GLEN ROBINSON

Questioning Conventional Wisdom Wherever He Finds It

PROFESSIONALS ARE OFTEN ASKED HOW THEY DECIDED ON their profession, what first sparked their interest, what plans they followed, who advised them along the way, etc. Glen Robinson, David A. & Mary Harrison Distinguished Professor of Law, does not know the answer to these questions. "I just sort of wandered aimlessly through school without much direction," he says. A native of Utah, Robinson began college at Utah State University. After two years he "wandered" off to Harvard as a transfer student. As he now recalls, "Nothing in particular prompted the move; I just had to get out of a cow town [Logan, Utah] and an intellectually under-nourishing environment." At Harvard he majored in political theory. "It was for want of any other aptitude or skill; I had not really laid the groundwork either in high school or at Utah State for much else."

His overriding concern has been to ask what happens to a legal rule once it becomes the subject of litigation.

Upon graduation he returned west, this time to Stanford Law School

where he graduated in 1961. In another geographic turn, he headed east again, to Washington, D.C. where he practiced law between 1961 and 1967, interrupted by a two year tour in the Army's Armor Corps at Fort Knox, Kentucky. On returning to private practice after studying the fine art of war with tanks, he returned to private practice, but he soon realized that private practice was not going to be his "dream career." In 1967 he found that career when he began teaching at the University of Minnesota.

In 40 years of teaching, Robinson's teaching and scholarly interests have covered a range of subjects. He has taught courses in administrative law, antitrust, communications law, criminal law, evidence, intellectual property, internet law, property and torts. He attributes the variety of interests as "the product of attention deficit disorder," but some interests have been sustained over most of his career. He had an early interest in administrative law and communications law by reason of his experience in private practice. To fill out his curricular obligations he also began teaching torts in his first year, and he continued to teach that subject, on and off, for the next four decades.

Government service briefly interrupted his teaching career; from 1974 to 1976 he was a member of the Federal Communications Commission, and in 1979 he was the U.S. ambassador to the World Administrative Radio Conference (a periodic radio spectrum management conference held under the auspices of the UN's International Telecommunications Union). When he joined the Virginia faculty in 1976, he continued teaching administrative law, communications law and torts, but his interests began to shift to other subjects. He still teaches communications law, most recently in partnership with Tom Nachbar. However, since joining Virginia his "attention deficit disorder" led him to other academic subjects as well—antitrust, property, internet law and, most recently, intellectual property.

Robinson's scholarly interests have generally tracked his teaching interests. With the exception of criminal law and evidence courses that he briefly taught—"for reasons that now escape me entirely—he has written in all the subjects he has taught. He denies any coherent pattern in his

scholarship. "Winston Churchill once famously accused English pudding of lacking a theme; I think that's true of most of what I write," he says. "I write about things that grab my attention for some reason or other."

Still, some persistent ideas do appear in his work. For example, his writings on administrative law and regulation display a fairly consistent skepticism about administrative regulation. Shortly after leaving the FCC in 1976, he wrote a long critique of that agency's policies in "The Federal Communications Commission: An Essay on Regulatory Watchdogs," 69 *Va. L. Rev.* 169 (1978). The criticisms were echoed more than a decade later in several articles, for example, "The Titanic Remembered: AT&T and the Changing World of Telecommunications," 5 *Yale J. On Reg.* 517 (1988); "The New Video Competition: Dances with Regulators," 97 *Colum. L. Rev.* 201 (1997), "The Electronic First Amendment: An Essay for the New Age," 47 *Duke L. J.* 899 (1998), and "Spectrum Property Law 101," 41 *J. Law & Econ.* 609 (1998). He is currently working with Tom Nachbar on a book covering the field of regulated communications. While they are designing it to be a course text, it will, he says, "have an attitude (unless Tom holds me back)."

Skepticism towards the FCC's regulatory performance in communications law fits a more general pattern of skepticism towards administrative regulation generally. His book *American Bureaucracy: Public Choice and Public Law* (1991) explores, among other things, interest group theory (now more commonly described as "public choice" theory) and its intersection with the growth of administrative government and administrative law. In the book, he argues for a more robust conception of judicial constraints on regulatory programs--even to the extent of suggesting a revival of *Lochnerism*. In defense of the latter suggestion, Robinson challenges the post-*Lochner* view that constitutional judicial review should be essentially limited to legislation affecting personal liberties, not with social and economic legislation that "merely" affects economic activities. This view cannot, he argues, be justified by any notion that the former is less an interference with the democratic process than the latter. It can only be justified by the assumption that there is some deep distinction between

personal and economic liberties. Robinson argues that this distinction has what a leading constitutional scholar of an earlier generation called "the smell of the lamp"—reflecting the "tastes of academic dons more than ordinary (working) folks."

