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### Thoughts on Hayden C. Covington and the Paucity of Litigation Scholarship

Ronald K.L. Collins

*Co-director, History Book Festival. Former Harold S. Shefelman Scholar, University of Washington School  
of Law*

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## THOUGHTS ON HAYDEN C. COVINGTON AND THE PAUCITY OF LITIGATION SCHOLARSHIP

Ronald K.L. Collins\*

Start here: Hayden Cooper Covington (1911–1978). His name defined him.

*Heathen.* According to the *Oxford English Dictionary*, the word refers to someone who holds, “religious beliefs of a sort that are considered unenlightened, . . . not of the Christian, Jewish, or Muslim faiths.” By that measure, he fit the definitional bill. His first name, *Hayden*, circled back in etymological time to the German *Heiden*, meaning “heathen.” On the one hand, it is strange that a man who devoted his life to defending religious liberty should be tagged a “heathen.” On the other hand, it is entirely understandable given the religious beliefs he defended—those of a non-Trinitarian sect that negated the immortality of the soul and denied the existence of Hell. In short, those whose faith he defended were often seen as heathens, enemies of True Faith. That his faith encouraged conscientious objection to military service in wartime and likewise urged its followers to refuse to salute the American flag only increased the animus (local and worldwide) directed at such “unpatriotic” “heathens.” And then there is this: to be named a “Jehovah’s Witnesses” has long been viewed (and continues to be in many parts of the world) as a badge of madness of the kind that invites censure, censorship, condemnation and incarceration.<sup>1</sup>

In sum, Hayden Covington, the “heathen” from birth who headed the Watchtower Society’s legal team, made it his life calling to defend the rights of his fellow “heathens.” Yet in time, he was forced to take his leave from his beloved Witnesses, though he was accepted back into the group’s fold just prior to his death in 1978.

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\*Co-director, History Book Festival. Former Harold S. Shefelman Scholar, University of Washington School of Law. This Article (© 2019 Ronald Collins) benefited greatly from comments made at workshops at New York Law School and CUNY Law School and also from comments offered during my presentation at the annual conference of the First Amendment Lawyers Association. Thanks go out as well to Professors Larry Tribe, David Vladeck, and Kathryn Watts for their most helpful suggestions and to Cheryl Nyberg of the University of Washington Gallagher Law Library for her invaluable research assistance. Additionally, I have benefitted from the thoughtful and timely works (cited below) of Professor Richard Lazarus, whose scholarship in the area of Supreme Court litigation is a model for others to follow.

<sup>1</sup> In Germany, Witnesses were placed in concentration camps and were in the words of the British Ambassador to Germany, ‘almost as badly treated as the Jews.’ In Britain 1593 Witnesses were convicted for refusing conscription and many, including 334 women, were imprisoned. In the United States prosecution and incarceration of some 4000 Witnesses under selective service laws followed its entry into the war.

William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah’s Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1015 (1987) (footnotes omitted).

Think of it: what better exemplar of First Amendment freedom than this maverick of a man, this “heathen” who defended “heathens” and did so at time when the tide of public sentiment stood to destroy him. And yet, many in the world of First Amendment law know little or nothing of the man and his many contributions to our first freedom. Why?



The world of American free speech law is populated with many names, from Benjamin Bache to Benjamin Gitlow, from James Madison to Alexander Meiklejohn, and from Holmes and Brandeis to Kennedy and Roberts. And then there is Floyd Abrams, the most noted First Amendment lawyer of our time. But what of Hayden Covington, who argued more First Amendment cases in the Supreme Court than all others? Who was he and what is his legacy? And what does his obscurity say about today’s public law scholarship?

To raise such questions is to point to the problem, the key one: So much of legal scholarship is infatuated with appellate decisional law and those who “write” it. (The quotation marks point to the fact that today few appellate judges actually write their own opinions, leaving it instead to the handiwork of young law clerks.) In other words, if lawyers like Hayden Covington are virtually ignored in our scholarship and casebooks, it is first and foremost because of the judge-made-law view that is so much the norm in modern American legal thinking.

We live in court-centric times. That is, the law is equated with the work-product of judges, and this with sustained frequency. Judicial review is the altar at which many worship. By that measure, John Marshall is the High Lord of all things deemed law. Ever since 1803 when he pronounced on the rule and role of judicial review<sup>2</sup> in our constitutional system of government, the ever-evolving tendency has been to look to appellate judges to comprehend everything from the workings of the Commerce and Taxing Power Clauses, to the ambiguities of the Eleventh Amendment, to the mysteries of the Equal Protection Clause, to the modern-day meanings of the First Amendment. And the same is often the stock-in-trade of how private law is taught and written about, ranging from remedial matters in the law of contracts, to the level of liability in torts, to the meaning of a testamentary document in wills. To discern the law and its meaning, we all too often look first and finally to what *judges* do and say.

In light of this, too many teachers and scholars of the law remain shamelessly silent about what lawyers do beforehand in writing statutes,

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<sup>2</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

drafting regulations, crafting ordinances, preparing corporate bylaws, negotiating deals, or in representing their clients at trial and on appeal. To be sure, there are exceptions<sup>3</sup> as in the case of clinical<sup>4</sup> and transactional approaches<sup>5</sup> to teaching law along with what appears in a few specialty journals.<sup>6</sup> But the lion's share of what is taught (at least in the first<sup>7</sup> and second<sup>8</sup> years of law school) and what is written about in scholarly journals<sup>9</sup> (particularly in constitutional law and criminal procedure) has to do with judicial opinions, with the work-product of appellate judges. That is the portrait of the law portrayed in much of the scholarship currently published in American law journals.<sup>10</sup>

There was a time when the official *U.S. Reports* set out the lawyers' arguments in considerable detail in order to set the scene for the opinions that followed. That practice ended in 1941.<sup>11</sup> Since then, the role of lawyers in

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<sup>3</sup> See, e.g., STEPHEN C. YEAZELL, *CONTEMPORARY CIVIL LITIGATION* (2009) (discussing strategic, tactical, and practical choices inherent in civil litigation and using a variety of non-decisional materials).

<sup>4</sup> There are, for example, Supreme Court litigation clinics that exist in more and more law schools. See Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 *STAN. L. REV.* 137 (2013) (insofar as clinics have control over which cases they bring to the Court and can cause the Court to hear cases that it might not otherwise have heard, the clinics' work can implicate sometimes-latent tensions between client-centered representation and cause-based advocacy).

<sup>5</sup> See Ronald Collins & Edward Rubin, *To Aid Business, Change Law School*, *N.Y. TIMES*, March 5, 1995, at F9 (calling for changes to how law is taught and for need to move to more transactional approaches to teaching commercial law).

<sup>6</sup> There is also West's informative and historically rich Law Stories Series. See *Series*, WEST ACADEMIC, <http://home.westacademic.com/series> (click on "Law Stories Series" within the "Overviews" section) (last visited Nov. 3, 2018). Even here, however, the work of the lawyers is too often presented in abbreviated form (sans any serious analysis) as the story moves at a good clip from the facts to what the appellate courts ruled. See, e.g., Neil Gotanda, *The Story of Korematsu: The Japanese-American Cases*, in *CONSTITUTIONAL LAW STORIES* 249–95 (Michael C. Dorf ed., 2004) (virtually no mention of the lawyers who argued the case in the Supreme Court and no analysis of the briefs they presented to the Court).

<sup>7</sup> See Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 *B.C. J.L. & SOC. JUST.* 247, 268–69 (2012) (discussing the "underlying problems with the casebook method").

<sup>8</sup> See *id.* at 272–73 (Second-year "[t]eachers who do the hard work of incorporating active learning methods do so knowing that their primary institutional reward will come, not from their efforts to improve what students learn, but from production of scholarship that is of attenuated use to their students" (footnotes omitted)).

<sup>9</sup> Similar trends seem to be at play with online scholarly journals that publish shorter articles. Even if such online sources prove more diverse in the range of their selections (e.g., they post essays that scrutinize the work of administrative agencies or examine tax policies), the constant appears to be the same so far as any serious study of the work-product of lawyers, particularly appellate lawyers.

<sup>10</sup> Journals such as *The Review of Litigation* are the exception.

<sup>11</sup> See Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 *J. SUP. CT. HIST.* 9, 16 (2001) ("The practice tapered off and finally ceased during the tenure of Mr. [Ernest] Knaebel in 1941. Office records do not reveal why this occurred."). See also Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 *MICH. L. REV.* 1291, 1328–29 (1985).

Supreme Court cases has received ever less and less attention. In what should be seen as a disconcerting state of affairs, the official Supreme Court site<sup>12</sup> along with some of the leading online websites<sup>13</sup> (such as Findlaw and Cornell's Legal Information Institute) do not list the names of the attorneys in the posted opinions of the Supreme Court. Thus, if one were to go the former's<sup>14</sup> or latter's<sup>15</sup> link on *Citizens United v. Federal Elections Commission*,<sup>16</sup> one would have no idea that the attorneys who argued the case were Theodore Olson (for the Appellant), Elena Kagan (Solicitor General for the Appellee), Floyd Abrams (for Senator Mitch McConnell, as *amicus curiae* in support of Appellant), and Seth Waxman (for Senators John McCain et al. as *amici curiae* in support of Appellee).<sup>17</sup> Professor Richard Lazarus has rightly observed that “[w]hat is wholly absent . . . from that media scrutiny and scholarly commentary is any recognition of the significance for the Supreme Court and the nation’s laws, of the identity of the advocates who argue[] before the Court . . . .”<sup>18</sup> Of course, this omission has long been the practice in casebooks, which have for over a century almost uniformly carved the lawyers out of the case accounts. The implication is that what the lawyers think—how they conceptualized and analyzed the case—is of little or no moment. Where such practices constitute the governing norm, few, if any, students would ever know of the remarkable insight that Robert L. Carter had when he argued that implicit in the First Amendment is a *right of association*,<sup>19</sup> the same right later affirmed by Justice John Harlan in his landmark opinion in *NAACP v. Alabama*.<sup>20</sup>

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<sup>12</sup> See *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013) (not listing lawyers who argued the case), [http://www.supremecourt.gov/opinions/12pdf/11-1231\\_32q3.pdf](http://www.supremecourt.gov/opinions/12pdf/11-1231_32q3.pdf).

<sup>13</sup> The same is true of the Justia postings of Supreme Court opinions. See JUSTIA, <http://supreme.justia.com> (last visited Nov. 3, 2018).

<sup>14</sup> See *Citizens United v. Federal Election Commission*, FINDLAW, <https://caselaw.findlaw.com/us-supreme-court/08-205.html> (last visited Nov. 3, 2018).

<sup>15</sup> See *Citizens United v. Federal Election Comm'n*, CORNELL UNIV. LAW SCH.: LEGAL INFO. INST., <http://www.law.cornell.edu/supct/html/08-205.ZS.html> (last visited Nov. 3, 2018).

<sup>16</sup> 558 U.S. 310 (2010).

<sup>17</sup> By and large, the Oyez website still sees value in providing such information. See *Citizens United v. Federal Election Commission*, OYEZ, [http://www.oyez.org/cases/2000-2009/2008/2008\\_08\\_205](http://www.oyez.org/cases/2000-2009/2008/2008_08_205) (last visited Nov. 3, 2018).

<sup>18</sup> Richard J. Lazarus, *Advocacy Matters Before and Within the U.S. Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1488 (2008). Lazarus goes on to note “the emergence of a modern Supreme Court Bar whose expertise in Supreme Court advocacy has quietly transformed the Court’s docket and its substantive rulings.” *Id.* For a thoughtful and informed account of the practice and influence of lawyers who argue before the high Court, see KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* (1993).

<sup>19</sup> See RONALD K.L. COLLINS & SAM CHALTAIN, *WE MUST NOT BE AFRAID TO BE FREE: STORIES ABOUT FREE EXPRESSION IN AMERICA* 134–71 (2011) (discussing case history and Robert L. Carter’s lawyerly involvement in it).

<sup>20</sup> 357 U.S. 449 (1958).

Practically *and* theoretically speaking, much is lost by this myopic approach to law. By considering law from the vantage point of the lawyer,<sup>21</sup> the study of the law stands to be more holistic;<sup>22</sup> it also stands to be enriched in legal realist ways ranging from constitutional norms to commercial negotiations. A lawyer's perspective (be it in estate planning or securities law counseling) is *before* the fact of judicial review. For that matter, a good lawyer will often want to advise her client in such a way as to *avoid* judicial intervention. And when judicial review is unavoidable, it is the lawyer who must then plan the scope of a deposition, or the guidance to be given to a criminally accused, or the manner of how a case is to be briefed and argued on appeal duly attentive to existing law.

And then there is this point: as law teachers we put a lot of stock into *how* cases are decided and how opinions are structured without fully appreciating the ways in which the issues were presented *to* the Justices beforehand by the lawyers in the case. That is, even accepting a court-centric model, it might not always be clear *why* judges decided cases the way they do without the context of the ways in which the issues were first presented to them. Even after the fact of judicial review, it is lawyers who must first apply that judge-announced law to the facts of future cases. As Professor David Vladeck has rightfully noted:

[L]aw schools fail students by focusing only on opinions and not briefs. . . . [All too often, law professors fail to ask] students to read briefs; indeed, I know of no professor who ever has asked students to read briefs, except, perhaps, professors who teach appellate advocacy courses. But that use of briefs is for skills training, not to see how doctrine evolves. The only mention of briefs in law school is the mention of Brandeis brief, and that is simply a way of describing a brilliant advance by a brilliant lawyer.<sup>23</sup>

And most assuredly, doctrine does evolve in important part by how it is shaped by lawyers.

