

## A LESSON IN HISTORY:

# The Origins of the Federal Constitution

Judge Charles R. Eskridge, United States district judge for the Southern District of Texas, teaches a course of his own design called *Origins of the Federal Constitution* as an adjunct professor at the University of Texas School of Law and the University of Houston Law Center. His course materials are currently in the editorial process for publication by the *Texas Review of Law & Politics* ("TROLP"). One of his current law clerks, Paige Scobee Fish, was his student during her 2L year at the University of Texas School of Law while also an editor for TROLP. The Houston Lawyer sat down with Judge Eskridge and Scobee Fish to ask a few questions about their experiences with the class.

**HBA:** Can you give us an overview of the class?

**Judge Eskridge:** Well, it covers a lot of ground. *Origins of the Federal Constitution* presents an intensive introduction to the historical sources of the Constitution. With select readings of original source documents, we consider the common law and other influences on early American government and justice, such as Locke, Montesquieu, and Blackstone's *Commentaries*; the colonial experience leading to and immediately following the American Revolution; documents and debate directly relevant to formation of individual constitutional provisions and amendments; and the initial experience and understanding of the Constitution, through to Justice Joseph Story's *Commentaries*, in addition to later amendments. And while not the main focus, the class also considers the influence and use of this material on modern

understanding of the Constitution.

**HBA:** Why was it important to you to take Judge Eskridge's class?

**Scobee Fish:** *Origins* was one of the few classes in law school that actually dug deeply into the historical materials that underpin the Constitution. Part of what drew me to law school was my interest in government and constitutional law, so it was important to take advantage of this unique chance to dive into its history. I wanted to take a class where I could learn from firsthand sources how our framers developed our unique blend of democracy, republicanism, and federalism. And it was just an amazing opportunity to have Judge Eskridge as my professor, along with Judge Brantley Starr of the Northern District of Texas, who co-taught the class that year.

**HBA:** What first got you interested in this topic?

**Judge Eskridge:** It actually traces way back for me. I quickly became aware of a gap in my legal education when I clerked for Justice Byron White just after law school. An extract in some prior opinion from *The Federalist*, or a quote from Blackstone's *Commentaries* in a brief, would seem on its face fairly dispositive. But I had no broad understanding of its place in the development of an issue, beyond what the opinions themselves said. Law school depends a great deal on historical reference, but it isn't designed as an advanced history class. And that always nagged at me a bit, until Fall 2008, when Justice Clarence Thomas gave the endowed lecture at my alma mater, Pepperdine University School of Law. He delivered it as a fireside chat of sorts, and I was fortunate to be one of three on a panel posing questions to him. He was asked about his interpretive philosophy and what he uses as guideposts when deciding difficult cases. In answering, he first paused to note that the classes on constitutional law are case-driven, typically focusing on the most recent cases that articulate current doctrine. And he said that he wished law schools had started first with a course called something like "The Formation of Our Constitution," so that a broader view of history



could illuminate the various provisions and amendments, along with the problems and issues that the framers had under review in the early days of the Republic. I jotted that down, and it became my class, which I taught for the first time at the University of Houston Law Center in Spring 2010.

**HBA:** What was your biggest takeaway from the class?

**Scobee Fish:** The readings in *Origins* changed my perspective on the Constitution. As Judge Eskridge often pointed out in class, it is amazing to consider how studied and prolific our founders were, as a generation. The hundreds of pages of documents that he selected for the class syllabus are only a sliver of the total writings published during the drafting and ratification of the Constitution. Alexander Hamilton himself wrote over 50 essays in the *Federalist Papers* in less than a year. Reading this vast [number] of primary sources showed me that, even if the framers didn't agree on everything, and even if their decisions didn't turn out perfectly, they put

an amount of thought and effort into reaching compromise that is almost unfathomable today. I took away from the class a new understanding and gratitude for their efforts and the constitutional system they designed.

**HBA:** How did you select the documents to include?

**Judge Eskridge:** In the main, the documents are distilled and edited from a truly remarkable five-volume compendium of original documents called *The Founders' Constitution*. The University of Chicago Press published this in conjunction with the 200th anniversary of the Constitution in 1987. All in, it's about 7,000 pages of reference material. That is a monumental achievement, from which I selected a "greatest hits" that total approximately 1,000 pages, so the class covers about 70 pages each week. A note that the University of Chicago Press also performs a real public service in keeping a free, online, searchable version. The Press has also recently published a similar, two-volume treatise devoted to the Thirteenth, Fourteenth, and

Fifteenth Amendments, from which I've since designated further materials. And the research librarians at Pepperdine University School of Law assisted me when I taught my class there in Fall 2011, pulling legislative and background documents for the Sixteenth through Twenty-Seventh Amendments.

