

CommonLaw.S2.Ep8.FINAL EDITED

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

LESLIE KENDRICK: And I'm Leslie Kendrick, the vice dean.

RISA GOLUBOFF: If you've been following the show this season, you know we've been looking at times when law changed the world. So far, we've seen how social and legal change have been inspired by actions ranging from grassroots movements to major conflicts like war.

LESLIE KENDRICK: And this episode touches on both. We're going to start by looking at the Revolutionary War era and one of the most famous American protests of all time.

RISA GOLUBOFF: That would be the Boston Tea Party. In 1773, colonists famously protested taxation without representation by dressing up as Native Americans to dump tea imported by the British East India Company into the harbor. It might sound strange, but wearing such costumes and using Indian symbols to complain about a perceived injustice was a tradition that continued for decades, even generations after the Revolutionary War.

LESLIE KENDRICK: Today, we're talking with UVA Law Professor Farah Peterson about how this tradition developed and what it says about Americans' conception of their constitutional rights before the United States Constitution was even written. Farah, a legal historian, explores these issues in a forthcoming Virginia Law Review article. Farah, welcome to Common Law.

FARAH PETERSON: Thank you.

RISA GOLUBOFF: Farah, we're so pleased to have you with us today. So what caught your attention about the Boston Tea Party?

FARAH PETERSON: Well, so any legal scholar knows this as a legal event because it's a constitutional protest. These people are dealing with quintessentially legal claims. They are being taxed without their representation, and that is the essence. But for some reason, we always teach it with the detail that they're dressed up in Indian costume. Why?

And as I was reading a **contemporaneous** account, the oddity of that fact came out to me very strikingly because the person remembering his participation says, "It was evening, I decided to dress myself in Indian costume. I put on a hatchet that I denominated the Tomahawk, and then I stopped by the shop of a local blacksmith to use his coal dust to put black coal on my face and hands. And then I fell in on the street with others who were dressed in the same way."

So I paused here, and I thought to myself, wait a second, what's going on here? This is not just something he's doing without thinking about it. This is expressive. And it's not just practical. He's painting not just his face to disguise his identity, he's painting his hands. He's putting on a

hatchet that is not a tomahawk, but then he's calling it a tomahawk. For some reason in this legal event, his costume has a meaning to him. And the question that I started to investigate is, what was that meaning? And why do we still talk about this event with that detail involved in the retelling?

LESLIE KENDRICK: So what did you find when you started looking into that question?

FARAH PETERSON: Part of it is that this is a culture that is closer to medieval Europe in some ways than it is to modern day America, and so this is borrowing from or the inheritance of a tradition of the medieval European Carnival tradition, of people once in a while, on calendar days, dressing up in costumes that represent kings or gods or demons and being able to throw off the normal social norms that bind their very hierarchically arranged lives in everyday life.

And throughout European history, and especially in British history, the Carnavalesque tradition of the people out of doors has a subversive political component or potential that, especially in the lead-up to the Revolution, really became part of the political movement toward revolt.

So in Boston, the site of the Boston Tea Party, of course, there were annual Carnival traditions on Pope's Day, a boisterous celebration of the defeat of Catholicism that involved different groups of young men creating floats that come from the north side and south side of Boston parading toward the center of town, and then having a riot basically in which they tried to steal each other's floats, sometimes resulting in the death or maiming of various participants, and then victoriously carrying off the victors' float and having a party afterwards.

And young boys going around from house to house taking effigies of a pope or a Satan and demanding treats is sort of an ancestor of Halloween. It was the leaders of those Carnivals that would then turn into become the leaders of the mobs protesting British trade policies. They took the attitude of the organizational knowledge from this Carnavalesque traditions that include costuming, among other things, and translated them into a really potent political power.

RISA GOLUBOFF: So what made them choose Native American dress, right? So that's the Carnival and the performative aspect of the mob. So why Native American dress? Why is that the costume that they choose for these protests?

FARAH PETERSON: So part of it is simply that for Americans at the time, especially Americans in a place like Boston or on the Eastern seaboard or who may never have met a real Native American in their lives, the idea of a Native American is really scary because there's constant literature from reports from the frontier colonies discussing the conflicts and attacks on white settlements there by Native American aggressors and vice versa.

So there's an aspect of the costuming that is simply, just as white men would dress up as devils or demons in order to express these traditions, they're dressing up as the thing that's the scariest thing they can think of. But there's another aspect of it that's borrowing from Enlightenment philosophers who use Native Americans-- Rousseau, Locke, Diderot all discuss Native peoples, if not Native Americans, as their ideal man in a state of nature, the basis for a compact theory of how societies are constituted.

