Chapter 11

Two Ways to Derive Implied Constitutional Rights

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In contrast with the United States Constitution, the Australian Constitution does not explicitly grant any right either to free speech or to individual equality. Reportedly, equality was not guaranteed in part because Australians wanted to avoid the problems they had seen in the passage and application of the Fourteenth Amendment in the United States. Another reason for omitting these rights seems to be that the Australian framers trusted their Parliament more than the American framers trusted their Congress. Whatever the explanation, the fact is that individual equality and free speech as such are not mentioned in the Australian Constitution.

Because their Constitution is silent on speech and equality, many Australians were surprised, shocked, and dismayed when some High Court judges cited these very constitutional rights as a basis for striking down popular Parliamentary statutes, especially in *ACTV*[1] and *Leeth*.[2] To critics, these decisions looked like attempts by judges to grab power that rightfully belonged to Parliament.

Critics had reacted in much the same way on the other side of the Pacific when the United States Supreme Court declared a constitutional right to privacy in *Griswold*[3] and then used that right to strike down abortion prohibitions in *Roe*.[4] It was not obvious what gave the Supreme Court the authority to reach these decisions. The word 'privacy', after all, does not occur in the United States Constitution, any more than the phrases 'free speech' and 'individual equality' occur in the Australian Constitution.

Defenders of such decisions claim that the implicit right can be derived somehow from the text of the constitution or from prior decisions in constitutional law. However, it is not clear exactly how these derivations are supposed to run. Moreover, opponents deny that the derivations are legitimate, however they are reconstructed.

One goal of this paper is to clarify the mode of derivation that was used in these important cases and others. Once the form of argument is laid out, we can ask normative questions: Which modes of derivation, if any, are legitimate? If some modes of derivation are legitimate, which of the decisions that use these methods use them properly? These large questions cannot be answered fully in this paper. Indeed, I will barely begin to try to suggest a tentative way to start moving towards a partial answer to some of these questions.

Towards this end, I will distinguish two ways to derive rights and then argue that one of these forms of derivation is more dubious than the other. My position is a compromise between those who accept all modes of derivation and those who accept none. As with any compromise, my view is doomed from the start. I am bound to fail to satisfy either side. Those who oppose judicial activism will respond that I give judges too much power when I allow them to derive implicit rights by the method that I prefer. Those who favor judicial activism will probably say that I restrict judges too much by limiting them to only one mode of derivation. Luckily, my goal is not to satisfy extremists but instead to carve out an alternative position that enables judges to do their job without overstepping their authority.

This alternative is framed in terms of modes of derivation rather than in terms of original intent or meaning, because those traditional notions are misleading and indeterminate. If I tell my son to get milk, and he cannot get milk without opening the refrigerator door, it is still not clear whether I intended for him to open the refrigerator door or whether opening it is part of what I meant for him to do or of what I meant to say, especially if I thought that the milk was outside of the refrigerator. Similarly, when a judge derives a right because the judge believes that the derived right is necessary to protect an explicit right, but the framers or ratifiers did not think about that derived right at all or did not believe it to be necessary for any explicit right, then it is not clear whether the judge went beyond the original meaning or intention. Those who approve of the derivation will stretch the notions of meaning and intention so as to include the derived right. Those who disapprove of the derivation will shrink the notions of meaning and intention so as to exclude the derived right. In the end, the notions of meaning and intention do little, if any, real work; and they can be misleading. That is why I will not talk about meaning or intention but will instead focus on forms of derivation.

A Necessary-Condition Derivation in the United States

The two forms of derivation that I want to distinguish and analyze could be illustrated by any number of cases from the United States, Australia, and other countries. In almost every case, different arguments are given by different judges. Indeed, a single judge usually gives a variety of arguments within a single opinion. Consequently, I need to oversimplify by picking out what I take to be the central argument in one opinion in each case. This simplification is severe, but it will enable me to assess each form of argument in isolation and in detail.

I will begin in the United States with Justice Douglas's argument for a constitutional right to privacy in *Griswold*. This is an old story, but I will try to tell it from a somewhat new angle.

