John: This is Bound by Oath from the Institute for Justice's Center for Judicial Engagement. I'm John Ross; welcome to Episode Seven of our story of the 14th Amendment. If you enjoy the podcast, please leave us a review on iTunes. On this episode: incorporation. Today, we all more or less take it for granted that the rights in the Bill of Rights protect us not only against the federal government, but also against state and local governments -- that is, that the rights in the Bill of Rights are *incorporated* against the states. That's what the Framers of the 14th Amendment intended the Amendment to do. But for a long time the Supreme Court turned its back on incorporation. Why on earth did it do that? Professor Gerard Magliocca, of the Indiana University Robert McKinney School of Law, has an explanation you've probably never heard before. And we're going to hear from him about that. But first, we're going to take another look at the world before the 14th Amendment. Prior to the 14 Amendment, people did try to use the Bill of Rights to protect themselves from state and local governments. And the Supreme Court turned them aside. To learn more about that, we'll head back to the city of New Orleans, where in 1845, before the 14th Amendment, city officials prosecuted a Catholic priest for the crime of conducting an open casket funeral. Here is Michael McConnell, a professor at Stanford Law School and a former judge on the U.S. Court of Appeals for the Tenth Circuit.

Michael McConnell: So the Bill of Rights -- the reason why we know textually that the Bill of Rights did not apply to the states is First Amendment begins Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. So when it says Congress, that means the United States Congress. And when you look at the debates over the Bill of Rights that was quite intentional.

John: At the time of the founding, some state governments still did have establishments of religion, and officials in those states did not want the federal government telling them what they could or couldn't do. Massachusetts, for example, had an official state church.

Michael McConnell: The principal argument in the House of Representatives against the first amendment was that it would disrupt the religious establishments of the handful of states in which there still were.

John: So the First Amendment didn't apply to the states. States could support establishments of religion, and if they wanted to abridge the freedom of speech, the press, assembly, or the right to petition -- well nothing in the federal Constitution was there to stop them. Same deal with the other amendments in the Bill of Rights.

Michael McConnell: Now Madison back then proposed that three of the rights of the Bill of Rights should be made applicable to the states. Namely the equal rights of conscience, the right of trial by jury in criminal cases, and the freedom of the press. He was voted down.

John: Other Founding Fathers like Patrick Henry were much more concerned that federal government would become tyrannical than that state governments would.

Michael McConnell: Now Patrick Henry and many others were worried that a new national government would begin to be as distant and unrepresentative as say the government across the ocean in London had been.

John: Initially Patrick Henry opposed the Constitution altogether, but when he lost on that he supported having a Bill of Rights to keep the federal government from getting too powerful.

Michael McConnell: Henry believed and so did a lot of other people that because of the security of rights under the state constitutions and because the state governments were much closer to the people, much more representative of themselves, much more responsive, shorter terms, more democratic -- they didn't like the word democratic -- but more responsive to public opinion that the states are less dangerous and it's really the new national government that needed where we needed protections like the Bill of Rights.

John: But even though it's pretty clear that the Founders didn't mean for the Bill of Rights to apply to the states, that doesn't mean plaintiffs and their lawyers didn't try and make a go of it.

Michael McConnell: It had to be litigated. Just like today we litigate claims trying to test a proposition. And you know, it may not fly, but unless you take the case to court you never know.

John: In 1833, the Supreme Court decides the case of *Barron v. Baltimore*. The case involved a lawsuit by a property owner against the city of Baltimore. To make some road improvements, the city had diverted several streams, which then sent sediment into the harbor, which built up to the point that ships no longer had deep enough water to dock at John Barron's wharf. Maryland state courts said the city didn't owe John Barron any compensation. So he sued in federal court, arguing that the Fifth Amendment prevented a local government from taking property without just compensation. And the Supreme Court said nah-uh; the Fifth Amendment does not apply to the states. Today, *Barron v. Baltimore* is the seminal case that stands for the

idea that before the 14th Amendment, all of the first eight Amendments to the Constitution did not apply to the states. That's what lawyers learn about the case in law school. But at the time, the matter wasn't settled for good. Twelve years after *Barron v. Baltimore*, the Supreme Court took another look at the issue in a case you probably haven't heard about -- *Permoli v. Municipality No. 1 of the City of New Orleans*. And it just so happens that Professor McConnell is an expert on this case, which begins with Father Bernard Permoli performing an open casket funeral in the French Quarter of New Orleans.