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<sup>21</sup> There is also something to be said, though not much on this occasion, about considering law from the perspective of lawmakers. See, e.g., Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

<sup>22</sup> See Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, 74 J. AM. HIST. 1013, 1032–33 (1987) (Constitutional history "requires a perspective wide enough to incorporate the relations between official producers of constitutional law, and those who at particular times and in particular circumstances resisted or reinterpreted constitutional law."). Such a holistic approach is taken in LINDA H. EDWARDS, *READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD* (2012) (discussing strategies used in classic Supreme Court briefs along with descriptions of the lawyers and the briefs they authored. Cases discussed include *Muller*, *Brown*, *Loving*, *Miranda*, *Gideon*, *Griswold*, *Furman*, *Lawrence*, and *Meritor*).

<sup>23</sup> E-mail from David Vladeck to author (Aug. 5, 2013) (on file with author).

Another reason why the work-product of lawyers is largely absent from how law is taught and examined has to do with the makeup of the professoriate in the legal academy. Many law professors come to their profession with relatively little lawyering experience. Just consider the “ideal” candidates for teaching slots—young women and men who graduated from Ivy League schools and then clerked for a federal circuit judge and thereafter clerked on the United States Supreme Court. Sometimes their résumés may include a few years in a big firm, but that is more for the “parsley effect” (i.e., for appearance’s sake). For the most part, the “better law schools” do not hire practicing lawyers with any meaningful and extended experience. They hire *scholars* and *teachers*.<sup>24</sup> But think about it: why are bright lawyers less inclined to be bright teachers and scholars? Why does the practice of law count more as a hiring disadvantage than as an indicator of potential worth?

*Scholarship*: Perhaps this concern best explains some of the bias against practicing lawyers and those who discuss their work. Their so-called “nuts-and-bolts” take on life and law, so the argument goes, blinds lawyers to the nuances of “high theory.” There is no “meta” in their understanding of law; there are no “paradigm shifts” in their views of doctrine; there is no profound “cost-benefit” appreciation of the law; there are no “normative theories” in their legal calculations; there is no “gestalt take” in their interpretation of how law evolves; and there are no “empirical prototypes” in how they do their work. That, at any rate, may be the general tenor of the bias. The problem with the bias is threefold: First, it merges the study of law with the study of philosophy, sociology, history, psychology, and economics. Law is, of course, related to all of those, but it is more . . . and also less. Second, the bias assumes that even if law is seen through such heady lenses, practicing lawyers are unable to appreciate such views of the law—they are too consumed with the mechanics of law to grasp its weighty jurisprudential side. As with so many other generalizations in life and law, this bias degrades and thereby devalues the mindset of some of the best of our lawyers. And finally, legal scholarship (of the “highest order”) is and must remain theoretical and not practical (if only to accommodate the wishes of aspirational philosophers). Where phrases like “democratic competence” and “sociology of knowledge”<sup>25</sup> spice the pages of legal scholarship, there is little desire to

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<sup>24</sup> See NEIL DUXBURY, JURISTS AND JUDGES: AN ESSAY ON INFLUENCE 43–44 (2001) (discussing character of legal scholarship among professors at elite schools).

<sup>25</sup> See Ronald K.L. Collins & David M. Skover, *The Guardians of Knowledge in the Modern State: Post’s Republic and the First Amendment*, 87 WASH. L. REV. 369, 374–80 (2012) (critiquing use of such terminology).

“ratchet down” into the rhetorical realm of the real.<sup>26</sup> Here, too, a dollop of sober modesty can be salutary: profound thinking need not be wrapped in perplexing terminology. Clarity of expression, after all, is a sign of clarity of thought, the kind typical of good lawyering.

Beyond the question of how much legal scholarship speaks to sitting judges,<sup>27</sup> there is also the question of its usefulness, if any, to practicing lawyers. Even among seasoned appellate lawyers, one wonders how much contemporary scholarship is useful to them. Additionally, if scholars ignore the litigation practices of appellate lawyers, then their scholarship’s value is diminished even more. Here again, there is the problem of the insularity of much public law scholarship and the audiences to which it is or is not directed. By that conceptual measure, it seems that too much legal scholarship neither focuses on litigation nor is concerned with informing those who practice in the area of public law.<sup>28</sup>

My primary aim here is not to debunk theoretical scholarship,<sup>29</sup> or to disparage decisional law scholarship, or even to be unduly harsh about the way law professors teach. Rather, my real concern is to *broaden* the lens through which law professors and law students study and understand law.

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<sup>26</sup> See David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), <https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> (“Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England. Professors are rewarded for chin-stroking scholarship, like law review articles with titles like ‘A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory.’”). In light of such depictions, it is all too easy to be reminded of Jonathan Swift’s Academy of Lagado and with the disdain its professoriate had for things practical. For a critical reply to such claims and portrayals, see Brian Leiter, *David Segal’s Hatchet Job on Law Schools...*, BRIAN LEITER’S LAW SCHOOL REPORTS (Nov. 20, 2011), <http://leiterlawschool.typepad.com/leiter/2011/11/another-hatchet-job-on-law-schools.html>, and Larry Ribstein, *The NYT on Law Teaching*, TRUTH ON THE MARKET (Nov. 20, 2011), <http://truthonthemarket.com/2011/11/20/the-nyt-on-law-teaching/> (“The real problem . . . is not that law professors are teaching theory rather than the way to the courthouse, but that their choices of which theories to teach pay insufficient attention to the skills and knowledge today’s and tomorrow’s market demands.”) Here again, some moderation is salutary. That is, whatever the state of education in the legal academy and the scholarship it produces, can it reasonably be denied that too often too much attention is devoted to judicial review to the exclusion of the work of lawyers?

<sup>27</sup> See, e.g., Pierre Schlag, LAYING DOWN THE LAW: MYSTICISM, FETISHISM AND THE AMERICAN LEGAL MIND 70 (1996); see also Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419, 422 (1992) (“The academic practice of writing for judges, increasingly appears as a degraded art-form used to communicate with personas who are not listening . . .”).

<sup>28</sup> See SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 5 (1992) (“Practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns, particularly when compared with the great treatises of an earlier era.”).

<sup>29</sup> In all of this, I do not deny the importance of such scholarship, if only because I have done my small share of it. See, e.g., Ronald K.L. Collins, *Outlaw Jurisprudence?*, 76 TEX. L. REV. 215 (1997) (deconstructing the thought of a leading deconstructionist).



Those of us in the legal academy could do much to enhance the educational experience by paying more attention to how the law is actually applied, construed, and developed *by lawyers*.



What to do? Well, the time is ripe for those of us in the academy to abandon our unfounded biases and open our minds to the rich world of litigation scholarship. And what exactly is that? Let me paint with a broad brush, if only for openers.

By litigation scholarship I mean scholarship focusing on the adversarial process and how practicing lawyers work with clients, strategize with each other and groups, make arguments in legal documents, examine witnesses, and interact with trial and appellate judges at the state and federal levels. To be sure, there is surely more to the lawyering process than that and I do not mean to deny the importance of things like lawyer counseling, planning, and various other kinds of non-litigation practice. Those are all areas worthy of the legal academy's serious attention. But one must start somewhere, and so I begin with a focus on litigation. To be more precise, my concerns on this occasion are with *appellate* litigation, primarily at the level of the Supreme Court of the United States. Here, too, I do not wish to devalue the importance of litigation at the federal or state intermediate appellate levels—indeed, academic attention in this area is sorely needed. The reason I have selected the niche that I have is simple: it is the world I now know best, at least at this stage in my life. As someone who has spent the past few decades working with lawyers who argue public-law cases (especially First Amendment freedom of expression ones<sup>30</sup>) before the High Court, I have learned quite a bit about that world and those who practice in it. That affiliation has greatly broadened my understanding of the law; and it has also alerted me to how deficient my knowledge was without it. Thus, have I come to this scholastic juncture.

While many scholarly pages—in articles, casebooks, and law-related books generally—have been devoted to what judges have written in historic First Amendment cases such as *Schenck v. United States*,<sup>31</sup> *Chaplinsky v.*

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<sup>30</sup> For years I was a scholar at the First Amendment Center (part of the Newseum) in Washington, D.C. While the Center is a non-profit, non-partisan, and non-litigation group committed to educating Americans about the five freedoms of the First Amendment, it once interacted quite heavily with those who practice in this area of the law. Today, I work with many First Amendment lawyers, professors, and journalists in connection with the First Amendment Salons co-hosted with the Floyd Abrams institute for Freedom of Expression.

<sup>31</sup> 249 U.S. 47 (1919). See THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 219–21 (Ronald K.L. Collins ed.) (2010) (noting the lawyers who argued the case).

*New Hampshire*,<sup>32</sup> *United States v. Stevens*,<sup>33</sup> *Brown v. Entertainment Merchants Association*,<sup>34</sup> and *United States v. Alvarez*,<sup>35</sup> relatively little has been or is likely to be said about the lawyers in those cases and even less by way of any extended analysis of how those cases and many others were briefed and argued.<sup>36</sup> In part, and as Dean Erwin Chemerinsky has observed,<sup>37</sup> this is due to the fact that until somewhat recently it was difficult to access the appellate briefs to examine the work of the lawyers in the aforementioned cases and others. Thus, previous generations of legal scholars either had to check with the Supreme Court library, the Library of Congress, a few other select law libraries, or consult the voluminous *Landmark Briefs and Arguments of the Supreme Court of the United States* once edited by Philip B. Kurland and Gerhard Casper, which only included briefs from notable cases. But that world is no longer: The more recent of Supreme Court briefs *and* transcripts of oral arguments are today readily accessible online<sup>38</sup> at sites such as SCOTUSblog. As for earlier cases, many law schools now have the Gale Group's<sup>39</sup> complete online compendium of Supreme Court Records and Briefs from 1832 to 1978. As for lawyers' profiles, Lexis-Nexis has launched Litigation Profile on Judges, Attorneys,

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<sup>32</sup> 315 U.S. 568 (1942).

<sup>33</sup> 559 U.S. 460 (2010). See Ronald K.L. Collins, *Foreword: Exceptional Freedom – The Roberts Court and the New Absolutism*, 76 ALBANY L. REV. 409, 424–25 (2013) (discussing briefs and arguments made by Patricia Millett on behalf of the Respondent).

<sup>34</sup> 564 U.S. 786 (2011). See Collins, *supra* note 33, at 431 (discussing briefs and arguments made by Paul M. Smith submitted on behalf of the Petitioner). Subsequently, Mr. Smith filed an amicus brief on behalf of the National Coalition Against Censorship in support of the Petitioner in *Butt v. Utah*, <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/12/12-348-ncamicus.pdf> (defendant prosecuted and convicted of violating state harmful materials to minors law re hand-drawn sketches of himself that were mailed to his wife and to be shared with his then five-year-old daughter).

<sup>35</sup> 567 U.S. 709 (2012). See Collins, *supra* note 33, at 435–36 (discussing briefs and arguments submitted on behalf of the Respondent).

<sup>36</sup> *But see* Ronald K.L. Collins, *NUANCED ABSOLUTISM: FLOYD ABRAMS AND THE FIRST AMENDMENT* (2013) (discussing and critiquing Floyd Abrams's manner of arguing First Amendment cases and causes); Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis' Vote in Whitney v. California*, 2005 S. CT. REV. 333 (2005) (discussing appellate lawyers and the arguments they made in *Gitlow v. New York* and *Whitney v. California*).

<sup>37</sup> This by way of a phone conversation we had in early December of 2012.

<sup>38</sup> See Chad M. Oldfather, Joseph P. Bockhorst & Brian P. Dimmer, *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189, 1189 (2012) (“The increasing availability of digital versions of court documents, coupled with increases in the power and sophistication of computational methods of textual analysis, promises to enable both the creation of new avenues of scholarly inquiry and the refinement of old ones.”).

<sup>39</sup> See *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832–1978*, GALE, <https://www.gale.com/c/making-of-modern-law-us-supreme-court-records-and-briefs-1832-1978> (last visited Feb. 2, 2019).

and Experts, which offers a rich selection of information and resources materials heretofore either unavailable or difficult to compile.<sup>40</sup>

Hence, we are now able to examine, for example, what arguments Alan Morrison made on behalf of the Litigation Group<sup>41</sup> in his amicus brief in *Bigelow v. Virginia*<sup>42</sup> and in his merits brief and oral arguments in *Virginia Pharmacy Board v. Virginia Consumers Council*.<sup>43</sup> Important as those briefs were in those cases, there was much more at stake here than any won-and-done efforts to persuade the Court move on doctrine. That is, Morrison and the Litigation Group were ongoing participants in the development of doctrine before the Supreme Court. For example, the Litigation Group filed briefs in virtually every commercial speech case, each of which bore the Morrison stamp: for example, he argued *Zauderer v. Office of Disciplinary Counsel*<sup>44</sup> and then worked with David Vladeck who argued *Edenfield v. Fane*.<sup>45</sup> Between the two of them, they filed briefs in many of the Court's commercial speech cases and in many lower court commercial speech cases as well. Thus, the Litigation Group's influence on the development of commercial speech was significant. Viewed from this vantage point, we can better understand how the modern-day commercial speech doctrine developed not merely from the detached mind of Justice Harry Blackmun, the author of *Bigelow* and *Virginia Pharmacy*, but from the lawyering skills of a public-interest advocates.<sup>46</sup>

There is historical value<sup>47</sup> in examining the appellate work of lawyers in such cases. It can help us to better understand how ideas, doctrines, and

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<sup>40</sup> See *Litigation Profile Suite*, LEXISNEXIS, <https://advance.lexis.com/lpshome/> (last visited Feb. 2, 2019).

