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RISA GOLUBOFF: Hi, and welcome back to *Common Law*, a podcast from the University of Virginia School of Law. I'm Risa Goluboff, the dean.

LESLIE And I'm Leslie Kendrick, the Vice Dean. This season we're traveling backward in time,
KENDRICK: shedding light on some crucial turning points in legal history with stories about how law changed the world.

RISA GOLUBOFF: That's right. You might have heard our last episode, where we talked with Sarah Milov about how lawyers and activists came to recognize nonsmokers as a group with legal rights, which in turn led to a real shift, not only in tobacco regulation, but also in public health law more broadly. So today, we're going to look at how a global catastrophe created the conditions for a different sort of transformation in our conceptions of civil rights and civil liberties.

LESLIE The global catastrophe you're referring to, Risa, is World War II, and we're going to be talking
KENDRICK: about it and its impact on American law with someone who knows a great deal about that subject, UVA law professor Ted White. Ted White is a giant in legal history. He's written 19 books, which have won numerous honors, including a final listing for the Pulitzer Prize in History.

RISA GOLUBOFF: We invited Ted to discuss World War II and its legal ramifications with us, especially some landmark Supreme Court cases, a topic he covers at length in his latest book, *Law in American History, Volume Three*. It's the final work in a series on the evolution of law in America across the entire history of the United States. Ted, welcome to *Common Law*.

TED WHITE: Nice to be here, Risa and Leslie. Thanks for having me.

LESLIE Ted, as you write in your book, one of the reasons the war had such an impact on the law in
KENDRICK: the United States was because of the way Americans define themselves as against their enemies, the Germans, the Japanese, and then later, the Soviets. Could you start us off by talking a bit about that?

TED WHITE: Maybe the first thing to understand about World War II from the experience of Americans is how comparatively late the United States entered the war. Hitler's Germany, fascist Italy under

Mussolini, and imperial Japan have emerged as aggressive totalitarian regimes beginning in the early '30s. And by the late '30s, the Germans are annexing other countries in Europe, the Japanese have moved into China and occupied Korea, and the Italians have moved into North Africa. And these regimes have formed a military alliance.

Now Americans had not had much participation in overseas wars at all. The participation of Americans in the World War I was comparatively slight because we came into the war at the very end. And most of the casualties of the United States in World War I were from influenza rather than from military campaigns.

So going from that to a situation all of a sudden in which Japan bombs us at Pearl Harbor, we enter the war. All of a sudden, there's a massive military call up. And what does it look like to the average American? What it looks like is a bunch of totalitarian ruffians seeking to conquer the world and impose their regimes on everyone, which are completely devoid of freedom for individuals in which the rulers of the state control every facet of life.

And can one imagine America comparably being occupied and having rulers like that? So it's a big deal, conceptually, for Americans. I mean, this is a titanic struggle, if you will, for control of the world.

RISA GOLUBOFF: And so for Americans, what are the values that they see the United States as standing for in contrast to those other countries?

TED WHITE: It's the United States is the so-called leader of the free world. What does it mean to be free? Well, first of all, you don't have the state telling you what to do in every facet of your life. You don't have totalitarianism. You have democracy. You have freedom of speech. You have freedom of religion.

These values, embodied in the US constitution but not prior to World War II really a significant part of the Supreme Court's jurisprudence, become elevated in public consciousness. And so there's a direct connection, I think, between the way in which the war is set up and conceived by American audiences and this post-war growth of civil liberties and civil rights.

LESLIE KENDRICK: Are there particular examples of legal cases or legal doctrines where you really think we can see that show up, we can see that concern manifest in the law?

TED WHITE: Absolutely. What happens in the early '40s-- one thing to remember is that although we think

of the New Deal as a sort of prominently liberal period in American history, and it was in some respects in economic matters, free speech really doesn't begin until the early 1940s.

And the early free speech cases are, to an important extent, Jehovah's Witnesses cases. These are religious minorities who are claiming that their civil right of free exercise of religion is being infringed upon. And typically in pretty mundane contexts like distributing leaflets in parks.

But the Witnesses are a very litigious group and they bring a lot of cases. And it is those cases that force the Justices to think more profoundly and deeply about the meaning of free speech, particularly insofar as it involves protection for unpopular communications by minorities.

