Episode 547: The Central Rothbard Contribution I Overlooked, and Why It Matters

Guest: Stephan Kinsella

WOODS: Ordinarily, as I would do in these episodes and as I've done in the past with Stephan, I would launch into a biographical discussion of the guest, but instead, I'm going to turn things over to Stephan and say, Stephan, what do you think people should know about you?

KINSELLA: Well, I was born in a little town (laughing) —

WOODS: (laughing) I knew I shouldn't have done this.

KINSELLA: I'm a libertarian patent attorney in Houston. How about that?

WOODS: Oh, but you've done so much more. I want to know about your writings.

KINSELLA: Okay, so I am a practicing attorney, but I've written a lot on libertarian legal theory for *The Journal of Libertarian Studies*, and then I founded sort of a successor journal called *Libertarian Papers*, which is still ongoing, which I'm the managing editor of. And yeah, I've written some books, and I've written on intellectual property, both the legal side and the libertarian theory side.

WOODS: I'm going to be linking to everything that we talk about today, in terms of articles that you've written and stuff like that; I'll link to it at TomWoods.com/547. I spent last night actually reading some of your stuff that I hadn't read before, and then all the way up to the moment I called you today I was reading your stuff, so I am very much in a Kinsella frame of mind right now. And I have to say — I want to get to this later — I was really struck by — I guess I hadn't read — gosh, you know, I've read so much Rothbard, but it's — I haven't read it in the past week, and sometimes I forget what was in it. And some of the insights are so interesting, because they apply to current debates.

I was interested to see that Rothbard I guess deals with the question of how do we confront problems in, let's say — well, let's just say this: sometimes we don't have what me might call clean capitalism. Sometimes property titles are not legitimate, because when you go back into the mists of time you might be able to say that so and so stole it, and you're an inheritor of stolen goods. But the difficulty is how can we know that today. We can't always, and so does that mean that everybody holds his

property only precariously or it's all questionable? These are the sorts of complaints that left-libertarians have made, and Rothbard addresses this as if he's living in 2015 debating the same people I debate. Just exactly right. So I want to get into that later.

But right now I want to talk about, the issue of contract is important for libertarianism, and I guess frankly even up until today, this very day when I read your discussion of the Evers-Rothbard title transfer theory of contract, I guess I just assumed that our view of contract was not all that different from the mainstream view. And I guess you learn something every day. How is the mainstream — well, first of all, what's a contract? And how does the mainstream try to justify basically forcing someone to live up to his side of a contract?

KINSELLA: Right. Actually, I think this is one of Rothbard's sort of seminal contributions to political theory or legal theory, and it's relatively unappreciated.

WOODS: Yeah, you could say that again. I've been praising the guy for decades, and I didn't appreciate it.

KINSELLA: I think it's in the final chapter of *The Ethics of Liberty*, if I'm not mistaken, which is I think '82, it was first published?

WOODS: Yes.

KINSELLA: Which fascinated me when I read it. And then it's based upon a 1977 article by Williamson Evers in *The Journal of Libertarian Studies*, which Rothbard was the founder and editor of and which was the very first article — it was Volume I, Number I, so this was the first article ever published in the *JLS*, the article by Evers on contract theory. I later discovered — after I wrote a long article about this in 2003, I later discovered in '74, Rothbard sort of had the germ for this idea in one of his early articles, the one you were alluding to, which is fascinating.

The standard understanding of contract, which I think most libertarians actually share in a kind of crude way, is that a contract is a binding promise. Now, legally speaking if you get more precise, you can distinguish three things. You can distinguish consent from agreement and from contract. They're all different things. Consent just means the person who has the right to give permission or to deny permission gives permission. That's consent. We determine who can do this by deciding what property rights there are, so it's really a propertarian kind of issue. The owner of a certain thing, their body or something else, has the right to permit or to deny others from using that thing. That's just consent.

