Australian Adam Smith Club
(Melbourne)

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History suggests that capitalism is a necessary condition for political freedom.
Milton Friedman (1962)

Keith Windschuttle
on
Intellectuals and Aborigines

The Adam Smith Club will host a dinner meeting on Monday the 25th of November 2002, at Nikitas Greek Tavern, 258 Swan Street, Richmond.

Keith Windschuttle has a Master of Arts with honours in politics from Macquarie University. In the 1970s and 1980s he taught Australian history and social policy at the University of New South Wales and other academic institutions. He also had a career as a journalist and magazine editor. For the past decade he has worked as an author and publisher, writing principally for Quadrant in Sydney and the New Criterion in New York. His latest book is entitled *The Fabrication of Aboriginal History*. He is author of six books, including *The Killing of History: How a Discipline is being Murdered by Literary Critics and Social Theorists* (1994), now in its fourth edition. He has written extensively on history and historiography for both academic and popular journals. His more recent articles are published on his website, www.sydneyline.com.

Over the last thirty years, Australia's intellectual classes have taken up the Aboriginal cause. The result has been a portrait of the Australian nation and its British heritage that could not be more unflattering. Historians have accused Australia of having waged widespread and bloody frontier warfare against the Aborigines that amounted to genocide. The centenary of Federation produced statements of agreement from the Governor-General and symbolic monuments to the theme, such as the design of the National Museum of Australia. Why have intellectuals created these ideas and why do they want so badly to believe them? Keith Windschuttle draws on his newly published book, The Fabrication of Aboriginal History, to answer these questions.

Attendance is open to both members and non-members. Those desiring to attend should complete the attached slip and return it to the Club no later than Friday the 22th of November 2002. Tickets will not be sent. Those attending should arrive at 6.30pm for dinner at 7.00pm. The cost is $36.00 per head for members and $41.00 per head for non-members (PTO for explanation of arrangements).

Enquiries to Ms Regina Bron, tel 9859 8277 (AH)
or Dr Tom Jellinek, tel 9706 7400 (BH)

✂ *detach and return*

The Secretary,
Australian Adam Smith Club (Melbourne),
PO Box 950, Hawthorn, Victoria 3122.

Please reserve ..... place(s) at $36.00 dollars per member and .....place(s) at $41.00 per non-member for the November 25th meeting of the Australian Adam Smith Club. I enclose the amount of $..... in payment for the same.

NAME (please print): .....
ADDRESS: .....
.....
SIGNATURE: ..... TEL: .....

LAISSEZ FAIRE ON THE WEB

This newsletter has a new address on the web: ***http://www.economic-justice.org/asmith.htm***. The Institute for Economic Justice has been created by David Sharp a former president (and current committee member) and Timothy Warner the current Treasurer of the Club. As stated on the web site, 'The Institute has been founded to assist those who have been subject to economic injustice, and to increase both public and professional awareness of remedies available under the Law.'

A LEGAL TENDER STORY

There is nothing quite like an economic downturn to excite" hard money" advocates. A demise of a national currency or three is guaranteed to revive even the most dormant of gold-bugs and have them eagerly asking each other whether the much prophesized and long awaited collapse of the worldwide fiat monetary system is at last occurring.

What is much more likely of course is that, as in the past, the system, with much international cooperation and judicious tinkering will once again weather the storm, accommodate the failures and restore confidence in and stability to the world's fiat currencies. At that stage the Keynesians and the Monetarists are likely again to proclaim the inherent viability and superiority of government monopoly money. What they are unlikely to mention is the role of Legal Tender legislation which usually accompanies government-issued "paper money".

Typically Legal Tender legislation compels people to accept government issued currency in payment on any exchange or in settlement of a debt and forbids insistence on any other form of payment even if freely agreed to beforehand. It is the linchpin of fiat money systems. To "hard money" advocates such legislation is analogous to the gun which turns deceit into robbery.

It is interesting to consider the American experience of Legal Tender legislation.

During the Revolutionary War the Continental Congress issued a large volume of government "paper", the value of which promptly plummeted. As a result the phrase "not worth a Continental" passed into the English language. Painfully conscious of this experience the American "founding fathers" when drafting their Constitution in 1787 took considerable care in addressing monetary aspects. Congress was given no specific power to issue paper money or to make laws with respect to Legal Tender. Thereafter, for the next three quarters of a century Americans experienced relative monetary laissez faire.

In February 1862, with the advent of the Civil War, President Lincoln whose inclinations generally towards complying with the Constitution seem, on the evidence, to have been more apparent than real, signed a Legal Tender Act. Rather than raise money for the war by taxation or borrowing Lincoln chose to finance it by issuing paper money enforced by Legal Tender legislation. His Secretary of the Treasury, a former prominent lawyer named Salmon Chase had grave misgivings about the constitutionality of the Act but was persuaded by Lincoln to go along with it.

