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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, dean of the law school.

LESLIE And I'm Leslie Kendrick, the vice dean. You may have heard this season's all about when law

KENDRICK: changed the world. We've been talking about the power of legal action to make change.

RISA GOLUBOFF: So far, Leslie, we've talked mostly about how lawyers and courts have helped make some positive changes, like rolling back. America's smoking habit or expanding civil rights and civil liberties during the Cold War and after World War II. But in this episode, we're talking about the power of law and lawyers to hold back progress and to re-entrench hierarchy and oppression.

So during and immediately after the Civil War, there was an interesting experiment happening in the coastal areas of the south where the Union Army had captured territory and was in occupation. It might actually have dealt a powerful blow to white supremacy and bolstered the economic power of former slaves and undermined the economic power of the white planters who had previously owned them.

But the experiment really failed. And it was partly due to the work of southern lawyers who very much wanted to re-establish their way of life who were not reconciled to the idea that slavery was over, or that African-Americans would be landowners.

And this is what the research of UVA Law professor Cynthia Nicoletti is revealing. Cynthia is the author of *Secession on Trial-- The Treason Prosecution of Jefferson Davis*, which won the Cromwell Book Prize. She's now turned to a new book project, which is exploring emancipation and land redistribution to former slaves, focusing on what happened in the Sea Islands, why it mostly unraveled, and why black land ownership in the south became a dream deferred. Cynthia, welcome to Common Law.

CYNTHIA Thank you for having me.

NICOLETTI:

INTERVIEWER: So good to have you, have this conversation.

CYNTHIA It's a pleasure to be here.

NICOLETTI:

INTERVIEWER: We want to get to what happened in the Sea Islands. But first, can you tell us about the Emancipation Proclamation and what comes after it? I think many people assume that the Emancipation Proclamation ends slavery, but it doesn't.

CYNTHIA Sure, so the Emancipation Proclamation goes into effect January 1, 1863. President Lincoln
NICOLETTI: issues it as a war measure. And the idea here is that he puts it into effect in places where the rebellion is currently going on. So it's supposed to free slaves in places that are currently under Confederate control. The idea here being that it's touching places where if slaves are freed, that's going to help the union war effort and help the union to win.

INTERVIEWER: But is it possible to free slaves in places that are controlled by the Confederate army?

CYNTHIA Yeah, so this is the rub. That's the problem. So the Emancipation Proclamation goes into
NICOLETTI: effect ironically only in those places where it can't really be effective.

INTERVIEWER: So if the proclamation is the thing that actually creates emancipation, where do we go next? What happens after that?

CYNTHIA Well, so the proclamation isn't effective on the date that it's actually put into effect, but it
NICOLETTI: becomes so. So as the Union Army moves into Confederate territory throughout the duration of the war, wherever the army made inroads, slaves were freed effectively when there was a strong Union Army presence.

INTERVIEWER: But we wind up with the 13th Amendment that abolishes slavery. And you could say, do we even need that? Is that unnecessary if we've got emancipation already?

CYNTHIA Yeah, so the answer is that, yes, we very much needed that. So the Emancipation
NICOLETTI: Proclamation is not the only measure that goes into effect for emancipation during the war. There are various other ones. But both the Emancipation Proclamation and various other statutes under which the Union freed slaves of participants in the rebellion are under legal attack.

So there are lawyers challenging the constitutionality of these various statutes. And the 13th Amendment is really what puts those challenges to rest. So the amendment wipes out all of the constitutional challenges that could have been mounted against the Emancipation

Proclamation.

INTERVIEWER: So tell us a little bit about the shaky legal ground that was underneath the proclamation and some other statutes that were from that time.

**CYNTHIA
NICOLETTI:** Sure, so when Lincoln issues the Emancipation Proclamation, then there are these arguments that even if the federal government had the power to free slaves under constitutional law, it might also have to compensate slaveholders for the cost of slaves. So there is this sense after the war, and actually during the war too, that it's not entirely clear that if somebody brings a challenge to the Emancipation Proclamation that a court won't strike it down.

INTERVIEWER: But one of the places where the Emancipation Proclamation did have an impact during the Civil War was the South Carolina Sea Islands, where you have focused your work and where the federal government actually had control of the territory from early on. Tell us about that.

**CYNTHIA
NICOLETTI:** Sure, so the way that I really got into this was first, I started looking at the South Carolina Sea Islands for discussions about emancipation. And what I found when I looked there was lots of discussions from former slaves, from former slaveholders, who are talking about emancipation and talking about whether or not it's actually going to survive the war. They're not entirely clear on that. But they also were talking about land redistribution.

