



THE SUPREME COURT  
HISTORICAL SOCIETY

# Quarterly

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## Clay v. United States Revisited

*Editors thank Robert M. White, who provides freelance work, for his contributions to this article.*

Spectators crowded the Court on November 8, 2017 to relive the drama of *Clay v. United States*, 403 U.S. 698(1971), the latest installment of the Frank C. Jones Reenactment Series. Justice Sonia Sotomayor presided over the event. The Clay in the case was none other than Muhammad Ali.

Cassius Marcellus Clay, Jr., was already an Olympic gold medalist and the world heavyweight boxing champion when, in 1964, he announced that he had been worshipping with the Nation of Islam under Elijah Muhammad since 1962 and would change his name to Muhammad Ali. Three years later, his successful boxing career was derailed when boxing authorities stripped Ali of the heavyweight title, and the State of New York revoked his professional boxing license. His problems stemmed from his refusal to report for induction into the armed forces.

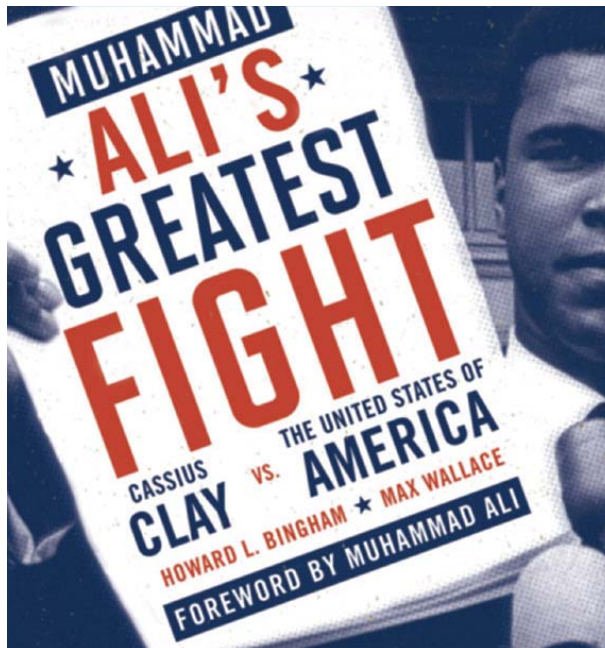
In the reenactment, Theodore V. Wells, Jr., and Donald B. Ayer breathed new life into the arguments originally given by Chauncey Eskridge and Solicitor General Erwin N. Griswold. Mr. Wells is a partner and co-chair of the litigation department at Paul, Weiss, Rifkind, Wharton & Garrison, and Mr. Ayer is of counsel at Jones Day. The Society was pleased to welcome the widow of Muhammad Ali, Mrs. Lonnie Ali, and one of his daughters, Ms. Khaliah Ali-Wertheimer.

Ali's case took a long path to reach the Court. He petitioned his local draft board in Kentucky to classify him as a conscientious objector and was denied, so he appealed to the state appeal board, which considered the advice of the Department of Justice (DOJ), which, in turn, made inquiries and held hearings on Ali's character and good faith. The officer who conducted those inquiries and hearings recommended

to his superiors that the DOJ advise the state board of appeals to classify Ali as a conscientious objector. But his superiors ignored that finding and, instead, advised the state appeal board that it could reject Ali's appeal on the basis that his opposition was insincere, was political or racial rather than religious, or was specific to certain wars, rather than to participation in war in any form. The state board of appeals rejected Ali's appeal without indicating which aspect or aspects of his opposition—sincerity, religiousness, or specificity—had been found lacking, and the national appeal board also rejected his appeal.

