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THAT THOSE ALONE MAY BE
SERVANTS OF THE LAW WHO LABOR
WITH LEARNING, COURAGE, AND
DEVOTION TO PRESERVE LIBERTY
AND PROMOTE JUSTICE.

— *Leslie H. Buckler, Professor, UVA School of Law, 1931*

Inscribed on the face of Clay Hall

INTRODUCTION

THIS PUBLICATION CELEBRATES THE SCHOLARSHIP of the University of Virginia School of Law. Each year, the *Virginia Journal* presents in-depth intellectual profiles of selected scholars, plus a survey of recent publications by the entire faculty. The tradition began in 1998. Since then, a total of twenty-seven Virginia faculty have been honored in these pages. Their scholarship reflects a wide variety of interests, perspectives, and methodologies, but a consistent commitment to excellence. Our goal is to maintain an intellectual community where the broadest range of opinion and debate flourish within a framework of common purpose. Every person honored by the *Virginia Journal* has contributed to that goal, not only by his or her published work, but also by constructive participation in our community of scholars.

This year's *Virginia Journal* presents three additional members of our faculty:

Risa Goluboff, although new to the tenured ranks, is already a mainstay of this faculty. Her first book, *The Lost Promise of Civil Rights* (Harvard University Press, 2007), seeks to do nothing less than reconstruct our understanding of the history of civil rights. Risa mined original sources to recover the “lost promise” of a civil rights law focused not just on race but also on labor rights and economic exploitation, a focus irrevocably changed by *Brown v. Board of Education*. She brought to that project the same passion and creativity that have made her a classroom star and a leading figure among a younger generation of scholars who are forging new understandings of civil rights law and history.

Caleb Nelson is that rarest of rare birds, a young scholar with genuinely original things to say on topics that have preoccupied the rest of us for generations. He has written on sovereign immunity, stare decisis, standing, preemption, originalism, non-Article III courts, and the persistence of so-called “general law.” To each of these time-worn topics, he has brought new evidence and fresh insight. And in Caleb's case, these

hallmarks of intellectual creativity are joined with unfailing analytic rigor and consistently sound judgment. The result is work of lively interest, but also of uncommon weight and maturity. At a remarkably young age, Caleb has become one of the nation's most widely respected scholars in federal courts.

Glen Robinson is almost a faculty unto himself. His experience includes private practice, government service at the highest levels, and a long academic career, in which he has taught and written on everything from torts and property to communications, administrative law, antitrust, and jurisprudence. Few scholars, of this or any other era, have broader reach. And Glen's insights have vertical range as well, extending from the concrete and practical to soaring insight and playful speculation. There seems to be no dimension of legal thought or inquiry that has escaped his attention, and none in which he has failed to excel. In a profession dominated by expectations of future promise, Glen Robinson is a scholar and thinker of exceptional achievement and unsurpassed breadth.



JOHN C. JEFFRIES, JR.

Dean

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A Legal Historian Committed to Contemporary Social Justice

WHEN RISA GOLUBOFF THOUGHT ABOUT WHAT TO DO AFTER graduating from college, she grew frustrated. Throughout her four years at Harvard University, she had spent her time in two related but different pursuits. As for academics, she studied American history and sociology—a combined major she created herself. She focused on labor history, social history, and the history of race relations in the United States. Outside the classroom, she participated in and sometimes led a host of public interest organizations. She perceived no real conflict between her academic interest in American history and her extracurricular commitment to social justice. Indeed, in preparation for writing her senior honors thesis on the civil rights movement on Johns Island, South Carolina, Goluboff spent a semester there both researching the movement and volunteering at a number of movement-initiated non-profit organizations.

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justice.*

It was disheartening, then, to think about choosing between academic pursuits and public interest work after college. But in preparing to apply either to graduate school in history or to law school, that was precisely the choice Goluboff felt she had to make. She decided to do both. After spending a year teaching sociology at the University of Cape Town as a Fulbright Scholar in South Africa, Goluboff returned home to pursue both a Ph.D. in history (at Princeton University) and a law degree (at Yale Law School).

Two graduate degrees, two federal clerkships, and five years of law teaching later, Goluboff has clearly found a way to unite her interests. As a legal historian at the University of Virginia School of Law, Goluboff is a scholar motivated by real-world concerns whose work, both in the classroom and in her writing, has real-world consequences. “Teaching law students about constitutional law and civil rights,” Goluboff says, “gives me an opportunity to shape their understanding not only of the law but also of the relationship between the law and larger political and social questions.” Her students, who uniformly rave about her teaching, agree. One has said that in her first-year Constitutional Law course, Goluboff “created a semester-long exploration of the Constitution that was so much more than just a class. It was a true discourse, an intellectual adventure, and a downright deep experience.”

Even more than her teaching, Goluboff’s scholarship reflects both her intellectual and her personal concerns with social justice. In a dissertation, a series of law review articles, and most recently her first book, *The Lost Promise of Civil Rights* (Harvard University Press, 2007), Goluboff has explored the meaning and possibilities of American civil rights law in the era before *Brown v. Board of Education*.

That wasn’t how the project started out. When Goluboff first began thinking about a dissertation topic, she went to the National Archives to look for a file of letters migrant farmworkers had written to the federal government in the 1930s. She had spent a summer in law school working with migrant farmworkers, and she had thought the history of such work and workers would make a promising dissertation topic. What she found

in the archives, however, was not what she expected. She found instead letters from the 1940s from African Americans to a newly created Civil Rights Section of the United States Department of Justice complaining about slavery and involuntary servitude.

