

Bound By Oath | Season 3, Episode 6 | This Is Mine

BBO Montage - Justices saying the oath

John Ross: This season on Bound By Oath we're talking about property rights and how the Constitution protects them. To get a start on that journey, you can go back to the last couple episodes where we talked about when the government has to pay you for regulating your property and how it can stop you from using your land in certain ways. But more basically the word "property" itself raises more foundational questions. Like, what is property in the first place? And where does it come from? Maybe I bought my house from someone else fair-and-square, but where did they get it from? And before that? And before that? When did it start being property, and where's the justification for that? After all, some people might say, isn't property just a social construct or that "property is theft"? So even if the Constitution protects our property rights, how are those rights, and this thing we call property, justified? In this episode we're going to explore these issues in a much more first principles kind of way than we normally do. We'll dig into questions like where does property come from, how should property be owned, and what do we do with property that at some point wasn't, quote, "justly acquired"? At the Institute for Justice, we think that property is an incredibly important institution that we're thrilled the Constitution is designed to protect. But to better appreciate property we need to take its foundations seriously. We're going to talk to a couple experts who have taken a deep look into these questions. What we'll learn is that private property is a fundamentally human thing that's shared across various cultures and an immensely practical mechanism for human beings to live together, but also that the justifications for any specific rule of property are hard to nail down in a concrete way. To start this foundational exploration off we're going to go to the beginning. And I really mean that, the very beginning.

Bart Wilson: You see the beginning of compound spears in *Homo heidelbergensis*. So that's 400, 500,000 years ago.

John Ross: That's Bart Wilson, an economics professor at Chapman University, whose scholarship traces the idea of property ownership, starting with compound spears, back to the beginning.

Bart Wilson: It's fully there with *Homo sapiens*, probably 300 to 100,000 years ago. And then the big explosion of symbolic thought is 50 to 70,000 years ago, then you see, see things all over the place.

John Ross: The earliest farmers distinguished between the fields they cultivated and those in the next field or village. Even our nomadic ancestors owned tools and clothing. If we go even further back into evolutionary history we also get hints of property. Prof. Wilson argues that property isn't just common, it's universal.

Bart Wilson: Every language has the ability for someone to say, This is mine. And the interesting thing is that in every language, it means exactly the same thing. Because you can't break down this and mine into any simpler concepts. In fact, you can translate this and mine, one to one into every single language. This tells us that these concepts are presumably innate in some way. There's something about all human societies that we're going to have this concept of this is mine. Now, it might differ under the social circumstances under which you can make that claim. Certainly, that's going to vary all over the place. But the idea that it's comprehensible by any two people on the planet with this and mine means is very clear.

John Ross: Every culture has this basic understanding—this is mine. It's not yours, it's mine. When and how you can say that is going to vary based on a host of factors, but the underlying idea—which sounds a lot like the same thing as private property—is essentially hard-wired into

our brains. Which raises another question, why don't animals have property? Chimpanzees use sticks to get termites, birds make nests, and all kinds of animals will defend something they're going to eat. Isn't that property too?

Bart Wilson: The neuroanthropologist Terrence Deacon argues that human beings are the only species to have symbolic reference in our language. And to me, that seems to be key to distinguishing what humans do with what we call property and what any other animal might be doing with what with things or what we might call quote, property. And that we want to take seriously how our mind perceives the world and then organizes it for us, and then how we act on that.

John Ross: Some of this comes down to things all of us should have learned in Kindergarten. Or even before:

Bart Wilson: Any animal that has those things doesn't want to give it up. It's in their genes to resist dispossession. And you'll see that in children as well, no one has to teach a child to resist the grasp of that new toy in their hand, they grab that thing, they don't want to take it away from them. In fact, they'll go into another place another house, and they'll see that stuff, and they want to grab it and claim those things. But what other animals don't do is teach their children the negative of that: what is not. So when a child wants to claim something as mine, and they claim it and say mine, you say no. And what we do is we teach our young, the negative of mine, not yours. And no other animal does that. And I argue the reason why is because they don't even have the concept of mine, the abstract notion of this idea that stands outside here and now. And that's what other animals don't have. They will certainly resist getting beaten up and attacked by something bigger. But that's not acknowledging that it's not mine, that's just saying I don't want to get beat up.

