

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era – Individual Rights/Property/Due Process

City of Chicago v. Netcher, 183 Ill. 104 (1899)

Charles Netcher owned the Boston Store, a very successful department store in Chicago. Department stores, or stores that sold different kinds of merchandise in separate departments within the same building, were a new innovation in the nineteenth century. Department stores owned by Marshall Field, Rowland Hussey Macy, and John Wannamaker were transforming the retail industry in the major cities of the United States. Other merchants fought back against these emerging industry giants. Cities across the country adopted ordinances designed to outlaw department stores and discount stores.

In Chicago, the city adopted two ordinances aimed at department stores. The first prohibited any store from selling “provisions,” or fresh food, in the same location as dry goods or clothing. The second prohibited any store from selling alcohol in the same location as dry goods or clothing. Charles Netcher was found guilty by a justice of the peace for violating both ordinances. A criminal court held the ordinances to be unconstitutional and overturned the conviction. The city appealed to the state supreme court, which unanimously affirmed the criminal court.

The Netcher decision was influential among state courts, which were increasingly being asked to evaluate the constitutionality of these sorts of ordinances. The Illinois Supreme Court’s conclusion that police powers did not justify such anti-competitive legislation and that state and federal due process provisions protected the rights of individuals to engage in ordinary businesses that did not cause public harms was consistent with many judges’ hostile view of economic regulations.

Why did Chief Justice Cartwright claim that the Chicago ordinance did not serve a legitimate public purpose? Is his claim persuasive? Could Chicago have written a better ordinance that would have had the effect of banning department stores? Given constitutional doctrines in the Republican Era, could cities outlaw “big box” stores or Walmart “Supercenters”?

CHIEF JUSTICE CARTWRIGHT delivered the opinion of the Court.

...

The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the constitutions of the United States and of this State. The questions involved are not new. They have been before this and other courts throughout the country in numerous cases, and the rights of the citizen as against such interference have been frequently defined and uniformly upheld. These constitutions insure to every person liberty and the protection of his property rights, and provide that he shall not be deprived of life, liberty or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale or sell his property he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety and welfare. The State, for the purpose of public protection, may, in the proper exercise of the police powers, impose restrictions and regulations, but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or

hindrance from any one, all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither can by enactment of its own interfere with such rights, nor authorize a municipal corporation to do so. In order to sustain legislative interference with the business of the citizen by virtue of the police power it is necessary that the act should have some reasonable relation to the subjects included in such a power. If it is claimed that the statute or ordinance is referable to the police power the court must be able to see that it tends in some degree, toward the prevention of offenses of the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended, and there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a policy regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void. . . . It is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort or welfare of the public. No attempt is made to suggest any grounds upon which the ordinance can be justified as an exercise of the police power of the city or the State. It certainly cannot be contended that there is anything in the character of dry goods, clothing, jewelry, and drugs which renders it dangerous to the public or inimical to the general welfare that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise enumerated in different departments of the same building, and no one has ever imagined that the comfort, safety or welfare of the public was in any manner or to any extent injured or prejudiced by them. Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them; nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. . . . It is plain that the object is not to protect the health, morals or safety of the public or to accomplish any object falling within the police powers. It is a mere attempt to deny a property right to a particular class in the community where all other members of the community are left to enjoy it. . . .

. . . [The second ordinance] is not an exercise of the police power for the protection of the public from the injurious effects of the liquor business. It is not aimed at the suppression of the business, either in certain localities or upon any ground of police regulation, but is directed solely against the sale by certain persons in their places of business—that is, by those who also sell dry goods, clothing, jewelry or hardware. . . . It is apparent that if there is any evil in permitting a sealed bottle of liquor to be sold from a store where dry goods, clothing, jewelry or hardware are sold, the same evils would result from the sale from any other kind of store. . . . [T]he city cannot arbitrarily discriminate against the defendant without any basis or ground for the discrimination. Special privileges are not to be granted to favored persons in the liquor business any more than in any other business. . . . [T]he attempted discrimination is illegal and in violation of the defendant's rights.

The criminal court was right in holding both ordinances void, and the judgments are *affirmed*.