Douglas argued, first, that there is nothing unusual or suspect in general about courts using rights that are not mentioned explicitly in the text of the Constitution. His main example was *NAACP*.[5] The question in that case was whether the State of Alabama could force the NAACP to disclose their membership lists. The NAACP refused to reveal this information, because they feared (and reasonably so) that opponents like the Ku Klux Klan would get their hands on these lists and then retaliate violently against NAACP members. This would make it more dangerous for anyone to join the NAACP. On this basis, the NAACP argued that Alabama's requirement to name its members violated the 'right of the people peaceably to assemble' in the First Amendment to the United States Constitution.

Alabama's response was simple: The state did not prevent the NAACP from assembling or associating. Nor did it impose any costs on anyone for joining the NAACP. The Klan did that. The state just wanted to know who was assembling or associating. Such knowledge was not mentioned in the First Amendment, so requiring the NAACP to give up such knowledge could not possibly violate that clause of the Constitution.

This response might seem strong if one considers only the words of the constitution and their plain meanings. Fortunately, the Court did not stop at those words and meanings. The Court held that the explicit right to assemble implied implicit rights to associate and then to 'privacy in one's association'.

The argument for these implicit rights is described by Justice Douglas when he says that the right to privacy of knowledge about one's associations 'while not expressly included in the First Amendment' is '*necessary* in making the express guarantees *fully meaningful*' (my emphasis). In other words, 'Without these peripheral rights, the specific rights would be *less secure*' (my emphasis).[6] More formally, this mode of derivation runs like this:

(1) The Constitution grants an explicit right to E.
(2) A right to D is necessary to prevent the right to E from becoming less meaningful or secure.
(3) Therefore, the Court should recognize a derived right to D (even though D as such is never mentioned explicitly).

Of course, this argument becomes logically valid only when one adds a suppressed premise:

(0) The Court should recognize any right that is necessary to prevent another right from becoming less meaningful or secure.

I will call this the *necessary-condition* form of derivation. It raises many tricky questions. I will mention just three for now.

First, what kind of necessity is at stake? Not logical necessity. It is logically possible for NAACP membership lists to become public without any NAACP members getting hurt. This is also physically possible in a way, since NAACP members could be guarded, or Klan members could be watched, constantly. The problem is that these solutions have obvious and great costs and risks. When I say that I can't play golf today, because I have to work, all this means is that the costs of playing golf today would be too great. I still have the physical ability and

should interpret the legal system so as to contain any underlying principles that are needed to make the system connected and coherent by providing the best justification of a community's legal practice.[14]

Whether or not this argument works, it does seem to be what Justice Douglas is trying to argue in *Griswold*. Douglas's claim is that the individual amendments and decisions on his lists form an incoherent package if they are not justified and, hence, connected by a general right to privacy. Judges should not interpret the laws as incoherent if they can avoid it. So judges should grant a general right to privacy.

This mode of derivation can be laid out more formally like this:

(1*) The Constitution grants explicit rights to E, E', E'', etc.
(2*) A right to D would provide the best or most coherent justification of these rights to E, E', E'', etc.
(3*) Therefore, the Court should recognize a derived right to D (even though D as such is never mentioned explicitly).

As before, this argument form becomes logically valid only when one adds a suppressed premise:

(0*) The Court should recognize any right that provides the best or most coherent justification of explicit rights.

Again, many details need to be spelled out, and some will be discussed below, but I hope the general idea is clear enough for now. I will call this the *best-justification* form of derivation.

A Best-Justification Derivation in Australia

These same two modes of derivation occur in recent Australian law. An example of a best-justification derivation occurs in the opinion of Justices Deane and Toohey in *Leeth*.

That case arose from three practices: First, the Commonwealth regularly housed Commonwealth prisoners in State prisons. Second, the Commonwealth Prisoners Act of 1967 required judges to follow the practices of the relevant State in fixing minimum non-parole periods (so that prisoners within the same prison would have comparable parole expectations). Third, States varied greatly on minimum non-parole periods for the same crime. The result was that criminals who violated the same federal laws but who were imprisoned in different states sometimes received very different minimum non-parole periods.

Leeth argued that this result violated the Australian Constitution. That constitution did not explicitly grant a right to equal treatment of individuals. It did prohibit discrimination by the Commonwealth against any State, but the Commonwealth Prisoners Act did not discriminate against any State.