The first paper to come out of that research won prizes from *Law & Social Inquiry* and the Law and Society Association. “‘Won’t You Please Help Me Get My Son Home?’: Peonage, Patronage, and Protest in the World War II Urban South,” 24 *Law & Soc. Inquiry* 777 (1999), stuck close to the archival material. Goluboff explored the rhetorical strategies southern African Americans used to convince the Civil Rights Section to prosecute the United States Sugar Corporation for holding their sons, brothers, nephews, cousins, and friends in a form of debt-based involuntary servitude called peonage. Tracing both the transformation of complaints from letters to telephone calls to in-person visits to local FBI offices and the language the complainants used to convince the federal government to act, Goluboff revealed a larger transformation: from a group of people who thought the government would only consider their interests if they were tied to more powerful patrons to a group increasingly confident in asserting their own rights to government protection.

The second article in the series followed what happened to those complaints once they arrived at the Department of Justice. In “The Thirteenth Amendment and the Lost Origins of Civil Rights,” 50 *Duke L.J.* 1609 (2001), Goluboff explored why the Civil Rights Section pursued involuntary servitude cases with such vigor in the 1940s and the doctrinal innovations they undertook. Placing the lawyers’ Thirteenth Amendment practice in larger historical context, Goluboff realized that civil rights in the era before *Brown* looked very different from the civil rights after it.

Although the progression of civil rights law may now seem, and is often depicted, as inevitable, during the fifteen years between the Supreme Court’s New Deal revolution in the late 1930s and its 1954 decision in *Brown*, the meaning of civil rights was up for grabs. The *Lochner* era had largely ended the Court’s protection of contract and property rights, but what kinds of individual rights the Court would begin to pro-

text was uncertain. Indeed, contrary to current ideas about civil rights, labor and economic rights—the right to organize into unions and bargain collectively, as well as to minimal economic security—appeared the most likely rights for protection. In the Thirteenth Amendment practice of the Civil Rights Section, the lawyers combined racial claims with economic ones; they saw the Constitution not only through the lens of race but also through the lens of labor rights stemming from both the Reconstruction era and the New Deal. Goluboff thus discovered a form of pre-*Brown* civil rights quite distinct from what it became afterwards and remains today—mostly a negative restraint on racial classifications, shorn of concern for labor and positive economic rights.

Goluboff's implicit critique of the heroes of the conventional civil rights story—the lawyers of the National Association for the Advancement of Colored People (NAACP)—came to the fore in Goluboff's next two articles: “‘We Live’s in a Free House Such as It Is:’ Class and the Creation of Modern Civil Rights,” 151 *U. Pa. L. Rev.* 1977 (2003), and “‘Let Economic Equality Take Care of Itself:’ The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s,” 52 *UCLA L. Rev.* 1393 (2005). Like her first two articles, these again moved from the complaints of ordinary African Americans to the responses of the lawyers to whom they complained. Goluboff wrote “‘We Live’s in a Free House Such as It Is” for a symposium at the University of Pennsylvania on “Law and the Disappearance of Class in Twentieth-Century America.” Goluboff thus explicitly and self-consciously undertook to explore the class implications of modern civil rights by unearthing complaints African American agricultural workers had lodged with the NAACP in the pre-*Brown* era. Because scholars had largely followed the NAACP's lead in writing the history of civil rights, they largely ignored earlier economic challenges and the southern agricultural workers who made them.

Goluboff's article thus challenged the conventional historical narrative by showing how the complaints of African American agricultural workers addressed not only the racial but also the economic components of southern agriculture. Their complaints, which usually went

unanswered, asked the NAACP to redress both racial and economic discrimination. Goluboff concluded by briefly exploring the road not taken by the NAACP and by considering how pursuing combined claims of racial and economic discrimination might have led civil rights law in a different direction, one that would have challenged economic inequalities more so than the strategy the NAACP eventually embraced.

Following up on that article, “Let Economic Equality Take Care of Itself” delved more deeply into the NAACP’s approach to workers and labor-related litigation in the pre-*Brown* era. From its inception, the NAACP had not overly concerned itself with the problems of working-class African Americans. But in the 1940s, Goluboff discovered, with unions wielding considerable political power and the economy gearing up for World War II, the lawyers in the NAACP came to see employment discrimination as one of the two most important problems (along with voting rights) facing African Americans. Goluboff described how the NAACP’s new interest in black workers stemmed both from its perception that new legal tools were available to fight discrimination and from its interest in attracting a new constituency to the NAACP, namely industrial black workers who were increasingly moving north and earning higher salaries. As a result, the NAACP largely eschewed the kinds of agricultural cases Goluboff had described in her previous work—the kinds of cases the Department of Justice was taking—in favor of the cases of black industrial workers.

One of the major contributions of this article to the larger understanding of civil rights history is Goluboff’s depiction of the unsettled nature of the NAACP’s legal strategy in the decade and a half before *Brown*. She showed that not only did the Civil Rights Section of the Department of Justice practice a civil rights strategy very different from that in *Brown* and beyond, but so too did the NAACP. Where *Brown* targeted state-mandated segregation, took a principled stand against all segregation regardless of material equality, and used the equal protection clause of the Fourteenth Amendment as its constitutional basis, the NAACP’s labor cases in the 1940s targeted private as well as public actors, sought material equality even within the confines of segregation,

and used a revamped notion of the right to work derived from the Due Process Clause of the Fourteenth Amendment. The lawyers creatively mined legal doctrine in order to redress both the racial and the economic claims of the black industrial workers who sought their assistance. Having established that the approach the NAACP took to civil rights in *Brown* was neither timeless nor inevitable, Goluboff then went on to describe and explain the process by which the NAACP lawyers marginalized labor cases in favor of the direct attack on *Plessy v. Ferguson* in the education context that would ultimately lead to *Brown*. In her rendering, that case and that process entailed not only the familiar successes but also the loss of the creative and wide-ranging efforts against Jim Crow the NAACP had previously embraced.

