TRADITIONAL VALUES, OR A NEW TRADITION OF PREJUDICE?
THE BOY SCOUTS OF AMERICA vs. THE UNITARIAN UNIVERSALIST
ASSOCIATION OF CONGREGATIONS
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This article is based 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. BSA, 9th Cir. Nos.
04-55732 & 04-56167, and Winkler v. Rumsfeld, 7th Cir. No. 05-3451. The Barnes-Wallace brief
was filed in the Ninth Circuit on behalf of the Social Justice Committee and Board of Trustees of the
First Unitarian Universalist Church of San Diego, its ministers, the Rev. Dr. Arvid Straube and the
Rev. Julie Kain, and its Director of Religious Education, Elizabeth Motander Jones; the Sacramento-
based Unitarian Universalist Legislative Ministry California; and the Boston-based Unitarian
Universalist Association of Congregations. The Ninth Circuit is reviewing orders in Barnes-Wallace
finding that the City of San Diego’s preferential leases of public parklands to the Boy Scouts of
America violate the religion clauses of the state and federal constitutions. See Barnes-Wallace v.
BSA, 275 F. Supp. 1259 (S.D. Cal. 2003), appeal pending, 9th Cir. Nos. 04-55732 & 04-56167
(argued and submitted February 14, 2006). The Winkler brief was filed in the Seventh Circuit on
behalf of the Unitarian Universalist Association of Congregations; Elliott Welsh; the Social Justice
Committee of the Unitarian Universalist Society of Geneva, Illinois, and its ministers, the Rev. Dr.
Linday Bates and the Rev. Jennifer Innis; the First Unitarian Church of Cincinnati and its minister,
the Rev. Sharon Dittmar; the Social Justice Ministries of All Souls Church, Unitarian, and its
Director of Social Justice Ministries, the Rev. Louise Green; the Board of Trustees of the Unity
Temple Unitarian Universalist Congregation and its minister, the Rev. Alan C. Taylor; and the
foregoing California amici on the Barnes-Wallace brief. In Winkler the Seventh Circuit is
reviewing a district court’s conclusion that federal sponsorship of the Boy Scout Jamboree violates
the federal constitution’s establishment clause. See Winkler v. Chicago School Reform Board of
Trustees, No. 99-C-2424, slip op. (N. D. Ill. March 16, 2005), injunction granted, 382 F. Supp. 2d
1040 (N.D. Ill. 2005), appeal pending sub nom. Winkler v. Rumsfeld, 7th Cir. No. 05-3451 (argued
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remarks on May 18, 2005, as part of a panel discussion moderated by Dean Daniel B. Rodriguez,
with Dean Kenneth W. Starr, Professor Alan E. Brownstein, Professor John C. Eastman, and Boy
Scouts of America lawyer George A. Davidson, on “the Constitution and the Boy Scouts: Equal
Access to Government Land and the First Amendment,” an event that was sponsored by the
Federalist Society’s Civil Rights Practice Group and San Diego Lawyer’s chapter.
Abstract: President William Howard Taft, a Unitarian leader whose liberal faith had been viciously attacked by religious conservatives in the 1908 presidential campaign, used the White House as a platform in 1911 to launch a new nonsectarian organization for youth: The Boy Scouts of America (“BSA”). Lately, however, the BSA itself has come under the control of religious conservatives – who in 1992 banned Taft’s denomination from the BSA’s Religious Relationships Committee, and in 1998 threw Taft’s denomination out of its Religious Emblems Program. The denomination’s offense: A tradition of teaching its children that institutionalized discrimination is wrong. Unitarian Universalist religious leaders had objected to the BSA’s new policy construing the Boy Scout Law’s statement that a Scout is “brave, clean, and reverent,” to mean both that homosexuals must be shunned as not “clean” and that agnostics or atheists are insufficiently “reverent” to be Boy Scouts. The BSA’s leadership retaliated against the denomination, openly punishing Unitarian Universalists and their children. This article examines how the BSA leadership’s current notions about “traditional values” have placed the youth organization at odds with a liberal religious denomination that is itself deeply rooted in American traditions and values. The article briefly reviews the denomination’s history and values, and its place in American history, then examines the conflict with the BSA’s recent leadership – documenting, in the process, the BSA’s policy of discriminating against Unitarian Universalists and their children. The article concludes by showing how the BSA’s policies and actions directly contradict assertions that both the BSA and its governmental sponsors make – in high-profile court proceedings – as they seek to justify continuing public sponsorship of the BSA and its discriminatory policies. The underlying documentation of the BSA’s actions against Unitarian Universalists is presented as an appendix, for easy reference by judges and scholars.
I. INTRODUCTION

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I. INTRODUCTION

In 1910 organizers of the Boy Scouts of America (“BSA”) asked William Howard Taft, the President of the United States and a leading Unitarian whose liberal faith had been attacked by religious conservatives in the presidential race of 1908,¹ to be honorary president of their new organization for youth.² Taft not only agreed, he ensured the group’s success: “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.”³

The Unitarian Taft was prominently featured as the organization’s “Honorary President” in its first-edition Official Handbook for Boys,⁴ and he subsequently served

¹ See infra text accompanying notes 93-99.
² William D. Murray, The History of the Boy Scouts of America 34 (New York: BSA, 1937). Murray’s History of the Boy Scouts, authored by a charter member of the BSA’s Executive Board and published in 1937 by the BSA (which also held the copyright) provides the organization’s definitive history of its own early years.
the BSA as its honorary vice president, from 1913 to 1930.\textsuperscript{5} Taft served his denomination too, as president of the General Conference of Unitarian and other Christian Churches from 1915 to 1925 when it was absorbed by the American Unitarian Association – which itself would merge with the Universalist Church in America in 1961, to become the Unitarian Universalist Association of Congregations or “UUA.”\textsuperscript{6} It is said that “Taft gave of himself to his church unstintingly, much more so than any other of our occupants of the highest office in the land.”\textsuperscript{7} Taft’s parallel service, to his religious denomination and as the BSA’s honorary vice president, overlapped with his tenure as Chief Justice of the United States Supreme Court from 1921 to his death in 1930.\textsuperscript{8}

One imagines that the great President and Chief Justice would be surprised to learn that – just a few decades later – national leadership of the youth organization

\textsuperscript{5} Id. at 545-46.

\textsuperscript{6} Vernon B. Hampton, Religious Background of the White House 262, 340 (Boston: Christopher Publ. House, 1932); Mark W. Harris, Historical Dictionary of Unitarian Universalism 459 (Lanham, Maryland: Scarecrow Press, 2004).

\textsuperscript{7} Hampton, Religious Background of the White House at 262. “In connection with no other political leader do we find such a generous activity in church work” Id. (emphasis in original). Hampton notes that Taft was “Vice-President of the American Unitarian Association, 1916-1922; President of the Unitarian General Conference, 1915-1925; Honorary Chairman of the Unitarian Campaign; Honorary Vice-President of the Unitarian Laymen’s League; 1920-1925; [and] President of the International Congress of Religious Liberals from 1927 to . . . March, 1930.” Id.

\textsuperscript{8} See Hampton, Religious Background of the White House at 262; Harris, Historical Dictionary at 459; Murray, History of the Boy Scouts 37-38, 309, 545-46.
that he launched, whose operations today are directly supported and sponsored by the state and federal governments, has turned upon his own religious denomination. For, as set forth in this article, the BSA leadership in 1992 banned Taft’s denomination from its Religious Relationships Committee. And in 1998 the BSA expelled Taft’s denomination from its Religious Emblems program. The denomination’s offense: A tradition of teaching its children that institutionalized discrimination is wrong.

The Scout Law declared from the beginning that a Scout is “brave, clean, and reverent.” But in recent decades the BSA’s national leadership has issued new pronouncements under this Law – that homosexuals must be condemned and shunned as not “clean,” while atheists and agnostics apparently cannot be “reverent.” Corporate leadership of the BSA has enforced its controversial and deeply divisive views with a vengeance from the 1980s to date – excluding homosexuals as spiritually unclean, along with anyone who might be reluctant to recite the Scout Oath about

9 See infra text accompanying notes 106-122.
10 See infra text accompanying notes 123-150.
11 See infra text accompanying notes 123-130, 146-148.
13 See infra text accompanying notes 108-116.
performing “duty to God,” and expelling even those who merely speak out against such discrimination. When its new policies were challenged in court in the 1980s and 1990s, the BSA insisted that it was entitled to act on matters of faith and morality as a fundamentally religious expressive association, utterly exempt from complying with civil-rights laws. “There are few religions in America which can boast of millions of


See, e.g. Sherman v. Community Consol. School Dist., 8 F.3d 1160, 1162 (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. BSA, 787 F. Supp. 1511 (N.D. Ill. 1992) (exclusion from Cub Scouting of a seven-year-old child and his Unitarian Universalist father when they objected to the Cub Scout Promise and Declaration of Religious Principle), aff’d, 993 F.2d 1267 (7th Cir. 1993); Randall v. Orange County Council, BSA, 17 Cal. 4th 736, 952 P.2d 261, 72 Cal. Rptr. 2d 453 (1998) (seven-year-old twins expelled from Cub Scouts because they could not confess a belief in God).

Eagle Scout, and University of California (Davis) Professor of American Studies Jay Mechling observes that the BSA’s late 1990s purge included Dave Rice, a sixty-nine-year-old veteran Scout leader from Petaluma, California. Rice, a heterosexual who had been in Scouting for fifty-nine years and was a Redwood District Scout executive for sixteen of those years, was booted from the organization for being “a visible part of the campaign to get the Boy Scouts to end their exclusion of gay youngsters and adults.”


See, e.g., Randall, 17 Cal. 4th at 741-42, 952 P.2d at 264-65, 72 Cal. Rptr. 2d at 456-57 (“Defendant also introduced numerous formal declarations by the Boy Scouts of America to demonstrate the importance of religion, and the Scout's duty to God, in its training of youth. . . .
youth who meet each week and openly affirm their belief in God,” its court filings bragged. And obeying civil-rights laws, the BSA insisted, would offend “the Boy Scouts’ creed that ‘no member can grow into the best kind of citizen without recognizing an obligation to God.’” Thus, when the United States Supreme Court ruled in *Dale v. BSA*, that the BSA is constitutionally entitled to discriminate, it naturally quoted precedent to the effect that “‘Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.’”

But when *Dale*’s holding produced calls for an end to government sponsorship of the organization – and law suits were filed challenging public financing of a discriminatory religious institution – the BSA leadership suddenly changed its tune. In an appeal involving the BSA’s preferential access to public lands and operation of

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18 *Barnes-Wallace v. BSA*, 275 F. Supp. 1259, 1270 (S.D. Cal. 2003) (quoting prior BSA briefs); see *Barnes-Wallace*, 9th Cir. Nos. 04-55732 & 04-56167, Excerpt of Record (“ER”) ER2007 (¶¶185, 191). I am indebted to the plaintiffs’ lawyers in *Barnes-Wallace* for bringing this material to my attention, and for allowing me to review such portions of the *Barnes-Wallace* record as are not under seal.


its regional headquarters from government-owned buildings in a city park, for example, the BSA’s briefs now tell the United States Court of Appeals for the Ninth Circuit that the BSA is not a religious organization, after all, but one that is essentially “secular” in character.\(^\text{22}\) The BSA’s Ninth Circuit briefs insist that “Scouting includes boys of virtually every religious faith and is ‘absolutely nonsectarian.’”\(^\text{23}\)

Defending the federal government’s expenditure of millions of dollars to sponsor each of the BSA’s quadrennial Jamborees, Secretary of Defense Donald H. Rumsfeld echoes the BSA’s new position – in papers filed before the United States Court of Appeals for the Seventh Circuit. Relying primarily on the declaration of

\(^{22}\) *Barnes- Wallace v. BSA*, 9th Cir. Nos. 04-55732 & 04-56167, Opening Brief of BSA and Desert Pacific Council, BSA, at 12, 43, \textit{on appeal from Barnes- Wallace v. BSA}, 275 F. Supp. 1259 (S.D. Cal. 2003). The BSA’s brief in *Barnes- Wallace* tells the Ninth Circuit:

“‘The Boy Scouts are not primarily a religious organization.’”


“Boy scouts is ‘a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith.’”


“Scouting is ‘primarily secular in nature.’”


\(^{23}\) *Barnes- Wallace v. BSA*, 9th Cir. Nos. 04-55732, 04-56167, Opening Brief of BSA and Desert Pacific Council, BSA, at 12, 42-43.
Douglas Sovereign Smith, Jr., long-time BSA leader and its National Director of Programs (who several months before had confessed to felony possession and distribution of child pornography) Secretary Rumsfeld tells the Seventh Circuit that the BSA is genuinely nonsectarian and that it “welcomes young people of every religious denomination.”

Citing the Seventh Circuit’s own opinion in Welsh v. BSA, Secretary Rumsfeld adds that “[f]or more than 90 years, the Boy Scouts of America has ‘successfully presented its combination of educational, social, athletic, craft, and wilderness training and outdoor activities to our young people.’” Yet Welsh itself was a case in which the BSA expelled a Unitarian Universalist, Elliott

24 Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 6 (citing a Declaration of Douglas S. Smith, Jr.). Secretary Rumsfeld’s October 2005 brief relies heavily on declarations of Douglas Sovereign Smith, Jr., the BSA’s former National Director of Programs and Chairman of its Youth Protection Task Force, for most of Rumsfeld’s assertions regarding the BSA’s mission and values – citing Smith’s declarations more than a dozen times, despite the widely publicized fact that Smith had only a few months before confessed his guilt to charges of felony possession and distribution of child pornography. See Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 4-7 (citing Smith’s declarations); United States v. Douglas Sovereign Smith, Jr., N.D. Tex. No. 4:05-CR-040-Y (March 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), and 3583(k)); United States v. Douglas Sovereign Smith, Jr., N.D. Tex. No. 4:05-CR-040-Y (Dec. 6, 2005), Judgment in a Criminal Case (committing Douglas Sovereign Smith, Jr., to prison for a term of 96 months); see infra note 174.

25 993 F.2d 1267, 1278 (7th Cir. 1993).

26 Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 3 (quoting Welsh v. BSA, 993 F.2d 1267, 1278 (7th Cir. 1993)).
Welsh, and his young son from Scouting – because their religious beliefs were unacceptable.27

As set forth in this article, the BSA has since the early 1990s displayed open hostility toward the Unitarian Universalist denomination itself – the denomination of the President who personally launched the BSA in 1911, and one that also happens to include some of America’s oldest Protestant churches. The dispute is no secret. It received considerable press coverage in the late 1990s – when the BSA expelled the denomination from its Religious Emblems Program.28 One Eagle Scout’s book about life at summer camp acknowledges, with apparent regret, that the BSA has openly “punished the Unitarian Universalist Church and its Scout members” for opposing institutionalized discrimination on the basis of sexual orientation and religious beliefs.29 Lamenting the BSA’s early ties to “liberal churches” embracing what he calls a “sissified, watered-down Social Gospel,” another Eagle Scout lauds the BSA’s expulsion of the Unitarian Universalist denomination from its Religious Emblems Program.

27 See infra text accompanying notes 112-116. Currently a member of the Unitarian Universalist Society of Geneva, Illinois, Elliott Welsh has for many decades been active in Unitarian Universalist circles. See infra note 112. Welsh is among the Unitarian Universalist amici curiae represented by this article’s author in Winkler v. Rumsfeld, 7th Cir. No. 053451.

28 See infra notes 134-139, 149-150, and accompanying text.

29 Jay Mechling, On My Honor: Boy Scouts and the Making of American Youth 211 (Chicago: University of Chicago Press, 2001) (noting that the BSA “punished the Unitarian Universalist Church and its Scout members by revoking the religious medals boys can earn”). An Eagle Scout, Jay Mechling, is Professor of American Studies at the University of California’s Davis campus.
program as part of what he characterizes as the BSA’s “spiritual war” against evolving mainstream values.\textsuperscript{30} But only a single law-review article has noted the BSA’s action against the religious denomination and its members, and that is in only a passing reference.\textsuperscript{31} This is unfortunate.

For the dispute between the BSA and Unitarian Universalists is one that casts considerable light on the real character of an organization that receives extraordinary governmental assistance and support – support that currently is the subject of litigation. In Southern California, for example, the BSA operates regional headquarters from government-owned buildings in a city park, paying rent of only $1 a year for facilities from which enforces its discriminatory policies throughout the surrounding 8,900 square miles of San Diego and Imperial Counties. When taxpayers challenged the arrangement, a district judge found it unconstitutional under religion clauses of both the California and United States Constitutions, and the BSA filed an appeal that is currently pending before the Ninth Circuit.\textsuperscript{32} When a federal district judge in Illinois ruled that federal sponsorship of the BSA’s quadrennial Jamboree is


\textsuperscript{32} \textit{See Barnes-Wallace v. BSA}, 275 F.Supp. 1259 (S.D. Cal. 2003), appeal pending, 9th Cir. Nos. 04-55732 & 04-56167 (argued and submitted February 14, 2006).
similarly unconstitutional, Secretary of Defense Donald H. Rumsfeld filed an appeal.\(^{33}\) Congress then enacted new legislation requiring the Secretary to continue spending at least as much on future Jamborees as on past Jamborees – unless he first reports to Congress that doing so would “be detrimental to the national security of the United States.”\(^{34}\) That a discriminatory religious organization should receive such backing is remarkable.


\(^{34}\) The “Support Our Scouts Act of 2005” was included as §8126 of the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006,” which became law on December 30, 2005, and which amended 10 U.S.C. §2554 by adding a new subsection (i):

SUPPORT. – Section 2554 of title 10, United States Code, is amended by adding at the end the following:

(i)(1) The Secretary of Defense shall provide at least the same level of support under this section for a national or world Boy Scout Jamboree as was provided under this section for the preceding national or world Boy Scout Jamboree.

(2) The Secretary of Defense may waive paragraph (1), if the Secretary –

(A) determines that providing the support subject to paragraph (1) would be detrimental to the national security of the United States; and

(B) reports such a determination to the Congress in a timely manner, and before such support is not provided.

Pub. L. 109-148, §8126(c)(2), 119 Stat. 2680, 2728-30 (Dec. 30, 2005), to be codified as 10 U.S.C. §2554(i). The record in Winkler v. Rumsfeld indicates that the federal government spends around $8-million per Jamboree. See Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Brief of Appellant at 11 (“[f]or the 2001 Jamboree, the Army budgeted and spent approximately $8 million”); Winkler v. Chicago School Reform Board of Trustees, No. 99 C 2424, slip op. at 6 (N.D. Ill. March 16, 2005)
Whatever the constitutionality of such governmental sponsorship and endorsement of the BSA and its programs, the dispute between the BSA and the Unitarian Universalists also is important because it casts light on what we mean when we speak of “traditional values” in conversations about religion and public policy. For the BSA insists that its discriminatory policies are motivated by unstinting commitment to “traditional moral values.” Yet the Unitarian Universalists, whose congregations include those of the Mayflower Pilgrims, and of the Massachusetts Puritans’ shining “city on a hill,” think that they too know something about American traditions and values.

(noting that for the Jamborees “in 1997 and 2001, the DOD spent approximately $6 million and $8 million”).

35 E.g., Barnes-Wallace, 9th Cir. Nos. 04-55732 & 04-56167, BSA “Opening Brief” at 5. See also Oliver L. North, “Foreword” to Hans Zeiger, Get Off My Honor: The Assault on the Boy Scouts of America vii (Nashville: Boardman & Holman, 2005) (framing the matter in terms of the BSA’s “long-standing commitment to faith in God and what many of us euphemistically call traditional values”).