A contract is what we call in the law a binding agreement. So an agreement is just when people come to an agreement, they say things that they're going to do something, and if it satisfied certain requirements in the law, then it's called a contract, which means it's a binding agreement or it's a binding obligation. So the standard view of contract is that it's basically a promise of a certain type that is binding. And most libertarians think of this too. They'll say that you have to keep your

contracts. They view it as something you promised to do that has certain formalities, like consideration or whatever, that makes it legally enforceable. So the standard view of contract, it's the legally enforceable promise or agreement, and this is not Rothbard's understanding.

WOODS: Well, if a promise then is not really what's at the heart of what makes a contract binding, so to speak, what is the correct way to think about it?

KINSELLA: So Rothbard's view, which, again, I think he came up with this in '74, and he was thinking from a Misesian point of view about the nature of property and a libertarian view about the nature of property rights. And then Evers elaborated on this, and then Rothbard built upon that, so it was really a collaboration between the two. And by the way, I have an interview with Evers on my podcast, which I finally was able to, after trying for years to reach him, finally last year he spoke with me about this, and he —

WOODS: Wow, I didn't realize — I figured — I really thought he basically was unreachable at this point.

KINSELLA: I tried for years, and finally he consented. I was able to do it. And it was fun to do it; it was great. I think it was important to do it. He basically confirmed my understanding of the chronology of this, of the idea. In any case, so Rothbard's rooted in thinking of human action as the use of resources, right, and libertarianism is the property rights in resources. And what it means to have ownership of a resource is you can grant permission to others or you can get rid of that resource; like, you can give it or sell it to another person by consent.

So he basically says that promises by themselves are not enforceable. It's almost like a free speech issue. Saying, "I promise to do this to you or for you," that's not in itself enforceable, because it's just a statement about your intention. You're not committing aggression, so the other person has no right to use aggression against you to make you do what you said you were going to do. But he said that if you own a resource, you do have the ability and the power to transfer it to someone else, and that really is what contracts are all about.

And if you think about — if you understand the way the legal philosophers classify and understand contracts, the way the legal system treats contracts right now, the outcome is actually very similar. So for example, in the civil law system — which you know is one of the two major systems in the world, and the common law's the other — contracts are called agreements that give rise to obligations. And then there are two types of obligation: an obligation to do something or an obligation to give.

Now, Rothbard would say, I believe, that contracts are really only to give. So the contract is just the exercise of power over the resource to transfer it to someone else. And in the law, if there's an obligation to do something, like to make a performance or to sing a song at a wedding, and if you don't do it, guess what the remedy is. It's almost never what we call specific performance. The judge would never compel

someone to sing a song at a wedding for various practical reasons. Instead they would say, well, you breached the contract, so you have to pay monetary damages. So even in the case of an obligation to do something, in the current legal system it really boils down to a transfer or property, which is money in that case. So you could have reformulated the entire contract as just a transfer or titles to property, which is why I believe Evers called his article "Toward a Reformulation of the Law of Contract." It's a different way of viewing what contracts are.

WOODS: Now, I want to raise a case or a doctrine that's used in the mainstream, because a lot of times there are things that libertarians believe that make perfect sense to us and are perfectly in line with our basic principles, but that when they're told to people who don't have the foundation in our principles, they just sound crazy. Like if we talk about slander or libel or blackmail or whatever the way Walter Block does and you don't have a foundation in libertarianism, you think this is just crazy. And likewise there is this doctrine of detrimental reliance that we hear in the mainstream —

KINSELLA: Yes.

WOODS: — that I think would seem like an equitable solution and a just foundation for obligation. If, for example, you make a promise to me, and I organize my life on the basis that you'll keep that promise and you don't, then it seems that there would be cases when that promise could be enforceable as a contract. For example, I think you gave the example of a grandfather who promises that he'll pay the college tuition for his granddaughter, and she goes ahead and arranges her life according to that expectation. And then if he suddenly decides to stop paying, well, has he breached a contract? Well, the way they might look at it is this was a case of detrimental reliance. Now, we would say, I think, that she wouldn't be able to actually sue him or demand that he keep on paying, and yet she is very much inconvenienced, so it seems like that's just kind of a shame for her, and maybe the mainstream is more humane than the tough-as-nails libertarian alternative. How would you think about this kind of situation?