In *The Lost Promise of Civil Rights*, Goluboff brought together all of these strands of her previous scholarship and broadened them out into a larger story about the shape and potential of civil rights law before *Brown*. Goluboff's innovations in the book were methodological, historical, and normative. Methodologically, Goluboff drew on the complaints with which she had begun her project in graduate school to highlight the idea of law as a dynamic process rather than a product simply of judicial decision-making. She emphasized the complaints of both agricultural and industrial workers in order to excavate the law-making process from an injury that a layperson perceives as legal in nature, to a complaint to a lawyer, to a lawyer's transformation of that complaint into a legally cognizable form, to a litigated case, and perhaps, only then, to a judicial opinion. Thus, she argues, it is impossible to understand *Brown* without also understanding the cases the NAACP chose not to take to the Supreme Court, without understanding the myriad complaints from African Americans that lawyers and judges filtered out of the litigation process.

Among Goluboff's historical innovations, three are most significant. First, Goluboff redefines a baseline assumption about Jim Crow. Where most historians have treated Jim Crow as a system of state-mandated segregation, Goluboff reveals it to encompass not only that component but also a system of private and publicly-supported economic exploitation.

For many southern whites, the abolition of slavery following the Civil War had spawned two related problems: a race problem and a labor problem. How, they asked themselves, would they prevent the newly freed African Americans from contaminating the white race and debasing white politics? And how would they find a replacement for the cheap labor black slaves had previously provided and on which the southern economy was largely based? The answer to both questions was the complex of laws and customs that arose in the late nineteenth century and eventually came to be called Jim Crow. Those laws and customs encompassed both the kinds of state-enforced formal discriminations we associate with Jim Crow today as well as myriad private and publicly-supported methods of racial subordination and economic exploitation. Defining Jim Crow as a product of both public and private power, and operating in the political, social, cultural, and economic sphere is a crucial contribution of the book.

Second, while most scholars have tended to view Jim Crow as largely a southern phenomenon, Goluboff gives it a national focus. Once one moves away from the cramped definition of Jim Crow as state-mandated segregation, it becomes clear that the South, though perhaps an extreme, was hardly an aberration. Goluboff thus explores the way both African American agricultural workers in the South and African American industrial workers across the nation experienced Jim Crow, and the complaints they lodged about it.

Finally, Goluboff reorients the history of civil rights away from *Brown* to the era before *Brown*. Until now, with a few exceptions, scholars have usually skipped directly from the New Deal Revolution of the late 1930s to *Brown* itself in describing the history of civil rights law. The 1940s is important only as a prelude to *Brown*. In the conventional story, just as the Supreme Court withdrew from closely scrutinizing economic regulation, it determined, as revealed in footnote four of *United States v. Carolene Products*, to closely scrutinize state racial classifications instead. But that timeline is misleading. In fact, neither judges nor scholars saw *Carolene Products* as an answer to the civil rights question until after *Brown* was decided, when it became a justification for the case. As Goluboff shows,

the 1940s were instead a period of openness and experimentation in civil rights. And they are crucial to understanding modern civil rights, because they illuminate the choices lawyers made on the way to where we are now.

These historical points are closely bound up with Goluboff's normative conclusions. Once one views Jim Crow as a system of both racial oppression and economic exploitation, the partialness of *Brown's* victory becomes apparent. And once one realizes the breadth of challenges to Jim Crow in the 1940s, the choices that *Brown* embodied become clear. *Brown* challenged state-mandated segregation, but it did nothing to challenge the public and private economic inequalities that were equality intrinsic to Jim Crow nationwide. It left aside much of the civil rights energy of the 1940s that had been directed toward other, equally important aspects of Jim Crow. With this in mind, racial inequalities in contemporary America are revealed not as happenstance but rather as remnants of Jim Crow that constitutional law has thus far been unable and unwilling to redress.

Which brings us back to Goluboff's commitment to social justice in the world she lives in today, as opposed to the lost world about which she writes. At the end of the day, it's her sense that perhaps this history might change the way people think about the current state of civil rights that keeps her in the archives, at the computer, and at the lectern. She continues to challenge the next generation to ponder not just what might have been, but what might still be. ❄

EXCERPTS

A New Deal for Civil Rights

(Introduction to Chapter 5, *The Lost Promise of Civil Rights*,
Risa Goluboff, Harvard University Press, 2007)

IN 1947, ROBERT CARR WROTE *Federal Protection of Civil Rights: Quest for a Sword*. A political science professor at Dartmouth and the executive secretary of President Harry Truman's 1946 Committee on Civil Rights, Carr hoped to publicize the work of the "unique and little-known agency" called the Civil Rights Section (CRS). Carr organized this first history of the section around a metaphor Supreme Court Justice Robert Jackson used in the 1944 peonage case of *Pollock v. Williams*. Jackson described two ways to protect those caught in involuntary servitude. "Congress," Jackson declared, "raised both a shield and a sword against forced labor because of debt." When victims of peonage found themselves imprisoned on charges of accepting advances under false pretenses, or breaking parole by leaving a particular job, they invoked the shield of federal law. They defended themselves "by requesting a federal court to invalidate the state action that is endangering [their] rights." When the federal government brought prosecutions against individual perpetrators of peonage, however, it raised a sword against them. It "[took] the initiative," Carr described, "in protecting helpless individuals by bringing criminal charges against persons who are encroaching upon their rights."