<sup>41</sup> See *Litigation Initiative*, PUBLICCITIZEN, <http://citizen.org/our-work/litigation> (last visited Feb. 2, 2019) ("The Litigation Group is the litigating arm of Public Citizen. The Group works on cases at all levels of the federal and state judiciaries, and specializes in cases involving regulation, consumer rights, access to the courts, open government, and the First Amendment, including Internet free speech.")

<sup>42</sup> Brief for Amici Curiae Public Citizen and Center for Women Policy Studies, *Bigelow v. Virginia*, 421 U.S. 809 (1975) (No. 73-1309), 1974 WL 186260.

<sup>43</sup> Brief of Appellees, *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (No. 74-895), 1975 WL 173826; Oral Argument at 22:50, *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (No. 74-895), [https://apps.oyez.org/player/#/burger4/oral\\_argument\\_audio/16084](https://apps.oyez.org/player/#/burger4/oral_argument_audio/16084) via @oyez.

<sup>44</sup> Brief of Appellant, *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985) (No. 83-2166), 1984 WL 565570. David Vladeck, then with the Litigation Group, did a lot of the work on the brief filed with the Court.

<sup>45</sup> Brief of Respondent, *Edenfield v. Fane*, 507 U.S. 761 (1993) (No. 91-1594), 1992 WL 547197.

<sup>46</sup> See Alan Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189 (2004).

<sup>47</sup> See R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482 (1994).

paradigms in the law originated and developed.<sup>48</sup> In that regard consider this: For all that has been published on *Whitney v. California*,<sup>49</sup> before 2010 relatively little of critical worth was written about how the lawyers for Anita Whitney argued her case at the trial level.<sup>50</sup> More troublesome still is that historians and others have paid negligible attention to the appellate briefs prepared on her behalf, which along with other materials could help to explain Justice Brandeis's curious concurrence in that case.<sup>51</sup> So, too, with the briefs filed in *Lovell v. Griffin*<sup>52</sup> (a Jehovah's Witnesses' case), especially the amicus one filed by the famed ACLU by Osmond Fraenkel<sup>53</sup> assisted by Francis Biddle,<sup>54</sup> the future Attorney General.

There is more: Simply consider something else that has been nearly lost to history, namely, the farsighted brief prepared in 1975 by then Professor Hans Linde<sup>55</sup> on behalf of the Oregon Newspaper Publishers Association. In his brief to the Oregon Supreme Court Linde successfully argued that limits on political campaign spending violated the free speech clause of the state constitution<sup>56</sup>—this before *Buckley v. Valeo*<sup>57</sup> was handed down. By the same measure, much stands to be learned about the development of First Amendment law and campaign financing by tracking and examining the

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<sup>48</sup> See, e.g., Ronald K.L. Collins & Jennifer Friesen, *Looking Back on Muller v. Oregon*, A.B.A. J., April 1983, at 294, 294–98, 472–77 (discussing history and importance of the “Brandeis Brief”).

<sup>49</sup> *Whitney v. California*, 274 U.S. 357 (1927).

<sup>50</sup> The exception was HAIG BOSMAJIAN, ANITA WHITNEY, LOUIS BRANDEIS, AND THE FIRST AMENDMENT 90–124 (Fairleigh Dickinson Univ. Press ed., 2010). Admirable as its treatment of the lawyer's role in the *Whitney* trial, the book offered no similar treatment of the appellate work in the case.

<sup>51</sup> *But see* Collins & Skover, *supra* note 36, at 349–72, 379–86 (discussing and critiquing appellate briefs and examining the reasons for J. Brandeis's concurrence).

<sup>52</sup> *Lovell v. Griffin*, 303 U.S. 444 (1938). The last Jehovah's Witnesses' case to be decided by the Court was *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) (a case not argued by Hayden Covington but by Blanca Bianchi de la Torre).

<sup>53</sup> Brief and Motion on Behalf of American Civil Liberties Union as Amicus Curiae, *Lovell v. Griffin*, 303 U.S. 444 (1938) (No. 391), 1938 WL 39268. Among other things, he argued 26 cases in the Supreme Court, including *Bridges v. California*, 314 U.S. 252 (1941), and *DeJonge v. Oregon*, 299 U.S. 353 (1937). See ROGER K. NEWMAN, *Osmond K. Fraenkel*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 200 (Roger K. Newman ed., 2009) [hereinafter BIOGRAPHICAL DICTIONARY].

<sup>54</sup> See SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 108 (Oxford University Press ed., 1990). Biddle was a law clerk to Justice Holmes and thereafter, among other things, a Third Circuit Judge, Solicitor General of the United States, and then, in 1941, he served as U.S. Attorney General (he drafted Exec. Order No. 9066 re the Japanese Internment) and later as served a judge at the Nuremberg Trials. See GREG ROBINSON, *Francis Biddle*, in BIOGRAPHICAL DICTIONARY, *supra* note 53, at 43–44.

<sup>55</sup> Re Hans Linde and his career in American law, see HANS LINDE, INTELLECT AND CRAFT: THE CONTRIBUTIONS OF HANS LINDE TO AMERICAN CONSTITUTIONALISM 3–8 (Robert F. Nagel ed., 1995); *Symposium on the Work of Justice Hans Linde*, 70 OR. L. REV. 679, 679–906 (1991). Full disclosure: I clerked for the Judge in 1981.

<sup>56</sup> See *Deras v. Myers*, 272 Or. 47 (1975).

<sup>57</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

Supreme Court cases argued by James Bopp,<sup>58</sup> who has argued *Wisconsin Right to Life v. Federal Election Commission*,<sup>59</sup> *Randall v. Sorrell*,<sup>60</sup> *Republican Party of Minnesota v. White*,<sup>61</sup> and who wrote the jurisdictional brief in *McCutcheon v. Federal Elections Commission*<sup>62</sup> along with the Republican National Committee merits brief<sup>63</sup> in that case, among other cases.

Scholars and students of federalism would find much of interest in the oral arguments of Solicitor General Robert Bork when he *defended*, albeit unsuccessfully, Congress's expansive powers in *National League of Cities v. Usery*.<sup>64</sup> "I think this is a very unintrusive statute," said General Bork in his exchange with Chief Justice Burger. "[T]here can be no doubt," he added, "that interstate is involved when state and local governments in 1971 purchased goods and services worth \$135 billion, which was at the time 12% of our gross national product . . ."<sup>65</sup> And then, in an exchange with Justice Rehnquist, General Bork further added: "When this Court has over the centuries attempted to find a formula for confining the Commerce Clause, [it] has never found an adequate formula. I suggest to you that you will never find a mechanical bright line distinction that will tell Congress, 'you may do

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<sup>58</sup> Among other positions, Mr. Bopp has served as the general counsel for National Right to Life and as the special counsel for Focus on the Family.

<sup>59</sup> *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006).

<sup>60</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>61</sup> *Republican Party v. White*, 536 U.S. 765 (2002).

<sup>62</sup> Jurisdictional Statement, *McCutcheon v. FEC*, 133 S. Ct. 1242 (2014) (No. 12-536), 2012 WL 5395232. Mr. Bopp's role in this case and other cases is discussed in RONALD COLLINS & DAVID SKOVER, *WHEN MONEY SPEAKS: THE MCCUTCHEON CASE, CAMPAIGN FINANCE LAWS & THE FIRST AMENDMENT* (2014) (ebook).

<sup>63</sup> See Brief on the Merits for Appellant Republican National Committee, *McCutcheon v. FEC*, 572 U.S. 185 (2014) (No. 12-536), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-536\\_pet\\_rnc.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-536_pet_rnc.authcheckdam.pdf). Much the same could just as easily be said of Professor Joel Gora's work on the area by way of his First Amendment challenges to campaign finance like those he contested on behalf of the ACLU in *Buckley v. Valeo*, 424 U.S. 1 (1976); *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Wisconsin Right to Life v. Federal Election Commission*, 546 U.S. 410 (2006); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007); and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In all of these cases, the ACLU filed amicus briefs which were co-authored by Professor Gora. See generally Joel Gora, *Campaign Finance Reform: Still Searching Today for a Better Way*, 6 J.L. & POL'Y 137 (1997-1998).

<sup>64</sup> 426 U.S. 833 (1976), *overruled in* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>65</sup> Oral Argument at 49:23, *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), [http://www.oyez.org/cases/1970-1979/1974/1974\\_74\\_878](http://www.oyez.org/cases/1970-1979/1974/1974_74_878).

this to the states but not do that.”<sup>66</sup> To be sure, there is more to the story, but such snippets reveal that history can reveal many an important and forgotten idea or argument.

Additionally, there is that category of legal arguments that was set out in a brief but was not recognized by the U.S. Supreme Court, for whatever reason. Such arguments, like judicial dissents, can prove immensely important to lawyers and judges in future cases. Thus, there is both historical and practical value in such forms of litigation scholarship. There is also educational value—that is, how we in the legal academy teach law students how a case is actually argued mindful of the constraints and opportunities available to lawyers as they argue a given case at a particular time.

Mindful of the importance of such history, the study of First Amendment law would surely be enhanced if, for example, scholars considered and students studied Floyd Abrams’s involvement in the *Pentagon Papers Case*,<sup>67</sup> and likewise how he thereafter successfully argued *Landmark Communications v. Virginia*<sup>68</sup> and other free expression cases.<sup>69</sup> And then there is the need to examine and critique<sup>70</sup> the appellate work done by members of the legal academy, for example:

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<sup>66</sup> *Id.* at 01:03:01.

<sup>67</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). See FLOYD ABRAMS, *SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT 1–61* (2005) (discussing how he worked with Professor Alexander Bickel in preparing for and briefing case).

<sup>68</sup> 435 U.S. 829 (1978). See COLLINS, *supra* note 36, at 15–26 (discussing Abrams’s litigation strategy).

<sup>69</sup> Mr. Abrams discusses his litigation practices in his book *FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT* (2013). See also COLLINS, *supra* note 36.

<sup>70</sup> See Adam Liptak, *Friend-of-Court Filings Mushroom, and a Law Professor Takes Issue*, N.Y. TIMES (Nov. 14, 2011), <https://www.nytimes.com/2011/11/15/us/law-professor-takes-aim-at-supreme-court-filings.html> (“In the [2010-2011] term that . . . , the Supreme Court decided about 80 cases after briefing and argument. By Professor [Richard] Fallon’s count, it received 56 briefs from groups of law professors. In the term that ended in 1986, by contrast, the court decided twice as many cases, but it received only three such briefs.”). The article went on to express some reservations Professor Fallon and others had about the quality of some of the amicus briefs being submitted by and signed onto by law professors. See Richard Fallon, Jr., *Scholars’ Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012) (critiquing the practice of law professors signing onto amicus briefs), [http://www.law.nyu.edu/ecm\\_dlv2/groups/public/@nyu\\_law\\_website\\_academics\\_colloquia\\_legal\\_political\\_and\\_social\\_philosophy/documents/documents/ecm\\_pro\\_070012.pdf](http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website_academics_colloquia_legal_political_and_social_philosophy/documents/documents/ecm_pro_070012.pdf); see also Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public*, 81 B.U. L. REV. 101, 104 (2001) (proposing “[some] conventions for law professors who render opinions in the course of public debate, [arguing that] when academics offer public opinions in their professional capacities they should use the same care and have the same expertise called for in their published work, or else should disclose that they are adhering to a lesser standard”).

- Thomas Emerson's merits briefs in *Sweezy v. New Hampshire*<sup>71</sup> and *Griswold v. Connecticut*,<sup>72</sup> and his amicus brief in *Sweatt v. Painter*,<sup>73</sup>
- Herbert Wechsler's brief in *New York Times Co. v. Sullivan*,<sup>74</sup>
- Mel Nimmer's brief in *Cohen v. California*,<sup>75</sup>
- Laurence Tribe's brief<sup>76</sup> in *Bowers v. Hardwick*<sup>77</sup> and *Rust v. Sullivan*<sup>78</sup> (then Deputy Solicitor General John Roberts was on the government's brief in *Rust*),
- the amicus brief submitted by Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland and Kathleen Sullivan in *Romer v. Evans*,<sup>79</sup>
- Randy Barnett's co-authored amicus brief in *United States v. Lopez*,<sup>80</sup>
- Erwin Chemerinsky's brief in *Tory v. Cochran*,<sup>81</sup>
- the amicus brief filed by Eugene Volokh and James Weinstein in *United States v. Alvarez*,<sup>82</sup>

71 Brief for Appellant, 354 U.S. 234 (1957) (No. 175).

72 Brief for Appellants, 381 U.S. 479 (1965) (No. 496); see Jonathan Entin, *The Law Professor as Advocate*, 38 CASE W. RES. L. REV. 512, 515–22 (1987) (discussing Emerson's role in litigating Supreme Court cases).

73 Brief of Amici Curiae in Support of Petitioner, 339 U.S. 629 (1950) (No. 44).

74 Brief for Petitioner, 376 U.S. 254 (1964) (No. 39); see David A. Anderson, *Wechsler's Triumph*, 66 ALA. L. REV. 229 (2014).

75 Brief for Appellant, 403 U.S. 15 (1971) (No. 70-299).

76 Kathleen Sullivan was his co-counsel. For Tribe's involvement in the case, see JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 285–303 (2001) and LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* 252, 254, 258–59, 260–61, 267, 292, 311 (2012).

77 Brief for Respondent, 478 U.S. 186 (1986) (No. 85-140); see also Linda Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 885, 900–07 (2010) (discussing briefs filed in *Hardwick*).