Somewhat ironically, Lincoln appointed Chase as Chief Justice of the Supreme Court in 1864. Accordingly when in 1869 a challenge to the Legal Tender Act eventually reached the Court Chase was presiding. Earlier decisions at State level had gone either way, with some State courts upholding Legal Tender as an implicit part of Congressional war powers and others rejecting it as unconstitutional. In 1865, in Griswold v Hepburn, the Kentucky appeal court had decided against it, ruling that it was the clear intent of the Constitution that Congress's power to coin money was limited to metallic money.

In a 4-3 decision, Chase C.J. lead the Court in upholding the Kentucky court's decision. The number of Supreme Court justices at that time was 8. The final figure could have been 5-3, but one judge, who had earlier declared against the constitutionality of Legal Tender, resigned before the Court delivered its decision.

The Hepburn decision was handed down by the Supreme Court in February 1870 during the time of what was arguably the most corrupt administration in American history. On the day the decision was given President Grant nominated 2 new judges, who were known to favour Legal Tender, for appointment to the Court. The origin of Court stacking is popularly associated with President Roosevelt and the New Deal of the 1930s. However as the Legal Tender cases show, Roosevelt was not the first to think of it.

Four days after the appointment of the new judges was confirmed in March 1870, the Attorney-General moved the Court to consider 2 further Legal Tender cases. By a vote of 5-4 the Court voted to reconsider Hepburn v Griswold. The Court then took up the 2 new cases and again by a vote of 5-4 in Knox v Lee overturned its 15 months earlier decision. A casual reading of the report clearly reveals some of the bitterness that accompanied this divided judgment.

Knox v Lee was not the end of the Legal Tender story. In 1878 a new act called for the issue of greenbacks in peacetime. The blow was softened by them being convertible into gold upon demand. In 1884 in Juillard v Greenman by a vote of 8-1 the Court upheld the constitutionality of the peacetime issue of fiat money. With the rationale of wartime necessity not available the justices effectively fashioned one of economic necessity in its place; only by the mandated use of paper money could there be sufficient currency available for economic growth and to enable Congress to benefit the people. The economic reasoning of the majority has been criticized by economists as naïve.

The conclusion of the dissenting judge in Juillard's case, Justice Stephen Field is worthy of quote;

"From the decision of the court I see only evil likely to follow. There have been times within the memory of all of us when the legal tender notes of the United States were not exchangeable for more than one half of their nominal value. The possibility of such depreciation will always attend paper money. This inborn infirmity no mere legislative declaration can cure. If Congress has the power to make the notes a legal tender and to pass as money or its equivalent why should not a sufficient amount be issued to pay the bonds of the United States as they mature? Why pay interest on the millions of dollars of bonds now due, when Congress can in one day make the money to pay the principal? And why should there be any restraint upon unlimited appropriations by the government for all imaginary schemes of public improvement, if the printing press can furnish the money that is needed for them?"

It is the words of Justice Field and those of similar commentators over the years which are still persuasive to the present day hard money advocates, small minority though they are. It is 70 years since general convertibility of American fiat money for gold was abolished yet the argument continues. Short of a decisive monetary collapse, or the passage of a few centuries without one, it is likely to continue to do so. *DBS*

VENUE ARRANGEMENTS

In order to control costs the Club is attempting a number of new formats for our meetings. Drink is not included in the price but can be purchased at the venue. BYO wine only. An upstairs room has been reserved for the dinner meeting. We hope these arrangements do not cause inconvenience and we welcome your feedback.

Laissez Faire

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I.P. IS AN OXYMORON

The term "intellectual property" and its acronym "I.P." are becoming widespread and familiar. This is partly a result of globalization and an increased awareness of the importance in our lives of technology and invention.

Traditionally the term has been used in English-speaking countries to refer collectively to three discrete legal areas; patents, copyrights and trademarks. In Australia the Constitution allots these specific areas to the Commonwealth. Section 51 [xviii] provides for the Commonwealth Parliament to have power to make laws with respect to 'copyrights, patents in inventions and designs and trade marks'. Similarly the U.S. Constitution Article 1 Section 8 gives the power to Congress 'to promote the progress of science and useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries'.

In recent times attempts have been made to widen the use of the term I.P. to embrace such legal concepts as trade secrets, confidential information, standards and so forth. Legal opinion however remains divided on whether this is appropriate. It is significant in this regard to note that the three traditional areas are the creation of statute rather than of the common law. i.e. of politicians rather than of lawyers. This also has meant that the rights so created have tended to be national and enforcement confined to the borders of the country concerned.

One aspect of globalization has been the push, particularly on the part of various developed countries, to obtain expanded international recognition and acceptance of their I.P. claims and to provide for their world-wide enforcement. This has provoked reaction and considerable opposition. This has tended to come from the left of the political spectrum and be based on a view that I.P. is contrary to social justice or to the dictates of equality. In many instances it is an extension of an opposition to property generally. Conversely, supporters of the free market, mindful as they see it, of the vital and fundamental role of property in the creation of freedom and prosperity, have tended to support the concept of intellectual property, often as part of their support for property generally.