Adopting Jackson's metaphor, Carr concluded that in recent years the federal government, in the "tentative and experimental work" of the CRS, had taken up the sword not only in peonage cases but also in civil rights cases generally. "Government has traditionally been regarded as the villain in the civil rights drama," he wrote. "The government threat remains, but threats from other sources are extremely serious. They can

and should be met by government action.” Carr saw “the great achievement of the CRS” as making “[t]his new role of government [seem] to be inescapable.”

Carr’s choice to describe the CRS’s achievements through the lens of its peonage and involuntary servitude prosecutions is telling. As the section’s lawyers directed civil rights cases across the country from their perch in Washington, D.C., these Thirteenth Amendment violations made up the conceptual core of the section’s civil rights practice. Unlike the section’s other practice areas—lynching, police brutality, and voting rights cases—its Thirteenth Amendment cases uniquely responded to the combined racial and economic harms about which African American farmworkers complained. These cases built on New Deal protections for free labor and economic security and responded to wartime imperatives for racial justice. In pursuing involuntary servitude cases, the CRS lawyers aspired to a civil rights framework that assumed the government was responsible for eliminating some of the worst and most fundamental aspects of Jim Crow.

The section’s Thirteenth Amendment cases during and after World War II did not, however, comprise a single plan for a new civil rights doctrine. Rather, the CRS lawyers expanded the long-standing federal interest in peonage in three related but distinct directions. First, they reconceptualized Thirteenth Amendment violations from a narrow contractual understanding of peonage to a “federally-secured right to be free from bondage.” As Carr observed, this conceptual shift suggested that affirmative federal power could and should be used to protect not only New Deal economic security but also African Americans’ right to the “safety and security of the person”: the right to be free from bondage, lynching, and police brutality.

Second, the CRS expanded the Thirteenth Amendment from focusing on individual employment relationships to mandating the elimination of legal obstacles to African American free labor writ large. The CRS lawyers used the Thirteenth Amendment to deepen what had been the New Deal’s equivocal commitment to free labor within a unified national economy.

The National Labor Relations Act (NLRA) offered labor rights to industrial workers, but it largely accommodated the desire of southern whites to exclude many African Americans. So the CRS attacked the emigrant-agent, enticement, and other laws that restricted the mobility of black farmworkers. With these attacks, the CRS suggested that the Thirteenth Amendment should protect African Americans in the South from more than simply the chattel slavery it most centrally proscribed. The Thirteenth Amendment could guarantee free labor for those workers excluded from New Deal labor protections.

Finally, section lawyers expanded their understanding of the core economic problem of involuntary servitude. No longer were debt, violence, and legal coercion the sole indicia of unconstitutional servitude; extreme forms of economic coercion were also constitutionally problematic. Here, too, the CRS's use of the Thirteenth Amendment filled in the legislative gaps of the New Deal. Just as the NLRA had left many African Americans without labor rights, the New Deal's guarantees of economic security in the Fair Labor Standards Act (FLSA) and the Social Security Act (SSA) also excluded many African Americans. In attacking the poor conditions in which African American agricultural and domestic workers lived as problematic under the Thirteenth Amendment, the CRS lawyers indicated that such workers were entitled to a version of the economic rights to minimal living standards that FLSA and the SSA offered industrial workers.

Each expansion of the Thirteenth Amendment's protections built on a different strain of New Deal liberalism and represented a different promise for civil rights. Where the New Deal had emphasized labor and economic rights and assisted African Americans only partially and incidentally, these novel involuntary servitude prosecutions aimed to bring African Americans within the New Deal rights framework. Following changing trends within the involuntary servitude complaints of African Americans themselves, the CRS lawyers went about expanding the meaning of involuntary servitude—and the accompanying protection of the Thirteenth Amendment—in order to make the Constitution serviceable for African Americans in the post–New Deal era. ❧

Brown and the Lost Promise of Civil Rights

(*Civil Rights Stories*, Risa L. Goluboff and Myriam Gilles, eds., forthcoming Foundation Press, 2007)

BROWN BECAME THE ICONIC CIVIL RIGHTS CASE OF THE MODERN era. As legal scholars spent considerable effort analyzing, justifying, and systematizing the Court's decision, the image of Jim Crow it projected and the legal doctrine it embraced captured the collective legal imagination. Over the decade that followed *Brown*, subsequent cases, the rise of the civil rights movement, and legislative developments all contributed to this transformation of constitutional civil rights. To some extent, these developments reinvigorated particular aspects of pre-*Brown* civil rights. The pivotal civil rights protest of 1963 was called a March for Jobs and Freedom. The Johnson administration's War on Poverty tried to attack economic deprivation partly because it recognized the continuing connection between racial and economic inequality. And Title VII of the 1964 Civil Rights Act legislatively prohibited discrimination in the private labor market, in labor unions, and among state actors.

Even so, these developments often reinforced, rather than undermined, the image of Jim Crow and racial harm that *Brown* depicted. Media representations of the 1963 March on Washington largely forsook the protest's economic emphasis for Martin Luther King Jr.'s focus on formal color-blindness—in which people would “not be judged by the color of their skin but by the content of their character.” The War on Poverty took as its mission not the redress of economic inequality for its own sake but rather as a cause of the psychological alienation that underlay rising racial violence across the nation. And Title VII prohibited “discrimination on the basis of race” in the same terms as it prohibited discrimination in education and public accommodations. The law addressed work-related inequality as simply an ordinary manifestation of the general problem of race discrimination. Title VII, like *Brown* itself, submerged the substan-

tive right to work that had been a hallmark of the pre-*Brown* years for the antidiscrimination paradigm that was a hallmark of the post-*Brown* era.