Robinson's argument about *Lochner* reveals another pattern found in much of his writing: a self-admitted disposition to be contrarian. "It's not that I try to write against the grain," he says. "It's just a habit of mind which is probably what drew me into the law in the first place."

For example, in "Multiple Causation in Tort Law: Reflections on the DES Cases," 68 *Va. L. Rev.* 713 (1982) and "Probabilistic Causation and Compensation for Tortious Risk," 14 *J. Legal Stud.* 779 (1985), Robinson explored the question whether tort law could and should impose liability for unrealized but probabilistic injury. The question typically arises in the context of mass torts involving hazardous substances. Conventional wisdom (and conventional tort law) requires proof of actual injury before any "victim" can recover. However, Robinson argued that for certain types of cases the (wrongful) creation of the *risk itself* should be a sufficient basis of recovery, both as a matter of utilitarian (benefit-cost) theory and as a matter of corrective justice. The central intuition of the argument is that once the risk has been (wrongfully) created, all the relevant moral features of the event are known; the only question is one of whether there is a sufficient specific causation between the tortious act and the *particular* injury. Black letter tort law allows recovery for tortious events if, but only if, the court finds an actual injury and a preponderance of probability (>50%) that it was caused by the event. If a firm tortiously manufactures a cancerous substance, it will be liable only to those who can show (with probability >50%) that they have contracted cancer, but not to those who are merely put at risk. The latter will have to wait—often for years—to determine whether they have a possibility of recovery, by which time the firm may no longer exist, records may be lost, or proof be otherwise unattainable.

Robinson argues that this is needlessly inefficient. If a plaintiff is willing to settle for a probabilistic valuation of the future harm, she should

be allowed to recover for it. With a few isolated exceptions, neither the courts nor the commentators have accepted risk-based liability. Robinson believes they fear that doing so, even in only selective cases, would open the gates to a flood of new litigation. Acknowledging that the floodgates argument is a legitimate concern, Robinson believes it is exaggerated; the class of cases for which risk-based liability would be appropriate is quite small and manageable. Moreover, the concern over floodgates is better directed at the substantive standards of liability rather than the proof of causation.

The same contrarian disposition is seen in other scholarship. In "Personal Property Servitudes," 71 *U. Chi. L. Rev.* 1449 (2004), Robinson challenged the hitherto largely uncontested doctrine that restrictive covenants ("servitudes") that are a commonplace feature of land property are not allowed for personal property. For ordinary personal property ("common law property"), as opposed to intellectual property, there are relatively few modern occasions for using covenant restrictions. The chief examples usually implicate antitrust issues—e.g., resale price restrictions, which have long been illegal under the antitrust laws (an illegality that Robinson criticizes both in this article and in earlier work). However, the restriction on servitude restraints is a significant component of intellectual property law, most notably in patent and copyright law where it is instated in the so-called "first sale" doctrine. In recent years, the issue has come to the fore in copyright, particularly as a result of the ubiquitous use of "shrink-wrap" licenses in the distribution of computer software that restrict the user's rights in various ways that many have argued violate the first sale doctrine.

Robinson argues that the foundation of the first sale doctrine, like its more general common law counterpart principle, is less firmly grounded than is commonly assumed. The usual explanation for the first sale doctrine is that it is an essential part of the balance between the "monopoly" given to the patent or copyright owner on the one hand and the freedom of others to use property without undue restraint. The idea of a balance between exclusive rights and public domain is unexceptional; what

remains unexplained is why the first sale doctrine is an essential part of it. Robinson argues, contrary to the mainstream of commentators in this area, that these restrictions should be allowed. Indeed, if they are not, the sellers of these goods will find other ways to restrict use that may be even more inhibiting. The growing use of digital rights management in digital works (music, video, software) is, he points out, a kind of "hard-wired" servitude. If that is allowed—and there is little that can be done to regulate it effectively—it is odd to invalidate contract-based restrictions which are, arguably, a softer form of restraint.

