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# Evolution and the Constitution: Reassessing the Influence of Social Darwinism on the Turn-of-the-Century United States Supreme Court (1873-1937)

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# Evolution and the Constitution: Reassessing the Influence of Social Darwinism on the Turn-of-the-Century United States Supreme Court (1873-1937)

## **Abstract**

Of the controversies surrounding the turn-of-the-twentieth-century United States Supreme Court, one which seems to dominate is the debate over whether the Court drew from social Darwinism in its development and use of the so-called liberty of contract doctrine. This controversy over the Court's intellectual influences is further complicated by the significant contention among scholars surrounding the meaning of social Darwinism, its proponents, and its influence on late-nineteenth and early-twentieth century American thought. I trace the development of the liberty of contract doctrine through the Court's minimum wage and maximum hours jurisprudence in order to reexamine the Court for influences of social Darwinism. I argue that, in light of recent scholarship on this view, social Darwinism seems to have played a very marginal role, if any, in the Court's jurisprudence. In fact, these cases, which have often been cited as evidence that the Court was influenced by social Darwinism, contain very little rhetorical evidence to support this assertion. However, despite this lack of evidence in the Court's opinions, the influence of social Darwinism should not be entirely dismissed because the opinions may not provide enough insight into the justices' worldviews to allow one to assess the Court for extra-legal influences.

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EVOLUTION AND THE CONSTITUTION: REASSESSING THE INFLUENCE OF  
SOCIAL DARWINISM ON THE TURN-OF-THE-CENTURY  
UNITED STATES SUPREME COURT (1873- 1937)

By

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A Senior Thesis Submitted to the

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## Senior Honors Thesis

### ABSTRACT

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## **Introduction**

There are a number of controversies which surround the turn-of-the-century Supreme Court. First, there is a debate regarding the activism of the Court. Second, with respect to the debate over whether or not the Court was activist, there is significant contention over the influences and sources from which the turn-of-the-century Court drew in its jurisprudence. A number of scholars argue that the Court was influenced by social Darwinism, while another group of scholars eschew this view by arguing that the Court was influenced by libertarian notions grounded in American traditions that predated both Darwinism and social Darwinism. Though the debate over the Court's intellectual sources presents a significant barrier to assessing the Court's activism, this matter is further complicated by the fact that there is significant contention surrounding the meaning of the term social Darwinism, the list of those who are proponents of this view, and its influence on American thought. By examining recent scholarship on social Darwinism and the rhetoric of the Court's most significant turn-of-the-century minimum wage and maximum hours jurisprudence, I will assess the claim that the Court was influenced by social Darwinism through the prism of these controversies surrounding both the Court and social Darwinism itself.

## **The Debate over the Turn-of-the-Century Court's Activism and its Intellectual Sources**

The turn-of-the-century Supreme Court has been referred to as the *laissez-faire*-era or *Lochner*-era Court, a reference that arises from an interpretation of the turn-of-the-

century Court's jurisprudence that casts the Court as an activist vehicle for the institutionalization of social Darwinism and laissez-faire economics into constitutional law. Evidence for this view, as the orthodox version of this narrative reveals, can clearly be found in cases in which the Supreme Court eschewed legal principles, constitutional precedent, and the Constitution itself in order to overturn laws that were viewed as incompatible with the justices' own economic and social philosophies (Chemerinsky 1997; Ducat 1996; Twiss 1942; Miller 1968; Kelly and Harbison 1963; Irons 1999; Clinton 1994; Mendelson 1996). In addition, according to the orthodox view, the underlying principles which fueled the Court's departure from the past were evidenced by the Court's use of the doctrines of both liberty of contract and substantive due process (Chemerinsky 1997; Ducat 1996; Twiss 1942; Miller 1968; Kelly and Harbison 1963; Irons 1999; Clinton 1994; Mendelson 1996). Moreover, advocates of the orthodox thesis identify cases such as *Lochner v. New York*, 198 U.S. 45 (1905) and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) as proof of this explanation (Irons 1999; Chemerinsky 1997; Ducat 1996; Miller 1968; Kelly and Harbison 1963; Twiss 1942). Specifically, many of them call attention to Justice Holmes' famous dissent in *Lochner*, in which he indicts the Court's majority for interpreting Herbert Spencer's *Social Statics* into the Constitution (Ducat 1996; Twiss 1942; Miller 1968; Kelly and Harbison 1963; Irons 1999).

However, a number of revisionist critics have rejected this orthodox view. In general, these revisionist critics argue that a significant amount of evidence exists that

demonstrates that the Court was neither activist nor driven by interpreting laissez-faire<sup>1</sup> or social Darwinism into the Constitution. Instead, the Court was firmly grounded in traditional American philosophical and legal thought which placed an all-but-sacrosanct status on the protection of liberty and property (Semonche 1978; Gillman 1993 and 1996; Nedelsky 1990; McCurdy 1975).