Moreover, these and other developments remained largely separate from constitutional law itself. Title VII was not constitutionally mandated. The *Civil Rights Cases* with their state action requirement remained good constitutional precedent. And attempts to translate legislative and social movement momentum for protection of the poor into constitutional guarantees ultimately failed. Within the realm of constitutionally protected civil rights, *Brown*'s equal protection clause, with its state action requirement and concern for formal rather than material equality, remained dominant.

As legal scholars increasingly converged on a general framework for making sense of the constitutional law of civil rights, then, that framework was predominantly the one *Brown* had set into motion in 1954. This is apparent in changes to succeeding editions of civil rights and constitutional law casebooks and treatises. Before and just after *Brown*, treatises and casebooks reflected considerable variety in both the subjects they included within the field of civil rights and the way they analyzed those subjects. Legal scholars treated "civil rights" as encompassing issues like involuntary servitude and labor rights as much as racial segregation; they saw rights as falling into categories like "the security of the person" as much as "discrimination;" and they described the vindication of civil rights as an affirmative responsibility of government as much as the responsibility of private litigants. By the 1960s, treatise and casebook authors eliminated sections on the security of the person; they condensed or eliminated discussions of involuntary servitude and the Thirteenth Amendment; and they eliminated chapters on freedom of labor altogether. Work-related civil rights were largely reduced to the question of job discrimination under the equal protection clause, akin to discrimination in other arenas.

As scholars winnowed out the varieties of pre-*Brown* civil rights, they converged on a race-based, privately-litigated, equal protection-oriented civil rights framework that *Brown* had inaugurated. Indeed, they

reconstructed a pedigree for *Brown* that made that framework seem more timeless than it really was. Rooting *Brown* in the 1938 case of *United States v. Carolene Products*, scholars suggested that courts had long before determined to treat race cases differently from those involving economic regulation. The canonization of *Carolene Products* doctrinally separated economics from race and justified judicial interference with the latter but not the former. It consequently interred any linkage civil rights lawyers had been able to make between the economic and formal legal aspects of Jim Crow in the pre-*Brown* era.

The link to *Carolene Products* made it all too easy to assume that before *Brown*, as afterwards, civil rights doctrine primarily addressed questions of racial classification. In fact, neither lawyers, judges, nor scholars had viewed *Carolene Products* as determining the contours of civil rights law before its vindication in *Brown*. It was not until the post-*Brown* years privileged a race-focused equal protection clause, and contrasted stringent judicial review of government actions affecting racial minorities with those affecting the economy, that race and labor truly diverged in constitutional law. It was not until then that constitutionally-grounded civil rights became squarely rights against the government, in contrast to both rights against private power and rights protected by the government. It was not until then that it became clear how partial the victory in *Brown* was and how much of Jim Crow remained intact in the face of the new civil rights *Brown* had helped construct. ❧

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Shedding New Light on Old Problems

SINCE JOINING THE VIRGINIA FACULTY FROM PRIVATE practice in 1998, Caleb Nelson has established himself as one of the country's leading young scholars of the issues of statutory interpretation and constitutional law now taught under the rubric of "Federal Courts." Much of his work uses history to analyze contemporary judicial doctrines related to federalism or the separation of powers. Nelson has also written important articles about both interpretive theory and *stare decisis*.

Nelson did not set out to be an academic. While he was still in law school, the *American Journal of Legal History* did publish a paper that he wrote as a

first-year student about the rise of judicial elections. But Nelson expected to spend his career in private practice. After clerking for Judge Stephen F. Williams on the United States Court of Appeals for the D.C. Circuit and Justice Clarence Thomas on the United States Supreme Court, Nelson

Much of his work uses history to analyze contemporary judicial doctrines related to federalism or the separation of powers.

headed back to his home state of Ohio, where he joined the firm of Taft, Stettinius & Hollister as an associate in the litigation department. Nelson has fond memories of his time there: “The firm gave me great work to do and great lawyers to learn from.” But he began to want to write and think about issues of his own choosing, and to analyze them without regard to their potential impact on a particular case. “I decided to enter the teaching market,” he says, “and Virginia took a chance on me—for which I’ll always be grateful.”

Nelson made a splash with the very first article that he wrote after entering the academy. As a law clerk, Nelson had thought that existing doctrine did not give courts an adequate conceptual apparatus to approach questions about federal preemption of state law. Despite the importance of these questions, they had attracted relatively little systematic attention from scholars; most existing articles simply focused on the preemptive effects of one particular federal statute or another. Nelson thought that historical research into the meaning of the federal Constitution’s Supremacy Clause might permit him to say something more general. Drawing upon long-overlooked session laws and early discussions of preemption, Nelson made two discoveries. First, early Americans discussed the constitutional priority of federal law over state law in the same terms that they used to discuss whether one statute repealed another. Second, the Supremacy Clause’s final phrase (“any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”) was an example of what eighteenth-century lawyers called a “*non obstante*” provision, which served a very particular function within the jurisprudence of repeals. For legal draftsmen of the founding era, such provisions instructed interpreters not to construe one law narrowly simply in order to avoid conflicts with another law.

In “Preemption,” 86 *Va. L. Rev.* 225 (2000), Nelson reported these discoveries and the inferences that he drew from them. In keeping with the traditional framework for repeals, Nelson argued that the Supremacy Clause does not itself displace all state laws whose enforcement might have the practical effect of hindering the policies behind a federal statute;

while particular federal statutes may well be read to accomplish this sort of “obstacle preemption,” any such inference is properly seen as a matter of statutory interpretation rather than as an inevitable consequence of the Supremacy Clause. In this respect, Nelson’s analysis cut against the expansive understanding of preemption that the Supreme Court had derived from the Constitution in *Perez v. Campbell* (1971). But Nelson also argued that the *non obstante* provision in the Supremacy Clause undermined the artificial presumption against preemption advocated by some other modern courts and commentators. Nelson’s subtle and balanced analysis drew immediate attention, winning the Scholarly Papers Competition that the Association of American Law Schools sponsors for professors who have been teaching law for fewer than eight years.