78 Brief for Petitioners, 500 U.S. 173 (1991) (No. 89-1391).

79 Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, & Kathleen M. Sullivan, as Amici Curiae in Support of Respondents, 517 U.S. 620 (1996) (No. 94-1039), discussed in Andrew Koppelman, *Romer v. Evans and Invidious Dissent*, 6 WM. & MARY BILL RTS. J., 1, 117 (1997) (“[The majority’s] argument seems to draw on an amicus brief filed in the Supreme Court by Laurence Tribe and four other eminent constitutional law scholars (including Ely).”).

80 Amicus Brief on Behalf of: Academics for the Second Amendment, 514 U.S. 549 (1995) (No. 93-1260).

81 Petitioners' Brief on the Merits, 544 U.S. 734 (2005) (No. 03-1488); see also Amicus Curiae Brief in Support of Respondent by Members of the U.S. Congress, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), discussed in Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004).

82 Brief of Professors Eugene Volokh & James Weinstein as Amici Curiae in Support of Petitioner, 567 U.S. 709 (2012) (No. 11-210). Subsequently, Professor Volokh represented the petitioner in *Butt v.*

- the brief filed by Jack Balkin et al. in *Shelby County v. Holder*,<sup>83</sup>
- the influential amicus brief submitted on behalf of Walter Dellinger and authored by Irving Gornstein<sup>84</sup> in *Hollingsworth v. Perry*,<sup>85</sup>
- the amicus brief filed by Seth Waxman on behalf of Charles Fried and Robert Post in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,<sup>86</sup>
- in the securities law world, there is the virtually unnoticed brief filed by Professor Tribe in *Bulldog Investors General Partnership v. Galvin*<sup>87</sup> wherein it was argued that a state ban on truthful speech by an issuer of unregistered securities to members of the

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*Utah, cert denied*, 568 U.S. 1192 (2013) (defendant prosecuted and convicted of violating state harmful materials to minors law re hand-drawn sketches of himself that were mailed to his wife and to be shared with his then five-year-old daughter), <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/12/12-348-petition.pdf>. Professor Volokh's many and impressive briefs are alone worthy of a scholarly article. See, e.g., Brief Amici Curiae of Eagle Forum et al., *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014) (challenging constitutionality of criminal intimidation law as applied to a man who criticized a sitting judge re a child custody dispute in which he was involved); see also Brief for Respondent, *Matal v. Tam*, 137 S. Ct. 1744 (2017) (No. 15-1293).

<sup>83</sup> Brief of Amicus Curiae of Constitutional Scholars & Constitutional Accountability Center in Support of Respondents, *Shelby Cty. v. Holder*, (2013) (No. 12-96) (Jack Balkin, Guy-Uriel Charles, Luis Fuentes-Rohwer, and Adam Winkler).

<sup>84</sup> See Brief for Walter Dellinger as Amicus Curiae in Support of Respondents on the Issue of Standing at 34, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144).

<sup>85</sup> *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). Chief Justice John Roberts's majority opinion seems to be heavily influenced by the arguments advanced in detail in the Gornstein amicus brief.

<sup>86</sup> Brief for Amici Curiae Charles Fried & Robert C. Pose in Support of Neither Party, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps*, 138 S. Ct. 2448 (2018) (No. 16-1466).

<sup>87</sup> Petition for Writ of Certiorari, *Bulldog Inves. Gen. P'ship v. Galvin*, 566 U.S. 987 (2012) (No. 11-954).

A book that is long overdue is one that would document and discuss the roles played by noted First Amendment lawyers in developing our free speech law—lawyers such as Theodore Schroeder, Walter H. Pollak, Leonard B. Boudin, Hayden Covington, Osmond K. Fraenkel, Ephraim London, Stanley Fleishman, Jack Greenberg, William Kunstler, Bruce Ennis, John W. Weston, Floyd Abrams, and Eleanor Holmes Norton (she was the first woman to argue a First Amendment free expression case on behalf of a rights claimant in the Supreme Court: *Carroll v. Princess Anne*, 393 U.S. 175 (1968)) and Robert Corn-Revere, among others.

By way of another book idea, someone might select, say, twelve noted scholars who submitted briefs to the Supreme Court and discuss how they argued the law and how the Court ultimately interpreted it. See, e.g., Brief of Law Professors Erwin Chemerinsky and Adam Winkler, as Amici Curiae in Support of Petitioner, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). On a related front, there is also the line of cases in which renowned scholars argued cases *before* they began teaching. For example, Kent Greenawalt (a noted professor of constitutional law, criminal law and jurisprudence) originally argued *United States v. Orito*, 413 U.S. 139 (1973) (an obscenity case argued and reargued) on behalf of the government. In a 5-4 judgment, the government prevailed.



public based upon their financial status violated the First Amendment,

- the amicus briefs in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* filed by the Solicitor General's Office,<sup>88</sup> Evan Young<sup>89</sup> (for Cake artists), Robert Corn-Revere<sup>90</sup> (for the First Amendment Lawyers Association), Steven Shiffrin<sup>91</sup> (for Freedom of Speech Scholars), Anna P. Engh<sup>92</sup> (for National Women's Law Center), and John Paul Schnapper-Casteras<sup>93</sup> (for NAACP Legal Defense & Education Fund), and the certiorari petition filed in 2018 by C. Boyden Gray in *Klein v. Oregon Bureau of Labor and Industries*,<sup>94</sup> and
- finally, there is much to be gained by scholars exploring the work-product of federal government lawyers such those who urged a court to sanction a local police department for violating citizens' First, Fourth and Fourteenth Amendment rights.<sup>95</sup>

<sup>88</sup> Brief for the U.S. as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>89</sup> Brief for Cake Artists as Amici Curiae in Support of Neither Party, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>90</sup> Brief of Amicus Curiae the First Amendment Lawyers Ass'n in Support of Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>91</sup> Brief for Freedom of Speech Scholars as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>92</sup> Brief of the Nat'l Women's Law Ctr. & Other Groups as Amici Curiae in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>93</sup> Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>94</sup> Petition for Writ of Certiorari, *Klein v. Oregon Bureau of Labor & Indus.*, 289 Ore. App. 507 (2017) (another cake case).

<sup>95</sup> See Statement of Interest of the U.S., *Sharp v. Balt. City Police Dep't*, No. 1:11-cv-02-888BEL (D. Md., Jan. 10, 2012), at 1, available at [http://www.justice.gov/crt/about/spl/documents/Sharp\\_SOI\\_1-10-12.pdf](http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf). In this statement, the lawyer for the Civil Rights Division of the Attorney General's office urged a federal district court to sanction a local police department for abridging First, Fourth, and Fourteenth Amendment rights. In relevant part, Mr. Thomas Perez of the Civil Rights Division argued:

This litigation presents constitutional questions of great moment in this digital age: whether private citizens have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate citizens' Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States urges this Court to answer both of those questions in the affirmative. The right to record police officers while performing duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution. They are consistent

The scope of scholarly possibilities broadens the more one reflects on the range and value of this kind of study. For example, such scholarship might focus on the appellate work done by justices or judges *before* they were elevated to the bench. In this respect, consider the brief John Roberts authored when he was at Hogan and Hartson and represented the petitioner in *Alaska Department of Environmental Conservation v. United States Environmental Protection Agency*.<sup>96</sup> Though he did not prevail,<sup>97</sup> one might ask how his views of federalism as argued in his brief might fare in today's legal climate. Admittedly, he was an advocate. But that fact alone does not discount the possible merit of the arguments he tendered in that case and the value of scrutinizing such arguments under then existing law and likewise under current law. There are also the brief and arguments that then Assistant Solicitor General, Samuel Alito, tendered in the case of *Federal Communications Commission v. League of Women Voters of California*.<sup>98</sup> Here again, though he argued the case as a government lawyer, nonetheless there are some noteworthy arguments he advanced that might warrant future scrutiny—for example, the distinctions he made in that case between commercial broadcasting and public broadcasting.<sup>99</sup> In both cases, the focus is on the arguments advanced and what they tell us about how we might or might not conceptualize any variety of areas of law. By the same measure, there is much to be gained by studying the work done by the attorneys in the Solicitor General's Office and how that work directs the development of the law in the Supreme Court.<sup>100</sup>

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with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.

*Id.* at 1 (noting enforcement of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which authorizes the Attorney General to file lawsuits seeking court orders to reform police departments engaging in a pattern or practice of violating citizens' federal rights. The United States also enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964.). Notably, this Statement of Interest was subsequently relied upon in a case involving the same general issue but in a different county in Maryland. *See Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015) (Robert Corn-Revere was the attorney for the plaintiff).

<sup>96</sup> Brief for Petitioner, *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004) (No. 02-658) (holding the EPA has the authority under the Clean Air Act to overrule state agencies re whether a company is using the "best available controlling technology" to prevent pollution).

<sup>97</sup> *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004). The vote was 5-4 with Justice Kennedy in dissent joined by Chief Justice Rehnquist and Justices Scalia and Thomas.

<sup>98</sup> *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>99</sup> *See Professor Lisa McElroy Examines U.S. Supreme Court Justice Samuel Alito's Historic Oral Arguments on C-SPAN Radio*, EARL MACKE (Jan. 2, 2013), [http://earlemacklaw.drexel.edu/news/drexel\\_law\\_news/in\\_the\\_news/2013-Archive/Mcelroy-Alito-01022013/](http://earlemacklaw.drexel.edu/news/drexel_law_news/in_the_news/2013-Archive/Mcelroy-Alito-01022013/).

<sup>100</sup> *See, e.g., RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE INFLUENCE AND JUDICIAL DECISIONS* 134–36 (2012); *see also*

If scholars pay relatively little attention to the work of lawyers, especially appellate lawyers, then they are unlikely to have a rich appreciation about how our system of justice actually works. Take, for example, the elite bar of lawyers who litigate cases before the high Court. What do we know about that bar and their impact on certain areas of law?<sup>101</sup> Who are the main players in it? What do we know about the allocation of cases by the various firms?<sup>102</sup> What about the way a case finds its way to the Supreme Court and the role played by lawyers in the process?<sup>103</sup> Though much needs to be done to answer such questions, we do have some important information tendered by Professor Richard Lazarus, who in an important 2008 article noted:

The [modern] transformation of the [Supreme Court] Bar began when Sidley Austin hired Rex Lee, following his resignation as President Ronald Reagan's first Solicitor General in the summer of 1985, to create a Supreme Court

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Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. STATE L.J. 1183, 1183 (2014).

By the same token, much is to be learned about the development of the law by examining the appellate work of certain organizations that submit briefs to the Supreme Court. See Tony Mauro, *A Strong Supreme Court Term for Business*, NATIONAL L.J., (2012) (the litigation arm of the Chamber of Commerce "counted eight wins in the 13 cases last term in which it filed amicus briefs. In four of the other cases, the Court did not reach the issue that the [Chamber of Commerce] briefed, and in the 13<sup>th</sup> case, the Chamber did not take a side."). In the October 2006 Term, the Chamber of Commerce won "thirteen out of fifteen cases, which appears to be directly traceable to the rise of the modern Supreme Court Bar." Lazarus, *supra* note 18, at 1490–91.

<sup>101</sup> See Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court*, U. ILL. L. REV. 231, 232 (2012) ("[T]he NEPA cases . . . suggest that there is an increasing risk that the Court's [environmental] docket and rulings are being skewed in favor of commercial interests because of the disproportionate ability of those interests to retain expert Supreme Court advocates.").

<sup>102</sup> See, e.g., Lazarus, *supra* note 18, at 1499–501 (providing a general overview of some of the leading firms who argued before the Court as of 2008).

<sup>103</sup> The statistics are striking. While the number of merits cases has roughly declined by one-half during the past three decades, the influence of the expert Supreme Court bar over the plenary docket during this same time period has increased approximately tenfold; expert practitioners represent the successful petitioner at the jurisdictional stage in more than fifty percent of the cases.

Richard J. Lazarus, *Docket Capture at the High Court*, 199 YALE L.J. ONLINE 89, 90 (2009). Moreover:

Interviews with former clerks confirm the obvious: the clerks pay special attention to the petitions filed by prominent Supreme Court advocates and to the amicus briefs those advocates succeed in having filed in support of review. When they see the name of an attorney whose work before the Court they know, at least by reputation, that attorney's involvement in the case, by itself, conveys an important message about the significance of the legal issues being presented and the credibility of the assertions being made.

Lazarus, *supra* note 18, at 1526. And more needs to be said about the entrepreneurial and/or ideological zeal with which some of the lawyers in leading cases round up clients and ensure their own roles as lead counsel, etcetera, in important appellate cases. See generally MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 3–4 (2013).

and appellate practice in Sidley's D.C. office. Lee set out to establish a highly visible Supreme Court and appellate practice that could provide to private sector clients the kind of outstanding expert advocacy that the Solicitor General's Office had provided federal agencies. Lee was enormously successful from the outset. During the second half of October Term 1985, almost immediately after leaving office, Lee presented two oral arguments. And then during October Term 1986, the first full Term after Lee's post-government recusal period had expired, he presented oral argument in six different cases before the Court—then a strikingly high number for a private sector lawyer and effectively matching the number of arguments typically presented by the Solicitor General himself. And, in every case but one, Lee represented the petitioner who had successfully obtained Supreme Court review.<sup>104</sup>

That insight by the Sidley Austin law firm has proven to be the template for much of the modern Supreme Court bar practice. So far as that elite bar is concerned, how many people of color argue cases before the high Court? Is there any corresponding effort to improve the quality of advocacy for the criminally accused that appear before the Court?<sup>105</sup> And what about women and their advocacy before the High Court? As to the last point, we have the following observation concerning the workings of the Supreme Court bar:

Much like the Justices who sit on the Court and the law clerks who serve the Justices, the advocates who appear before the Court represent a fairly homogeneous group primarily consisting of white males. For example, one study concluded that, for the 1993 to 2001 Terms, only 150 (13.91 percent) of the 1,078 attorneys arguing cases orally before the U.S. Supreme Court were women, even though 2000

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<sup>104</sup> Lazarus, *supra* note 18, at 1498 (footnotes omitted). Notably, Lazarus adds: "In one single Term before the Supreme Court, the former Solicitor General had accomplished what no one had done for decades and what the Bar had assumed was no longer economically feasible: he had developed a highly profitable Supreme Court practice on behalf of private sector corporate business clients." *Id.* at 1498–99.