Despite the significant dispute between the orthodox view and the revisionist view with regard to whether the Court was indeed activist, these scholars agree that the Court was out of step with the prevailing political and policy trends, which attempted to cope with the immense social and economic changes that had accompanied industrialization and the social problems that had developed from these changes. Nevertheless, the central issue appears to stem from a disagreement over whether following legal traditions prevented the Court from conforming with the progressive tide, or whether it was a departure from these traditions that kept it out of step with the nascent reform movement.

While social Darwinism has been offered as an explanation for the Court's departure from legal traditions (Chemerinsky 1997; Ducat 1996; Miller 1968; Irons 1999; Clinton 1994; Mendelson 1996), revisionists argue that a conservative attachment to the traditional notions of American liberty was what kept the Court from falling in lock-step with the progressive movement (Semonche 1978; Gillman 1993 and 1996; Nedelsky 1990; McCurdy 1975). According to the revisionists, the orthodox view presents problems regarding both the interpretation that the Court had eschewed legal traditions and the use of social Darwinism to explain this departure. To illustrate, revisionists claim

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<sup>1</sup> However, though Michael les Benedict contends that the Court had indeed appealed to laissez-faire notions, he argued that its appeal was firmly grounded in the American tradition and, thus, was not indicative of activism (Benedict 1985).



that the orthodox view is misguided in its interpretations of the Court's behavior as activist (Semonche 1978; Gillman 1993 and 1996; Nedelsky 1990; McCurdy 1975), a criticism which is based on three premises. First, revisionists claim that the precedent for the Court's decisions in the *Lochner* era can be found throughout the Court's nineteenth-century jurisprudence (Semonche 1978; Gillman 1993 and 1996; Nedelsky 1990; McCurdy 1975). Specifically, they claim, all one has to do is to look at the jurisprudence of both Marshall and Taney to find examples (Gillman 1993 and 1996). Second, they claim that the underlying philosophy of the Marshall and Taney Courts is the same underlying philosophy of the *Lochner*-era Court—that is, that the protection of liberty as enshrined in the Constitution is of greater concern than the shifting policy concerns of the state or Federal governments (Gillman 1993 and 1996). The third premise is empirical; this premise is that the Court was not activist because, though it overturned some progressive legislation, it left the vast bulk of it intact (Warren 1913; McCloskey 1960; McCurdy 1975).

Though the revisionist view is quite appealing in its substance, the criticism of this view is quite devastating. First, critics of the revisionists view argue that the revisionists have overstretched interpretive boundaries by arguing that the *Lochner*-era Court was merely following the jurisprudential precedents of Marshall and Taney (Clinton 1994; Mendelson 1996). In fact, though the revisionists may be justified in their claim that the Marshall and Taney Courts were interested in protecting both liberty and private property “in general” (Clinton 1994), to extrapolate from this observation that the *Lochner*-era Court must therefore have adopted these same interests in their application of substantive due process and liberty of contract seems rather audacious in light of

Clinton's criticism. According to these critics, neither Marshall's nor Taney's jurisprudence approaches the *Lochner*-era Court's liberal use of these illegitimate doctrines of substantive due process and liberty of contract (Clinton 1994; Mendelson 1996) or suggests that they would have adopted such a limited view of legislative power; nor is there evidence that they would have provided such a powerful weapon as the doctrines of substantive due process and liberty of contract in order to broaden the Court's own power. Thus, the critics claim that the revisionists' view of Marshall, Taney, and the jurisprudence of the nineteenth century may be an excessively broad one. Indeed, some suggest that there may be no factual basis from which to extrapolate.<sup>2</sup>

However, while most revisionists claim that the Court was following the jurisprudential traditions of Marshall and Taney, some revisionists argue that the Court may not have been out of touch with reform movements after all because it upheld more progressive legislation than it overturned (Warren 1913; McCloskey 1960; McCurdy 1975). Critics such as Paul Kens, however, argue that this claim is weakened by the fact that the Court overturned critical legislative victories for the progressive movement, while the legislation which it left intact was minor by comparison (1991). Kens' observation seriously weakens the revisionist view that the Court was not activist or social Darwinist because it left most of the progressive legislation intact, suggesting that the Court merely left the most benign reform legislation intact rather than overturning every piece. However, though Kens' view weakens the views of some revisionists, it nonetheless gives further credibility to the arguments of other revisionists who argue that the turn-of-the-century Court was out of touch with the rising progressive tide. Likewise,

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<sup>2</sup> According to Clinton, revisionists such as Gillman have given far too much weight to Marshall's dicta rather than to the law which emerged from his opinions (1994).

Kens' observation also confirms the claims of those who subscribe to the orthodox view that the Court was hostile to progressive legislation.