Michael McConnell: He's fined $50. Well, Well over a thousand dollars in today's money.

John: He blessed the body. He offered prayers. He did everything the way Roman Catholic doctrine specifies it should be done. And it was against the law.

Michael McConnell: So it's an ordinance prohibiting open-casket funerals anywhere in the French Quarter of New Orleans.

John: Except at one chapel on the outskirts of town.

Michael McConnell: It only applies though to the Catholic churches and to the Catholic priests.

John: Father Permoli violates the ordinance. And when he's charged, he invokes the protections of the Free Exercise Clause of the First Amendment. When the case gets to the Supreme Court, he loses. The First Amendment does not apply to the states. But back to New Orleans -- what the heck was going on with the ordinance?

Michael McConnell: We don't know exactly what's going on. But I spent several years piecing together evidence behind the scenes.

John: In court, lawyers for the city argued that the ordinance was a public health measure. Now we talked a whole lot about New Orleans and public health in Episode 3. There, it was pretty hard to dispute that the slaughterhouse law was actually intended to keep animal remains out of the streets and out of the river. But here, three decades before *Slaughterhouse*, the public health justification for a law banning some open casket funerals is less persuasive.

Michael McConnell: So the the excuse for the ordinance was yellow fever. And indeed New Orleans had an annual yellow fever epidemic. And and and in very bad years, it was a terrible plague.

John: Just a few years before the ordinance, it had killed over a thousand people.

Michael McConnell: And they didn't know what caused yellow fever. And the leading medical explanation at that time was that it was caused by what they called the exhalations from decaying matter like swamps and dead animals and in this case corpses.

John: But there's good reason to think the city didn't actually pass the ordinance to combat yellow fever. Because if you were truly worried about keeping people away from dead bodies, there were a bunch of others things that you'd also have ban.

Michael McConnell: There are any number of practices that would have been prohibited if they were serious about this theory of yellow fever. They didn't prohibit all open casket funerals. There were open casket funerals in private homes at the time. Actually, this is still true in New Orleans. You would have these massive funeral celebrations with music and people marching through town. If you really were worried about the corpse and it's exhalations, you wouldn't want to be allowing it to go all the way through town. So the the circumstances make it not impossible that this was a bona fide public health measure, but make it highly suspicious.

John: So if it wasn't really aimed at public health, what was the ordinance for? Well, one possibility is race. As it turns out, the church that Father Permoli performed the funeral in was brand new. It opened only a few weeks before the ordinance was passed.

Michael McConnell: St. Augustine is the oldest black Catholic Church, I think in America certainly in New Orleans, but I think in in America. And that is where Father Permoli performed his funeral at the direction of the bishop. It could be that there was a racial element to this. The racial situation in New Orleans is unlike that at in the first part of the 19th century's unlike that of any other southern city -- mostly for the better. Although things were extremely complicated.

John: The city's commercial base very much depended on slavery, but the city had a large population of free people of color who had both wealth and power. In the church itself, services were not segregated.

Michael McConnell: The Bishop was certain it's hard to call him a liberal and certainly in most respects. But one of his closest associates is is the first African-American woman to be beatified

in America. And she founded a society for the education of young black mixed race women in New Orleans.

John: So it could be that the city leaders were annoyed at the Church for its relatively open approach to race: for teaching reading at a time when teaching slaves how to read was illegal, for having non-segregated services, and for opening the country's only Catholic church where the majority of congregants were black. But again on closer examination this theory doesn't explain the ordinance either.