His article, "Communities," 83 *Va. L. Rev.* 269 (1997) bears something of the same flavor of against-the-grain argument on a larger philosophical canvas. The article is an essay about the conflict between community and social values. In particular, it explores the question of when and in what ways a liberal society—one grounded in protecting individual choices—should restrict the practice of communities whose values are antithetical to those liberal values. Must the Amish send their children to high school? How far should a secular society go to accommodate community self-governance. Should it, for example, reinforce the community values of native Americans by restricting adoption of native American children by non-native Americans? More conventionally (and more commonplace), what should be the society's stance towards "lifestyle communities" that seek to isolate themselves from the surrounding society?

On the one hand, every society must protect itself; this is trite. It is also true, within limits, that a society should seek to protect basic social values. However, the latter produces an unavoidable conflict: the most basic value of a liberal society is individual choice, but individuals—real individuals, not abstract ones—often elect to be governed by communities which are themselves illiberal. Indeed, Robinson argues, all communities are in some degree illiberal insofar as they suppress individual choice in the name of communal values. A society that respects the individual thus ironically is bound to respect the individual's choice of illiberal values—up to a point. The philosophical and the legal challenge of a "modern" society is to find that point of accommodation that allows communities to exist

within the framework of the large society, while also preventing the undue fragmentation of society by the proliferation of what Edmund Burke called "the little platoons" to which we all belong.

In the end, what is perhaps more noteworthy than the contrarian strain in Robinson's scholarship is that it just keeps coming! After four decades as a law professor, Robinson has lost neither the curiosity nor the enthusiasm with which he began as a scholar. His intellectual ambition has not lessened but grown, and his field of vision has not narrowed but has continued to expand. A colleague said in an article about Robinson, "It's not just that he's still enthusiastic, but that he's still coming up with new ideas.… It's seldom that you find that kind of continuing enthusiasm from someone who has been at any line of work for a long time, and he's a model for all of us." Or, as the Dean put it when once introducing Robinson, "You are who we want to be when we grow up."

EXCERPTS

Personal Property Servitudes

71 *U. Chi. L. Rev.* 1449 (2004)

ANGLO-AMERICAN PROPERTY LAW HAS RECOGNIZED contractually created servitudes on real property for over four centuries. The power to impose restrictions on the use of land is an incident of the power to transfer, one of the conventional attributes of ownership. Of course, this is an oversimplification, for there are numerous restraints on how owners dispose of their property. Property owners cannot, for instance, impose restraints that offend public policy by imposing racially restrictive covenants, restraining alienation, or creating restraints of trade. However, even after accounting for all such public policy constraints, the power of property owners to place post-transfer limitations on the use of property remains robust and provides the foundation for an entire jurisprudence of servitude law.

Or, at least so long as the property being transferred is real property. What about personal property? Seventy-five years ago Zechariah Chafee puzzled over the absence of any comparable power over the use of chattels. Why, Chafee asked, has the law not generally recognized a power to create servitudes for personal property comparable to that recognized for real property? Chafee understood that there were relevant differences between real property and chattels that might call for special limitations on power over the latter—for example, antitrust issues or special limitations on intellectual property rights. But, conceding that such special objections might narrowly confine the realm of legitimate use for chattel servitudes, Chafee concluded that the "complexities and variety of modern business may eventually present opportunities for restrictions on personalty which are free from the disadvantages of restraint of trade."

Nearly three decades after his original speculations Chafee entertained second thoughts about the matter. The occasion for the second thoughts was a state case enforcing an equitable servitude on a jukebox. Plaintiff had entered into a lease agreement with the owner of a luncheonette for the installation and servicing of a jukebox. The agreement required a rent payment of 60 percent of the jukebox receipts, prohibited removal of the jukebox, required it to be operated, and prohibited installation or operation of any similar equipment during the period of the lease (fourteen and a half years). A final clause of the agreement made it binding on the parties' successors and assigns. A year into the lease the lessee sold the luncheonette to defendant. Although the defendant knew of the prior agreement, he claimed not to know that the rent called for 60 percent of the receipts—apparently a higher percentage than that demanded by plaintiff's competitors. When defendant learned of the rental amount, he told the plaintiff to remove the jukebox or he would remove it at plaintiff's expense. Plaintiff then sued to enjoin removal and to specifically enforce the agreement. Reversing a trial court judgment, the New Hampshire Supreme Court found that the agreement was binding on the defendant and could be specifically enforced as an equitable servitude.