Nonetheless, Justices Deane and Toohey argued for a right to equal treatment of individuals in this passage:

> . . . it would be somewhat surprising if the Constitution, which is concerned with matters of substance, embodied a general principle which protected the States and their instrumentalities from being singled out by Commonwealth laws for discriminatory treatment but provided no similar protection of the people who constitute the Commonwealth and the States.[15]

'Somewhat surprising'! So what? Surprising conclusions can be correct. And this result does not seem surprising at all to some people.[16]

What Justices Deane and Toohey really seem to be suggesting is that there could not be any good reason to grant a right to equal treatment to States but not to 'the people who constitute . . . the States'. Of course, many things have rights that their constituent parts do not share, and States have rights that their individual citizens do not share. In any case, Deane and Toohey seem to be claiming that this particular combination of rights is undesirable, because it is incoherent, so judges should not interpret the law in this way. That sounds just like a best-justification derivation.

Another passage in Deane and Toohey's opinion also suggests the best-justification form of derivation:

> [T]he existence of a number of specific provisions which reflect the doctrine of legal equality serves to make manifest rather than undermine the status of that doctrine as an underlying principle of the Constitution as a whole. Among those specific provisions are: the guarantee against discrimination between persons in different parts of the country in relation to customs and excise duties . . . the guarantee that the Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or part thereof (s 90); the guarantee of freedom of interstate trade, commerce, and intercourse (s 92); the guarantee of direct suffrage and equality of voting rights among those qualified to vote (ss 24, 25); the guarantee that no religious test shall be required as a qualification for any office or public trust under the Commonwealth (s 116) . . . .[17]

The argument here is not and could not reasonably be that equal rights to vote and to gain public office and to practice religion are impossible without a right to equality among minimum non-parole periods or to equality in general. That claim would be as hard to swallow as a claim that a general right to privacy is necessary to prevent soldiers from being quartered in private homes in times of peace.

To make sense, this argument, like that for a right to privacy in *Griswold*, must exemplify the best-justification form of derivation. The point is then that this list of rights seems arbitrary and incoherent until they are connected by a background justification in terms of individual equality, so judges need to interpret the law as containing that right in order to make the legal system look as good as it can be.

Opponents could still respond that this general right would make the legal system as a whole incoherent insofar as a right to equality is incompatible with

other provisions in the Constitution that explicitly allow inequalities.[18] Justices Deane and Toohey are being too selective for them to be able to claim coherence overall. However, this response does not deny that the form of argument works when its premises are true, that is, when the legal system really would be less coherent without the more general right.

Other justices, however, avoid or reject this form of derivation. Justice Gaudron, for example, agrees in part with Justices Deane and Toohey in *Leeth*, but she gives a very different argument. Gaudron argues that the Constitution explicitly requires certain people to act as judges, and procedural equality is necessary to act as a judge, so the constitution does require a kind of equal treatment from judges and, thereby, gives others a right to equality.[19] There is something to this, but notice that this derivation does not refer to a best justification. Instead, it has the necessary-condition form. Moreover, it does not yield a general right to equality, such as Deane and Toohey claimed (and that is crucial to later cases).[20]

Even with Gaudron's partial support, Deane and Toohey's arguments did not prevail completely. Justices Dawson and McHugh disagreed, along with Chief Justice Mason (who, as we will see, is not known for judicial restraint in other cases). The crucial opinion was then by Justice Brennan, who claimed that the Australian Constitution requires equal treatment of Commonwealth *offenders*, which includes sentencing; but the Australian Constitution does not require equal treatment of Commonwealth *prisoners*, which includes minimum non-parole periods. Thus, Leeth lost, and Deane and Toohey failed to muster a majority behind the general right to equality. Perhaps that was because of flaws in the form of derivation that they used.

A Necessary-Condition Derivation in Australia

In contrast, an Australian example of a necessary-condition derivation occurs in Chief Justice Mason's opinion in *ACTV*. That case concerned The Political Broadcasts and Political Disclosures Act of 1991 (Cth). The negative part of this Act banned political advertisements on radio or television during an election period. The positive part of the Act established a system of free time for candidates, 90% of which went to parties in proportion to the votes they received in a previous election. The format and length of these free advertisements was restricted. The purpose of this complex statute was to take pressure off political parties to raise money and to reduce the influence of uninformative image-making in electronic media.

Opponents of this statute claimed that it violated a constitutional guarantee of freedom of speech or communication. This right is never explicitly stated in the Australian Constitution, but it is supposed to be implied at several places.

A variety of derivations were given, but one central argument refers to the guarantee of representative government in Section 1 of the Australian Constitution.