John Ross: This idea of “that’s mine” even arises from a physical instinct that property is a part of our bodies.

Bart Wilson: A spear in particular is something you can feel through the spear when you're using it. Take a cane or a stick and close your eyes and tap around to look for that leg on a table. If you click the table's leg, your mind orders, what you're doing is feeling through the stick. And even though what you're actually happening is that the vibrations of the handle in your hand is what's being sent to your brain, the brain reorganizes to say no, you're sensing the table leg through the cane. And that's what's happening with a stool. And anyone who's an expert in sports with equipment assumes the whole you know, the lacrosse stick is part of your body, the hockey stick is a part of your body as you're as you're moving. And our mind is doing that for us without any teaching. And so in a sense, then it's part of us. And compound spears have three pieces. They have a shaft, they have a point, and they have some glue that put it together. And these aren't just three different things kind of in physical space next to each other. As soon as you make a spear, it's a new thing. It's a new idea. And that's not what you find in any other animal, this kind of compounds tools. Because they don't have these abstract ideas of oh, this is a new thing that's put that's put together. And it's a new thing that I feel through. And then what happens when I put the thing down? Am I still in it? And if you have an abstract idea of mine, you can still think about it that being physically in that thing itself.

John Ross: So at some point in human history we went from being like chimpanzees that use tools but didn't have property to beings who do have property because of the concepts of mine and not mine. The invention of the compound spear is around when this took place.

Bart Wilson: We have to teach every generation how to make these tools. Then we teach them how they're used. We then also the process of that teach them when you can use it, and who can use it. And that gets passed along. And it has this element of connecting to the actual

individual in the person who actually made the thing. And so I think all of those are important elements of how we would get property off the ground in humans what might be the first thing. Now maybe it's not compound spears, spears are what are left in the archaeological record. So maybe they're making compound things before spears that out of things that degrade and we'll never find it. But the idea is that there's something about abstract thought, at that moment that we have compound spears

John Ross: Note that Prof. Wilson said there's a connection between the person who made a compound spear and the spear itself. That's a reason for the spear maker to say "this is mine" and others to recognize "this is not mine." But of course, human cultures are a lot more complex than that basic thought. So how does that initial recognition of "this is mine" grow into the various rules of property that we have in society? That's a big question, and to get started in thinking about it here's an example from the nineteenth century that comes from Yale property law scholar Robert Ellickson.

Bart Wilson: In whaling off the North Atlantic, the prey were called right whales, because they were the right whale to hunt. Because they don't dive, they don't have teeth, and they don't sink when they die. And the rule that the whalers had was if your harpoon was in the whale, and attached to your boat, no one went after that whale. And generally, there are big pods of them out there. So, there's no reason to go after anyone else's. And that worked well. But then when whaling moved off the coast of the North American continent, the prey was changed, it was sperm whales, and he noticed that the rule seem to change, that if your harpoon is in the whale, and a drogue attached to it, so it can't dive, like sperm whales are like to do, and you're in pursuit of it, then that's your whale, and no one else will go after him. And the reason for that was the cost of sperm whales were different than the cost of right whales. And so the transaction costs of getting them were different. So the rule had to adapt.

John Ross: These are just a couple examples of rules of property rights, rules for figuring out who owns what. As Bart explains, they're not abstract, they're particular to their time and place. And they can change over time to fit new facts. So property is universal; it's a thing all people have in some way. But the exact rules of property—of exactly who owns what—is sensitive to circumstances. So you may be wondering, ok I get that the rules of what exactly is property can change over time, but what does that mean when it comes to the Constitution? After all, if the rules of who owns what can be one way today but another tomorrow, couldn't that mean the government could just change the law and the rules whenever it wanted? Here's my colleague Anthony Sanders, director of IJ's Center for Judicial Engagement.

Anthony Sanders: The Supreme Court has often said that the Constitution itself doesn't define what property is, that's defined by state law. But as the Court has carefully pointed out, that's not the whole story. Because although the states have the power to define what property is, the Constitution also mandates that they respect your property rights. Now, we all understand that your city council can't just take title to your land without, at a minimum, giving you just compensation. But what if instead of taking your land they redefine what your land is in the first place. Can they do that? This is something property law theorists have called the "positivist trap," because it would allow changes in positive law—such as state statutes or city ordinances—to change what property is and make an end-run on constitutional protections, such as the takings clause.

