 1040 (N.D. Ill. 2005) (ruling unconstitutional the federal government's sponsorship of the quadrennial BSA Jamboree), *appeal docketed sub nom. Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Aug. 19, 2005); *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (ruling unconstitutional the City of San Diego's preferential lease of eighteen acres of urban parkland to the BSA for its regional headquarters and camping facilities), *certifying questions to the California Supreme Court*, 471 F.3d 1038 (9th Cir. 2006). *But cf.* *Powell v. Bunn*, 108 P.3d 37 (Or. Ct. App. 2005) (allowing public schools to promote the BSA despite Oregon's anti-discrimination law, on the ground that the discrimination had taken place off-campus); *Scalise v. Boy Scouts of Am.*, 692 N.W. 2d 858, 878 (Mich. Ct. App. 2005) (finding no Establishment Clause violation when the BSA is permitted to recruit on public school grounds).

14. See The Heritage Foundation, Edwin Meese, III, <http://www.heritage.org/About/Staff/EdwinMeese.cfm> (last visited Feb. 5, 2007).

General Meese touts *Get Off My Honor* as “an important book” that provides an “insightful account of the significance of the Boy Scout movement to America and describes the critical battle to defend Scouting from the cowardly and despicable attacks being waged against it.”¹⁵ “It is a must-read for citizens concerned about the youth of our nation, and the protection of *traditional moral values*,” says Mr. Meese,¹⁶ employing the “traditional values” theme that Oliver North’s *Foreword* acknowledges is a calculated euphemism.¹⁷ Former Ambassador Alan Keyes adds that he too is “honored to commend” Zeiger’s book “to all thoughtful Americans who care deeply about the moral preparation of our nation’s youth.”¹⁸

The BSA itself makes a point of providing many links to Zeiger’s political and social commentary, through its legal-affairs web site BSAlegal.org—which the BSA’s National Director of Program and Chairman of its Youth Protection Task Force, Douglas Sovereign Smith, Jr., in 2004 promoted as an instrument designed to expose and counter a three-decade-long legal assault on Scouting.¹⁹ Smith is in prison now, serving an eight-year sentence for possession and distribution of child pornography,²⁰ but the BSAlegal.org web site that he touted still carries links to more than a half dozen of Zeiger’s articles.²¹

Zeiger, apparently, remains a mouthpiece for the BSA, and elements of the homophobic religious right that have come to dominate it. If this perhaps is not surprising, still it is disturbing. For “what many of us euphemistically call traditional values,” to use Oliver North’s revealing phrase, in Zeiger’s hands turns out to be simple bigotry. Zeiger’s rhetoric is grounded in traditions of base demagoguery and attacks on the supposedly decadent minorities that he charges have brought American society into moral decline—including Hollywood interests, homosexuals, and even liberal Christians.

But Zeiger’s *Get Off My Honor* is not just a spiteful attack on historically persecuted minorities (such as homosexuals), on civic organizations that embrace human diversity (such as Big Brothers/Big Sisters, condemned by Zeiger as “the vehicle for the destruction of thousands of young

15. Edwin Meese, *Endorsement to ZEIGER*, *supra* note 1, at i-ii.

16. *Id.* (emphasis added).

17. *See supra* notes 1-2 and accompanying text.

18. Alan Keyes, *Endorsement to ZEIGER*, *supra* note 1, at i.

19. Douglas S. Smith, Jr., *Boy Scout Pride*, CORP. LEGAL TIMES, Sept. 2004, at 10.

20. *See infra* note 175 (citing articles about Smith’s child-pornography conviction).

21. *See, e.g.*, BSAlegal.org, What Others Are Saying, <http://www.bsalegal.org/whatothe-123.htm> (last visited Feb. 5, 2007) (featuring, for example, hotlinks to several Zeiger articles, including: Hans Zeiger, *ACLU vs. the Boy Scouts*, <http://www.renewamerica.us/columns/zeiger/040114>; Hans Zeiger, *ACLU Ruins Boy Scout Camp*, <http://www.renewamerica.us/columns/zeiger/030802>; Hans Zeiger, *No Charity for the Boy Scouts*, <http://www.renewamerica.us/columns/zeiger/030719>).

lives”),²² on suspect religious minorities (such as atheists and agnostics), and on religious liberals (who prefer a gospel of love and social service over one of divisiveness and damnation). Zeiger objects to the very principles of America’s democratic pluralism that celebrate our diversity and call upon us to recognize and respect our fellow citizens as our equals. Zeiger’s book is a frontal assault on mainstream American values.

II. ASSAULTING AMERICA’S MAINSTREAM VALUES

A. *Zeiger’s Assault on the Values of Mainstream Religious and Civic Organizations*

Ours is a diverse society, and that is a problem for Hans Zeiger, who insists that mainstream America’s healthy respect for human diversity, “contrary to popular belief, is not a moral virtue.”²³ Real virtue means “honor,” for Zeiger—and his concept of “honor requires a Scout’s allegiance to a code of conduct,” which necessarily “means neither homosexuals nor atheists can become leaders or members of the Boy Scouts.”²⁴

Get Off My Honor’s message is clear: to associate with those who might question God’s existence, or who balk at swearing religious oaths, is fundamentally *dishonorable*. For according to the BSA’s Declaration of Religious Principle, to which every new Boy Scout or Cub Scout is required to subscribe, “no member can grow into the best kind of citizen without recognizing an obligation to God.”²⁵ This conviction that nonbelievers are inherently *inferior citizens* is called “the Boy Scouts’ creed,” a fundamental article of faith, according to the organization’s court papers.²⁶ “Only persons willing to subscribe to these precepts of the Declaration of Religious Principle,” every membership application warns, “shall be entitled to certificates of membership.”²⁷

22. ZEIGER, *supra* note 1, at 81.

23. *Id.* at 25.

24. *Id.*

25. See Boy Scouts of America Youth Application, Form 28-406B (2006), available at <http://www.scouting.org/forms/28-406.pdf>; Cub Scout Application, Form 28-102R (2006), available at <http://www.scouting.org/forms/28-102.pdf>.

26. *Welsh v. Boy Scouts of Am.*, 742 F. Supp. 1413, 1430 (N.D. Ill. 1990) (quoting BSA brief arguing that to apply general civil rights laws “to the Boy Scouts ‘not only would . . . require a change in the Boy Scouts’ creed that ‘no member can grow into the best kind of citizen without recognizing an obligation to God’ . . . , it would restrict Boy Scouts’ ability to ‘exclude individuals with ideologies or philosophies different from those of existing members.’”).

27. Boy Scouts of America Youth Application, *supra* note 25; Cub Scout Application, *supra* note 25.

The BSA in a 2002 press release restated its position “‘that duty to God is not a mere ideal for those choosing to associate with the Boy Scouts of America; it is an obligation,’ *which has defined good character* for youth of Scouting age throughout Scouting’s 92-year history”²⁸ Associating with socially inferior agnostics and atheists is fundamentally dishonorable from this perspective.

To treat homosexuals as social equals is similarly *dishonorable*, in Zeiger’s book. But to *be gay* is even worse than dishonorable—it is spiritually *unclean*. Zeiger enthusiastically endorses the BSA’s 1991 pronouncement that homosexuals violate “the Scout Law that a Scout be clean in word and deed.”²⁹ He condemns dissenting local and regional divisions that, like the Massachusetts Minutemen Council in 2002, have sought, in Zeiger’s words, “to adopt a ‘don’t ask, don’t tell’ policy that ignored sexual morality and cleanliness instead of condemning homosexual behavior.”³⁰ Zeiger is emphatic in denouncing the depravity of those who think a boy’s sexual orientation is his own business: “After all, ‘a Scout is clean.’”³¹

The only *honorable* course for any self-respecting Scout is to shun the unclean, and to condemn any organizations that will not do the same—such as Big Brothers/Big Sisters, which Zeiger denounces as “the vehicle for the destruction of thousands of young lives,” because it will not join the BSA in condemning homosexuals.³² To accept homosexuals as full members of our civic and political communities borders on treason, so far as Zeiger can see, for he says “homosexuality preaches an end to the traditional family,” and an agenda under which “the community and nation would face their final days.”³³

28. Press Release, Boy Scouts of Am., National Executive Board of the Boy Scouts of America Has Reaffirmed its Traditional Leadership Standards, as Recommended by its Appropriate Committees (Feb. 6, 2002), reprinted in Marc Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEX. 271, 335-36 (2003) (App. 1) (emphasis added).

29. ZEIGER, *supra* note 1, at 66 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 652 (2000)). The BSA’s 1991 position statement denounced homosexuals’ conduct as “inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed.” *Dale*, 530 U.S. at 652 (quoting BSA position statement condemning homosexuals as unclean); see *id.* at 674 (Stevens, J., dissenting) (quoting 1991 position statement); see also Eric Alan Isaacson, *Traditional Values, or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations*, 17 GEO. MASON U. CIV. RTS. L.J. 1 (2006).

30. ZEIGER, *supra* note 1, at 24.

31. *Id.* at 72 (quoting Scout Law).

32. *Id.* at 81 (“Big Brothers Big Sisters is involved in thousands of schools across America, and it will become—like the Boy Scouts should it, too, give in someday—the vehicle for the destruction of thousands of young lives.”).

33. *Id.* at 68.

It should be apparent that what Zeiger and the BSA's national leadership really object to, though, are America's *mainstream values*. From its inception, our Constitution has accommodated those who cannot swear an oath of duty to God, providing in Article VI that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."³⁴ Running flatly counter to the American tradition of rejecting religious tests and oaths that might exclude some citizens from full participation in civic society, the BSA insists on excluding children from membership as social inferiors, incapable of becoming "the best kind of citizen," if they will not mouth the Scout Oath's declaration of "duty to God."³⁵ And the Boy Scout Jamboree—operated under the auspices of the Department of Defense at an expense of millions of dollars to federal taxpayers—thus imposes a religious test that excludes little children, and adult leaders, from participating in a national event backed by the federal government.³⁶ This is fundamentally at odds with the values expressed in our Constitution—both in Article VI with its condemnation of religious tests, and in the First Amendment, with its affirmation of spiritual freedom and command of government neutrality respecting religious viewpoint.

America's *mainstream values*, moreover, have come to condemn civic discrimination not just on the basis of religious belief, but on the basis of race and ethnicity, and even on the basis of sexual orientation. The struggle against discrimination on account of an individual's racial identity or ethnicity has been a long one. We cannot forget that, at the outset, our Constitution protected slavery and the slave trade,³⁷ or that interracial mar-

34. U.S. CONST. art. VI, cl. 3.

35. See *supra* note 8 (collecting cases where children were expelled from Scouting on religious grounds); see also *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 1259, 1270 (S.D. Cal. 2003) ("Adult leaders and youth members . . . are required to have a belief in a formal deity [and] to swear a duty to God."); Isaacson, *supra* note 29 (describing the text of the BSA's Declaration of Religious Principle, under which children who cannot subscribe to the BSA's notions about religious belief and duty are excluded as incapable of becoming "the best kind of citizen"). Requiring children to recite the Scout Oath may exclude many besides atheists and agnostics. Dr. Benjamin Rush, widely honored for signing the Declaration of Independence and for condemning the institution of slavery from our Republic's birth, joined America's Quakers in condemning oaths as contrary to pure religion and reason: "Let us proceed then to examine the bible, and here we shall find, that oaths are as contrary to the precepts and spirit of [C]hristianity as they are to sound reason." Benjamin Rush, *An Enquiry Into the Consistency of Oaths with Reason and Christianity*, in *ESSAYS: LITERARY, MORAL AND PHILOSOPHICAL* 74 (Michael Meranze ed., 1988).

36. See Isaacson, *supra* note 29 (discussing litigation concerning the BSA Jamboree).

37. See U.S. CONST. art. IV, § 2, cl.3 (the Fugitive Slave Clause provided: "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."); *id.* art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . ."); see also Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 *VAND. L. REV.* 93, 94-95 (1989); Paul Finkelman, *The Root of the Problem: How the Proslavery*

riage was illegal in many states until 1967.³⁸ The struggle for equal rights for homosexual citizens is one that continues—with dramatic strides made in recent decades as part of the dynamic mainstream current of developing American social ethics.³⁹

The BSA's national leadership, however, has placed the youth organization at odds with this mainstream current of American values. That is precisely why the BSA, having made itself notorious as an organization that excludes and denigrates disfavored minorities, today finds its "[c]haritable funding is being severed."⁴⁰ "School boards and city councils are telling Scout troops they can no longer meet on public premises," writes Zeiger, acknowledging that mainstream "[c]hurches and community organizations have declared enmity with the Scouts."⁴¹ "In opposing atheists and homosexuals as members," Zeiger writes, "the Boy Scouts find themselves increasingly separated from mainstream civic organizations that at one point or another have decided that moral virtue, sexual preference, and religious belief are irrelevant matters."⁴²

In fact, the mainstream organizations believe *in the moral virtue of respect for others*—despite differences in racial and ethnic background, sexual orientation, or religious belief. They are part of a larger current in the American tradition, that strives to transcend limitations—and bigotries—of the past. For America always strives to be better than her past. The days of slavery are gone—an increasingly distant memory—along with the days when women could not vote. American traditions and the BSA have come

Constitution Shaped American Race Relations, 4 BARRY L. REV. 1, 4-10 (2003); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338-39 (1987) (noting the economic considerations underlying the framers' preservation of the slave trade).

