

bore fruit in the form of *L'Ancien Régime et la Révolution* (1856); and his relatively early death in 1859, though not before returning to the Catholic faith of his ancestors.

Inevitably, comparisons will be made between Brogan's coverage of these events and that penned by Jardin. The latter's magisterial treatment of Tocqueville was praised by many as comprehensive, but so detailed to the point that Tocqueville's personality tended to be lost. By contrast, Brogan reveals to us a very definite picture of Tocqueville the man, but without losing sight of the larger political, social and historical picture. The Tocqueville emerging from these pages is one

who, despite his intellectual achievements, is more plagued by intellectual doubt and questions about his self-worth than perhaps hitherto realised. It is also a Tocqueville whose wife Marie—the middle-class Englishwoman who Tocqueville married against his family's wishes—looms as a far more important influence in his life than stated by previous biographers. One suspects that these emphases flow from Brogan's attentive reading of Tocqueville's correspondence with a number of his close life-long friends and supporters

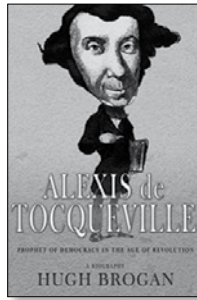
Brogan is not afraid to critique Tocqueville, be it for inconsistencies in aspects of his thought, his failure to provide convincing evidence for some of his intellectual claims, or even some of his character faults. This, however, contributes to a fuller, richer, more complex picture of Tocqueville, and explains why he is so difficult to pigeon-hole as a political thinker or even as a liberal.

Yet for all this, there is no question that Brogan powerfully captures the sheer force of Tocqueville's conviction that while man is destined for freedom, the threats to liberty—variously identified by Tocqueville as, among others, moral relativism, an excessive concern for equality, and the democratic state's potential for soft-despotism—never really go away. They may emerge under a variety of guises, be it Bourbon absolutism, Jacobin terrorism, socialist agitation or populist politics. But, as Brogan illustrates, Tocqueville believed that whatever their differences, they all share a low regard for people's ability to

shape their respective destinies in ways that promote civilisational development and authentic human fulfilment rather than cultural and political regression.

There are perhaps few better places for contemporary scholars to begin rethinking the meaning of liberalism.

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*Work Choices: What the High Court Said*

by **Andrew Stewart and George Williams**

Federation Press,

Sydney, 2007

\$29.95, 190pp

ISBN 9781862876422

In his celebrated second reading speech to the Judiciary Bill, which among other things provided for the establishment of the High Court, Alfred Deakin sought to explain the Court's role and importance. This was not just another Court, but rather 'a necessary and essential complement of a federal Constitution'. Accordingly, the purposes it was to serve were not strictly legal ones:

Indeed, although it relates to legal machinery, the purposes to be served by that machinery are but in a fractional sense legal, are in the main general, and in a very particular sense, political—affecting directly not only the businesses and bosoms of our population, but also the representatives of the people in both Chambers of this Parliament; affecting directly the Executive of this country; affecting in fact, every portion of that Constitution of which this court is created to be the guardian.

Deakin's prediction that the business of the Court would in the main be general and 'in a very particular sense, political' has proved, beyond doubt, to be true. Of course, Deakin did not mean political in the crude party-political sense, but in the more general sense of the administration of a State and the regulation of its relations with other States.

The most obvious and significant 'political' aspect of the work of the Court is its constitutional work and, more particularly, those constitutional cases which call for a determination of the existence or scope of legislative power.

It is because the nature of the work that the Court is called on to perform is, in the main general, and in specific instances political, that all concerned citizens should take an interest in its work, not just lawyers. *Work Choices, What the High Court Said*, assists in that task.

The authors, Andrew Stewart and George Williams, are both professors of law at Australian universities. Stewart's primary areas of expertise are labour law and intellectual property law, whereas Williams is a constitutional lawyer. Notwithstanding their significant academic standing, the authors have produced a book that is accessible to those who are not acquainted with the specialised area of constitutional law or the dynamics of our federal system.

Their topic is one that will be recognised instantly by anyone who has read a newspaper or watched a television news bulletin since the last election. The federal Coalition's Work Choices legislation has re-enlivened old ideological fights and occupied many pages of newsprint. Most readers of this magazine would also be aware that the validity of the legislation was challenged in the High Court, with the Commonwealth winning the day.

The book seeks to explicate the Court's decision in a manner accessible both to both lawyers and non-lawyers and, perhaps more importantly, to explain the divergences of opinion between the majority and minority judges.

The work is divided into three

parts. The first part provides background necessary to understand the dispute. It explains Australia's federal system of government, the history of Australian labour relations, the aims and controversies of the Work Choices legislation and the reasons and grounds for the constitutional challenge.

The second part deals with the Court's decision. The method of the part is to allocate each significant legal issue a chapter and in each chapter to introduce the topic and then set out the key passages from each of the three judgments, followed by an explanation and analysis.