John Ross: As it happens, the Supreme Court confronted a case involving the positivist trap just this last term. Litigated by our friends at the Pacific Legal Foundation.

Chief Justice Roberts: I have the opinion of the Court this morning in case 22-166, *Tyler v. Hennepin County*.

Anthony Sanders: The case at bottom is about a county making money off of an elderly woman who lost her home. But it also nicely demonstrates how the law of property cannot solely be defined by state legislatures. In the case, Geraldine Tyler purchased a condo in 1999 in Minneapolis, which is in Hennepin County. She acquired it when she was about 70 years old. What she didn't know — and, I mean, just about no one else in Minnesota knows either, I didn't when we bought our house in Minnesota a few years ago — was that since 1935 Minnesota has given the government a special right to private property when people don't pay their property taxes.

John: Here's Chief Justice Roberts:

Chief Justice Roberts: In 2010, Geraldine Tyler, who's now 94, moved from her condominium to an apartment building for seniors. She failed to pay the property taxes on the condo for three years. So Hennepin County seized it and sold it. The home sold for \$40,000. Tyler owed only \$15,000 in taxes and late fees. But the county kept the extra \$25,000 for itself.

John Ross: In many states if you don't pay your property taxes your local government can eventually put your house up for sale to settle your tax debt. Same thing if you don't pay your mortgage to the bank. That part isn't that controversial. But if your bank sells your house and is fully reimbursed it has to give you the excess of the sale. It can't just pocket any money that's left over as profit. However, in many states, like Minnesota, things were different. If you owed money to the government. At the Supreme Court, Ms. Tyler's lawyers argued that was a taking under the Fifth Amendment and also an excessive fine under the Eighth Amendment. In response, the county had a pretty simple argument.

Anthony Sanders: The county said this has been the law since the early 1900's. It's just how things are. It's right there in the definition of property. It's not like she bought the house back

then and relied upon the prior definition. She bought the condo in 1999 when this simply was quote the law of property. So there can't be a taking or an excessive fine. Now, Hennepin County conceded at oral argument that this was a pretty aggressive stance, so they argued that well, the limitations have to be reasonable.

John: And at the Supreme Court, the county argued that Minnesota's law was reasonable.

Neal Katyal: The tax is something that is a reasonable condition ... And if states, as Justice Jackson points out, wants to do things differently, they're, of course, free to do so.

John Ross: But the Court, in a unanimous opinion by Chief Justice Roberts, said not so fast.

Chief Justice Roberts: The principle that the surplus from a tax sale of property belongs to the taxpayer goes back to the Magna Carta in 1215. It was the rule at common law in England and here and has always been the rule in a clear majority of the states. ... Minnesota says it can keep the surplus because the law in that state is that any surplus is not protected property. But we have long held that a government cannot change the rules about what counts as property just so it can avoid having to comply with the Takings Clause. That would make the clause a dead letter and we're not going to do that.

Anthony Sanders: The Court here is kind of saying that, yes, property law is a state law issue but there's a kind of higher law, or, to use an old term, a general law, of property. It's not the Constitution itself—again, the Court says the takings clause does not define property. It's kind of the customs and traditions of our system of property law that put the brakes on states trying to use this one neat trick — the positivist trap — to get around the Constitution. And part of this too was that it wasn't like anyone who had a lien on Ms Tyler's condo could have walked away with

the extra money. It was only the government. And that made this change in the law highly suspect. Now if it were a different rule, akin to the whaling examples Bart Wilson gave, it might be a different story. To keep it with real estate, say it was a classic rule of property such as where a boundary line is in a river, and that rule changed incrementally through the common law process, or even just basic customs changed and the state legislature tweaked the law to reflect those new customs, then it might be a very different story. So the Court isn't saying changing the definition of what is property is always a taking. It's saying this is a pretty blatant example of when it is a taking.