38. See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia's still-enforced Racial Integrity Act of 1924); William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L. J. 1495, 1506 n.42 (1994) (noting that "[t]hirty-one states still had such laws at the end of World War II; sixteen states still had them in 1966, shortly before *Loving* was decided"); James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 97-98 (1993) (citing ROBERT J. SICKELS, *RACE, MARRIAGE AND THE LAW* 64 (1972)) (noting that most Southern states retained anti-miscegenation laws).

39. See, e.g., Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & L. 177 (2006).

40. ZEIGER, *supra* note 1, at 14.

41. *Id.* Most recently, the City of Philadelphia warned the BSA's Cradle of Liberty Council that it can no longer use city facilities rent-free. See Tina Moore, *Scouts Will Fight for Use of Building: The Mayor Says the Local Council Must Change Its Policy on Gays, Pay Market Rent, or Vacate*, PHILA. INQUIRER, July 25, 2006, at A1; Joseph A. Slobodzian et al., *Local Scout Leaders Caught in a Dilemma: Group's Policy on Gays Is at Root of Philadelphia Dispute*, PHILA. INQUIRER, July 30, 2006, at B3. Zeiger has condemned the action. See Hans Zeiger, *'Good Turns' Ought to Count*, PHILA. INQUIRER, July 28, 2006, at A17.

42. ZEIGER, *supra* note 1, at 39.

into conflict not because religious belief is “irrelevant” to mainstream organizations, but because each American’s religious scruples matter far too much to be left to coercive majorities backed by government power—as anyone familiar with our Constitution’s Article VI, and with the First Amendment’s religion clauses, should know.

Although Zeiger claims to be “the top young religious leader on the nation’s campuses,” he cannot feign respect for religious pluralism.⁴³ To the contrary, he displays sheer contempt for the “superficial” values that he says are today “espoused from the mainstream pulpits.”⁴⁴ Indeed, Zeiger writes that America’s “Christian churches are largely to blame” for the nation’s general moral decline, as a consequence of their “gutless ecumenism.”⁴⁵

Division and strife are preferred over an ecumenical spirit, as Zeiger’s rhetoric takes on a distinctly misogynistic tone. Despising our mainstream churches for their doctrinal liberalism and ecumenism, Zeiger complains: “Churches fail to speak for manly virtue.”⁴⁶ He condemns “the feminization of America,” supposedly produced by growing acceptance of women’s right to social equality with men.⁴⁷ Zeiger would turn the clock back, perhaps, to the days when “masculine” men dominated their women, and respectable women obeyed their men.

Zeiger’s vision is fundamentally at odds with the American mainstream.

B. *Marginalizing the Mainstream: Zeiger’s Assault on a Hollywood Jew*

If Zeiger’s beef is with America’s mainstream values, he nonetheless strives to marginalize the mainstream. This he does—as have far too many social conservatives before him—by associating the values he maligns with Hollywood Jews and religious liberals.

Our worst bigots have a history of using this stratagem. In the twentieth century’s opening decades, anti-Semitic diatribes blasted Jewish Hollywood for exercising a deplorable influence over American culture.⁴⁸ In his book *An Empire of Their Own*, Neil Gabler notes that Hollywood Jews

43. HansZeiger.net, *supra* note 3.

44. ZEIGER, *supra* note 1, at 40.

45. *Id.* at 56.

46. *Id.* at 55.

47. *Id.* at 56.

48. See NEAL GABLER, *AN EMPIRE OF THEIR OWN: HOW THE JEWS INVENTED HOLLYWOOD* 277 (1989) (noting how in 1921 the anti-Semitic *Dearborn Independent* denounced Hollywood as “Jew-controlled, not in spots only, not 50 per cent merely, but entirely; with the natural consequence that now the world is in arms against the trivializing and demoralizing influences”).

became a target for wave after wave of vicious anti-Semites—from fire-and-brimstone evangelicals in the teens and early twenties who demanded the movies' liberation from the "hands of the devil and 500 un-Christian Jews" to Red-baiters in the forties for whom Judaism was really a variety of communism and the movies their chief form of propaganda.⁴⁹

Gabler also points out that "[t]he sum of this anti-Semitic demonology was that the Jews, by design or sheer ignorance, had used the movies to undermine traditional American values."⁵⁰ As a consequence, Professor Jon M. Garon has observed, "the overwhelming wave of anti-Semitism that swept America prior to its entry into World War II threatened the very existence of Jewish Hollywood."⁵¹ Following the war's end, the head of the House Committee on Un-American Activities openly denounced "the racial minority" dominating Hollywood.⁵² Even today, self-appointed moralists' campaigns against supposedly decadent influences in American culture may only thinly veil an underlying anti-Semitism.⁵³

49. *Id.* at 2.

50. *Id.* Launching boycotts of supposedly decadent films, the Legion of Decency once raised a chorus denouncing Hollywood's Jews: "It is only because they [the Hollywood Jews] are outside the moral sphere of American culture that they blunder so badly that they require periodic campaigns such as that of the Legion of Decency to set them right." *Id.* (quotations omitted); see also Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 650 n.483 (2002) (quoting GABLER, *supra* note 48, at 2).

51. Garon, *supra* note 50, at 654.

52. Professor Anthony Chase observes, for example, that following World War II, a leading member of the House Unamerican Activities Committee,

Mississippi Congressman John Rankin was vigorously opposed to Jews and Communists in Hollywood and to the war crimes trials in Nuremberg. . . . Rankin was furious that "a racial minority, two and a half years after the war closed, are in Nuremberg not only hanging German soldiers but trying German businessmen in the name of the United States." . . . Rankin felt that it was more important to investigate "a racial minority" in Hollywood . . . than it was to permit that religious group, in Rankin's conspiratorial view, to persecute good German businessmen in Nuremberg. For Rankin, [Nora] Sayre adds, "Jews and Communists were barely distinguishable."

Anthony Chase, *Historical Reconstruction in Popular Legal and Political Culture*, 24 SETON HALL L. REV. 1969, 2000-01 (1994) (footnotes omitted) (citing JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBER* 139-40 (1978) and NORA SAYRE, *RUNNING TIME: FILMS OF THE COLD WAR* 17, 57-58, 69 (1982)).

53. See Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853, 871 n.100 (1995) (noting that "[b]laming Jews for violence on television is an outgrowth of the belief that Jews dominate Hollywood" (citing ARNOLD FORSTER & BENJAMIN R. EPSTEIN, *THE NEW ANTI-SEMITISM* 109-11, 210 (1974) and Bernard Weinraub, *Stereotype of Jews Is Revived*, N.Y. TIMES, Nov. 7, 1994, at C11)). Most such voices come from the political (and religious) right—though not all; for City College of New York Professor Leonard Jeffries made news in the 1990s with charges that African Americans are victims of "a conspiracy, planned and plotted and programmed out of Hollywood, where people named Greenberg and Weisberg and Chigliani . . . Russian Jewry' [have always] 'had a particular control over the movies.'" Robert O'Neil, *Free Speech in the College Community*, 29 ARIZ. ST. L.J. 537, 538 & n.4 (1997) (quoting Manuel Perez-Rivas, *CUNY Sidesteps Speech Flap*, NEWSDAY, Aug. 7, 1991, at 7); see also *Jeffries v. Harleston*, 21 F.3d 1238, 1241-42 (2d Cir. 1994) (holding that Jeffries' First Amendment rights were violated when City College

Zeiger appears to continue the shameful tradition, writing in the *Introduction* to his book that “much of society is determined to destroy the Boy Scouts,” and blaming “Hollywood and the rest of popular culture” under its influence.⁵⁴ As a prime case in point, Zeiger cites the treachery of one of Hollywood’s most eminent Jews—“Steven Spielberg, who started in cinema by filming his Scout troop in the 1960s,” and who “sat on the board of advisers for the national Boy Scouts of America (BSA) beginning in the early 1990s.”⁵⁵ Spielberg not only made time in his extraordinary career to serve the BSA as a member of its national Board of Advisers,⁵⁶ he also developed a new cinematography merit badge.⁵⁷

In 1989 the BSA gave Spielberg the Distinguished Eagle Scout Award,⁵⁸ an honor reserved for a very few Eagle Scouts with careers marked by distinguished service for at least a quarter century after they became Eagle Scouts.⁵⁹ Roughly one in twenty Scouts make Eagle,⁶⁰ and

reduced his term as department head because of the Albany speech), *on remand* 52 F.3d 9 (2d Cir. 1995) (holding on remand in light of the Supreme Court’s intervening decision in *Waters v. Churchill*, 511 U.S. 661 (1994), that Jeffries’ rights were not violated); Nathan Glazer, *Brown v. Board of Education after Forty Years: Confronting the Promise*; Levin, Jeffries, and the Fate of Academic Autonomy, 36 WM. & MARY L. REV. 703, 715-16 (1995); Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 ST. THOMAS L. REV. 39, 53-54 (1999); Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 PACE L. REV. 15, 29-30 (1994); Michael J. Sherman, *The Leonard Jeffries Problem: Public University Professor/Administrators, Controversial Speech, and Constitutional Protection for Public Employees*, 30 LOY. U. CHI. L.J. 651, 651-52 (1999); Robert J. Spitzer, *Tenure, Speech, and the Jeffries Case: A Functional Analysis*, 15 PACE L. REV. 111, 116-17 (1994); Harry F. Tepker, Jr. & Joseph Harroz, Jr., *On Balancing Scales, Kaleidoscopes, and the Blurred Limits of Academic Freedom*, 50 OKLA. L. REV. 1, 20 n.127 (1997).

54. ZEIGER, *supra* note 1, at 9.

55. *Id.* at 10.

56. *Id.*

57. See Elizabeth N. Aoki, *34,000 Scouts Around the Campfire: Youths Converging on Fort A.P. Hill For Quadrennial Jamboree*, WASH. POST, July 30, 1989, at D3.

58. *Id.* (“On Wednesday, film director and Eagle Scout Steven Spielberg will be on hand to help unveil a cinematography badge he helped create. Spielberg also will receive the Distinguished Eagle Scout Award for his work in the film industry and his continued involvement in scouting.”); Christopher Blank, *Boy Scouts are Busy at National Jamboree*, ST. PETERSBURG TIMES, Aug. 9, 1989, at 3 (describing the “opening show” of the BSA’s 1989 Jamboree, in which “Spielberg credited his success to the Boy Scouts because he made his first movie while fulfilling a requirement for a photography merit badge,” and “[t]he Scouts honored Spielberg by giving him the Distinguished Eagle award”); Christopher Blank, *Spielberg Secrets*, ADVERTISER, Feb. 19, 1994 (Spielberg “was given the Distinguished Eagle Scout Award at the 12th National Scout Jamboree in the U.S. in 1989”); Larry Pryor, *Newsmakers: E.T. Was in the Future So He Couldn’t Just Call Home*, L.A. TIMES, Aug. 4, 1989, § 1, at 2 (“[T]he movie producer addressed about 70,000 Scouts, leaders and visitors who had gathered for the evening ceremony in an amphitheater and to see him awarded the Distinguished Eagle Scout Award for his work in films and his involvement in scouting.”); Susan Spillman, *Spielberg’s List*, USA TODAY, Mar. 21, 1994, at D3 (noting that Spielberg who was “awarded the Distinguished Eagle Scout Award from the Boy Scouts of America in 1989,” also helped create a cinematography merit badge).

59. See WIKIPEDIA, DISTINGUISHED EAGLE AWARD, http://en.wikipedia.org/wiki/Distinguished_Eagle_Scout_Award (last visited Feb. 5, 2007).