Chief Justice Mason derived a right to free speech from this explicit right to representation as follows:

> . . . the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act . . . Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion . . . Absent such a freedom of communication, representative government would fail to achieve its purpose . . . and . . . would cease to be fully representative.[21]

In other places, Mason says that freedom of communication is 'logically or practically necessary for' or 'an essential concomitant of' or 'indispensable to the efficacy of the system of representative government'.[22] So this argument seems very similar in form to that in *NAACP*, which I defended above.

There are differences, however. The NAACP either gave up its list or it did not. In contrast, there are many degrees to which political speech can be restricted. Consequently, we need to distinguish two claims:

1. If a country has no freedom of communication at all, then its government cannot be representative at all.
2. If a country has any less freedom of communication, then its government is less representative.

Mason might make only the weaker claim, (i). But then he could conclude only that the constitution requires some free speech, even if not very much. Mason's claim is stronger than that. He claims free speech for all people and on 'all matters of public affairs and political discussion'.[23] He does say that the right to free speech is 'not an absolute',[24] but it is overridden only under very stringent conditions, which resemble strict scrutiny in United States law.[25] So Mason claims a strong right to freedom of communication based on the strong claim (ii).

Mason's position here might seem surprising after his argument against the derived right to equality in *Leeth*. How can he allow a derived right here but not there? What's the difference? Mason suggests a response when he says, 'it is essential to keep in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution'.[26] The best-justification kind of derivation tries to uncover underlying principles that the framers assumed. Thus, Mason in effect distinguishes his necessary-condition derivation from best-justification derivations. He accepts the former but rejects the latter, just as I will. (So my whole paper can be seen as an extended commentary on this sentence by Mason.)

Comparisons Between the Derivations

What exactly makes the necessary-condition form of derivation better than the best-justification form of derivation? One possible answer is that necessary conditions are a matter of fact, whereas the best justification cannot be determined without value judgments, which will be controversial.

That is too simple, however. As I said, the relevant kind of necessity is not a matter of logic alone. Just as it is logically possible for the NAACP to be safe even if the Ku Klux Klan has its membership lists, so it is also logically possible to have representative government without freedom of communication if officials can gather information by some other means, such as telepathy. The contingent facts matter.

Moreover, the facts in question will be controversial. What is necessary for what depends on what would happen in the actual contingent social circumstances if the court did not recognize the derived right. It is often not clear what will happen in such a future or counterfactual situation. That makes it unclear whether a certain derived right is necessary to produce or avoid a certain result.

Even when the facts are clear, neither form of derivation can be neutral with respect to all values. In the ACTV case, Mason counts what is 'practically necessary',[27] which depends on whether any alternative is practical or feasible. That in turn depends on whether other methods would get enough information to the right people without too many costs and risks. That requires judges to make value judgments about what is enough information, who are the right people, and which costs and risks are too high. Similarly, in the NAACP case, the United States Supreme Court held that, if membership lists were public, people could not join the group without too much personal risk. This argument depends on value judgments about how much risk is too much. In general, then, since the relevant kind of necessity depends on the best available or only acceptable means of adequately securing the explicit right, judges cannot determine which derived rights are necessary without relying on their own values and moral beliefs.

Nonetheless, best-justification derivations depend on a different *kind* of value judgment. Necessary-condition derivations usually yield more specific or concrete rights, whereas best-justification derivations usually yield more general and abstract rights. The demand for coherence, insofar as coherence demands connectedness, leads to generality. In contrast, strong general rights are rarely really necessary to secure specific provisions in a constitution.

As a result, mistakes are easier to detect and correct in necessary-condition derivations. If judges claim that broad derived rights are necessary to protect explicit rights, opponents can counter by revealing alternatives or by showing that costs will not be so high. It is not so clear how critics could respond to inferences to the best justification without engaging in very abstract arguments that are hard to spell out or assess. This will make it more difficult to correct mistakes when judges use the best-justification form of derivation.