### **The Debate Surrounding Social Darwinism**

This lack of consensus surrounding the turn-of-the-century Court creates significant barriers to its reevaluation for influences of social Darwinism. This task is made even more difficult by the fact that there is significant contention surrounding the historical scholarship on social Darwinism. The scholarship on social Darwinism presents three principal views with respect to the meaning of the term and its influence, and to the identification of its proponents. In the first view, social Darwinism is a social theory that advocates a form of extreme brutal individualism underpinned by notions taken from Charles Darwin's theories of evolution and Herbert Spencer's social views—themselves derived from Spencer's own evolutionary theory (Hofstadter 1944). This view, which could be described as the orthodox view on social Darwinism, argues that social Darwinism was an influential theory that had a considerable impact on American conservative thought at the turn of the twentieth century (Hofstadter 1944). For example, for orthodox historians such as Richard Hofstadter, social Darwinism served to bolster laissez-faire capitalism and was widely influential to American business leaders at the turn of the century (1944). The second view, which could be described as the revisionist view, holds that social Darwinism is a myth (Bannister 1979). According to this revisionist view presented by Robert Bannister, social Darwinism was neither the predominant view at the turn of the century, nor was it influenced by Darwinism (1979).

In fact, the revisionist view argues that Darwinism bolstered reform ideas rather than brutal individualism or other extremist ideas. Additionally, the revisionist view challenges the list of those characterized by earlier historians as social Darwinists (Bannister 1979). Finally, the third view is that social Darwinism is a worldview, rather than a social theory or ideology, and is indeed influenced by Darwin's notions of evolution (Hawkins 1997). In addition, this view, presented by Mike Hawkins, argues that social Darwinism is constructed from a number of assumptions which are interrelated and indeterminate, the most important of which is the assumption of scientific determinism (1997). In addition, the evolution of social and psychological development is taken by the social Darwinist to be analogous with the determinism in the evolutionary processes which effect species change (Hawkins 1997). Moreover, echoing the orthodox view, this last view maintains that social Darwinism was an influential worldview in America and Europe at the turn of the century (Hawkins 1997). However, in contrast to both the orthodox view and the revisionist view, Hawkins maintains that, social Darwinism, because of its indeterminacies, is a highly versatile worldview (1997). Thus, it could be adapted to a number of social theories and ideologies rather than only either conservative or reformist theories or ideologies (1997). Therefore, according to this view, social Darwinism was adaptable to both conservative and progressive views, a fact reflected in turn-of-the-century American thought (Hawkins 1997).

Though there are a number of controversies surrounding the turn-of-the-century Court, I wish to reexamine the role which social Darwinism may have occupied in its jurisprudence. Specifically, I will trace the development of the liberty of contract doctrine within the Court's treatment of maximum hours and minimum wage legislation. I will

argue that, in light of both Robert Bannister's and Mike Hawkins' scholarship and despite the disagreement between the two scholars on the meaning of the term 'social Darwinism,' its proponents, and its influence on American thought, the evidence that the turn-of-the-century Court was influenced by social Darwinism appears weak at best. On the one hand, the rhetorical evidence from at least one of the minimum wage / maximum hours cases—*Muller v. State of Oregon*, 208 U.S. 412 (1908)—suggests that the Court may have been influenced by a social theory derived from Darwinian ideas. On the other hand, however, none of the other significant cases from this line of jurisprudence suggests that the Court was influenced by Darwin or by evolutionary ideas more generally. Nevertheless, the influence of social Darwinism on the Court should not be dismissed. Instead, in my view, especially in light of Hawkins' scholarship on social Darwinism, the issue requires further study, which may reveal more insight into the underlying ideas which influenced the turn-of-the-century Court. In fact, the rhetoric from the cases themselves—at least, those presented here—may not contain enough information to provide the much-needed insights into the worldviews from which the justices of the turn-of-the-century Court constructed their legal opinions. Thus, although the Court may have been influenced by social Darwinism, there does not appear to be any significant evidence of this view, at least in the line of cases which have been most often cited as evidence of such an influence.

## **Social Darwinism in The Court? Minimum Wage / Maximum Hours Jurisprudence, the Liberty of Contract, and the Historical Context**

### **The Historical Context**

At the beginning of the twentieth century, the United States was in the midst of a number of deep, intense, and rapid structural changes which were reflected in many areas of American life. Because the American economy was increasingly driven by capital and industry rather than by agriculture, massive political, social, and economic consequences followed. For example, as the factory was rapidly replacing the farm as the nucleus of the American economy, lifestyles reflective of work in the factories located in America's urban centers were replacing the traditional culture that had grown up around a rural agrarian lifestyle. As a result of the great disparities in wealth which resulted from these changes and the real and perceived inequalities that followed, massive social movements emerged to challenge these inequities.

Generally, these social movements fall under what has been termed reformism or progressivism. Though not monolithic, the progressive movement took on the great power of the emerging corporations and institutions of capitalism which were the apparent forces of subjugation. Furthermore, as the progressive movement gained traction, it began to build political influence in both the state and Federal governments as well, leading to the emergence of reform legislation. These developments, in turn, led to conflict between progressive reformers and the institutions which were the target of their reforms. Accordingly, the Supreme Court became one of the central forums for this debate between the industrialists, who fought to protect their economic rights, and the progressives, who fought for better wages and working conditions.