60. See Eagle Scout Fact Sheet, <http://www.scouting.org/factsheets/02-516.html> (last visited Feb. 5, 2007) (“only about 5 percent of all Boy Scouts do so”); Nesa.org, Trail to Eagle, <http://www.nesa.org/>

fewer than one in a thousand Eagle Scouts can, with Spielberg, call themselves Distinguished Eagles.⁶¹

But the current BSA leadership inculcates values that are quite simply at odds with the most cherished values of mainstream American Judaism—as they are with the values of mainstream Christianity. Following the Supreme Court's decision in *Dale*, Reform Judaism's national leadership called for synagogues to sever their relations with Boy Scout troops and Cub Scout packs, and urged Jewish parents to withdraw their children from any further involvement in Scouting.⁶² Many did so.⁶³ But one need not be a Reform Jew to find the BSA's policies offensive—Steven Spielberg grew up in an Orthodox household.⁶⁴

trail/index.html (last visited Feb. 5, 2007) (same).

61. See DISTINGUISHED EAGLE AWARD, *supra* note 59.

62. A January 2001 memorandum to American synagogues explained that, in light of the BSA's discriminatory policies, and "with pain, we must recommend that congregations sponsoring/housing troops/packs withdraw sponsorship of a troop/pack and/or stop housing one." Memorandum from Rabbi Dan Polish, Dir. of the Comm'n on Soc. Action, and Judge David Davidson, Chair of the Comm'n on Soc. Action of the Union of Am. Hebrew Congregations and the Cent. Conference of Am. Rabbis to Union of Am. Hebrew Congregations (Jan. 5, 2001), available at <http://rac.org/pubs/packets/bsa/>. The memorandum continued: "In addition, we recommend that parents with children in non-Reform affiliated troops withdraw their children from troops/packs." *Id.* The *Los Angeles Times* was one of many papers noting this "plea to Reform synagogues to sever ties with the Boy Scouts." William Lobdell, *Reform Synagogues Wrestle with a Plea from National Leaders Not to Sponsor Troops*, L.A. TIMES, Jan. 20, 2001, at B2. The *Chicago Tribune* reported: "The leaders of Reform Judaism, the most liberal of the three main branches of Judaism, recommended last month that their synagogues cut their ties to the Boy Scouts and that parents take their children out of Scout troops." Karen Brandon, *Court Ruling Didn't End Scout Debate; Towns, Schools Facing Questions of Inclusion*, CHI. TRIB., Feb. 2, 2001, at N1; see also Karen Brandon, *Scouts' Position Prompts Many to Take a Stand*, OREGONIAN, Mar. 6, 2001, at A08. *Christianity Today* reported: "The American Reform Jewish movement has called on Jewish families and synagogues to sever all ties with the Boy Scouts." Kevin Eckstrom, *Reform Jewish Leaders Urge Boy Scout Ban*, CHRISTIANITY TODAY, Apr. 2, 2001, at 24.

63. This is from *The Star-Ledger*, for example, reporting on Temple B'nai Shalom of East Brunswick's decision to stop co-sponsoring a Boy Scout troop:

The board voted Jan. 17 to withdraw its sponsorship of the Scouts, following the recommendations issued earlier this month by the Union of American Hebrew Congregations and the Central Conference of American Rabbis.

"Numbers of congregations literally across the country are doing exactly what Temple B'nai Shalom is doing," said Rabbi Daniel Polish, director of the Joint Commission on Social Action of Reform Judaism.

Polish said, "Those core values (of the Boy Scouts) are incompatible with the core values of the Reform movement."

Tom Haydon, *E. Brunswick Synagogue Ousts Scout Troop Over Ban on Gays*, STAR-LEDGER (Newark, N.J.), Feb. 2, 2001, at 41. For a compelling account of how the Temple Israel of Hollywood was forced, by the BSA's discriminatory policies, to terminate its longstanding sponsorship of a Cub Scout troop during Loyola of Los Angeles Professor Ellen P. Aprill's tenure as the Temple's president, see Ellen P. Aprill, *Reform Judaism, B'tzelem Ehlohim, and Gay Rights, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW* (Robert Cochran ed., forthcoming 2007), available at <http://ssrn.com/abstract=887386>.

64. ABIGAIL POGREBIN, STARS OF DAVID: PROMINENT JEWS TALK ABOUT BEING JEWISH 26 (2005).

Faced with a conflict between his own fundamental values and sense of honor on the one hand, and his dedication to Scouting on the other, Spielberg had to resign from the BSA's Board of Advisers. Accepting the Human Rights Campaign's National Equality Award in October of 2002, Spielberg called "quitting the Boy Scouts . . . one of the most painful experiences I've ever had to endure."⁶⁵ Spielberg explained that he had been "a Jewish kid growing up, alive and alone, in an all-gentile neighborhood," experiencing "exclusion from many other kids my age who only knew what a Jew was from what their parents told them, what their friends said, or popular negative stereotypes."⁶⁶ "So when I joined the Boy Scouts of America I felt that I had found a safe haven, away from all the teasing and all the taunting."⁶⁷ As a Boy Scout, Spielberg found he could fit in, learn to achieve, and be proud of himself. "And maybe most importantly, it was through the Boy Scouts of America—as I was trying out for a merit badge in photography—that I actually discovered my passion for filmmaking."⁶⁸ Were it not for Spielberg's experience in Scouting, we would never have known *E.T.*, *Indiana Jones*, or *Schindler's List*. "That's exactly how I got started," Spielberg remarked, explaining that "Scouting gave me an amazing opportunity and it was the beginning of my personal yellow brick road."⁶⁹

That experience made him "a passionate advocate of Scouting" who enthusiastically "served on the national board for years—until the Supreme Court case of *Dale v. the Boy Scouts of America*" showed him that the organization had turned into one that denigrated, excluded, and humiliated children who needed—as badly as Spielberg once did—to fit in.⁷⁰ The Jewish Boy Scout who grew up to make *Schindler's List* and *Amistad* could not sponsor invidious discrimination: "So I quit the Boy Scouts. I resigned my commission."⁷¹ The Jewish kid who earned the rank of Eagle, and then of Distinguished Eagle, explained that "observing common humanity and decency should not be extraordinary" for American citizens—

65. Steven Spielberg, Address at the Sixth Annual Human Rights Campaign National Dinner [hereinafter Spielberg Address] (Oct. 13, 2002), available at http://www.hrc.org/content/contentgroups/news_releases/20021/address_by_Steven_Spielberg_at_Sixth_Annual_HRC_National_Dinner_Oct__13.htm; see also Roxanne Roberts, *Dinner with the Family: The Human Rights Campaign Puts Its Best Fete Forward*, WASH. POST, Oct. 14, 2002, at C1; GayPASG.org, Steven Spielberg: The Boy Scouts Are Wrong (Oct. 19, 2002), <http://www.gaypasg.org/GayPASG/PressClippings/2002/October%2002/Steven%20Spielberg%20-%20The%20Boy%20Scouts%20are%20wrong.htm>.

66. Spielberg Address, *supra* note 65.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

who awake every day “in a country that presumes basic liberty and freedom.”⁷²

Zeiger notes Spielberg's action, and his explanation that “[t]he last few years in Scouting have deeply saddened me . . . [with] the Boy Scouts of America publicly participating in discrimination. It's a real shame.”⁷³ Zeiger's response: “If a Scout declares himself incapable or unwilling to do his best to do his duty, *he is no more a Scout than a rat is an eagle.*”⁷⁴

If anything, the fact that Zeiger's own maternal grandparents were Jewish makes his condemnation of Spielberg as not an Eagle *but a rodent* all the more outrageous and offensive.⁷⁵ Without the “grace found in Jesus Christ,” Zeiger suggests in another book, the Jewish tradition is among those that “may be summarized as an endless reworking of spiritual depravity.”⁷⁶ Zeiger thinks himself cleansed of that depravity: “Only the blood of Christ, the abundant river of life, can wash away our old nature and give us a new one.”⁷⁷

Alluding to a prominent Hollywood Jew as Zeiger does—calling the Distinguished Eagle Steven Spielberg not an Eagle, *but a rat*—places Zeiger so far outside the bounds of civilized discourse that endorsements from Attorney General Meese and Lieutenant Colonel North come as something of a surprise. The many links to Zeiger's commentary from the BSA's own BSAlegal.org strongly suggest that BSA leadership accepts Zeiger as a mouthpiece despite his extraordinary rhetoric.⁷⁸ That is not honorable—it is disgraceful.

C. Denigrating American Religious Traditions: Zeiger's Assault on Liberal Churches

Hollywood cannot bear the full blame for the American mainstream's decline, but must share responsibility with liberal churches in Zeiger's

72. *Id.*

73. ZEIGER, *supra* note 1, at 10 & 178 n.11 (quoting *Spielberg Quits Scouts Post*, SAN DIEGO UNION-TRIB., Apr. 17, 2001, at A-3); see Stephen P. Anway, *The Restoration of States' Civil Rights Authority: An Alternative to Expressive Association After Boy Scouts of America v. Dale*, 62 OHIO ST. L.J. 1473, 1497 n.172 (2001) (noting Spielberg's resignation); Daniel E. McGuire, *The Supreme Court's Latest Resolution of the Conflict Between Freedom of Association and Public Accommodations Laws: Boy Scouts of America v. Dale and Its Implications in and out of the Courtroom*, 47 VILL. L. REV. 387, 415 & n.164 (2002) (noting Spielberg's resignation); Sunder, *supra* note 7, at 545 n.282 (noting Spielberg's resignation); see also David France et al., *Scouts Divided*, NEWSWEEK, Aug. 6, 2001 (Spielberg “ended 10 years on the advisory board, saying he could no longer serve a group that practices ‘intolerance and discrimination.’”).

74. ZEIGER, *supra* note 1, at 10 (emphasis added).

75. HANS ZEIGER, REAGAN'S CHILDREN: TAKING BACK THE CITY ON THE HILL 128 (2006).

76. *Id.* at 70.

77. *Id.*

78. See *supra* notes 19-21 and accompanying text.

worldview. “At the beginning of American Scouting,” Zeiger acknowledges, “progressive Social Gospel churches were among the biggest supporters of the movement.”⁷⁹ But Zeiger cannot begin to conceal his contempt for the “liberal churches” that sustained and fostered Scouting in its early years.⁸⁰

The term “liberal churches” long has designated Unitarians and Universalists in particular, of course.⁸¹ Used more loosely, it is broad enough to cover mainline Trinitarian Congregationalists, Episcopalians, and others who embrace what Zeiger calls a “sissified, watered-down Social Gospel.”⁸²

Zeiger in any event praises the purge of religious liberals that the BSA’s national leadership commenced in the 1980s and 1990s. It began with the expulsion from Scouting of a Unitarian Universalist, Elliott Welsh, and his first-grade son because the first-grader balked at an oath promising “duty to God,” while the father objected to “the Boy Scout creed,” or Declaration of Religious Principle, which disparages anyone uncertain of God’s existence as not “the best kind of citizen.”⁸³ The BSA leadership’s war against religious liberals escalated in 1992 when the Unitarian Universalist Association of Congregations, which includes some of America’s oldest Protestant Churches, criticized the BSA’s discriminatory policies—and BSA leadership retaliated by banning Unitarian Universalists from the organization’s Religious Relationships Committee.⁸⁴

Then, in 1998, the BSA formally disapproved the Unitarian Universalists’ *Religion in Life* award for Scouts, a Religious Emblem (which Zeiger

79. ZEIGER, *supra* note 1, at 147.

80. *Id.*

81. *See, e.g.*, LEONARD WOOLSEY BACON, A HISTORY OF AMERICAN CHRISTIANITY 226-27 (1897) (Orthodox Congregationalist historian identifying Unitarians and Universalists as “the two sects called ‘liberal’”); *see also* JOSEPH HENRY ALLEN, OUR LIBERAL MOVEMENT IN THEOLOGY (1882); A. POWELL DAVIES, THE MIND AND FAITH OF A. POWELL DAVIES: THE BEST RELIGIOUS AND SECULAR WRITINGS OF AN UNREPENTANT LIBERAL (William O. Douglas ed., 1959); CONRAD WRIGHT, THE LIBERAL CHRISTIANS: ESSAYS ON AMERICAN UNITARIAN HISTORY (1970); Conrad Wright, *Introduction* to THREE PROPHETS OF RELIGIOUS LIBERALISM: CHANNING-EMERSON-PARKER 3, 6 (Conrad Wright ed., Unitarian Universalist Ass’n 2d ed. 1986) (1961); Letter from John Adams to Thomas Jefferson (June 25, 1813), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 333, 333 (Lester J. Cappon ed., 1959) [hereinafter THE ADAMS-JEFFERSON LETTERS] (referring to English and American Unitarians as “these liberal Christians in London and Boston”).