Chafee was bothered by the fact that the court gave no attention to troublesome questions of public policy about enforcement of such restrictions, such as whether the business justifications for them outweighed the "grave possibilities of annoyance, inconvenience, and useless expenditure of money" that this type of equitable servitude could entail. Without committing to a clear answer to that question, he noted that the principal business purpose for such restraints turned out to be resale price fixing or tying, which were both illegal at the time he first wrote in 1928. Apart from such illegal purposes, it now appeared to him that there might be too few business needs for such restrictions to make it worthwhile to recognize them generally.

Nearly a half century later, there is reason to entertain third thoughts on the matter despite the general disposition of courts and commentators to be content with Chafee's judgment. Indeed, the question of chattel ser-

vitudes has gained a new salience in light of recent developments in the field of intellectual property, where the now ubiquitous use of restrictive licensing agreements has created the functional equivalent of personal property servitudes.

[T]HE POWER TO ENFORCE SERVITUDE-LIKE RESTRICTIONS HAS become a significant practical issue in the domain of intellectual property. In this property domain the question of resale and use restrictions primarily implicates the "first sale" or "exhaustion" doctrine that limits post-sale restrictions on the use and transfer of copyrighted, patented, or trademarked objects. The history suggests that the reasons for the doctrine are less clear than is often now assumed. Although the first sale doctrine today is often explained as a creature of public policy (most notably policies against restraints on alienation or restraints of trade), the early decisions suggest that it is simply a limit on the owner's rights to claim patent or copyright infringement, leaving open the possibility that an owner might impose restraints by contract. The latter possibility seems to defeat the argument that the doctrine derives from alienation or trade policies, which should be no less applicable to enforcement of contract rights than to intellectual property rights.

The extent to which one can contract around the first sale doctrine or other limitations imposed by copyright and patent laws is now hotly debated, particularly in the context of copyright where the ubiquitous use of licenses as a means of distributing copies of copyrighted software has been seen as a circumvention of the limitations on copyright protections. I argue that whether one should be able to contract around limitations on copyrighted or patented property should depend not on some formalistic distinction between contract rights and property rights, but on the policies at stake, and these policies require a closer examination than they have generally been given.

CONTRACTUAL RESTRICTIONS ON PERSONAL PROPERTY USE ARE one thing, but what about restrictions that are built into the object itself? Chafee did not have to confront the question; in an earlier time, it was a more theoretical than practical problem. In the age of digital works, however, digital rights management tools permit a range of use limitations hitherto impossible or at least impracticable. Needless to say, the same tools that can be used to enforce the legal rights the owner has under property or contract law can also be used to create "rights" that he does not have under those laws. The problem is well known. What to do about it is still a work in progress. One response, of course, is for users to disable the offending code. Quite apart from the doubtful legality of doing so, there is the obvious problem that for the average user this is simply not an option. Another possibility might be to establish legal restrictions on the kind of code that can be used. The problem with the latter approach is that it requires more regulatory surveillance into product design than is likely to be practicable or acceptable.

On Refusing to Deal with Rivals

87 *Cornell L. Rev.* 1177 (2002)

ACCORDING TO A LONG-STANDING DECLARATION OF ANTITRUST law a firm—even one with monopoly power—may deal with whom, and on such terms, as it chooses. Like so many declarations in law this one soon wilts under challenge, much like the Captain Corcoran's claim of sea hardiness in *H.M.S. Pinafore*:

Captain: … I am never known to quail
At the furry of a gale,
And I'm never, never sick at sea!
Crew: What, never?
Captain: No, never!
Crew: What, never?
Captain: Hardly ever!

Even the "hardly ever" qualification overstates the matter, however. A duty to deal may be an exception, but it is an exception of fairly indeterminate scope. It would be a closer approximation to say, not never, not hardly ever, but "it all depends."

On what? That too is not very well specified. Refusals to deal make many appearances in the antitrust law. Because they are means to ends, their appearance is as varied as the end purposes themselves. Indeed, almost any antitrust-relevant conduct can be characterized as a refusal to deal: price fixing involves a refusal to deal except on the basis of an artificially set price; tying involves a refusal to deal except on the basis of artificially bundled separate products, etc. In such cases the refusal element is not doing any independent work, of course, so giving it separate attention simply adds confusion to the underlying conduct issues. Unfortunately, adding confusion is not itself an offense under antitrust or other law so the practice of loose characterization goes undeterred.