KINSELLA: Well, yeah, so I think this is basically the result of — I won't say a statist legal system, necessarily, but a system that is not perfect and did develop in the government courts. And so you have this doctrine of — you know, there's an ancient principle, Tom; in international law it's called *pacta sunt servanda*. So *pacta sunt servanda* is a Latin term used to describe the old doctrine that agreements are to be respected, in international law, for example, which is why treaties between nations are considered to be legal and create international obligations under international law. So there's an intuitive practice among humans that when you make a promise, when you make an agreement, it's supposed to have effect. And the law generally does this, but then legal theorists struggle to explain why. Why should it have effect? And there's different theories about why it should have effect.

I actually think the promise to pay for tuition for a granddaughter could be enforceable, but under the title transfer theory of contract. Basically you would view

it as if you made the correct transfer and you may have the right contract, the grandfather is giving his future money to the girl. So she's the owner of that money at the appointed time. So there's no inability to enforce the contract.

The standard legal justification, one of them is a doctrine of equity called detrimental reliance, which you mentioned, which is similar, by the way, to the legal doctrine of estoppel, which I've used in some of my rights theory, this idea of estoppel. The idea is that if you perform an action that other people rely upon to their detriment — in other words, they made some decision that makes them worse off if you don't follow through with your promise — then it should be binding.

But as people have pointed out — like Randy Barnett, by the way, who's probably the other major libertarian legal theorist on the contract theory. He's written on his own theory called consent theory of contract a lot of interesting stuff; it's different than Rothbard's. But he points out and other people have pointed out the problem with detrimental reliance is that it's circular, because — there's always a reasonable requirement. Like, if you reasonably relied upon someone else's promise, then it could be enforceable. However, if the legal system never enforced promises, then everyone should know that, and it wouldn't be reasonable to rely upon someone's promise. So it's really a circular doctrine, and that's not the best way to defend the standard theory of contracts being binding promises.

What's interesting about this, Tom, is I think it basically fits into the basic theory understanding of what libertarian principles are. And I think you mentioned this on one of your other shows the other day; I heard you talking about this. You mentioned two of the three things I'm going to mention, that libertarianism basically can be defined by three principles. The first is original appropriation, right; that is, someone who homesteads an unused resource in the world has a better claim to it than anyone else. And the second is contract; that is, you can contractually transfer that resource to someone else, and then they're the better owner of it. And the third would be rectification or restitution. If you harm someone, you violate their rights, that might give them a claim to some of your resources to compensate them for the harm you did to them. But using those three principles, you can basically identify in principle the ownership of any disputed scarce resource in the world.

But this focus is a focus based upon scarce resources, and that's why it's different than if you do contract as binding promises, you have all kinds of people saying, well, someone can't quit the Army if they join the Army. They made a promise, after all. So you have this inalienability question that is easier to solve if you understand contracts as transfer of title to alienable property.

WOODS: Let's think then of the example of an actor who signs on with a movie company, and he agrees he's going to do five movies with them over the next seven years. And if he were not to deliver on this, the company would suffer. He probably wouldn't get paid, but the company would suffer. So what I want to know is — I want to know in the two cases — let's say we've got just a regular American judge looking at a case like this where the guy made two movies, and then he just stopped showing up

and they couldn't find him. How would they conceive of that contract? What would make that a contract, and what would make his failure to live up to it actionable? And how would we look at a contract like that?

KINSELLA: Right, so in today's sort of mainstream situation, the contract would be viewed as a legally enforceable obligation if it satisfied certain formalities. For example, if there had been consideration. That's an old doctrine of the common law, which actually the civil law rejects and which I think we would reject as libertarians. Like, you don't need to have consideration — the idea of consideration is that you have to have an exchange for the contract to be binding. Each side has to give the other something in return; otherwise, it's not binding. Even if they're not equal — that's why they say even a mere peppercorn could be satisfied as consideration. This is why you see in contracts quite often a fictional I give you a $1 or $10 — and actually, that's never transferred. It's just there as a relic of this idea of consideration.