82. ZEIGER, *supra* note 1, at 147.

83. *See* Welsh v. Boy Scouts of Am., 787 F. Supp. 1511 (N.D. Ill. 1992), *aff’d*, 993 F.2d 1267 (7th Cir. 1993). Today a member of the Unitarian Universalist Society of Geneva, Illinois, Welsh had long been active in liberal religious circles. *See* Isaacson, *supra* note 29; *see also* Brief for the Unitarian Universalist Ass’n of Congregations et al. as Amici Curiae Supporting Plaintiffs-Appellees, Winkler v. Rumsfeld, No. 05-3451 (7th Cir. Apr. 6, 2006). This Article’s author represents Welsh and other Unitarian Universalists as amici in *Winkler*.

84. *See* Isaacson, *supra* note 29.

misidentifies as a “patch”) designed and awarded by the denomination and its congregations.⁸⁵ When Unitarian Universalists criticized the BSA for discriminating on the basis of children’s religion or sexual orientation, Zeiger writes, “the BSA was forced to drop the Unitarian Universalist religious patch from its program.”⁸⁶

This is ironic. “Every President since Theodore Roosevelt and William Howard Taft openly supported Scouting,” writes Zeiger, condemning Bill Clinton as “the only president in history to turn down a request to speak at a national Boy Scout Jamboree.”⁸⁷ “The first honorary president of the BSA was William Howard Taft in 1911,” says Zeiger, actually understating the great President and Chief Justice’s critical role in launching the BSA.⁸⁸ The BSA’s own 1937 *History of the Boy Scouts of America* attributed the organization’s success to Taft, who was a prominent Unitarian:

The national character of the Boy Scouts of America was strikingly brought before the people of the country, in the very beginning, by holding the first annual meeting in the White House, on February 14 and 15, 1911, at the invitation of President Taft, Honorary President of the Boy Scouts of America.⁸⁹

Yet Taft, who as a Unitarian was viciously attacked in the 1908 election for his own theological liberalism (and also for his willingness to work with Catholics) was precisely what Zeiger condemns as a “sissified” religious liberal—Taft even served as “President of the International Congress of Religious Liberals from 1927 to his death in . . . 1930.”⁹⁰ A mainstream Protestant in the Dutch Reformed tradition, Theodore Roosevelt condemned Taft’s detractors who in the 1908 race derided the great Unitarian’s theology as too liberal. “If there is one thing for which we stand in this country,” President Roosevelt declared, “it is for complete religious freedom, and it is an emphatic negation of this right to cross-examine a

85. ZEIGER, *supra* note 1, at 151; Isaacson, *supra* note 29.

86. ZEIGER, *supra* note 1, at 151; see Gustav Niebuhr, *Unitarians Are Disputing Boy Scouts on Emblems*, N.Y. TIMES, Aug. 1, 1998, at A11 (“Until now, the Boy Scouts have never forbidden a religious body from awarding such emblems to its youth, a Scout spokesperson said.”).

87. ZEIGER, *supra* note 1, at 119.

88. *Id.* at 121.

89. WILLIAM D. MURRAY, *THE HISTORY OF THE BOY SCOUTS OF AMERICA* 309 (1937).

90. VERNON B. HAMPTON, *RELIGIOUS BACKGROUND OF THE WHITE HOUSE* 262-63 (1932). “Think of the United States with a *President* who does not believe that Jesus Christ was the Son of God,” one of his fundamentalist detractors wrote in 1908, “but looks upon our immaculate Savior as a common bastard and low, cunning imposter!” 1 HARRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 374 (1939) (quoting *Pentecostal Herald* of July 15, 1908); see EDMUND FULLER ET AL., *GOD IN THE WHITE HOUSE* 171 (1968) (same quotation); Edgar Albert Hornig, *The Religious Issue in the Taft-Bryan Duel of 1908*, 105 PROC. AM. PHIL. SOC. 530, 532 (1961) (same quotation).

man on his religious views before being willing to support him for office.”⁹¹ Yet Zeiger lauds the BSA for making first-graders’ religious beliefs a critical qualification for admission to Scouting.

Roosevelt wrote that the attacks on Taft’s personal religious beliefs “by a certain type of small Protestant bigots are so infamous as to make my blood boil.”⁹² One suspects Zeiger’s book too would make Roosevelt’s blood boil.

D. *Misappropriating America’s Liberal Religious Heritage: Conscripting Religious Liberals to Do Battle Against Their Own Faith Traditions*

As if Zeiger’s invocation of Taft’s and Roosevelt’s names were not enough, the irony of Zeiger’s assault on liberal religion is heightened by the fact that he so often invokes famed names, and words, of leading religious liberals—as though they supported his own narrow-minded view of honor and right-thinking. When Zeiger offers quotations to underscore values that the BSA supposedly represents, often as not, he adopts the words of notorious religious liberals—such as John Adams, Thomas Jefferson, and Julia Ward Howe—shamelessly misappropriating these liberals’ phrases to do battle against their own churches and liberal heritage.

1. *John Adams*

Zeiger quotes our nation’s second President, John Adams, for the notion that the Constitution was framed for a religious people—which Zeiger apparently takes to exclude all who oppose the BSA’s discriminatory policies: “‘We have no government armed with power capable of contending with human passions unbridled by morality and religion,’ wrote John Adams. ‘Our constitution was made only for a moral and religious people. It is wholly inadequate for a government of any other.’”⁹³

91. BERTON DULCE ET AL., *RELIGION AND THE PRESIDENCY* 73 (1962) (quoting 2 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 405-06 (1950) (quoting 2 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884-1918, at 324-25 (1925))).

92. Hornig, *supra* note 90, at 532 (quoting Letter from Theodore Roosevelt to William Howard Taft (Aug. 28, 1908)).

93. ZEIGER, *supra* note 1, at 132 & 191 n.54 (citing World Net Daily, California Scolds Boy Scouts (Sept. 2, 2003), http://www.wnd.com/news/article.asp?ARTICLE_ID=34379). Although Zeiger’s cited source for this quotation contains no reference at all to John Adams, the quotation in fact is drawn from Adams’ answer to an address in 1798. See John Adams, To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in 9 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 228, 229 (Charles Francis Adams ed., 1854) [hereinafter *THE WORKS OF JOHN ADAMS*]. Adams later wrote to Jefferson that he could not be expected to recollect every Expression of every Answer to an Address, when for six months together, I was compelled to answer Addresses of all Sorts from all quarters of the Union. My private

With Adams providing a model of Christian citizenship, Zeiger condemns California Assemblywoman Jackie Goldberg, whom he characterizes as a “militant feminist lesbian since she spent the sixties as a radical peacenik at the University of California–Berkeley.”⁹⁴ Because she has sponsored antidiscrimination legislation, Zeiger insists that Goldberg is “one of the elites who would say that the morality and religion spoken of by John Adams are better termed ‘discrimination.’”⁹⁵

Yet Adams found the normative foundations of good government not, as Zeiger apparently does, in Biblical law or in rules condemning homosexuality and heterodoxy, but in the works of pagan classical authors and others grounded not in theological doctrines, but in “the principles of nature and eternal reason.”⁹⁶ Adams was, in truth, a religious liberal—an eminently open-minded and tolerant man who repudiated the Christian orthodoxy of his day.⁹⁷ Indeed, he “identified himself with and became one of the leading Unitarians in America.”⁹⁸ Adams’ own brand of Unitar-

Secretary has declared that he has copied fifteen Answers from me in one morning. The greatest Affliction, distress, [and] confusion of my Administration arose from the necessity of receiving and Answering those Addresses.

Letter from John Adams to Thomas Jefferson (June 10, 1813), in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 81, at 326, 327. “For the hon[or] of my Country,” Adams added, “I wish these Addresses and Answers [were] annihilated.” *Id.*

94. ZEIGER, *supra* note 1, at 132.

95. *Id.*

96. Specifically, Adams cited “the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke; the principles of nature and eternal reason,” identifying them with “the principles on which the whole government over us now stands.” JOHN ADAMS, NOVANGLUS (1774), *reprinted in* 4 THE WORKS OF JOHN ADAMS, *supra* note 93, at 11, 15 (1854).

97. Adams wrote to Thomas Jefferson that, according to orthodox Christians, God had created this Speck of Dirt and the human species for his glory: and with the deliberate design of making, nine tenths of our Species miserable forever, for his glory. This is the doctrine of Christian Theologians, in general: ten to one.

Now, my Friend, can Prophecies, or miracles convince You, or Me, that infinite Benevolence, Wisdom, and Power, created and preserves, for a time, innumerable millions to make them miserable, for ever; for his own Glory? Wretch! . . . I believe no such things. My Adoration of the Author of the Universe is too profound and too sincere. The love of God and his Creation; delight, Joy, Triumph, Exultation in my own existence, tho but an Atom, a *Molecule Organique*, in the Universe; are my religion.

Letter from John Adams to Thomas Jefferson (Sept. 14, 1813), in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 81, at 372, 373-74. This passage strongly suggests that Adams was not just a Unitarian, but a Universalist as well.

98. NORMAN COUSINS, ‘IN GOD WE TRUST’: THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 75 (1958); *see* HAMPTON, *supra* note 90, at 339. Adams said he favored “the most liberal toleration” in matters of religion, expressing “hope that Congress will never meddle with religion further than to say their own prayers, and to fast and give thanks once a year.” 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 513 (1950) (quoting Letter from John Adams to Benjamin Kent (June 22, 1776), in 9 THE WORKS OF JOHN ADAMS, *supra* note 93, at 402). Adams’ grandson, Charles Francis Adams, recounted how after “a very elaborate examination of the religion of all ages and nations,” Adams had embraced

theological opinions very much in the mould adopted by the Unitarians of New England. Rejecting, with the independent spirit which in early life had driven him from the ministry,

ian Christianity was one that “brings the great principle of the law of nature and nations—Love your neighbor as yourself, and do to others as you would that others should do to you,—to the knowledge, belief, and veneration of the whole people.”⁹⁹ “For my part,” he wrote to Thomas Jefferson, “I cannot deal damnation round the land on all I judge the Foes of God or Man.”¹⁰⁰

Of religious conservatives Adams declared: “Howl, Snarl, bite Ye Calvinistick!, Ye Athanasian Divines, if You will. Ye will say I am no Christian: I say Ye are no Christians: and there the Account is balanced.”¹⁰¹ Yet Adams found among even the orthodox “honest men,” whom he deemed “Christians, in my sense of the word.”¹⁰² In fact, Adams earnestly practiced the kind of open-minded religiosity that Zeiger derides as “gutless ecumenism,”¹⁰³ for it is said “that he worshiped during sessions of the Continental Congress at services of the Roman Catholics, Episcopalians, Presbyterians, Quakers, Baptists, and Methodists, thus emphasizing the tolerance which the Constitution hoped to encourage.”¹⁰⁴

John Adams’ son, and our nation’s sixth President, John Quincy Adams was a religious liberal too, who in 1821 helped to organize the First Unitarian Church of Washington, D.C., today known as All Souls Church, Unitarian.¹⁰⁵ The two Presidents’ earthly remains are interred with those of

the prominent doctrines of Calvinism, the trinity, the atonement, and election, he was content to settle down upon the Sermon on the Mount as a perfect code presented to man by a more than mortal teacher. Further he declined to analyze the mysterious nature of his mission.

Charles Francis Adams, *The Life of John Adams*, in 1 THE WORKS OF JOHN ADAMS, *supra* note 93, at 621 (1851).

99. COUSINS, *supra* note 98, at 99-100 (quoting John Adams, Diary (Aug. 14, 1796)).

100. Letter from John Adams to Thomas Jefferson (June 28, 1813), in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 81, at 338.

101. Letter from John Adams to Thomas Jefferson (Sept. 14, 1813), in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 81, at 374.

102. *Id.* To Thomas Jefferson, Adams also wrote: “Allegiance to the Creator and Governor of the Milky Way and the Nebulae, and Benevolence to all his Creatures, is my Religion.” Letter from John Adams to Thomas Jefferson (Dec. 3, 1813), in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 81, at 402, 406.

103. ZEIGER, *supra* note 1, at 56.

104. 1 STOKES, *supra* note 91, at 512 (footnote omitted).

105. Writing on religion and Bible studies in a series of letters to his own son, John Quincy Adams concluded:

Be careful of all not to let your reading make you a pedant, or a bigot; let it never puff you up with pride or a conceited opinion of your own knowledge, nor make you intolerant of the opinions which others draw from the same source, however different from your own.