RISA GOLUBOFF: So, Ted, I'm thinking in particular here about two cases that were decided three years apart with incredibly different outcomes, so *Gobitis* and *Barnette*. *Gobitis*, *Minersville School District versus Gobitis*, which was 1940 case.

And then three years later, *West Virginia State Board of Education versus Barnette*. That's 1943. They're both religious freedom cases, very similar facts, one right after the other. But the results, totally different. So could you tell us a little bit about what happened there?

TED WHITE: Yeah, the petitioners, again, in both of these cases are Jehovah's Witnesses. Although the cases are not typically understood in that fashion. They're understood as flag salute cases. Because these are cases with identical fact patterns where a school board is requiring students in the school system to salute the flag.

There's a ceremony where you begin school by going through an exercise in which children salute the flag. This is challenged by Jehovah's Witnesses who take the position that saluting the flag is worshiping a graven image, which their religion forbids. So they want their children to be exempted from the ceremony.

The first time the case comes up, a majority of the court says, no, the school board can do this because compulsory saluting the flag is a kind of value inculcation exercise that public school students can do. And the flag is a national symbol and what you're saying in a wartime setting is pledge allegiance to it as part of being an American.

Three years later, with a slightly different configuration of Justices, but with some other Justices changing their minds, in an identical case the court goes the other way. And Felix Frankfurter, who wrote the majority opinion in the first case, writes a very impassioned dissent.

But he loses. And after that case, there is a majority, if you will, on the court for the proposition that government cannot simply impose its own values on dissenting minorities.

RISA GOLUBOFF: So you mentioned at the beginning that the war provoked a rethinking of free speech and also equal protection. So say more there, right? Race is really in flux at this moment.

TED WHITE: Race is in flux. The implications of race don't begin to play out immediately after the Second World War. But one of the features of World War II is that there is still some segregation of military personnel. There are still some regiments that are all black and others where African-Americans are not included.

In the middle of the war, Gunnar Myrdal's book *American Dilemma* is published. And that is written by a native of Sweden, a book based on interviews and expeditions that Myrdal took in the American South.

What it demonstrates in rather dramatic detail is that the United States on the one hand, fighting as a leader of the free world and an arsenal of democracy is also perpetuating segregation. And that ends up being increasingly embarrassing because the Soviet Union exploits it. The Soviet Union says, well, if the Americans are so dedicated to freedom how come that the freedom does not extend to African-Americans?

LESLIE KENDRICK: So certainly segregation within the armed forces and recognition of the status of African-Americans in the American South exposes the hypocrisy of American ideals that are part of that rally cry for the war.

But you go from 1945 when the war's over, Brown is in 1954. So it's like, obviously there's lots of other moderating and mediating influences here. But how do you trace out the legacy of the war and how civil rights come about?

TED WHITE: Yeah, Truman signs an order desegregating the armed forces after World War II ends. But a powerful argument is made by African-Americans who come back saying, I'm a veteran. I fought for my country. And I come back, and I'm still being treated as a second class citizen. I can't go to a movie theater, I can't ride on a bus. I fought for my country and that's just not fair.

But litigation being what it is it takes a while for this to emerge. The easier cases are the higher education cases. Law schools that just won't admit African-American students even though there's no other law school in the state or a graduate school that admits an African-American.

And then puts him in a separate seat in the classroom and he has to eat in the dining room by himself. I mean, and these in some ways easy cases because the segregation is so patently disruptive of educational opportunities. And how can they possibly argue that that's separate but equal?

**LESLIE
KENDRICK:**

So let me ask, and I don't know exactly how this cashes out. But in our heads now, I think we have the bucket civil liberties that's kind of speech related and some other rights, and civil rights which are more equality focused. And those are, in some ways, sort of artificial terms for a panoply of different rights that we can slice and dice in different ways.

So did these things that happened, is the legacy of World War II part of how it is that we think of this whole set of rights? Did it contribute to our understanding of what counts as civil liberties and what counts as civil rights? Are those categories that start to emerge in this time period?

TED WHITE:

They are categories that start to emerge. And along with them emerges the stance of the Supreme Court in reviewing legislation that I call in the *Law in American History* volumes bifurcated review. Which is to say they adopt a more aggressive stance toward reviewing legislation that, putting in your terms, infringes on civil rights and civil liberties than they do on legislation that infringes upon economic rights.

RISA GOLUBOFF: Like the New Deal, New Deal legislation.