**HBA:** Why did TROLP decide to edit and publish these materials?

**Scobee Fish:** A number of my fellow classmates that semester were also editors at the journal. We all thought *Origins* was a unique and rare reading into primary sources and constitutional history and we wanted to share that opportunity with law students around the country. By editing Judge Eskridge's collection of documents into an accessible format, we are hopeful that professors or judges will teach the class at other law schools. And consistent with TROLP's mission to provide a forum for the discussion and debate of issues like federalism, originalism, constitutional history, and con-

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temporary constitutional law, it is also our hope that the *Origins of the Federal Constitution* textbook will provide legal scholars a helpful introductory guide for research and study of the Constitution.

**HBA:** *Does this course and these documents influence your role as a judge?*

**Judge Eskridge:** It does in some ways, although a district court judge doesn't often have occasion to decide constitutional issues as an "original" matter. But it has definitely instilled in me the importance of understanding the exact text of any legal document and its meaning and context as written. And I guess as to the bigger picture—after gathering and sequencing the documents and having now taught the class ten times—I see the various provisions spread across the Constitution in a different way, as part of a seamless whole. And that's true as to the responsibilities shared across many articles to the legislative, executive, and judicial branches, as well as the balance of powers between the federal and state governments. For any power granted by the people to the government, there is a further connection to rights that specifically check and balance those powers.

**HBA:** *How do you anticipate using what you learned in your legal career?*


**Scobee Fish:** I'd echo what Judge Eskridge said. Learning to critically read the text of the Constitution taught me the importance of critically reading any legal text. And familiarizing myself with the vast array of primary sources in the course has made me much better prepared to research and make legal arguments bolstered by history. Plus, many of the documents themselves provide excellent examples of persuasive legal writing. Take Alexander Hamilton's pithy phrase from Federalist 78, the judiciary as the "least dangerous branch,"—that argument won the day at ratification, and almost every American lawyer today still knows it by heart. I think everyone who takes the class walks away with the goal to be as incisive a lawyer as Hamilton was—or Madison or Jay or Wilson or [the] many, many others that we read!

**HBA:** *If you had to pick a single, favorite document, which would it be?*

**Judge Eskridge:** James Madison recorded in his notes from the Convention the speech that Benjamin Franklin, at age 82, gave on the last day of their proceedings, September 17, 1787. His was a call to reach across lingering differences, and to put aside vanity and personal preference in favor of the continued strength and security of a nation whose future was still very much in doubt. If I can just quote a short passage: "I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others...I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility—and to make manifest our unanimity, put his name to this instrument." We cover this speech as the fifth document in our first class, and I come back to it again and again throughout the course. I think it really stands alone in its time for his wisdom, and it certainly stands apart from political speeches and discourse of the present day.

**HBA:** *Same question to you. What was your single favorite document?*

**Scobee Fish:** Judge Eskridge stole my favorite document! But if I had to choose a runner-up, it would be George Washington's Farewell Address, which he gave as he left the presidency in 1796. It is one of the last documents we read for the last day of class. And each time I read it again, I'm struck first by President Washington's humility—he begins with a "deep acknowledgment of that debt of gratitude which I owe to my beloved country." And then by his realism as he acknowledges the fragility of the new Constitution and uncertainty as to whether it will possibly last. He warns solemnly about the

dangers of disunity and the fragility of the newly ratified Constitution. But most importantly, I am struck by his optimism—that such uncertainty can be addressed by adhering faithfully to the Constitution, "by respecting all the words the framers wrote, by facing facts, and by seeking to understand their meaning for living people." And if we do so, he says, despite differences, the American people can again fight a common cause and "triumph[] together." His words always remind us that maintaining the Constitution is hard and never-ending work, but, as long as we do that work—and remain unified in that goal—our country will continue to prosper even in challenging times. 



**The Honorable Judge Charles R. Eskridge, United States district court judge for the Southern District of Texas,** received his J.D.

from Pepperdine University School of Law and went to college at Trinity University. He served as a law clerk to the Honorable Chief Judge Charles Clark of the United States Court of Appeals for the Fifth Circuit, as a law clerk to Justice Byron White of the Supreme Court of the United States, and as a special assistant to the Honorable Howard Holtzmann of the Iran/U.S. Claims Tribunal in The Hague. Before appointment to the bench, he was in private practice in Houston, litigating complex commercial disputes.



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at the University of Wisconsin. Before law school, she worked as a government relations associate at a lobbying firm in Madison, Wisconsin. Following her clerkship with Judge Eskridge, she will clerk for the Honorable Judge Don Willett on the United States Court of Appeals for the Fifth Circuit.