So if you have consideration and valid cause and there's no fraud and the parties are of age, these kinds of things, then the contract is a legally enforceable obligation, and if the actor doesn't perform in the next movie, he's in breach of the contract. And then the question is what's going to be done about it. And as I said, courts almost never order specific performance. That means the court wouldn't order the actor to perform under penalty of contempt of court, which would be going to jail. Instead, they would just say, well, you're breach of contract, so now you owe some damages. And quite often these kind of contracts have damages clauses where they specify what the damages would be, and the court will enforce that if it's not called a punitive damage. So the court will only enforce it if it's a reasonable damage. And if there's no damage clause, then the court would come up with a damage. They would say, well, how much did the breach of the contract cost the movie studio. So they would end up ordering the actor to pay some money to the studio.

Under our theory, it would be almost the same result, except the contract would simply say — it would be a set of conditional clauses. It would say the movie studio hereby agrees to transfer this much money to the actor in the future for appearing in a series of three movies or whatever, and the actor hereby agrees to pay the following amount of money to the studio if he doesn't perform. So it would cut right to the chase. It would just specify what the payments would be.

WOODS: I want to jump to something that surprised me when I read it. This was in another one of your articles, and it has to do with the phenomenon of fine print, which more and more people have to deal with now, because online we're always clicking our agreement to terms and conditions, and sometimes they gray out the click box until you've scrolled through the whole thing so they can say, look, you did actually look at it, and you've consented to it. But everybody knows, including the institution that's asking you to consent to it, that nobody's reading that. Basically nobody is reading any of that.

And you seem to suggest that that means that if somebody — because they could sneak in some crazy thing. I mean, let's say they snuck in, oh, and by the way, if you use

your site, we get half your income. Nobody would think that that's enforceable. So then how could any of it be enforceable if nobody's reading it? Is it based on a reasonable expectation of what's likely in there?

KINSELLA: Right, so in standard legal theory — well, there's a doctrine in the common law called meeting of the minds, which is the idea that when both parties have a common agreement as to what the terms are, there's a meeting of the minds, and therefore there's an enforceable contract. That doctrine gets a little problematic with these fine prints, because there's really not a meeting of the minds if nobody's reading and everyone knows this.

In the beginning you asked me to define contract. Contract, notice, I didn't say it's a written document. Libertarians and a lot of people tend to conflate a piece of paper with words on it as being the contract. It's not. I think of that as just evidence of what the contract is, because you can have an oral contract. People call it verbal — that's actually a common mistake, by the way, calling a contract — distinguishing verbal from written. All contracts are verbal, right? They have words. Oral is the contract that you don't have written down on paper. In any case, a contract can be oral, but so then the question is what are the terms, and that means what did the parties really agree to.

My only point is that in these click wrap agreements — and some of the, by the way, are like the shrink wrap agreements, where you would open a box of software, there were terms on the inside, you were held to have agreed to the terms on the inside of the box as soon as you tore the plastic wrap on the outside, even though you hadn't read it. So if we stop thinking so mechanistically about what contracts are, you wouldn't equate it with this piece of writing.

So let's just imagine that in a contract, buried near the end there's a clause saying, you know, the person using my website hereby agrees to pay me $1,000 for the rest of their life. Now, if you have a mechanistic view of contract, you would have to say that's enforceable, but of course that's absurd. And one way you could say that's absurd is you can say that no written contract can ever specify everything, because there's always some condition that can arise. So then you have to go back to what's reasonable or what the parties would have agreed to. So in other words, there's default conditions; they're gap fillers.

And I would say that one condition of a contract is a presumption of good faith on both parties and a presumption of good faith in enacting the basic terms and purposes of both parties. So it would not be good faith to sneak in a clause like that in a contract that has nothing to do with that kind of lifetime annuity payment, right? That would be in direct violation or contradictory to the presumed good faith term that governs the contract that both parties had agreed to. Like if you're negotiating with someone and you said, do you agree that we should negotiate in good faith, no one would say no, I'm not negotiating in good faith. So that's a fair thing to assume that it's one condition of the agreement.

