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## **Economic Liberty and the Constitution, Part 6**

**by Jacob G. Hornberger**

In the late 1800s, the state of New York charged a man named Jacobs with the criminal offense of making cigars in violation of the New York tenement-house cigar law. In 1885, the highest court in New York, the Court of Appeals, issued a decision in the Jacobs case. Its reasoning would have a major impact on the legal thinking, not only of American attorneys but also of the justices of the Supreme Court of the United States. The case has become known as the *Tenement-House Cigar Cases*.

Jacobs, who apparently had a rather large and successful tenement-house cigar operation, hired one of the most brilliant attorneys in the nation to represent him, New York attorney William M. Evarts. Evarts had a brilliant legal career: He served as president of bar associations (he helped found both the New York Bar Association and the American Bar Association), U.S. attorney general, U.S. secretary of state, and Republican senator from New York. According to *Landmarks of a Lawyer's Lifetime* by T.G. Strong, published in 1914, Evarts's law firm had been "for a long period, the most distinguished and able firm of lawyers in the city, if not in the country." In one of his most notable cases he represented President Andrew Johnson in his impeachment trial in 1868.

The New York law prohibited the manufacture of cigars on the same floor that people lived in tenement houses of more than three families. It applied only to cities whose population exceeded 500,000, which meant New York and Brooklyn.

What was a tenement house? A socialist tract originally published in 1891 which can be found on the [Internet](#) — "The Working-Class Movement in America" by Eleanor Marx Aveling and Edward Aveling — described them as follows:

“A few words on the horrors of the tenement houses. New York city is especially the home of these dens.... In 1883 there were 25,000 tenement houses, with 1,000,000 inhabitants. As to the overcrowding, it is estimated that 18,996 tenement houses accommodate fifty people each, and not a few of these contain three times as many. ‘I have seen a family of six and even eight people living in the customary front and ‘inside’ room. Where they all slept was a mystery, but that a portion of them were obliged to sleep on the floor seemed the only explanation. The temperature of these rooms is excessive, and while the smell of sewer gas is in itself obnoxious, it becomes simply refreshing when compared with the stifling fumes that seem to permeate every nook and corner of these dilapidated tenements. They cook, eat, and sleep in the same room, men, women, and children together. Refuse of every description makes the floors damp and slimy, and the puny, half-naked children crawl or slide about in it’ (Commissioner, pp. 174, 179). ‘These people very seldom cooked any of their meals.... I have seen large accumulations of tobacco scraps and tobacco stems which, having long lain in that way, have become putrid; in one instance I ran the point of my shoe into a mass of this kind to see what it really was, and it was filled with vermin’” (Evidence of Cigar Maker on Tenement House Cigar Factories. Report for 1884, p. 154).

Was this relevant to Jacobs’s case? Yes, because under traditional notions of sovereignty, states possessed police powers, that is, the power to legislate for the health, safety, and welfare of the citizenry. Thus, the state of New York could argue that the law had been enacted pursuant to its police powers in order to stop the unsanitary and unhealthy manufacture of cigars in tenement houses.

Could there have been another motive behind the law? Of course — the standard motive behind economic legislation: protecting someone from competition, in this case large cigar-manufacturing companies, which would obviously benefit from putting tenement cigar houses out of business. Not surprisingly, for example, the preamble to the Cigar Makers’ International Union’s Constitution of 1864 included the following objective: “Prevailing upon the Legislature to secure ... the abolition of tenement house cigar manufacture.”

### **The roots of socialism**

The late 1800s were sowing the seeds of America’s move toward socialism. The horrific conditions of sweatshops and tenement cigar houses, including child labor, were cited as the inherent byproduct of the capitalist system, necessitating the intervention of the government.

Even today, American school teachers point to the sweatshops and child labor of the 1800s to justify America’s move toward government intervention. The implication is that American

parents of that time were horrible people who loved to abuse their children and that it was only the enlightened hand of government that caused them to reform and stop mistreating their children.