<sup>105</sup> The Court, Professor Lazarus has argued:

[S]hould itself take steps to reduce the advocacy gap. [It] can do so by appointing expert Supreme Court advocates in criminal defense cases where counsel is lacking more frequently. And the Court can promote better legal arguments by more readily agreeing to allow organizations represented by outstanding advocates to present oral argument as *amicus curiae*.

*Id.* at 1562. See also Lazarus, *supra* note 103, at 95–97 (suggesting for reforms at the jurisdictional stage of review at the Supreme Court).

statistics put the percent of female members in the national bar at 27 percent.<sup>106</sup>

Why is this so?<sup>107</sup> What percentage of the women lawyers are government lawyers? And what do we in the legal academy know about the work-product of such important Supreme Court litigators such as Patricia Millett<sup>108</sup> and other notable female members of that bar?<sup>109</sup> Or to echo an earlier point, what do we know about the *history* of women lawyers such as Olive Rabe who in 1929 argued *United States v. Schwimmer*?<sup>110</sup> The answer: we know relatively little about that history and how the women of the Supreme Court bar have argued any variety of cases.<sup>111</sup>

There is one more thing: The arc of legal education in America is changing. That is, the curve of legal education is moving away from doctrinal/analytical/theoretical archetypes and ever more towards experiential or practice-oriented forms of education. To be sure, there will always be black-letter law and bar exams and all that entails. But such forms of education will likely exist in the caldron of experiential kinds of teaching. If such a change should occur, it could be only a matter of time before it has a spillover effect on legal scholarship. In that brave new world, the scholarship of the likes of Ronald Dworkin, Bruce Ackerman, John Rawls,

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<sup>106</sup> RICHARD SEAMON, ANDREW SIEGEL, JOSEPH THAI & KATHRYN WATTS, *THE SUPREME COURT SOURCEBOOK* 597–98 (2013).

<sup>107</sup> See Tammy A. Sarver, Erin B. Kaheny & John J. Szmer, *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238, 242 (2008).

<sup>108</sup> See *Patricia Millett Confirmed to U.S. Court of Appeals for the D.C. Circuit*, AKIN GUMP (December 10, 2013), <https://www.akingump.com/en/news-insights/patricia-millett-confirmed-to-u-s-court-of-appeals-for-the-d-c.html> (Ms. Millett had argued 31 cases before the Supreme Court). In June 2013, President Obama nominated Ms. Millett for a seat on the Court of Appeals for the District of Columbia, for which the Senate confirmed her. *Id.*

<sup>109</sup> See generally Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 1 J. LEGAL METRICS 561, 575 (2013) (listing top 11 women Supreme Court litigators). Maureen Mahoney, a former law clerk to Justice Rehnquist and now a retired partner at Latham & Watkins, has herself had a notable impact on the development of law in the Supreme Court. See LATHAM & WATKINS LLP, <http://www.lw.com/people/maureen-mahoney> (last visited Nov. 7, 2018); Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on Nepa's Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 231, 251 (2012) (noting Mahoney's influence at the jurisdictional stage in an important environmental law case).

<sup>110</sup> See generally *United States v. Schwimmer*, 279 U.S. 644 (1929). Apart from *pro se* cases, Olive Rabe was the first woman to argue a free speech case in the Court, though the case was not formally decided on First Amendment grounds. See Ronald Collins & David Hudson, *Remembering Two Forgotten Women in Free-speech History*, FIRST AMEND. CTR. (June 27, 2008) (no longer available on Internet).

<sup>111</sup> See Ronald K.L. Collins, *38 Women Who Argued First Amendment Free Expression Cases in the Supreme Court: 1880-2018*, FIRST AMEND. NEWS (Aug. 17, 2018), <https://concurringopinions.com/archives/2018/08/fan-199-first-amendment-news-special-issue-38-women-who-argued-first-amendment-free-expression-cases-in-the-supreme-court-1880-2018.html>.

Roberto Unger, and Joseph Raz (impressive as it was) may begin to vanish<sup>112</sup> (at least for a time) like the memories of those who drank from the River of Lethe.<sup>113</sup> We tend to forget the past; we tend to embrace the present; and we move forward as the conventions of our times point us.

Holmes put it laconically: “When we study law we are not studying a mystery but a well-known profession.”<sup>114</sup> But that it were so. If truth be revealed, much legal scholarship seems more interested in the mystery of the law than in the profession of the law—i.e. with how practitioners profess it. In the end, law (like life) is what we make it. The question is always, of course, who exactly is that *we*? Incredibly, too many in the academy have lost sight of them, both in our scholarship and teaching. Bringing lawyers back into that *we* perspective can only augment the value of legal scholarship, while at the same time enhancing the worth of legal education generally. To that end, my aim is to further inform legal scholars of the importance of such scholarship, to alert them to the rich possibilities for academic work in this area, and to suggest to them what this portends for legal education. The hope is that this will begin a vibrant and insightful dialogue concerning a long overdue and long neglected area of study. If so, the law may seem less mysterious and more meaningful.

All of which brings us back to Hayden C. Covington, one of the most influential figures in the history of First Amendment law. Beyond the numerous First Amendment cases he argued or co-argued in the Supreme Court, he also prevailed on behalf of the Witnesses in over “100 decisions handed down by various state supreme courts, and . . . also triumphed in dozens of lower federal court rulings.”<sup>115</sup>

Even so, we know relatively little about Hayden Covington. One will look long and hard to find his name in any First Amendment treatise or casebook. Simply consider the following observation made by Jennifer Jacobs Henderson in her PhD dissertation on the Witnesses and their First Amendment cases:

Hayden Covington, the Witnesses’ lawyer for all but one of the literature distribution and permit cases that reached the Supreme Court, is strangely absent from discussion in

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<sup>112</sup> Of course, I do not applaud this possible scenario as I think that the study of law, like the study of liberal arts generally, should not be confined to skills training simply but rather includes knowledge of matters related to the human condition more generally. By this measure, Plato’s *Laws* is as much a book of philosophy as it is one about rules and regulations concerning the governance of the *polis*.

<sup>113</sup> *Lethe* was one of the five rivers in Hades that flowed past the cave of Hypnos and into the Underworld. As Greek mythology has it, those who drank from Lethe’s waters lost all memory. See HARALD WEINRICH, *LETHE: THE ART AND CRITIQUE OF FORGETTING* 6–7 (Steven Rendall trans., 2004).

<sup>114</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

<sup>115</sup> SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 127 (2000).

[virtually all] First Amendment analyses. It is as if the cases were cultivated, argued and won without legal counsel. The focus of these works is clearly how the Jehovah's Witnesses cases shaped the law, not on who shaped the law.<sup>116</sup>

In light of this and what I have written above, now we have some idea why the litigation aspect of Supreme Court cases is so strikingly absent from contemporary legal scholarship. What remains is the story of Hayden Covington, a sketch of which follows.



*Covington's tireless efforts helped usher in a new era in American constitutional jurisprudence, the "rights revolution" that reached its peak in the 1960s.*

– Shawn Francis Peters<sup>117</sup>

Consider the following mainstays of modern First Amendment and constitutional law:

- The incorporation doctrine<sup>118</sup>
- The state action doctrine as applied to the First Amendment<sup>119</sup>
- The preferred position doctrine<sup>120</sup>
- The least restrictive means doctrine<sup>121</sup>

What do those four cases in which those doctrines were formulated have in common? Was it that the same jurist wrote all of the opinions in them? Was that it? To ask the question is to answer it. The common denominator in these cases, among others, is that the same man (Hayden Covington) argued all of them and all of them involved the same rights claimants (Jehovah's

<sup>116</sup> Jennifer Jacobs Henderson, *Hayden Covington, the Jehovah's Witnesses and Their Plan to Expand First Amendment Freedoms* (July 29, 2002) (unpublished Ph.D dissertation, University of Washington) 30.

<sup>117</sup> SHAWN FRANCIS PETERS, *Hayden Covington*, in *BIOGRAPHICAL DICTIONARY*, *supra* note 53, at 132 [hereinafter PETERS].

<sup>118</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>119</sup> *See generally* *Marsh v. Alabama*, 326 U.S. 501 (1946). *See also* *Tucker v. Texas*, 326 U.S. 517, 520 (1946) (companion case reversing trespass conviction regarding door-to-door proselytizing in a town owned by an agency of the federal government).

<sup>120</sup> *Jones v. City of Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting), *vacated*, 319 U.S. 103 (1943) (per curiam).

<sup>121</sup> *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

Witnesses).<sup>122</sup> “In the mid-twentieth century, Covington handled as many as 50 major cases every year involving the civil liberties of Jehovah’s Witnesses, who frequently faced persecution because of their uncommon beliefs and often provocative behavior.”<sup>123</sup> There is more to the story, including Covington’s role in *West Virginia State Board of Education v. Barnette*.<sup>124</sup> But that is to get ahead of the man and his legacy; more backdrop is needed.

In 1933, Hayden Covington was admitted to the Texas bar. His admission preceded his completion of law school at the San Antonio Bar Association School of Law (later St. Mary’s University Law School). This son of a Texas Ranger spent his early practice defending insurance companies. But after attending a Witness convention<sup>125</sup> in New York and after arguing some early Witnesses’ cases in Texas, he soon became one of its lawyers, and then one of its lead attorneys.<sup>126</sup> It was an era of great hostility towards the Witnesses. “Between 1933 and 1951, there were 18,866 arrests of American Witnesses and about 1,500 cases of mob violence against them.”<sup>127</sup> Such hostility, as Covington later recalled, was both extreme and life threatening:

[In Connersville, Indiana it] was a mob situation that occurred while we were trying that seditious conspiracy case in Connersville, a hot bed of American Legion action and they ruled the whole town. In the Connersville case I used Brother Franz as my witness and then the jury was put on and it was necessary for me to get to out the case and I finished the argument of the case at Connersville and I tried to get a postponement of the case in Maine but they wouldn’t put it off. As result I had to race from Indianapolis to Cincinnati to catch the plane to Boston and that saved my life because that night they had conspired to kill me. I went to catch the airplane in Cincinnati out of Connersville, and then Brother Victor Schmidt, who was with me as co-

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<sup>122</sup> In identifying these various doctrines, I do not mean to say that Mr. Covington was the originator of them but rather that he brought the Witnesses’ controversies to the Court in which these doctrines were formulated.

<sup>123</sup> PETERS, *supra* note 117, at 132.

<sup>124</sup> *See generally* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>125</sup> Henderson, *supra* note 116, at 70; *see also* M. JAMES PENTON, *APOCALYPSE DELAYED: THE STORY OF JEHOVAH’S WITNESSES* 79 (2nd ed. 1997) (In 1934 at the age of 23, Covington was baptized a Witness).

<sup>126</sup> PETERS, *supra* note 117, at 132; *see also* Henderson, *supra* note 117, at 67–74 (detailing Covington’s introduction to the Jehovah’s Witnesses, their faith and followers, and his early litigation of Witnesses’ cases).

<sup>127</sup> PENTON, *supra* note 125, at 88.



coun[sel], he is now dead, he stayed. And he and his wife. Sister Schmidt, were mobbed by the crowd [sic] and as they mobbed them that night, in the darkness, after the case was over, they were screaming and yelling that they were going to kill me that night. The Lord delivered me at the right time and I would have been killed that night.<sup>128</sup>

A January 1940 report by the ACLU took note of that religious animus against the Witnesses:

Not since the persecution of the Mormons years ago has any religious minority been so bitterly and generally attacked as the members of Jehovah's Witnesses—particularly the spring and summer of 1940. While this was the peak of the attacks upon them, hostility and discrimination have been rife for several years. Documents filed with the Department of Justice by attorneys for Jehovah's Witnesses and the American Civil Liberties Union showed over three hundred thirty-five instances of mob violence in forty-four states during 1940, involving one thousand four hundred eighty-eight men, women, and children.<sup>129</sup>

Long hours and dangerous work were his lawyerly trade. By 1942, Covington had earned the title of “chief legal counsel.” Following the death of Joseph F. Rutherford (president of the Witnesses' Watch Tower Society),<sup>130</sup>

Covington took over all Supreme Court appeals for the organization. While he had argued many cases before the Supreme Court prior to this time, Rutherford's death left him firmly in charge of the Witnesses' constitutional battles. During one week in 1943, Covington argued fourteen cases before the United States Supreme Court.<sup>131</sup>

<sup>128</sup> See Full text of “Hayden C. Covington Interview”, INTERNET ARCHIVE (Nov. 19, 1978), [https://archive.org/stream/HaydenCCovingtonInterview/HaydenCovingtonInterview\\_djvu.txt](https://archive.org/stream/HaydenCCovingtonInterview/HaydenCovingtonInterview_djvu.txt) [hereinafter *Covington Interview*] (“It was an eighteen hour day for me to cope with [all the cases], but I was young and dedicated and devouring of any opposition that we had. I kept on going all the time.”).

<sup>129</sup> AM. CIVIL LIBERTIES UNION, THE PERSECUTION OF JEHOVAH'S WITNESSES 3 (1941); Jennifer Jacobs Henderson, *The Jehovah's Witnesses and Their Plan to Expand First Amendment Freedoms*, 46 J. CHURCH & ST. 811, 820–21 (2004) (footnotes omitted) [hereinafter Henderson II] (“A *Life* magazine article published in 1940 noted that the American Civil Liberties Union was involved in more than 200 cases representing more than 1,300 Witnesses.”).