Having exhausted his administrative appeals, Ali refused to be drafted and was convicted of failing to report for

induction into the armed forces in the U.S. District Court for the Southern District of Texas, which sentenced him to five years' imprisonment and fined him \$10,000. The U.S. Court of Appeals for the Fifth Circuit rejected his subsequent appeal, and the Supreme Court granted certiorari "to consider whether the induction notice was invalid because grounded upon an erroneous denial of the petitioner's



**Clay appealed his conviction for failing to report for induction into the armed forces to the Supreme Court of the United States.**

*Clay v. United States Continued on Page 3*

## A Letter from the President



Recent months saw the publication of our most recent book “**Table for 9: Supreme Court Food Traditions.**” Readers can enjoy this guilt-free, non-caloric culinary treat that provides both workable recipes and insights into the personalities and traditions of Justices and their spouses. For example, it contains instructions on how to prepare homemade beef jerky, utilizing guidance

from Justice O’Connor’s brother, who continues to operate the family ranch. While he does not reveal the formula for his “secret sauce,” he does give instructions for making this treat, which Justice O’Connor traditionally sent colleagues at Christmastime. Written by Clare Cushman of the Society, with a foreword by Justice Ruth Bader Ginsburg, the book is a delightful and practical volume and is available from the Society’s Gift Shop. Ms. Cushman received generous assistance from Court Curator Catherine Fitts and her staff.

Justice Ginsburg observes in the foreword that “Food in good company has sustained Supreme Court Justices through the ages.” As the book demonstrates, meals shared together forge links of friendship and camaraderie that are difficult to achieve in other ways. Reading this book provides a warm and human perspective of the Justices. “For me, eating is sacred. You should not waste a meal, and so it can be simple and healthy, but it has to be tasty.” Justice Sotomayor said during a 2016 program called “Legal Eats.” That conversation between Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Curator Catherine Fitts, with Clare Cushman as moderator, suggested there was a large and eager audience and led to the new book.

Ms. Cushman provides interesting anecdotes, records and photographs of food-related events. For example, she uncovered stories about members of the Marshall Court boarding together and enhancing their meals with Madeira, a particular favorite of the Chief Justice. The titular rule was that the Justices would only partake of wine if it was raining. Enforcement of the rule, however, was flexible, as Chief Justice Marshall opined that the Court’s jurisdiction covered a large territory, so it was surely raining somewhere. The book is illustrated with many photographs, some of which have never before been published. These images include a photo of the Justices preparing to dine on a 28-pound salmon Justice Stephen G. Breyer caught in Alaska.

In addition to the debut of the cookbook, the Society has held a number of program events, such as those reported in this issue. Other recent programs will be discussed in the next issue. Such programming brings many aspects of Supreme

Court history to life, and we encourage you to attend and enjoy a stimulating evening of history.

Of great significance was the 4th New York Gala held in mid-March. The next issue of the magazine will include a more comprehensive report, but I express gratitude now to our Honoree, David Rubenstein, co-founder of The Carlyle Group. An extraordinary proponent of American history, Mr. Rubenstein has financed historical preservation for both the Washington Monument and the Lincoln Memorial. He has also purchased and shared with the public a number of rare documents for display, such as an antique copy of the Magna Carta. The copy he purchased is the only one on our side of the Atlantic Ocean. It is now displayed in the National Archives. At the end of his remarks, Mr. Rubenstein presented the Society with an original volume of Chief Justice Marshall’s **The History of the Colonies Planted by the English on the Continent of North America: From their Settlement, to the Commencement of that War which Terminated in their Independence**, published in 1824. The book contains a handwritten inscription by Chief Justice Marshall. There will be more about that volume in the next issue of the magazine.

We are deeply grateful to the many companies, firms and foundations which supported the event. Their contributions assured that the Gala produced funds to underwrite the on-going expenses of the Society associated with creating publications, educational programming, and the Society’s other activities. A complete list of donors will appear in the next issue, along with photographs taken at the Gala.

But it is you, the members, who are the background of the Society. I look forward to greeting many of you at our Annual Meeting on June 4, 2018. Thank you for your support and trust.

*Chilton D. Varner*

## Quarterly

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**Professor Thomas Krattenmaker provided background on the Clay case prior to the reenactment. He is shown here with Khaliah Ali-Wertheimer.**

claim to be classified as a conscientious objector.” Mr. Ali remained at liberty throughout the process and was able to win back his boxing license on equal protection grounds in a civil case, and in 1971, the Court heard his criminal appeal only weeks after he lost the “Fight of the Century” to Joe Frazier by unanimous decision. Muhammad Ali would fight perhaps his greatest fight in the Supreme Court of the United States, where he hoped for a different kind of victory.