Michael McConnell: I do not actually think that race was the predominant factor here. The ordinary rules of decorum were very different in New Orleans than they were in most of the South.

John: In New Orleans, the locals just did things differently than the rest of the South. And not only the rest of the South, but also from the rest of the Catholic church.

Michael McConnell: So for example, a very beloved priest who had who died in 1829 and was living openly with his concubine in the rectory of the church and they were okay with that. They didn't really want a more austere sort of orthodox moralistic priest being rammed down their throats.

John: So the ordinance probably wasn't about yellow fever and it probably wasn't about punishing the Church for its attitude about race.

Michael McConnell: I'm convinced that it was an internal struggle within the Catholic church. That there was a fight between the quite conservative Bishop of New Orleans, named by the Pope, of course, but also not from New Orleans versus the lay leadership of the church.

John: So you had the lay leadership of the Church, who had different ideas about morality than you would usually associate with Roman Catholicism. Years before, it was the lay leadership who had elected the priest who lived with his mixed-race girlfriend in a church rectory.

Michael McConnell: So the lay leadership were first of all, very committed to maintaining french-language control of the church in New Orleans at a time when there was an influx, especially of English speaking Irish Catholics also have Germans and anglo-americans, but especially the Irish.

John: There's an internal struggle, and a new Bishop is appointed by the Pope that the recent arrivals like and that the French Creole establishment, who would prefer to elect their own leader, does not like. So the lay leadership fights back. They have a lot of influence with the city council, and in fact one of them is on the city council. And they fight back by banning most open casket funerals.

Michael McConnell:So money is really behind the case I think. This is my deduction is that funerals are actually a source of revenue. Not the funeral itself. The actual religious service is provided by the priests at no cost. But almost every one of means also wanted additional things as part of the funeral service and that brought revenue into the church.

John: The revenue from services at St. Augustine where Father Permoli broke the law -- that went to the new Bishop. But the revenue from the one chapel on the outskirts of town where open casket funerals were still allowed -- that went to the lay leadership.

Michael McConnell: And this ordinance by forbidding any open casket funerals in Catholic churches other than the mortuary chapel were basically directing all that revenue away from the bishop and to the lay leadership. That's what I think it was all about.

John: The Bishop orders Father Permoli to defy the ordinance and when he does, the city prosecutes him for doing his priestly duty. And the case goes all the way to the U.S. Supreme Court.

Michael McConnell: So the Supreme Court decides, rejects Father Permoli's constitutional defense, which was based on our First Amendment to the US Constitution the free exercise clause. They reject that because the free exercise clause applies only to acts of the federal government and not to the acts of the states.

John: So what looks like a dispute about funeral rites turns out to be about economic protectionism. And, not for the last time, the Supreme Court says it's going to let economic protectionism slide. But tensions over slavery mean this isn't the last dispute we'll see over whether to protect individual rights against state and local governments.

Michael McConnell: Then we have you know the long period of build up to the Civil War during which time the southern states, which were often derogatorily called the slaveocracy, violated

just about every one of these rights in the interest of propping up slavery. So they prosecuted abolitionist newspaper editors.

John: You could get thrown in jail just for possessing abolitionist literature.

Michael McConnell: They barred the right of petition having to do with slavery.

John: Some states even banned African-Americans from preaching. Further, if you opposed slavery and lived in or were traveling through the South, local authorities would not protect you from physical violence.

Michael McConnell: And so by the time of the Civil War and its successful end one of the things that many Northern lawyers had learned is just how important the Bill of Rights rights are to being able to preserve a free society in the face of something like the slaveocracy.

John: So, the 14th Amendment.

Michael McConnell: And so the 14th Amendment contains a provision that says no State shall make or enforce any law abridging the Privileges or immunities of citizens of the United States.