Further, necessary-condition derivations require only particular knowledge, to which judges have access. Judges are not making policy judgments about society in general. In the NAACP case, the United States Supreme Court needed to know about the actual current risks to the NAACP from the Ku Klux Klan, or at least about how much fear potential members would feel. The Court also needed to know about whether the Klan would be likely to get hold of the membership lists if these lists were handed over to the State of Alabama. This information might be hard to pin down, but the point here is that this kind of detailed knowledge of particular circumstances is what judges are trained and equipped to gather through normal court procedures. In contrast, best-justification derivations depend on large questions of principle or policy that judges are ill-equipped to handle. Issues of coherence require judges to look at the legal system as a whole rather than at the particular case before the court. This is difficult for anyone, even moral philosophers, but especially for judges who are used to focusing on particular cases.

Most importantly, there seem to be no limits to the rights that judges could derive by inferences to the best justification. At the most abstract level, the best justification of any constitutional provision might be, in the words of the Preamble to the United States Constitution, 'to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity'. Presumably, the Australian Constitution is justified by similar general purposes. If something like this is the best abstract justification of the Constitution and its clauses, then judges could use any clause in the Constitution to derive any right that the judges believe to serve these interests, if they are authorized to derive rights by inferences to the best justification. That would give judges almost unlimited power to decide on the basis of whatever policy they like. This is frightening to people who do not trust judges, and it undermines the whole idea of checks and balances between separated powers.

Procedural considerations also seem to favor necessary-condition derivations. The demand for coherence and, hence, generality in best-justification derivations means, in effect, that the state has the burden of showing why the court should not restrict legislation in more and more ways. This seems like the wrong place for the burden of proof. If courts are going to restrict legislatures, then courts should be the ones who bear the burden of proving that they have good reasons for the restriction. Necessary-condition derivations do place the burden on courts to show that a derived right is necessary to protect explicit rights; so, in this respect at least, necessary-condition derivations better match our antecedent intuitions about appropriate procedure.

Finally, whereas courts that use best-justification derivations seem to usurp legislative authority in going beyond what legislatures explicitly said, the necessary-condition form of derivation avoids any such charge. Recall the parent who tells his child to bring milk from the refrigerator out to the dinner table. To fulfill this command, it is necessary for the child also to open the refrigerator door.

For the child to fulfill the command without too much cost, it might be necessary for the child to move items that were in front of the milk on the refrigerator shelf. Consequently, the child should not be criticized for opening the door or moving those items. In performing these acts that are practically necessary conditions of bringing the milk, the child is following the command of the parents, even though the parents never said anything explicitly about opening the door or moving the other items. Analogously, when the framers and ratifiers of a constitution command judges to protect certain explicit rights, judges can and must follow those explicit commands by protecting any rights that are necessary in order to protect the explicit rights. The judges are not usurping power but are implementing the expressed intentions of the ratifiers to the best of their ability.

In contrast, suppose the child honestly believes that the best justification for bringing the milk to the table is to make him happy, and he also believes that he will be even happier if he drinks soda, so he brings soda instead of milk. Even if there is nothing wrong with soda, the child should have asked his parents for permission first. The child cannot argue that he is simply fulfilling his parent's command, and he can legitimately be criticized for doing something that he was not given permission to do. This child's argument for bringing soda is analogous to the best-justification form of derivation. Just as the child could bring whatever he wants if he could follow his parent's command by bringing whatever could be justified by increasing his happiness, so judges can decide cases however they want if they can pick the best justification and then reach whichever decision best serves that justification. In contrast, just as soda is not necessary for milk, so many derived rights are not necessary for the explicit rights in a constitution. That shows why the necessary-condition form of derivation is much less questionable than the best-justification form of derivation, assuming that we want judicial power to be limited and to conform to legislative directives.

In all of these ways, then, the necessary-condition form of derivation seems less questionable than the best-justification form of derivation.

Disclaimers

I am not saying that necessary-condition derivations always work. For a derivation to work, its premises must be true. I have grave doubts about whether any kind of freedom of speech that is strong enough to rule out the Political Broadcasts Act really is necessary for a Representative Government to work properly, since the Political Broadcasts Act actually seems to enhance representation, and the Australian government did seem representative before any right to free speech was derived. If representative government can work just as well or better without a derived right to free speech or communication, then Mason's argument in the ACTV case is unsound.

Still, it is important to focus our criticisms in the right place. Even if Mason's argument fails, it does not fail because of its form or because judges should never

derive rights. If that were true, the decision in the NAACP case would also be mistaken; but I assume, along with most commentators, that the NAACP decision was legitimate. Thus, the necessary-condition form of derivation is a perfectly appropriate way for judges to derive implicit rights from Constitutions, even if it is sometimes abused.