Although Muhammad Ali had changed his name in 1964, the original draft notice had been issued under his birth name, and that name continued to be used throughout the process. Many Americans familiar with the Nation of Islam regarded it as a terrorist and/or subversive organization, and the FBI had wiretaps on many of its leaders. The mainstream press was almost uniformly unsympathetic to the idea that a high-profile Black Muslim would be allowed to evade the draft by virtue of his association with a group widely perceived to be terroristic in nature.

Representing the U.S. Government, Solicitor General Griswold symbolically laid down the gauntlet in his opening argument. He noted that “Congress has provided in the statute that the judgment of the draft board shall be final.” He then referred to the *Estep* case (1946), saying that the statute’s provision for finality “means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decision of the local boards made in conformity with the regulations are final, even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is ‘no basis in fact’ for the classification.”

Mr. Eskridge tried to put as much distance as possible

between the Nation of Islam and “orthodox Islam”—that is, the traditional varieties practiced by millions of Muslims abroad—because he conceded that those orthodox believers did not oppose the form of war known as jihad. Further, some of his client’s statements in the record had raised eyebrows. Ali had said:

**“We believe that we who declared ourselves to be righteous Muslims should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for we have nothing to gain from it, unless America agrees to give us the necessary territory, wherein we may have something to fight for. . . . But the Holy Qur’an do teach us that we do not take part in any war unless declared by Allah Himself, or unless it’s an Islamic world war or a holy war.”**

The Solicitor General stated:

**“[T]he Government’s argument. . . is that it is not enough that the objection be religious, but it must also be an objection to participation in war in any form. . . . If a man sincerely believes that he can participate in racial wars or in just wars, he is not a person who is opposed to participation in war in any form. There is in this record a ‘basis in fact’ for the conclusion that the petitioner’s objection, though religious, is selective. Now that is, that he is not opposed to participation in war in any form, as the statute requires, but that is, in fact, opposed to fighting what he regards as the White man’s wars, although having no religious or conscientious scruples against participation in war which would defend the Black man’s interest.”**



**(left to right) Theodore Wells, Lonnie Ali and Theodore Simon talk after the reenactment. Mr. Wells represented Clay in the reenactment.**



**Justice Sotomayor (center) acted as the Court on November 8, posing questions to the attorneys.**

Griswold concluded that Mr. Ali was therefore not opposed to war in any form after all.

To provide background on how the Supreme Court reached its decision in the case, Professor Thomas Krattenmaker, who clerked for Justice John Marshall Harlan II during the term the Court was considering *Clay*, described some of the “backstage drama” that was involved in making that decision.

Only eight Justices heard argument in the case. Justice Thurgood Marshall recused himself because he had been the Solicitor General at an earlier stage of the case. Initially, it appeared that there would be a majority, and Chief Justice Warren E. Burger asked Justice Harlan to draft an opinion affirming Ali’s conviction for the 5-3 majority, which was satisfied that the draft boards had relied on some “basis in fact” to deny the classification of conscientious objector to Ali. However, after reading some publications of the Nation of Islam and studying its doctrine, Krattenmaker became convinced that the Ali case was analogous to an earlier case in which a Jehovah’s Witness was found to qualify as a conscientious objector. Krattenmaker asked the Justice to read those materials as well. After reviewing them, Justice Harlan determined to reverse his vote. Justice Harlan informed the Court of his decision only one month before the end of the term, leaving the prospect of a 4-4 tie that would send Mr. Ali to five years’ imprisonment.

There was some consternation in the various chambers, and ultimately, Justice Potter Stewart suggested that the Court issue a per curiam decision citing error on the part of the Department of Justice in the early phases of the case. This approach avoided setting any precedent and also avoided answering the question whether Ali was willing to participate in “war in any form.” This reasoning won the support of most of his colleagues, and Stewart crafted an opinion that read in part:

**“[W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings, at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal**

**Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower court cases taking this position, and we believe that they state the correct rule.”**

The grounds upon which the Court relied to reverse the conviction of Ali must have surprised everyone, including his attorney, who had used less than four minutes of his oral argument to raise that point. But Justice Stewart’s opinion allowed the other Justices to join in the decision, avoiding the tie vote and prison for Ali.