37 The “city on a hill” reference comes, of course, from John Winthrop, A Modell of Christian Charity (1630), reprinted in 7 Collections of the Massachusetts Historical Society 31, 47 (Boston: 1838), describing the Puritans’ consciousness of their place in history as they arrived in America: “For wee must consider that wee shall be as a city upon a hill. The eies of all people are upon us.” Id. “When John Winthrop and his party stepped off the Arabella what is now Charleston, their first action in the new world was to draw up and sign a covenant for a church on July 30, 1630.” http://www.fscboston.org/uuu/events/category/C581. Nearly four centuries later, that very Covenant remains the basis of membership in the First Church of Boston, a Unitarian Universalist
I endeavor in this article, then, as background first briefly to trace the historical origins and values of America’s Unitarian Universalist denomination, which affirms the inherent worth and dignity of every human being, and accordingly opposes institutionalized discrimination – including the BSA’s. Unitarian Universalists firmly believe their own opposition to institutionalized bigotry and discrimination – whether on account of an individual’s race, sex, religious beliefs, or sexual orientation – flows from the traditional American values that their forebears in faith have struggled for centuries to develop and honor.\footnote{See infra text accompanying notes 45-77.} In that struggle, Unitarians and Universalists have more than once faced hostility from those who, like the BSA today, speak for a very different view of “traditional values.”\footnote{See infra text accompanying notes 78-105.}

I next document the history of the recent dispute between the BSA and Unitarian Universalists, which began with disclosure of the BSA’s new policy discriminating against homosexuals on the ground that they are not spiritually “clean,” and with its expulsion of children and adult leaders – including Unitarian Universalists – who cannot confess a belief in God to the BSA’s satisfaction. When the UUA – whose member churches sponsored dozens of Boy Scout troops – objected that such congregation.

\textit{Id.; see generally} Arthur B. Ellis, \textit{History of the First Church in Boston, 1630-1880} (Boston: Hall & Whiting, 1881).
discrimination on the basis of religious viewpoint and sexual orientation is wrong, the BSA responded first by denying Unitarian Universalists a place on the BSA’s Religious Relationships Committee, and then by revoking BSA approval for the denomination’s Religious Emblem awards, thereby denying Unitarian Universalist youth an opportunity to participate in Scouting on an equal footing with other denominations. The BSA openly “punished the Unitarian Universalist Church and its Boy Scout members,” as Professor of American Studies (and Eagle Scout) Jay Mechling put it,\(^{40}\) enjoying wide press coverage as it “effectively excommunicated the Unitarians.”\(^{41}\)

When the UUA nonetheless called for Unitarian Universalists to join Scouting and work for change from within the youth organization, the BSA leadership demanded that children now subscribe to a Declaration of Religious Principles affirming that “no member can grow into the best kind of citizen without recognizing an obligation to God,” and disqualifying from membership any who cannot agree.\(^{42}\)


\(^{42}\) Every application for membership as a Boy Scout or Cub Scout now includes an “Excerpt from the Declaration of Religious Principle” stating:

The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God . . . . Only persons willing to
The BSA leadership’s effort to implement its own version of “traditional values” in this fashion has consequences that may trouble those who – like Unitarian Universalists – perceive the best American traditions and values to be ones that celebrate human freedom and diversity, in a pluralistic society. For the BSA’s policy now operates to exclude not just most Unitarian Universalist youth, but most American Jews, and most Buddhist children – all shunned on religious grounds as social inferiors (not “the best kind of citizen”).

I next briefly review the consequences of the BSA’s policies in the context of the current litigation concerning government sponsorship of the BSA and its activities – where both the BSA and its governmental sponsors somehow manage to insist that the organization is nonsectarian, or even “secular,” in character, and that it welcomes children of all faiths.

Finally, I provide the relevant correspondence between the BSA and the UUA from 1992-1993 and 1998-1999 in the form of an appendix, to ensure that the primary materials – significant historical documents – are made broadly available.

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subscribe to this Declaration of Religious Principle and to the Bylaws of the Boy Scouts of America shall be entitled to certificate of membership.

See infra, note 156 & text accompanying notes 151-163.

43 See infra text accompanying notes 151-167.

44 See infra text accompanying notes 168-228.
II. BACKGROUND OF CONFLICT: UNITARIAN UNIVERSALIST TRADITION AND VALUES IN THE AMERICAN EXPERIENCE – HONORING SPIRITUAL FREEDOM AND HUMAN DIGNITY

A. The Unitarian and Universalist Denominations in American History

Comprising more than 1,000 congregations, churches, and fellowships, the Unitarian Universalist Association of Congregations or “UUA” was formed in 1961 by the union of the American Unitarian Association and the Universalist Church of America – two denominations that, despite the BSA’s claim to speak for “traditional values,” have shaped the development and moral conscience of the American nation.

American Unitarianism grew from New England’s first Protestant congregations, founded by the Pilgrims and Puritans in the 1600s, as they shed Calvinist dogmas for a noncreedal liberal faith. \(^{45}\) Organized from the very beginning

as free churches answering to no ecclesiastical hierarchy, by the early 1800s Massachusetts’ oldest congregations were Unitarian – including the church of the Mayflower Pilgrims, who landed at Plymouth in 1620, along with the first churches founded by the Puritans at Salem and Boston. These are the very churches of our

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47 Bumbaugh, *Unitarian Universalism*, at 115; see generally John Cuckson, *A Brief History of the First Church in Plymouth from 1606-1901* (Boston: George Ellis & Co., 1902); Arthur B. Ellis, *History of The First Church in Boston, 1630-1880* (Boston: Hall & Whiting, 1881). The Plymouth congregation’s date of origin at some times is given as 1606, based on the Pilgrims’ covenantal organization at Scrooby, and at others is given as 1620 – when they landed at Plymouth Rock in Massachusetts. Either way, theirs is the oldest church in New England, preceding the earliest Puritan congregations there by roughly a decade. Church historian Joseph Henry Allen aptly observed, in 1894, that “the First Church in Plymouth (1620), the First Church in Salem (1629), and the First Church in Boston (1630) . . . are all now known as Unitarian, and each exists at this day under its original covenant.” Joseph Henry Allen, *Historical Sketch of the Unitarian Movement Since the Reformation*, in Joseph Henry Allen & Richard Eddy, *A History of the Unitarians and the Universalists in the United States* 170 (New York: Christian Literature Co., 1894). These congregations’ Internet websites show that they remain active today, as members of the UUA:

First Parish Church Plymouth: [http://firstparish.plymouth.ma.uua.org/](http://firstparish.plymouth.ma.uua.org/)

First Church Salem: [http://www.firstchurchinsalem.org/](http://www.firstchurchinsalem.org/)

nation’s nearly iconic “Pilgrim Fathers,”\(^{48}\) and of the Puritan pioneers’ shining “city on a hill.”\(^{49}\)

Others, of course, joined the Pilgrims’ and Puritans’ first churches. Boston’s King’s Chapel, founded in 1686 as New England’s first Episcopal Church, has been Unitarian since the 1780s.\(^{50}\) Founded in 1729 as the Church of Presbyterian Strangers, King’s Chapel is a member of the UUA. See [http://www.kings-chapel.org](http://www.kings-chapel.org).

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\(^{49}\) John Winthrop, A Modell of Christian Charity (1630), reprinted in 7 Collections of the Massachusetts Historical Society 31, 47 (Boston: 1838); see Arthur B. Ellis, History of the First Church in Boston, 1630-1880 (Boston: Hall & Whiting, 1881).

\(^{50}\) See F.W.P. Greenwood, A History of King’s Chapel in Boston; the First Episcopal Church in New England 137-43 (Boston: Carter, Hendee & Co., 1833); 2 Henry Wilder Foote (Henry H. Edes, ed.), Annals of King’s Chapel from the Puritan Age of New England to the Present Day ix-xii, 371-77, 380-94 (Boston: Little Brown & Co., 1896); Thomas Belsham, Memoirs of the Late Theophilus Lindsey, M.A., Including a Brief Analysis of his Works; together With Anecdotes and Letters of Eminent Persons, His Friends and Correspondents; Also A General View of the Progress of the Unitarian Doctrine in England and America 178-83 (London: Rowland Hunter, rev. 2d ed. 1820); Bumbaugh, Unitarian Universalism, at 95, 102-04; Paul Johnson, A History of the American People 115 (New York: HarperCollins 1998); see also Hale v. Everett, 53 N.H. 9, 141, 1868 N.H. LEXIS 47, at **349 (N.H. 1868) (Doe, J., dissenting) (“The Episcopalian Society of King’s Chapel, in Boston, had been in existence ninety-nine years, when, in 1785, having become Unitarian, it altered the Episcopal liturgy.”); Attorney General v. Rector and Church Warden of Trinity Church and Others, 91 Mass. 422 9 Allen 422, 1864 Mass. LEXIS 288 (1864) (rejecting contentions that King’s Chapel’s Unitarianism frustrated a testator’s alleged intent to benefit an Episcopal institution); Boston v. Doyle, 184 Mass. 373, 68 N.E. 851 (1903) (construing Benjamin Franklin’s devise of property to be managed by “the Ministers of the oldest Episcopal, Congregational, and Presbyterian churches” in Boston; holding that by embracing Unitarianism “King’s Chapel ceased by being an Episcopal church within the meaning of the term used by the testator,” but that Boston’s First Church remained the City’s oldest Congregational church despite its similar adoption of Unitarianism); Rector and Wardens of King’s Chapel v. Pelham, 9 Mass. 501, 1813 Mass. LEXIS 12 (Mass. 1813) (rejecting contentions that a will devising property to King’s Chapel, once an Episcopal church, should not be honored because the Church had departed from the Episcopal liturgy). King’s Chapel is a member of the UUA. See [http://www.kings-chapel.org](http://www.kings-chapel.org).
Boston’s Federal Street Church “passed from Presbyterianism to independency in 1786” and – led by the Rev. William Ellery Channing – to Unitarianism in the early 1800s.

Nor was Unitarianism confined to New England. Recognized today as his era’s leading scientist, Dr. Joseph Priestley also was an outspoken Unitarian who wrote extensive religious commentaries. In 1794, Dr. Joseph Priestley fled England’s mob violence and religious persecution – to organize churches and conduct Unitarian

- http://www.ascboston.org/

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52 See Charles T. Brooks, William Ellery Channing: A Centennial Memory, 92-121 (Boston: Roberts Brothers, 1880); Handbook of the Arlington Street Church 5-10 (Boston: Arlington Street Church, 1936). See also Attorney General v. Federal Street Meeting House, 66 U.S. 262, 262-63 (1861) (syllabus noting contentions that “the land on which said meeting-house is built was conveyed in 1735, by its then proprietor, to trustees, to be held as a place for the preaching and maintaining of the doctrine, worship, and form of government of the Presbyterian Church of Scotland, which was Calvinistic and Trinitarian, teaching the Westminster confession of faith and catechisms; that the meetinghouse continued to be used according to the trust expressed in the deed until 1786, when various changes were introduced into the Society, and it became Congregational; [and] that this lasted until 1815, when the trust was wholly perverted and abused by the conversion of the congregation into a Unitarian Society”); see also Attorney General v. Proprietors of the Meeting-house in Federal Street in the Town of Boston, 69 Mass. 1, 40-41, 59-63, 3 Gray 1 (1854). Following a move to Arlington Street in the 1860s, the congregation took the name Arlington Street Church, under which it continues today as a member of the UUA. See http://www.ascboston.org/.

services in Pennsylvania. On his arrival in America, as it happens, Priestley was welcomed to preach from Elhanan Winchester’s Universalist pulpit in Philadelphia, where Rev. Winchester had founded the Society of Universal Baptists there in the 1780s.

54 Bumbaugh, Unitarian Universalism, at 95; see also Belsham, Memoirs of the Late Theophilus Lindsey, supra note 50, at 275-98 (on Priestley’s emigration from England to America), and at 191 (noting that Priestley’s chapel at Philadelphia, which was then the seat of the American government, was “crowded with the principal characters in the United States”). Priestley’s son recounted: “It was a source of great satisfaction to him, and what he had little previous reason to expect, that his lectures were attended by very crowded audiences, including most of the members of the Congress of the United States at that time assembled at Philadelphia, and of the executive offices of the government” of the United States.” Joseph Priestley, Jr., A Continuation of the Memoirs of Dr. Joseph Priestley (Written by his Son Joseph Priestley), in John T. Boyer, ed., The Memoirs of Joseph Priestley, at 144 (Washington, D.C.: Barcroft Press, 1964). John Adams and Thomas Jefferson both made a point of hearing Priestley’s sermons. See Jack Lindsay, Introduction to Autobiography of Joseph Priestley 32 (Somerset: Adams & Dart, 1970); Charles B. Sandford, The Religious Life of Thomas Jefferson 5-6, 33, 101-116 (Charlottesville: University of Virginia Press, 1984). Founded in 1796, Joseph Priestley’s First Unitarian Church of Philadelphia today is a member of the UUA. See http://www.firstuu-philly.org/index.html.

55 See e.g., Joseph Priestley, Discourses Relating to the Evidences of Revealed Religion, Delivered in the Church of the Universalists, at Philadelphia 1796 (Philadelphia: John Thompson, 1796); Joseph Priestley, Unitarianism Explained and Defended, in a Discourse Delivered in the Church of the Universalists, at Philadelphia, 1796 (Philadelphia: John Thompson, 1796); see also Thomas Brown, A History of the Origin and Progress of the Doctrine of Universal Salvation 325 n.* (Albany: Thomas Brown, 1826) (discussing Priestley and Winchester, who fellowshipped one another despite profound differences in Christology – Winchester was Trinitarian, while, “Dr. Priestley was a Unitarian Universalist”).

56 When the Rev. Winchester was expelled from a Baptist church in 1782 on account of his Universalist convictions, nearly half the congregation left with him. See Thomas Whittemore, The Modern History of Universalism 345-47 (Boston: Thomas Whittemore, 1830); Edwin Martin Stone, Biography of Rev. Elhanan Winchester 53-76 (Boston: H.B. Brewster, 1836); Elhanan Winchester, The Outcasts Comforted. A Sermon Delivered at the University in Philadelphia, January 4, 1782. To The Members of the Baptist Church, Who Have Been Rejected By Their Brethren, for Holding The Doctrine Of The Final Restoration Of All Things (originally Philadelphia: 1782; reprinted London: H. Trapp, 1783); see also Bumbaugh, Unitarian Universalism, at 151; Joseph R. Sweeney,
moved by a gospel of universal love, America’s Universalists had joined Quakers and Anabaptists in leading early religious opposition to slavery.\textsuperscript{57} Following the American Republic’s organization in 1789 under a new federal Constitution that preserved slavery and protected the slave trade,\textsuperscript{58} the Universalist General Convention met at Philadelphia in 1790 – to condemn both slavery and the slave trade, in prose framed by Dr. Benjamin Rush.\textsuperscript{59} With the 1843 Universalist General Convention’s renewed condemnation of involuntary servitude, Universalists were recognized for

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\textsuperscript{57} See, e.g., \textit{2 The Philadelphian Magazine} 89-90 (March 1789) (Elhanan Winchester’s Universalist publication, circulating a petition condemning the slave trade and acknowledging the Quakers as “the friends of our liberating plan”).

\textsuperscript{58} U.S. Const. Art. IV, §2, cl. 3 (preserving slavery: “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 upon claim of the Party to whom such Service or labour may be due.”); U.S. Const. Art. I, §9, cl. 1 (protecting the slave trade: “The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”); \textit{see Scott v. Sanford (The Dred Scott Case)}, 60 U.S. (19 How.) 393, 411 (1857) (Taney, J., for the Court: “the importation which it [Art. I, §9] thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States has always been confined to them”).

formally opposing slavery in the United States before other major denominations.\textsuperscript{60}

And when the Fugitive Slave Law took effect in 1850, Universalist state conventions called for civil disobedience.\textsuperscript{61} Some influential Unitarians joined them.\textsuperscript{62}

\textsuperscript{60} Bumbaugh, \textit{Unitarian Universalism}, at 152, 164-165; Miller, \textit{Larger Hope}, at 614-15; see also John G. Adams, \textit{Fifty Notable Years: Views of the Ministry of Christian Universalism During the Last Half Century} (Boston: Universalist Publishing House, 1882). The 1843 Convention explained that ‘‘the holding in bondage of our brethren . . . or the treatment of any human being with obloquy, harshness, or any indignity on account of his color or race,’’ was ‘contrary to righteousness, inconsistent with Christianity, and especially with that doctrine of Universal Grace and Love which we cherish as the most important of revealed truth.’’ Miller, \textit{Larger Hope}, at 614 (quoting resolutions reprinted in Cassara, \textit{Universalism in America} at 189-90). ‘‘The Unitarians were also well represented among the abolitionists through people like Theodore Parker, William Ellery Channing, and Samuel J. May, but not until 1844, after years of interminable debate, was their association successfully badgered into passing a moderate anti-slavery resolution.’’ Mark D. Morrison-Reed, \textit{Black Pioneers in a White Denomination} (Boston: Skinner House, 3d ed. 1994); see Samuel J. May, \textit{Some Recollections of Our Antislavery Conflict} 335-45 (Boston: Fields, Osgood, & Co., 1869) (criticizing the American Unitarian Association for its relatively slow action despite the fact that ‘‘we Unitarians have given to the antislavery cause more preachers, writers, lecturers, agents, poets, than any other denomination in proportion to our numbers, if not more without that comparison’’). ‘‘In 1845, one hundred seventy Unitarian ministers published an antislavery declaration in \textit{The Liberator}, lamenting both the fact that the gospel could not ‘‘be fully preached in the slave-holding states’ and the ‘long silence of Northern Christians and churches.’’’ Unitarian Universalist Commission on Appraisal, \textit{Empowerment: One Denomination’s Quest for Racial Justice, 1967-1982} 12 (Boston: UUA, 1984) (quoting ‘‘Protest against Slavery,’’ \textit{The Liberator} XV (Oct. 10, 1845)). By then, some leading Unitarians, such as the Revs. Parker, Channing, and May, had become quite notorious for their antislavery sentiments. See, e.g., Theodore Parker, \textit{Additional Speeches, Addresses and Occasional Sermons in Two Volumes} (Boston: Little, Brown & Co., 1855) (collecting some of Rev. Parker’s antislavery orations); Theodore Parker (James K. Hosmer, ed.), \textit{The Slave Power} (Boston: American Unitarian Ass’n, 1910) (collecting Parker’s antislavery sermons from 1842-1852); Theodore Parker (F.B. Sanborn, ed.), \textit{The Rights of Man in America} (Boston: American Unitarian Ass’n 1911) (collecting several further antislavery speeches and sermons from 1849-1856); William Ellery Channing, \textit{Slavery} (Boston: James Monroe & Co., 1835); William Ellery Channing, \textit{Emancipation} (New York: New York Antislavery Society, 1841); William Ellery Channing, \textit{An Address Delivered at Lenox, On The First of August, 1842, The Anniversary of The Emancipation, in the British West Indies} (Lenox: J.G. Stanley, 1842); see also 2 John Weiss, \textit{Life and Correspondence of Theodore Parker} 68-243 (New York: D. Appleton & Co., 1864); Jack Mendelsohn, \textit{Channing, The Reluctant Radical} 229-48 (Boston: Skinner House, 1971); Arthur W. Brown, \textit{Always Young for Liberty: A Biography of William Ellery Channing} 222-41 (Syracuse, NY: Syracuse University Press, 1956); John White Chadwick, \textit{William Ellery Channing, Minister of
Unitarians and Universalists also led the vanguard for women’s equality in the United States. “Judith Sargent Murray, an advocate of Universalism and women’s rights, held a local Universalist preacher’s license as early as the 1790s; other Universalist women joined her in the opening decades of the 1800s.”

And Universalists became the first American denomination to ordain women – beginning with the Revs. Olympia Brown and Augusta J. Chapin in 1863.

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Rev. Brown naturally joined Unitarians Susan B. Anthony, Elizabeth Cady Stanton, Julia Ward Howe, and Lucy Stone, in leading the Women’s Suffrage movement. Their movement for political equality of women often held its meetings and conventions in Unitarian and in Universalist churches.