John Quincy Adams, Letter IX, in THE BIBLE LESSONS OF JOHN QUINCY ADAMS FOR HIS SON 73, 78-79 (2d prtg. 2002). The Reverend Theodore Parker, discussed *infra* notes 127-37, eulogized John Quincy Adams:

His devotion to freedom appeared—where it seldom appears—in his notions about religion. He thought for himself, and had a theology of his own . . . but he allowed others to think also for themselves, and have a theology of their own. Mr. Adams was a Unitarian. It is no

their wives, Abigail Adams and Louisa Catherine Adams, at the United First Parish Church (Unitarian) in Quincy, Massachusetts,¹⁰⁶ which made the news recently—when local officials tried to keep “the Church of the Presidents” from displaying a banner supporting the right of same-sex couples to marry.¹⁰⁷

The Church of the Presidents at Quincy,¹⁰⁸ the church of the Mayflower Pilgrims at Plymouth,¹⁰⁹ and the original churches of John Winthrop's celebrated “city on a hill,”¹¹⁰ all celebrate weddings of same-sex

great merit to be a Unitarian, or a Calvinist, or a Catholic, perhaps no more merit to be one than the other. But he was not ashamed of his belief when Unitarianism was little, despised, mocked at and called “infidelity” on all sides. When the Unitarian church at Washington, a small and feeble body, met for worship in an upper room—not large, but obscure, over a public bathing-house—John Quincy Adams, then Secretary of State and expecting to be President, came regularly to worship with them. It was not fashionable; it was hardly respectable

THEODORE PARKER, A DISCOURSE OCCASIONED BY THE DEATH OF JOHN QUINCY ADAMS: DELIVERED AT THE MELODEON IN BOSTON, MARCH 5, 1848, at 45-46 (1848) (“reprinted from the Massachusetts Quarterly Review”); see also HAMPTON, *supra* note 90, at 339 (noting that “the first Unitarian Church in Washington was erected” during John Quincy Adams' presidency, “he being one of the founders”); GEORGE W. HOSMER, A DISCOURSE ON THE LIFE AND CHARACTER OF JOHN QUINCY ADAMS: DELIVERED IN THE UNITARIAN CHURCH, FEBRUARY 27, 1848, at 20 (1848) (eulogizing John Quincy Adams as a Unitarian who “would no more be confined by a sect than by a party”); OLGA JONES, CHURCHES OF THE PRESIDENTS IN WASHINGTON 70-71 (2d ed. 1961) (noting that John Quincy Adams was an organizer of All Souls Church).

106. See HAMPTON, *supra* note 90, at 339.

107. See *Banner Boosting Gay Marriage Rejected*, BOSTON GLOBE, Mar. 1, 2006, at B1 (“The Quincy Historical District Commission has rejected a proposal by United First Parish Church to hang a massive banner supporting same-sex marriage outside the storied old church, which once included John Hancock and John Adams in its congregation.”); *Church Forbidden to Hang Large Banner Supporting Gay Marriage*, ASSOCIATED PRESS, Mar. 1, 2006, available at http://www.boston.com/news/local/massachusetts/articles/2006/03/01/church_forbidden_to_hang_large_banner_supporting_gay_marriage/ (“Commission members stressed that their objections were related to the banner's technical dimensions and possible aesthetic effects on the historic facade of the church, home to the crypts of Presidents John Adams and John Quincy Adams, and their wives.”); see also *Banner Days*, UU WORLD, Summer 2006, at 44 (photograph depicting the banner: “People of Faith for Marriage Equality”). The local authorities relented, and allowed the Church of the Presidents to hang its banner. See Robert Knox, *In Historic Area, Pro-Gay Sign Wins OK*, BOSTON GLOBE, Mar. 12, 2006, *Globe South*, at 7.

108. See United First Parish Church (Unitarian), Quincy, Massachusetts, <http://www.ufpc.org> (last visited Feb. 5, 2007).

109. The First Parish Church at Plymouth Massachusetts is the very congregation of the Pilgrims who gathered in 1606, and then sailed on the Mayflower, landing at Plymouth Rock in 1620. See First Parish Church in Plymouth, <http://firstparish.plymouth.ma.uua.org> (last visited Feb. 5, 2007); see generally JOHN CUCKSON, A BRIEF HISTORY OF THE FIRST CHURCH IN PLYMOUTH, FROM 1606 TO 1901 (1902); CHURCH OF THE PILGRIM FATHERS (George N. Marshall ed., 1950); DOROTHY B. REED ET AL., A BRIEF HISTORY OF THE FIRST PARISH CHURCH IN PLYMOUTH (1973). It may be noted that a substantial minority left the congregation in 1801, to form the Church of the Pilgrimage, which today is affiliated with the United Church of Christ, while the original First Parish Church is affiliated with the Unitarian Universalist denomination.

110. The “city on a hill” reference is from JOHN WINTHROP, A MODELL OF CHRISTIAN CHARITY (1630), reprinted in 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 31, 47 (3d. ed. 1838), describing the Puritans' understanding of their place in history: “For wee must consider that wee shall be as a citty upon a hill. The eies of all people are uppon us.” *Id.* “When John Winthrop and his party stepped off the *Arabella* in what is now Charleston their first action in the new world was to draw

couples.¹¹¹ The two denominations representing the Pilgrims' and Puritans' churches in North America, the Unitarian Universalist Association of Congregations and the United Church of Christ, have both called for legal recognition of homosexuals' right to marry.¹¹²

up and sign a covenant for a church on July 30, 1630." First Church In Boston—History, <http://www.fscboston.org/index.php?/events/category/C58> (last visited Feb. 5, 2007). Nearly four centuries later, the same Covenant is the basis of membership in the First Church of Boston, a Unitarian Universalist congregation. *Id.*; see generally ARTHUR B. ELLIS, HISTORY OF THE FIRST CHURCH IN BOSTON, 1630–1880 (1881). That congregation continues the tradition of Boston's First (gathered in 1630) and its Second Church (gathered in 1647), where Increase Mather, Cotton Mather, and Samuel Mather preached from 1664–1723, and which merged with First Church in 1970. See First Church In Boston—History, *supra* (First and Second Church merger); First Church In Boston—Social Justice, <http://www.fscboston.org/index.php?/history/item/137> (last visited Feb. 5, 2007) (Second Church history).

111. The author personally sought and obtained confirmation of this point from these congregations' current ministers. See Email from the Reverend Dr. Sheldon W. Bennett, Minister of the United First Parish Church (Unitarian) in Quincy, Massachusetts to Eric Alan Isaacson (Oct. 31, 2006) (on file with the *Pierce Law Review*) (confirming that "our congregation, also known informally as 'the Church of the Presidents' supports same-sex marriages and welcomes their celebration"); Email from the Reverend Sarah Clark, Minister of the First Parish Church in Plymouth to Eric Alan Isaacson (Mar. 1, 2007) (on file with the *Pierce Law Review*) (providing written confirmation: "Yes, we do celebrate same-sex weddings at First Parish Plymouth."); Email from the Reverend Stephen Kendrick, Senior Minister of the First (and Second) Church in Boston to Eric Alan Isaacson (Oct. 28, 2006) (on file with the *Pierce Law Review*) ("we do indeed perform same sex weddings"); Email from the Reverend Rosemary Lloyd, Assistant Minister of the First (and Second) Church in Boston to Eric Alan Isaacson (Oct. 29, 2006) (on file with the *Pierce Law Review*) ("Yes, indeed, we celebrate marriage ceremonies for same-sex couples at First Church in Boston."); see also Robert Knox, *Gays Welcome Outreach by Churches, Cite Unitarians for Efforts to End Prejudice*, BOSTON GLOBE, June 23, 2005, Globe South, at 4 (noting that the Mayflower Pilgrims' "First Parish in Plymouth . . . was among those issuing a statement of support" for the right of gay couples to marry). The author learned from personal conversation with the Reverend Gary L. Marks of the Church of the Pilgrimage that the second congregation claiming descent from the Mayflower Pilgrims, see *supra* note 109, also celebrates weddings of same-sex couples.

112. New England's oldest Protestant churches, comprising both the congregation of the Mayflower Pilgrims and those of the Puritans suffered a schism in the early 1800s, with the "liberal" congregations disfellowshipped by conservatives forming the Unitarian denomination, and the "orthodox" congregations retaining the designation "Congregationalist." See *Hale v. Everett*, 53 N.H. 9, 143 (1868) (Doe, J., dissenting). By the late twentieth century, the "liberal" congregations were members of the Unitarian Universalist Association of Congregations formed in 1961 by the union of Unitarian and Universalist denominations, see DAVID E. BUMBAUGH, UNITARIAN UNIVERSALISM 181-84 (2000), and the more conservative or "orthodox" Congregationalist churches were members of the United Church of Christ, formed in 1957 by the merger of the Congregationalist denomination with the Evangelical and Reformed Church. See J. WILLIAM T. YOUNGS, THE CONGREGATIONALISTS 190-93 (1990). Recognizing that "debate about legally recognized marriage of same-sex couples has focused on the objections of certain religious communities, while the Unitarian Universalist Association has adopted numerous resolutions over the last twenty-six years supporting equal rights for gay, lesbian, bisexual, and transgendered persons," the Universalist Association of Congregations General Assembly in 1996 resolved overwhelmingly to support the call for "legal recognition for marriage between members of the same sex," to "make this position known through the media," and to "urge[] member congregations to proclaim the worth of marriage between any two committed persons and to make this position known in their home communities." Universalist Association of Congregations 1996 General Assembly Resolution of Immediate Witness, Support of the Right to Marry for Same-Sex Couples, <http://www.uua.org/actions/immediate/96same-sex.html> (last visited Feb. 5, 2007). By 2005, the somewhat more conservative United Church of Christ General Synod had joined the call for full marriage equality. See United Church of Christ, General Synod Resolution, In Support of Marriage Rights

Zeiger clearly perceives the Boy Scouts as warriors—in a religious war against gays and the liberal churches that embrace them and insist on their right to marry. “Most damaging” of current trends, writes Zeiger, is “‘homosexual marriage’ [which] has become a reality in San Francisco, New York, Seattle, Massachusetts, and New Mexico, and soon will become legal in all of America if conservative Christian opposition is as minimal as it has been on most other moral issues of the past several decades.”¹¹³ Zeiger, the religious conservative, has enlisted John Adams, the religious liberal, in the battle—a battle against Adams’s own church, and against his own denomination.¹¹⁴

Zeiger is right about one thing, at least. Unless Zeiger’s ideological allies impose their will with constitutional amendments, religious liberals’ conviction that fundamental rights should not turn on sexual orientation likely will sweep the country, just as the idea has that African Americans, and even women, should have rights on par with white men. Conservative Republicans’ efforts to obtain approval for a federal constitutional amendment outlawing the liberal churches’ same-sex weddings have so far failed.¹¹⁵ That public opinion is rapidly shifting against them can hardly be doubted: “A Pew Research poll in March [2006] found that 51 percent of the public opposed legalizing same-sex marriage, down from 63 percent in February 2004.”¹¹⁶ In October 2006, on the heels of the New Jersey Supreme Court’s decision on same-sex unions, press reports indicated that polling “showed that 49% of New Jersey voters supported legalizing gay

for All (adopted July 4, 2005), <http://www.ucc.org/synod/resolutions/gsrev25-7.pdf>; see also Jim Callison, *Supporting Same-Sex Unions*, ARGUS LEADER (Sioux Falls, S.D.), July 18, 2005, at 1A; Irwin Smallwood, *General Synod Overwhelmingly Calls for “Full Marriage Equality,”* UNITED CHURCH NEWS, July 4, 2005, available at http://news.ucc.org/index.php?option=com_content&task=view&id=243&Itemid=54 (reporting that the United Church of Christ 2005 General Synod “overwhelmingly passed a resolution in support of equal marriage rights for all people, regardless of gender”).

113. ZEIGER, *supra* note 1, at 70.

114. See notes 107-09 and 111-12.

115. In 2004, efforts to pass a Federal Marriage Amendment (FMA) failed in both the House of Representatives and the Senate. See Laura N. Fellow, Note, *Congressional Striptease: How the Failures of the 108th Congress’s Jurisdiction-Stripping Bills Were Used for Political Success*, 14 WM. & MARY BILL RTS. J. 1121, 1131 n.62 (2006). Renewed efforts to move the FMA through the Senate failed again when, on June 7, 2006, conservatives obtained only forty-nine of the sixty votes required for cloture, with forty-eight votes against. See Laurie Kellman, *Gay Marriage Amendment Rejected by Senate*, ASSOCIATED PRESS, June 7, 2006.

116. David D. Kirkpatrick, *A Religious Push Against Gay Unions*, N.Y. TIMES, Apr. 24, 2006; see also Press Release, Pew Research Center, Only 34% Favor South Dakota Abortion Ban; Less Opposition to Gay Marriage Adoption and Military Service, at 4 (Mar. 22, 2006) (“Currently, 51% oppose legalizing gay marriage, down from a recent high of 63% just two years ago in February of 2004. The percent who favor allowing gay marriage has increased from a low of 29% in August of that year to 39% today.”). This shift dramatically counters recent assertions that “support for the legalization of gay marriage has risen only slightly since 1996.” Nate Persily et al., *Gay Marriage, Public Opinion and the Courts* 13-14, (Univ. of Pa. Law Sch. Working Paper No. 06-17, 2006), available at <http://papers.ssrn.com/abstract=900208>.

and lesbian marriage and 44% opposed it.”¹¹⁷ Mainstream public opinion clearly is shifting toward the view that all citizens—even gays and lesbians—are entitled to equal justice under law, including the fundamental right to marry.