The Court responded to the rising progressive tide with inconsistency, upholding progressive legislation in some cases while declaring it unconstitutional in other cases. Thus, the great lack of consensus among scholars of the jurisprudence of the turn-of-the-century-Court should come as no surprise. Some have interpreted the turn-of-the-century Court as defenders of an illegitimate doctrine guided by a discredited and repugnant social theory. Others, however, have interpreted the Court's behavior as consistent with traditional notions of American liberty and thus construed the justices not as advocates of brutal individualism following from social Darwinism but as ardent defenders of liberty. However, though there seems to be a great deal of confusion over the behavior of the turn-of-the-century Court, I believe that these apparently disparate interpretations can be reconciled in light of recent scholarship on social Darwinism.

**Maximum Hours, Minimum Wages Legislation, and Limitations on the Liberty of Contract: *Lochner*, *Muller*, *Adkins*, and *West Coast Hotel***

Though there are a number of cases in which the Court was forced to confront progressive-era reform legislation, the maximum-hours and minimum-wage cases are perhaps some of the most significant to scholars who have either eschewed or advocated the view that the turn-of-the-century Court was influenced by social Darwinism. In fact, *Lochner*, the case from which the era derives its name, falls within this area of public policy. Thus, since *Lochner* is at the center of such controversy, this case is perhaps the rational place from which to begin a discussion of the Court's turn-of-the-century minimum wage and maximum hours jurisprudence.

### ***Lochner v. New York and its Antecedents***

By the time the case of *Lochner v. New York* reached the Supreme Court, the notion of “liberty of contract” had been clearly articulated in a few nineteenth-century cases. The Court had initially rejected this notion when it first emerged in *The Slaughterhouse Cases*, 83 U.S. 36 (1873) and in *Munn v. Illinois*, 94 U.S. 113 (1876). However, having gained acceptance in the majority opinion of *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the liberty of contract doctrine thus became enshrined in the Court’s jurisprudence.

Soon after the Civil War, the Court was confronted with cases in which a substantive notion of due process was used to argue that states were limited in their authority to pass laws that may impinge on the economic liberties of individuals or groups. However, the majority of the Court in these cases rejected this notion as untenable. Indeed, in the *Slaughterhouse Cases*, 83 U.S. 36 (1873), the Court held that the due process clause of the Fourteenth Amendment did not prevent the State of Louisiana from passing a law which, in effect, created a state-sanctioned monopoly of slaughterhouses. However, the dissenters—Justices Field and Bradley—argued that the state had passed an arbitrary law which impinged upon the plaintiffs’ economic liberties in violation of the Fourteenth Amendment. On this point, Justice Bradley wrote that

A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of the law. Their right of choice is a portion of their liberty; their occupation is their property (83 U.S. at 122).



While the majority in *The Slaughterhouse Cases* dismissed the interpretation of the due process clause, the Court hinted elsewhere at the possibility that the states might face some limitations with regard to their regulatory sphere. For example, in *Munn v. Illinois*, 94 U.S. 113 (1876), the Court reasoned that the business of grain storage was a business affected with a “public interest” and thus subject to control “by the public for the common good”—a notion which the Court viewed as being derivable from the “common law” and being further “protected” by the Constitution (94 U.S. at 132, 126). Thus, the Court upheld the constitutionality of an Illinois state law which regulated grain storage pricing on the basis that the legislature of Illinois had properly exercised its authority in controlling the price of grain storage because it is a business which is naturally public, rather than private, and thus subject to public scrutiny.

Justice Field, of course, disagreed with the majority opinion in *Munn*. In his dissent, he wrote that, by declaring the Illinois law constitutional, the majority’s opinion was, in fact, “subversive of the rights of private property... protected by constitutional guarantees against legislative interference, and... in conflict with the authorities cited in its support” (94 U.S. at 136). Furthermore, Justice Field argued, the rationale of the majority led to the necessary conclusion that “all property and all business in the State are held at the mercy of a majority of its legislature”—a view which Field clearly rejected (94 U.S. at 140). Thus, underpinning Field’s opinion and mirroring Bradley’s dissent in *The Slaughterhouse Cases* is the notion that the term ‘liberty’ in the due process clause has substantive meaning. For Justice Field, the term ‘liberty’ referred, among other things, to an individual’s “freedom...to pursue such callings and avocations as may be

most suitable to develop his capacities, and give to them their highest enjoyment” (94 U.S. at 142). Moreover, Justice Field wrote,

The same liberal construction which is required for the protection of life and liberty, in all particulars in which life and liberty are of any value, should be applied to the protection of private property (94 U.S. at 142).

Therefore, though the Court’s opinion in *Munn* remained largely consistent with its opinion in the *Slaughterhouse Cases*, the Court modified its position by adding an additional category of economic activities in which the state may interfere (i.e., those affected with a public interest). However, Justice Field’s dissent in *Munn* had left the status of the protection of private economic activities open to interpretation.