Unitarians and Universalists weathered many other battles for human dignity in the United States – too many to detail here. Mary White Ovington and the Rev. John Haynes Holmes were among the NAACP’s founders in 1909. Rev. Holmes also served for decades on the Board of Directors of the American Civil Liberties Union, organized in 1920 by Roger Nash Baldwin, who had himself taught Sunday school in the Unitarian church at Wellesley, Massachusetts, where he learned “that you had to help the underdog – that you had a moral obligation to help the people on the bottom.” The Rev. Duncan Howlett of Washington, D.C.’s All Souls Church served as the first chair of the District of Columbia Advisory Committee to the United States

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Commission on Civil Rights. And Unitarian Universalists, more generally, stood fast for civil rights in the twentieth century – even in the face of violence.

Following the two denominations’ 1961 merger, and reflecting values developed over the preceding centuries, the UUA’s General Assembly in the 1980s resolved overwhelmingly:

We, the member congregations of the Unitarian Universalist Association, covenant to affirm and promote

- The inherent worth and dignity of every person;
- Justice, equity and compassion in human relations;
- Acceptance of one another and encouragement to spiritual growth in our congregations;
- A free and responsible search for truth and meaning;
- The right of conscience and the use of the democratic process within our congregations and in society at large;
- The goal of world community with peace, liberty, and justice for all;
- Respect for the interdependent web of all existence of which we are a part.

70 Mark D. Morrison-Reed, Black Pioneers in a White Denomination 202 (Boston: Skinner House, 3d ed. 1994).

71 See infra, text accompanying notes 102-105.

72 UUA Bylaws & Rules, Art. II, sec. C-2.1; http://www.uua.org/administration/bylaws.html#sectionC-2.1.; see John A. Buehrens & Forrest Church, A Chosen Faith: An Introduction to Unitarian Universalism xxiv-xxvi (Boston: Beacon Press, Rev. ed. 1998); Bumbaugh, Unitarian Universalism, at 196-97; see also Edward A. Frost, ed.,
These principles continue a longstanding tradition of freedom of conscience, and of honoring theological diversity – both within and without the denomination’s fellowships. As one nineteenth-century text explained:

The Unitarians acknowledge no binding creed. They contend for the fullest liberty in belief, and exclude no one from their fellowship for differences in doctrinal views. Unitarianism is declared to be “not a fixed dogmatic statement, but a movement of ever-enlarging faith,” welcoming “inquiry, progress, and diversity of individual thought in the unity of spiritual thought.”

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73 See, e.g., William Ellery Channing, Remarks on Creeds, Intolerance, and Exclusion 1 (Boston: American Unitarian Ass’n (James Munroe & Co.), 1837) (“My aversion to human creeds as bonds of Christian union, as conditions of Christian fellowship, as means of fastening chains on men’s minds, constantly gains strength.”).

Through the years, the UUA has repeatedly reaffirmed the principle that religious freedom requires governmental neutrality, with respect to religious viewpoint, and genuine separation of church and state.\textsuperscript{75} Since the 1970s, moreover, it has declared vehement opposition to discrimination on account of sexual orientation.\textsuperscript{76} As set forth in some detail below, these positions have placed the denomination at odds with the BSA.\textsuperscript{77}

\textbf{B. The Unitarian Universalist Experience with Political Disabilities and Discrimination}

The UUA comprises many of America’s oldest and most venerated churches.\textsuperscript{78} “Five Presidents of Unitarian belief have graced the presidential chair, John Adams and his son John Quincy Adams heading the list, the other three being Thomas Jefferson, Millard Fillmore, and William Howard Taft.”\textsuperscript{79} Ten Unitarians have served

\begin{footnotesize}
\begin{enumerate}
\item See http://www.uua.org/actions/religious-freedom/.
\item See http://www.uua.org/actions/bglt/.
\item See infra text accompanying notes 106-167.
\item See supra notes 45-52 and accompanying text.
\end{enumerate}
\end{footnotesize}
on our Supreme Court – Joseph Story, Oliver Wendell Holmes, Jr., and William Howard Taft, among them. Yet Unitarians and Universalists too often have suffered at the hands of those who – like the BSA – purport to speak for “traditional values.”


William Cushing was a prominent member of the First Parish Church of Scituate (today, the First Parish Church of Norwell, Unitarian Universalist); “well acquainted with the controversies of the day,” he stood “conspicuously on the side of liberal Christianity.” Samuel Deane, *History of Scituate, Massachusetts, from Its First Settlement to 1831* 257-58 (Boston: James Loring, 1831); see 2 Henry Flanders, *The Lives and Times of the Chief Justices of the Supreme Court* 28 (Philadelphia: J.B. Lippincott & Co., 1858). An Episcopalian in later life, Benjamin Robbins Curtis served as a vestryman at King’s Chapel and was a member of the Unitarian congregation until 1860 – having resigned from the Court in 1857, following his celebrated dissent from the infamous *Dred Scott* decision. See 2 Henry Wilder Foote (Henry H. Edes, ed.), *Annals of King’s Chapel from the Puritan Age of New England to the Present Day* 463, 543-44, 609 (Boston: Little, Brown & Co., 1896); 1 Benjamin R. Curtis, Jr., *A Memoir of Benjamin Robbins Curtis* 18-21, 322-24 (Boston: Little, Brown & Co., 1879); Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism* 12 (Charleston: University of Virginia Press, 2005) (noting that Curtis “was a vestryman of King’s Chapel”); *Scott v. Sanford (The Dred Scott Case)*, 60 U.S. (19 How.) 393, 594 -633 (1857) (Curtis, J., dissenting). It is said that Nathan Clifford, on becoming “dissatisfied with what he considered narrowness in the creed” of more orthodox congregations “began to attend Unitarian meetings.” Philip Greely Clifford, *Nathan Clifford, Democrat (1803-1881)* 339 (New York: G.P. Putnam’s Sons, 1922). In addition to his duties as judge and legal scholar, Joseph Story served in 1816 on the Committee on Theological Education for the Harvard Divinity School, and in 1844 as President of the American Unitarian Association. Gerald T. Dunne, *Joseph Story*, in 1 Leon Friedman & Fred L. Israel, *The Justices of the United States Supreme Court: Their Lives and Opinions*, 254, 261, 267 (New York: Chelsea House, 1997). “Abhorring tests and rituals of religious orthodoxy, and yearning for a broader horizon, [Samuel Freeman] Miller, with generous sympathies and a rigorously analytical mind, was inclined toward religious liberalism, which in his case meant Unitarianism.” William Gillette, *Samuel Miller*, in 2 Leon Friedman & Fred L. Israel, *The Justices of the United States Supreme Court: Their Lives and Opinions*, 504, 506-07 (New York: Chelsea House, 1997). “Moreover, he practiced what he preached, by freeing his slaves.” *Id.* at 507. Miller organized a Unitarian Church at Keokuk, Iowa in 1853, maintaining his membership for life, and he served for three years as President of the National Unitarian Conference. Charles Noble Gregory, *Samuel Freeman Miller* 58-59 (Iowa City: State Historical Society of Iowa, 1907); Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* 20, 238-39, 256 (Baton Rouge: Louisiana State University Press, 2003); Charles Fairman, *Mr. Justice Miller and the Supreme Court: 1862-1890* 14 & n.22 (Cambridge, Massachusetts: Harvard University Press, 1939); Charles H. Lyttle, *Freedom Moves West: A History of the Western Unitarian Conference 1852-1952* 81-82 (Boston: Beacon Press, 1952). Oliver Wendell Holmes, Jr. grew up in a prominent Unitarian family that worshiped at Boston’s King’s Chapel, for which his father wrote hymns and poetry. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 7-8, 17-18 (New York & Oxford: Oxford University Press, 1993); 2 Henry Wilder Foote (Henry H. Edes, ed.), *Annals of King’s Chapel*, at 131 n.1, 563-64, 626-29. Holmes’ diary recounts that when he was wounded in the Civil War and “‘thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was en route for Hell came up with painful distinctness. . . and so with a “God forgive me if I am wrong,” I slept –. ’” White, *Holmes: Law and the Inner Self* at 73
Universalists, in particular, faced daunting disabilities – some nineteenth-century courts even refused to let them testify in legal proceedings. And some


81 From the beginning, emotions ran high among the “orthodox” against the two liberal denominations: “It was sincerely felt that, while the one [Unitarianism] abandoned the foundation of the Christian faith, the other [Universalism] destroyed the foundation of Christian morality.” Leonard Woolsey Bacon, A History of American Christianity 226 (New York: Christian Literature Co., 1897). Thus, “the conflict against the two sects called ‘liberal’ was waged ruthlessly, not as against defective or erroneous schemes of doctrine, but as against distinctly antichristian heresies.” Id. at 227.

82 See, e.g., Smith v. Coffin, 18 Me. 157, 1841 Me. LEXIS 260 (1841); Atwood v. Welton, 7 Conn. 66, 70-79, 1828 Conn. LEXIS 8 (1828); Curtiss v. Strong, 4 Day 51, 55 1809 Conn. LEXIS 30, at **7 (Conn. 1809) (“Every person who does not believe in . . . a future state of rewards and punishments . . . is by law excluded from being a witness”); see also Jackson ex dem. v. Gridley, 18
states’ constitutions apparently precluded Universalists, who could not accept Calvinist notions of hell, from holding public office.83

Taxed to support politically established Calvinist churches – from whose dogmas of human depravity, predestination, and eternal hell they recoiled – Universalists struggled for half a century to “disestablish” state-sponsored religion in Massachusetts. When Universalists started their own church at Gloucester, political Johns. 98, 103, 1829 N.Y. LEXIS 57, at **9 (N.Y. Supreme Court 1829) (“it is fully and clearly settled, that infidels who do not believe in a God, or if they do, do not think that he will either reward or punish them in the world to come, cannot be witnesses in any case, nor under any circumstances”). In the 1856 edition of his book Religion in America, Robert Baird (who personally detested Universalists) was pleased to report that that Universalists who disbelieved in hell were generally barred from testifying: “No State allows the oath of an atheist to be received in a court of justice, and in one only, in so far as I am aware, is that of a disbeliever in a future state of rewards and punishments received as evidence.” Robert Baird, Religion in America 117 (New York: Harper Torchbooks, 1970; abridged reprint of 1856 edition) (Baird’s emphasis; noting New York as the exception). Some courts distinguished between those Universalists (as the Rev. Hosea Ballou) who altogether denied the notion of divine retribution and punishment in hell, and who therefore could never testify in a court of law, and those (as the Rev. Adin Ballou) who “only deny the duration of those punishments to be eternal,” and whose testimony might, therefore, be accepted – since they believed in at least a temporary hell. Butts v. Swartwood, 2 Cow. 431, 432, 1832 N.Y. LEXIS 289 at **2-**3 (N.Y. Supreme Court 1823) (noted in commentary at 2 Cow. 572-73 (“Are Universalists admissible witnesses?”)); see Atwood, 7 Conn. at 71 (“The question is not, whether a person who believes in any future punishment, though not endless, may be admitted as a witness; – but, whether a person who denies all punishment after this life, and who, in the language of the motion, believes that men will be punished in this life for their sins, but immediately after their death be made happy, [may] be a competent witness.”) (court’s emphasis).

83 Carl Esbeck writes that Vermont’s constitution of 1786, for example, imposed a religious test for holding public office, and an oath, that “effectively excluded deists, Jews, and Universalists,” since “[t]he oath required a belief in both the Old and New Testaments, which neither deists nor Jews could swear to, as well as belief in punishment in hell, which was objectionable to Universalists.” Carl H. Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, 2004 B.Y.U.L. Rev. 1385, 1527 & n.509 (2004).
authorities seized and auctioned off their property. The Universalists went to court – eventually vindicating their right to support their own church and not someone else’s. So political authorities prosecuted their minister – for performing weddings – forcing him to flee the country. Massachusetts finally disestablished its churches in 1833.

Unitarians too have faced considerable hostility, and occasional disabilities. State authorities meddled in Unitarians’ affairs, for example, when New Hampshire’s


85 *Id.* at 23-28; Eddy, *History of Universalism*, at 401-403; Miller, *Larger Hope*, at 21-26; see also David Reich, *Founding Fathers: Tufts and the Universalist Tradition*, Tufts Online Magazine, http://www.tufts.edu/alumni/magazine/spring2002/univ.html (Spring 2002) (“In 1786 the State’s Supreme Judicial Court ruled for the Universalists. It was their first victory in their long campaign for church-state separation”).


87 *See Colo v. Treasurer and Receiver General*, 378 Mass. 500, 556, 392 N.E. 2d 1195, 1198-99 (1979); 1 Anson Phelps Stokes, *Church and State in the United States* 418 (New York: Harper, 1950); Carl H. Esbeck, *Dissent and Disestablishment*, 2004 B.Y.U. L. Rev. 1385, 1458, 1512-24 (2004). Disestablishment was, perhaps, facilitated by the fact that many of Massachusetts’ oldest established churches were, by then, Unitarian. *See supra* notes 45-47. Universalists also ran into problems in other states – and in New Hampshire were even jailed for refusing financial support for established churches whose doctrines they found repugnant. *See* Charles B. Kinney, Jr., *Church & State The Struggle for Separation in New Hampshire, 1630 -1900* 94-97 (New York: Teachers College, Columbia University, 1955) (discussing *Muzzy v. Wilkins*, 1 Smith 1 (N.H. 1803)). In New Hampshire, as in Massachusetts, Universalists worked for decades “toward separating church and state,” to ensure religious freedom for themselves and others. Kinney, *Church & State*, at 194.

highest court in 1868 disqualified the Dover, New Hampshire, First Unitarian Society of Christians’ chosen minister – finding him insufficiently “Christian.”\textsuperscript{89} Justice Jonathan Everett Sargent’s opinion for the court quoted passages from the Rev. Francis Ellingwood Abbot’s sermons, to show that the minister was too open-minded to serve his congregation. The Rev. Abbot, after all, had once preached:

\begin{quote}
Whoever has been so fired in his own spirit by the overwhelming thought of the Divine Being as to kindle the flames in the hearts of his fellow men, whether Confucius, or Zoroaster, or Moses, or Jesus, or Mohammed, has proved himself to be a prophet of the living God; and thus every great historic religion dates from a genuine inspiration by the Eternal Spirit.\textsuperscript{90}
\end{quote}

And Rev. Abbot had, in another sermon, even declared:

\begin{quote}
America is every whit as sacred as Judea. God is as near to you and to me, as ever he was to Moses, to Jesus, or to Paul. Wherever a human soul is born into the love of truth and high virtue, there is the “Holy Land.” Wherever a human soul has uttered its sincere and brave faith in
\end{quote}

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Whittemore). “In thousands of communities,” Vernon B. Hampton wrote over a century later, “the Unitarian Church is looked upon askance by the Orthodox bodies, both pastors and people.” Vernon B. Hampton, \textit{Religious Background of the White House}, 27 (Boston: Christopher Publishing House, 1932).
\end{flushright}

\textsuperscript{89} \textit{Hale v. Everett}, 53 N.H. 9, 16 Am. Rep. 82, 1868 N.H. LEXIS 47 (1868). See Charles B. Kinney. Jr., \textit{Church & State: The Struggle for Separation in New Hampshire, 1630-1900} 113 (New York: Teachers College, Columbia Univ., 1955) (“One of the more celebrated cases in New Hampshire jurisprudence is that of Hale versus Everett.”); Carl H. Esbeck, \textit{Dissent and Disestablishment: The Church-State Settlement in the Early American Republic}, 2004 B.Y.U. L. Rev. 1385, 1534 n.541 (“As late as 1868, the state supreme court decided that a Unitarian minister would not be allowed to use the town meeting house because of his heterodoxy, and in spite of being called and settled by a majority of the community.”).

\textsuperscript{90} \textit{Hale}, 53 N.H. at 86, 1868 N.H. LEXIS 47 at *203 (quoting Rev. Abbot’s sermon of March 15, 1868).
the Divine, and thus bequeathed to us the legacy of inspired words, there is the “Holy Bible.”

“If Protestantism would include Mr. Abbot in this case,” Justice Sargent opined for New Hampshire’s highest court, “it would of course include Thomas Jefferson, and by the same rule also Thomas Paine, whom Gov. Plumer of New Hampshire called ‘that outrageous blasphemer,’ that ‘infamous blasphemer,’ ‘that miscreant Paine,’ whose ‘Age of Reason’ Plumer had read ‘with unqualified disapprobation of its tone and temper, its course vulgarity, and its unfair appeals to the passions and prejudices of his readers.’”

91 Id. (quoting Rev. Abbot’s sermon of March 29, 1868).

William Howard Taft faced religious bigotry four decades later, as the Republican candidate in the presidential race of 1908, when religious conservatives “needed no evidence to convince them that Taft, a Unitarian, was necessarily also an infidel.”93 “Wherever he went,” recounts Franklin Steiner, the Democrats’ candidate William Jennings Bryan, “raised the odium theologicum against Taft, saying, among other things, that ‘the American people would never elect a man President who disbelieved in the virgin birth and the divinity of Christ.’”94 Some denounced the Republican Taft as a “Unitarian atheist.”95 The Nation magazine noted religious conservatives’ “ardent personal appeals, not to let high heaven witness the seating in


95 Harris, Historical Dictionary at 458; see Edmund Fuller & David E. Green, God in the White House: The Faiths of American Presidents 169 (New York: Crown Publishers, 1968) (noting that Taft was the “first President since Lincoln to have the charge of infidel raised against him,” with “some denouncing him as atheist” because of his Unitarian faith); Albert J. Menendez, Religion and the U.S. Presidency: A Bibliography 111 (New York: Garland Publishing, 1986 (noting that “Taft was a Unitarian whose religious views became an ugly issue in the 1908 election”).
the White House of a man who denies the divine parentage of Jesus.”

“Think of the United States with a President who does not believe that Jesus Christ was the Son of God,” shuddered the editor of one religious paper, “but looks upon our immaculate Savior as a common bastard and low, cunning imposter.”

Taft faced such hostility, The Nation observed, “because 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.” But the American people placed Taft in the White House, from which he of course launched the BSA.


98 “Taft and his Religion,” 87 The Nation 279 (Sept. 24, 1908). In addition to attacking Taft for his own liberal religious views, it may be noted that the fundamentalists also derided Taft for being too charitable in his dealings with Catholics. See Edgar Albert Honig, The Religious Issue in the Taft-Bryan Duel of 1908, 105 Proc. Am. Phil Soc. 530, 532 (19610); 1 Pringle, Life of Taft, at 374; Menendez, Religion and the U.S. Presidents at 111; Berton Dulce & Edward J. Richter, Religion and the Presidency: A Recurring American Problem 73-74 (New York: MacMillan Co., 1962). President Theodore Roosevelt wrote to Taft that “the attacks on you by a certain type of small Protestant bigots are so infamous as to make my blood boil.” Edgar Albert Honig, The Religious
In 1958, after Unitarian churches – which had long rejected compulsory creeds, tests, and confessions – refused a government-mandated loyalty oath, Justice William O. Douglas observed: “The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs.”100 That same year Unitarians from Pennsylvania filed suit to stop Biblical readings and state-sponsored prayer in public schools – eventually terminating “religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.”101

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The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that
The denomination faced violence in the 1960s. When the Rev. Martin Luther King, Jr., a Baptist minister, issued a call in March of 1965 to all American clergy, of all races and faiths, to come to Selma, Alabama, and counter the violence against civil rights workers there, five hundred or so white clergy were among those who answered – and more than 200 of these were Unitarian Universalists. But when the Unitarian Universalists came to Selma to bear witness for human dignity and equality under law, segregationists attacked them, murdering the Rev. James Reeb. Moved by the Rev. Reeb’s tragic end, Viola Liuzzo – a Unitarian Universalist lay person and mother of five from Detroit – made the pilgrimage to Selma and, working for civil rights, was

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\text{it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.}
\]

\textit{Id.}

\textsuperscript{102} Richard D. Leonard, \textit{Call to Selma: Eighteen Days of Witness} viii (Boston: Skinner House, 1993) (March 21, 1965: “Of the estimated five hundred white clergy now in Selma, over two hundred were Unitarian Universalist.”).

herself murdered by Klansmen. These two were, declared the Rev. Martin Luther King, Jr., “martyrs of the faith.”