TED WHITE:

New Deal legislation. So you get a lot of New Deal and state social welfare legislation routinely upheld by the court, under a so-called rational basis review standard where they really just ask the legislature to give some purported justification for the legislation. They don't go much further than that.

It's very different where the equal protection clause is concerned or the First Amendment is concerned. That triggers more aggressive review. And the Warren Court has decisions where you get very supine attitudes toward economic legislation. At the same time you get rather aggressive scrutiny and some overturning of legislation challenged on civil liberties or civil rights grounds.

**LESLIE
KENDRICK:**

Which just to be clear is a change. The review of economic regulation goes way down. The scrutiny goes way down in the period of the late '30s and onward, where they start to give this more permissive form of review for economic regulation. That's a change for them.

TED WHITE: Absolutely, the strict scrutiny for some cases, rational basis scrutiny for others, intermediate scrutiny. The court never used to have these levels. Every case was the equivalent of aggressive review.

It only began, this more deferential form of review, in the 1930s. If you think about this in terms of the argument that judges shouldn't interfere with legislatures because legislators are properly elected and judges are not, Supreme Court is not.

And it's counter majoritarian, if you will, for the Court to usurp legislation. Well, if that's the case, if the court internalizes that view, then why not have deferential legislation across the board? Why not have it in all cases? Well, because an idea, and it's a World War II idea, has seeped into the court's thinking, which is majorities have the capacity to repress legislative minorities.

Majorities can exclude minorities from the process. And then they can pass legislation imposing costs on them. It is majoritarian, but it runs counter to our democratic principles. And who is going to help the minorities except the court? So it's that sort of memory of a state like the Axis powers where the state completely controlled the welfare of minorities, seeping into the Justices' consciousness and making them worry about majoritarian repression of minorities.

LESLIE
KENDRICK: I wonder if we could move that conversation into the Cold War a little bit. I'm thinking about the treatment of communists in the United States during the Cold War, where I think we see some similar kind of tensions between the ideals and the opposition to the purported values of the enemies. But then how we actually apply that in the United States. What can tell us about that?

TED WHITE: There's an interesting evolution of attitude toward communism that takes place between the 1930s and 1940s. And the house Un-American Activities Committee is formed during World War II to look into Nazis, to look into subversive organizations. And they transformed themselves to look into communists.

And that really catches on. They become a quite important and influential force in American politics in the late '40s. And the first response of the court is to allow legislatures to engage in proceedings where they're identifying people as communists. And dismissing them from positions of public education.

And the people who are dismissed sue, claiming it's a violation of their First Amendment rights.

For the most part the court-- when Vinson is Chief Justice--

RISA GOLUBOFF: So what years?

TED WHITE: Vinson becomes Chief Justice in 1946 and stays until he dies suddenly in 1953. So we have on the Vinson court a bare majority for support of this legislation punishing people for being communists or communist sympathizers.

And then after Vinson dies and Warren replaces him and Brennan comes on the court the majority shifts. But it takes a while for the Supreme Court to revise its posture toward government decisions that punish people because of their views sympathetic to communism.

LESLIE KENDRICK: So one could ask if free speech became a more important value to society or if threats on the ground change. It's a lot easier in 1959 to determine as a factual matter that communists are not a major threat to the national security of the United States than it is in 1954.

The House Un-American Activities Committee, all of this has been basically discredited at that point. And you could say the Supreme Court's coming on the battlefield after the war has been fought to shoot the wounded, basically.

TED WHITE: The Communist Party has certainly been marginalized between the late '40s and let's say the late '50s. There was one more case, United States vs. Scales in 1960 in which there's a conviction of somebody for subversive advocacy.

There's not a single case after that. So by then of course the Warren Court is, for my generation growing up in law school in that period, it's a heroic institution protecting civil rights and civil liberties. That's not been its entire history.

LESLIE KENDRICK: Well, and this gets me back to the question of the division between civil rights and civil liberties. And how that can be kind of a messy distinction. Because you think about in Barnette, back to the pledge case, Gobitis treated the pledge issue as a free exercise issue and rejected it. And Barnette comes along and treats it as a free speech issue and says, oh, this is about state neutrality toward ideas.

It's not about equal treatment of people. It's not about religious minorities. So in many ways you do see the Court at various times kind of going back and forth. And putting things in one bucket that maybe easily could have gone in another.