And actually, when I started looking, they talked way more about the possibility of land redistribution after the war than the possibility of getting compensation for former slaves or re-enslavement. And so it sort of dawned on me that these two issues were very much connected in the minds of people who are actually living through both of these things at the time of the Civil War.

INTERVIEWER: And thinking about land redistribution, it's moving from the slave holders and the plantation owners to the newly freed folks. So talk a little bit about how you move from their property too to they're now going to be property owners.

**CYNTHIA
NICOLETTI:** Yeah, so what I would say is that we tend to think about land redistribution as one thing. So land gets redistributed as you said from the former slave holder to the former slave. But that's not actually the way that it was considered.

So if you take a step back, and you think about this in a very lawyerly way, which they did, land redistribution actually has two aspects. One is land seizure, and aspect two is land grant. So what are they doing when they are redistributing land? They're thinking about a, how do they

strip land from former Confederates?

And then b, how do they get land into the hands of former slaves? And I'll say that that is not a perfect one-to-one transfer. So they use various strategies to try to strip land from former Confederates. And the most effective one is the tax code. But other statutes are about punishing Confederates. And so they seize land from former Confederates. And then they think about redistributing it as a separate process to former slaves.

INTERVIEWER: I just have to hear a little bit about this tax code hook and how that worked. [LAUGHTER]

**CYNTHIA
NICOLETTI:** Of course. I knew that would be your favorite part. [LAUGHTER] So there's a Tax Act that's passed in 1861. And what it does is it's actually property tax. And so it is required at the time that the tax code tax each state according to its population. And it turned out that when they passed it in 1861, that they couldn't collect it in the states of the former Confederacy.

And so they passed an amending provision in 1862 where they say, if we can't collect the tax in your state because you're in rebellion, now, if you don't pay the tax, we are going to put a penalty of 50% of the tax on your property. And if you don't pay the tax plus the penalty, your land will be seized and sold at auction. And so this was effective at actually seizing much of the land in the South Carolina Sea Islands because the union was actually there.

So what happens after the army gets there? They send out tax collectors into South Carolina. And so what these tax collectors did was they sold the land at auction. And that's how a lot of the land actually gets seized. And that's the part of land redistribution that actually sticks because it was sold pursuant to this tax act.

Then the question becomes well, OK, if you sell it at auction, how does it get into the hands of the former slaves? And this is actually a huge problem. Because along with the former slaves, many of whom are in the South Carolina Sea Islands, along with them come land speculators who now look for passes from the union because they actually have to get past the blockade to get to the Sea Islands to try to buy land. And unsurprisingly, they are able to outbid former slaves.

And so what the government does is they fight about this for about a year about whether or not they are going to make this land available at very low prices to former slaves who are living on the land at the price of \$1.25 an acre, which is not randomly picked out of the air. That's the amount that they were using for land sales in the west for squatters, essentially.

And so they do the same thing in the Sea Islands. And some land is sold to former slaves at low prices. But it's actually a much lower percentage than you might think because a good deal of it got into the hands of land speculators.

INTERVIEWER: And is that because even at those low prices, former slaves don't have the wealth to acquire the land? Or is it just they didn't structure this in a way to privilege their claims? It wasn't right of first refusal from people who were living on the land or something like that. So there was just no chance the speculators were going to come along and get it?

**CYNTHIA
NICOLETTI:** Yeah, it's somewhere between those two stories. So what happens is that they fight about this for a long period of time. And so there's quite a conflict in the Sea Islands particularly among the tax commissioners. If you do this exciting research in the tax commissioner's record, there is a split in the tax commission where there are two tax commissioners of the three who say, we are tax commissioners. Our job as collectors of this tax is to maximize revenue. I mean, that's what you do when you raise taxes.

And so if we want to maximize revenue, we want to sell the land at the highest price possible, which means on the open market. We want speculators to come in, and we want them to bid up the prices. And then there are people who say, absolutely not.

The goal here is to put this land into the hands of former slaves, which is going to require that we set aside a good deal of the land that's going to be sold at these very low prices of \$1.25 an acre, which-- so the idea here would be if it's 40 acre plots, if you can bid on it at \$1.25 an acre, you can get a livable plot for \$50. That's the idea.

And so there's this question of whether or not they're actually going to set aside land for former slaves. And what I would say is that they just go back and forth on this, and so there's not a concrete policy. Some of the sales, they exclude speculators. Some, they do not.

INTERVIEWER: So what happens with land redistribution in the Sea Islands after the war? And just understanding what happens there, help us understand why those efforts ultimately failed on a larger scale?