Unitarian Universalists believe Reeb and Liuzzo died in a struggle for human dignity and social equality of despised minorities that continues today, as their


105 Martin Luther King, Jr. (Claiborne Carson, ed.), The Autobiography of Martin Luther King, Jr. 289 (New York: Warner Books, 1998) (“let us especially mark the sacrifices of Jimmie Lee Jackson, Rev. James Reeb, and Mrs. Viola Liuzzo as the martyrs of the faith”); see also id. at 294 (praising “James Reeb and Viola Liuzzo, the martyrs of the Selma campaign”).

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denomination bears public witness against institutionalized discrimination on the basis of religious viewpoint and sexual orientation – thereby incurring the BSA’s wrath.

III. THE BSA vs. UNITARIAN UNIVERSALISTS

Objecting to Unitarian Universalists’ public witness against discrimination on the basis of theological viewpoint and sexual orientation, the BSA has lately embarked on a policy of discrimination not just against homosexuals, atheists, and agnostics, but against Unitarian Universalists and their children. Since the 1990s the BSA has publicly espoused a rigidly doctrinaire theological stand, hostile to the Unitarian Universalist denomination itself. From the events recounted below, it becomes clear that a liberal religious faith embracing the dignity and worth of agnostics and homosexuals – and teaching its children that discrimination and shunning are wrong – is simply unacceptable to the BSA.

1. The BSA Begins to Pursue Discriminatory Policies, Then Bars Unitarian Universalists from its Religious Relationships Committee

The BSA’s current hostility toward the Unitarian Universalists is ironic, to say the least. At its inception, the BSA was personally launched from the White House by a devout Unitarian leader, President William Howard Taft. Unitarian and

Universalist churches sponsored Boy Scout troops from the very beginning. From its formation in 1961, moreover, the UUA worked with the BSA so that Unitarian Universalist youth in Scouting might earn from the denomination and wear on their uniforms a denominational Religion in Life award recognized by the BSA’s Religious Emblems Program.

But in 1978, the BSA secretly promulgated a new policy of discriminating against homosexuals. It condemned gays publicly in 1991 – insisting for the first time that homosexuals violate the Scout Law because they are not “clean.” The

107 See William D. Murray, The History of the Boy Scouts of America 527 (New York: BSA, 1937) (noting that at the close of 1936, troops were sponsored by 27 Unitarian churches, and by 31 Universalist churches). By the early 1990s, 26 Unitarian Universalist churches still sponsored Boy Scout troops despite growing tension with the BSA. See Letter of January 11, 1993, from Donald L. Townsend to the Rev. Jory Agate [Appendix 5 hereto].

108 See BSA v. Dale, 530 U.S. at 651-52 (quoting BSA’s 1978 internal statement); id. at 672 (Stevens, J., dissenting) (noting that “the 1978 policy was never publicly expressed”; being stated only in “an internal memorandum, never circulated beyond the few members of BSA’s Executive Committee,” it was “in effect, a secret Boy Scouts policy”); see also Hans Zeiger, Get Off My Honor 65 (Nashville: Broadman & Holman Publishers, 2005) (conceding that “the national Boy Scouts didn’t actually have an established membership code about homosexuality before 1978”).

109 If a Scout is “brave, clean, and reverent,” the BSA concluded, homosexuals cannot participate in Scouting because they are not “clean.” The BSA’s 1991 position paper asserted:

We believe 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, and that homosexuals do not provide a desirable role model for Scouts.

Dale, 530 U.S. at 652 (quoting 1991 BSA position paper) (emphasis added); see id. at 650 (“The Boy Scouts asserts that homosexual conduct is inconsistent with the values embedded in the Scout Oath and Law, particularly with the values represented by the terms ‘morally straight’ and ‘clean.’”) (emphasis added); see also Hans Zeiger, Get Off My Honor: The Assault on The Boy Scouts of
BSA abandoned late twentieth-century social norms that honor human dignity and diversity, instead, condemning homosexuals as *unclean*, reverting to what Unitarian Universalists – and many other religious people – view as outdated Levitical notions of proper conduct and spiritual purity.\(^{110}\) The BSA also began to employ the Scout Oath’s promise of “duty to God” and the Scout Law’s instruction that a Scout is

\[^{110}\] See, e.g., *Leviticus* 18:22; 20:13. The Supreme Court acknowledged, in *Dale*, that “the terms ‘morally straight’ and ‘clean’ are by no means self-defining,” and that “some people may believe that engaging in homosexual conduct is not at odds with being ‘morally straight’ and ‘clean.’” *Dale*, 430 U.S. at 650. Indeed, a coalition of religious organizations had filed an amicus curiae brief opposing the BSA’s antigay policies. *See BSA v. Dale*, U.S. No. 99-699, Brief of *Amici Curiae* the General Board of Church and Society of the United Methodist Church, the United Church Board for Homeland Ministries, the Religious Action Center of Reform Judaism, the Diocesan Council of the Episcopal Diocese of Newark, and the Unitarian Universalist Association in Support of Respondent; *see also BSA v. Dale*, U.S. No. 99-699, Brief *Amicus Curiae* of the American Jewish Congress in Support of Petitioner; Brief of Deans of Divinity Schools and Rabbinical Institutions as *Amici Curiae* in Support of Respondent. North America’s largest group of Jewish clergy, the Central Conference of American Rabbis (CCAR) condemns discrimination against homosexuals. *See, e.g.*, http://data.ccar.net/cgi-bin/resodisp.pl?filed=gays&year=1993; *see also* http://data.ccar.net/cgi-bin/resodisp.pl?file=gl&year=1996. So do most mainstream Christians – the BSA simply ignores Christian scripture renouncing the Levitical restrictions: “For all the law is fulfilled in one word, even in this: Thou shalt love thy neighbor as thyself.” Galatians 5:14 (KJV); *see also* Romans 14:13-14 (KJV) (“Let us not therefore judge one another any more: . . . there is nothing unclean of itself.”). A longtime Eagle Scout and Professor of American Studies, Jay Mechling writes: “To maintain the position that homosexuality is immoral amounts to preferring some religions over others on this matter.” Jay Mechling, *On My Honor: Boy Scouts and the Making of American Youth*, 225 (Chicago: University of Chicago Press, 2001). The tension between the BSA, on the one hand, and Reform Judaism, Unitarian Universalists, and the United Church of Christ, on the other, supports this thesis.
“reverent” to expel atheists, agnostics, and anyone else who could not confess a satisfactory belief in the BSA leadership’s God.111

One of the most prominent cases, *Welsh v. BSA*, involved the BSA’s exclusion of a Unitarian Universalist, Elliott Welsh, and his elementary-school son – who had been solicited by his first-grade public-school teacher to join Scouting.112 Coming

111  *See, e.g. Sherman v. Community Consol. School Dist.*, 8 F. 3d 1160, 1162 (children expelled from Scouting “because of their refusal to abide by the provision in the Scout oath which requires belief in God”); *Welsh v. BSA*, 787 F. Supp. 1511 (N.D. Ill. 1992) (exclusion from Cub Scouting of a seven-year-old child and his father because they could not confess a belief in God to the BSA’s satisfaction), *aff’d*, 993 F.2d 1267 (7th Cir. 1993); *Randall v. Orange County Council, BSA*, 17 Cal. 4th 736, 952 P.2d 261, 72 Cal. Rptr. 2d 453 (1998) (seven-year-old twins expelled from Cub Scouts because they could not confess a belief in God); *see also* Jay Mechling, *On My Honor: Boy Scouts and The Making of American Youth* 35-38 (Chicago: University of Chicago Press, 2001). That none of this had to be can be seen from the experience of the Girl Scouts of America. While the Boy Scout Oath appears to parallel the Girl Scout Promise “to serve God and my country,” so that *no child* will be excluded or denigrated because of her personal religious beliefs, the Girl Scouts of America, since 1993 has emphasized:

The word “God” can be interpreted in a number of ways, depending on one’s spiritual beliefs. When reciting the Girl Scout Promise, it is okay to replace the word “God” with whatever word your spiritual beliefs dictate.

http://www.girlscouts.org/program/gs_central/promise_law. The BSA refuses to accommodate dissenting children’s beliefs in a similar fashion.

112  *See Welsh v. BSA*, 742 F. Supp. 1413 (N.D. Ill. 1990) (denying the BSA’s motion to dismiss); *Welsh v. BSA*, 787 F. Supp. 1511 (N.D. Ill. 1992) (granting BSA’s summary-judgment motion), *aff’d* 993 F.2d 1267 (7th Cir. 1993). Currently a member of the Unitarian Universalist Society of Geneva, Illinois, Welsh has for many decades been active in Unitarian Universalist circles. The Rev. Stephen H. Fritchman describes in his autobiography how, in the 1960s, Elliott Welsh who at the time was not a church member, “came by my study one evening at the suggestion of his wife, Peggy, a member of our church since the early days of my pastorate,” to discuss his status as a conscientious objector. Stephen H. Fritchman, *Heretic: A Partisan Autobiography* 271 (Boston: Beacon Press, 1977). Welsh faced a three-year prison sentence when the Ninth Circuit ruled his beliefs insufficiently religious to qualify him as a conscientious objector – a conclusion that the Supreme Court overturned. *See Welsh v. United States*, 398 U.S. 333 (1970), rev’g 404 F.2d 1078 (9th Cir. 1970).
from a faith tradition that rejects creeds, and accommodates doubt,\textsuperscript{113} Elliott Welsh’s agnostic son Mark was confronted with an oath “to do my duty to God,”\textsuperscript{114} and Elliott, as an adult, with a Declaration of Religious Principles that BSA lawyers described as the “Boy Scouts’ creed that ‘no member can grow into the best kind of citizen without recognizing an obligation to God.’”\textsuperscript{115} When neither could agree, their nontheistic religious scruples provided the basis for their expulsion from Scouting – which the Seventh Circuit sustained.\textsuperscript{116}

Unitarian Universalists, who had worked with the BSA for decades, were deeply offended by the new policies. The UUA’s Board of Trustees resolved, in June of 1992, to express “disapproval of the BSA’s policy of discrimination against gay and atheist scouts and leaders,” and the denomination’s \textit{Religion in Life} manual was

\begin{itemize}
\item \textsuperscript{113} \textit{See supra} text accompanying notes 72-74.
\item \textsuperscript{114} The Boy Scout Oath declares: “On my honor I will do my best, To do my duty to God and my country, and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight.” The Cub Scout Promise declares: “I, (say your name), promise, to DO MY BEST, To do my DUTY to GOD, and my Country, To HELP other people, and To OBEY the LAW of the Pack.” A Tiger Cub Promise, for children in first grade, declared: “I promise to love God, my family, and my country, and to learn about the world.” \textit{See Welsh v. BSA}, 787 F. Supp. at 1511, 1515-16 (N.D. Ill. 1992).
\item \textsuperscript{115} \textit{See Welsh}, 742 F. Supp. at 1430 (quoting the BSA’s own characterization of its Declaration of Religious Principle as “the Boy Scouts’ creed that ‘no member can grow into the best kind of citizen without recognizing an obligation to God.’”); \textit{Welsh}, 787 F. Supp. at 1517 (“Mark Welsh is not willing to subscribe to the Cub Scout Promise and Elliott Welsh is not willing to subscribe to the Declaration of Religious Principle”).
\item \textsuperscript{116} \textit{Welsh v. BSA}, 993 F.2d 1267 (7th Cir. 1993).
\end{itemize}
revised to reflect this. The UUA’s Youth Programs Director, the Rev. Jory Agate, communicated the Board’s action in a September 4, 1992, letter to the BSA, specifically objecting to the BSA’s “policy of discriminating against homosexual and atheist youth.” “Our faith tradition values the worth and dignity of every individual,” Rev. Agate wrote, “no matter their sexual orientation or their belief in a deity.” Recognizing how much the BSA does “to develop young men’s self-identity, confidence, and leadership skills,” Rev. Agate applied for membership on the BSA’s Religious Relationships Committee.

The BSA, however, retaliated by barring Unitarian Universalists from its Religious Relationships Committee, suggesting even that “the Resolution of the Unitarian Universalist Association appears to bring to an end our longstanding

See Wayne B. Arnason, Religion in Life: Boys; a Program of Study, Reflection, and Action in Religious Living; for Ages 12-18, and for Unitarian Universalist Boy Scouts Seeking the Religion in Life Emblem Awarded by the Unitarian Universalist Association 6 (Boston: UUA, 3d ed. 1993) [Appendix 6 hereto]; September 4, 1992 letter from the Rev. Jory Agate, UUA Youth Programs Director, to David Worley, BSA Relationships Division [Appendix 1 hereto].

September 4, 1992, letter from Rev. Jory Agate, UUA Youth Programs Director, to David Worley, BSA Relationships Division. [Appendix 1 hereto].

Id.

Id.

October 29, 1992, letter from Donald L. Townsend, Director, BSA Relationships Division, to the Rev. Jory Agate, UUA Youth Programs Director, at 2 (“Because of the resolution you have passed, I do not see a member of the Unitarian Universalist Association serving on this committee.”) [Appendix 2 hereto].
alliance in serving youth.”¹²² Yet Unitarian Universalist congregations continued to sponsor Scouting troops, and to award their denomination’s Religion in Life emblems.

2. The BSA Disapproves Unitarian Universalist Religious Awards, Prohibiting Scouts from Displaying their Denominational Emblems

Problems came to a head in 1998, when Dr. Lawrence Ray Smith, as Chair of the BSA’s Religious Relationships Committee, dispatched a letter dated May 7, 1998, to the UUA’s Youth Programs Director, complaining that the denomination’s Religion in Life manual “contains several statements which are inconsistent with Scouting’s values.”¹²³

First, the UUA manual said: “The Boy Scouts of America is a secular organization that does not attempt to define or promote a specific theological position.”¹²⁴ This, Smith wrote for the BSA, was flatly wrong: “Boy Scouts is not a ‘secular organization’ as stated in Religion in Life; Boy Scouts is an ecumenical


¹²³ May 7, 1998, letter from Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, to Jennifer Harrison, UUA Youth Programs Director [Appendix 7 hereto].

¹²⁴ Wayne B. Arnason, Religion in Life: Boys; a Program of Study, Reflection, and Action in Religious Living; for Ages 12-18, and for Unitarian Universalist Boy Scouts Seeking the Religion in Life Emblem Awarded by the Unitarian Universalist Association 5 (Boston: UUA, 3d ed. 1993) [Appendix 6 hereto].
organization which requires belief in God and acknowledgement of duty to God by its members.”  

The BSA also objected to the UUA manual’s observation that “[s]ome Unitarian Universalists have trouble with the religious language in the Scout Oath, Law, and Charter.” The BSA insisted that any “reference to the ‘trouble’ some Unitarian Universalists may have regarding the duty to God inappropriately incorporates doubt in an award process that is designed to forge a stronger link between a youth’s Scouting values and religious life.” The Unitarian Universalists’ open-ended approach to the infinite was simply unacceptable to the BSA, which could not abide the denomination’s liberal acceptance of uncoerced theological diversity.

Finally, the BSA objected to the UUA manual for informing Unitarian Universalist youth that their denomination’s “General Assemblies have affirmed the rights of gays and lesbians to participate fully and equally in the life of their community,” and that its Board of Trustees had thus disapproved of the BSA’s “policy

125 May 7, 1998, letter from Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, to Jennifer Harrison, UUA Youth Programs Director, at 1 [Appendix 7 hereto].


127 May 7, 1998, letter from Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, to Jennifer Harrison, UUA Youth Programs Director, at 1.
of discrimination against gay and atheist scouts and leaders. “We note with considerable dismay,” Smith wrote for the BSA, “that this version of Religion in Life also includes an official expression of disapproval of Boy Scouts’ membership policies relating to known or avowed homosexuals.”

The BSA letter closed with a pronouncement that Unitarian Universalist Scouts could no longer earn or wear their denomination’s Religious Emblems:

The current version of Religion in Life does not adhere to Scouting policies and is inappropriate for distribution to Scouting youth in connection with the administration of the [UUA’s] Religion in Life religious award. Until such time as the UUA materials can be redrafted to a form acceptable to the Committee, youth may not be awarded a Unitarian Universalist religious emblems [sic] in Scouting or wear the emblem on a Scout uniform. This includes the [Cub Scout] Love and Help emblem as well.

The UUA’s President, the Rev. Dr. John A. Buehrens, in a June 11, 1998, letter to Smith, expressed dismay at the BSA’s unilateral action: “Surely the Religious Relationships Committee of the Boy Scouts of America cannot intend to tell a

129 May 7, 1998, letter from Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, to Jennifer Harrison, UUA Youth Programs Director, at 1 [Appendix 7 hereto].
130 Id. It should be noted that the BSA never identified anything as objectionable in the instructional materials for the UUA’s Love and Help emblem for Cub Scouts.
religious group what we may teach with regard to our own religious principles.”

“You risk exposing the BSA to charges of discrimination – not only against a sexual minority,” Buehrens warned, “but against entire religious groups, starting with Unitarian Universalism, a movement which has deep spiritual roots in America’s commitment to religious freedom, to democratic values, and to minority rights.” He concluded: “Most Americans will see such actions for what they are: blatant discrimination against children on the basis of their religion.”

The BSA’s remarkable action garnered national press coverage, with the Chicago Tribune reporting that “the loyal, friendly and cheerful Boy Scouts effectively excommunicated the Unitarians.” The Los Angeles Times explained that the BSA had ordered “a progressive Protestant denomination with roots in colonial

131 June 11, 1998, letter from the Rev. John A. Buehrens, UUA President, to Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee [Appendix 8 hereto]. “You do this because our manual for the Religion [in] Life award includes statements designed to help Unitarian Universalist youth deal with the tension that they may feel between Unitarian Universalist religious principles and certain aspects of BSA current policy,” Buehrens observed, “particularly with regard to discrimination against gay Scouts and leaders and with regard to those whose conscientious ethical and spiritual principles may not include a belief in God.” Id.

132 Id.

133 Id.

134 Steve Kloehn, Boy Scouts, Unitarians Reach Parting of the Ways, Chicago Tribune, July 24, 1998 (“In recent years, the Unitarian Universalist Association, which prides itself on being open-minded, has been sharply critical of the Boy Scouts. In response, the loyal, friendly and cheerful Boy Scouts effectively excommunicated the Unitarians this summer, declaring the church could no longer sponsor the ‘Religion in Life’ badge, and that Boy Scouts could no longer wear the Unitarian Universalist emblem on their uniforms.”).
Puritanism, to stop giving its Religion in Life award to Unitarian Scouts.”¹³⁵ “Until now, the Boy Scouts have never forbidden a religious body from awarding such emblems to its youth, a Scout spokesperson said” to the New York Times.¹³⁶ Newspapers across the country covered the controversy between the BSA and a denomination comprising some of America’s oldest Protestant churches.¹³⁷

¹³⁵ Holly J. Lebowitz, Scouts Bar Life Awards Issued by Unitarians, Los Angeles Times, Aug. 1, 1998 (“The Boy Scouts of America has told the Unitarian Universalist Association, a progressive Protestant denomination with roots in colonial Puritanism, to stop giving its Religion in Life award to Unitarian Scouts.”).