TED WHITE: Yeah, I think the equal protection argument is the slowest to take root on the Court. For example, you could have thought of *Roe v. Wade* as an equal protection case.

RISA GOLUBOFF: And people have made arguments that it should be treated that way, right?

TED WHITE: And instead it goes off along on due process. But the Court is just, for some reason, reluctant to embrace a sort of full-blown conception of equality. For example, the Warren Court doesn't even bat an eye about gender discrimination cases.

The case they take, *Hoyt versus Florida*, where a female juror is excluded on the theory that women ought to stay home and not participate in civic affairs, unanimously decided by the Justices, including Earl Warren, and Hugo Black, and William O. Douglas, and William Brennan. They just don't see it. They don't begin to see it until the 1970s. So that the equality argument is somehow later than the others.

RISA GOLUBOFF: So would you say that we're still in the shadow of World War II?

TED WHITE: I would say we are in some respects. Take habeas corpus in Guantanamo. Something I've learned since the advent of the Trump administration is the extraordinary power that the President has to issue executive orders. Many of which are not reviewable by anybody, apparently.

And what is that all a product of? I think that's a product of what we might call the imperial presidency. And that is a product of World War II.

Because what you need is you need the idea of an executive who can make swift decisions which don't get bogged down in red tape which may involve national security. So the national security rationale and the sort of imperial presidency conception I think are products of World War II. And we are still very much stuck with them.

RISA GOLUBOFF: It's interesting because in World War II you have executive orders creating fair employment practices among federal contractors. It's through an executive order that Truman, after World War II, desegregated the military. So you see those examples of executive orders. They look very different. But you see examples of those executive orders in the midst of the war as well.

LESLIE That's kind of a double edged sword.

KENDRICK:

RISA GOLUBOFF: It goes both ways, yeah.

TED WHITE: I also think that the line of cases involving detainees from the Gulf Wars and War on Terror, in those cases the Bush administration repeatedly argued that there was essentially no judicial review of these decisions whatsoever. And their rationale was national security. And their rationale was a need to have this sort of summary executive treatment? Well, where's that come from? World War II.

LESLIE Well, this has been really interesting. And I feel I've learned so much both about World War II
KENDRICK: and about jurisprudential history. So thank you very much, Ted.

TED WHITE: Oh, my pleasure. Glad to be here.

RISA GOLUBOFF: Thanks so much.

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LESLIE So, Risa, that was really interesting. And it certainly played up both civil liberties questions and
KENDRICK: civil rights questions. And where we wound up with Ted I think was a complicated picture. And not one where the war is simply a catalyst for progress on either of those fronts, but something that's a little bit more complicated than that.

RISA GOLUBOFF: Absolutely. I think there's often a dichotomous effect on civil rights and civil liberties in wartime. Simultaneously, the state is repressing disloyalty, repressing marginal or challenging speech or activism. And the stakes are really high and national security is really important.

And at the same time various groups find openings to say, you have to prove why we should be loyal to you. If you're saying we're fighting a war for freedom and democracy and yet there's still Jim Crow at home, why would I want to fight for you?

LESLIE So one example that that makes me think of is Japanese internment.

KENDRICK:

RISA GOLUBOFF: Clearly from World War II, that's the biggest example, right? So we can talk all about desegregation in the military which happens after this. And I think African-American activism did soar during this period. And you could see the beginnings of progress even if the fruits of those protests weren't really going to be seen for a decade or two after that.

But the Japanese internment is the complete opposite side of that dichotomous coin. So during World War II there was enormous panic on the west coast that Japanese-Americans living in California and elsewhere on the West Coast were saboteurs, were spies, were planning violence, were doing all kinds of nefarious things.

And the folks who lobbied for the exclusion order that comes into effect during World War Two that says people of Japanese descent can't live on the west coast. And then later not only pushes them out but it detains them in, essentially, concentration camps, where the exact same people who had been pushing for various kinds of discriminatory laws against the Japanese for years and years. So they were opportunistically using the emergency of the war to prosecute their anti-Japanese discriminatory agenda.

LESLIE

KENDRICK:

That seems very similar to an earlier time period history that our conversation made me think about, which is World War I and its relationship to civil liberties and free speech in particular, where you have socialists being prosecuted under the Espionage Act. And it's this combination of national security justifications but also clear animus toward socialists.