So especially in the lead-up to the Revolution, this pattern of dressing up as an Indian also expresses the sense that we are the men of nature, and we are now exercising our renewed right to decide on our own compact. And there is yet another thing. They are comparing themselves to the British in Britain. These British North Americans, who have long thought of themselves as Britons and as part of a unified empire under one king, now have to differentiate themselves and assert a special relationship to the soil of North America.

And part of how they do that is by dressing as Native people themselves and saying, no, we are really Native here in comparison to you, imperial officers, and so we get to decide what the laws are here and which laws we're going to comply with that are sent from overseas.

LESLIE KENDRICK: Wow, as a practice, this is just completely fascinating. So I hear from you there is a kind of Enlightenment Rousseauian thing about the state of nature. There's also this kind of colonialist approach to Native peoples that's at once tinged with the feeling of superiority, but also fear toward Native peoples. But all of that is also being used for a sort of anti-imperialist message, which when I hear about white people dressing up as Native Americans, that to me, the imperialist overtones of that seem quite apparent from a modern viewpoint. But they're using this to assert their right to this land as against their imperial overlords in some way.

FARAH PETERSON: Right. And the irony of it is really striking because there are some people who became known in the pre-Revolutionary Era for their horrific anti-Indian attacks, who were even reviled throughout the colonies for a special barbarity in attacking Indian nations on the frontier, who then take on this Indian dress and become heroes of the Revolution while dressed as Indians.

And so speaking of it just as an assertion of white British North Americans becoming Americans by comparing themselves and distinguishing themselves from the British loyalists or imperial officers is one thing. Thinking about what is the communication this directs toward the nations on the frontier is a completely different question. There's violence toward the actual Native person that is not just a byproduct of this costuming, but is actually one of the rich aspects of the symbology.

Because in port cities, sure, the Revolution was all about these economic policies and trade policies. But for Pennsylvanians and other people in what was then the West, the impetus for a revolution was very much an anti-Indian campaign, a feeling of the British have been too good to our violent neighbors, and they have failed to protect us against the victimization by these strong peoples who we've continually impinged upon and who are reacting with violence. And so the embodiment of the white American as the Indians' replacement, it expresses something quite violent toward the actual Indian American.

RISA GOLUBOFF: And to add onto that, you talk in your paper also about how it's not only about imperialism or the expansion across territory, but it's also about race, very much about race, and that this is part of the project of creating whiteness among the British colonists.

FARAH PETERSON: The process of distinguishing the body of people from Europe, from Britain, from the other empires who are waiting on the edges of the British North American colonies and hoping to take over -- Spain and France -- and defining a new people that could express nationalism as one people was a difficult creative process, and part of it involved defining a new thing in the world, this idea of the white person.

And the British North Americans, who, at the time, we also had Germans and Dutch and Spanish peoples who were all living in New York or in Pennsylvania, in order to come together as one monolithic people, part of that creative process involved comparing themselves to imagine monoliths of other cultures, so comparing themselves to this caricature of the Indian. And there were so many instances in early America in the colonial period during the Revolution and then after the Revolution for generations of people putting on Indian dress in order to assert a consistent suite of legal ideas and claims about economic justice.

LESLIE KENDRICK: Could you say a little bit more about that?

FARAH PETERSON: Sure. So part of the lead-up to revolution, part of the way that the revolutionary movement was explained and justified and built upon by its proponents was talk of economic injustice. So it wasn't just that tea was being taxed unfairly, it was that these unfair taxes are a symbol of a broader system of economic oppression, and there's a slippery slope argument. If we allow this kind of oppression to persist, even in these small ways, the next thing we know, we'll be no different from our slaves.

And to elites who were talking in these tones, it perhaps had less radical connotations than to some of the regular colonial Americans who were hearing it. So the farmer marching off to war thinks, I am marching toward a revolution that will mean that creditors can no longer lock me up in prison when I can't pay, and these kinds of unfair credit and debt relationships that are so pre-modern. And so against the Enlightenment ideas of consent and volition are going to fade away, and instead we're all entering a new rational world in which people are basically going to be better to each other.

And none of those promises were fulfilled. The Constitution that emerged in 1787 was quite a conservative document compared to some of the radical promises of that revolutionary rhetoric. And one of the things that the Indian costuming expressed was the continuation of those other ideas, the ideas that had not been included in the written document that would move forward as what we now think of as the only American Constitution.