2. *Thomas Jefferson*

Zeiger also invokes Thomas Jefferson’s phrase from the Declaration of Independence that he drafted with John Adams, about “the Laws of Nature and of Nature’s God,” to argue that the government should endorse the BSA’s position on religion.¹¹⁸ Our nation’s third President, Jefferson—like Adams, who served with him on the Declaration’s drafting committee—was in his personal religious convictions, a Unitarian, who dearly hoped that Unitarianism’s liberal influence would make it America’s general religion.¹¹⁹ In his *Notes on Virginia*, moreover, Jefferson endorsed the very religious pluralism that has come to be the hallmark of modern Unitarian Universalism: “But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.”¹²⁰ He even urged a nephew not to be frightened if free inquiry led him to atheism.¹²¹ Jefferson was by no means a man who could endorse

117. Ellen Barry, *N.J. Justices Clear the Way for Gay Unions*, L.A. TIMES, Oct. 26, 2006, at A1 (describing a June 2006 Rutgers-Eagleton Poll).

118. ZEIGER, *supra* note 1, at 131. “A government without morals,” Zeiger writes, “is a government out of touch with the higher law—‘the Laws of Nature and of Nature’s God,’ spoken of by the Founding Fathers in the Declaration of Independence.” *Id.* The committee appointed to draft the declaration consisted of Jefferson, Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston. CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 4, 135 (1964). The phrase regarding “the laws of nature & of nature’s god,” appears in Jefferson’s original draft. *Id.* at 141-42.

119. Jefferson expressed hope that, “Unitarianism would become the general religion of the United States.” CHARLES B. SANDFORD, *THE RELIGIOUS LIFE OF THOMAS JEFFERSON* 101 (1984) (quotations omitted); *see also id.* at 5-6, 33, 116.

120. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 159 (William Peden ed., 1955).

121. Jefferson wrote to his young nephew:

Question with boldness even the existence of a God, because, if there be one, he must more approve of the homage of reason, than that of blind-folded fear. Do not be frightened from this inquiry by any fear of its consequences. If it ends in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise, and the love of others which it will procure you. If you find reason to believe there is a God, a consciousness that you are acting under his eye, and that he approves you, will be a vast additional incitement, if there be a future state, the hope of a happy existence in that increases the appetite to deserve it; if that Jesus was also a God, you will be comforted by a belief of his aid and love. In fine, I repeat, you must lay aside all prejudice on both sides, and neither believe nor reject anything, because any other persons, or description of persons, have rejected or believed it. Your own reason is the only oracle given you by Heaven, and you are answerable, not for the rightness, but the uprightness of the decision.

the BSA's current policy of making religious belief a test of good citizenship, let alone good character.

As for the phrase about "the Laws of Nature and of Nature's God" that Zeiger quotes from the Declaration of Independence, Alan Dershowitz has observed that this formulation was meant to invoke natural principles self-evident to ordinary inquiry independent of divine revelation.¹²² "Invoking God was simply not controversial in Jefferson's day," Dershowitz writes, because to religious liberals such as Jefferson and Adams "it meant 'Nature's God,' not the Bible's God."¹²³ John Adams' letters to Jefferson late in life confirm that the phrase was one that elevated enlightened reason far above special revelation and ecclesiastical doctrine:

We can never be so certain of any Prophecy, or the fulfillment of any Prophecy; or of any miracle, or the design of any miracle, as We are, from the revelation of nature, *i.e.*, of nature[']s God, that two and two are equal to four. Miracles or Prophecies might frighten Us out of our Wits; might scare us to death; might induce Us to lie; to say that we believe 2 and 2 make 5. But We should not believe it. We should know the contrary.¹²⁴

Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 350-51 (Adrienne Koch & William Peden eds., Franklin Library ed. 1982) (quoted in ALAN DERSHOWITZ, AMERICA DECLARES INDEPENDENCE 20 (2003)).

122. See DERSHOWITZ, *supra* note 121, at 88-89. Dershowitz explains:

"Natural law" based on divine revelation—the source of Christian natural law for Aquinas—was anathema to Jefferson. Since there was no existing positive law that supported secession, and since Jefferson would not invoke revealed biblical law, he needed a source beyond positive law but within the realm of human reason and experience. Hence "the Laws of Nature and of Nature's God," which Jefferson and his fellow deists believed could be derived from observing the design of the universe and of human nature, as the Stoics had done centuries earlier. . . . Moreover, it did not take a philosopher, a prophet, or a theologian to translate these laws to the average person. They were "self-evident" in the sense that they were "impressed on the sense of every man," who was equipped with an innate moral sense of right and wrong.

Id.

123. *Id.* at 81. Dershowitz adds:

As to the question of how the deistic, un-Christian reference to Nature's God could have gotten the approval of the drafting committee, it must be recalled that a *majority* of the five-man committee were deists and/or Unitarians—as were many leading colonialists at that time. In fact, Leo Pfeffer lists George Washington, Patrick Henry, George Mason, James Madison, Benjamin Franklin, Thomas Paine, John Adams, and, of course, Thomas Jefferson among the most prominent leaders of the time who were influenced by deism or Unitarianism. Three of those leaders were on the drafting committee, which consisted of Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston.

Id. at 65 (citing LEO PFEFFER, CHURCH, STATE, AND FREEDOM 209-10 (1967)).

124. Letter from John Adams to Thomas Jefferson (Sept. 14, 1813), *reprinted in* THE ADAMS-JEFFERSON LETTERS, *supra* note 81, 372, 373. "The question before the human race is, Whether the God of nature shall govern the World by his own laws, or Whether Priests and Kings shall rule it by fictitious Miracles?" Letter from John Adams to Thomas Jefferson (June 20, 1815), *reprinted in* THE ADAMS-JEFFERSON LETTERS *supra* note 81, at 445, 445.

That the phrase honoring Nature's God and unencumbered reason could be invoked centuries later, by someone like Hans Zeiger, to bar children from participating in government-sponsored activities such as the Boy Scout Jamboree—because their religious scruples make them not “the best kind of citizen”—surely would have horrified Jefferson and Adams.

3. *Julia Ward Howe*

Zeiger cites Julia Ward Howe's *Battle Hymn of the Republic* to support his notion that federal, state, and local governments all should “acknowledge and support the principles of virtue and honor identified in the Scout oath and law,” which he takes as mandating discrimination on the basis of sexual orientation and religious viewpoint.¹²⁵ Zeiger demands government support for the BSA's discrimination: “For the Boy Scouts exist, to paraphrase the ‘Battle Hymn of the Republic,’ to make boys righteous and so to make men free.”¹²⁶

This makes a mockery of Howe's religion—for the woman who wrote the *Battle Hymn of the Republic* was a prominent religious liberal of the very sort that Zeiger detests. Howe was, indeed, a close friend and confidant of the notorious Reverend Theodore Parker,¹²⁷ a Boston minister indicted for his abolitionist activities, who scandalized conservatives by insisting in his 1841 sermon, *The Transient and Permanent in Christianity*, that Christianity's moral truth cannot depend upon the Bible's historical accuracy—or even on whether Jesus actually lived.¹²⁸

125. ZEIGER, *supra* note 1, at 129.

126. *Id.*

127. See HENRY STEELE COMMAGER, THEODORE PARKER 104-05 (1936); see also DEAN GRODZINS, AMERICAN HERETIC: THEODORE PARKER AND TRANSCENDENTALISM 385-96 (2002).

128. Theodore Parker, *The Transient and the Permanent in Christianity*, as quoted in JOHN WHITE CHADWICK, THEODORE PARKER: PREACHER AND REFORMER 98 (1901). “If it could be proved that Jesus of Nazareth had never lived, still Christianity would stand firm and fear no evil.” *Id.* (quoting what Chadwick believed was, to many at the time, “probably, the most offensive utterance” from the Reverend Theodore Parker's May 19, 1841 ordination sermon for the Reverend Charles C. Shackford). In slightly fuller context, Parker declared:

So if it could be proved,—as it cannot,—in opposition to the greatest amount of historical evidence ever collected on any similar point, that the gospels were the fabrication of designing and artful men, that Jesus of Nazareth had never lived, still Christianity would stand firm, and fear no evil. . . . If Christianity were true, we should still think it was so, not because its record was written by infallible pens; nor because it was lived out by an infallible teacher,—but that it is true, like the axioms of geometry, because it is true, and is to be tried by the oracle God places in the breast. If it rest on the personal authority of Jesus alone, then there is no certainty of its truth, if he were ever mistaken in the smallest matter, as some Christians have thought he was, in predicting his second coming.

Theodore Parker, *The Transient and Permanent in Christianity*, in THREE PROPHETS OF RELIGIOUS LIBERALISM: CHANNING-EMERSON-PARKER 133 (Conrad Wright ed., 2d ed. 1986); see COMMAGER, *supra* note 127, at 74-79 (describing the sermon and its aftermath). The reference in the last quoted line is, of course, to what many early Christians took as Jesus' promise that he would soon return: “I

"I can truly say that no rite of public worship," Howe wrote in her memoir, "ever impressed me as deeply as did Theodore Parker's prayers."¹²⁹ "Truly, he talked with God, and took us with him into the divine presence."¹³⁰ "It was hard to go out from his presence, all aglow with the enthusiasm which he felt and inspired," Howe continued, "and to hear him spoken of as a teacher of irreligion, a pest to the community."¹³¹ For people like Zeiger were very quick to speak ill of Parker's liberal faith.¹³²

"Churches fail to speak for manly virtue," Zeiger whines today,¹³³ as he rants against "sissified" religion and "liberal churches," allied with "feminist-trained educators" and leftist intellectuals seeking to "socially engineer" a new politically correct "sissified man."¹³⁴ But Parker and Howe were at the very vanguard of what Zeiger despises as feminizing influences in American religion. "I am almost certain that Parker was the first minister who in public prayer to God addressed him as 'Father and Mother of us all,'" wrote Howe.¹³⁵ Parker called often for a "thorough revolution in the idea of woman,"¹³⁶ exercising a profound effect on the

assure you: this generation will certainly not pass away until all these things come to pass." *Matthew* 24:34 (Holman Christian Standard Bible); see also *Luke* 21:32 ("I assure you: this generation will certainly not pass away until all things take place."); *Mark* 13:30 ("I assure you: this generation will surely not pass away until all these things have taken also place . . ."). Because Hans Zeiger's book uses the Holman Christian Standard Bible, which is put out by the same publishing house that has published *Get Off My Honor*, I will do the same. Unless otherwise noted, all Scripture quotations are taken from the Holman Christian Standard Bible®, Copyright © 1999, 2000, 2002, 2003 by Holman Bible Publishers. Used by permission. Holman Christian Standard Bible®, Holman CSB®, and HCSB® are federally registered trademarks of Holman Bible Publishers.

Alan Dershowitz reports that most of his students say that their faith "would be destroyed by proof of knowing fraud—even well-intentioned 'pious fraud,'" demonstrating that scriptural accounts were deliberately falsified. DERSHOWITZ, *supra* note 121, 46-47 (2003). Theodore Parker's faith, apparently, was more robust than theirs. So, perhaps, was Thomas Jefferson's. Dershowitz suggests that Jefferson, if asked to assume that the Bible was fabricated, really "would not regard these testing cases as difficult: they would confirm his conclusions about the mistaken or fraudulent nature of 'revelations' and 'miracles,'" but they could not "shake his belief in a nonintervening God of Nature," whose existence has little to do with scripture. *Id.* at 47.

129. JULIA WARD HOWE, *REMINISCENCES 1819-1899*, at 166-67 (1899).

130. *Id.* at 167.

131. *Id.*

132. See *id.* Henry Steele Commager recounts that "Julia Ward Howe's friends could scarcely forgive her perverse habit of attending Mr. Parker's church." COMMAGER, *supra* note 127, at 104. When William Howard Taft's religion became an issue in the presidential 1908 campaign, *The Nation* observed that religious fundamentalists condemned him too because, as a Unitarian, "he believes in the religion of Emerson, of Channing, of Theodore Parker—in fine, because he is a member of a sect which has supplied leaders for all the great humanitarian movements of the last century." *Mr. Taft and His Religion*, 87 *NATION* 278, 278-79 (1908).

133. ZEIGER, *supra* note 1, at 55.

134. *Id.* at 54.