¹³⁷ See, e.g., Diego Ribadeneira, Boy Scouts, Church Spar on Gay Issue, Boston Globe, July 21, 1998 (“The Boy Scouts of America has ordered the Unitarian Universalist Association, a liberal denomination with long roots in New England, to stop giving out religious awards to scouts who are Unitarians because the church promotes gay rights”); Diego Ribadeneira, Boy Scouts Quarrel With Unitarians Stirs Some Anger, the Boston Globe (July 22, 1998) (“The dispute between the Boy Scouts and the Unitarian Universalists was provoked by a manual widely disseminated by the Unitarians describing the denomination’s beliefs and practices.”); Kathleen A. Shaw, Views of homosexuality put Unitarians, Boy Scouts in Conflict, Worcester Telegram & Gazette, July 22, 1998 (“The national Scout organization told the Unitarians not to give out any more of [their] religious award emblems to Scouts of that denomination.”); Caryle Murphy & Hanna Rosin, Unitarians Taking Boy Scouts to Task; Local Church Members to Protest Stand on Gays, the Washington Post, Aug. 1, 1998 (describing controversy surrounding “the Boy Scout’s recent order that the denomination stop giving out religious awards to Scouts in their congregations”); Scouts’ Gay Stance Riles Unitarians, San Jose Mercury News, August 2, 1998 (“Many Unitarians are upset by the Boy Scouts’ recent order that their denomination stop giving out religious awards to Scouts in their congregations. That order came in response to a church handbook that calls national Scouting leaders homophobic.”); Kendall Anderson, Scouts at odds with Unitarians; Meeting set to discuss church’s acceptance of gays, atheism, September 26, 1998 (“The Boy Scouts of America require members to believe in God. In fact, they encourage thousands of churches, synagogues and mosques to give religion awards to members who are Scouts. Unless they’re members of the Unitarian Universalist Church.”); see also Bill Maxwell, Intolerance as policy, St. Petersburg Times, Aug. 9, 1998 (“The Boy Scouts of America has declared that Unitarian boys can no longer wear the ‘religion in life’ emblem because the Unitarian Universalist Association officially opposes the Scouts’ policy of banning homosexuals from the organization. The Scouts rejected the Unitarians’ entire religion
But the UUA, whose President was himself a Life Scout, and had served as a pastor at the Boy Scouts’ 1990 World Jamboree, remained committed to Scouting, and struggled earnestly to reach a workable compromise. The two organizations’ representatives met and managed, over several months, to negotiate an agreement,\(^{138}\) again receiving national media coverage.\(^{139}\) The Unitarian Universalists would

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\(^{138}\) See Appendices 9-16 hereto.

\(^{139}\) News in Brief: Scouts, Church Close to Settling Dispute, the Washington Post, Oct. 10, 1998 (“The Boy Scouts of America and the Unitarian Universalist Association are nearing settlement of a merit badge dispute that flared because of the organizations’ differing views on homosexuality and religious skepticism. . . . ‘a tentative agreement’ was reached at a Sept. 29 meeting in Boston between the Boy Scouts and church officials.”); Kendall Anderson, Boy Scouts officials, Unitarians meet, The Dallas Morning News, Oct. 10, 1998 (a “tentative agreement was reached at the Boston meeting”); Diego Ribadeneira, Unitarians, Scouts reach compromise, The Boston Globe, April 30, 1999 (“Controversy erupted last May when the Boy Scouts ordered the Boston-based Unitarian Universalist Association to stop giving out religious awards to scouts who are Unitarians because the church promotes gay rights . . . The [BSA] ‘now reauthorizes the awarding of the Religion in Life emblem.’”); Scouts, Unitarians reach accord, The Dallas Morning News, May 1, 1999 (“Unitarian Universalists and the Irving-based Boy Scouts of America have reached an agreement on the church’s Religion in Life award, church officials said.”); Kathleen A. Shaw, Boy Scouts, church resolve differences on view of homosexuality; Unitarians agree to make changes in manual,
publish a new edition of *Religion in Life*, omitting material BSA leadership found offensive: “Where we feel it necessary to help Scouts working on the award or Scout leaders acting as advisors to more fully explore Unitarian Universalist understandings of ‘duty to God’ or current BSA policies, the new edition will simply reference other helpful publications available from our Youth Office.”  

The UUA consulted closely with the BSA as a new *Religion in Life* manual was prepared. When the BSA objected to a proposed foreword, for example, Rev. Buehrens agreed that the UUA would “simply omit” it. With all controversial text expurgated from the denomination’s manual, the BSA announced on April 23, 1999, that it “now reauthorizes the awarding of the *Religion in Life* emblem to Scouts and

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140 September 30, 1998, letter from the Rev. John A. Buehrens, UUA President, to Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, at 1 [Appendix 9 hereto].

the wearing of that emblem on a Scout uniform.”

Rev. Buehrens thus reported to the Unitarian Universalist faithful, in an April 28, 1999, letter posted on the Internet, that “this conflict has been resolved” with the revised manual, allowing the UUA to provide its youth other “resources appropriate to dealing with issues of homophobia and religious discrimination.” If the BSA leadership’s discriminatory policies remained troubling, Rev. Buehrens still was “very pleased, however, that we have been able to resolve any implication that they wish to practice an added discrimination toward Unitarian Universalists simply because we support the belief that it is not homosexuality but homophobia which is a sin.”

This was too much for the BSA, which with a letter from Dr. Smith dated May 7, 1999, once again disapproved the Religion in Life award, explaining:

142 April 23, 1999, letter from Thomas R. Deimler, Director, BSA Relationships Division, to the Rev. Dr. John A. Buehrens, UUA President [Appendix 13 hereto].

143 Id. Again, it should be noted that the BSA had never suggested that it found anything objectionable in UUA materials for the Love and Help award for Unitarian Universalist Cub Scouts.

144 April 28, 1999, open letter from the Rev. John A. Buehrens, UUA President, to “Friends” [Appendix 14 hereto].

145 Id.
Your letter goes on to say the following: “The new edition of Religion in Life will be available from the UUA Bookstore this summer. Along with each copy, the Association will separately provide a letter from me, along with resources appropriate to dealing with issues of homophobia and religious discrimination.” Unfortunately, this simply opens the entire issue of using boys as a venue to air your differences with the policies of the Boy Scouts of America.

These circumstances were not contemplated . . . . Therefore, Boy Scouts of America is not in a position to authorize the awarding of the Religion in Life emblem to Scouts and the wearing of that emblem on a Scout uniform. 146

The BSA’s stated object was to silence an outspoken denomination. It would permit full participation by Unitarian Universalists who could recite the Scout Oath and obey the Scout Law only if their denomination agreed not “to air your differences with the policies of the Boy Scouts of America.”147 The BSA simply would not countenance the denomination teaching its youth that homophobia, not homosexuality, is a sin, and that atheists and agnostics should not be shunned as social inferiors. 148

The BSA’s action again enjoyed widespread press coverage, with the Los Angeles Times reporting that the BSA objected to “the church’s plans to distribute its own materials on homosexuality and religious beliefs to Unitarian Scouts working

146 May 7, 1999, letter from Dr. Lawrence Ray Smith, Chairman, BSA Relationships Committee to Dr. John A. Buehrens, UUA President [Appendix 15 hereto] (emphasis in original).

147 [Appendix 15 hereto].

148 See id.
toward the award.” Unitarian Universalist parents expressed fear about the BSA policy’s impact on their children.

149 Boy Scouts Rescind Offer to Unitarians, Los Angeles Times, May 29, 1999 (“the [BSA] have rescinded an offer to reauthorize the [UUA] to issue its Religion in Life Award to Scouts who are Unitarians, adding a new wave of contention to a battle that many felt had been fought and settled. . . . Smith said in a brief letter to Buehrens that the Boy Scouts could not reinstate the Religion in Life award for Unitarians because of the church’s plans to distribute its own materials on homosexuality and religious beliefs to Unitarian Scouts working toward the award”); see also, e.g., Diego Ribadeneira, Church says it will defy Scouts’ order on badges, The Boston Globe, May 19, 1999 (“After apparently reaching a compromise . . . the Boy Scouts of America revoked the authority it had granted the Unitarians to give out the awards.”); Scouts’ Honor, Cleveland Plain Dealer, May 22, 1999 (“With the removal of the objectionable statements from the manual, the [BSA] agreed to reinstate the Religion in Life award for Unitarian Scouts. But one week later, the Scouts rescinded, saying that they could not reinstate the Religion in Life award for Unitarian Scouts because of association plans to distribute its own materials on homosexuality and religious beliefs to Unitarian Scouts working toward the award.”); In Brief: Unitarian-Boy Scout Agreement Collapses, The Washington Post, May 29, 1999 (“A recent reconciliation between the [UUA] and the [BSA], which have been at loggerheads over definitions of God and attitudes toward homosexuality, has collapsed. . . . [E]arly this month, the Scouting group . . . again ordered the Unitarians to stop conferring the badges.”); Christine Pelisek, Troop, LA Weekly, June 18, 1999 (“Arnold, like hundreds of other Unitarian parents in California and thousands nationwide, are at odds with the Boy Scouts of America’s decision to deny their children the traditional Religion in Life medal because of their tolerance of homosexuality and religions that don’t profess a belief in God.”); Bob Mims, Different Set of Family Values Comes to Utah; Unitarians Embrace Family Diversity At National Gathering, The Salt Lake Tribune, July 3, 1999 (“A settlement had appeared in place . . . but BSA officials last month rescinded it.”); Lyn Jerde, Boy Scouts’ Meaning of Reverence Inconsistent Dubuque Telegraph-Herald, August 14, 1999 (“On the one hand, the Boy Scouts of America have religious award programs for a range of faiths, including Catholicism, various Protestant denominations, Mormonism, Judaism and Islam. On the other hand, the national scout organization has instructed the Unitarian Universalist church not to bestow its faith award to Unitarian Scouts, partly because Unitarians teach tolerance of homosexuals.”).

150 “‘It wouldn’t be right to put my son in a situation where he could be a victim of discrimination,’” one Unitarian Universalist parent told the LA Weekly. Christine Pelisek, Troop, LA Weekly, June 18, 1999 (quoting Unitarian Universalist parent, Abby Arnold). “‘Even though it might not affect him on a day-to-day basis, the underlying issue is that he would be considered second-class.’” Id. (quoting Abby Arnold).
3. Closing the Door to Change by Excluding Religious Liberals

The UUA General Assembly responded to the BSA’s actions by expressing dismay and urging all, both within and without the BSA, to seek change of the BSA’s discriminatory policies.\(^{151}\) The 1999 General Assembly resolved, moreover, to “urge individual UU Scouts to remain in Scouting, and to encourage UU members to join Scouting, in order to work for change from within the BSA.”\(^{152}\)

After the UUA General Assembly’s 1999 call for Unitarian Universalists “to join Scouting, in order to work for change from within,”\(^{153}\) however, the BSA closed the door to change by making not just a confession of personal faith in God a precondition for membership, but also a willingness to declare that nontheists are inferior, second-class citizens. The “Boy Scouts’ creed”\(^{154}\) or “Declaration of Religious Principle,” which had previously applied to adult leaders,\(^{155}\) now appears on every membership application, warning: “The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to


\(^{152}\) Id. (emphasis added).

\(^{153}\) Id.

\(^{154}\) Welsh, 742 F. Supp. at 1430.

\(^{155}\) See infra text accompanying notes 161-163.
Only persons willing to subscribe to this Declaration of Religious Principle and to the Bylaws of the Boy Scouts of America shall be entitled to certificates of membership.”

What this means is clear enough. To be a Boy Scout or Cub Scout now requires agreeing that anyone who cannot declare a faith in God, to the BSA’s satisfaction, must be shunned as not “the best kind of citizen.” A September 2003 Harris Poll reports that most American Jews, for example, cannot provide the confession of faith required by the BSA to qualify as the “best kind of citizen” and participate in

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157 Id.
Scouting. One imagines that most Buddhists find themselves excluded as well, for Buddhists generally understand their faith to entail no belief in God.

By requiring new members to subscribe to a Declaration that excludes and denigrates most secular Jews, and Buddhists, along with secular humanists, atheists, and agnostics of every stripe – as not “the best kind of citizen” – the BSA has acted to exclude the vast majority of Unitarian Universalist youth. Even for those comfortable swearing an oath of duty to God, the notion that different convictions in matters of

158 Based on a scientific survey conducted in September 2003, the Harris Poll found that only 48% of American Jews could affirm a belief in God. Most could not – 19% were either “somewhat certain” or “absolutely certain that there is no God,” while 33% percent were simply “not sure whether or not there is a God.” Humphrey Taylor, The Harris Poll #59: While Most Americans Believe in God, Only 36% Attend a Religious Service Once a Month or More Often (October 15, 2003). http://www.harrisinteractive.com/harris_poll/index.asp?PID=408. On Judaism that transcends theology and dogma, see Saul Goodman, The Faith of Secular Jews (New York: KAT, 1976), Sherwin T. Wine, Judaism Beyond God (New York, KAT, 1995); and Judith Said, God-Optional Judaism (New York: Citadel Press, 2001).

159 See Tornado v. Watkins, 367 U.S. 488, 495 n.11 (1961) (noting that among the religions that “do not teach what would generally be considered a belief in the existence of God” are “Buddhism, Taoism, Ethical Culture, Secular Humanism and others”); Welsh v. United States, 398 U.S. 333, 357 n. 8 (1970) (Harlan, J., concurring) (same); Peter Harvey, Introduction to Buddhism: Teachings, History and Practices 36 (Cambridge: Cambridge University Press, 1990) (“Buddhism sees no need for a creator of the world, as it postulates no ultimate beginning to the world, and regards it as sustained by natural laws”); Rupert Getting, The Foundations of Buddhism 65, 114 (Oxford: Oxford University Press, 1998) (“Buddhism does not involve belief in a creator God who has control over human destiny”; “it would be wrong to conclude that there is any one or final overarching Great Brahma – God the Creator”); see also Michael J. Perry, Liberal Democracy and Religious Morality, 48 DePaul L. Rev. 1, 3 n.7 (1998) (“Although some Buddhist sects are theistic, Buddhism - unlike Christianity, for example - is predominantly nontheistic, in the sense that Buddhism does not affirm the meaningfulness of ‘God'-talk.”). The Buddha himself, apparently, was not “the best kind of citizen.”
personal faith should make anyone a second-class citizen or social outcast is deeply offensive to Unitarian Universalist traditions and values.  

Mandating that children subscribe to the Declaration appears to be a very recent development, postdating the UUA General Assembly’s 1999 call to the faithful to “urge individual UU Scouts to remain in Scouting, and to encourage UU members to join Scouting, in order to work for change within the BSA.” Previously, the Declaration was a requirement only for adult leaders and not for youth. The BSA

160  See supra text accompanying notes 72-74.

161  Supra notes 151-152.

162  See William D. Murray, The History of the Boy Scouts of America 500 (New York: BSA, 1937) (quoting BSA Constitution, Article III: “Only men willing to subscribe to this declaration of principle shall be entitled to certificates of leadership in carrying out the Boy Scout Program.”). The Record in Barnes-Wallace – a case that was filed in the year 2000 – includes versions of the BSA bylaws that require only adult leaders, not youth, to subscribe to the Declaration. See, e.g., Barnes-Wallace, 9th Cir. Nos. 04-55732 & 04-56167, Opening Brief at 10. A search of the precedents similarly indicates that adult leaders, not youth, were required to subscribe to the Declaration. The Kansas Supreme Court in Seabourn v. Coronado Area Council, 257 Kan. 178, 181-82, 891 P.2d 385, 389 (1995), for example, presented the then-operative version of the BSA Declaration of Religious Principle as a requirement for adult leaders, not youth:

“Clause 1. The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God . . .

“Clause 4. Only persons willing to subscribe to these declarations of principles shall be entitled to certificates of leadership in carrying out the Scouting program.”

Id. (emphasis added); see also Shannon Wead, Boy Scouts in the Bible Belt; Boy Scouts' Rejection of Atheist not Illegal in Kansas, 35 Washburn L.J. 359, 361 & nn. 17, 22 (1996). The New Jersey Court of Appeals in Dale similarly indicated that while children are required to “agree to live by the Scout Oath, the Scout Law, the Scout motto, the Scout slogan, and the Outdoor Code,” adult leaders “must subscribe to the Declaration of Religious Principle, the Scout Oath and the Scout Law,” strongly suggesting that only adults, and not children, were required to subscribe to the Declaration. Dale v. BSA, 160 N.J. 562, 577, 734 A.2d 1196, 1204 (1999). Other decisions similarly present
thus has frustrated the 1999 General Assembly’s call for Unitarian Universalists “to join Scouting, in order to work for change within the BSA,” by barring all who cannot agree that their secular friends are social inferiors.  

Unitarian Universalist congregations have been forced by such policies to sever longstanding relations with the BSA. Nor are they alone in finding that the BSA’s discriminatory policies have made further cooperation with the organization impossible. Reform Judaism, too, has been forced to sever links with the BSA. Following the Supreme Court’s decision in Dale, its national leadership in early 2001


163 Supra notes 151-152.

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called upon Jewish families and synagogues to sever all remaining ties with the BSA.\textsuperscript{165} News archives are full of articles indicating that synagogue after synagogue acted upon the Reform leaders' recommendation.\textsuperscript{166} The BSA’s most outspoken

\begin{quote}
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.” January 5, 2001, Memo to UAHC Congregations from Rabbi Dan Polish, Director of the Commission on Social Action, and Judge David Davidson, Chair of the Commission on Social Action of the Union of American Hebrew Congregations and the Central Conference of American Rabbis. The memo, which is archived on web sites of the Union for Reform Judaism and the Religious Action Center of Reform Judaism, continued: “In addition, we recommend that parents with children in non-Reform affiliated troops withdraw their children from troops/packs.” \textit{Id.} (the memo is archived on the web at http://urj.org/csa/boyscoutsmemo3/index.cfm?; http://rac.org/pubs/packets/bsa/; and http://rac.org/pubs/packets/bsa/index.cfm?printable=1). The Los Angeles \textit{Times} was one of many papers noting this “plea to Reform synagogues to sever ties with the Boy Scouts.” William Lobdell, \textit{Reform Synagogues Wrestle with a Plea from National Leaders Not to Sponsor Troops}, Los Angeles Times, January 20, 2001. The Chicago \textit{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, \textit{Court Ruling Didn’t End Scout Debate; Towns, Schools Facing Questions of Inclusion}, Chicago Tribune, Feb. 2, 2001; see also \textit{Scouts’ Position Prompts Many to Take a Stand}, The Oregonian, March 6, 2001. \textit{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, \textit{Reform Jewish Leaders Urge Boy Scout Ban}, Christianity Today, April 2, 2001.

\textsuperscript{165} This is from the Middlesex \textit{Star-Ledger}, for example, reporting on Temple B’nai Shalom of East Brunswick’s decision to stop co-sponsoring a Boy Scout troop:

\begin{quote}
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.’
\end{quote}

Tom Haydon, \textit{E. Brunswick Synagogue Ousts Scout Troop Over Ban on Gays}, The Star-Ledger February 2, 2001. 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

\begin{quote}
\end{quote}
supporters report that congregations in the United Church of Christ – and even a
Baptist congregation or two – have similarly terminated their former sponsorship of
Boy Scout troops. There is, apparently, no place for religious liberals in today’s
BSA.