John: What are the privileges or immunities of citizenship? Well, as we talked about on Episode 3, that's controversial, but most scholars agree that at the very least it's the rights contained in the Bill of the Rights.

Michael McConnell: Many people then and many people now believe that the rights of citizens of the United States is a very convenient and logical phrase for referring to the Bill of Rights. There's no other place in the Constitution where you have a list of the rights of citizens of the United States. In addition to that, the senate floor leader who introduced the 14th amendment gave that as the explanation of what privileges and immunities means.

> **Jacob Howard**: To these privileges and immunities, whatever they may be--for they are not and cannot be fully defined in their entire extent and precise nature--to these should be added the personal rights guaranteed and secured by the first eight Amendments of the Constitution.

John: That was Senator Jacob Howard, introducing the 14th Amendment on the senate floor.

Michael McConnell: Now, unfortunately and very early on in the US Supreme Court read the privileges and immunities clause as not only not meaning that but pretty much not meaning anything meaning very little.

John: On episode 3, we talked about how in 1873, the Supreme Court said the Privileges or Immunities Clause does not protect unenumerated rights, like the right to earn an honest living. But soon after, the Court closed the door on the Clause being used to protect rights enumerated in the Bill of Rights.

Michael McConnell: And so for a very long period of time there was precedent in the Supreme Court that it did not incorporate the Bill of Rights against the states.

John: Eventually, the Supreme Court reverses course on incorporation, but they don't do it through the Privileges or Immunities Clause. And they don't incorporate the whole Bill of Rights against the states. They do it Amendment by Amendment, clause by clause, case by case.

Michael McConnell: And when the Supreme Court began going the other way on that instead of just straight forwardly saying well we were wrong they the Court illogically began sort of one Bill of Rights right after another to say that it was incorporated as part of the due process clause, which is a highly implausible way of doing it and even now not all provisions of the Bill of Rights have been incorporated.

John: The story of how the Supreme Court started incorporating the Bill of Rights is a good one. But we're not going to tell it--at least on this episode. And that's because there's another story that's just as good--the story of why the heck the Supreme Court originally refused to incorporate the Bill of Rights through the Fourteenth Amendment. You may think you already know that story, but after the break, Professor Gerard Magliocca offers a version of it that they don't teach in law school.

Break

John: If you've ever taken a con law class, you probably learned that incorporation of the Bill of Rights didn't happen because of Slaughterhouse. But maybe not that's not right. Gerard Magliocca, professor of law at the Indiana University Robert McKinney School of Law, has an

alternative theory about what it was that really caused the Supreme Court to resist incorporation.

Gerard Magliocca: Right so the standard story of incorporation is that in 1873 the Supreme Court decided The Slaughterhouse Cases. And said that the Privileges or Immunities clause of the Fourteenth Amendment included only a very narrow list of rights as those that apply to the states and excluded the Bill of Rights. Now the question is what do we make of this list? Is this list complete?

John: You remember that list from Episode 3.

> **Justice Miller:** to come to the seat of government to assert any claim he may have, to seek its protection, free access to seaports, to the subtreasuries, land offices, and courts of justice in the several States. To demand the care and protection of the federal government when on the high seas. To peaceably assemble [and] … the right to use the navigable waters of the United States.

John: In the first 14th Amendment case to reach the Supreme Court, the Court said that the Privileges or Immunities Clause doesn't protect the right to earn an honest living. And Justice Miller gives a list of what rights the Clause does protect. One of those rights is in the Bill of Rights.

Justice Miller: To peaceably assemble

John: But only the one. The rest of the Bill of Rights is not on Justice Miller's list, so the standard story is that the Supreme Court rejected incorporation in Slaughterhouse.

Gerard Magliocca: Now the interesting thing if you look at cases that cited Slaughterhouse in the 20 or 30 years following that decision is that none of them read the case as excluding the Bill of Rights from application to state governments. People cited it for all sorts of reasons but not for that reason.