In the reenactment, Messrs. Ayer and Wells presented arguments based on transcripts of the original oral argument, but they also presented new reasoning to represent their respective sides of the case. The presentation was not static, as Justice Sotomayor asked questions and made comments about points each advocate made as the evening progressed, at

times symbolically putting each advocate “on the ropes” as they worked to respond to her questions.

At the conclusion of the argument, the Justice announced the “opinion” of the Court, commenting on the original decision, and providing some explanatory material. She commented that Justice Harlan’s announcement that he was changing his vote one month before the end of the term must have caused great consternation among his Brethren (the Court was all male at the time), and said that she would certainly not be popular with her colleagues were she to do a similar thing. Justice Sotomayor made the point that while the case had been presented nearly 50 years previously, many of the issues considered and questions raised had relevance currently, making its outcome of greater interest to modern observers.

After his conviction was overturned by the Supreme Court in the summer of 1971, Muhammad Ali made good use of his liberty, returning to his boxing career. His successful career and memorable slogan, “Greatest of All Time,” became well known.

The reenactment was followed by a reception in the East and West Conference Rooms of the Court. Many guests had the opportunity to meet Ali’s wife and daughter, who have continued the charitable work and educational projects initiated by Muhammad Ali.



**Donald B. Ayer represented the U.S. government in the reenactment. He dressed in the traditional morning attire worn by attorneys in the Office of the Solicitor General of the United States when they argue in the Supreme Court.**

Photos by Kevin@kevinkennedy.com

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## 2017 Silverman Lecture Series

The 2017 Leon Silverman Series was concluded in December after four lectures given by distinguished scholars on the central theme: Justices in Presidential Cabinets. In recent times, it has been rare for a Justice to have had Cabinet service, but earlier, particularly in the 19th century, it was fairly common and the series focused on several Justices who had Cabinet experience.

The four lectures each discussed some aspect of the life and service of an earlier Justice. Professor Saikrishna Prakash of the University of Virginia School of Law spoke October 4th, 2017 on both John Jay and John Marshall. The Professor was introduced by Justice Clarence Thomas, for whom he had once clerked. Chief Justice Jay technically never served in a Presidential Cabinet, but he served as Secretary of Foreign Affairs under the Articles of Confederation. Chief Justice Marshall was serving as Secretary of State at the time of his appointment to the Court by John Adams. What made the situation of these two Chief Justices unusual and indeed unique was that they both held a diplomatic assignment concurrently with their time on the Court. Jay went to England to negotiate what came to be known as the Jay Treaty while still serving as Chief Justice. Marshall was in



Photos by Kevin@kevinkennedy.com

**Professor Prakash shook hands with Justice Clarence Thomas prior to presenting the lecture. The Professor served as a clerk to Justice Thomas.**

Professor Cynthia L. Nicoletti, also a faculty member of the School of Law at the University of Virginia. The Professor centered her remarks on Chief Justice Salmon P. Chase, Secretary of the Treasury under Lincoln. The complex relationship between Chase and Lincoln has already been explored extensively by scholars of the era, so Professor Nicoletti carefully analyzed several cases in which Chase had written the Opinion of the Court.

Chief Justice John G. Roberts, Jr. was the host on Novem-

Photos by Kevin@kevinkennedy.com



**Professor Saikrishna Prakash discussed the service of Chief Justices John Jay and John Marshall in their roles in Presidential Cabinets.**

the Cabinet when he was appointed to the Supreme Court and was briefly in both positions at the same time.

Professor Prakash discussed the constitutionality of such simultaneous service. Article I explicitly forbids a member of Congress from holding other government offices during service in Congress. There is, however, no similar prohibition in Article III to set standards for Justices and other federal judges. The speaker drew laughter when he suggested that current Justices might well be ambassadors while still serving on the Court.