IV. SETTING THE RECORD STRAIGHT: BSA POLICY AND
CURRENT LITIGATION CONCERNING GOVERNMENT
SPONSORSHIP OF A DISCRIMINATORY RELIGIOUS
INSTITUTION

Although the BSA and its allies among self-styled “social conservatives” say
they speak for “traditional values,” Unitarian Universalists see in BSA policies a new
tradition of prejudice – of which their own children are the most recent victims. But
the story by no means ends with the BSA’s effective exclusion of religious liberals
from its ranks, or even with the Supreme Court’s decision in Dale that the BSA is
legally entitled to condemn, exclude and discriminate, since “[r]eligious beliefs need

Aprill, Ellen P., Reform Judaism, B'tzelem Ehlohim, and Gay Rights, in Robert Cochran, ed., Faith
and Law: How Religious Traditions from Calvinism to Islam View American Law (New York: NYU

167 Hans Zeiger, Get Off My Honor: The Assault on the Boy Scouts of America 150-51, 193
nn.20-22 (Nashville: Broadman & Holman, Publishers, 2005). See also, e.g., Religion Briefs, The
Washington Times, December 9, 2000 (reporting that the Taunton, Massachusetts Union
Congregational Church, affiliated with the United Church of Christ, voted to cancel the charter of its
Boy Scout troops).
not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.’”\textsuperscript{168}

Following the Supreme Court’s June 2000 ruling in *Dale*, a UUA press release renewed the denomination’s “call upon the Boy Scouts of America to end their discrimination against gays and also to end their discrimination on the basis of religious belief, including discrimination against Unitarian Universalists and others whose definition of God is different from the Boy Scouts.”\textsuperscript{169} The press release warned that, with its victory in *Dale*, the BSA “cannot have it both ways,” both insisting on a right to discriminate, while simultaneously demanding government sponsorship of its activities.\textsuperscript{170}

Shortly after, lawsuits were indeed filed – challenging government sponsorship and public support of the BSA as a discriminatory institution. In San Diego, a lesbian couple and their son joined an agnostic couple and their son in challenging preferential leases that the City of San Diego affords the BSA – under which the BSA occupies nearly 18 acres of San Diego’s Balboa Park and operates regional


\textsuperscript{170} *Id.*
headquarters from City-owned buildings at $1-a-year rent. Another suit was filed in Chicago by a Methodist minister and a Reform Rabbi, challenging (among other things) federal sponsorship of the BSA’s quadrennial Jamboree. Federal district judges in both cases ruled the preferential treatment and government sponsorship of the BSA to be unconstitutional.171

Briefs in appeals from those rulings insist that the district judges erred in concluding that the BSA is a religious organization. In the appeal involving the BSA’s preferential access to public lands, and operation of its regional headquarters from government-owned buildings in a city park, the BSA’s briefs tell the Ninth Circuit that the “Boy Scouts is not a religious organization,” but one that is essentially “secular” in character.172 The BSA’s Ninth Circuit briefs insist that “Scouting


172 Barnes-Wallace v. BSA, 9th Cir. Nos. 04-55732 & 04-56167, Opening Brief of BSA and Desert Pacific Council, BSA, at 12, 43, on appeal from Barnes-Wallace v. BSA, 275 F. Supp. 1259 (S.D. Cal. 2003). Invoking dictum – mainly from cases to which it was not a party – that have identified it as a “secular” group, the BSA’s brief in Barnes-Wallace tells the Ninth Circuit:


‘‘Boy scouts is ‘a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith.’’” Id. at 43
includes boys of virtually every religious faith and is ‘absolutely nonsectarian.’” 173

Relying, surprisingly enough, on the declaration of a confessed child-porn felon, Secretary of Defense Donald H. Rumsfeld’s Seventh Circuit brief in Winkler – which concerns federal sponsorship of the BSA Jamboree – similarly insists that the BSA is nonsectarian, and that it “welcomes young people of every religious denomination.” 174


“Scouting is ‘primarily secular in nature.’” Id. at 43 (quotting Good News Club v. Milford Central School, 21 F. Supp. 2d 147, 160 (N.D.N.Y. 1998), aff’d, 202 F.2d 502 (2d Cir. 2000), rev’d on other grounds, 533 U.S. 98 (2001)).

Barnes-Wallace v. BSA, 9th Cir. Nos. 04-55732, 04-56167, Opening Brief of BSA and Desert Pacific Council at 43.

173 Barnes-Wallace v. BSA, 9th Cir. Nos. 04-55732, 04-56167, Opening Brief of BSA and Desert Pacific Council, BSA, at 12, 42-43.

174 Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 6 (citing declaration of Douglas S. Smith, Jr.). The BSA’s former Director of National Program, Douglas Sovereign Smith, Jr., whose declarations provide the basis for Secretary Rumsfeld’s description of the BSA’s mission and values, pleaded guilty to charges of felony possession and distribution of child pornography more than six months before Secretary Rumsfeld filed his Opening Brief on appeal. See United States v. Douglas Sovereign Smith, Jr., N.D. Tex. No. 4:05-CR-040-Y (March 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), and 3583(k)); see also United States v. Douglas Sovereign Smith, Jr., N.D. Tex. No. 4:05-CR-040-Y (Dec. 6, 2005) (Judgment in a Criminal Case, committing Douglas Sovereign Smith, Jr. to prison for a term of 96 months); United States Department of Justice Press Release: Colleyville, Texas Man Pleads Guilty to Child Pornography Charge in Federal Court (N.D. Tex. March 30, 2005) (“Douglas Sovereign Smith, Jr., was employed by the Boy Scouts for 39 years. Before retiring last month, Smith held the position of National Director of Programs.”). Secretary Rumsfeld had taken a similar position, based on Smith’s declarations, before the district court. See Winkler v. Chicago School Reform Board of Trustees, No. 99 C 2424, slip op. at 34 (N.D. Ill. March 16, 2005) (“Defendants argue against a finding that the BSA is either pervasively sectarian or religious by asserting that the BSA is a primarily secular organization.”). Smith, who was not fired by the BSA but rather was permitted to quietly retire, had publicly defended the BSA’s policies against the “intolerant elements in our
Secretary Rumsfeld tells the Seventh Circuit that the BSA is a “secular organization.”\textsuperscript{175}

Yet the BSA revoked approval for Unitarian Universalist emblems insisting the opposite: “Boy Scouts is not a ‘secular organization’ as stated in Religion in Life; Boy Scouts is an ecumenical organization which requires belief in God and acknowledgement of duty to God by its members.”\textsuperscript{176} A religious faith embracing the dignity and worth of agnostics and homosexuals – and teaching its children that discrimination and shunning are wrong – was simply unacceptable.\textsuperscript{177}

The BSA’s treatment of Unitarian Universalists raises serious questions about these and other arguments made by the BSA and Secretary Rumsfeld in both pending appeals – a few of which are highlighted in the following pages.

\textsuperscript{175} Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 42.

\textsuperscript{176} May 7, 1998, letter from Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, to Jennifer Harrison, UUA Youth Programs Director, at 1 [Appendix 7 hereto].

\textsuperscript{177} See id.
A. *Barnes-Wallace v. BSA: Operating Regional Headquarters From a City Park*

The BSA’s briefs in its Ninth Circuit appeal acknowledge that, faced with the question of whether challenged government action violates the establishment clause, a court must ask whether, in light of the surrounding circumstances, hypothetical reasonable observers would perceive in the governmental action an endorsement of religion.\(^{178}\) In the context of the San Diego case, then, just what are people excluded from Scouting – for religious reasons – to think when they find that the BSA runs its regional headquarters in Southern California from government-owned offices in a public park, paying the City of San Diego rent of a dollar a year?\(^{179}\)

San Diego Unitarian Universalists spoke directly to this question when the San Diego City Council on December 4, 2001, gave citizens two or three minutes apiece to oppose a renewed 25-year lease of Camp Balboa, 18 acres of San Diego’s Balboa Park containing the BSA’s regional headquarters. Speaking for the Unitarian Universalist Fellowship of San Dieguito’s Social Action Committee, Irving Himelblau explained to the City Council how the BSA had disapproved the *Religion in Life* award “[b]ecause of our egalitarian beliefs. It was because of our support of equal  

\(^{178}\) See, e.g., *Barnes-Wallace v. BSA*, 9th Cir. Nos. 04-55732 & 04-56167, Opening Brief of BSA, at 32.

rights for all children, regardless of sexual orientation, and because of our support for religious freedom, that they withdrew recognition from our religious groups, to issue . . . this award." 180 John Millspaugh, then an intern minister for the First Unitarian Universalist Church of San Diego, warned: “In the last few years, the Boy Scouts have legally become what they never have been before. A religious, creedal organization.” 181 He continued: “If the Council renews this lease, here and now today, we send a message that Unitarian Universalists, and Buddhists and people of diverse faith are not as welcome in this City as we thought we were.” 182

The City of San Diego apparently chose to send that message, by authorizing the BSA to maintain administrative authority over 18 acres of “Camp Balboa,” and to operate its regional affairs from offices in the City park for another twenty-five years. The City has even had signs posted around the public property housing the BSA’s regional headquarters, announcing that it “is owned by the City of San Diego and is


181 Amended Transcript of Testimony before the San Diego City Council, December 4, 2001: John Millspaugh (mistranscribed “Milspaugh”) ER2503-04 in Barnes-Wallace Excerpt of Record, who was then the intern minister of the First Unitarian Universalist Church of San Diego now is settled minister of the Unitarian Universalist Church of South County, at Mission Viejo, California. See http://www.uucsc.org/.

182 Id.; ER2504 in Barnes-Wallace Excerpt of Record.
being utilized for the benefit of the general public through the joint cooperation of the City and the Boy Scouts of America.”

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The message is clear, that the City and the BSA are working together, advancing a joint agenda out of the BSA’s regional offices. This is something that establishment-clause cases call “entanglement” and “endorsement.”

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183 See Barnes-Wallace, 9th Cir. Nos. 04-55732 & 04-56167, BSA Reply Brief at 20 (reproducing one of the signs; citing SER22).
That the San Diego case involves the administration of 18 acres of public parklands – ordinarily a governmental function – may well be pertinent. For in *Evans v. Newton*, the Supreme Court held: “Conduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to constitutional limitations placed on state action.”

In *Evans*, the city of Macon, Georgia, had transferred control of an urban park to a private organization – one that happened to discriminate on racial grounds. Even if private individuals and associations are constitutionally free to discriminate, the Supreme Court held, “when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.” “Mass recreation through the use of parks is plainly in the public domain,” the Court observed, holding “that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment,” even

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187 *Evans*, 382 U.S. at 299.
though the state had formally transferred administrative responsibilities (and even ownership) to a private entity.\textsuperscript{188}

Thus even if, as \textit{Dale} holds, the BSA is a private expressive association, entitled to discriminate on religious or other grounds,\textsuperscript{189} San Diego’s transfer of administrative authority over 18 acres of urban public parklands to such an organization likely violates the Constitution under \textit{Evans}.\textsuperscript{190} But whether or not \textit{Evans} controls, the City’s decision to confer administration of nearly 18 acres of its public parklands to a private organization – permitting it to operate regional headquarters in the public spaces – \textit{says something} to reasonable observers.

Decisions such as \textit{Capital Square Review & Advisory Board v. Pinette},\textsuperscript{191} show that discriminatory organizations may demand \textit{equal access} to public parklands, and to other areas traditionally open as public forums, of course. But conferring the administration of public parklands to such an organization, and allowing it to direct its regional operations from headquarters in a public park, is something more than equal access to public facilities.

\begin{flushleft}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{See Dale, 530 U.S. at 651.}
\textsuperscript{190} \textit{See Evans, 382 U.S. at 299.}
\textsuperscript{191} 515 U.S. 753 (1995).
\end{flushleft}
The question in *Capitol Square* was whether allowing the Ku Klux Klan to erect a cross on the Capitol Square Park, by the Ohio statehouse, would suggest that the government endorsed the Klan’s bigoted religious speech. The Supreme Court held it would not – because giving the Klan *equal access* to a public forum does not suggest endorsement of the Klan or its message.

Four justices – Scalia, joined by Rehnquist, Kennedy and Thomas – reasoned that giving equal access to a public forum, open to all, cannot offend the Establishment Clause if some choose to use it for religious speech.¹⁹² They emphasized: “*Of course, giving sectarian religious speech preferential access* to a forum close to the seat of government (or anywhere else for that matter) *would violate the Establishment Clause* (as well as the Free Speech Clause, since it would involve content discrimination).”¹⁹³ San Diego’s leases of public parklands to the BSA obviously fail this test, for the BSA clearly gets the prohibited *preferential access and support*.¹⁹⁴

Justice O’Connor, joined by Justices Souter and Breyer, concurred in *Capitol Square*, believing no endorsement of the Klan’s religious message could be inferred

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¹⁹² *Capitol Square*, 515 U.S. at 763-70 (Scalia, J., joined by the Chief Justice, Kennedy, and Thomas, JJ.).

¹⁹³ *Id.* (emphasis added).

¹⁹⁴ *See Barnes-Wallace*, 275 F. Supp. at 1269-76.
by reasonable observers “aware of the history and context of the community and forum in which the religious display appears.” 195 For, Justice O’Connor explained, no endorsement could be inferred from allowing nonpreferential equal access to

“places which by long tradition or by government fiat have been devoted to assembly and debate, . . . [particularly] streets and parks which ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” 196

“The reasonable observer would recognize the distinction between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer.” 197 The San Diego leases by taking a traditionally public area and conferring control over it to a discriminatory religious organization surely fails this test – for the BSA receives preferential access and control of land that is denied to others. And far from providing an appropriate disclaimer distancing the City from the BSA’s religious discrimination, the City has posted signs around the BSA’s regional

195 515 U.S. at 780.

196 Capitol Square, 515 U.S. at 781 (quoting Perry Ed. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).

197 Id. at 782.
headquarters proclaiming their operation “through the joint cooperation of the City and the Boy Scouts of America.”

One can easily modify the Capitol Square facts to parallel the San Diego case. What if government did much more than merely allow the Klan – an organization with a horribly bigoted religious message – equal access to a public park? What if public authorities gave the private expressive organization several acres of the park – allowing it to administer these public parklands on the state’s behalf? What if the private organization operated its regional headquarters there – from government-owned offices on the public parklands it administered – issuing edicts to enforce ideological discipline throughout the surrounding eight or nine thousand square miles? What if the organization set up an Internet website prominently displaying its parkland address, along with membership applications denouncing those whom it despises and shuns as incapable of becoming “the best kind of citizen”?

What if the government erected fences enclosing the organization’s special enclave, announcing that the facilities were being operated “for the benefit of the general public through the joint cooperation” of the government and the

198  See supra text and graphic accompanying notes 183-184.

discriminatory organization? Finally, what if the State conferred all these benefits and administrative powers over public facilities without giving anyone else an opportunity to compete for them? The reasonable observer would have to conclude that the State had endorsed the discriminatory organization’s program, hopelessly entangling itself with the organization and its message.

Those are the facts of the San Diego case, for all the world to see. A discriminatory religious organization – one that shuns homosexuals as unclean, that shuns nontheists as inferior second-class citizens, that excludes Unitarian Universalists from full participation, and that instills values hostile to Reform Judaism and to Buddhism – was conferred the right to control nearly 18 acres of Balboa Park, in the City of San Diego’s very heart, where it operates its regional headquarters, administering its discriminatory regional programs from government-owned offices on government-owned land. The Internet website for the BSA’s regional headquarters in Balboa Park feature membership materials identifying

200 See supra, text and graphic accompanying notes 183-184; Barnes-Wallace, 9th Cir. Nos. 04-55732 & 04-56167, BSA Reply Brief at 20.

201 In 1992, for example, from its headquarters in Balboa Park, the BSA terminated a volunteer leader – El Cajon police officer Chuck Merino – because he is gay. Merino v. San Diego County Council of the BSA, No. 659236, slip op. at 9 (Cal. Super. Ct. App. Dep’t, July 7, 1994); see Barnes-Wallace, 9th Cir. Nos. 04-55732 & 04-56167, ER454-57; ER1223.
nontheists as inferior citizens, and associating those materials with its dominion of the public parklands. 202

The Supreme Court held in *County of Allegheny v. ACLU*, 203 that the “Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’” 204 Justice O’Connor concurred, explaining that the government cannot engage in conduct “sending a clear message to nonadherents that they are outsiders or less than full members of the political community.” 205 The Declaration of Religious Principle displayed on every membership application on the Balboa Park website makes it very clear that children and adults both are excluded as not “the best kind of citizen.” 206


204 *Id.* at 594 (Blackmun, J., for the Court, quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)).

205 *Id.* at 625-27 (O’Connor, J., concurring); see also *id.* at 595 (noting that government endorsement of religion is prohibited “because it ‘sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’”) (Blackmun, J., quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (O’Connor, J., concurring)).

206 See *supra* text accompanying notes 151-163.
If the City of San Diego had leased 18 acres of Balboa Park not to the BSA, but to the Ku Klux Klan – giving no one else an opportunity to compete with the Klan for the use of the property – what would people think? The BSA, of course, is not the Klan – it claims no tradition of violence designed to terrorize the minorities it apparently detests. But that means reasonable citizens are all the more likely to perceive that the City has endorsed its views. 207

B.  Winkler v. Rumsfeld: The Boy Scout Jamboree

Since 1981, the BSA’s quadrennial Jamborees have been held at Fort A.P. Hill, with the federal government – through the Department of Defense – spending millions of dollars to support each of the outdoor extravaganzas. 208 After District Judge Blanche M. Manning ruled the practice unconstitutional in light of the BSA’s character as a religious institution, 209 and while the government’s appeal of that ruling was pending, Congress enacted the “Save Our Scouts Act of 2005,” directing the

207 The BSA’s theological character and discriminatory policies were known when the City acted. See supra text accompanying notes 181-183.

208 See Winkler v. Chicago School Reform Board of Trustees, No. 99 C 2424, slip op. at 4-6 (N.D. Ill. March 16, 2005) (noting that Jamborees have been held at Fort A.P. Hill since 1981, and that for the Jamborees of 1997 and 2001 the government spent “approximately $6 million and $8 million”), injunction issued, 382 F. Supp. 2d 1040,1044-45 (N.D. Ill. 2005), appeal pending sub nom. Winkler v. Rumsfeld, 7th Cir. No. 05-3451 (argued and submitted April 6, 2006).

Secretary of Defense to continue providing “at least the same level of support” for each future Jamboree as was provided for the preceding event – unless the Secretary first reports to Congress that doing so “would be detrimental to the national security of the United States.” The substantive question on appeal is whether the government’s remarkable program of direct aid to a discriminatory religious institution and its outdoor extravaganzas violates the first amendment’s establishment clause.

Secretary of Defense Donald H. Rumsfeld’s opening brief before the Seventh Circuit concedes “that the ‘touchstone of neutrality under the Establishment Clause’ is whether a program ‘differentiates based on the religious status of beneficiaries or providers of services.’” Yet the BSA Jamboree clearly does differentiate by discriminating against children because of their religious beliefs and – in the case of Unitarian Universalists – denominational affiliation. By excluding many children on the basis of their theology, the government-sponsored Jamboree clearly is a program that “define[s] its recipients by reference to religion” – and that, ordinarily, amounts to a violation of the establishment clause.


211 Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 44 (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 654 n.3 (2002)).

212 Agostini v. Felton, 521 U.S. 203, 234 (1997) (sustaining a program that “does not run afoul of any of the three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion [because] it does not result in government indoctrination, define its
Citing the nineteenth century decision of *Bradfield v. Roberts*, Secretary Rumsfeld insists in *Winkler* that the government is entitled to enter contracts with “religious institutions.” *Bradfield* involved a government contract with a hospital that happened to be operated by Catholics. “Whether the individuals who compose the corporation under its charter happen to be all Roman Catholic, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is not of the slightest consequence,” the Supreme Court held, emphasizing there is “no allegation that its hospital work is confined to members of that church.” Had the hospital denied treatment to Unitarians or to secular Jews on the basis of their faith – as the BSA excludes children on the basis of their religion – one suspects the result would have been very different.

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213 175 U.S. 291 (1899).

214 *Winkler v. Rumsfeld*, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 23.

215 175 U.S. 299.

216 *See Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (emphasizing that *Bradfield* rejected contentions “that the mere fact that the hospital was ‘conducted under the auspices of the Roman Catholic Church’ was sufficient to alter the purely secular legal character of the corporation; particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter”); *see also Hunt v. McNair*, 413 U.S. 734, 743-44 (1973) (State aid to Baptist College permissible where record “establishes that there are no religious qualifications for faculty memberships or student admissions; and that only 60% of the college student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina”); *cf. Colbert v. Speer*, 24 App. D.C. 187, 201 (1904) (an educational
In Winkler, Secretary Rumsfeld acknowledges that Justice Breyer’s concurring opinion in Van Orden v. Perry,217 aptly describes the religion clauses’ purposes.218 “They seek to avoid that divisiveness that promotes social conflict, sapping the strength of government and religion alike.”219 That the BSA’s discriminatory policies have produced considerable social discord seems beyond dispute.220 Federal sponsorship of the BSA Jamboree places the government in the center of open sectarian strife, with the government taking the side of religious conservatives who control the BSA,221 and against what the BSA’s most outspoken proponents loudly deride as “liberal churches” characterized “gutless ecumenism” and a “sissified, watered-down Social Gospel.”222 The government has entered what the BSA’s

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218 See Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 41-42.