**CYNTHIA
NICOLETTI:** So there, I think we're primarily looking at former slaveholders who now-- who fled the South Carolina Sea Islands in early on in the war in November of 1861. And these are some of the richest people in the United States. This is the heart of secessionist territory. These are people

who own huge plantations, large numbers of slaves.

And after the war, they are thinking about, what parts of their pre-war life can they re-establish? And it turns out that they sue and they petition Congress to try to get money back for the lands that are actually sold at the tax sales. And so they are continuing this effort to try to get money back from the federal government for 25 years.

And there are lawyers behind all of this. But there is one lawyer, this guy William Henry Trescot from South Carolina, who is, I would say, the main mover behind a lot of the efforts to try to roll this back. He is actually a small time planter himself from South Carolina. He's from the Sea Islands. So he's got a personal stake in all of this. And he has two plantations, and they are seized by the union.

And so in fall of 1865, he becomes the, quote, "executive agent" for the state of South Carolina. And his job is to go to Washington to try to agitate, by whatever means he possibly can put together, to get land back for the planters.

INTERVIEWER: And what does this look like on the ground in the Sea Islands? And is this why the redistributions end up getting reversed because of some of this?

**CYNTHIA
NICOLETTI:** Yeah, so exactly right. So as I mentioned, there are various parts of this. So a lawyer takes it all apart, thinks about, oh, there are various statutes undergirding all of this. And Trescot did this.

And what I would say the most effective prong of his campaign is any land redistribution that was not based on the tax code, or land that was not actually sold under the tax code, Trescot says all of that land, which is now being held by the Freedmen's Bureau, he goes after that. And all of those land seizures essentially evaporate because of the campaigning he does in Washington with the president and with Congress in 1865 and 1866.

INTERVIEWER: It does then raise the question, though, where are the lawyers on the other side on the land redistribution question? So if you say on emancipation, there was more political will backing it up. And we foreclosed. But through the 13th Amendment, the kind of arguments in the weeds.

On the land redistribution side, there's not the political will at the large scale, at the national scale. Where's the government? Why aren't they defending these? Is that who would be defending them? Where are the lawyers who might win on the other side? Or are the arguments just so bad that they can't possibly win?

CYNTHIA Yeah, so there's not a concerted effort on the other side in the same way. For instance, if you
NICOLETTI: look at debates about the Freedmen's Bureau, active 1866, where there are very strong voices in Congress for land redistribution-- so Thaddeus Stevens is the biggest proponent of land redistribution. And he defends it again and again in Congress. But he doesn't actually go into the weeds.

And so Trescot did. South Carolinians did. And they really, I think, thought about the whole puzzle. And I think that Stevens was more of a big picture thinker. He's a representative, and he's got a lot of other things he's doing. He didn't think about it maybe the way a lawyer would if a lawyer is planning a campaign of attacking the overall policy.

INTERVIEWER: It's interesting. One thing that occurs to me is although it would have been very difficult to effect redistribution on a larger scale, and that would have required a great deal of resources and, ultimately, force, that would have had ongoing outcomes and effects for how much power was necessary to enforce emancipation and enforce equal protection sort of down the road and that it's interesting that it seems the inability to marshal enough political and military-- political will and military force to affect redistribution then leaves you in a situation where former slaves are much more vulnerable to the types of oppression that follow.

CYNTHIA Yeah, one thing that's really striking about doing this research is how path dependent we are.
NICOLETTI: So I think in 1865, there's this choice. How much military authority is Congress going to put in the former Confederacy? And how much of a wrench do they want there to be? And how strictly do we want to punish them? I mean, do we want to sort of decimate their power?

If they had done something really strong at the beginning, then I think they'd be set along a path where the amount of authority that the federal government has to have over the white South can diminish over time. And nobody really takes that big leap. They think more incrementally than we probably would want them to. But at the time, it seems almost unthinkable, or very difficult for them. But I do think that in general, we tend to think incrementally. We tend not to think, oh, let's think about remaking the entire society. This is the moment where--

INTERVIEWER: Yeah. And this is related, of course, to your first book, which was about secession rather than emancipation or land redistribution and thinking about the relationship between the former Confederacy and the union in the aftermath of the war. So will you just tell us a little bit about

that as a teaser before we finish?

CYNTHIA Sure, so my first book was about secession. And I guess I've always been interested in the
NICOLETTI: legal history of the Civil War. And I guess I thought, why not take on the big questions?
[LAUGHTER] So if there are two things that we know about the legal history of the Civil War,
we know that clearly, it settled secession. And of course, we were going to be one nation at
the end of the Civil War. Secession was clearly unconstitutional.