For many years subsequent to *Munn*, the Court continued to reject the notion that the due process clause protected economic liberties from arbitrary state laws. However, this view had begun to change significantly by the 1890s. For instance, in *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897), the Court overturned a Louisiana State law which prohibited its citizens from purchasing insurance from companies which were not state-licensed. In order to challenge the constitutionality of this law, E. Allgeyer Company had “deliberately” violated it (Irons 1999, pg. 248), and its lawyers had chosen similar arguments—which were based on the notion that the due process clause protected economic liberties vis-à-vis a “liberty of contract”—to those raised by the unsuccessful petitioners in *The Slaughterhouse Cases* (Ivers 2002, pg. 475). However, departing from its reasoning in *The Slaughterhouse Cases*, the Court in *Allgeyer* unanimously held that the Louisiana state law had, indeed, arbitrarily impinged upon the company’s “liberty of

contract” in violation of the Constitution (Irons 1999, pg. 248).<sup>3</sup> Furthermore, *Allgeyer* contains not only a unanimous adoption of a liberty of contract doctrine, representing a significant departure from earlier cases, but also a more detailed explication of the meaning and scope of this doctrine along with a more comprehensive presentation of its sources. With respect to the scope and meaning of liberty of contract as embodied in the Fourteenth Amendment, Justice Peckham wrote for the majority that

[t]he liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contacts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned (165 U.S. at 589).

Furthermore, with respect to the sources of this view of the Fourteenth Amendment, Justice Peckham quoted Justice Bradley’s concurring opinion from *Butchers’ Union Company v. Crescent City Company*, 111 U.S. 746 (1884):

The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase ‘pursuit of happiness’ in the Declaration of Independence, which commenced with the fundamental proposition that ‘all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.’ This right is a large ingredient in the civil liberty of the citizen...I hold that the liberty of pursuit -- the right to follow any of the ordinary callings of life -- is one of the privileges of a

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<sup>3</sup> *Allgeyer v. State of Louisiana* (1897) was decided unanimously. Thus, it was a significant turnabout from both the *Slaughterhouse Cases* and *Munn v. Illinois*, which were decided 5 to 4 and 7 to 2, respectively.

citizen of the United States...[b]ut if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen (*Butchers' Union Company v. Crescent City Company*, 111 U.S. at 762 as cited in 165 U.S. at 589).

Likewise, though Peckham conceded that “remarks were made in regard to questions of monopoly,” he argued that they “well describe the rights which are covered by the word ‘liberty’ as contained in the Fourteenth Amendment” (165 U.S. at 590). Thus, *Allgeyer* represents the earliest uses of the liberty of contract doctrine to overturn state legislation. This doctrine would later be used to overturn a number of minimum wage and maximum hours statutes.

At the time of *Lochner*, the application of this liberty of contract doctrine to maximum hours legislation had just recently been addressed in *Holden v. Hardy*, 169 U.S. 366 (1898). In *Holden*, the Court had found an inherent dangerousness in underground mine-work and had therefore held that the setting of maximum hours for underground mine workers comported with a legitimate means of maintaining the health, welfare, and safety of the community. Thus, the Court maintained that the Utah statute limiting the hours of mine workers constituted a legitimate use of state police power and was therefore constitutional. Nevertheless, though upholding the Utah statute in *Holden*, there the Court did not reject the doctrine of liberty of contract.

However, though the Court had ruled in *Holden* that the states had the power to set maximum hours constraints if a genuine interest existed in protecting the safety of

those whom the statute would affect—in that case, mine workers—the Court in *Lochner* struck down a similar New York statute which placed limits on the working hours of bakers. In 1897, the New York State legislature passed a law limiting the hours which bakers could work. The passage of this statute was perceived as a major victory for both the progressive movement and the statute’s principal backer, Henry Weismann, then the secretary of the Journeymen Baker’s Union (Irons 1999). However, the law was viewed by many to be unconstitutional and was thus soon challenged in the state courts (Irons 1999). In 1899, Joseph Lochner, the owner of a small Utica bakery, was convicted of violating the State “bakers” statute and forced to pay a fine of twenty-five dollars (Irons 1999). After losing an appeal in the highest state court, Lochner appealed his case to the United States Supreme Court on “due process” grounds, or, rather, on the grounds that the statute violated the petitioner’s so-called “liberty of contract” contained in the due process clause of the Fourteenth Amendment (Irons 1999, pg. 255).

In *Lochner v. New York*, the Court argued that, though the state may impose constraints on one’s liberty to contract, such limitations must have legitimate ends and must fall within what the Court defines as the state’s police powers, or its power to legislate to protect the general health, welfare, safety, and good order of the community. Since the New York statute was purely a “labor law,” Justice Peckham argued, and because there was neither a nexus between the protection of the safety of bakers and the limitations on their hours of work nor a provision in the law allowing employees to work longer hours in times of “emergency,” the statute illegitimately infringed on liberty of contract in violation of the due process clause of the Fourteenth Amendment (198 U.S. at 57, 55).