John: Justice Miller didn't say his list of rights was exhaustive. He didn't say it excluded the rights enumerated in the Bill of Rights. And that makes sense because the plaintiffs in Slaughterhouse weren't asking about enumerated rights; they were asking about the unenumerated right to earn a living.

Gerard Magliocca: It was only in 1900 that the Supreme Court for the first time said or really any Court said that slaughterhouse meant that only the rights listed in the list given would apply to the states and no others.

John: Your con law professor wasn't lying to you. The reason people think *Slaughterhouse* killed incorporation is because eventually that's what the Supreme Court said. But not until 1900. In a case called *Maxwell v. Dow*, the petitioner argued that the entire Bill of Rights was

incorporated through the 14th Amendment. The Supreme Court rejected the claim, and they relied on *Slaughterhouse* to do it. But here's the thing. Lots of other plaintiffs between 1873 -- when Slaughterhouse was decided -- and 1900 -- when *Maxwell* was decided -- argued that the Bill of Rights applied to the states. And, according to Professor Magliocca, the Supreme Court rejected all of them. And never once mentioned *Slaughterhouse*.

Gerard Magliocca: So Cruikshank involved essentially mob violence against African-Americans in the south.

John: Okay, so if it wasn't *Slaughterhouse* that killed incorporation, it had to be *Cruikshank* right? We talked about *Cruikshank*, which the Supreme Court decided in 1876 on episode 3 and on episode 5. In the case, a sort of quasi-militia that included former Confederate soldiers massacred African-Americans after a local election.

Gerard Magliocca: Now the Supreme Court held that the prosecutions could not be brought under the statute that was being used and the basis of that was that the 14th Amendment empowered Congress only to deal with things related to state action.

John: If state government officials in Louisiana had participated in the massacre, then the federal government could have gotten involved. But since the militia was composed of private citizens, it was up to the state of Louisiana to prosecute them.

Gerard Magliocca: So in other words if a state engaged in violence against citizens based on race for example that that was something that that Congress could remedy with a statute. Now

when a private mob like the Ku Klux Klan, let's say engaged in the same activity. Then that was not something that Congress could reach because it was by private citizens. Only state law could provide a remedy.

John: Lame.

Gerard Magliocca: Now of course whether that is an accurate reading of the original understanding of the amendment is questionable, but let's just take as a given that the court was correct in making that assertion.

John: Federal prosecutors said the African-Americans who were massacred were engaging in their First Amendment right to assemble and also their Second Amendment right to bear arms and that the militia in *Cruikshank* had interfered with those rights, and therefore the federal government had the authority under the 14th Amendment to prosecute. But the Supreme Court said the First and the Second Amendments did not apply to the states.

Gerard Magliocca: But these were more in a way of stray comments that were unnecessary to the decision. The actual holding was that there was a lack of State action and thus the prosecutions could not go forward. And indeed that it was unconstitutional basically for Congress to enact a law that would provide penalties for the kind of actions that were undertaken.

John: Unlike with Slaughterhouse though, courts did cite Cruikshank for the idea that the Bill of Rights or some of the rights in the Bill of Rights did not apply to the states.

Gerard Magliocca:So it is true that after Cruikshank courts did cite some of the statements that were made about the non application of some of the provisions of the Bill of Rights as support for the proposition that the Bill of Rights did not apply to the states or that particular rights had not applied to the States, but that was an extension of dicta rather than a reading that was required by the holding of Cruikshank.

John: So that's Professor Magliocca's view; other scholars argue that *Cruikshank* was more definitive in rejecting incorporation. Either way over the next few decades, the Supreme Court had many more chances to consider incorporation in cases where the protections of the Bill of Rights were unequivocally being invoked against state actors, rather than private ones.

Gerard Magliocca: So if you look at the opinions that came out of the Supreme Court between slaughterhouse and around 1900 that dealt with claims that people were making about the application of the Bill of Rights of the state's most of the cases involved procedure.