John Ross: Now, although just about all of us sympathize with Ms. Tyler and are glad she won her case at the Supreme Court, her case concerns something that people often have deep disagreements about when it comes to property. And that's real property, or more basically, land. Most people can accept that you have a property right in your personal belongings and that the government can't come in and redistribute all your clothes. Or your Pokémon cards. But usually in battles over property rights we're not talking about personal stuff. We're talking about money or land. We're going to take a break, but when we come back we're going to explore why owning land sometimes rubs people the wrong way, even people who otherwise are big supporters of individual liberty. And a lot of that comes down to how we acquire land. As any student of history knows, it hasn't always been pretty. We'll learn that the best way to justify owning land isn't to follow a chain of title back to the beginning of time—although people have tried. It's to see what owning land does for people today and for them going forward.

BREAK

John Ross: We at the Institute for Justice are libertarians, people who believe in a limited government that protects people's rights and doesn't do much else. We sat down with someone who just co-wrote a book about the history of libertarian thought. It turns out that far from being

monolithic in their beliefs, libertarians have advocated all kinds of things over the years, while still being libertarian. And that includes the question of how we figure out and justify who owns what. A lot of what we think about regarding land ownership and property rights today goes back to a name that you still hear all the time in property rights conversations: John Locke, the seventeenth century English philosopher.

Matt Zwolinski: Locke's importance in the history of political thought on this issue, in particular, just is something that can't be overstated.

John Ross: That is Matt Zwolinski, a professor of philosophy at the University of San Diego.

Matt Zwolinski: Locke starts by wondering how, how we can have any kind of legitimate property at all. And he starts with this assumption, which he takes for granted and assumes a lot of his readers will take for granted, that God, the Creator of everything, gave the world to mankind in common, that the earth and all of its fruits belong not to one person, or to one nation, but to everybody. And so then the question is, well, if you if the earth belongs to everybody in common, how can any one individual take a piece of it; like a plot of land, and claim that as their own private dominion? So this is what's philosophers have referred to as the problem of original appropriation. You take resources that don't belong to anybody, or they belong to everybody in common. There's different ways of phrasing that question and the different ways turned out to matter quite a bit. And you ask, how can one individual appropriate some portion of that for their own private use?

John Ross: You might say the history of property rights theory has been attempts to figure this out. Even if you're not religious like Locke was, you still can see that at some point we went from a world where no one owned anything to where people did own stuff, especially bits of land. So how was that process justified? Or was it justified? Or did it depend?

Matt Zwolinski: Locke's answer to this question moves in stages. So the first stage is to note that there has to be some way of answering the question, because he says, Look, God gave the earth to mankind in common but why did he give it to mankind in common? Well, if we can't use it, it's worthless. If we can't take the fruit from the apple tree and eat it and use that to nourish ourselves, then what's the point of putting it there in the first place? So God gave the earth to mankind in common, to use, there has to be some way of appropriating. What's that way? Well, Locke says, let's start with our bodies and our labor. Because even if God gave the earth to mankind in common, what's not common to mankind is our own self, our own body, the labor of our body. That, Locke says, is ours and ours alone. So if we start with that assumption that people own themselves, that they're self owners. Locke says, Well, look, if you own yourself, and you own your labor, and you mix your labor with these external resources, then you can come to own those things. Because you've mixed something you own with something that you don't own. And it's that act of productive labor, that gives you a property right in these external resources.

John Ross: But there are some limits.

Matt Zwolinski: So Locke notes that if you take more than you need, meaning that if you take so much more than you need, that some of it spoils and goes to waste, that you've done something very wrong there that you've violated rights that other people have, who could have taken and used that stuff that you let go to waste. So you can't let stuff spoil.

John Ross: Locke's attempt to solve the problem of original appropriation is something philosophers and property rights theorists are still grappling with over 300 years later. That's partly because it makes a lot of intuitive sense. But it also doesn't help us as a practical matter very much, as we all know that most land hasn't just been improved by one person and then peacefully passed along. At some point it's been passed along in a very illegitimate way.

Matt Zwolinski: There's this question of what we should think about current property holdings when you look at the actual history of almost any property holdings if you go back far enough, you're going to find some bad things. You're going to find some unjust acts, some theft, some violence. So if property rights depend on a historically pure process of origination, then almost all property rights are going to wind up looking unjust. That's a big problem.