Indeed, with respect to the police powers of the State and the powers of the Court in this matter, Justice Peckham wrote that,

[i]n every case that comes before this court...where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor (198 U.S. at 56).

Moreover, he argued, although the Court may be “opposed” to such laws which the legislature enacts under its police powers, “the question would still remain: Is it within the police power of the State? and that question must be answered by the court” (198 U.S. at 57). Thus, with respect to the New York statute, Justice Peckham concluded that

[t]he question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker (198 U.S. at 57).

In contending that there was no reasonable ground on which the statute stood, Peckham wrote that “[t]here is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action,” and that bakers were “in no sense

wards of the State” (198 U.S. at 57). Likewise, Peckham found reason to believe neither that the statute had a legitimate “health” aspect, nor that it had been designed to protect either the welfare, safety, or morals of the community (198 U.S. at 57). In fact, Peckham speculated that the statute “does not affect any other portion of the public than those who are engaged in that occupation” since “[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week” (198 U.S. at 57). Nevertheless, Peckham claimed, though statistical evidence suggested that baking “does not appear to be as healthy as some other trades,” it was “also vastly more healthy than still others”; to be sure, “[t]o the common understanding the trade of a baker has never been regarded as an unhealthy one” (198 U.S. at 59). According to Peckham, “[t]here must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty” (198 U.S. at 59). Thus, he concluded that “[statutes] limiting the hours in which grown and intelligent men may labor to earn their living are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power” (198 U.S. at 61). Thus, on the bases that the Court is the legitimate and final arbiter of the limit and scope of state police powers and that the statute addressed no legitimate safety, health, welfare, or moral concerns, the majority of the Court ruled that the New York statute limiting the work-hours for bakers was unconstitutional. However, the decision was not unanimous; four justices disagreed with both the majority’s rationale and its interpretation of the facts.

With respect to the facts, Justices Harlan, Day, and White challenged the assertion of the majority that, on balance, baking is a benign activity. To the contrary, these

dissenting Justices observed that, according to a number of sources, baking was in fact a dangerous occupation in which there was a nexus between long work-hours and injurious effects. Thus, the dissent argued that there were indeed legitimate health and safety concerns which the statute attempted to remedy. Accordingly, these dissenters disagreed with the majority's central thesis that the statute was an illegitimate infringement on the liberty of contract.

Though Justices Harlan, Day and White challenged some of the significant facts of the case, Justice Holmes challenged the underlying theory on which he believed the majority rested its case. In his separate dissent, Holmes contended that

[i]f it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law...[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics...[and] a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire* (198 U.S. at 75).

Thus, Holmes claimed that majorities have the right to embody their opinions in law irrespective of his personal views. Nevertheless, he believed that the Constitution does not endorse a particular economic theory and argued that an illegitimate economic theory underpinned the majority's opinion—"an economic theory which a large part of the country does not entertain" (198 U.S. at 75). In addition, Holmes' indictment of the



Court for attempting to embody Herbert Spencer's *Social Statics* vis-à-vis the Fourteenth Amendment perhaps suggests that, in his view, the Constitution does not endorse a particular social theory either. Accordingly, Holmes concluded by writing that

the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law (198 U.S. at 75).

Thus, Holmes argued that the majority of the Court based its decision on illegitimate grounds because it “pervert[ed]” the meaning of the Fourteenth Amendment by drawing from an economic or perhaps social theory which was not reflective of majority opinion and by presenting an interpretation of liberty which prevents the “natural outcome” of “dominant opinion” (198 U.S. at 76).

### **Beyond *Lochner*: The Demise of Liberty of Contract in Minimum Wage and Maximum Hours Cases**

Though it had reversed a reformist victory by overturning maximum hours legislation in *Lochner*, the Court upheld similar legislation only a few years later in *Muller v. State of Oregon*, 208 U.S. 412 (1908).

*Muller*, like *Lochner* and *Holden*, emerged from the continued public debate surrounding working conditions at the turn of the century. However, unlike those earlier cases, *Muller* was a case which dealt solely with the working conditions of women.

Writing for the majority, which included Holmes, Justice Brewer argued that, though the

plaintiff in error was correct in arguing that the Court had overturned similar legislation in *Lochner*, he “assume[d]” that the differences between men and women would not justify disparate treatment with respect to contractual rights (208 U.S. at 419). However, Brewer argued, there were indeed substantial differences that required disparate treatment under the strictures of liberty of contract. Alluding to the collection of statistics, research, and “other” sources compiled and presented by Louis Brandeis, who argued the case on behalf of the State of Oregon, Brewer argued that there was considerable evidence that women were in fact different from men, both in their “physical structure” and in the “functions” they performed, and were thus entitled to “special legislation restricting or qualifying under which [they] should be permitted to toil” (208 U.S. at 420). Furthermore, Justice Brewer noted specifically that it is obvious that “woman’s physical structure and the performance of her maternal functions place her at a disadvantage in the struggle for subsistence” (208 U.S. at 421). Noting that “this is especially true when the burdens of motherhood are upon her,” he reasoned that,

Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of the public interest and care in order to preserve the strength and vigor of the race...in the struggle for subsistence she is not an equal competitor with her brother (208 U.S. at 421).