135. HOWE, *supra* note 129, at 166; see also COMMAGER, *supra* note 127, at 120 (noting Louisa May Alcott's recollection of the Reverend Parker's "voice veiled in tears as he prayed to Our Father and Our Mother God, and gave thanks for the beauty of the physical world and the goodness of man").

136. COMMAGER, *supra* note 127, at 179-80.

lives and thoughts of Elizabeth Cady Stanton¹³⁷ and Louisa May Alcott—who, like Howe, was inspired by Parker’s prayers to “our Father and our Mother God.”¹³⁸

For Zeiger to invoke the Unitarian Howe’s sacred *Battle Hymn* in the BSA’s battle against her own liberal religious tradition requires some nerve—or pathetic ignorance.

E. Assaulting Christian Values—as “Moral Relativism”

Zeiger insists that the BSA is being punished for taking a courageous stand against “moral relativism.”¹³⁹ This is puzzling. For what Zeiger attacks as “moral relativism” has Biblical roots, in the teachings of Jesus himself.

137. See ELIZABETH CADY STANTON, *EIGHTY YEARS AND MORE: REMINISCENCES, 1815–1897*, at 132-33 (Schocken Books 1971) (1898) (noting that Parker’s lectures “were so soul-satisfying to me that I was surprised at the bitter criticisms I heard expressed” against him); see also ELIZABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* 45-46 (1985); DEAN GRODZINS, *AMERICAN HERETIC, THEODORE PARKER AND TRANSCENDENTALISM* 343-44, 555-56 n. 145 (2002).

138. Alcott described Parker’s sermons in her autobiographical novel *Work*, where Parker appears in the character of “Mr. Powers.” See LOUISA MAY ALCOTT, *WORK* 197-218 (1873); see also Joan Goodwin, *Louisa May Alcott*, <http://www.uua.org/uuh/duub/articles/louisamayalcott.html> (last visited Feb. 5, 2007). Like Howe, Alcott was impressed by Parker’s use of the phrase “Our Father and our Mother God,” which she found so “inexpressibly sweet and beautiful,” as to be life changing. *Id.* (“To one laborious young woman, just setting forth to seek her fortune, that Sunday was the beginning of a new life, that sermon like the scroll given to Christians, that prayer the God-speed of one who was to her, as to so many, a valiant Great-heart leading pilgrims through Vanity Fair to the Celestial City.”). Alcott also wrote the preface to a collection of Parker’s prayers. See Louisa May Alcott, *Preface to THEODORE PARKER, PRAYERS BY THEODORE PARKER*, at iii-vii (1888). In those prayers Reverend Parker addressed the universe’s great creative force:

O Thou Infinite Mother, who art the parent of our bodies and our souls, we know that thou hast us always in thy charge and care, that thou cradlest the world beneath thine eye, which never slumbers nor sleeps, and for a moment we would be conscious of thy presence with us, that thereby we may enlighten what is dark, and raise what is low, and purify what is troubled, and confirm every virtue that is weak within us, till; blameless and beautiful, complete and perfect, we can present ourselves before thee.

PARKER, *supra*, at 154 (prayer of June 6, 1858). “O Thou who art our Father and our Mother, we thank thee for the loving-kindness and tender mercy which are over all thy works.” *Id.* at 173 (prayer of July 11, 1858).

139. See, e.g., ZEIGER, *supra* note 1, at 56 (bemoaning “the contemporary doctrines of moral relativism”); *id.* at 59 (charging Dr. Jay Mechling with “confusion resulting from moral relativism”); *id.* at 63-64 (condemning “Matt Hill and his allies in the homosexual movement [who] would like to think that morally straight is flexible enough to conform to an alternative code of morals that are relative, that are personalized, that differ from person to person and place to place”); *id.* at 82 (disparaging “the litigious spirit sweeping America,” as one manifestation of “a battle between judicial relativism (moral relativism and the judiciary combined) and constitutionalism”); *id.* at 136 (“the most pronounced feature of the current relativist age is its rejection of God and all things spiritual”); see also *id.* at 36-37 (disparaging “the spurious theory that the principles of Scouting are changeable by the whims of morally relative modern culture”).

When moralists endeavored to enforce God's law concerning sexual misconduct by stoning a woman, we are told that a gentle soul named Jesus intervened, saying, "The one without sin among you should be the first to throw a stone at her."¹⁴⁰ The angry mob dispersed, and Jesus addressed the woman: "Neither do I condemn you."¹⁴¹ Zeiger could take a lesson here. He might counter that Jesus demonstrated his disapproval of the woman by adding, "Go and from now on do not sin any more."¹⁴² But Jesus spoke clearly: "I judge no one."¹⁴³ Jesus made a point not of shunning, *but of socializing with people of questionable morals.*¹⁴⁴ To bigoted moralists like Zeiger Jesus said: "Tax collectors and prostitutes are entering the kingdom of God before you!"¹⁴⁵

The model presented by Jesus is one of loving acceptance of people who deviate from our own notions of proper sexual conduct—not one of condemning them and shunning them as spiritually unclean. And if Zeiger finds this kind of "moral relativism" objectionable, Jesus Christ himself was its master. "Do not Judge," he said, "so that you won't be judged."¹⁴⁶ "Do not judge, and you will not be judged. Do not condemn, and you will not be condemned. Forgive, and you will be forgiven."¹⁴⁷

Christian moralists who cite as "God's law" the Torah's injunctions against homosexual acts typically manage to ignore the same book's many other proscriptions. Leviticus is loaded with scriptural rules requiring the faithful to refrain from eating rabbit and pork,¹⁴⁸ or shellfish,¹⁴⁹ from asso-

140. *John* 8:7.

141. *John* 8:11.

142. *Id.*

143. *John* 8:14.

144. When the Pharisees derided Jesus for socializing with tax collectors and prostitutes, he answered "I desire mercy and not sacrifice. For I did not come to call the righteous, but sinners." *Matthew* 9:13; *see also Luke* 5:29-32; *Mark* 2:16-17.

145. *Matthew* 21:31. "For John came to you in the way of righteousness, and you didn't believe him. Tax collectors and prostitutes did . . ." *Matthew* 21:32. Jesus celebrated the prodigal son, who had squandered his estate with prostitutes. *See Luke* 15:11-31. And Paul praised "Rahab the prostitute." *Hebrews* 11:30. "By faith Rahab the prostitute, received the spies in peace and didn't perish with those who disobeyed." *Id.*; *see also James* 2:25 ("And in the same way, wasn't Rahab the prostitute also justified by works when she received the messages and sent them out by a different route?").

146. *Matthew* 7:1.

147. *Luke* 6:37.

148. *See Leviticus* 11:6-8 ("the hare, though it chews the cud, does not have hooves—it is unclean for you; the pig, though it has divided hooves, does not chew the cud—it is unclean for you. Do not eat any of their meat or touch their carcasses—they are unclean for you."); *see also Deuteronomy* 14:7-8 ("the hare, and the hyrax, though they chew the cud, they do not have hooves—they are unclean for you; and the pig, though it has hooves, it does not [chew] the cud—it is unclean for you. You must not eat their meat or touch their carcasses.").

149. *See Leviticus* 11:9-12 ("This [is what] you may eat from all that is in the water: You may eat everything in the water that has fins and scales, whether in the seas or streams. But these are to be detestable to you: everything that does not have fins and scales in the seas or streams, among all the swarming things and [other] living creatures in the water. They are to remain detestable to you: you

ciating with a menstruating woman,¹⁵⁰ from impiously uttering God's name,¹⁵¹ from getting piercings or tattoos,¹⁵² from hybridizing livestock, planting complementary crops together and wearing garments made of blended fibres,¹⁵³ and—oh yes—from engaging in certain sexual relations with another of one's own sex.¹⁵⁴ But it condemns certain acts of erotic love between two men in the same way that it condemns eating pork or shellfish, or coming in contact with a menstruating woman.

Daniel A. Helminiak observes in his book, *What the Bible Really Says About Homosexuality*, that “Jesus and the Christian testament reject the only biblical basis for condemning male-male sex.”¹⁵⁵

For the Bible tells Christians, quite clearly, how to deal with the Levitical injunctions—with what Zeiger condemns as “moral relativism.” The scripture really could not be clearer. When Jesus was challenged for violating the Torah's dietary restrictions, he answered, “Listen and understand: It's not what goes into the mouth that defiles a man, but what comes out of the mouth, this defiles a man.”¹⁵⁶ Zeiger and the BSA together condemn homosexuals as not “clean,” and as people to be shunned, disregard-

must not eat any of their meat, and you must detest their carcasses. Everything in the water that does not have fins and scales will be detestable to you.”)

150. See *Leviticus* 15:19-24 (“When a woman has a discharge, and it consists of blood from her body, she will be unclean because of her menstruation for seven days. Everyone who touches her will be unclean until evening. Anything she lies on during her menstruation will become unclean, and anything she sits on will become unclean. Everyone who touches her bed is to wash his clothes and bathe with water, and he will remain unclean until evening. Everyone who touches any furniture she was sitting on is to wash his clothes and bathe with water, and he will remain unclean until evening. If discharge is on the bed or the furniture she was sitting on, when he touches it he will be unclean until evening. If a man sleeps with her, and [blood from] her menstruation gets on him, he will be unclean for seven days, and every bed he lies on will become unclean.”); see also *Leviticus* 18:19 (“You are not to come near a woman during her menstrual impurity to have sexual intercourse with her.”); *Leviticus* 20:18 (“If a man sleeps with a menstruating woman and has sexual intercourse with her, he has exposed the source of her flow, and she has uncovered the source of her blood. Both of them must be cut off from their people.”).

151. *Leviticus* 24:16 (“Whoever blasphemes the name of the Lord, is to be put to death; the whole community must stone him.”).

152. *Leviticus* 19:28 (“You are not to make gashes on your bodies for the dead or put tattoo marks on yourselves; I am the Lord.”); see *id.* (New Revised Standard) (“You shall not make any gashes in your flesh for the dead or tattoo any marks upon you: I am the Lord.”).

153. *Leviticus* 19:19 (“You are to keep My statutes. You must not crossbreed two different kinds of your livestock, sow your fields with two kinds of seed, or put on a garment made of two kinds of material.”). Bishop John Shelby Spong writes: “I do not believe that much heed is paid today to the Leviticus prohibition against letting ‘your animals breed with another kind’ (19:19, NRSV). Scientists have done amazing things in the field of animal husbandry to improve the heads of livestock.” JOHN SHELBY SPONG, *THE SINS OF SCRIPTURE: EXPOSING THE BIBLE'S TEXTS OF HATE TO REVEAL THE GOD OF LOVE* 124 (2005).

154. *Leviticus* 18:22 (“You are not to sleep with a man as with a woman, it is detestable.”); *Leviticus* 20:13 (“If a man sleeps with a man as with a woman, they have both committed an abomination.”).

155. DANIEL A. HELMINIAK, *WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY* 72 (2000).

156. *Matthew* 15:11.

ing Peter's declaration in *Acts*: "God has shown me that I must not call any person common or unclean."¹⁵⁷

When Paul nevertheless had to deal with congregations divided between Jewish Christians who insisted on following dietary restrictions, and Gentile Christians who ignored them, he wrote: "One who eats must not look down on who one who does not eat; and one who does not eat must not criticize one who does, because God has accepted him."¹⁵⁸ Paul insisted that in Christ, *nothing* is unclean in itself—and that whether something is unclean really is matter of subjective judgment. He wrote: "I know and am persuaded by the Lord Jesus that nothing is unclean in itself. Still, to someone who considers a thing to be unclean, to that one it is unclean."¹⁵⁹

Zeiger may call this "moral relativism," but it is the religion of Jesus and Peter and Paul. The "sissified" and "feminized" religion of "moral relativism" that Zeiger rants against, is the loving and inclusive religion of Christ himself.

What did Jesus say about the homosexuality that Zeiger and the BSA condemn as unclean? Nothing at all—unless, of course, you think that he meant to include gays and lesbians when he said not to judge others, and implored his followers to "love your neighbor," and even to "love your enemies."¹⁶⁰

John's epistles confirm: "For this is the message you have heard from the beginning: we should love one another."¹⁶¹ And Paul's epistles underscore Christ's central message: "For the entire law is summed up in this: Love your neighbor as yourself."¹⁶² "Do not owe anyone anything but to love one another, for the one who loves another has fulfilled the law."¹⁶³

157. *Acts* 10:28.

158. *Romans* 14:3.

159. *Romans* 14:14; see also *Romans* 14:22-23 ("Blessed is the man who does not condemn himself by what he approves. But whoever doubts stands condemned if he eats, because his eating is not from faith, and everything that is not from faith is sin.")