REFUSALS TO DEAL ARE THE BANE OF ANTITRUST, THE SOURCE of endless confusion. Some of the confusion might be easily avoided where the refusal is merely an incidental attribute of another category of activity. For instance, every price fixing arrangement or every tying arrangement or every exclusive dealing agreement could be characterized as a refusal to deal, but there is little to be gained from doing so. However, superfluous

characterization is mostly just confusing and probably does not do any real mischief. The real mischief is when a refusal to deal is made an independent offense. The mischief becomes all the more serious when the offense lies in refusing to deal with competitors for it threatens to put antitrust at war with itself.

Granted the duty to deal is supposed to be exceptional, as we are endlessly reminded every time courts enforce the duty. A firm is free to deal with whomever it pleases, except.… The exception is typically cast in terms of a firm, or group of firms, exercising monopoly power and seeking to aggrandize that power by refusing to deal with other firms. Unfortunately, the measure of market power, and what it means to aggrandize it, give a very uncertain scope to the exception. To make matters worse there is an unsettled question whether either of these things is different for a group of firms as opposed to a single firm.

A refusal to deal may be justified by valid business reasons. This sounds simpler than it is. In the classic farmers model of competition, individual producers act oblivious to each other; there is no rivalry among firms. But that model does not have much relevance to world of antitrust (some might say it has no relevance period). In the world where antitrust lives, competitors are rivals, antagonists. When Intel's Andy Grove famously pronounced "only the paranoid survive," he wasn't expressing a farmer's concern about general market conditions; he was expressing a fear about what his rivals were doing. In this world the distinction is very fine between conduct that is permissibly rivalrous and conduct that is impermissibly exclusionary.

The difficulty of defining what is a legitimate business justification for not dealing with a rival is made more complicated where refusals to deal are conditional. Here the difficulty is not simply a matter of defining business justification in general terms, but defining what are the specific terms on which it is reasonable to compel the deal. In *Aspen Skiing*, the Court deemed it unreasonable for a firm to stop dealing with its rival on the same basis that the two firms had cooperated in the past. The Court did not bother to ask why the past terms of dealing were so eminently rea-

sonable that they could not be reasonably altered. It has been suggested that the case might be limited to cases where one firm has stopped a previous course of dealing, the assumption being apparently that the prior dealing establishes a continuously reasonable basis for dealing. That is a very precarious assumption. Reasonable business firms do not voluntarily enter into arrangements that bind them indefinitely to the same set of terms, and reasonable courts should not force them to do so.

Antitrust commentators recognize the problematic character of an enforced duty to deal. Ironically, some of those commentators have misdirected their fire at the essential facilities doctrine, which is only one application of the duty (as *Aspen Skiing* again shows). Perhaps this is because the essential facilities doctrine is a "doctrine" that squarely defines a duty to deal in affirmative terms. That, however, is its virtue, not its vice. Critics' complaints that the doctrine is too broad miss the point that all things are relative. In his widely cited critique, Phillip Areeda declared essential facilities doctrine an "epithet in need of limiting principles." It is a phrase that could find wide ranging application in antitrust law, but what makes it quite peculiar here is that, under present practice, the alternative to essential facilities doctrine is not a carefully prescribed set of principles governing the duty to deal, but an open ended, completely untheorized "it-all-depends" principle—basically the principle followed in *Aspen Skiing*. It will be recalled that the Court there explicitly refused to apply, or even to recognize, the essential facilities doctrine. Whether it would have reached a different result on the facts under an essential facilities doctrine is unknowable, but also unimportant to the more general point of principle. Whatever the outcome would have been in that case, it is certain that the analytical framework of the doctrine would have provided more "limiting principles" than a resort to general monopolization doctrine. Surely that is just why the Supreme Court has resisted embracing essential facilities—not because it is too broad, but because it is too limiting. While the Supreme Court has been ducking the question whether there is such a thing as an essential facilities doctrine, the lower courts have formulated a set of criteria, cum principles, that place accept-

able limits on the duty to deal. No one would claim these criteria are so tight that they preclude a few false positives (enforcing a duty where it is inappropriate), but no legal rule can meet that claim. What does appear from a review of the lower court opinions is that they have been quite conservative in their application of essential facilities doctrine. Certainly they have been far more resistant to imposing a duty to deal than the Supreme Court has been under the more general criteria of concerted action in restraint of trade or monopolization.

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