

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era – Equality/Equality Under Law

Mayor and City Council of Baltimore v. Radecke, 49 Md. 217 (MD 1878)

John Radecke was granted a permit to use a steam engine in his carpentry and boxmaking business. A Baltimore city ordinance at that time declared, “all permits granted for steam boilers and steam engines and boilers may be revoked, and the same shall be removed, after six months’ notice from the Mayor.” In 1873, the mayor of Baltimore informed Radecke that he was to remove the steam engine within six months. Radecke refused. When the city of Baltimore filed a lawsuit to recover the penalty for nonremoval, Radecke sought an injunction against the official enforcement of the removal ordinance. The trial court granted Radecke the injunction. The mayor appealed that decision to the Supreme Court of Maryland.

The Supreme Court of Maryland upheld the injunction against enforcing the city ordinance. Judge Miller’s unanimous opinion asserted that the city could not give the mayor unfettered discretion to determine who could operate a steam engine. On what grounds did the Maryland justices sustain the injunction? Did Miller rely on the constitutional powers of the city government? On individual rights? Suppose the mayor had provided the court with evidence that Radecke worked in a particularly crowded part of the city? Would the result have been different or would the court still have required that the standards be articulated in the ordinance?

JUDGE MILLER delivered the opinion of the court.

... It is obvious that those who enacted this provision did not suppose it was an exercise of the power “to prevent and remove nuisances,” for it would be a curious anomaly in municipal legislation on that subject, as well as a novel mode of *removing* a nuisance, to pass an Ordinance allowing a nuisance *to remain for six months* after the Mayor had determined it to be such, before any steps could be taken to enforce its removal. But further than this, a stationary steam engine is not in itself a nuisance even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets. There is no proof in this record of any such interference, or even that this was the ground of the Mayor’s action in giving the notice. Nor was this engine used in connection with any trade or occupation which the law pronounces offensive or noxious. The business of carpentering and boxmaking is neither offensive to the senses nor deleterious to health. In fact, the only complaints made against the engine are its liability in common with all other steam boilers, to explode, and that it is used in a business in which combustible materials are necessarily brought in dangerous proximity to the fire of its boiler, and it therefore subjects buildings and merchandise in that vicinity to increased danger from fire, raises the premiums of insurance thereon, and excites the fears of neighboring owners for the safety and security of their property, but neither one nor all of these circumstances combined, make it a nuisance.

But the Legislature has granted ample power of legislation upon the subject of the erection and use of steam engines within the city limits. They are clothed with the power to pass Ordinances “for the prevention and extinguishment of fires,” for “securing persons and property from danger or destruction, and for promoting the great interests and insuring the good government of the city,” and “to pass all Ordinances necessary to give effect and operation to all the powers vested in the corporation of the city.” It has been well said in reference to such general grants of power that as to the *degree of necessity* for municipal legislation on the subjects thus committed to their charge, the Mayor and City Council are the *exclusive judges*, while the selection of the means and manner (contributory to the end) of exercising the

powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their *sound discretion*. This discretion is very broad, but it is not absolutely and in all cases beyond judicial control. . . .

[W]hile we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an Ordinance passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the presumption that the Legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority. . . .

The inquiry then arises is the Ordinance in question such as we have described? To answer this question it is necessary to consider briefly upon what it operates and what mischiefs or wrongs it is capable of inflicting. It is matter of common knowledge, as well as of proof in this case, that the use of steam engines is absolutely necessary for the successful prosecution of nearly all the various manufacturing, commercial, industrial and business enterprises which are essential to the prosperity of large cities. Great numbers of them are in constant use in the City of Baltimore for purposes so varied and numerous as to embarrass description, and they are to be found in every business locality and in all sections of the town. In fact it may be safely affirmed that their use could not be prohibited or discontinued without the most serious impairment, if not destruction, of the prosperity and growth of the city. Now it is with these powerful and dangerous but most important and valuable aids to human industry, that this Ordinance deals, and what does it do? It does not profess to prescribe *regulations* for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box-factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the Ordinance to guide or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an Ordinance which clothes a single individual with such power, hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void.

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