RISA GOLUBOFF: So what do these practices look like after the Revolution and after there is a written Constitution? How did the interactions between these kind of out-of-doors protests, are they still legal in your view? And what form do they take, and where do they pop up?

FARAH PETERSON: Well, it's fascinating because these continual assertions of rights obviously confront and challenge a new way of thinking about law as only what happens to be written down, and the confrontation often creates really interesting political situations. For example, the Whiskey Rebellion involved protesting a federal whiskey tax in Western Pennsylvania.

They protested in much the same terms, using much the same rationale that the American revolutionaries had used to protest British taxes, saying, you cannot tax us. We're not adequately represented. We demand actual representation, and that's not possible here. And because you're not representing us in passing these laws, we refuse to pay. And we're going to dress up in these costumes, erect liberty poles, name new republics, create new flags, and declare ourselves independent.

RISA GOLUBOFF: And what year is that?

FARAH PETERSON: That's in 1791. And so when George Washington marches out of the head of a 13,000-person army down to squish them, what kind of rationale can he possibly use? This man who just yesterday was a **traitor** himself to the only government he had ever known, how can he tell them, you have no right to use these same arguments against the same problems? And so what happens is the rebellion is dispersed, certain **traitors** are arrested. They're tried, they're sentenced to death, and then pardoned.

And this pattern of arresting the protester, sentencing him under the positive law, even to death, and then letting him out of jail as a result of a presidential or gubernatorial pardon, this back and forth, it is part of the adjustment of old legal ideas and ways of expressing themselves to new legal ideas. Obviously, it's not possible to implement a new legal regime all at once right away, with no safeguards and no space for the old forms of expression.

RISA GOLUBOFF: So you say that these practices last for generations. There continue to be, into the late 19th century, into the 20th century, into the 21st century, mob actions and protests of various kinds. Would you say there does come a moment when that's no longer continuity, but change? Does there come a moment when we're in a new era and now the relationship between those actions and the Constitution is fundamentally different? Or do you see all those actions up until today as really being a continuation of the pre-revolutionary kind of activities that you're describing here?

FARAH PETERSON: Well, I do think that some of these pressures, these opposing pressures that I'm talking about, were resolved through the electoral process, and there's real change, even during the period I'm still talking about, with the rise of Andrew Jackson and the expansion of the franchise to more white men, to poor men. Because of that franchise, men, who otherwise would not have had another avenue of institutional expression and would have had to mob in the streets, can instead elect their avatar, Andrew Jackson, who is anti-debt and who is pro-settler and who hates banks and who expresses some of these economic justice issues that had been at the core of these protests all along.

So with the rise of American democracy, the creation of new avenues of political expression, the utility and the need for these old forms of constitutionalism, fades away. And so I would think that as you see sort of modern actions in the streets, they are still expressive, they're still important, but they're not the same. They're different in important ways, and that would take a longer conversation to sort of figure out exactly how.

LESLIE KENDRICK: So in this question and the answer, I hear you all as historians having a conversation, where maybe, as usual, Risa is playing the role of the lumper, but this time you're playing the role of the splitter. Risa looks at this and sees continuities between this practice and other moments of constitutional change that involve group action, the civil rights movement, the suffragettes, and you're saying this is importantly different and distinct. And it seems like these are both important aspects to this movement. But I see you all as historians having a conversation about how much continuity there is in these forms of expression about the Constitution-- because I think they're all that-- and how different they are.

FARAH PETERSON: One of the strange legal fictions of a positivist view of our constitutional order is this idea that only elites matter in deciding what the Constitution is, what's in it, that only a person with highly specialized knowledge can tell you how the society is constituted, when we know as a matter of historical observation, as a matter of day-to-day practice, that there are other pressures, political pressures, population pressures, movement pressures on how we decide who gets rights and who doesn't.

And something that's nice about looking back at British-style constitutionalism is it gave participants in it the freedom to simply say, our Constitution is what you see. The powers that interact here are how society is constituted, and we move forward with that understanding. And insofar as there are ruptures from that understanding, then we fight about it, and then perhaps we have a revolution and a new constitutional settlement. Writing things down makes that more hard.

However, there are still claimants to constitutional rights in power that are outside of the sphere of what courts or legislatures or other elites acknowledge, and they still do exercise pressure. So there is a sense of continuity just as a matter of realism that a community is vulnerable to large scale groups demanding political representation, even when not through the forms that are honored in the positivist law, and that has both good sides and both sides.