John: For instance on the last episode we talked about the *Hurtado* case, which involved whether the state of California had violated the procedural rights of a man convicted of murder because he wasn't first indicted by a grand jury. The Fifth Amendment requires a grand jury in felony cases. But in Hurtado and in other cases like Hurtado the Supreme Court said procedural rights in the Bill of Rights were not incorporated against the states.

Gerard Magliocca: What the Court said in those cases in rejecting those claims was: well look process is just something that is more a means rather than an end. It's something that can be

improved or we might discover better methods of protecting rights than the ones that we have inherited from English history.

John: Process and procedure can be improved upon, and there is no need to force states to follow the procedures enumerated in the Bill of Rights as long as whatever alternative procedure they are providing is reasonable.

Gerard Magliocca: And indeed if you look at the Supreme Court statements at the time, they tended to endorse more of what we would now call like an international law approach of let's see what other countries that are kind of democratic or kind of have legal systems that are worth looking at were doing. And they're not always using the same forms that were used in England.

John: So for the first couple decades after the 14th Amendment was ratified, the Supreme Court mostly got cases about whether procedural rights were incorporated. And they said no.

Gerard Magliocca: Another way of putting it is to say that procedural rights were not natural rights. So natural rights were things that were more important and that were either god-given right or so clearly things that we possess that we would never find an improvement on saying that there's a right of free speech or a right to practice your religion. When it came to something like grand jury indictment that was not the case.

John: But the Supreme Court did get some cases involving substantive rights like the right to free speech. And with substantive rights, the Court didn’t incorporate those either.

Gerard Magliocca: So when the threat of disorder became more acute there was greater hesitance to want to give people the rights that the Bill of Rights provides.

John: According to Professor Magliocca, the best explanation for the failure to incorporate substantive rights is that in the decades after Reconstruction the country was in the grip of serious unrest and upheaval. In rural areas, you had the populist movement which called for nationalizing some industries and protecting farmers from big business.

Gerard Magliocca: The populist movement is a response to the decline of you could say family farms in the late 19th century as a result of industrialization -- the fact that farmers were more subject to the power of institutions, like railroads or banks.

John: In the late 1800s, farmers started needing to purchase expensive equipment on credit from bankers. They felt taken advantage of and they called for government takeover of banks and also railroads.

Gerard Magliocca: You could also say was a kind of change in the culture in that for the first hundred years or so of our history farming was the dominant not only line of work, but thing that people sort of look to as a model for the citizen of America kind of a Jeffersonian idea of small farmers who were the backbone of society of a democratic society. And that began to change because fewer farmers were needed as farms got more efficient. All of this led to a kind of first informal and then a more formal organization of farmers that ultimately came together in the populist party, which was founded in 1891 and became one of the most significant third parties in our history.

John: In addition to the populists in the countryside, there was also widespread unrest in the cities. You had violent labor strikes, where strikers threatened to seize the means of production and companies sent in Pinkertons to beat up strikers. Strikers beat up replacement workers. There were literal battles. All across the country.

Gerard Magliocca: So the biggest strike and the most crippling in this period of turmoil was the Pullman Railroad Strike.

John: In 1894.

Gerard Magliocca: So at the time Chicago was kind of the central transportation hub for goods in the United States. And Eugene Debs, who was a famed labor leader, socialist, later ran for president led a strike and by railroad workers for the Pullman company.

John: The Pullman Company was the country's largest producer of railroad cars. Most of its manufacturing was done in a company town where workers paid rent to the company and they bought their food and necessities from the company store. In 1893, with the country in the grip of a financial panic, the Company cut its wages by 25 percent but refused to lower prices and rent it charged its workers. Pullman workers went on strike. And ultimately the strike ballooned to a quarter million workers.

Gerard Magliocca: And the result of that was that basically transportation came to a halt and in a way that was threatening to inflict significant damage on the national economy at a time when the national economy was already in a recession.