John Ross: And as we'll explore in a later episode, that's of course what happened to most land in the United States – and elsewhere. Say your ancestors owned a farm in England. They may have been Normans who stole it from some Saxons. Who stole it from some Celts. Who stole it from the folks who built Stonehenge. Further, original appropriation is not the only problem when we think about property in land.

Matt Zwolinski: Herbert Spencer was, I think, one of the most important libertarian theorists of the 19th century. He is not very widely read today. But in his time, he was a major influence not simply on political thought. He was one of the most well known public intellectuals, generally speaking of the late 19th, and early 20th centuries. In 1851, he published a book called *Social Statics*.

John Ross: Herbert Spencer was generally what now you'd call pretty libertarian, but today some of his views on land ownership would make him seem more like a kind of socialist. We'll get to what he had to say about land in a moment, but first we should quickly address something about Spencer. If you've heard of him it's probably because of the one thing he is usually identified with today: social Darwinism. But although Spencer did say some things that sound a bit like that to our ears, actually like a lot of thinkers, he's complicated.

Matt Zwolinski: One of the main reasons nobody reads Spencer anymore is that he is widely thought to have been discredited as a social Darwinist. Sometimes these evolutionary views and Spencer are presented in a way that look pretty unpalatable. So he talks, for instance,

about poverty relief, in *Social Statics*, and he seems at points to be against the relief of the poor, on the grounds that we'll look if somebody is poor, it's because they've acted badly in some way. And if they've acted badly, and we go and bail them out, by providing them with relief, then we're only encouraging people to act badly. That looks pretty cold hearted and social Darwinist. So you can see where people would get this idea. I'll just say that there are complicating factors. So while it's true that Spencer does at times caution against relieving the poor, there are other times where he says that we should we just need to be careful about it.

John Ross: But let's get back to Spencer and land, which in any case isn't related to his ideas on poor relief.

Matt Zwolinski: There is a chapter in the book called the Right to the Use of the Earth, where Spencer lays out his views on property rights in natural resources. And it's a striking chapter. Because while Spencer is pretty clearly a libertarian in in any normal sense of the word, and while libertarians are known for being champions of the right of private property, Spencer actually takes the position in that chapter, that private property in land cannot be morally sustained. It's indefensible on even his libertarian political theory, and he gives a rather short but but fairly compelling argument for why he thinks that could be the case. The first step is to make a kind of broad argument against private property and land based on what he calls the law of equal freedom, which holds that every individual should have as much freedom as possible, compatible with a similar freedom for other people. Spencer says, first of all, if people are to have this greatest possible sphere of freedom, that freedom requires the ability to use physical resources. You can't live somewhere, if you don't have a place to live. You can't walk. If you're not entitled to step upon the ground that you're walking on. He says, Well, look, if everybody has the right to private property and to acquire and claim for their exclusive dominion pieces of the earth, then that means that there could come a point where all the earth is held as the private property of someone. And if we reach that point, then those who lack private property in the

earth will not be able to do anything without the permission of the people who do own the earth. And that, Spencer says, would be intolerable.

John Ross: That's not quite the same problem as original appropriation, but does get back to Locke's proviso that a person should only take as much land as they need. It's important to remember, though, that Spencer wrote this as an idealized work of philosophy, so he wasn't advocating massive land redistribution or anything like that. In fact, later in life he seems to have moderated his position.

Matt Zwolinski: But he doesn't conclude from that, that we – 19th century Britons – ought to actually abolish these rights in any kind of practical sense. He doesn't think that the government should seize all this land that ostensibly belongs to private individuals and either open it up to the commons or manage it directly itself. Instead, he basically says that the state should sort of leave things where they are, but that the state should be regarded as the true owner of this property while leaving it to private persons to manage as a practical matter. In his later works, you get him revisiting these questions without the assumption of pure ideal theory. And he gives somewhat different answers to the questions later in his career. It's difficult to know why he gives these different answers. It's difficult to know if he changed his mind, or if he is simply kind of doing a different kind of philosophy now than he was earlier. He basically drops all this stuff about private property in land being illegitimate, and seems to say that it's it's perfectly legitimate. And he got a lot of flack for that.

John Ross: One person who gave him flack was an American economist who, like Spencer, was a big deal in his time but isn't heard much about today.

Matt Zwolinski: One of the most interesting theorists of property in the United States, a guy named Henry George, who wrote a book in 1879, called Progress and Poverty, which turned out to be enormously influential.