219 Van Orden, 125 S. Ct. at 2868 (Breyer, J., concurring).


221 See Peter Applebone, Scout’s Honor: A Father’s Unlikely Foray Into the Woods 240 (Orlando: Harcourt Inc., 2003) (acknowledging that the BSA has come to be dominated by religious groups and the conservative voices of the nation’s culture wars”).

proponents themselves characterize as “a spiritual war” against liberal churches and mainstream values.223

Secretary Rumsfeld cites Capitol Square Review & Advisory Board v. Pinette,224 for the proposition that federal sponsorship of the BSA Jamboree must be evaluated from the perspective of a “reasonable observer” fully aware of the program’s history and context.225 So, just what are those whom the BSA excludes, for religious reasons, as spiritually unclean, or as not “the best kind of citizen,” to think when the federal government expends millions of dollars sponsoring every Boy Scout Jamboree?226 What are victims of the BSA’s religious discrimination to think when the President of the United States attends the government-sponsored Jamboree and urges some 30,000 assembled scouts to continue their organization’s policies of religious discrimination?227 What, indeed, are they supposed to think when the Congress provides for a unique upward ratchet for this organization – and no other –

225 Winkler v. Rumsfeld, 7th Cir. No. 05-3451, Appellant’s Opening Brief at 55.
227 See Joseph Curl, Bush Urges Scouts to Retain Principles, The Washington Times, Aug. 1, 2005 (“President Bush yesterday told more than 30,000 Boy Scouts of America gathered at their annual jamboree not to waiver from their moral conviction or their duty to God and country, telling the boys that ‘there is right and there is wrong, and we can know the difference.’”).
by requiring the Secretary of Defense to provide “at least the same level of support” for each future Jamboree absent a report to Congress that doing so would pose a threat to national security?228

The federal government’s decision to lavish governmental support on a specific private organization like this – and in the midst of what conservatives insist is a “culture war” against religious liberals – says something to reasonable observers. Judge Manning was right: reasonable observers can only conclude that the government endorsed the BSA’s message, standing with religious conservatives, against America’s liberal churches and synagogues – and their children.

V. CONCLUSION

The conflict between the BSA and the UUA is one between different views of America’s religious traditions and her “traditional values.” The history set out in this article shows that the BSA today is controlled by religious conservatives who have made it very clear that religious liberals are not welcome, and who exclude many children on the ground that they are spiritually not “clean,” or do not possess religious beliefs critical to qualifying as “the best kind of citizen.” That the government should sponsor or endorse such an organization, aligning itself with the BSA against religious liberals, against Reform Judaism, and against Unitarian Universalism – including the

churches of the Pilgrim Fathers and the Puritans “city on a hill” – should give us all pause.
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2. October 29, 1992 letter from Donald L. Townsend, Director, BSA Relationships Division, to the Rev. Jory Agate, UUA Youth Programs Director.

3. December 2, 1992 letter from the Rev. Jory Agate, UUA Youth Programs Director, to David Townsend, Director, BSA Relationships Division.


5. January 11, 1993 letter from Donald L. Townsend, Director, BSA Relationships Division, to the Rev. Jory Agate, UUA Youth Programs Director.


7. May 7, 1998 letter from Dr. Lawrence Ray Smith, Chair, BSA Religious Relationships Committee, to Jennifer Harrison, UUA Youth Programs Director.


10. October 19, 1998 letter from Dr. Lawrence Ray Smith, Chairman, BSA Religious Relationships Committee, to Dr. John A. Buehrens, UUA President.
11. March 18, 1999 letter from Thomas R. Deimler, Director, BSA Relationships Division, to Dr. John A. Buehrens, UUA President.


13. April 23, 1999 letter from Thomas R. Deimler, Director, BSA Relationships Division, to the Rev. Dr. John A. Buehrens, UUA President.


15. May 7, 1999 letter from Dr. Lawrence Ray Smith, Chairman, BSA Relationships Committee to Dr. John A. Buehrens, UUA President.

16. May 18, 1999 open letter from UUA President John A. Buehrens.

17. UUA June 20, 2000 press release: Religious Leader Decries Court Ruling.
APPENDIX 1

Letter from the Unitarian Universalist Association Youth Programs Director to the Boy Scouts of America Religious Relationships Division

September 4, 1992

Mr. David Worley
Relationships Division
Boy Scouts of America
1325 West Walnut Hill Lane
P.O. Box 152079
Irving, TX 75015-2079

Dear Mr. Worley:

I am the new Youth Programs Director for the Unitarian Universalist Association. My job is to oversee our association’s programs for 12- to 20-year-olds, including the UU scouting awards Love and Help and Religion in Life. While the UUA is a small denomination and we serve relatively few scouts each year, I feel it is important that these youth have the opportunity to earn their religious awards in a program which shares their values and faith tradition. Therefore, I have recommended that we continue to provide services for UU scouts.

We are concerned, however with the Boy Scouts Association’s policy of discriminating against homosexual and atheist youth. Our faith tradition values the worth and dignity of every individual, no matter their sexual orientation or their belief in a deity. We find it distressing that an organization that does so much for helping youth to develop young men’s self-identity, confidence, and leadership skills can support a policy which is so destructive to youth who do not conform to their mold of what a boy should be.

For this reason, our Board of Trustees passed a resolution at their recent meeting once again condemning BSA’s policy and reorganizing the way we provide services to UU scouts. We have also committed ourselves to educate individuals regarding BSA’s discriminatory policy and work toward having those policies changed.
I have enclosed a copy of the resolution as well as a check for $7.00 to register as a member of the Religious Relationships Committee. I look forward to discussing these issues with your organization in the future.

Shalom,

/s/
Rev. Jory Agate
Youth Programs Director

JA:af
Enclosures
APPENDIX 2

Letter from the Boy Scouts of America Relationships Division Director to the Unitarian Universalist Association Youth Programs Director

October 29, 1992

Rev. Jory Agate
Youth Programs Director
Unitarian Universalist Association
25 Beacon Street
Boston, MA 92108

Dear Rev. Agate:

Please forgive the tardy response to your September 4th letter. I wanted to present your letter and resolution to the Religious Relations and Relationships Committees before I responded. They met as part of the National Executive Board Meeting on October 13th and 14th.

It is the position of the Boy Scouts of America that we have an obligation to the youth of America and to their parents to insure the best leadership possible. Scout leaders must possess character traits that are compatible with traditional family values which have been the backbone of our country and Scouting. We grant charters to organizations whose values are compatible.

The policy of the Boy Scouts of America is not to define God nor does it discriminate against any special interest group. As a private organization, we have the right to set standards of leadership. The same Congress that has given you the right to set your agenda has granted us the same courtesies. We respect your rights and would trust that you would extend us the same consideration.

Currently, there are over 75 youth and adult religious emblems available to the Scouts of their particular faith. While it is true that the respective religious institutions set the criteria for the award, it is worn on the Scout uniform and therefore responsibility [sic] of the Relationships Committee to give final approval for all such awards. We have a committee reviewing your award in light of the resolution that your association has passed.

While we regret that you have taken the position of condemnation of our policies we must maintain our commitment to the values that have served millions of
youth since 1910. At our last National Executive meeting our policies were reviewed. It was determined that they should not be compromised and are nonnegotiable.

The Religious Relationships Committee of the Boy Scouts of America uses a nominating committee process. Because of the resolution you have passed, I do not see a member of the Unitarian Universalist Association serving on this committee. Therefore I am returning your check for $7.00. Please understand that the refund is for your individual registration and in no way affects registration of the 682 youth enrolled.

Sincerely,

Donald L. Townsend, Director
Relationships Division

enclosure
APPENDIX 3

Letter from the Unitarian Universalist Association Youth Programs Director to the Boy Scouts of America Relationships Division Director

December 2, 1992

David Townsend, Director
Relationships Division
Boy Scouts of America
1325 West Walnut Hill Lane
P.O. Box 152079
Irving, TX  75015-2079

Dear Mr. Townsend:

I am concerned about questions raised by your letter dated October 29, which refunded my check for membership on the Religious Relationships Committee. The Unitarian Universalist Association has a long history of involvement with the Boy Scouts of America, dating back to 1961 when the first version of our Religion in Life program was approved for UU Scouts. Over the years, earning this award has become an important part of a UU scout’s religious and leadership development. Working on such an award helps youth understand who they are, what is important to them, and how they can best serve others. I believe that these are goals that both of our organizations share.

You stated in your letter that the Religious Relationships Committee uses a nominating committee process. Could you please clarify this process? It is not clear from your letter whether or not this was a decision made by the Religious Relationships Committee or your administrative action. It is my understanding that no criteria has yet been established for serving on this committee. I should like to have the opportunity to discuss the issue of my membership with you and other members in the next committee meeting in February. Perhaps we could clarify our concerns at that time.

Further, I am greatly concerned for the 682 UU youth currently enrolled in scouting. Their religion award is an important part of their scouting experience. I am sure you can recognize this since your organization mandates that “a scout shall be reverent.” Can you please inform me as to when a decision would be made on the approval of our scouting award program, and on what criteria our program is being
reviewed? I hate to leave our youth in limbo and want to inform them as to the status of this program.

The Unitarian Universalist Association and the Boy Scouts of America have worked together toward common goals for more than three decades. If the Religious Relationships Committee is considering severing this alliance, then it is my hope that we may have the opportunity to discuss the issues before such an action is taken.

I look forward to meeting you in February.

Shalom,

Rev. Jory Agate
Youth Programs Director
APPENDIX 4

Letter from the Unitarian Universalist Association Youth Programs Director to the Boy Scouts of America Religious Relationships Committee Members

December 2, 1992

Religious Relationships Committee Member
Boy Scouts of America

Dear [Committee Member]:

Last week I received a letter from Donald Townsend, Director of the Religious Relationships Committee, returning my $7 registration fee for membership on the committee. He stated that due to the UUA Board resolution regarding BSA policy, he does “not see a member of the Unitarian Universalist Association as [sic] serving on this committee.”

The Unitarian Universalist Association has a long history of involvement with the Boys [sic] Scouts of America dating back to 1961 when the first version of our Religion in Life program was approved for UU Scouts. Over the years, earning the award has become an important part of the religious and leadership development of UU Scouts. Working on such an award helps our youth understand who they are, what is important to them, and how they can best serve others. I believe that these are goals that all of us share.

Mr. Townsend stated in his letter that the Religious Relationships Committee uses a nominating committee process. He did not explain this process or state why he does not see a member of our Association as serving on this committee. It is unclear to me whether this was a decision made by the Religious Relationships Committee at your October meeting or an administrative action taken on his own part. It is my understanding that the Committee has not yet established its criteria for membership. I would appreciate discussing the issue of my membership as UUA representative at the next committee meeting in February.

Mr. Townsend informed me that the Religious Relationships Committee has also established a committee to review the approval of our Religion in Life award. I am greatly concerned for the 682 UU youth currently enrolled in scouting. Their religion award is an important part of their scouting experience. I am sure you can recognize this in administering your own awards. While our denomination is small and the number of UU scouts is few, that does not lessen the impact their Boy Scout
experience has on their lives. The Boy Scout Handbook calls on all scouts to be faithful in their religious duties and to respect the beliefs of others. We expect no less from our scouts, or from the BSA Religious Relationships Committee.

The Unitarian Universalist Association and the Boys [sic] Scouts of America have worked together towards common goals for the past three decades. If the committee is considering severing this relationship, then it is my wish that we have the opportunity to discuss the issues before such an action is taken.

I hope you support our desire for continued dialogue, and I look forward to meeting you in February.

Shalom,

Rev. Jory Agate
Youth Programs Director
APPENDIX 5

Letter from the Boy Scouts of America Relationships Division Director to the Unitarian Universalist Association Youth Programs Director

January 11, 1993

Rev. Jory Agate
Youth Program Director
Unitarian Universalist Association
25 Beacon Street
Boston, MA   02108

Dear Rev. Agate:

During our 30 year association, thousands of Unitarian Universalist youth have received the positive benefits of a quality Scouting program. One of the strong bonds that our two programs have shared has been the Scout Oath and Law. Any adult or youth who in good conscience can repeat the Scout Oath and Law are welcome in the B.S.A.

The Boy Scouts of America grants charters to churches, educational, fraternal and community organizations whose mission and values are compatible. The clear intent of your resolution is to remove the Unitarian Universalist Association as a national chartered organization. At the last meeting of the National Religious Relationships Committee, your request was honored.

With regard to your question concerning the B.S.A. Religious Relationships Committee structure, the bylaws of the BSA states [sic] that the Relationships Committee is the only standing committee recognized by the Executive Board. Clause 13 does establish the nominating committee as the standard operating procedure. The Religious Relationships Committee, Catholic, Jewish, Protestant, Community Relations plus the other various committees are “ad hoc” and members serve at the will of the chairman.

The Twelfth Point of the Scout Law is a Scout is Reverent. While the BSA does not define God nor does it discriminate against any special interest group, we do feel that a Scout must be able to adhere to the Scout Oath and Law. The Religious Emblem Program of the BSA has given millions of Scouts the opportunity to earn the award of their particular faith. It is the responsibility of the BSA to establish guidelines if the award is to be worn on the BSA uniform.
There is currently a committee reviewing these guidelines. They will bring forward their recommendations at the next Religious Relationships Committee meeting in February.

Currently, there are 26 Scouting units serving over 680 youth sponsored by Unitarian Universalist Churches. As long as they can live within the guidelines of the Scout Oath and Law, they are welcome to participate in the Scouting program.

It is not our desire to sever relations with any of our national chartering organizations nor to deny a quality Scouting program to any person who is willing to subscribe to the Scout Oath and Law. But, the Resolution of the Unitarian Universalist Association appears to bring to an end our longstanding alliance in serving youth.

Yours in Scouting,

Donald L. Townsend, Director
Relationships Division

jmw
APPENDIX 6


Religion in Life for Scouts and Explorers

Denominational religious emblem programs are highly regarded among Scouts and Explorers. Most Protestant denominations as well as Catholics, Jews, and Buddhists offer a program and emblem for Scouts and Explorers of their respective faiths.

The rationale for a religious award in Scouting is found in the Scout Oath, the Scout Law, and the Charter and Bylaws of the Boy Scouts of America. For example, “On my honor I will do my best to do my duty to God and my country and to obey the Scout law” (from the Scout Oath). “A Scout is referent toward God. He is faithful in his religious duties. He respects the beliefs of others” (from the Scout Law, Twelfth Point).

The Boy Scouts of America is a secular organization that does not attempt to define or promote a specific theological position. Nevertheless, the fact that a majority of Scout troops are chartered by Roman Catholic, Methodist, and Latter-day Saint (Mormon) churches influence the positions and attitudes of the national leadership of the Boy Scouts. Local troops will vary in the political and cultural attitudes of their leaders depending on who these volunteers are.

Some Unitarian Universalists may have trouble with the religious language in the Scout Oath, Law, and Charter. The Boy Scouts of America Advancement Guidelines contain a clear statement of religious principles in Scouting, quoted below from the 1980 printing:

The Boy Scouts of America:

1. Does not define what constitutes belief in God or the practice of religion.

2. Does not require membership in a religious organization or association for enrollment in the movement, but does prefer and strongly encourages membership and participation in the religious programs and activities of a church, synagogue or other religious association.
3. Respects the convictions of those who exercise their constitutional freedom to practice religion as individuals without formal membership in an organized religious organization.

4. If a boy says he is a member of a particular religious body, the standards by which he should be evaluated are those of that group. This is why advancement committees usually ask for a reference from his religious leader to indicate whether he has lived up to their expectations.

The Board of Trustees of the Unitarian Universalist Association has expressed its dismay at the efforts of the Boy Scout’s national leadership to forbid boys who are gay or atheists from participating in Scouting activities. On June 30, 1992 the Board passed a resolution which states in part:

WHEREAS the By-Laws of the Unitarian Universalist Association affirm the inherent worth and dignity of every person, and a free and responsible search for truth and meaning;

WHEREAS the Unitarian Universalist Association Board and numerous General Assemblies have affirmed the rights of gays and lesbians to participated fully and equally in the life of their community;

WHEREAS the National Executive Board of the Boy Scouts of America has recently reaffirmed its policy requiring all boy scouts to affirm a duty to God;

THEREFORE BE IT RESOLVED that the Board of Trustees of the Unitarian Universalist Association express to the Executive Board of the Boy Scouts of America its disapproval of the Boy Scouts of America’s policy of discrimination against gay and atheist scouts and leaders.

BE IT FURTHER RESOLVED that the Department of Religious Education undertake to update the Religion in Life and Love and Help materials to include educational materials dealing with the conflict between the values of the Unitarian Universalist Association and the Boy Scouts of America; and to allow the award to be administered by local congregations.

BE IT FINALLY RESOLVED that the Unitarian Universalist Association explore possible coalitions with other organizations who share our concern with the Boy Scouts of America’s policies, to develop effective strategies to seek appropriate changes in those policies.
The UUA is not formally affiliated with the Boy Scouts of America. Individual UU congregations may charter scout troops if they wish. The UUA’s *Religion in Life* program is recognized by the Boy Scouts of America as one of the religious awards in scouting. However, the Boy Scouts of America is not responsible for its content or administration. It can also be used in other liberal religious denominations. This 1993 revision reflects our Association’s ongoing concern regarding homophobic and discriminatory attitudes of the national leadership of the Boy Scouts of America.

In Canada, the Boy Scouts award a religious emblem and promote denominational religious emblems in the Boy Scouts of Canada, or the *Religion in Life* program published by the Canadian Unitarian Council. Canadian UU Scouts can earn the emblem through this program.
Letter from the Boy Scouts of America Religious Relationships Committee Chair
to the Unitarian Universalist Association Youth Programs Director –

May 7, 1998

Ms. Jennifer Harrison
Director, Youth Programs
Unitarian Universalist Association
25 Beacon Street
Boston, MA 02108-2800

Re: Religion in Life

Dear Ms. Harrison:

As you know, the Religious Relationships Committee is responsible for reviewing the content of the religious award manuals of the various religious organizations to ensure adherence to Boy Scouts policies. It has come to our attention that the UUA apparently has been recommending a version of the Religion in Life manual which was never submitted to or approved by the Committee for use in obtaining the Unitarian religious award in the Boy Scouting and Exploring programs.

This version of Religion in Life contains several statements which are inconsistent with Scouting’s values. Boy Scouts is not a “secular organization” as stated in Religion in Life; Boy Scouts is an ecumenical organization which requires belief in God and acknowledgement of duty to God by its members. The reference to the “trouble” some Unitarians Universalists may have regarding the duty to God inappropriately incorporates doubt in an award process that is designed to forge a stronger link between a youth’s Scouting values and religious life.

We note with considerable dismay that this version of Religion in Life also includes an official expression of disapproval of Boy Scouts’ membership policies relating to known or avowed homosexuals. The Committee believes that this expression of disapproval has no place in a Boy Scouting/Exploring youth religious award manual.

The current version of Religion in Life does not adhere to Scouting policies and is inappropriate for distribution to Scouting youth in connection with the administration of the Religion in Life religious award. Until such time as the UUA
materials can be redrafted to a form acceptable to the Committee, youth may not be awarded a Unitarian Universalist religious emblems [sic] in Scouting or wear the emblem on a Scout uniform. This includes the *Love and Help* emblem as well.

Sincerely,

Lawrence Ray Smith, Ph.D
Chair, Religious Relationships Committee
Boy Scouts of America
Letter from the Unitarian Universalist Association President to the Boy Scouts of America Religious Relationships Committee Chair --

June 11, 1998

Lawrence Ray Smith, Ph.D.
Chair, Religious Relationship Committee
Boy Scouts of America
522 East Lane
Kerrville, TX 78028

Dear Dr. Smith:

Our Youth Office received your letter of May 7 stating that Scouting youth may no longer be awarded the Unitarian Universalist Religion in Life award for Boy Scouts nor the Love and Help award for Cub Scouts. You do this because our manual for the Religion and Life award includes statements designed to help Unitarian Universalist youth deal with the tension that they may feel between Unitarian Universalist religious principles and certain aspects of BSA current policy, particularly with regard to discrimination against gay Scouts and leaders and with regard to those whose conscientious ethical and spiritual principles may not include a belief in God.