So a Red Scare mentality combined with this sort of national security impetus for cracking down on them. And you get the same dynamic where the war and wartime become both a catalyst for conceiving of and crystallizing free speech rights. But also that's coming out of a moment of severe repression. And it's not really until after the war is over that you start to see some movement on that, the national security justification has kind of fallen away at that point.

RISA GOLUBOFF: And those are dissents and concurrences, right? Which is also parallel to what happens in World War II. So the Court is deciding these Japanese internment cases. And they uphold Japanese internment. But there are dissents that create the possibility for future doctrine that will uphold the civil rights of minorities.

LESLIE

KENDRICK:

That's right. And it seems like that is a kind of common pattern where, mistakes were made.

Mistakes are made during wartime.

RISA GOLUBOFF: Big, big, big mistakes.

LESLIE

KENDRICK:

The take away, the constitutional jurisprudence take away is, we learned from that mistake.

And this thing that the case comes to stand for is that we're not going to do that again, this sort of anti-canon idea. And that's certainly true in the post-war era during the Cold War, where the same dynamic sets up.

And the lesson that we take away from all of the McCarthy era, both prosecutions and denials of various types of government benefits or status for communist is that we don't punish people for their political beliefs. But it's through a lot of trial and error--

RISA GOLUBOFF: That we punished people, right?

LESLIE We'll put emphasis on the error, that we sort of come to this takeaway.

KENDRICK:

RISA GOLUBOFF: So does that make you think we don't ever really learn because each war we do it again? Or whether Cold War or hot war we continue to make these kinds of mistakes? Can you even call them mistakes if we do them every time? Or is it just a dynamic?

There's a Latin saying that the laws are silent in wartime. And I think maybe you could tell an optimistic story. Well, maybe the laws are silent in wartime. But after each war then we figure out a way to make that experience meaningful for the law going forward. But you could also say, why don't we ever learn that we shouldn't have the laws be silent in wartime? And just treat it differently at the time.

LESLIE Yeah, that's a great question. I see examples going both directions. So on the free speech front, I think we tend to advance and then make new mistakes. So at the point of the McCarthy era there's kind of a collective consensus that outlawing a political party is something that one can do.

And this goes back to early 20th century conversations about whether the Klan could be banned outright. And instead the tactic becomes to get at that Klan through sunlight, through disclosure laws, and through a variety of other types of mechanisms like that. And those same conversations come up again in the anti-communist era. And so maybe you see development. But still not always in the best direction.

RISA GOLUBOFF: You know Leslie, we've been talking about how law changed the world and how the world changes law. And we talked about that with Sarah's episode and smoking and nonsmoker's rights. And I think here we see a particular way in which when the world changed the law, the law changes the world.

Which is in both the early free speech cases and the Japanese interment cases you see dissents and concurrences that are not the majority opinion, and are not making law at a

particular moment. But that they come back later and they are resources both for social movements, and lawyers, and litigation, and creating opportunities for people to continue to challenge the law and try to create new law. And then for Justices to actually create majorities going forward.

LESLIE Yeah, it seems like these world events, they force changes in the law which then get push
KENDRICK: back. And the push back itself then becomes new legal rules going forward. So it's a really interesting dynamic.

RISA GOLUBOFF: Exactly.

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LESLIE Well, that's all we have for you today on *Common Law*. We hope you'll join us next time for
KENDRICK: more stories about when law changed the world.

RISA GOLUBOFF: If you want to find out more about Ted White's work on law in American history and much, much more, please visit our website site, CommonLawPodcast.com. You'll also find all of our previous episodes, links to our Twitter feed, and more.

LESLIE Be sure to leave us a review on Apple Podcast, Stitcher, or wherever you listen to the show.
KENDRICK: We'll be back in a few weeks with Cynthia Nicoletti, talking about the Civil War.

CYNTHIA In 1865 there's this choice, right? How much military authority is Congress going to put in the
NOCOLETTI: former Confederacy? And how much of a wrench do they want there to be?

LESLIE *Common Law* is a production of the UVA School of Law and is recorded at the studio of the
KENDRICK: *Virginia Quarterly Review*. This episode was produced by Sidney Helleman, Robert Amangal and Mary Wood. We had help from Virginia King. I'm Leslie Kendrick.

RISA GOLUBOFF: And I'm Risa Goluboff. See you next time.

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