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Pounds and Lochner's decision

- Towards Conservative politics
- Lochner
 - The court has a formalist view: a picture of textuality, and the reasoning didn't mention social conditions and power difference.
 - Holmes accused that the case was decided upon a particular economic theory. The court seems to purport
 - Formalism is a mask, it's an unwarranted legitimating move for ideology. Judges pretended that they were neutral, but they are politically actor, deciding on the ideology (economic ideology), which is unfair.
 - Judges pretended that they were compelled by rules, but it is not the truth.
- Pounds
 - The employers and employee have the same rights, the legislator comes in and interferes
 - There is a freedom of contract
 - Formalism isn't attach to reality.

Seminar 4 Realism (1920-1940)

Law's Empire (Ronald Dworkin)

Integrity in law

- Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism
- It insists that legal claims are interpretive judgments and therefore combine backward and forward-looking elements; they **interpret** contemporary legal practice seen as an unfolding political narrative

Integrity of interpretation

- The adjudicative principle of integrity instructs judges to identify legal rights and duties on the assumption that they were all created by a single author expressing a coherent conception of justice and fairness
- According to law as integrity, propositions of law are true if they follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice
- Law as integrity is therefore more relentlessly interpretive than either conventionalism or pragmatism
 - For **conventionalist** judges, they need to interpret a text to decide what statutes our legal conventions construct from it
 - But once a judge has accepted conventionalism as his guide, he has no further occasion for interpreting the legal record as a whole in deciding particular cases

- **Pragmatism** requires judges to think instrumentally about the best rules for the future. That exercise may require interpretation of something beyond legal material
 - Once again, a judge who accepts pragmatism is then done with interpreting legal practice as a whole
- **Law as integrity** is different. It is both the product of and the inspiration for comprehensive interpretation of legal practice. It is more detailed interpretation.

Integrity and History

- Integrity does not require consistency over all historical stages of a community's law nor require judges to understand law of previous generation. It commands a horizontal consistency of principle across the range of the legal standards the community now enforces
- It insists that the law, the rights and duties that flow from past collective decisions contains not only the narrow explicit content of these decisions but also the scheme of principles necessary to justify them
 - History matters because that scheme of principle must justify the standing as well as the content of these past decisions
- Law as integrity begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture the ideals or practical purposes of the politicians who first created it; it aims rather to justify what they did in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honourable future

The chain of law of interpretation

- Look for the best solution and it has to fit with the past principles
- Interpretation taken up must flow throughout the text; it must have general **explanatory power**, and it is flawed if it leaves unexplained some major structural aspect of the text
- The **second** dimension of interpretation requires him to judge which of these eligible readings makes the work in progress best
- **Example:** two divergent interpretation will lead to enormous difference. You must ask yourself which interpretation makes the work of art better on the whole
- Interpreter can be unconsciously led to endorse a new conviction.
- Whether any interpreter's convictions check one another depends on the complexity and structure of his pertinent opinion as a whole
- When interpreting, you will not find any interpretation that flows through the text, you must try to construct an interpretation that fits the bulk of what you take to be artistically most fundamental in the text
- More than one interpretation may survive this more relaxed test. To choose among these, you must turn to your background aesthetic convictions, including those you will regard as formal

note

6. Do judges find or invent law? – 'both and neither'. 'The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.'

Seminar 5 (The formalism debate and democracy: Balancing Proportionality and the use of Foreign Law)

Class note

- critical move
 - critical race study, which find the power structure in race. Has critique based on race
 - feminist critique of law: relation power between man and women
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	McCloy v New South Wales
Facts	<ul style="list-style-type: none"> • <i>The Election Funding Expenditure and Disclosures Act 1981</i> (NSW) imposes restrictions on private funding of political candidates and parties in State and local government elections in the NSW • The plaintiffs contend the provisions of the EFED Act imposes a cap on political donations, prohibit property developers from making such donations, and restrict indirect campaign contributions, are invalid for impermissibly infringing the freedom of political communication on governmental and political matters (the freedom).
Reasoning	<ul style="list-style-type: none"> • The freedom under the Australian Constitution is a qualified limitation on legislative power that people of the Cth may “exercise a free and informed choice as electors.” • It is not an absolute freedom • The question whether a law exceeds the implied limitation depends upon these answers: <ul style="list-style-type: none"> ○ <u>Does the law effectively burden freedom in its terms, operation or effect?</u> <ul style="list-style-type: none"> ▪ If no, then law does not exceed the implied limitation ▪ <u>If yes, then are the purpose of the law and the means adopted legitimate in the sense that it is compatible representative government?</u> (compatibility test) <ul style="list-style-type: none"> • If no, then law exceed the implied limitation • <u>If yes, is the law reasonably appropriate and adapted to advance that legitimate object?</u> (proportionality testing) <ul style="list-style-type: none"> ○ Suitable: having a rational connection to the purpose of the provision ○ Necessary: there is no obvious and compelling alternative ○ Adequate in balance: a criterion requiring a value judgment consistently with the limits of the judicial function ○ If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be no and the measure will exceed the implied limitation on legislative power • The aforementioned questions involves a proportionality analysis. The term “proportionality” in Australian law describes a class criteria which have been developed to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done