Nelson revisited issues of federalism in “Sovereign Immunity as a Doctrine of Personal Jurisdiction,” 115 *Harv. L. Rev.* 1559 (2002). Modern debates about the constitutional status of state sovereign immunity have tended to feature two contrary mantras: one side emphasizes the text of Article III (which explicitly extends the federal government’s judicial power to various categories of “Cases” and “Controversies” between individuals and states), while the other side emphasizes statements made during the ratification debates by the likes of James Madison and John Marshall (who assured their colleagues that the Constitution would not expose unconsenting states to suit at the behest of individuals). Ever since *Hans v. Louisiana* (1890), the Supreme Court has accepted the views of Madison and Marshall. But it has not attempted to understand the legal basis of those views: given the language of Article III, how could Madison and Marshall possibly have taken the position that they did? To shed light on this puzzle, Nelson reexamined early discussions of sovereign immunity and discovered that they were cast in terms of the judiciary’s power over the “person” of a state. Using that discovery, Nelson sought to reconstruct the logic behind Madison and Marshall’s position.

Nelson’s research led him to conclude that their argument proceeded in two steps. As a matter of general law, many members of the founding generation believed that states were not subject to compulsory process, at

least at the behest of an individual. As a matter of constitutional interpretation, moreover, many members of the founding generation believed that the existence of a “Case” or “Controversy” within the meaning of Article III depended upon the actual or constructive presence of two adverse parties who are both subject to the court’s power. Putting these two propositions together produces the position that Madison and Marshall articulated. More generally, Nelson found substantial historical evidence that members of the founding generation who believed in sovereign immunity expected it to operate through the mechanisms of personal jurisdiction. As he noted, this analysis clears up an enduring mystery: “it explains the sense in which sovereign immunity was considered ‘jurisdictional’ and yet could be waived by the state.” But as Nelson also noted, the first step in Madison and Marshall’s logic relied upon the states’ exemption from compulsory process under the general law, and that exemption was not necessarily hard-wired into the Constitution. Nelson explored the consequences of this fact for various modern disputes about state sovereign immunity, including questions about whether the Constitution empowers Congress to abrogate the protections that Madison and Marshall had in mind.

Nelson’s analyses of both preemption and sovereign immunity took an originalist approach to constitutional interpretation, and Nelson followed them up with a more sustained exploration of some of the theoretical issues raised by this approach (“Originalism and Interpretive Conventions,” 70 *U. Chi. L. Rev.* 519 (2003)). Originalism often is associated with the use of eighteenth-century dictionaries and similar evidence about how members of the founding generation tended to use individual words that appear in the Constitution. As Nelson noted, however, the meaning of any legal provision depends not only on the conventional usages of individual words but also on a variety of broader linguistic conventions—some common to the English language in general, others specific to the drafting and interpretation of particular kinds of legal documents. Even though these conventions may well be prone to quicker change than the conventional usage of individual words, originalists have not thought

systematically about the kinds of linguistic conventions that bear on the “original meaning” they seek, nor have originalists systematically investigated the content of those conventions at the time of the founding. Nelson’s article marked a first step in that direction. He concluded, among other things, that the relevance of interpretive conventions builds an extra source of legal indeterminacy into the Constitution; founding-era lawyers used somewhat different canons of construction for different kinds of legal documents, and it was not entirely clear which sets of canons the Constitution would trigger. Nelson also investigated the extent to which members of the founding generation expected the precedents that they and their successors established to “fix” the meaning of the Constitution for future generations. Although Nelson acknowledged that much more work remains to be done on the topic of founding-era interpretive conventions, his article has already been described as a “classic study” of the subject.

Some of Nelson’s more recent articles have returned to retail-level constitutional analysis, this time of the separation of powers. In “Does History Defeat Standing Doctrine?,” 102 *Mich. L. Rev.* 689 (2004), Nelson and his colleague Ann Woolhandler used nineteenth-century understandings of the difference between “public rights” and “private rights” to shed light on doctrines about standing to sue. Responding to academic criticism of the modern Supreme Court’s view that the Constitution restricts Congress’s ability to confer standing on private litigants, the article showed that the ideas behind this view have long historical roots. From the early Republic on, American jurisprudence tended to put the political branches of government in charge of seeking redress for invasions of rights held by the public as a whole. According to Woolhandler and Nelson, moreover, modern courts can properly recognize at least some limitations on Congress’s ability to transform public rights into individual interests of the sort that will support private litigation. In “Adjudication in the Political Branches,” 107 *Colum. L. Rev.* 559 (2007), Nelson went on to explore the same framework’s relevance to issues that scholars typically discuss under the rubric of “non-Article III courts.” Both the public/private distinction

and the right/privilege distinction, he argued, are deeply ingrained in the very structure of our government, to such an extent that American-style separation of powers cannot really avoid them. Not only as a matter of history but even as a matter of current doctrine, Nelson described how these distinctions help to separate the types of legal interests that Congress can authorize administrative agencies to adjudicate in a binding way from the types of legal interests whose authoritative adjudication instead requires “judicial” power.