So my point is that we shouldn't assume automatically that fine print that is snuck into these shrink wrap or click wrap agreements is necessarily enforceable, because it's not really agreed to by both sides.

WOODS: All right, I found that interesting, and another thing is the subject of debtors' prison.

KINSELLA: Right.

WOODS: This is obviously a theoretical issue at this point. There's no chance debtors' prison is coming back, and we're not saying that it should, but I want to know on what grounds would we say that it shouldn't. If somebody owes me a debt and just can't pay it, well, you could see a certain logic by which, well, you've got to do something until you can pay it back, because in effect you have stolen from me.

KINSELLA: Right, and this is where I disagree with, like, Walter Block. I think we have a podcast on this too, where we discuss this issue too. And even Rothbard, even in that article he I think slightly missteps on the debtors' prison issue. What he says is that, you know, you would view a loan, for example, as two title transfers. Like, I give you $1,000 now, and you give me $1,100 in a year — like $1,000 plus 10% interest, let's say. So those are two title transfers. One is immediate, and the other is set a year in the future. If the debtor doesn't have the money in a year, then Rothbard says, well, theoretically he could be put in prison for stealing from the creditor. But then Rothbard says that, but that wouldn't be just, because that would be disproportionate. So he says that theoretically debtors' prison would be justified, but it would be disproportionate punishment so it can't be justified.

I think he doesn't realize that his own theory shows another way that we can say that debtors' prison is wrong, and that is that there is no theft, because if I'm a penniless — look, if I have $1,100 then the ownership of that money automatically transfers by operation of the contract to the creditor, and then if I don't turn it over, I'm actually basically kidnapping his property, right? I'm trespassing on his property. That would be a type of theft. But if I'm penniless, there is no money to steal, and sometimes Rothbard and Walter, I believe, it's not clear which money they think is being stolen. Sometimes they'll say the original $1,000 was stolen, because it was only given conditionally on the condition of being repaid later, and if it's not repaid —

WOODS: Yeah, that seems right to me. How is that wrong?

KINSELLA: The problem with that is, first of all, there are two separate title transfers. The $1,000 transfer from the creditor to the debtor has to be unconditional, because the purpose of it is to give it to the debtor so he can spend it. I mean, the whole purpose of the loan is to give money to someone so they can use it for some project, and for them to spend the money they have to own it. They have to own it unconditionally. So the $1,000 is transferred 100% unconditionally. The $1,100 being transferred back is a future title transfer, which means it's inherently uncertain, and there is a risk there that it might not exist. If it doesn't exist, it can't be stolen. So the

$1,100 can't be stolen if it doesn't exist. And the $1,000 was not stolen; it was given with permission of the owner to the borrower.

WOODS: Maybe I'm supposed to accept that theoretically, but I just find that very hard. So that's what makes it different from I'm going to let you use my apartment for a couple of months, and if you — I guess in that case you could pay in advance, and that would solve that problem, but is the idea that the apartment still exists and there's no way I could spend the apartment and then claim I have no apartment to give back to you?

KINSELLA: Correct. The apartment still exists and has an owner, right? And actually, I would say the apartment theoretically under a libertarian propertarian theory, in a sense the apartment has two owners for a while. It's basically co-owned by the original owner and by the tenant; it's just that the tenant has limited ownership rights, limited in scope and limited in time. So at a certain time, the full ownership reverts back to the landlord.

WOODS: Say something about this controversy involving the basic guaranteed income, only because — we don't have to talk about the income aspect of it, but one of the foundational arguments in justification for it is that because we can't know for sure that the property titles that are in existence right now are just, if that the property, if we trace it back in history, was always acquired and transferred justly — there was no theft involved, there was no government subsidy or whatever — it's hard to know today if people really are justly holders of their property. So we suddenly become agnostic about this, and this therefore means that we more or less assume everything is screwed up, so that means we have to have redistribution of some kind.

I mean, I'm not caricaturing the argument. People can listen to — well, I'll go back and look at what number it is; I'll put it at TomWoods.com/547, a link to the episode where I basically debated Matt Zwolinski on this. I'm sure you're familiar with all this stuff. We don't have to talk about the income aspect of it, but how do you deal with the objection that probably is well founded, that there's a lot of property out there that when you look through its history it's a fairly grim history, and so therefore we should question the legitimacy of existing titles?