Thus, Brewer concluded, “she is properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men, and could not be sustained” (208 U.S. at 422). Therefore, the Court upheld the Oregon statute despite the fact that the law differed significantly from the law under

indictment in *Lochner* only in that it applied only to women. However, although the Court in *Muller* sustained the notion of special protections for women, which allowed the state's legitimate infringement on the liberty of contract, it would reject such special protections a mere thirteen years later with respect to their application to statutes which allowed for the fixing of minimum wages for women in *Adkins v. Children's Hospital* 261 U.S. 525 (1923).

Arguing for the majority, Justice Sutherland wrote that, though *Muller* had rested on the notion that considerable differences existed between men and woman, the Nineteenth Amendment—which gave women the right to vote—and other such legislation had immensely augmented the “contractual, political and civil status of women,” thus diminishing inequalities between the sexes almost to the “vanishing point” (261 U.S. at 553). However, Justice Sutherland argued, though the non-physical differences between the sexes were moot, the Court may take into account the “physical differences” between men and women in the “appropriate cases” (261 U.S. at 553). Nevertheless, he noted that “we [the Court] cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances” (261 U.S. at 553). Thus, irrespective of the doctrine of special treatment articulated in *Muller*, the Court overturned the federal statute which allowed for the establishment of a minimum wage for women in certain kinds of professions.

Although the Court had rejected the constitutionality of minimum wage laws based on sexual differences in *Adkins*, in the late 1930's, the Court suddenly discarded the constitutional theory upon which it had previously based its rejection of such

legislation in *Adkins* and *Lochner*, respectively. The Court had relied on the liberty of contract doctrine in rejecting the constitutionality of minimum wage laws for women in *Morehead v. Tipaldo*, 298 U.S. 587 (1936). However, despite the fact that there had been no subsequent change in the composition of the Court, it reversed its decision in *Morehead* the following year when it upheld minimum wage laws in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). What is more, in *West Coast Hotel*, the Court explicitly rejected the doctrine of liberty of contract as an invalid interpretation of the Fourteenth Amendment. In this case, Chief Justice Hughes wrote that, in *Adkins* and *Morehead*:

[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular (300 U.S. at 391-92).

Moreover, Hughes suggested that, instead of placing no limitations on the freedom of contract, the jurisprudence of the Court and the Constitution implied the opposite. For example, Hughes noted that the Constitution impeded freedom of contract in cases which involved a “public interest with respect to contracts between employer and employee” (300 U.S. at 392-93). Indeed, Hughes asserted,

[i]n dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression (300 U.S. at 393).

Furthermore, Hughes wrote that he thought that “the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of the employer and employed” (300 U.S. at 397). Likewise, citing *Nebbia v. New York*, 291 U.S. 502 (1934), Hughes wrote that if laws which regulate private contracts “have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied” (300 U.S. at 398, citing *Nebbia v. New York*, 291 U.S. at 537, 538). Accordingly, again citing *Nebbia*, Hughes reiterated that

times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that, though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power (300 U.S. at 379, citing *Nebbia v. New York* 291 U.S. at 502)

Likewise, with respect to the statute setting a minimum wage for women, Hughes asked, “[w]hat can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?” (300 U.S. at 398) Additionally, as a class, women received the “least pay,” had “relatively weak” “bargaining power” and were “ready victims of those who would take advantage of their necessitous circumstances” (300 U.S. at 398). Thus, “[t]he legislature of the State was clearly entitled

to consider the situation of women in employment” and “to adopt measures to reduce the evils of the ‘sweating system,’ the exploiting of workers at wages so low as to be inefficient to meet the bare cost of living,” (300 U.S. at 398. 399). In addition, with respect to the sweating system and the ways in which the states were dealing with it at the time, Hughes noted that many states had responded to this problem by taking similar measures, a fact which perhaps reflected “a deepseated conviction both as to the presence of the evil and as to the means adapted to check it” (300 U.S. at 399). Thus, on this matter Hughes concluded that

[l]egislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment (300 U.S. at 399).

Additionally, aside from his claim that states have the authority to set minimum wage laws for women because there may be a legitimate policy concern over the detriments of the so-called sweating system, Hughes maintained that there were “additional and compelling” considerations which may have suggested that minimum wage laws protecting women were all the more legitimate (300 U.S. at 399). Hughes noted that the “recent economic experience” of the Great Depression had revealed that a credible case could be made for minimum wage protections based on the notion that “[t]he bare cost of living must be met” and that “[t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage... casts a direct burden for their support upon the community” (300 U.S. at 379). Furthermore, argues Hughes, “[w]hat these workers lose in wages the taxpayers are called upon to pay”; however, “[t]he community is not bound

to provide what is in effect a subsidy for unconscionable employers” (300 U.S. at 399).