We have the suffragettes, we have the **Civil Rights movement** pressing on government to acknowledge the rights of more of the community. But then there's also the Ku Klux Klan that is expressing, especially in the Redeemer movement of the post-Reconstruction Era, expressing their own view of how society is and must be constituted and imposing that view successfully on the American post-Civil War states. So is there continuity? Yes, of course, there's continuity. Do we talk about that in the language of constitutionalism or not? That's a matter of intellectual style, I think.

RISA GOLUBOFF: I don't think we're very far off. I'm going to lump again.

LESLIE KENDRICK: Lump. Lump, lump.

RISA GOLUBOFF: Farah and I together. And when you're talking, I'm sitting here thinking, it's not surprising that we would not necessarily have the same views, but similar views about the relationship between the Mandarin interpretations of constitutions, which is often the high priests of the Constitution, justices and judges and lawyers and academics, which is where most people stop when they're thinking about who makes the meaning of the Constitution and how it changes.

It's not surprising that we would both think, no, you can't stop there. You have to think outside of those bounds to everyday people, to mob actions, to social movements, because we studied with the same person, right? We're intellectual siblings. And Dirk Hartog, who is one of the main creators of the idea that everyday people have legal consciousness and constitutional consciousness in particular. So I'm just going to keep lumping and reject your attempt to split us apart.

LESLIE KENDRICK: Fair enough.

FARAH PETERSON: We're sisters.

RISA GOLUBOFF: There you go.

LESLIE KENDRICK: I just wanted to get some clarity on the situation. That's very good. Well, and that brings us to a point, I think a very important point, in your article, which is this is not just about this phenomenon, which is so fascinating in and of itself, but this represents a larger important lesson about constitutional interpretation. And with our methods today that are so focused on text, it is easy to look back at the past and only see things through our lens. And if we do, we're going to miss important aspects of constitutionalism.

FARAH PETERSON: Right. One of the wonderful things about doing historical research is that you're dipping into a world that was really quite different from our own. And practices like these, if we pause and take them seriously, reveal in what ways, in what ways was it different, and we start to understand the past on its own terms. I came to this project looking for information about early American insolvency law. I kept seeing these strange figures popping out from newspaper articles and documents, recollections of protests that involved questions of economic justice, and so I had to pause and follow that lead.

And in doing so, I found something much more interesting, at least to me, than early American insolvency laws. And giving yourself the leeway to go on those frolicking detours is important because there's only so much information we actually have about a past that is shrouded with time, about which we have an imperfect record, and that, frankly, was just as complicated and complex as the present. And if multiple people can have different interpretations of the present, we can't expect to be able to look back at the past and find a simple, easy to understand story, easily laid out in the archives for us to follow.

LESLIE KENDRICK: And because of that aspect of your work, the title of the piece is Constitutionalism in Unexpected Places. And I think the lesson is to keep looking for the unexpected aspects of lawmaking and constitutional interpretation. There are more stories like this to be uncovered that we have lost.

FARAH PETERSON: Absolutely.

LESLIE KENDRICK: Thank you so much for joining us. It's so nice to talk with you.

FARAH PETERSON: It's always a pleasure.

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RISA GOLUBOFF: That was UVA Law Professor Farah Peterson. She's a legal historian currently working on a book about the history of judicial interpretation.

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LESLIE KENDRICK: So I feel like there's so much that you must have to say about this. I want to hear all of it. No pressure.

RISA GOLUBOFF: That's unfair. I know--

LESLIE KENDRICK: No pressure.

RISA GOLUBOFF: **Now** I feel like I'm on the spot. I mean, there are so many different places to start. First, it's just how fascinating the practice is, right? And even just hearing Farah talk about the different layers of symbolism, of what it meant for these white British North American non-propertyed men to dress as Native Americans and how many different layers there are, is just an absolutely fascinating aspect of the story.

LESLIE KENDRICK: Yeah, I think if that were written in a novel, enormous numbers of dissertations could be written about the symbolism of that, right? Layers upon layers.

RISA GOLUBOFF: And then there's coming back to your question about continuity and change, right? And I think there are two claims that Farah makes that are significant. So one of them is the difference between the Constitution out of doors and the actions of people in mobs and other kinds of political and public actions outside of courtrooms or the places where we think that law and constitutionalism get made. There's the relationship between those actions and an unwritten Constitution and then how the meaning of those actions change with a written Constitution.

And I think she thinks that once there's a written Constitution, you still see these actions because these are the same people who were acting before there was a written Constitution, and then their practices, their legal and constitutional practices, continue into the new world order of having a written Constitution and then get passed down right, but eventually fade. And I think for me, I would say I don't see as fundamental a break, right?