John: Workers walked off the job. They sabotaged equipment. And the stoppage caused food shortages in cities and towns across the country. Federal and state troops were called in, and dozens of people were killed in riots. And there was a racial component as well. African-Americans were excluded from the railroad union that was striking, and they were hired as replacement workers.

Gerard Magliocca: And so the national government under President Grover Cleveland basically declared a kind of martial law in Chicago to basically get the rail cars moving again and arrested the leaders of the strike.

John: What does that means for incorporation? Well, according to Professor Magliocca, legal elites, including the Supreme Court, came to believe that extending substantive rights like the right to free speech, to carry firearms and against unreasonable searches and seizures would empower the strikers, encourage destruction of private property, and undermine public order.

Gerard Magliocca: First of all, there is a greater fear of disorder and many of the rights in the Bill of Rights are about creating disorder or about making it harder to punish people who are engaged in protest or trying to make change, right? So, I mean some people engage in speech do so to disrupt the system.

John: The leaders of the strike got thrown in prison and they didn't get a trial.

Gerard Magliocca: In the case of Debs, right the government imprisoned Debs and the other strike leaders of the Pullman Strike on criminal contempt charges. Meaning they got no jury trial at all. Just a judge who was not sympathetic to the strike just put them in jail.

John: And it was a a federal judge in federal court where the Sixth Amendment absolutely guarantees a right to trial by jury.

Gerard Magliocca: So when they said and they said well look, you know, we're entitled to a jury trial and this was in federal court, right? This was not even in state court and the Supreme Court said, no, you know because it's an emergency in a sense. It's okay to use this contempt power and besides well, hey a jury might not have wanted to keep them in jail or might not have wanted to convict.

John: Which is like the whole point of a jury trial. To stop the government from putting people in jail just because it wants to.

Gerard Magliocca: Right, which of course is true for any jury trial or jury proceeding. That's why we have them. So the thing is if in federal court, you weren't getting a jury trial if you were somebody like Debs, why would we expect that the court would then say Oh, but if you were in State Court, we would say that you were entitled to a jury trial.

John: If the Supreme Court wasn't even forcing the federal government to abide by the Bill of Rights, there was no way the Court was going to extend them to the states.

Gerard Magliocca: So even the core of the Bill of Rights as applied to the federal government was not faring so well in this period of stress. That sort of made the thought of extending it further sort of something of a fantasy which is how things played out.

John: So all of this is ultimately an educated guess, a hypothesis. There are no opinions or even private writings from the Justices that say explicitly -- hey this is why we're not incorporating.

Gerard Magliocca: I think that Justices respond to dramatic developments in society. And so one might look at what was going on with strikes and protests and violence and think to oneself. Well, maybe this is not the time for extending more rights to dissenters or not the time for impeding law enforcement from doing what is necessary in their view to prevent vile -- further violence from occurring something like that.

John: And so, whenever a plaintiff in federal court claimed that a right enumerated in the Bill of Rights meant that the plaintiff should win and a state action was unconstitutional, they lost. And starting in 1900 , the Court began citing Slaughterhouse as the reason the Bill of Rights was not incorporated. But, according to Professor Magliocca, it was actually fear of disorder and maybe even revolution that caused the Supreme Court to turn away from incorporation. Eventually, the Supreme Court begins to reverse course on that but not in a big way until the 1930s and 40s. And not even completely. Today, there are still rights, mostly procedural rights, that are not

incorporated against the states. And it's been a long slog for substantive rights, too. The 2nd Amendment right to keep and bear arms wasn't incorporated until 2010. And the 8th Amendment right to be from excessive fines wasn't incorporated until earlier this year.

John: And not to toot our own horn, but that one -- on the excessive fines clause -- that was an IJ case. Okay, we're obviously going to toot a little. On a later episode. We'll talk more about excessive fines and the revival of incorporation more generally. But before that, we have one more episode on the due process clause. Next time on Bound By Oath, substantive due process. When the courts tell other branches of government that there are just some things they cannot do.

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