In both cases, the focus on property is erroneous. The term intellectual property is a misnomer. A more accurate description would be intellectual privilege or intellectual monopoly, terms with much less positive connotations. Intentionally or otherwise, wrongful use of the word property has tended to confuse the issues and to lend the concept of I.P. an aura it does not deserve.

In defining property it is necessary to distinguish it from ownership. Ownership is the total bundle of rights that a person or persons may have with respect to a thing such as the right to use, possess, consume, dispose of or destroy it. Such rights are sometimes referred to as the rights of property or property rights and the person or persons in whom such rights accrue is or are sometimes said colloquially to have property in the thing, as synonymous with having ownership of it. However, property is the thing itself; it is the thing to which ownership or the rights of property attach.

What things then are or can be property? One view widely held is that property is the creation of law and that accordingly any thing can be decreed by law to be property and thereupon become so. For various reasons however such view is not sustainable.

Firstly there is the anthropological and biological evidence. Anthropologists seem clearly to have established that early people understood and used property in their daily relationships, long before the existence of any law-making or law-enforcing body or order. Similarly, many animals, in the absence of law, have been shown nonetheless to possess quite clear property instincts, as witness the so-called 'territorial imperative'. Rather than the creation of law, such evidence suggests that both ownership and property arise from and form part of the natural order.

Secondly there is the question of language. Property is a widely used and commonly understood English word. Users of a word intuitively do so in conformity with its meaning as they understand it.

Such general use and understanding is not derived from or based upon law or a legal definition. Accepting that there are some things which are generally not regarded as property or capable of being so, then people would not be expected to refer to or describe them as such and people would not normally be expected to use the word property when referring to them. It is difficult to believe that legislation purporting to proclaim such things as property could effectively change the commonly understood meaning or usage. Tables and chairs for instance have much in common with each other. Typically both have legs and are intended to enable persons and things to rest off the ground or floor. But legislation purporting to proclaim all tables to be chairs would surely have little real effect on the general understanding that such things are separate and distinct and could be expected merely to leave users of the language perplexed and confused. In fact, legislation purporting to proclaim a thing or things to be property would ipso facto tend to have the opposite effect, merely thereby underlining and confirming that such thing or things was or were not actually property since otherwise such legislation would not be necessary

Finally, the fact that property is a widely used and commonly understood word enables us to deduce its definition from such use and understanding. Property is a social device or mechanism. It can be tangible or intangible; both a share of a company and the share certificate which records the shareholding are property. Its function is to prevent disputes and enable or facilitate orderly dealing with things, whether tangible or intangible, which are desired and capable of a separate existence but which are scarce, that is, not capable of being universally used or enjoyed to the extent desired by all who wish to do so.

Scarcity is thus the raison d'etre of property and fundamental in its definition. But what constitutes IP is information or ideas. The use by one or more persons of information or an idea diminishes its availability to others not one whit. In the absence of laws restricting their use, all who wish to do so can do so to whatever extent they desire. As Thomas Jefferson's famous analogy illustrates, my lighting my candle from yours does not diminish your flame. If I erect a lighthouse on a rocky coast is the light emanating there from property? Can I charge any ship that passes a fee for using my light? And if a ship uses the light to fix its position but refuses to pay my toll has anything been diminished other than my arrogance and the sum of money I might hope to exact from those willing to pay? Similarly information and ideas are not scarce and hence lack the essential ingredient of property.

The consequences of the fact that IP is not property are more than semantic. One is that it is not subject to being stolen. Theft is to deprive someone, without lawful cause and with the intention of permanency, of his or her property. If IP is not property, then whatever other offence or offences may be thereby committed, helping yourself to it does, or should, not amount to theft. This may help explain why apparently so many basically honest people are prepared nonetheless to engage in what is labeled as the 'pirating' of CDs, videos, software and so forth.

Another consequence of IP not being property is that it thereby falls outside the legal protection that the law especially affords to property. Thus, for example, the Australian Constitution S. 59 [xxxi] makes the Commonwealth's power to acquire property contingent upon just compensation, the 5th amendment to the U.S. Constitution precludes inter alia the deprivation of property without due process or its taking for public use without just compensation and the common law generally has features favouring property and property holders.

Recently, various medical crises have resulted in some governments effectively ignoring the patents of certain drug companies in order to procure supplies of needed drugs or to procure them at a cheaper price than that at which the patent holders wished to sell, prompting complaints that this amounted to an unlawful deprivation of the patent holder's property. Such complaints however are meaningless if patents are properly recognized as a government granted monopoly or privilege rather than property.

One consequence that does not follow however from the fact that IP is not property is that it should not exist at all. There are a variety of arguments for the existence of IP not dependant on whether or not it is a valid form of property which have not been examined in this article and which are able perhaps to justify its creation and continued existence. Suffice to say that such arguments are not assisted by claims that it is property that is being supported and protected by the existing IP laws, rather than monopoly and privilege. A ship that flies a false flag is not necessarily crewed by pirates. It does however raise the suspicion that it is. *DBS*