KINSELLA: I would deal with it the way Rothbard did in the 1974 article, which is again an amazing piece, the one where he lays out sort of the germ of this contract theory idea. And I noticed this as I was reading through it; it was published in two versions in 1974. In the first version, it touched a little bit on the issue you just brought up, but in the second version he published in a different book the same year, he added a whole new paragraph where he explicitly deals with that issue.

And I think he did it because someone must have called to his attention this problem. He detects some of these left-libertarians were making this argument, which I call sort of the original sin argument, you know? It's the idea that if there's a — they're basically trying to say that the 1% or the rich West, their ownership of property traces back to some kind of problem in the past, some kind of theft, some kind of oppression, some

kind of hierarchical exploitation, and therefore they don't really have a good claim to their property or can't really complain if its taken away from them to compensate the poor or to engage in redistribution. So basically they're just trying to find a flaw in your title to your property so that they can justify taking it from you.

Rothbard points out that, look, it's in a sense harking back to the possession is 9/10ths of the law dictum of the common law, right? We have a system right now where there are resources being currently possessed and used by people. Unless you can show you have a better claim to that resource than they do, then you need to let them own it. Unless they're criminal, like the state, or unless they used the state's eminent domain maybe to get their resources, they have a better claim to that resource than anyone else, and they should remain undisturbed.

Even if you could find that five generations before, one of their what we call ancestor in title, someone further back in the chain of ownership, one of the stole the property from someone else, unless you can show who really owns it, then the current person should maintain ownership of that property. So I agree totally with Rothbard on that, and it's a very important insight, and it does deflate a lot of these claims.

And by the way, the contract theory also helps to highlight the absurdity of a lot of these implied contract arguments, the social contract theory arguments. Sometimes libertarians will say that, well, even if everyone in the country agreed to be bound by the state, after a certain amount of time, next generations didn't agree to that. But even that original assumption granting that a group of people could agree to be bound by the state is not really right, because if contracts are just transfers of title to property, then they're agreeing to be bound by a state doesn't mean that they can't change their minds later.

So the contract theory plays into inalienability theory also. If you basically think a contract is the exercise of dominion over a resource by its owner, then you understand there are two types of resources. There are bodies, and there are other things that are acquired. And our bodies are not something we can sell, because we didn't acquire our bodies like we acquire other scarce resources of the world. That's a whole different argument, but it does play into that. But it does imply that a soldier who's in the Army has the right to quit, just like someone working for a company has the right to quit.

WOODS: I want to — you know, you have so many things going on. You've got *Libertarian Papers*; you've got your website; you have a podcast. I want to know where people should go if they want unvarnished Kinsella. They want to read more about what you're doing. What's the central location you send them to?

KINSELLA: StephanKinsella.com.

WOODS: Okay, and if you type in "StevenKinsella," Stephan's going to come through the Internet somehow and slap you in the face.

KINSELLA: (laughing) I answer to anything now, Tom; I'm so used to that.

WOODS: All right, well, fair enough. Well, StephanKinsella.com of course will also be linked at TomWoods.com/547. All right, this is great stuff, and I have to think — I haven't yet thought of the title for this episode — well, so to speak, the title for this episode. I have to get people to listen to it, and if I say it's on contract theory, they won't. But they need to, and at the end they'll say I'm glad I listened to this episode. It's one of these things I've got to somehow trick them into listening. Like, there are books that people need to read, and they won't realize it until they've already read them. This is an episode like that. They needed to hear this, so I don't know; I've got to figure out some way to scan my listeners into clicking "Play."

KINSELLA: Let's call Ann Coulter; let her come up with a title. She's good at titles.

WOODS: Yeah, she could probably come up with a pretty good title, but — yeah, they'd click, all right, but it may be the last time they click. All right, Stephan, thanks a lot for doing this. We appreciate it.

KINSELLA: Thanks a lot, Tom.