On October 18, Justice Ruth Bader Ginsburg introduced



Photos by Kevin@kevinkennedy.com

**Professor Cynthia Nicoletti's topic was the service of Chief Justice Salmon P. Chase as Secretary of the Treasury under President Lincoln.**



**Justice Ruth Bader Ginsburg introduced Professor Nicoletti on October 18.**

ber 1, when John Q. Barrett of St. Johns University School of Law discussed the remarkable relationship between President Franklin Roosevelt and his Attorney General Robert H. Jackson. Jackson's rise from an upstate New York lawyer to service as General Counsel of the IRS, Solicitor General, and Attorney General was an acknowledgment of his legal ability, his reputation as a problem solver, and his leadership skills. A special treat the evening of the lecture was the presence of some of Justice Jackson's grandchildren. Prior to the lecture, Chief Justice Roberts graciously invited them to visit the Justices' Conference Room to view the Court's official portrait of their famous grandfather.

The final lecture in the series was held on December 6 when Justice Stephen Breyer introduced Sidney M. Milkis. Professor Milkis' topic was Justice James F. Byrnes and Franklin D. Roosevelt. Byrnes is unique in American history. He is the only person ever to serve as a member of the



**Professor John Q. Barrett discussed aspects of Robert H. Jackson's career as General Counsel to the IRS, Solicitor General and Attorney General, positions he held prior to his appointment to the Supreme Court Bench.**

U.S. House of Representatives, U.S. Senator, Justice, member of the cabinet, and Governor of a state. Byrnes's experience was different in other ways from the other Justices highlighted in this lecture series. Unlike the others, Byrnes was not appointed to the Court from the Cabinet but served in the Cabinet only after he had served as a Justice. Byrnes had left the Senate to be sworn in as a Justice in June, 1941. After the attack on Pearl Harbor, President Roosevelt increasingly leaned on him for advice and activity. Ultimately, the Justice resigned from the Court to become for all practical purposes the "Domestic President." This was a way to allow Roosevelt to center his time and efforts on diplomatic



**Justice Stephen G. Breyer introduced Professor Milkis (right) on the evening the Professor talked about Justice James F. Byrnes and the many roles in which he served President Franklin D. Roosevelt.**

and military issues arising from the war. Byrnes then became the President's decision maker for non-war related activity. After Roosevelt's death, Byrnes was appointed Secretary of State by President Truman. Late in life he was elected Governor of South Carolina before ending his remarkable political career.

The lectures were well attended and well received. C-SPAN recorded the lecture given by Professor Prakash, which can be viewed on the Society's website, [supremecourthistory.org](http://supremecourthistory.org) by accessing the multimedia tab at the top of the home page. Articles derived from these lectures will be published in a forthcoming issue of the **Journal of Supreme Court History**.



## Twenty-third Annual Supreme Court Institute a Success

By Kat Mall, Street Law Inc. Intern

In June 2017, teachers from across the United States arrived in the Nation's Capital for a transformative educational experience. For more than two decades, the Supreme Court Historical Society has partnered with Street Law, Inc., to provide a unique professional development opportunity for secondary school social studies educators

staff, aided by a number of leading constitutional law and Supreme Court experts who have real-life knowledge and experience working with the principles they discuss. The Institute ensures that participants gain both knowledge and strategies for how best to impart that knowledge to their students through accessible and engaging activities.

The Supreme Court Historical Society provides vital support and entrée to make this professional development exceptional.

In the program, teachers hear from and meet with an array of experts, fittingly called "Resource People." One of these experts is Mr. Chris Landau, a former clerk to two Supreme Court Justices and current partner and Supreme Court practitioner at Quinn Emanuel. In June 2017, the Supreme Court handed down a decision in a case in which Mr. Landau had presented oral argument, *Maslenjak v. United States*, ruling in favor of his client. On the day the decision was rendered, Mr. Landau presented the "Introduction to Supreme Court Practice" session of the Institute and spoke collegially with the teachers about his experience arguing in front of the Supreme Court. Summing up that experience in a sentence, one teacher remarked, "I could have listened to him talk for hours." Connecting teachers to such insightful experts as Mr. Landau familiarizes them not only with some of the Court's procedures and operations, but also provides a rare opportunity to meet and learn from some of the key "players" involved in the operation of the least understood branch of our government, the Judiciary.