John: You may remember that we talked about Henry George on the regulatory takings episode.

Gideon Kanner: Henry George, who was frankly, between you and me a bit of a wacko. He had some weird ideas. There are two kinds of value, he said. ... Value which is contributed by the private investment and enterprise and the value that has contributed by the public influences.

Matt Zwolinski: For George, the fundamental root of all of society's ills, from crime, to poverty everything you could possibly hope to fix about American society could all be traced to the issue of land, and the unjust claimed ownership of land by the relative few at the expense of the great many – very much like the view of Herbert Spencer in 1851, when he was writing Social Statics.

John Ross: Also like Spencer, Henry George had very Lockean premises and was pretty libertarian in other ways. But he pushed back — hard — on how Locke thought your labor mixes with the land.

Matt Zwolinski: He thought that private property in land was a fundamentally unjust. And he thought that despite the fact that he agreed with a lot of what John Locke had to say about self ownership, about the right of each individual to control his or her body, and the labor of their body. In fact, he thought that land was unjust, precisely because he agreed with Locke about the point about self ownership and ownership of one's labor. So here was his basic concern in a nutshell. He said, Look, suppose we granted Locke that you own yourself, you own your labor. It doesn't follow that you can come to thereby own land, simply by mixing your labor with it. Suppose you find this field out in the wilderness, right? And you pluck all the weeds and you till the soil and you plant some yams. And you you go out there every day, and you water them. And then a few months later, you got you got a bunch of fat yams that you can harvest. You own those yams. Those yams wouldn't have been there without your labor. You produced those

things. You are fully entitled to the value of those of those yams. But the land itself, the field that you tilled and plowed and watered and all that, that wasn't the product of your labor. You didn't create that you didn't build that. That pre existed you and anything you did. So you don't get to claim an ownership in that. You own what your labor produces. But you don't own anything that exists independent of your labor. And so if the state wanted to tax you a value equivalent to the full value of the unimproved resource that you are controlling, it would be within its rights to do so.

John Ross: It wasn't too long after George published his book that Spencer moderated his view on land ownership.

Matt Zwolinski: When Social Statics was reissued later in his life, he actually pulled the chapter on the right to the use of the earth from the reissued volume like it never existed. This infuriated Henry George. This was George's big issue. This was like the central issue of his philosophical and political career. And Herbert Spencer was a big name at this time. So for Spencer to distance himself publicly from this view that was so central to everything that George saw as being wrong in the world. George felt as a huge betrayal. And he so he writes this book called The Perplexed Philosopher, which is all about Herbert Spencer, and how he started off so well, and then just went downhill. And it's a remarkable book. I just sort of picture Henry George as this angry blogger, going through literally, like everything Herbert Spencer ever wrote about the topic of land line by line and arguing for why he thought he was mistaken.

John Ross: More radical than either George or Spencer was another property theorist of their time: Pierre-Joseph Proudhon. He took the common-ownership-of-land idea to another level with his often quoted claim that "property is theft."

Matt Zwolinski: We think commonly that that theft presupposes the concept of property. Like you can't just steal something is to take what doesn't belong to you what belongs to somebody

else. And so you can't have theft without property. And so to say that property itself is theft. Seems odd. What Proudhon meant was essentially that to claim private property, is to claim for yourself something that really belongs to everybody. And so it's the private theft of communal property, the property of humanity as a whole. And that was the real source of Proudhon's concern about property. It was that when individuals claim land or other natural resources as their own, they are unnecessarily limiting the freedom of other people.

John Ross: Of course, all of these critiques about private property raise the question, okay if people don't individually own land, who does? It's fine to say we all communally own everything, but the world doesn't work that way. In practice that usually means the government will own everything, and there's all kinds of reasons why that doesn't work out well. Herbert Spencer didn't really have an answer to this, and changed his tune anyway. Henry George thought we'd leave land in private hands but tax the heck out of it, and Proudhon, well, he was a socialist, although one of a libertarian flavor. Of course, this doesn't answer our original question we started with either, where does property—the justifiable ownership of stuff—come from? John Locke has a pretty satisfying answer if you aren't sold on arguments like George's and Spencer's, but then there's still the problem of original appropriation. If you own land, just about anywhere in the world, at some point in the past that land was stolen or conquered from someone else. Probably many times. The original mixer of labor—if there ever was one—is long gone. So what do we do? We know private property is inherently human—"this is mine," as Prof. Wilson told us. How do we justify it? Well, maybe we're overthinking this. Prof. Wilson believes that Locke had the right idea, even if it gets complicated when it comes to land.