However, there is one big fallacy behind their analysis: their points of comparison. They improperly compare living standards of people in the Industrial Revolution with those who came after the Industrial Revolution, when the correct comparison is with those who came before the Industrial Revolution.

As Adam Smith points out in his book *The Wealth of Nations*, prior to the Industrial Revolution life was very nasty and very short. The average life span was 20-25. People died of famine, disease, malnutrition, and war. People would have to have a dozen children in order to have a few who survived into adulthood.

Thus, the reason that poor people fled Europe to come to America was that for the first time in history, people had a chance to survive and live longer, and perhaps more important, to have their children do so. Whenever a society is first accumulating a capital base, there is going to be tremendous misery and poverty, such as existed in the Industrial Revolution, but over time an expanding capital base leads to higher standards of living.

The reason that American parents sent their children into sweatshops in the 1800s was a very simple one. It wasn't because they hated them but because they loved them. Why? Because the alternative was death. In the pre-Industrial era, the children would have died, very quickly. The sweatshops, while miserable, at least gave them a chance to survive, and most of them did.

Ask yourself what you would do under the following circumstances: A cigar manufacturer offers you, your wife, and your 10 children a job at \$2 a day plus meals. If your wife and children stay at home, some members of the family will starve to death because your income is not sufficient to sustain them. Do you leave them at home, facing certain death, or do you take them with you to the factory?

That's the choice that faced our ancestors. And it wasn't laws that took them and their children out of the sweatshops. It was a growing capital base, which came from savings in society, a capital base that was gradually raising people's standard of living. It was that rising standard of living that gradually permitted wives and children to remain at home or go to school.

## **The Fourteenth Amendment**

Evarts, then, was faced with a monumental task. He had to overcome the socialist trends in New York, a law that had been enacted by the legislature ostensibly for the public health of the people, and the challenge of powerful special-interest groups that were seeking protection from competition.

Evarts turned to the Constitution, and specifically the Fourteenth Amendment, which had been enacted after the Civil War. Recall that that's the Amendment that placed a Due Process restriction on the state governments. Evarts argued that the New York law took away Jacobs's liberty and property without due process of law, not in a procedural sense but rather in a substantive sense. Evarts turned to the *Slaughterhouse Cases*, and specifically the dissenting opinions, for precedent.

He declared,

“Regulations must have reference to the comfort, safety and welfare of society . . . . Under the power to regulate the state cannot deprive the citizen of the lawful use of his property if it does not injuriously affect or endanger others.”

According to Benjamin R. Twiss,

“Evarts then launched into a review of American and economic ideology drawn almost entirely from John A. Campbell's argument and the opinions of [Supreme Court Justices] Field and Bradley in the *Slaughterhouse Cases*, although he did not mention until he was nearly finished that they were dissenting opinions . . . . Applying the ideas he found there, he then spoke of the right and privilege of the cigar maker to pursue his trade, which ‘was a valuable right and privilege, in the sense of a natural and inalienable right . . . .’”

He quoted from Adam Smith's *Wealth of Nations*, which Justice Field had drawn upon in his dissenting opinion:

“The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbor is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.”

Declaring the tenement-cigar act unconstitutional, the New York Court of Appeals ruled in favor of Jacobs. The court stated,

“Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties, in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or to live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements, are infringements upon the fundamental rights of liberty, which are under constitutional protection.”

The court added that it was preventing a return to

“those ages when governmental prefects supervised the building of houses, the rearing of cattle, the selling of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands recognized as outside of governmental functions. Such governmental interferences disturb the normal adjustment of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills when attempting the removal of one.”

The significance of the *Tenement-House Cigar Cases* went far beyond Jacobs and New York. Its philosophy and reasoning formed the basis of one of the most controversial cases in U.S. Supreme Court history, *Lochner v. New York*, decided in 1905, ultimately setting the stage for the critical battle in the U.S. Supreme Court over substantive due process and economic liberty during the presidential regime of Franklin D. Roosevelt.

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