During the week, teachers were able to walk in the shoes of attorneys and justices when they executed a moot court coached by VIP mentors like Judge Sri Srinivasan of the Court of Appeals

for the District of Columbia Circuit and Jeff Lamken of the law firm Molo Lamken. For this portion of the training, teachers were assigned roles to give them the opportunity to research and create arguments in a case that was currently on the docket. Within the group, some were chosen to act as advocates and present oral argument. Teachers acting as Justices fired off questions from the bench to the advocates, adding a greater sense of authenticity. This experience was



**A group of teachers in the 2017 Summer Institute Program posed in front of the Supreme Court Building on the last day of their seminar.**

who seek to expand their knowledge about the Supreme Court of the United States and its importance and influence on American life.

Each summer, two groups of high school and middle school teachers participate in a week-long comprehensive professional development immersion program that covers all aspects of the functions and purpose of the Supreme Court. The instruction is led by members of Street Law's



held in Georgetown University Law Center's beautiful moot court room, where the décor echoes elements of the real Supreme Court Chamber. Just days after conducting the moot court, the teachers in the second session witnessed Justice Alito announce the Court's decision in the case they had mooted, *Matal v. Tam*, 137 S.Ct.1799. Later in the day, the teachers compared the outcome of their moot court to the actual outcome. That the Institute can bring these teachers into the courtroom to watch decisions being handed down has a powerful impact on the teachers, one of whom called the experience "the highlight of my career!"

The opportunity to visit Washington and the Supreme Court under these circumstances truly is a once-in-a-lifetime opportunity for some educators. The program has a truly national impact, as this year's 56 participants represented 29 states. They came from urban, suburban, and rural locations; 18



**Teachers in the first group of the Summer Institute Program pose with Chief Justice Roberts in a Conference Room during the reception held at the close of their session.**



**Participants in the Summer Institute consult together as they prepare argument for a moot court assignment.**

participants teach at school with more than 50% students of color; and half teach at schools where more than 25% of the students receive free or reduced-price lunch.

Teachers attend a reception at the Supreme Court on the final day of their seminar. These events are hosted by a sitting Justice of the Court and are held in the beautiful conference rooms located just down the hall from the Supreme Court Chamber. The first group had the opportunity to meet and hear from Chief Justice John G. Roberts, Jr., who himself was a resource person for Street Law seminars for a number of years prior to his appointment to the Supreme Court. For the second reception, the teachers had the opportunity to meet

and hear briefly from Justice Sonia Sotomayor, who has hosted several receptions for teachers since joining the Court.

One important byproduct of the Institute is the development of actual lesson plans created cooperatively by the teachers based on their experiences. These plans are available to other teachers through a special website connection, providing enrichment materials that benefit thousands of students each year and affording outreach to all parts of the country.

The Institute has been a popular professional training experience of great value to teachers. Many past participants have provided assistance to other teachers within their local school districts increasing outreach dramatically. Plans have been made for two more sessions in June 2018 as the program continues to garner praise from teachers.



**Teachers stand as "the Court" enters a moot court presentation. Teachers act as Justices, attorneys and consultants in these exercises.**

## A Recent Acquisition

By Matthew Hofstedt, Associate Curator, Supreme Court of the U.S.

A five-piece silver coffee and tea service associated with the family of Associate Justice Henry B. Brown, who served on the Court from 1891 to 1906, was recently acquired by the Society for use in the Court. It is often said in the museum field that objects speak for themselves. If so, this set tells the story of how an object may be valued for different reasons throughout its history.

To start at the beginning, the silver service was made sometime in the late 1840s, based on the hallmarks found on the original four-piece service (coffee pot, tea pot, sugar bowl, and cream pitcher). The marks are from the New



Collection of the Supreme Court

Early Wood & Hughes Hallmark.