I am also not saying that there is no right to privacy (or contraception or abortion) in the United States, as Douglas claimed in *Griswold*. In my view, something close to those rights can be derived from the equal protection clause of the Fourteenth Amendment insofar as it applies to women, and possibly also from the religion clauses of the First Amendment insofar as laws against contraceptives and abortion need to be religiously motivated or grounded. It is not Douglas's conclusions but his basis for those conclusions that I find questionable. It is important to get clear about the basis for such controversial legal rights in order to make those rights more secure than they will be as long as they remain an easy target for opponents to ridicule.

The possibility of these new derivations shows that my limitation to one mode of derivation does not restrict the power of judges very much (or too much). Judges will still be able to derive the rights that are necessary to enforce the explicit rights in the constitution. Where those explicit rights are numerous and broad, as in the United States Constitution, judges will be warranted in deriving very many strong rights that are not mentioned explicitly in the text. *NAACP* is just the beginning.

This power might scare opponents of judicial activism, but judges cannot do their job without it. If judges are not authorized to derive rights that are truly necessary to protect explicit rights, they could not stop people (like the Ku Klux Klan) who think up ingenious ways to undermine those explicit rights. Then all of our rights will become less secure and meaningful.

Admittedly, judges can go overboard and derive rights that are not truly necessary to protect explicit rights. Even if we assume that judges really believe what they say when they claim that a derived right is necessary, they can still be wrong. Sometimes judges might even say that a derived right is necessary when they do not really believe this, because they want the law to add this right. To minimize mistakes or subterfuge, it would be useful to spell out more detailed rules about what has to be shown in order to show that a derived right is 'practically necessary'. At least, the costs of recognizing the derived right should not be disproportionate to the gain in making the explicit right more secure. We might also want to restrict judges to value judgments that are not controversial or do not go against the majority or consensus of society. And we might require judges to meet a burden of proof in showing that a derived right is practically necessary in the relevant way. Many details remain to be spelled out, and other rules could be added. The point here is just that opponents of judicial activism can reel in the power of judges somewhat by instituting more detailed rules about when judges may claim that a derived right is practically necessary.

What opponents of activism cannot reasonably do is deny judges the power to derive rights that are necessary for explicit rights. In the end, we have no choice

but to give judges this powerful tool, and then to keep a close watch on whether they abuse that tool.

Notes

1 Australian Capital Television Pty Ltd v The Commonwealth of Australia (1992), 177 CLR 106.
2 Leeth v The Commonwealth of Australia (1992), 174 CLR 455.
3 Griswold v Connecticut 381 US 479 (1965).
4 *Roe v Wade* 410 US 113 (1973).
5 *NAACP v Alabama* 357 US 449 (1958).
6 *Griswold v Connecticut* 381 US 479 at 483 (1965).
7 Robert Bork, *The Tempting of America* (New York: Macmillan, 1990), p. 98.
8 *Griswold v Connecticut* 381 US 479 at 484 (1965).
9 Ibid.
10 Ibid.
11 Geoffrey Sayre-McCord, 'Coherence and Models for Moral Theorizing', *Pacific Philosophical Quarterly*, **66** (1985), pp. 170–190.
12 Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), pp. 179 ff.
13 Dworkin, *Law's Empire*, *op. cit.*, p. 53.
14 Dworkin, *Law's Empire*, *op. cit.*, p. 225.
15 *Leeth v The Commonwealth* (1992), 174 CLR 455 at 484.
16 For example, Justice Dawson in *Kruger v The Commonwealth of Australia* (1997), 146 ALR 126 at 156.
17 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487.
18 As Justice Dawson charges in *Kruger v The Commonwealth* (1997), 146 ALR 126 at 156 and 158.
19 *Leeth v The Commonwealth* (1992), 174 CLR 455 at 502.
20 This lack of generality explains why Justice Gaudron parted ways with Justice Deane in *Kruger v The Commonwealth* (1997), 146 ALR 126 at 194.
21 *ACTV v The Commonwealth* (1992), 177 CLR 106, sections 37–38.
22 Ibid., sections 29, 34, and 42, respectively. Similar remarks are made by Justice Brennan in his section 5.
23 Ibid., sections 39 and 44, respectively.
24 Ibid., section 45.
25 Ibid., section 58.
26 Ibid., section 30.
27 Ibid., section 29.