<sup>130</sup> M. JAMES PENTON, JEHOVAH'S WITNESSES AND THE THIRD REICH: SECTARIAN POLITICS UNDER PERSECUTION 363 (2004) (“During his years as president of the Watch Tower Society, J.F. Rutherford ruled that organization—and, eventually, Jehovah's Witnesses—with a rod of iron.”).

<sup>131</sup> Henderson, *supra* note 116, at 73–74 (footnote omitted).

Thereafter, his name was forever linked with that of the Jehovah's Witnesses.<sup>132</sup>

The group's zeal, unorthodoxy, and persistence made it an easy target for social ostracism,<sup>133</sup> especially when it came to matters such as patriotism. Consider, for example, the following tenet of their faith:

Nowhere in the New Testament is Patriotism (a narrowminded hatred of other peoples) encouraged. Everywhere and always murder in its every form is forbidden; and yet, under the guise of Patriotism the civil governments of earth demand of peace-loving men the sacrifice of themselves and their loved ones and the butchery of their fellows, and hail it as a duty demanded by the laws of heaven.<sup>134</sup>

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<sup>132</sup> William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1003 (1987) ("The name, 'Jehovah's Witnesses,' was not formally adopted until 1931 when the group was about fifty years old. The organization had been incorporated in 1884 as 'Zion's Watch Tower Tract Society;' this was then changed in 1896 to the 'Watch Tower Bible and Tract Society.' In 1909, a separate corporation was formed in New York, 'The People's Pulpit Association;' its name was changed in 1956 to 'Watch Tower Bible and Tract Society of New York, Inc.'") (footnotes omitted).

<sup>133</sup> Allen Rostron, *Demythologizing the Legal History of the Jehovah's Witnesses and the First Amendment: Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution*, 22 QUINNIPIAC L. REV. 493, 522 (2004) (footnote omitted) ("[The Witnesses] did not have the 'quiet and reserved personality' of the Amish. In addition, the Witnesses' attitude toward the state was unequivocally hostile. For them, the secular nations were instruments of Satan, undeserving of any form of submission, and to be tolerated with loathing only when absolutely necessary. The Witnesses were determined to worship God as they believed they should, and even gained special satisfaction from doing so in defiance of the law. Negotiation and compromise were tactics of last resort. Compromising would merely have deprived them of the opportunity to wage a good fight for Jehovah.").

<sup>134</sup> McAninch, *supra* note 132, at 1008 (quoting *1974 Yearbook of Jehovah's Witnesses, Part 1—United States of America*, WATCHTOWER ONLINE LIBRARY, <https://wol.jw.org/en/wol/d/r1/lp-e/301975002> (last visited Nov. 9, 2018)).



Hayden Covington (credit: Watchtower Bible & Tract Society)

As early as 1918, the government viewed that kind of pacifism as a real and serious threat to the nation's security:

One of the most dangerous examples of this sort of propaganda is the book called 'The Finished Mystery,' a [Jehovah's Witnesses'] work written in extremely religious language and distributed in enormous numbers. The only effect of it is to lead soldiers to discredit our cause and to inspire a feeling at home of resistance to the draft.<sup>135</sup>

Hence, even *before* the famous 1943 *Barnette* decision, the Witnesses were often viewed as vile, both for their religious beliefs and for their purported unpatriotic attitudes toward America. These, then, were Hayden

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<sup>135</sup> *Id.* at 1009.

On May 7, 1918 federal warrants were issued for President Rutherford, the general manager, the secretary-treasurer, the two compilers of *The Finished Mystery*, and three other members of the Society's editorial committee for violation of the 1917 Espionage Act. They were charged with conspiring to cause insubordination in the military, conspiring to obstruct the recruiting service, attempting to cause insubordination in the military, and obstructing the recruiting service . . . The government's evidence consisted primarily of the publications mentioned in the indictment and a record of a meeting of the society's board of directors at which *The Finished Mystery* was discussed. The government avoided the difficulty posed by the fact that the book had been written before the enactment of both the Draft Act and the Espionage Act of 1917 by arguing that its continued sale after the acts' effective dates was sufficient. The jury was convinced, and each defendant was convicted on every count.

*Id.* at 1010–11 (footnotes omitted).

Covington's clients. When their flag-salute case came before the Supreme Court in *Minersville School District v. Gobitis* (1940),<sup>136</sup> George K. Gardner (a Harvard Law Professor with the ACLU)<sup>137</sup> and Joseph Rutherford argued the matter unsuccessfully for the Witnesses (the vote was 8-1). That may well have seemed to be the end of the matter—defeat by a large margin.

Defeat, however, did not dissuade him: he petitioned the Supreme Court no fewer than 111 times.<sup>138</sup> That said, between “1938 and 1958, the Supreme Court heard more than fifty cases involving Jehovah’s Witnesses, deciding the vast majority of them in the Witnesses’ favor.”<sup>139</sup> Hayden Covington was a key player in many of those cases. In the period between 1939 and 1955, he brought forty-five First Amendment cases involving free speech, press, and religion before the Supreme Court.<sup>140</sup> Like Thurgood Marshall and the plan developed by the NAACP in race cases, Covington and Rutherford formulated a First Amendment litigation strategy by which to foster, try, appeal, and then prevail in a variety of free expression cases. To do that, one needed the right plaintiffs<sup>141</sup> and the right facts, something that the Witnesses, thanks to their legal counsel, did not leave to chance.<sup>142</sup> As Jennifer Jacobs Henderson has noted:

Between 1938 and 1953, the Watchtower Bible and Tract Society published several tracts and booklets providing legal advice and guidance to Jehovah’s Witnesses. Written by

<sup>136</sup> See generally *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>137</sup> M. JAMES PENTON, *JEHOVAH’S WITNESSES AND THE THIRD REICH: SECTARIAN POLITICS UNDER PERSECUTION* 129 (2nd ed. 2004) (“George K. Gardner . . . made the legal arguments for the Witnesses’ side far better than Rutherford. But neither Rutherford’s poor performance nor Gardner’s more able one seemed to have any impact on the court, except for Justice Harlan Fiske Stone.”).

<sup>138</sup> *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 132 (Roger K. Newman ed., 2009) (quoting SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF RIGHTS REVOLUTION* (2000)).

<sup>139</sup> Rostron, *supra* note 133, at 493 (citing Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 *ANNALS AM. ACAD. POL. & SOC. SCI.* 20, 22 (1958)) (ranking Jehovah’s Witnesses with the NAACP as one of the most effective and frequent of organizations involved in constitutional litigation); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, 261–68, 313–20 (1990) (compiling cases involving Jehovah’s Witnesses); see also Joseph F. Zymunt, *Jehovah’s Witnesses in the U.S.A. 1942-1976*, 24 *SOC. COMPASS* 45, 47 (1977) (reporting 3,500 cases tried in state courts and 200 appealed to higher courts by Witnesses by 1946).

<sup>140</sup> PENTON, *supra* note 125, at 88.

<sup>141</sup> See MARLEY COLE, *JEHOVAH’S WITNESSES: THE NEW WORLD SOCIETY* 110 (1955) (explaining that Covington assured Witnesses that “You are writing your faith into the laws of the land.”).

<sup>142</sup> Jerry Bergman, *Hayden Covington: Attorney and Watchtower Society Vice President*, (Nov. 2004), <http://ed5015.tripod.com/JwCovington99.htm> (“Covington looked for cases and people who could win. They would interview a person and conclude, ‘He’s not quite right. He loses his cool and is not very articulate.’ They wanted people who had good reputations in the community, who were store owners, or shopkeepers that had a good chance of winning. They tried to eliminate all extraneous things that are brought up in court cases. They wanted women, especially presentable, attractive women who were articulate and had children who they felt would elicit sympathy from the jury.”).

Judge Rutherford, president of the Watchtower Bible and Tract Society, and Olin R. Moyle and Hayden C. Covington, Jehovah's Witness legal counsel, these tracts informed Witnesses of their legal rights to proselytize. They also explained how they could avoid arrest, how they should respond once arrested, how to prepare for trial once arrested and what arguments to use in preparing court briefs.<sup>143</sup>

When Covington assumed the reins of legal power for the Witness, the Watchtower legal department was a small but active one: there was the chief counsel, several legal assistants, and clerical help.

The legal department was not proactive . . . until Hayden Covington arrived. Covington's first task was to develop a legal strategy as aggressive as [his predecessor's] spiritual one. The first step of his plan was to identify local communities where Witnesses faced legal roadblocks to their ministry.<sup>144</sup>

Moreover, and as Professor Henderson observed:

Covington would determine which communities were targeted for intensive fieldwork, and thus, potential future litigation. Covington would "send people into areas they knew would be a problem, specially if there was a large Catholic population," "an active priest," or "previous opposition." Covington would simply inform a certain congregation that they needed to preach in a certain territory,<sup>145</sup> often adding, "It hasn't been preached in awhile."

Covington also delighted in telling his Witness clients they were "writing [their] faith into the laws of the land."<sup>146</sup> While that was stretch, it was nonetheless true that the practice of their faith led to a series of cases (most argued by Covington) that changed the law of the land.

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<sup>143</sup> Henderson, *supra* note 116, at 26 (footnotes omitted).

<sup>144</sup> Henderson II, *supra* note 129, at 816–17 (footnotes omitted).

<sup>145</sup> *Id.* at 818 ("The job of these Witnesses, in addition to spreading the word of God, was to get arrested, thus clogging the local jail and legal system and freeing up local members to return to their work. By replacing local members with mobile Witnesses in the jails, Covington was able to ensure that the Watchtower could continue to spread the Word of God and generate test cases. With law enforcement and court officials tied up in processing the newly arrived Witnesses, local Witness members were free to continue proselytizing. The mobile Witnesses, recently arrested under the same questionable ordinances, provided new opportunities for trial and appeal.") (footnotes omitted).

<sup>146</sup> Henderson, *supra* note 116, at 83 (footnote omitted).

Then there was the working alliance the Witnesses' legal counsel forged with the ACLU in developing key arguments and how best to appeal a case.<sup>147</sup> Covington also had the legal savvy to link the plight of his client pamphleteers to that of the mainstream media.<sup>148</sup> He had a way of linking secular First Amendment claims to religious ones. By this measure, he was able to recruit the favor of both press groups and civil liberties ones. Consider, for example, what he wrote in his brief in *Schneider v. Irvington*<sup>149</sup>: “What mysterious quality can there be in the principles of constitutional law which prohibits licensing or censoring of the press but authorizes a license for preaching the gospel of God’s kingdom?”<sup>150</sup>

Largely because of such factors, among others, Covington (an 18-hour day workhorse<sup>151</sup>) “had a success rate before the United States Supreme Court higher than any man except former NAACP attorney and Supreme Court Justice Thurgood Marshall, claiming victory in 36 of 42 Supreme Court cases.”<sup>152</sup> Even so, though Zechariah Chafee, Jr. devoted a section of his *Free Speech in the United States* to the Witnesses' cases (titled “Peddlers of Ideas”<sup>153</sup>), he was doctrinally unsympathetic to their claims<sup>154</sup> and found no reason to mention Hayden Covington, which even if he had his portrayal would have been a uncomplimentary one.

Beyond his successful strategies for identifying good-fact cases and then taking them up on appeal (a critical talent), when it came to his Supreme Court manner, Covington was often more style than substance. For example, a reporter for *Newsweek* commenting on his argument in *Cantwell v. Connecticut* (1940)<sup>155</sup> portrayed his style this way:

<sup>147</sup> See *id.* at 26.

<sup>148</sup> See Brief for Petitioner, *Jones v. City of Opelika*, 316 U.S. 584 (1942) (No. 280), 1941 WL 52767, quoted in Henderson, *supra* note 116, at 168 (“There is no difference between proportionately taxing the publishing corporation having the larger circulation and imposing the license tax or fee upon a boy or other person distributing pamphlets or leaflets. The result, regardless of motives, is to discourage, hinder or destroy circulation.”).

<sup>149</sup> Brief for Petitioner, *Schneider v. New Jersey*, 308 U.S. 147 (1939) (No. 11), 1939 WL 48518.

<sup>150</sup> *Id.* at 32.

<sup>151</sup> See *Covington Interview*, *supra* note 128 (“It was an eighteen hour day for me to cope with [all the cases], but I was young and dedicated and devouring of any opposition that we had. I kept on going all the time.”).

<sup>152</sup> Henderson, *supra* note 116, at 67, 74–75 (referencing “18–20 hour” days); see also SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 107 (1990) (discussing that Thurgood Marshall won 29 of 32 cases before the Supreme Court as the lead attorney for the NAACP’s Legal Defense Fund).

<sup>153</sup> ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 398–409 (1941).

<sup>154</sup> But that would change when Chafee included his name on an amicus brief filed by the Committee on the Bill of Rights, of the American Bar Association in support of the Witnesses in the *Barnette* case. See text accompanying notes 179–183 *infra*.

<sup>155</sup> PETERS, *supra* note 117, at 132.