Bart Wilson: I think Locke basically had it right. His focus, however was more or less on land, and kind of taking things out of the commons, and that's a very modern Western bias of thinking of property through the lens of land.

John Ross: Maybe we shouldn't worry so much about what happened in the past, at least the deep part, but instead concentrate on how we can get along in the future.

Matt Zwolinski: While natural rights libertarians justify property by looking backwards in time by looking at the history, other libertarians justify property by looking forward in time, that is to say, by looking at the consequences, the beneficial consequences, that a regime of property rights is likely to produce. Maybe some bad stuff happened in the 19th century or the 18th century, the 17th century, whatever. Our problem now is to design a social system that is going to minimize conflict, that is going to ensure that resources are put to productive use, that is going to right incentivize people to use their local knowledge effectively, right? There's a whole host of considerations that are important for the design of social policy. And it's those considerations that should really be our focus, not what happened 100 or 200 or 300 years ago for these people that I think probably finds its clearest expressions in the writing of David Hume. It's a forward looking broadly consequentialist approach. If we had to go back and try to adjudicate who wronged who when, and who owes whom compensation now, this, these philosophers argue, would be a recipe for interminable disputes. We could never figure this stuff out. It would just be an unending series of conflicts about who is the perpetrator of injustice and who suffered the results of it. Better to focus our energies on moving forward, and trying to find a system that's going to allow for all of us to live in peace and prosperity. And that's precisely what property rights do for these people.

John Ross: On Bound By Oath this season, we're exploring all kinds of ways that property rights bring that peace and prosperity to people, and how not respecting property rights does the opposite. But to close, here's Prof. Zwolinski again discussing one legal philosopher and economist who had his eyes on what we do with property much more than where property comes from. That's Nobel Prize winner Ronald Coase. Coase basically said a lot of the time when the property line, so to speak, isn't clear between two people they can just bargain to clear

it up. And when it comes to the government, it should be available to help them sort it out, but otherwise stay out of the way.

Matt Zwolinski: Ronald Coase is famous for arguing that, among other things, that when it comes to certain kinds of social problems, when it comes to problems involving, say, how we ought to grapple with the issue of social cost, or negative externalities, given certain assumptions, it doesn't really matter so much how we allocate the initial distribution of property rights doesn't really matter what belongs to who or who has the liability. As long as people can transact, as long as people can enter into agreements and contracts and trade with each other, then moving forward, we can expect that people will transact people will interact in a way that essentially gets the rights where they need to be, right, that channels the property to where it will do the most good, yield the greatest value. It's a little bit more complicated than that. Because, you know, as some, sometimes transactions are hard, right? From the perspective of a philosopher who is interested in questions of distributive justice, the Coasian response to some of these issues is less than fully satisfying, but it does make an important point and it's one that philosophers moral political philosophers in particular, I think, have had yet to fully appreciate.

John Ross: Property is universal. Every person in every culture says both "this is mine" and "this is not mine." The rules for exactly how property is divided up and traded, though, are going to depend on your specific time and place. For example, sometimes rules for when hunters acquire wild animals are one way, sometimes they're another. And exactly who owns what at any one time isn't always super important because often people can trade to sort that out. What we haven't talked about today is what happens when the government doesn't respect those rules and tries to take property for itself or transfers it to someone else. That's what we'll be talking about the rest of the season. How the Constitution is supposed to protect our property and our right to trade with each other, and how a lot of the time the government doesn't follow

those rules. I'm John Ross, and you'll hear from me again soon on Bound By Oath. Thanks for listening.

Credits

John: This episode was produced by Anthony Sanders and John Ross of the Institute for Justice's Center for Judicial Engagement. It was edited by Kais Ali and Charles Lipper at Volubility Podcasting. Audio from the Supreme Court comes from Oyez. The theme music is by Patrick Jaicomo.