Much of Nelson’s work uses historically grounded ideas to reveal hidden structure in current judicial practice. His recent article “The Persistence of General Law,” 106 *Colum. L. Rev.* 503 (2006), is an arresting illustration of this trait. Many modern lawyers assume that the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* (1938) eliminated any meaningful role for the concept of “general” law in the United States. But Nelson persuasively argued that state and federal courts alike still look to general jurisprudence (defined as “rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions”) for the content of many of the rules of decision that they apply. To be sure, *Erie* changed the relationship between state and federal courts; in Nelson’s words, “[w]hen a state’s highest court uses principles of general jurisprudence to resolve issues that lie within the state’s legislative competence, federal judges now accept its resolution even if they would have taken a different view of the general law,” and “[t]he converse is true when the Supreme Court of the United States draws upon general jurisprudence to resolve issues that lie within the exclusive legislative competence of the federal government.” According to Nelson, however, *Erie* “did not radically transform the source or substance of the underlying rules of decision.” Nor could it have: in Nelson’s view, the structure of our federal system effectively compels courts to continue drawing certain rules of decision from general American jurisprudence rather than from the local law of any individual state. Nelson illustrated this point with a plethora of examples from areas in which courts have understood the federal Constitution or a federal statute to displace the

lawmaking authority of individual states, but in which written federal law does not itself suggest the content of the rules of decision that the courts are supposed to apply instead.

This analysis returned Nelson to the topic of preemption, and it gave him an opportunity to make progress on one of the questions that his first article had bracketed. In discussing the extent to which federal statutes should be understood to displace state laws whose practical effects might hinder some of Congress's policy goals, Nelson's earlier article had contented itself with two relatively modest points: (1) as a matter of constitutional interpretation, the Supremacy Clause did not itself generate this sort of "obstacle preemption" automatically, and (2) as a matter of statutory interpretation, it is not true that *all* federal statutes should be read as implicitly forbidding states to enact or enforce *any* law that might get in the way of accomplishing one or more of Congress's underlying purposes. Equipped with insights from general jurisprudence, Nelson was now able to say something more concrete about the second point. In particular, Nelson argued that general American choice-of-law jurisprudence permits courts to identify what other scholars have called "policy bundles"—clusters of issues that American policymakers are presumed to treat as a package. Those policy bundles, in turn, can help courts identify some outer limits on the plausibility of inferences of obstacle preemption. "When considering matters within the same policy bundle that a federal statute addresses," Nelson explained, "courts often can plausibly impute to Congress an intention to displace certain state laws whose practical effects would hinder Congress's policies. But this intention should not lightly be presumed to reach matters outside the policy bundle[s] that the federal statute addresses...."

Overall, Nelson's scholarship reflects his desire to understand how various moving parts in American law fit together. He is intrigued by the intricate interplay of different forms of law—the relationships between state law and federal law, between doctrines of general law and written statutes or constitutions, and between judicial precedents and the sources of law that they purport to apply. He is also intrigued by the complicated

institutional structure of American government, and the overlapping allocations of responsibility among different branches and different sovereigns. Both in his research and in the classroom (where his courses in Civil Procedure and Federal Courts are renowned for both their rigor and their popularity), he seeks to organize complexity without losing its nuances. He brings to both tasks an unparalleled work ethic, a mind both disciplined and creative, and a genuine desire to follow the evidence wherever it leads. So far, it has led Nelson to make a number of important and fresh contributions to long-standing debates and has made him, at a relatively early stage in his career, one of the most important and respected federal courts scholars in the country. ❧

EXCERPTS

The Persistence of General Law

106 *Colum. L. Rev.* 503 (2006)

STUDIES OF AMERICAN FEDERALISM HAVE ELEGANTLY CATALOGUED the ways in which federal law can interact with the local law of individual states. Many federal rules of decision address only a few discrete questions, leaving each state free to regulate related matters as it sees fit. Other federal rules themselves incorporate local law in certain respects, so that their substance differs in different states.

Modern scholars, however, have been slower to acknowledge a different way in which federal law can piggyback on state law. Within the interstices of written federal law, courts often articulate federal rules of decision that again draw their substance from state law. Rather than tracking the local law of any single state, though, these federal rules reflect state law in general; what matters is how most states do things, not whatever the policymakers in one particular state have said.

To take just one example, consider the legal rules that determine the federal government's rights and obligations under contracts to which it is a party. Under current doctrine, no individual state is in charge of those rules; in the absence of relevant federal legislation, the governing rules are instead a matter of "federal common law." But the substance of those rules nonetheless reflects a multijurisdictional form of general American jurisprudence. As Judge Posner puts it, courts derive the legal rules applicable to government contracts from "the core principles of the common law of contract that are in force in most states" (tweaked where necessary to reflect "special characteristics of the federal government as a contracting partner").

The Supreme Court has taken much the same approach to a variety

of federal statutes that implicate background concepts of agency law, tort law, contract law, or the like. When the Bankruptcy Code refers to “fraud,” for instance, the Court has understood it to be incorporating “the general common law of torts, the dominant consensus of common-law jurisdictions.” Likewise, the Court has assumed that various modern federal statutes implicitly draw their rules of vicarious liability from “the general common law of agency, rather than ... the law of any particular State.”

For scholars who assume that the Court’s landmark decision in *Erie Railroad Co. v. Tompkins* marked the end of the very concept of “general” law, this theme in modern jurisprudence is hard to fathom—which may be why it has largely escaped comment. Properly understood, however, *Erie* does not deny the ability of lawyers and judges, drawing upon precedents and practices followed in diverse jurisdictions, to distill rules that are available for legal recognition and that are sufficiently determinate to be “law-like.” *Erie* simply altered prior views of the relationship between state and federal courts that engage in this process.

