

PALKO v. CONNECTICUT (1937)

UNITED STATES v. CAROLENE PRODUCTS CO., FOOTNOTE 4 (1938)

PALKO

DUE PROCESS CLAUSE: HISTORICAL SUMMARY

From 1868 to 1937, the US Supreme Court interpreted the DP Clause as follows:

Major Decision: *Lochner* (1905)

Principle: States may not pass laws that infringe the right to life, liberty, or property unless these laws bear a real and substantial relation to a legitimate end, where the only legitimate ends are health, safety, morals, or the public welfare.

EQUAL PROTECTION CLAUSE: HISTORICAL SUMMARY

EP Clause: Discrimination Must Be Reasonable

Major Decisions: *Yick Wo* (1886), *Plessy* (1896)

Principle: EP Clause prohibits States from enacting laws that discriminate on their face or in their application in an unreasonable manner, where a classification counts as reasonable if it follows the “established usages, customs, and traditions of the people” and is intended to promote “comfort” and “preserve the public peace and good order”.

BACKGROUND TO PALKO

After a trial in Fairfield, CT, Palko was sentenced to life imprisonment for second degree murder. An 1886 State Statute permitted the state prosecutor to retry a defendant if the original trial contained any “error of law” detrimental to the prosecution. After such errors were found, Palko was retried and sentenced to death for first degree murder. Palko appealed to the CT Supreme Court, and lost. He then appealed to the US Supreme Court.

Palko’s Claim: The CT Statute authorizing new trials on “error of law” grounds violates the Double Jeopardy Clause of the 5th Amendment, as incorporated in the Due Process Clause of the 14th Amendment.

The US Supreme Court rejected Palko’s claim.

THE IMPORTANCE OF *PALKO*

The Supreme Court faced the question of which Federal rights are “absorbed” in the DP Clause.

A Right is absorbed if and only if it is

“implicit in the concept of ordered liberty”

or

“so rooted in the traditions and conscience of our people as to be ranked as fundamental”

or

such that “a fair and enlightened system of justice would be impossible without [it].”

THE *PALKO* PRINCIPLE APPLIED

The Court conceded that Palko had been “twice put in jeopardy of life or limb” “for the same offence”, but denied that the particular kind of double jeopardy to which Palko had been subjected violated “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”.

THE DEATH OF *LOCHNER*?

Palko suggests a way of overturning *Lochner*: Find that the right to liberty of contract is not a fundamental right, in the sense of being “implicit in the concept of ordered liberty”.

A WRONG TURN?

Even assuming that some rights are more fundamental than others, it isn’t clear that the right to liberty of contract is not fundamental.

Under ideal conditions, it is a paradigmatic form of unjustified paternalism to prevent an adult from disposing of her labor power as she thinks fit on the grounds that doing so would be injurious to her own health.

HOW TO DECIDE *LOCHNER*

Under the “laissez faire” economic system in place in the United States in 1905, there was a power imbalance in the labor market. Low wage workers with little education exercised their right to liberty of contract in circumstances that severely restricted the available range of minimally acceptable options (either work for low wages under appalling conditions or starve). The system rendered their right to liberty of contract virtually worthless.

Moral theory suggests that it is not merely the formal right to liberty that deserves protection, but the *value* of this right. Under the DP Clause of the 14th Amendment, the States have a duty to ensure that the right to liberty can be meaningfully exercised (in a way that avoids drastic forms of exploitation).

CAROLENE PRODUCTS, FOOTNOTE 4

LAW AND FACTS

Statute

In 1923, Congress passed the “Filled Milk Act”, appealing to its powers under the Commerce Clause to prohibit interstate shipments of “filled milk” for reasons of public health.

Facts

The Carolene Products Co. was indicted for violating the Statute and, after a series of appeals, the case reached the US Supreme Court in 1938.

CAROLENE PRODUCTS BRIEF

Claim

The “Filled Milk Act” violates Carolene Products’ rights under the DP Clause of the 5th Amendment and its rights under the EP Clause of the 14th Amendment.

Stone rejected both parts of the Claim.

DP CLAUSE: WEAKENING *LOCHNER*

Principle: States may not pass laws that infringe Economic Rights unless these laws bear a RATIONAL relation to a LEGITIMATE end (e.g., public health, safety).

Judicial Deference: All legislation in relation to a legitimate end is presumptively rational. [See Harlan's *Lochner* dissent]

WEAKENED PRINCIPLE APPLIED

The right to sell "filled milk" is an economic right.

Judges should presume that the "Filled Milk Act" is rationally related to the legitimate end of protecting public health, and there is no evidence to defeat the presumption.

The "Filled Milk Act" does not violate the DP Clause of the 5th Amendment.

FOOTNOTE 4

Suggests the need for a "more searching judicial inquiry" when the rights at issue are not economic or the relevant law was enacted with prejudice:

Rights under the First 10 Amendments (when embraced within the 14th Amendment)

Political Rights (e.g., right to vote)

Legislation directed at "discrete and insular" minorities, whether religious, national, or racial.

RATIONAL BASIS TEST

Due Process: Non-Fundamental Rights

A state or federal law that infringes non-fundamental rights is unconstitutional unless it bears a RATIONAL relation to a LEGITIMATE end.

Equal Protection: Non-Suspect Classification

A state or federal law that engages in non-suspect classification is unconstitutional unless it bears a RATIONAL relation to a LEGITIMATE end.

STRICT SCRUTINY

Due Process: Fundamental Rights

A state or federal law that infringes fundamental rights is unconstitutional unless it bears a NECESSARY relation to a COMPELLING end.

Equal Protection: Suspect Classification

A state or federal law that engages in suspect classification is unconstitutional unless it bears a NECESSARY relation to a COMPELLING end.