A precedent-buster extraordinary, the 6-foot lawyer erupted into the austere chamber in a bright green suit with padded shoulders and red plaid tie. Locking his hands behind his back and bending his body into a right angle, or tucking his thumbs into his green vest and lifting his head, he roared, first at the black-robed justices and then at the audience: “Jehovah’s Witnesses are plain people who derive their authority to preach the truth from Jehovah himself, not from organized wealthy groups. Many of them are poor and uneducated.” Then, glowering at Justice Murphy, a Catholic: “They don’t preach in a dead language.”<sup>156</sup>

His charismatic style notwithstanding, Covington prevailed in *Cantwell* and in many other First Amendment cases as well. For example, his strategy and style helped him to prevail in such important cases as *Marsh v. Alabama*,<sup>157</sup> *Murdock v. Pennsylvania*,<sup>158</sup> and *Martin v. Struthers*.<sup>159</sup> True, he lost some cases: *Chaplinsky v. New Hampshire*,<sup>160</sup> *Prince v. Massachusetts*,<sup>161</sup> *Jones v. City of Opelika*,<sup>162</sup> and *Douglas v. Jeannette*.<sup>163</sup> But overall, he was on the winning side far more often than not. He won 85% of the 44 cases that he argued before the High Court.<sup>164</sup> What Covington lacked in doctrinal nuance he ventured to make up with a certain down-to-earth humanism that may well have moved certain members of the Court, even if they had to do some jurisprudential spadework to help him prevail on behalf of the persecuted clients he so vigorously defended. Perhaps this picture of him is most apparent in his most famous case, one he won.

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<sup>156</sup> *Witness’s Angle*, NEWSWEEK, Mar. 22, 1943, at 68.

<sup>157</sup> See generally *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>158</sup> See generally *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>159</sup> See generally *Martin v. City of Struthers*, 319 U.S. 141 (1943).

<sup>160</sup> See generally *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), discussed in JUDGING JEHOVAH’S WITNESSES, *supra* note 115, at 203–29.

<sup>161</sup> See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>162</sup> *Jones v. City of Opelika*, 316 U.S. 584, 600 (1942) [hereinafter *Jones v. Opelika I*] (upholding a licensing tax imposed against the Witnesses). Of course, the dissents in this case flagged a new willingness of several of the Justices to move away from the holding in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Justices Murphy, Black, and Douglas joined Stone’s dissent in *Jones*, 316 U.S. at 600. More directly, they informed the reversal in the one paragraph *per curiam* ruling in *Jones v. City of Opelika*, 319 U.S. 103 (1943) [hereinafter *Jones v. Opelika II*], the Justices vacated *Jones v. Opelika I* on the basis of the reasons set forth in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>163</sup> See generally *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

<sup>164</sup> JOHN R. VILE, GREAT AMERICAN LAWYERS: AN ENCYCLOPEDIA 134 (1st ed. 2001), noted in John R. Vile, *Hayden Covington*, <https://mtsu.edu/first-amendment/article/1392/hayden-covington> (last visited Nov. 5, 2018). Thurgood Marshall’s success rate in the 36 of 42 cases he won in the Supreme Court was slightly higher: 85.71%. *Id.*

The case: *West Virginia State Board of Education v. Barnette*,<sup>165</sup> the wartime flag-salute case. Recall, *Barnette* came to the Court against the backdrop of an 8-1 ruling in the *Gobitis* case with only Justice Stone in dissent.<sup>166</sup> Then there was the appalling aftermath of the *Gobitis* ruling against the Witnesses: Six days after the ruling came down,

a mob of 2,500 burned the Kingdom Hall in Kennebunkport, Maine. On June 16, Litchfield, Illinois police jailed all of that town's sixty Witnesses, ostensibly protecting them from their neighbors. [Shortly thereafter], townspeople in Rawlins, Wyoming brutally beat five Witnesses; on June 22, the people of Parco, Wyoming tarred and feathered another. The American Civil Liberties Union reported to the Justice Department that nearly 1,500 Witnesses were physically attacked in more than 300 communities nationwide. One Southern sheriff told a reporter why Witnesses were being run out of town: "They're traitors; the Supreme Court says so. Ain't you heard?"<sup>167</sup>

Hence, when Covington argued the case he had an 8-1 precedent against him and a notable measure of ongoing public animus directed towards his clients.<sup>168</sup> Then again, he was the beneficiary of a newly constituted Court.<sup>169</sup> Even so, Justice Robert Jackson, who would become the Witnesses' hero in

<sup>165</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Covington's role in the case is discussed at some length in David R. Mainwaring's book. *See* DAVID R. MAINWARING, *RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY* (1962).

<sup>166</sup> *Gobitis*, 310 U.S. at 601. And then there was the adverse ruling in *Jones v. Opelika I*, 316 U.S. 584 (1942).

<sup>167</sup> *Minersville Sch. District v. Gobitis*, WIKIPEDIA (Oct. 12, 2018, 12:48 PM), [https://en.wikipedia.org/wiki/Minersville\\_School\\_District\\_v.\\_Gobitis](https://en.wikipedia.org/wiki/Minersville_School_District_v._Gobitis) (last visited Oct. 1, 2018).

<sup>168</sup> Though some of the major newspapers were supportive of the Witnesses. *See, e.g.*, Editorial, *Religious Freedom*, WASH. POST, June 16, 1943, at 16; Lewis Wood, *Rutledge Joins Supreme Court Civil Liberty Cases are Reopened*, N.Y. TIMES, Feb. 16, 1943, at 1; Lewis Wood, *Jehovah Sect Wins in High Court*, N.Y. TIMES, May 4, 1943, at 6.

<sup>169</sup> *See* Patrick J. Flynn, "Writing Their Faith into the Law of the Land:" *Jehovah's Witnesses and the Supreme Court's Battle for the Meaning of the Free Exercise Clause, 1939-1945*, 10 TEX. J.C.L. & C.R. 1, 11-16 (2004); Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 392-401 (2008). Other cases argued and won by Covington include: *Jones v. Opelika II*, 319 U.S. 103 (1943) (per curiam) (reversing state court judgments adverse to Petitioners); *Jamison v. Texas*, 318 U.S. 413 (1943) (9-0 decision) (holding that Dallas ordinance violated free exercise); *Largent v. Texas*, 318 U.S. 418 (1943) (8-0 decision) (holding that Paris, Texas ordinance requiring permits in order to solicit orders for books was unconstitutional); *Taylor v. Mississippi*, 319 U.S. 583 (1943) (9-0 decision) (finding that criminal sanction cannot be imposed for communication that has not been shown to have been done with an evil or sinister purpose); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (6-3 decision) (striking down local ordinance as violative of free exercise guaranteed by the First and Fourteenth Amendments as applied to Witnesses who distributed religious tracts and who made their livelihood from such sales); *Saia v. New York*, 334 U.S. 558 (1948) (5-4 decision) (striking down sound amplification law as impermissible prior restraint).



*Barnette*, was unsympathetic toward them only a month earlier when he penned his concurrence in *Douglas v. City of Jeannette*<sup>170</sup> (a 9-0 loss). There, Jackson complained of the “singular persistence of the turmoil about Jehovah’s Witnesses, one which seems to result from the work of no other sect.”<sup>171</sup> As he saw it, his colleagues should commence “a thorough examination of their methods to see if they impinge unduly on the rights of others.”<sup>172</sup> To compound the problem for Covington’s clients, Jackson quoted from Professor Chafee’s *Freedom of Speech in the United States*: “I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and impostors by a staff of servants or the locked entrance of an apartment house.”<sup>173</sup> From a lawyer’s perspective, such declarations by a revered Justice were not good omens.

Then again, there were others who viewed the First Amendment matter through a different lens, one sympathetic to the Witnesses. Notably, in a June 16, 1940 radio address, then Solicitor General Francis Biddle spoke openly in defense of the Witnesses:

Jehovah’s Witnesses have been repeatedly set upon and beaten. They had committed no crime; but the mob adjudged they had, and meted out mob punishment. The Attorney General has ordered an immediate investigation of these outrages. The people must be alert and watchful, and above all cool and sane. Since mob violence will make the government’s task infinitely more difficult, it will not be tolerated. We shall not defeat the Nazi evil by emulating its methods.<sup>174</sup>

Not long thereafter, Biddle spoke publicly once more, this time before the Pennsylvania Bar Association: “Self-constituted bands of mob patrioteers,” he declared, “are roaming the country, setting upon these people,

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<sup>170</sup> *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (Jackson, J., concurring). Even so, Harold Ickes noted a discussion he had with Robert Jackson, before he was a Justice, who was said to be “particularly bitter about the decision recently handed down by the Supreme Court in the Jehovah’s Witnesses case . . . .” Vol. III, HAROLD L. ICKES, *The Lowering Clouds 1939–1941*, in THE SECRET DIARY OF HAROLD L. ICKES 1, 211 (1954).

<sup>171</sup> *Douglas*, 319 U.S. at 181.

<sup>172</sup> *Id.* Contrast the statement in the text with what Jackson wrote in *Barnette*: “The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943).

<sup>173</sup> *Douglas*, 319 U.S. at 182, n.3 (citing CHAFEE, *supra* note 154, at 407).

<sup>174</sup> Jerry Bergman, *The Modern Religious Objection to Mandatory Flag Salute in America: A History and Evaluation*, 39 J. CHURCH & ST. 215, 232 (1997); Francis Biddle, Solicitor General, Department of Justice, National Radio Address (June 16, 1940).

beating them, driving them out of their homes.”<sup>175</sup> Here by contrast, from a lawyer’s perspective, such declarations from the Solicitor General were good omens.

As for Mr. Covington and *Barnette*, he had the good fortune of having an amicus brief filed in support of his clients by the Committee on the Bill of Rights of the American Bar Association.<sup>176</sup> One of the people on that committee was none other than Professor Zechariah Chafee, the same man who (like Justice Jackson) had been a critic of the Witnesses and their proselyting. Covington’s merits brief echoed<sup>177</sup> some of the important arguments filed by the Committee in its amicus brief in *Gobitis*,<sup>178</sup> which in part declared:

The Committee has no interest in this litigation save as its outcome (a) will affect the integrity of the basic right to freedom of conscience, and (b) will bear upon the extent of governmental power affirmatively to *force* our people to express themselves in a particular manner. In this latter aspect the case presents a constitutional question apparently new to this Court, in that the question relates to the validity of an affirmative command that the individual *shall* perform a certain ritual. This is a new type of legislation, raising questions different from the validity of a mere restraint or prohibition against a particular form of expression, e.g., seditious or obscene utterances.<sup>179</sup>

Furthermore, the Committee argued that (i) a finding of fact regarding a sincere religious belief cannot be dismissed by some claim by the state to the contrary,<sup>180</sup> (ii) if the state is to prevail over such claims of conscience where compulsion is involved, it must prove that “overriding . . . the individual’s religious belief is *essential* in the public interest,”<sup>181</sup> and (iii) “to compel the salute over objection is an unconstitutional infringement upon individual

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<sup>175</sup> PETERS, *supra* note 115, at 10.

<sup>176</sup> Brief for Comm. on the Bill of Rights of the Am. Bar Ass’n as Amicus Curiae Supporting Respondents, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591).

<sup>177</sup> See Henderson, *supra* note 116, at 32 (citing DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY* (1962)).

<sup>178</sup> Brief for Comm. on the Bill of Rights of the Am. Bar Ass’n as Amicus Curiae Supporting Respondents, *Minersville Sch. Dist v. Gobitis*, 310 U.S. 586 (1940) (No. 690).

<sup>179</sup> *Id.* at 2–3.

<sup>180</sup> *Id.* at 5.

<sup>181</sup> *Id.* at 6 (emphasis added).

liberty, even though the refusal to comply is not deemed to involve a religious question.”<sup>182</sup> The latter argument proved dispositive in *Barnette*.

Then there was Covington’s oral argument in the case. Drawing on a *U.S. Law Week* summary of those arguments from the time,<sup>183</sup> Professor John Q. Barrett identified the following nine arguments made by Covington:

1. The Barnett sisters were directly challenging the correctness of the Court’s 1940 decision, *Minersville School District v. Gobitis*, upholding the constitutionality of compelling children who were Jehovah’s Witnesses to salute the American flag in their public school.
2. There was no “more unstatesman-like decision” in the law than *Gobitis*, “except possibly the *Dred Scott* decision.”
3. The effect of *Gobitis* had been “to restrain conscience and prohibit the free exercise thereof.”
4. In *Gobitis*, the Supreme Court “shifted the burden of interpreting the Constitution back to the school boards throughout the country” and said, in effect, that their decisions would determine the rights of Jehovah’s Witnesses.
5. Because “it is human to err and divine to forgive,” the Court should reconsider *Gobitis*.
6. *Gobitis* advocated people fighting this issue out in the public forum. The effect had been a “civil war against Jehovah’s Witnesses,” including 48 states passing mandatory flag salute laws, expulsions of more than 20,000 Jehovah’s Witnesses from public schools, and other forms of persecution.
7. West Virginia admitted that Jehovah’s Witness school children refusing to salute the flag while paying due respect to it in other ways did not pose a clear and present danger to the community, so there was no basis to deny the children’s exercise of their religious convictions.
8. Three years of experience since *Gobitis* indicated that the only clear and present danger resulting from a refusal to salute the flag was the danger that the person so refusing would be mauled or killed.
9. *Gobitis*, “one of the greatest mistakes that this Court has ever committed,” should be reversed.<sup>184</sup>

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<sup>182</sup> *Id.*; see also *id.* at 16 (explaining that the legislation at issue here “is of a sort new to America. We have noted . . . its novelty as an attempt to *compel* a particular form of expression as distinguished from *restraints* on certain kinds of expression.”).

<sup>183</sup> JOHN Q. BARRETT, ARGUING *BARNETTE*, ET AL. (1943) 1–2 (2013), <http://thejacksonlist.com/wp-content/uploads/2014/02/20130311-Jackson-List-Arguing-Barnette.pdf>.

<sup>184</sup> *Id.* at 2–3 (footnotes omitted).