Indeed, our federal system all but requires continuing recourse to rules of general law. There are many situations in which courts and Congress alike will want to refer to some sort of national law on topics that typically are handled at the state level. Although the law of each state addresses these topics, one can certainly imagine questions as to which no individual state’s law deserves controlling weight, and on which it seems more sensible to refer to a species of general law.

Part I of this Article canvasses a variety of legal areas in which modern courts do just that. As we shall see, the governing rules of decision in these areas are not entirely under the control of any federal decisionmaker, nor are they dictated by the policymakers of any single state. Instead, the substance of these rules emerges from patterns followed across a multitude of jurisdictions; the decisions of each state’s courts and legislature help to determine their content, but the rules are best understood as a distillation of general American jurisprudence.

Unfortunately, modern courts lack a framework for thinking about such rules. As Part II notes, the result has been confusion and uncertainty; on

many matters of great practical importance, different judges have reached sharply different conclusions about the relationship between federal law and general jurisprudence. Yet just as recognition of the persistence of general law helps us identify common themes in these disagreements, so too it suggests some ways of analyzing them. Part III explains how one particular branch of general jurisprudence can account for the patterns observed in Part I and can help resolve many of the controversies identified in Part II. ❧

Sovereign Immunity as a Doctrine of Personal Jurisdiction

115 *Harv. L. Rev.* 1559 (2002)

IN 1777, WHEN A SOUTH CAROLINIAN NAMED ROBERT FARQUHAR contracted to supply goods to the State of Georgia, he could not have known that he was laying the groundwork for one of the most enduring debates in American constitutional law. Farquhar delivered the merchandise, and Georgia apparently gave its agents money to pay him. But the state's agents never passed the money along to Farquhar. After Farquhar died, his executor—another South Carolinian named Alexander Chisholm—became responsible for collecting the debt. Taking advantage of the intervening ratification of the federal Constitution, Chisholm eventually sued Georgia in the original jurisdiction of the newly established United States Supreme Court. In its first major decision, the Court concluded that it could entertain Chisholm's suit whether or not Georgia consented. If Georgia would not appear to defend itself, the Court threatened to enter a default judgment against the state.

At first glance, this aspect of the Court's decision in *Chisholm v. Georgia* seems plainly correct. Article III of the Constitution explicitly said that the federal government's judicial power "shall extend ... to Controversies ... between a State and Citizens of another State," and it added that "the supreme Court shall have original Jurisdiction" over all such controversies. Justice James Wilson—who, as a delegate to the Philadelphia Convention, had been on the five-member committee that introduced this language into the Constitution—thought it difficult to imagine words that would "describe, with more precise accuracy, the cause now depending before the tribunal," and three of the other four Justices agreed that Article III permitted Chisholm's suit to proceed. Most modern scholars share this view: while they acknowledge that Georgia may have had some defenses on the merits of Chisholm's claims, they see nothing wrong with

the Court's decision to entertain *Chisholm's* lawsuit in the first place and to order Georgia to respond. According to the conventional academic wisdom, "the plain meaning of the language used [in Article III]" supported the Court's decision on this point.

The Supreme Court itself, however, no longer follows *Chisholm*. Part of the change can be attributed to the Eleventh Amendment, which overruled *Chisholm's* specific holding. But the Amendment is quite limited, and it does not address all of the provisions in Article III to which *Chisholm's* logic can be extended. For more than a century, the Court nonetheless has been holding that federal courts cannot entertain suits against states in a variety of contexts that apparently *are* covered by Article III's grants of subject matter jurisdiction and are *not* covered by any plausible reading of the Eleventh Amendment. As the Court has recently acknowledged, these decisions have little to do with the Eleventh Amendment; they rest instead on the premise that *Chisholm* was wrong. According to the Court's current view, the original Constitution did not subject unconsenting states to suits by individuals (or, indeed, by anyone other than the federal government or another state).

The Court has recently gone a step further. In addition to concluding that the original Constitution did not itself abrogate the states' immunity from being sued by individuals, the Court has held that the original Constitution did not empower Congress to abrogate that immunity either. The upshot is that Congress cannot use its Article I powers to let individuals sue unconsenting states, whether in state or federal court.

These decisions have generated an outcry in the academy, and impassioned dissents have echoed the conventional academic wisdom. In response to all such criticism, the Court has invoked what it calls the "original understanding" of the Constitution. The Court never tires of reminding its critics that during the ratification debates, prominent supporters of the proposed Constitution—including both James Madison and John Marshall—explicitly asserted that Article III would not expose unconsenting states to suit by individuals. When *Chisholm v. Georgia* took the contrary view, moreover, many contemporary observers lambasted the decision as illogical and unlawful.

Yet despite trumpeting this evidence, the modern Court has made little effort to connect the early criticisms of *Chisholm* to the text of the Constitution, or to understand how anyone could have interpreted Article III as Madison and Marshall apparently did. As a result, even while the Court purports to embrace the conclusions of Madison and Marshall, it has overlooked potential limitations on those conclusions. Some of the Court's critics, for their part, have been too quick to suggest that Madison and Marshall had no textual basis at all for their conclusions and were simply trying to deceive people about the Constitution's likely effects.

Part I of this Article steps back from the current debate and tries to explain the logic behind Madison and Marshall's position. Although Article III of the Constitution extends the federal government's judicial power to various "Cases" and "Controversies," many members of the Founding generation thought that a "Case" or "Controversy" did not exist unless both sides either voluntarily appeared or could be haled before the court. Traditionally, courts could not command unconsenting states to appear at the behest of an individual. For many members of the Founding generation, Article III did nothing to change this system: if a state did not consent to suit, there would be no "Case" or "Controversy" over which the federal government could exercise judicial power.... ❧

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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.”

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

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

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*:

EXCERPTS

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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