The third part canvasses the implications of the decision both for Australia's system of government and for labour relations.

What then is the purpose of the book and to whom will it be of interest? It is perhaps easiest to start with what the book is not. It is not a serious work of legal scholarship. Nor is it a comprehensive analysis of the reasoning in the various judgments. For those reasons it is not a book for those with an active interest in constitutional law. People in that class will no doubt go to the primary source in the first instance and to the learned commentaries and analyses that will most likely fill many of this country's law journals over the coming years.

Nor is the book a genuine socio-political or socio-economic critique of the Court's reasons. While background material dealing with the political debates surrounding the legislation is incorporated, the work does not seek to analyse the social, economic or political consequences of the Court's decision in any real depth.

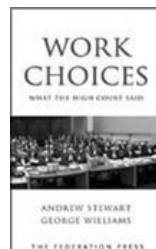
Rather this is a book that makes

what might seem an inaccessibly long and complicated decision manageable. In the *Australian Law Reports*, the judgments sprawl over 271 pages, incorporating 1227 footnotes and 913 paragraphs. By contrast the book is only 190 pages, including a table of contents, index, 42 pages of introductory material, 24 pages of discussion on the effect of the decision, a select bibliography and extracts from the Constitution. In all, the extracts and analysis of the reasoning occupies only 108 pages. Legal jargon is avoided to the extent possible, and explained when unavoidable, and the reader is not taken to have any assumed knowledge of the vagaries of past decisions.

The impact of the Work Choices decision will be felt for many years indeed. In time it will come to be seen as a case of seminal importance to Australia's Constitutional history. Whether the course taken by the majority was the correct one is not something that should be left to lawyers alone to decide—the Constitution exists for all Australians—which is why all Australians should take an interest.

It was Deakin who understood and explained better than anyone, the importance of the Court and its work. There are, he said, three fundamental conditions to any functioning federal polity, and he made no bones about which was the most important:

The first is the existence of a supreme Constitution; the next is a distribution of powers under that Constitution; and the third is an authority reposed in a judiciary to interpret that



supreme Constitution and to decide as to the precise distribution of powers ... The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others—the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the ‘keystone of the federal arch’.

It is for that very reason that interest should be taken in the decisions of the High Court and in this decision in particular. The authors should be commended for making one of the more significant cases decided in recent years accessible to the many, not the few.

### Reviewed by Mark Costello

#### *Actual Ethics*

by James R Otteson

Cambridge University Press

Cambridge, 2006

US\$26, 360pp

ISBN 9780521862714

James R Otteson’s latest book provides a sustained moral defence of the classical liberal tradition. In this respect, it builds upon his previous book, *Adam Smith’s Marketplace of Life* (which I reviewed in *Policy* in 2003). There is much in *Actual Ethics* to remind us of Otteson’s debt to Smith; however, the work draws on a wide range of other sources to mount a resourceful and original argument.

Otteson’s conception of the classical liberal state will be familiar to those acquainted with the tradition. He contends that the functions of government should be strictly confined to ensuring security of life, liberty and property (pp 103–4)—other functions, such as the redistribution of wealth, are morally impermissible.

Otteson’s argument for this position proceeds in three stages. Chapters one to four of *Actual Ethics* are concerned with matters of principle; they sketch and defend a moral framework that motivates the ensuing discussion.

Chapter five focuses on empirical matters, suggesting that the classical liberal state is not only morally right, but also to the practical benefit of everyone in the community—particularly the poor. Although this empirical case absorbs only one chapter, it is among the highlights of the book. Otteson shows that anyone worried about poverty should not seek to expand the role of government,

but rather should focus on securing private property and promoting stable legal institutions.

Chapters six to eight apply the framework set out in the earlier chapters to a range of specific social and political issues, including schooling, sexual harassment, same-sex marriage and animal welfare. The book concludes in chapter nine with a short but valuable discussion of happiness; Otteson argues that social values have evolved through human efforts to pursue a satisfying life and are therefore likely to help us to be happy, as well to do what is right.

Otteson bases his moral argument on a Kantian conception of personhood (pp 5–6). He argues that we are obliged to respect the personhood of other humans; this is the ‘bedrock moral principle’ (p 7). The

notion of personhood is linked with two distinct capacities: the ability to formulate and pursue specific goals and purposes; and the capacity to develop and exercise moral judgment. Otteson argues we must allow each person to exercise these capacities on their own behalf; otherwise, we fail to treat them as a distinct moral person. This leads him to endorse the ‘General Liberty principle’: so long as one does no positive harm to others, one should be allowed to do as one likes (p 40).

Otteson’s exposition of this framework is commendably clear and straightforward. Indeed, one of the great merits of his account is its simplicity; his argument is conceptually parsimonious, setting out and defending a succession of elegant and clearly-defined positions. This, one suspects, is part of the point: the modern state has become so gargantuan—and