160. See, e.g., *Luke* 6:27 ("But I say to you who listen: Love your enemies, do good to those who hate you, bless those who curse you, pray for those who mistreat you."); *Matthew* 5:43-45 ("You have heard that it was said, Love your neighbor and hate your enemy. But I tell you, love your enemies and pray for those who persecute you, so that you may be sons of your Father in heaven. For He causes His sun to rise on the evil and the good, and sends rain on the righteous and the unrighteous.")

161. *1 John* 3:11; see also *1 John* 2:10 ("The one who loves his brother remains in the light, and there is no cause for stumbling in him."); *1 John* 4:20 ("Those who say, 'I love God,' and hate their brothers or sisters, are liars; for those who do not love a brother or sister whom they have seen, cannot love God whom they have not seen.")

162. *Galatians* 5:14. "But if you bite and devour one another, watch out, or you will be consumed by one another." *Galatians* 5:15.

163. *Romans* 13:8.

“Love does no wrong to a neighbor. Love, therefore, is the fulfillment of the law.”¹⁶⁴

“The time has come for all Christians” writes John Shelby Spong, who served as the Episcopal Bishop of Newark until his retirement in 2000, “to decide whether a person can follow Christ and still maintain his or her homophobic prejudices.”¹⁶⁵ That Zeiger has made his own choice in this regard does not mean that it is the only honorable one.

F. Zeiger’s Assault on Legal Accountability: *The BSA and Pedophilia*

Ironically, the BSA’s rigid intolerance of homosexuality and religious doubt contrasts quite dramatically, with its rather tolerant attitude toward pedophilia—discussed at length in Patrick Boyle’s remarkable book *Scout’s Honor: Sexual Abuse in America’s Most Trusted Institution*.¹⁶⁶ For decades, the BSA swept sexual molestation by Scout leaders under the rug.¹⁶⁷ Only a “liability crisis”—engendered by scores of lawsuits filed against the BSA on behalf of the victims of child molestation—forced the BSA to change its ways.¹⁶⁸

Zeiger concedes that the BSA took what steps it did against pedophilia in its ranks only reluctantly, and only when it was forced to do so by the financial concerns raised by the threat of legal liability. He writes: “What actually forced the Scouts to attack their own problem directly was a combination of the 1980s liability crisis when lawsuit awards were inflated and society became increasingly litigious and skyrocketing of insurance rates.”¹⁶⁹ “Between 1984 and 1992,” Zeiger observes, “the Boy Scouts of America were sued at least sixty times by families of Scouts abused by leaders, resulting in settlements of more than \$16 million.”¹⁷⁰

164. *Romans* 13:10.

165. SPONG, *supra* note 153, at 126.

166. See generally PATRICK BOYLE, *SCOUT’S HONOR: SEXUAL ABUSE IN AMERICA’S MOST TRUSTED INSTITUTION* (1994).

167. See, e.g., *id.* at 125-40, 193-202.

168. See BOYLE, *supra* note 166, at 166; see also Mark C. Lear, *Just Perfect for Pedophiles? Charitable Organizations That Work With Children and Their Duty to Screen Volunteers*, 76 TEX. L. REV. 143, 167 n.118, 173-74 nn.154-56 (1997) (noting that lawsuits caused the BSA to inaugurate stricter screening of adult leaders).

169. ZEIGER, *supra* note 1, at 79.

170. *Id.* at 79. Zeiger cites Patrick Boyle’s book, without acknowledging that what appear to be Zeiger’s words actually are Boyle’s. Here is the text that Zeiger lifted, as it appeared in Boyle’s book: “From 1984 through early 1992, the Boy Scouts of America were sued at least 60 times by families of children abused by Scout leaders. The settlements and judgments against the corporation totaled more than \$16 million.” BOYLE, *supra* note 166, at 334. Boyle added: “The complete figure is not available because most of the settlements are sealed.” *Id.* Most of the settlements, Boyle explains, “came with gag orders that said no one could reveal what the Boy Scouts paid,” *id.* at 248, as the BSA and its

One might think that Zeiger would appreciate the workings of a legal system that produces incentives to protect children from molestation and sexual abuse by trusted adults. But no—Zeiger actually condemns the threat of “inflated jury awards” presented by the “litigious spirit sweeping America.”¹⁷¹ Zeiger apparently would do away with the legal accountability that forced the BSA to take action against child molesters. Perhaps we should credit him with consistency—he thinks that seven-year-olds excluded from Cub Scouts as social inferiors, and gay youth excluded as unclean, should have no right to complain when state and federal governments back these discriminatory policies. Why should children victimized by sexual predators in Scouting have rights worthy of legal recognition?

One of the leaders in the BSA's war against gays was its National Director of Program, Douglas Sovereign Smith, Jr., who also served as Chairman of the BSA's Youth Protection Task Force, responsible for protecting Scouts from sexual predators. Smith was quick, as a BSA official, to respond to criticism of the BSA's discriminatory policies, writing in the *Corporate Legal Times*, for example, that “our legal-issues web site, bsalegal.org,” which currently links to Zeiger's commentary, was designed to expose the ACLU's “three-decade-long legal assault on Scouting.”¹⁷² Smith, as the BSA's Director of Program and Chairman of Youth Protection, also provided declarations about Scouting's mission and values to support Secretary of Defense Donald Rumsfeld against challenges to government sponsorship of the BSA Jamboree—and Secretary Rumsfeld's briefs before the Seventh Circuit rely heavily on Smith's assurances about Scouting's wholesomeness, and its openness to children “of every religious denomination.”¹⁷³

While Rumsfeld's appeal was pending in the Seventh Circuit, Smith pleaded guilty to felony charges of trafficking in child pornography.¹⁷⁴ What did the BSA's national leadership—so quick to expel agnostic children, and anyone who happens to be gay—do? Did BSA leadership fire

lawyers sought desperately to avoid publicity that might produce still more victims of sexual abuse to file suit. *See id.* at 249-50.

171. ZEIGER, *supra* note 1, at 79, 82.

172. Douglas S. Smith, Jr., *Boy Scout Pride*, CORP. LEGAL TIMES, Sept. 2004, at 10.

173. Brief of Appellant at 6, *Winkler v. Rumsfeld*, No. 05-3451 (7th Cir. Oct. 25, 2005) (citing a Declaration of Douglas S. Smith, Jr.).

174. *See, e.g., id.* (citing Smith's declaration as support for Rumsfeld's assertion that the BSA “welcomes young people of every denomination”). Secretary Rumsfeld's brief, filed in October 2005, cites Smith's declarations more than a dozen times—despite the already widely publicized fact that Smith had several months earlier pleaded guilty to felony possession and distribution of child pornography. *See United States v. Smith*, No. 4:05-CR-040-Y (N.D. Tex. Dec. 6, 2005) (judgment in a criminal case, committing Smith to a prison term of ninety-six months); *United States v. Smith*, No. 4:05-CR-040-Y (N.D. Tex. Mar. 30, 2005) (Factual Resume and Guilty Plea of Douglas Sovereign Smith, Jr. to Receipt and Distribution of Child Pornography, 18 U.S.C. §§2252A(a)(2)(A), (b)(1), 3583(k) (2000)).

Smith on learning of his criminal trafficking in child pornography? It did not. When federal authorities came after Smith, with proof that he was part of an international child-pornography distribution ring, the BSA's national leadership chose not to fire him for cause, but rather allowed the child-porn trafficker to quietly retire—one naturally supposes, with a full pension and benefits for his thirty-nine years of “service” to youth.¹⁷⁵

Some perceived a pattern when the BSA allowed Smith to retire. Associated Press coverage of the incident observed that “[a] California court case in the early 1990s revealed about 2,000 cases of sexual abuse of scouts and other boys that Boy Scouts officials [at BSA headquarters] in Irving had documented privately for two decades without telling law enforcement officials.”¹⁷⁶ The BSA, it seems, is hard on gays, and soft on sexual predators who actually victimize children. With Smith's quiet retirement, one has to wonder if the BSA's hard-line anti-gay stance is not, at least in part, a smokescreen for a national leadership that protects its own, and coddles the real sexual predators in its ranks.

Zeiger's sense of “honor” somehow makes him stand with the sexual predators—and against the legal system that seeks to hold them accountable.

III. CONCLUSION

Hans Zeiger vigorously defends—and appears to speak on behalf of—the national leadership of an organization that has, quite frankly, turned its back on the values of cultural and religious pluralism that have made the United States of America truly a great nation.

Social conservatives have seized control of the BSA's national leadership, using it to advance a self-declared “culture war, of which the Boy

175. See Ralph Blumenthal, *Boy Scouts Executive Surrenders in Fort Worth on a Child Pornography Charge*, N.Y. TIMES, Mar. 30, 2005 (BSA spokesman Gregg Shields “said the Scouts learned of the investigation in a visit by agents from the Department of Homeland Security in February and put Mr. Smith on administrative leave. ‘Shortly thereafter he chose to retire,’ Mr. Shields said.”); Lisa Falkenberg, *Scout Official Charged in Child Porn Case*, ASSOCIATED PRESS ONLINE, Mar. 30, 2005 (“Smith was put on leave . . . [and] then chose to retire.”); Betty Nguyen, et al., CNN NEWS Transcript 032904CN.V85, Mar. 29, 2005 (“The Boy Scouts of America say they are shocked and dismayed by this. But when they had learned of this investigation back in February, that Mr. Smith had volunteered to retire after 39 years with the Boy Scouts.”); Lori Rackl, *Ex-Scout Leader in Child Porn Case Once Ran Council Here; Texan Pleads Guilty, Led West Suburban Unit from ‘78 to ‘83*, CHI. SUN-TIMES, Mar. 31, 2005 (“Smith was put on leave last month after the allegations surfaced. He then chose to retire.”); see also *Ex-top US Boy Scouts Official Pleads Guilty to Child Pornography Possession*, AGENCE FRANCE PRESSE, Mar. 30, 2005 (“The Boy Scouts said *he chose to retire* shortly after [being placed on administrative leave].” (emphasis added)).

176. Lisa Falkenberg, *Scout Official Charged in Child Porn Case*, ASSOCIATED PRESS ONLINE, Mar. 30, 2005.

Scouts is perhaps the most salient symbol,” to use Zeiger’s own words.¹⁷⁷ And Zeiger invites his readers to “help fight on the side of the Boy Scouts in the culture war” against religious liberals and the churches that fostered and nurtured the BSA in its early days.¹⁷⁸

Religious conservatives who control the BSA today have made it very clear that religious liberals are no longer welcome. Thus, an organization launched from the White House by so eminent a religious liberal as President William Howard Taft has, with Zeiger’s vigorous approval, turned on Taft’s denomination by barring the Unitarian Universalist Association of Congregations first from the BSA’s Religious Relationships Committee, and then from the BSA’s Religious Awards program—merely because the denomination teaches its children that the BSA’s discriminatory policies are wrong.¹⁷⁹ And Reform Judaism has been forced to sever its ties with an increasingly dogmatic and self-righteous organization that denigrates and expels children on the ground that their sexual orientation makes them unclean, and fit only to be shunned.¹⁸⁰

Zeiger and the social conservatives who have seized control of the BSA are entitled to worship God as they please, of course, and to follow the code of ethics that their religion mandates. That is honorable. But for them to turn an iconic national institution that was established to serve youth into a battleground where innocent children are caught in the cross-fire of the social conservatives’ religious “culture war”—that is something less than honorable.

Zeiger writes: “It is only in a morally confused nation that character, integrity, and love and duty toward God and country become the grounds for bigotry.”¹⁸¹ Yet, purported moral integrity and assertions of duty toward God provide precisely the grounds that Zeiger and the BSA’s national leadership give for their own sadly confused conduct.

Zeiger compounds the BSA leadership’s moral confusion with rhetoric that condemns the Distinguished Eagle Steven Spielberg as “no more a Scout than a rat is an eagle,”¹⁸² and that shamelessly enlists the names of eminent religious liberals—John Adams, Thomas Jefferson, Julia Ward Howe, and William Howard Taft, among them—in war against their own churches and liberal faith tradition.¹⁸³

There is nothing honorable about that.

177. ZEIGER, *supra* note 1, at 173.

178. *Id.*; see *supra* text accompanying notes 79-92.

179. ZEIGER, *supra* note 1, at 151; Isaacson, *supra* note 29.

180. See *supra* notes 62-64, and accompanying text.

181. ZEIGER, *supra* note 1, at 170.

182. *Id.* at 10.

183. See *supra* notes 83-138 and accompanying text.

If the honor of Scouting and the future of the BSA are threatened—and I believe they are—the threat clearly comes from Zeiger’s ideological allies, who control the BSA today, and who are willing to destroy the organization in order to advance their own agenda of fighting against the strong current of America’s mainstream values.