Pitts of Detroit, Michigan (in 1864) and was serving as a federal judge on the U.S. District Court for Eastern Michigan. Sometime after Judge and Mrs. Brown received the original coffee and tea service, they chose to add a hot water kettle on a warming stand. Wood & Hughes was still in business and they created the new piece with the same pattern, but this time using sterling silver (containing 92.5% silver).

At first glance, all of the pieces look identical, but upon closer examination, it is clear that the newer kettle lacks some of the fine detail and precision seen in the earlier pieces. The hallmarks on this newer piece date it to the last period of Wood & Hughes' work, sometime between 1880 and 1899. Following the earlier pattern, Caroline Pitts Brown's name was engraved on the new piece in the same fashion



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Coin Silver Teapot, Wood & Hughes, Coin Silver, c. 1849.

York silversmiths Wood & Hughes who were in business from 1845 to 1899, making this one of their earlier works. The pieces are made of "coin" silver, a term meaning they contain 90% silver, which was common for American silver produced prior to 1852.

Designed with delicate floral (possibly sunflowers) and c-scroll elements, the name "Mary Tyler Brown" appears on each of the original pieces, along with the date 1849. Mary Tyler Brown was Justice Henry B. Brown's mother. The significance of 1849, however, is more elusive. Does it mark the year the set was purchased by the Brown family? Or could it commemorate the year the Brown family—with thirteen-year-old Henry in tow—moved to a new home in Ellington, Connecticut? Perhaps the significance was only known to the Browns themselves, but unfortunately they were able to enjoy the set for just a few years before Mary died in 1853.

Billings Brown, father of the Justice, later remarried and the silver set likely passed on to his son sometime after Billings' death in 1883. By then, Henry had married Caroline



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Cream Pot; Wood & Hughes; Coin Silver; c. 1849.

as her mother-in-law's had been. But herein lies another bit





Hot Water Kettle, Wood & Hughes, Sterling Silver, c. 1895.

of mystery, because the year engraved, 1901, was the year Caroline died. Were the engravings added by Mrs. Brown soon after commissioning the new piece? Or perhaps they were added later by Justice Brown as a memento to his late wife? Like the earlier date, this part of the story may never be known.

Three years after his first wife's death, Justice Brown married Josephine Tyler, the widow of a cousin. Justice Brown never had any children with either of his wives, and upon his death in 1913, he left most of his substantial estate to his widow, but he left a few specific bequests in his will. One of these was that a cousin, Mrs. Fanny Tyler Merrell, was to receive "\$20,000 and the **family silver**"[emphasis added] and her daughter, Dorcas Merrell, an additional \$20,000. Fanny Merrell was the wife of Rear Admiral John P. Merrell, but sadly both of them died during 1916, and their estate—including the Brown family silver—came to Dorcas, who had married a naval officer, Richard H. Johnston.

The Brown silver set descended in the Johnston family until 1992, when it was donated to the Virginia Chapter of the Colonial Dames of America in honor of several family members who had been members of the organization, including Dorcas Merrell Johnston and Elizabeth King Johnston. The silver set became part of the collection at the Dumbarton House in Washington, D.C., the headquarters for the National Society of the Colonial Dames. Twenty-five years later, the curatorial staff at Dumbarton House decided to refocus their collection on decorative arts from the Federal Period, 1790-1830. The Brown Family silver set fell outside this more specific collecting scope and it was approved for sale at auction. When the lot did not sell, the Supreme Court Historical Society was able to purchase it in a post-auction sale.

Once valued as a special family gift, then a treasured family heirloom, the silver set eventually became valued for its decorative form. Now, the silver set has found a new home, where its historical associations to a Supreme