Surely the Religious Relationships Committee of the Boy Scouts of America cannot intend to tell a religious group what we may teach with regard to our own religious principles. We teach our youth, as a matter of religious principle, that discrimination against people simply by virtue of their belonging to a particular category of human being is wrong. We cannot be expected to ignore the question of discrimination against gay scouts and leaders in our guidance to boys studying our religious principles and history.

Unitarian Universalism also has a special openness, ministry and mission to those who may have trouble with traditional ideas about God. This too is a matter of religious principle with us. We know that we are not alone in regarding doubt, as well as piety, as a part of faith. Moreover, if a good Buddhist Boy Scout said, “No, I do not believe in a God,” would you exclude that child for following the teachings of his own faith?

You attempt to define the Boy Scouts of America as an ‘ecumenical’ organization, and object to our reference to it as ‘secular.’ I believe that you
misunderstand both words. ‘Ecumenical’ is a distinctively Christian term properly used only with regard to inter-Christian cooperation. It is not appropriate to an organization that aspires to inter-faith relationships. Rabbis and imams would not find it appropriate at all. Moreover, because the BSA is grounded in moral and civic values, but not in a particular religion per se, the term ‘secular’ is quite appropriate. Many BSA leaders, including members of the National Council, would repudiate the implication of your statement that the BSA is an entirely Christian organization. Or do you really wish to exclude Jews, Muslims, Hindus, and members of other minority faith communities?

Your committee is charged with a great responsibility: to help the BSA relate to the increasing religious pluralism of American society. Judging by your letter, you are in danger of failing in that task. You risk exposing the BSA to charges of discrimination – not only against a sexual minority, but against entire religious groups, starting with Unitarian Universalism, a movement which has deep spiritual roots in America’s commitment to religious freedom, to democratic values, and to minority rights.

Some of our congregations date back to the time of the Pilgrims; others are associated with the American Revolution, the abolitionist movement, the struggle for women’s rights, for civil rights, etc. Our members have long cooperated with the BSA. Our churches sponsor troops, our members serve as adult leaders (some on the National Council), and our youth regularly win awards. Hundreds have received the Religion in Life award in recent years. I myself became a Life Scout, and attended a World Jamboree. As a pastor in New York City in 1990, I helped to organize a troop for boys then living in the city’s welfare hotels. Because of our long-standing concern for religious pluralism, we could be helpful to your committee. It saddens me when I see mistakes like your letter that threaten to deny Scouting and support of Scouting to boys who could benefit from it.

I have consulted Tom Deimler, the staff member of the BSA who works with your committee, and have agreed with him to take part in a meeting about all these issues in September or October. In the meantime, I must tell you that I believe that your letter has put your committee and the BSA in an untenable and nearly ridiculous position. We will not acquiesce in such discrimination. We will not stop distributing a Religion and Life manual that reflects our religious principles. We will not stop providing Religion and Life awards and Love and Help emblems to Scouts and Scout leaders. If you and the BSA honestly believe that it will promote or defend Scouting to refuse our awards or to have Scout officials tear them off the uniforms of boys, I
think that you are sadly mistaken. Most Americans will see such actions for what they are: blatant discrimination against children on the basis of their religion.

Yours regretfully,

John A. Buehrens  
President  
Unitarian Universalist Association

cc.   Tom Deimler  
       Howard Guthman
APPENDIX 9

Letter from the Unitarian Universalist Association President to the Boy Scouts of American Religious Relationships Committee Chair –

September 30, 1998

Lawrence Ray Smith, Ph.D.
Chair, Religious Relationship Committee
Boy Scouts of America
522 East Lane
Kerrville, TX 78028

Dear Dr. Smith:

Yesterday we had a very good meeting with Tom Deimler, Director of the Relationship Division of the BSA, and with Mike Healy, an active Unitarian Universalist who also serves as area president for the BSA in the Northeast region. We agreed on two steps that taken together would allow the UUA and the BSA to resume an appropriate relationship.

For our part, the UUA will publish a new, revised edition of the Religion in Life manual. While continuing to assert as a matter of religious principle our belief in the worth and dignity of every person – regardless of race or creed, gender or sexual orientation, ability or disability – the revised manual will be written so as not to offend the BSA in any way.

Authors of the new edition will be the Rev. Keith Kron of our Faith in Action Department and the Rev. Cynthia Breen, UUA Director of Religious Education, both of whom were present at the meeting. Where we feel it necessary to help Scouts working on the award or Scout leaders acting as advisors to more fully explore Unitarian Universalist understandings of ‘duty to God’ or current BSA policies, the new edition will simply reference other helpful publications available from our Youth Office. This will avoid including in a manual for a BSA award material which the BSA finds inappropriate.

In return, I ask that the Religious Relationships Committee invite a Unitarian Universalist representative to join the Committee. We think it appropriate, given our willingness to resolve this dispute over the Religion in Life manual, to be invited “inside the tent,” as it were. There we hope to join other religious groups in a spirit of
inter-faith cooperation, helping the BSA to meet constructively the varied challenges of diversity.

Since I would like to convey word of both these steps to the UUA Board of Trustees when they meet in Boston on October 24, it would be helpful if you could respond to me promptly following the meeting of your committee on October 13. Obviously, we would also like to see the Religion in Life award re-instated to official BSA recognition, and to convey to concerned Scouts and others news of this agreement in a timely fashion.

As we discussed with Mr. Deimler and Mr. Healy, there have been some regrettable misunderstandings in the past both about some BSA terms and procedures and about the UUA’s intentions. We do, however, desire to have a constructive relationship in which each organization can be true to its own sense of mission.

I trust that you and the Committee will accept this letter as it is intended – in a spirit of reconciliation and in the hope for relational renewal. Please recognize that we need in return a communication from you that will both welcome us to the Committee table and hold out hope for official reinstatement of the award once the new manual is published.

It would be good to have a letter from you that can be released soon along with mine.

Yours in hope,

John A. Buehrens
President
Unitarian Universalist Association

cc. Tom Deimler
    Mike Healy
Letter from the Boy Scouts of America Religious Relationship Committee Chairman to the Unitarian Universalist Association President --

October 19, 1998

Dr. John A. Buehrens, President
Unitarian Universalist Association of Congregations
25 Beacon Street
Boston MA 02108

Dear Dr. Buehrens:

Thank you for your letter dated September 30, 1998, which I received on October 10, 1998. I’m pleased to learn that you had a very good meeting on September 29, 1998, with Tom Deimler, Director of the Relationships Division of the BSA and Mike Healy, active Unitarian Universalist and Area President for the BSA in the Northeast Region.

Regarding the manual for the Religion in Life and the Love and Help Awards, I’m glad that there is a mutual agreement to offer a revision acceptable to both of us. Let’s move quickly to resolve this.

As chair of the National Religious Relationships Committee of the Boy Scouts of America, I am asking our Relationships Division Director, Tom Deimler, to work with the already designated members of your staff as the new editions of the booklets are developed. The material would then be reviewed by our Religious Relationships Committee. As you are aware, our concern is whether the revised material will be consistent with Scouting’s values and appropriate for use by Scouts. If it is, we would authorize the awards for use by Scouts and for display on Scout uniforms. At that point we can discuss the other matters in your letter.

Sincerely yours,

Lawrence Ray Smith, Ph.D., Chairman
Religious Relationships Committee
APPENDIX 11

Letter from the Boy Scouts of America Relationships Division Director to the Unitarian Universalist Association President --

March 18, 1999

Dr. John A. Buehrens, President
Unitarian Universalist Association of Congregations
25 Beacon Street
Boston, MA 02108

Dear Dr. Buehrens:

As you recall from Dr. Lawrence Ray Smith’s letter of May 7, 1998, we have been working with you and your staff to rewrite the Unitarian Religious Award manuals so that they reflect and are consistent with the values of the BSA. If a youth is to wear a medal on his Scout uniform, it must reflect the long-held values of our programs. As you indicated in your letter of September 30, the “revised manual will be written so not to offend the BSA in any way.”

In this spirit, a subcommittee of the National Religious Relationships Committee began to review the revised Religion in Life booklet and foreword when it was received on February 24, 1999. They felt that we had made significant progress on the main body of the requirements booklet, but wanted to review the references on page 5, section 3e before making final comments. They also asked to see the revision of the Loved and Help requirement booklet (Cub Scout Award) and the Religion and Youth Award (adults).

In reference to the new foreword, the committee found that it continues to use boys as a venue for discussions related to UUA policies versus those of the BSA. Secondly, the committee found the forward to be unacceptable, because it was being used as an agenda to drive issues with the BSA similar to those found in the 1993 rewrite of the curriculum.

John, as we move forward to resolve these issues, I want you to know that we continue to be very concerned that our private conversations appear on the UUA web site. As we have discussed before, the use of this very public forum to espouse your issues with our organization has not contributed toward an atmosphere of cooperation.
Again, in the spirit of contributing to the character and integrity of our youth, I look forward to hearing from you regarding our concerns.

Sincerely,

Thomas R. Deimler
Director, Relationships Division

sd
APPENDIX 12

Letter from the Unitarian Universalist Association President to the Boy Scouts of America Relationships Director --

March 30, 1999

Thomas R. Deimler
Director, Relationships Division
Boy Scouts of America
1325 West Walnut Lane
Irving, TX 72015-2079

Dear Tom:

I’m sorry that my proposed Foreword for Religion in Life caused consternation. Fine. We’ll simply omit it.

We have also decided not to reference any specific UUA pamphlet resources on page 5, section 3e, but simply suggest that the mentor and youth select those that seem relevant. That should take care of that concern.

In addition to a revised version of Religion in Life incorporating those changes, I am also sending along a copy of the current edition of Love and Help. While last revised in 1984, we have no plans to change it. It seems to work well and has never been cause for any concern by the BSA. I can understand your desire to see it, however.

There simply is no manual for the Religion and Youth Award currently in print. Evidently there has been insufficient demand in recent years for such a UUA publication. If we do develop one again, we will be glad to run it by you.

Certainly I’m as sorry as you are that we have to post progress reports on our discussions in the semi-public space of our website. The demand from our constituents for updates, however, makes such reporting necessary.
Please give me a call at your convenience. With all good wishes in this season of renewal,

Yours sincerely,

John A. Buehrens
President

cc. Breen, Kron; Stites, Hurley, Weiner
Enc. (2) Religion in Life, Love & Help
APPENDIX 13

Letter from the Boy Scouts of America Relationships Division Director to the Unitarian Universalist Association President --

April 23, 1999

The Rev. Dr. John A. Buehrens, President
Unitarian Universalist Association of Congregations
25 Beacon Street
Boston, MA 02108

Dear John:

Many thanks for your early response to matters concerning the revision of “Religion and Life” booklet. We have received your letter of March 30, 1999 along with your latest changes of this material.

Copies of the booklet were then forwarded to the subcommittee of the National Religious Relationships Committee for their review. A meeting of that group was held on April 20, 1999.

I am very happy to report that the committee has unanimously expressed their endorsement of this new material. They are most complimentary of the willingness of you and your staff to work closely with us in this endeavor.

Thusly, the Boy Scouts of America now reauthorizes the awarding of the Religion in Life emblem to Scouts and the wearing of that emblem on a Scout uniform. This includes the Love and Help emblem as well. If any further changes would be needed in the future, our committee will stand ready to review your proposals.

Best wishes to you.

Sincerely yours,

Thomas R. Deimler, Director
Relationships Division

jmw
APPENDIX 14

Open letter from the Unitarian Universalist Association President --

April 28, 1999

Dear Friends:

As you know, the UUA has been involved in discussions with the Boy Scouts of America regarding the status of our Religion in Life award. In May, 1998, the BSA informed us that, due to certain language in the Religion in Life manual, we could not award the Religion in Life emblem to our scouts. We strongly protested this decision. It pleases me to tell you that this conflict has been resolved: the UUA has revised its Religion in Life manual to the satisfaction of the BSA without abandoning the UU values at its core. I want to share with you a portion of the letter dated April 23 which I received from Thomas Deimler, Director of the Relationships Division of the Boy Scouts of America. The letter reads, in part:

“Many thanks for your early response to matters concerning the revision of the Religion in Life booklet... I am very happy to report that the committee has unanimously expressed their endorsement of this new material. They are most complimentary of the willingness of you and your staff to work closely with us in this endeavor. Thus the Boy Scouts of America now reauthorizes the awarding of the Religion in Life emblem [by the UUA] to Scouts and the wearing of that emblem on a Scout uniform. . . . . Best wishes to you.”

The UUA will now begin discussions with the Boy Scouts about possible service on the BSA Religious Relationships Committee. We would like to do this for three reasons.

First, many of the values of scouting are congruent with our UU principles. I myself became a Life Scout, and other UU ministers are Eagle Scouts. Scouting has played a significant role in the lives of many young UUs, no small number of whom are members of scout troops sponsored by their own UU congregations.

Second, the BSA bylaws contain a statement about the nature of God which many good people in many traditions would find impossible to accept. The BSA is already being challenged on issues of religious discrimination. The American Civil Liberties Union has sued the public schools of Chicago, for example, over sponsoring Scout units which require a particular form of religious belief. If the BSA is going to
adapt successfully to the religious pluralism of the 21st century, they will need counsel from groups like the UUA – not just from religious conservatives.

Third, we believe that the BSA can and should adopt new policies with regard to volunteers, to membership and to homophobia. Along with many UUs involved in Scouting, it is our position that local parents, Scout Councils, and troop sponsors should assume a great role in volunteer and membership issues. Discrimination on the basis of sexual orientation should not be allowed to continue as a national policy of the BSA. It will ruin the organization, costing them the support of millions of people, of foundations, and of the United Way in many areas.

Congregations and denominations that oppose homosexuality may have some right to influence the selection of leaders in troops which serve their own youth, but they should not prevent congregations and denominations like the UUA and the United Church of Christ (UCC) from conducting themselves in a way that represents our own religious values. For us, this will include an emphasis on comprehensive sexuality education and efforts to reduce homophobia.

The new edition of Religion in Life will be available from the UUA Bookstore this summer. Along with each copy, the Association will separately provide a letter from me, along with resources appropriate to dealing with issues of homophobia and religious discrimination.

It is still not clear to me that the BSA can be redirected from patterns that in the long run will be institutionally self-destructive. I am very pleased, however, that we have been able to resolve any implication that they wish to practice an added discrimination toward Unitarian Universalists simply because we support the belief that it is not homosexuality but homophobia which is a sin.

Yours faithfully,

John A. Buehrens
Unitarian Universalist Association of Congregations
APPENDIX 15

Letter from Boy Scouts of America Religious Relationships Committee
Chairman to the Unitarian Universalist Association President --

May 7, 1999

Lawrence Ray Smith, Chairman
Religious Relationships Committee
Boy Scouts of America

Dear Dr. Buehrens:

It has come to our attention that you have posted on the UUA web site a letter of April 28, 1999, in which you state that the UUA has revised its “Religion in Life” manual to the satisfaction of the Boy Scouts of America, referring to a letter of April 23 from Thomas Deimler of the BSA.

Your letter goes on to say the following: “The new edition of Religion in Life will be available from the UUA Bookstore this summer. Along with each copy, the Association will separately provide a letter from me, along with resources appropriate to dealing with issues of homophobia and religious discrimination.” Unfortunately, this simply reopens the entire issue of using boys as a venue to air your differences with the policies of the Boy Scouts of America.

These circumstances were not contemplated when Mr. Deimler wrote his letter. Therefore, Boy Scouts of America is not in a position to authorize the awarding of the Religion in Life emblem to Scouts and the wearing of that emblem on a Scout uniform.

Sincerely yours,

Lawrence Ray Smith, Chairman
Religious Relationships Committee
APPENDIX 16

Open letter from the Unitarian Universalist Association President –

May 18, 1999

What has happened to Boy Scout honor?

The Boy Scouts of America have sent the UUA yet another letter. This one rescinds the decision to reinstate BSA recognition of our Religion and Life Award for UU scouts. Moreover, they have taken the initiative to contact the press on the matter. Both steps seem to me astonishing. I have tried consistently to be cooperative with the BSA, while staying true to Unitarian Universalist principles. On receiving the letter, my first reaction was that there must be a lack of internal coordination within the Boy Scouts or a misunderstanding of our intentions. Those intentions were explained to representatives of the Boy Scouts last September and were fully agreed to. It was agreed that the UUA would issue a new edition of the Religion and Life manual; that the manual would contain nothing objectionable to the BSA; and that the UUA would then make available, along with the manual, some separate materials that would be helpful to our young people and their advisers, showing forth our religious principles in relation to the issues that have been part of this controversy. Unitarian Universalism has long been a strong supporter of equal rights for gay, lesbian, bisexual, and transgender people, and we have a responsibility to our young people to instruct them in the religious values which underlie our commitment to this struggle.

This is all we have done. We have prepared a new manual, which they have accepted and which we will publish. We have also prepared some materials aimed at advising young people whose religion teaches “the worth and dignity of every person” how they might want to respond to slurs aimed at another person’s, or their own, sexuality, or supposed sexuality. These materials are coordinated with our comprehensive new curriculum on human sexuality, Our Whole Lives.

I have personally written a short pamphlet, When Others (or You) Say ‘God’, designed to help young people from a pluralistic religious tradition understand some of the multiple ways in which the word ‘God’ is or can be understood. It seems to me that UU youth who choose to take the Scout oath need this because in the oath a scout promises “to do my duty to God . . .”

In the course of this controversy I learned that the BSA actually knows that what it is doing in response to the so-called ‘gay’ issue has more to do with politics than with children’s safety. The BSA knows the difference between pedophilia and
homosexuality. It does training on the subject. Yet they continue to practice arbitrary discrimination. Ignorance is one thing. Knuckling under to anti-gay pressure groups is quite different, and entirely unworthy.

The UUA will continue to teach its religious principles and to help its young people to apply them. This is our religious duty. My question is this: does the BSA really mean to say that our teaching must stop where it makes them uncomfortable? That we cannot provide religious materials along with Scout materials? If so, what other faith groups will suffer from Boy Scout discrimination? After all, prejudice, once it takes hold in one’s soul and is rationalized against one group can easily spread to include other objects of prejudice. Evidently Unitarian Universalists have now become such objects for the BSA. No wonder they have not been honorable in their dealings with us.

Rev. John Buehrens
President, UUA
Religious Leader Decries Court Ruling

(June 20, 2000) The Rev. John Buehrens, president of the Unitarian Universalist Association, deplored today’s ruling by the United States Supreme Court in the case of the Boy Scouts vs. James Dale. “We regret the Court’s decision, which is a setback for justice, human rights, and non-discrimination,” Buehrens said. Addressing the issue from a moral perspective, Buehrens said, “Unitarian Universalists and others know that it is homophobia that is the sin, not homosexuality.”

“The Boy Scouts have been alone among youth organizations in practicing this kind of discrimination,” Buehrens continued. Noting that the Court’s decision treated the Boy Scout’s as a “private organization,” Buehrens said, “The Boy Scouts cannot have it both ways. If they are allowed to discriminate, then it is time to end their access to public facilities such as public schools and to consider revoking their Congressional charter.”

The Unitarian Universalist Association has been embroiled in a dispute with the Boy Scouts for over two years due to the Association’s vocal support of both gay rights and the rights of agnostic scouts. In 1998, the Boy Scouts rescinded the authority of the liberal religious group to award its Religion in Life emblem to Unitarian Universalist scouts who complete the required program. The UUA has continued to award the emblem despite the Boy Scouts’ prohibition.

“We call upon the Boy Scouts of America to end their discrimination against gays and also to end their discrimination on the basis of religious belief, including discrimination against Unitarians and others whose definition of God is different from the Boy Scouts’ definition,” Buehrens said.

Unitarian Universalism is a liberal, creedless religion with Judeo-Christian roots. The UUA was formed in 1961 through the merger of the Universalist Church of America and the American Unitarian Association. For more information on the UUA.
or its dispute with the Boy Scouts of America, please contact John Hurley, Director of Information, at (617) 742-2100 x131 or by email at jhurley@uua.org.

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Contacts:
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