And the second thing we know about the Civil War is that it results in emancipation. And that's
totally a no-brainer. And so I thought, why not take these two questions on, and think about
how they actually happen, and whether or not they were sort of predestined to happen?

INTERVIEWER: It's a great book. [LAUGHTER]

CYNTHIA Thanks.

NICOLETTI:

INTERVIEWER: This is a book that's available. It was published by Cambridge University Press in 2017.

CYNTHIA Yes.

NICOLETTI:

INTERVIEWER: And we can look forward to your next book on emancipation and land redistribution in the
future.

CYNTHIA In the future. Not sure when in the future, but in the future.

NICOLETTI:

INTERVIEWER: Well, we'll look forward to it. It's been a pleasure talking to you, Cynthia.

CYNTHIA Thank you. Thank you for having me.

NICOLETTI:

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RISA GOLUBOFF: So Leslie, most of my favorite themes in legal history came out in that interview. [LAUGHTER]

LESLIE Yes, it seemed like an interview tailor-made for you. And for you and Cynthia to have the
KENDRICK: conversation was fun just to watch. So I think at the broadest level, the question is, when the

Civil War ends and slavery ends, what is freedom going to mean? And what is the opposite of slavery?

One of the things that strikes me in having this conversation is that there were certainly some people, Thaddeus Stevens among them, who thought economic power would be the key to really transforming southern society, undermining white supremacy, and enabling African-Americans to actually create real freedom and, ultimately, I think, real equality.

And so the failure of land redistribution is this huge, as you were saying before in your conversation, this just enormous failure to create the basic economic infrastructure that would enable equality and freedom going forward.

INTERVIEWER: And it raises questions too about positive versus negative rights and the idea that you could have a sort of negative right that, well, now, you're allowed to contract, and you're allowed to own land. But if the conditions aren't in place to make that an actual reality, then there's a big piece of the puzzle missing.

And the opportunity to engage in more affirmative provision of opportunity, that was there. And it didn't happen. It never really happen. And the places where it did happen, it was clawed back, partly through the actions of lawyers.

INTERVIEWER: Yeah, and there's a kind of imbalance in the interests and motivations of the two sides. So the lawyers that Cynthia is talking about, this is their land. They want back this very specific piece of land. And they're going to fight tooth and nail to get it.

And to the extent that the federal government is interested in land redistribution-- and that's obviously very qualified because whites in the North also were invested in white supremacy in many ways. But to the extent that there were people who were interested, they weren't really focused just on the Sea Islands. They were trying to figure out, how do you do this in a large scale way?

And there was a lot that reconstruction didn't do. And even after reconstruction, that sets the stage then for peonage and involuntary servitude and sharecropping and tenant farming and Jim Crow that gets established in the decades after reconstruction. And that doesn't really end until the modern civil rights movement really takes those on.

INTERVIEWER: That's right, and this area, this question of land redistribution, it seems, now that we've talked about with Cynthia, such an important part of that, that tenant farming and those types of

economic systems depend on a certain distribution of property. But having a chance to really focus on that issue and to hear some history of that I've never heard before, it really adds a whole new level to understandings of reconstruction and narratives about reconstruction. And it's a really useful conversation.

INTERVIEWER: And I think it's important to remember that these were not only arguments between white lawyers over black land ownership, but these were arguments in which African-Americans were making claims on a regular basis. And all of this at the back of, I'm sure, many of our listeners minds is, how does this relate to reparations. And 40 acres and a mule, the redistribution of that land is one way to create reparations that really didn't happen.

And so I think there are echoes of this that we can see. You see reverberating all through history the lack of federal will and the success of these really determined white supremacist lawyers to ensure that African-Americans did not get anything after slavery that they deserved as a matter of the economic system and the labor that they put into it. And so I think we're still talking about reparations in part because of the story that Cynthia's telling.

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With that food for thought, we'll wrap up this episode of Common Law. We hope you join us next time for more stories about when law changed the world. In the meantime, don't be a stranger. Leave us some stars or, better yet, a short review on Stitcher, Spotify, Apple Podcasts, or wherever you hear the show.

Our website is commonlawpodcast.com. You can find all our past episodes there, including last season's episodes about the future of law, plus lots of background information on all the topics we've been covering. You can always tweet at us @commonlawUVA

We'll be back in a couple of weeks with our next guest, Kimberly Robinson. She's going to walk us through a crucial 1973 Supreme Court case and what's happened in the decades since. I think it is a surprise to most people that they don't have a constitutional right to education.

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. The show's recorded at the studio of the *Virginia Quarterly Review*. I'm Leslie Kendrick

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

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