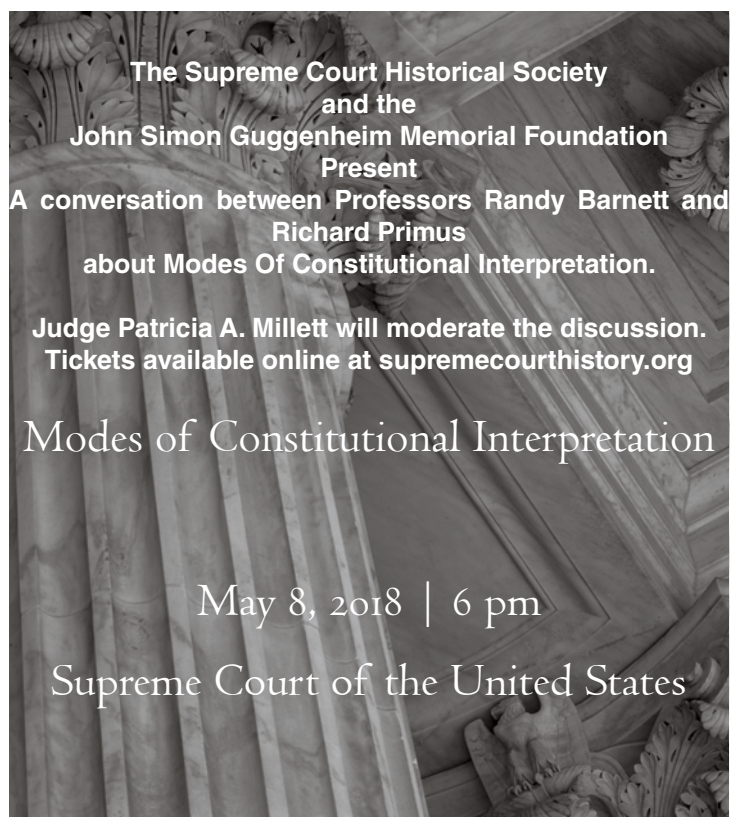
Court Justice are also appreciated. In the care of the Society and the Court, the set will undergo conservation treatment to repair some minor flaws—one handle was previously broken—and will eventually be placed on view in one of the dining rooms in the Supreme Court Building, where it will help to recall stories of Justice Brown and his family.



Detail of Engraving on Hot Water Kettle.

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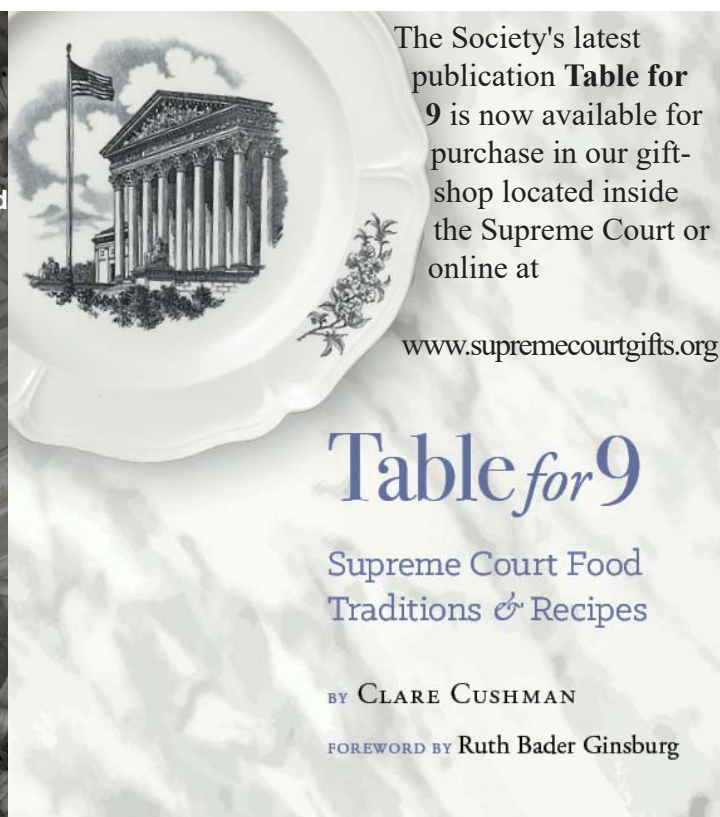
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A conversation between Professors Randy Barnett and  
Richard Primus  
about Modes Of Constitutional Interpretation.

Judge Patricia A. Millett will moderate the discussion.  
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Modes of Constitutional Interpretation

May 8, 2018 | 6 pm

Supreme Court of the United States



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BY CLARE CUSHMAN

FOREWORD BY Ruth Bader Ginsburg