While such arguments may have won Covington some sympathy for his clients, they were not the kind of arguments that carried much jurisprudential weight.<sup>185</sup> It is true: When it came to a panoramic knowledge of doctrinal law, he was no Laurence Tribe or Kathleen Sullivan; when it came to nuance, he was no Paul Clement or Neal Katya; and when it came to familiarity with the history and jurisprudence of the First Amendment, he was no Floyd Abrams or Robert Corn-Revere. Still, he was the lawyer who found and prepared his clients; he was the one who tried the cases and then appealed them; and he was the one who had the savvy to provide the right facts at the right time to the right Court. None of the other luminaries brought that to the table. In that sense, Hayden Covington could rightfully claim a place among the great lawyers of the Supreme Court bar . . . *and* in the process gave new and sustained meaning to the First Amendment.



*The Lawyer & the Boxer*: Beyond his fame as a First Amendment lawyer, Hayden Covington also became one of the noted figures of the 1960s counter-culture, sort of. It all had to do with a May 8, 1967 grand jury indictment of man who refused induction into the military at the time of the Vietnam War. That man was Cassius Clay, the infamous boxer who later came to be known as Muhammad Ali.<sup>186</sup>

There is an Associated Press photo of a smiling Muhammad Ali flanked by his attorney, Hayden Covington. The two talked with reporters after Ali was arraigned in Houston.<sup>187</sup> The boxer's bond was set at \$5,000. The smiles between the two did not continue, however, as the first round of legal proceedings did not favor the notorious champion. In part, that may well have

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<sup>185</sup> Gregory L. Peterson et al., *Recollections of West Virginia State Board of Education v. Barnette*, 81 ST. JOHN'S L. REV. 755, 782 (2007). One of Justice Stone's law clerk from the time, Bennett Boskey, has observed: "Hayden Covington argued many cases in the Supreme Court. Many of them were won by his side. There were those who said that his arguments had absolutely nothing to do with it, that it was because of the views that the Justices had come to already and not the briefs or the arguments being made by counsel that produced the result." *Id.*

<sup>186</sup> See generally WINSTON BOWMAN, *UNITED STATES V. CLAY: MUHAMMAD ALI'S FIGHT AGAINST THE VIETNAM DRAFT* 1 (2018), [https://www.fjc.gov/sites/default/files/trials/U.S.\\_v.\\_Clay\\_Muhammad\\_Ali%27s\\_Fight.pdf](https://www.fjc.gov/sites/default/files/trials/U.S._v._Clay_Muhammad_Ali%27s_Fight.pdf). The legal side of the story is ably detailed in Winston Bowman's *United States v. Clay: Muhammad Ali's Fight Against the Vietnam Draft*. *Id.* As recounted by Bowman, "Moments after receiving news that Ali had formally refused to enter the military, the New York Athletic Commission, a powerful regulatory body in the boxing world, suspended his boxing license. Other major licensing organizations soon followed suit, making it virtually impossible for Ali to box in the United States." *Id.*

<sup>187</sup> See Ed Kolenovsky, *Covington Ali*, FREDERICKSBURG.COM (June 4, 2016), [https://www.fredericksburg.com/covington-ali/image\\_15dba72e-2a0e-11e6-ae2d-53bdd6f071e2.html](https://www.fredericksburg.com/covington-ali/image_15dba72e-2a0e-11e6-ae2d-53bdd6f071e2.html).

been owing to the way Covington handled the case. In that regard, legal historian Winston Bowman has noted:

At trial, Covington opted not to emphasize the potential weaknesses in the DOJ's legal recommendations, primarily relying on other defenses, including arguments that Ali should be classified as a religious minister and that the draft process itself was unfair. Covington likely should have known that the Department's recommendations offered a real opportunity to attack Ali's classification, however. Several years earlier, he had successfully argued an analogous case, *Sicurella v. United States* (1955),<sup>188</sup> in which the Supreme Court reversed the conviction of a conscientious objector because of a flawed DOJ recommendation. Importantly, in *Sicurella*, the Court established a rule to the effect that erroneous advice on *any* element of a conscientious objector claim required reversal of a draft evasion conviction, even if a board might have decided the case on other, valid grounds. The premise of this rule was that because the boards did not produce written opinions stating the rationale for their decisions, it was impossible to tell whether an objector's claim had been denied on proper or improper grounds.<sup>189</sup>

The trial in *United States v. Clay* lasted two days. Covington asked few questions of the government's three witness. His defense was as simple, apparently too simple: the government, he maintained, was processing classification claims at such a furious pace that it could not have possibly given due consideration to his client's claims. Moreover, the draft board clerks based their biased decision on press stories about Ali—hardly credible. To that end, Covington called two of the clerks of the local draft boards. That tactic had only partial success owing to the judge's rulings limiting the scope of such questioning. To compound the problem, Covington called a member of the draft board of appeals to the witness stand; it proved embarrassing: the man "was not one of the board members who had deliberated on Ali's draft status."<sup>190</sup> And when he had the opportunity to contest the DOJ's assessment of Ali's religious beliefs, he made other arguments, again not compelling ones. The result: after a mere twenty minutes, the jury returned a guilty

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<sup>188</sup> *Sicurella v. United States*, 348 U.S. 385, 385–86 (1955) (discussing how Covington argued the cause and filed a brief for the petitioner).

<sup>189</sup> BOWMAN, *supra* note 186, at 14.

<sup>190</sup> *Id.* at 15.

verdict. The sentence: five years in a federal prison and a \$10,000 fine.<sup>191</sup> It was the maximum.

Of course, the conviction was appealed. When it went up before the Court of Appeals for the Fifth Circuit, Hayden Covington's services were no longer sought. Sometime afterwards,<sup>192</sup> the famed counsel sued the famed boxer to the tune of \$250,000 in attorney's fees, purportedly for unpaid services.<sup>193</sup>

After the matter was argued<sup>194</sup> before the high Court, the vote originally appeared to be 5-3 (with Justice Marshall not participating) to *uphold* Ali's conviction.<sup>195</sup> But in the end, it all played out in Ali's favor<sup>196</sup>: 8-0 to *reverse* by way of a *per curiam* opinion with Justices Harlan and Douglas writing separate concurring opinions. It all ended quite well for Hayden Covington's client,<sup>197</sup> despite his trial court strategies. Not surprisingly, missing from the press photos of the time was one with the famous boxer and his once famous lawyer.



*I think he was a crusader. He was a fighter. He needed a cause to fight for, and this was a cause he found.*<sup>198</sup>

*Winning for him was losing because when he won his purpose in life was gone.*<sup>199</sup>

– Jerry Bergman

He won many cases, but by 1978 his glory days were past. All that were left were memories of many cases won and some lost, but even those were “righteous” losses. His time and come and passed. He was a man no longer

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<sup>191</sup> *Id.* at 16.

<sup>192</sup> *Id.* “Having been rebuffed by the Fifth Circuit, Ali appealed to the Supreme Court, which remanded the case to Judge Ingraham’s court for procedural reasons.” *Id.* at 18.

<sup>193</sup> *Id.* at 16.

<sup>194</sup> *Clay v. United States*, 403 U.S. 698, 698 (1971) (discussing how Chauncey Eskridge argued the cause for Petitioner. With him on the briefs were Jack Greenberg, James M. Nabrit III, Jonathan Shapiro, and Elizabeth B. DuBois. Solicitor General Erwin Griswold argued the cause for the United States. With him on the brief were Assistant Attorney General Wilson and Beatrice Rosenberg.).

<sup>195</sup> *See Bowman*, *supra* note 186, at 20.

<sup>196</sup> *See Clay*, 403 U.S. at 705, 710.

<sup>197</sup> BOWMAN, *supra* note 186, at 22. “In 2005, President George W. Bush awarded Ali the Presidential Medal of Freedom, the nation’s highest civilian honor.” *Id.*

<sup>198</sup> Henderson, *supra* note 116, at 67 (citing Interview with Jerry Bergman in Montpelier, Ohio (May 18, 2002)).

<sup>199</sup> Bergman, *supra* note 142.

kept alive by a cause, by a fight,<sup>200</sup> by that chance to charge into a battle against all odds—he was a war-torn soldier with no more wars to fight. And then there was money: it was always a struggle making ends meet, especially when he went out on his own.<sup>201</sup> At a time when men were seen as the sole breadwinners, his wife Dorothy<sup>202</sup> “took care of the family and worked full time (in the pressroom of a Cincinnati newspaper for over 20 years).”<sup>203</sup> Worse still, then as now, he was a virtual unknown in the legal profession, in the constitutional world, and in the First Amendment community. In that sense, he was dead even before he died.

In an interview two days before he died, Covington (age 67) looked back on law and life, albeit with his mind on the Lord: “you have got to recognize the power that’s against us,” he said, and then added, “without the power that Jehovah’s got helping us out, we’re dead ducks.”<sup>204</sup> It had been a long battle, first fighting for the Church, and then against the demon drink,<sup>205</sup> and even against the Witnesses’ president whom he tagged a “cobra”—“Do you know what a cobra does? They’ll slither behind you, and they’ll strike viciously.”<sup>206</sup> Predictably, this great champion of the Witnesses was

<sup>200</sup> *Id.*

Covington had no qualms about fighting physically. He said, “If someone looks at me the wrong way I’ll beat the s— out of him.” He was a fighter, and that is one reason why he did so well in court. Covington freely used profanity, which could have been due to his Texas upbringing (his father was a Texas Ranger). This surprised me: Witnesses usually don’t swear. He was good with words, was very aggressive in court, and loved a good fight. Part of his downfall was, as the Society won more and more cases, there was less and less need to fight.

*Id.*

<sup>201</sup> *Id.* Said his wife, Dorothy: “He would get a job at a law firm and handle a case or two, but would soon be let go.” *Id.* “After Covington was disfellowshipped [see text *infra* accompanying note 207] from the Witnesses in 1963, he almost wholly abandoned his legal career. While he worked from time to time on cases for various law firms, he was unable to hold down a position for more than a few months.” Henderson, *supra* note 116, at 79.

<sup>202</sup> Dorothy Covington, *Wife of Civil Liberties Attorney Hayden Covington, Dies at 92*, JW.ORG (Apr. 27, 2015), <https://www.jw.org/en/news/legal/by-region/united-states/dorothy-covington-dies/>.

<sup>203</sup> Bergman, *supra* note 143.

<sup>204</sup> *Id.*; *Covington Interview*, *supra* note 128.

<sup>205</sup> Henderson, *supra* note 116, at 79 (footnotes omitted).

In 1963, twenty-four years after Hayden Covington accepted the job at the Watchtower Bible and Tract Society, he was disfellowshipped from the organization. The official reason behind Covington’s removal from the Watchtower Bible and Tract Society was alcohol abuse. Colin Quackenbush described Covington’s weakness for alcohol as falling ‘into the trap of drinking too much.’ M. James’ Penton, in *Apocalypse Delayed* suggested that Covington’s drinking problem was a symptom of ‘overwork and tension’ from almost twenty-five years of service in the legal department.

*Id.*

<sup>206</sup> Bergman, *supra* note 142.

disfellowshipped, meaning he was excommunicated. Shortly before his death, however, he was reinstated.<sup>207</sup>

If you venture to Covina Hills, California, you'll find Mr. Covington resting at plot 3, block 5727 of the Forest Lawn Memorial Park Cemetery. His headstone reads:

HAYDEN C. COVINGTON  
Beloved Husband and Father  
Jan. 19, 1911–Nov. 21, 1978<sup>208</sup>

Those words seem ironic for two reasons: first, apparently, he was not the best of husbands and fathers,<sup>209</sup> and second, no lasting words were cast for his greatest life achievement—that of a lawyer who argued and won more First Amendment cases in the Supreme Court than all others. His tombstone was thus lacking; it needed to be reversed if only to give Hayden Covington the credit he deserves. The past, after all, lives only in the memories of the living.

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<sup>207</sup> VILE, *supra* note 164, at 139; Henderson, *supra* note 116, at 82 (footnote omitted) (“Covington was formally reinstated to the Watchtower Bible and Tract Society just prior to his death in 1978. He was a dedicated Witness upon his return to the Society, choosing fieldwork as a new mission. Colin Quackenbush reported that the Sunday prior to Covington’s death, he was ‘out in the field for seven hours.’”).

<sup>208</sup> Richard Pittman, image post to *Hayden Cooper Covington*, FIND A GRAVE (Sept. 3, 2015), <https://www.findagrave.com/memorial/61896595/hayden-cooper-covington>.

<sup>209</sup> See Bergman, *supra* note 142.

Covington’s fall from grace was not just a personal struggle. His family was directly influenced by both his lack of work and his alcoholism. For example, Covington’s wife left a full-time position raising her children for a full-time position in the pressroom of a Cincinnati newspaper. [Jerry] Bergman, who spoke with Covington’s wife during his interview, said she resented the fact he could not or would not support his own family . . . These problems ultimately lead, in the mid-1970s, to a separation between Covington and his wife. Although he was drinking more than working, Covington made the decision to leave his wife and her continued connection to the Witnesses. While they never officially divorced, their separation marked the end of a long, painful period in the Covington family history. In the late 1970s, Hayden Covington “hit rock bottom.” His alcohol abuse had led to liver disease so severe his doctors said that if he did not stop drinking he would die.

Henderson, *supra* note 116, at 81 (footnotes omitted). Cf. Robert H. Jackson Center, *Lynn Covington Elfers (2018) on Hayden Covington*, 17:33, YOUTUBE (Oct. 19, 2018), <https://www.youtube.com/watch?v=Pgv8LmfhmpI> (“I’m proud to be genetically connected to someone that had such an [impact] on American jurisprudence. Really. It’s, of course, something that any daughter would really be proud of.”).