And I think that even with a written Constitution, what goes on outside the courts-- and there are various kinds of constitutional theory and legal historical movement, scholarly movements that talk about the Constitution outside the courts or the people's Constitution-- that really are about the interaction between what goes on in courtrooms among lawyers, among judges, and what happens out in the streets. And that's not to say there's no difference between those two things, but I think I still think those actions and those activities are crucial.

And the second piece that I think is different is I think Farah has defined the group who is acting constitutionally in relation to a constitution out of doors is a group that doesn't have formal access. And I would go so far as to say, no, there are different ways of accessing, and there are

people who may have formal access, but are still choosing, either feel like they don't have informal access or think that the informal methods are more powerful in some respects. And I think you see that up through today.

LESLIE KENDRICK: So another thing I'm thinking of with this is that each time is going to have its own rituals of this kind. So the whole idea that white colonists would take on Native American garb, it's so kind of foreign to us. And this is a kind of constitutional ritual. It had symbolic significance at the time. It had all of these different meanings. And different times have their own kind of rituals, and what we think of as kind of concerted action, things like a march and how we frame a march and who participates in the march, where it goes, these are also kind of rituals of a kind.

And suffragettes had their own rituals, and of course, I thought it was really important that Farah brought up the Ku Klux Klan as a form of a kind of negative constitution interpretation that's also a mob action with their own costumes and their own political agenda that they're trying to instantiate through this mob action, that each of these has its own rituals and that ties into the view of the Constitution that they're trying to express.

RISA GOLUBOFF: Mm-hm. And I think thinking about the Ku Klux Klan, it's so important, I think it's so easy for historians or legal scholars to kind of get captured by the sympathetic groups who are articulating, whatever a given scholar thinks is a sympathetic group, who are articulating constitutional visions. But there are all kinds of constitutional visions.

They have all kinds of normative ideal outcomes, and I think it's so important as historians to recognize and as lawyers to recognize you don't get to pick and choose who the groups are that you think are constitutionally significant, right? They're coming from all different places, and they have all different rituals, and they have all different arguments and meanings to their constitutionalism.

LESLIE KENDRICK: Yeah, and we ignore that at our peril.

RISA GOLUBOFF: Absolutely. One other thing that we didn't get into with Farah that could be a whole episode in and of itself is the idea of the economic claims behind what these folks were doing. And I think our constitutional tradition tends to write out the economics of rights claims and tends to treat the Constitution as if it's not an economic document, and that the kinds of rights it enshrines are kind of economically neutral, and they're really only about political or civil rights.

And I think all throughout constitutional history, both within the official doctrine and without the people in the streets or in social movements, you see economic claims being made all the time on the Constitution. And I think her project really brings that out as well, that that's not a new thing. That's not something the Warren Court creates in the '60s or that comes up for the first time in the New Deal, or even the Gilded Era, right? It's before our Constitution even exists that people are imprinting upon it ideas about economic injustice and their economic rights.

LESLIE KENDRICK: That seems exactly right. And there's always been this relationship between economic and political and civil rights. And in some ways, that's even more patent and obvious in 1787 than it is today, where only men who owned a certain type of property or a certain amount of land would have the ability to vote. So political rights are exactly expressly linked to economic opportunities. And that's always been the case, and it continues to be the case today.

I mean, you look at today, where in Florida, felon re-enfranchisement, the assertion is you can't actually get back your right to vote. You otherwise would have it, except for the fact that you owe money to the court. And if you're too poor to pay it, you're not going to be able to vote. And still we see these relationships between political and economic rights, but somehow it's a strand that comes and goes from our constitutional narrative. And this project really brings it out and brings it out at the time of the founding in a fascinating way.

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That wraps up this episode of Common Law. We hope you'll join us next time for more stories about when law changed the world.

RISA GOLUBOFF: In the meantime, tell us what you think. Rate or review us on Stitcher, Spotify, Apple Podcasts, or wherever you hear the show. To learn more about this episode and catch up on others, visit us at commonlawpodcast.com. And you can always tweet at us @CommonLawUVA. Common Law comes to you from the University of Virginia School of Law. Today's episode was produced by Sydney Halleman, Robert Armengol, and Mary Wood, with help from Virginia Kane. The show is recorded at the studio of the Virginia Quarterly Review. I'm Risa Goluboff.

LESLIE KENDRICK: And I'm Leslie Kendrick. See you next time.

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