To be sure, Hughes concluded,

The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach... This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power...[t]heir relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment (300 U.S. at 400).

Thus, the majority of the Court upheld the Washington State minimum wage statute protecting women on the basis that, despite *Adkins*, there was in fact a legitimate policy consideration in setting a wage which comported with living standards. This decision was based on the fact that women had traditionally occupied an inferior bargaining position and, because of this, were left at the mercy of their employers, who were in a position to exploit this reality by paying women substantially less than other groups. Additionally, the Great Depression had only exacerbated this tradition of exploitation, thus creating a significant burden on the community. This burden, in turn, brought about the absurdity in which the community was forced, in effect, to subsidize unconscionable employers. Furthermore, and perhaps more importantly, the majority of the Court eschewed the liberty of contract doctrine and gave state legislatures new powers to regulate their economies by giving the states the authority to set minimum wage laws for women, effectively overturning *Adkins*. However, though the majority of the Court in *West Coast*

*Hotel* rejected both the liberty of contract doctrine and the arguments from *Adkins*, in which it had been proffered that women did not deserve special treatment because they had overcome their inferior status, the dissenting Justices vehemently disagreed with both of these lines of reasoning. Furthermore, the dissenters rejected the notion that the contemporary economic troubles reflected in the Great Depression gave special weight to the notion that there is a compelling community interest in guaranteeing a minimum wage to women.

The dissenting Justices pointed to the earlier decisions in *Morehead* and *Adkins* as the proper standards by which the Washington State statute should have been judged. Moreover, Justice Sutherland, in his dissent, noted that the Court has a constitutional responsibility to uphold the provisions of the Constitution and that, despite the changes in economic conditions between *Adkins* and *West Coast Hotel*, the words and the meaning of the Constitution had not changed. Likewise, he continued, “[t]he judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation” (300 U.S. at 404). Thus, he reasoned,

[i]f the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation -- and the only true remedy -- is to amend the Constitution ... [t]he people by their Constitution created three separate, distinct, independent and coequal departments of government...each of the departments is an agent of its creator; and one department is not and cannot be the agent of another...therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling (300 U.S. at 404).



Moreover, with respect to the statute in question, Sutherland argued that, irrespective of the dispute over the possible benefits and the dangers of minimum wage legislation—i.e., whether a minimum wage might remedy the problems associated with “underpaid labor,” or might instead “bring down the earnings of the more efficient employees toward the level of the less-efficient employees”—the Court should only be concerned with the “question of constitutionality” of the statute (300 U.S. at 405-406). Accordingly, he argued that the Fourteenth Amendment forbade legislation such as that which was before the Court in *West Coast Hotel* and that *Morehead* and *Adkins* had thus been rightly decided. Indeed, Sutherland contended that

[the fact that] the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule (300 U.S. at 406).

Invoking cases such as *Adair v. United States*, 208 U.S. 161 (1908), *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adkins*, Justice Sutherland argued that, though the Court had maintained that there was no “absolute freedom of contract,” it was the “general rule and restraint [was] the exception [and] the power to abridge that freedom could only be justified by the existence of exceptional circumstances” (300 U.S. at 406). Quoting Justice Harlan from the majority opinion in *Adair*, Justice Sutherland wrote of freedom of contract:

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the

liberty of contract which no government can legally justify in a free land (300 U.S. at 406, citing *Adair v. United States* 208 U.S. at 174-175).

Additionally, Justice Sutherland noted, in cases in which the Court had addressed minimum wage legislation, it had found in none of these cases anything that would have constituted a legitimate infringement on the freedom of contract. Indeed, with respect to these cases and to the case before the Court, Justice Sutherland contended that

[this case] does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court (300 U.S. at 407).

Thus, Sutherland contended that the Washington State minimum wage legislation was “essentially arbitrary” (300 U.S. at 408). In Sutherland’s view, the arbitrary nature of the statute was further demonstrated by the lack of “relation [of wages] to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment” (300 U.S. at 408). These issues were problematic because too much weight was being given to the needs of one class of employees at a potentially great expense to employers. In fact, argued Sutherland:

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of

his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss.... It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole (300 U.S. at 409).

Furthermore, not only did this type of legislation create a potential inequality for employers, Sutherland echoed the majority opinion in *Adkins* by arguing that “[w]omen today stand upon a legal and political equality with men,” so that “[t]here is no longer any reason why they should be put in different classes in respect of their legal right to make contracts” (300 U.S. at 411, 412). Accordingly, women should not be “denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept...[a]nd it is an arbitrary exercise of the legislative power to do so” (300 U.S. at 412). Moreover, Sutherland argued that, indeed, “[d]ifference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free...[t]he ability to make a fair bargain, as everyone knows, does not depend upon sex” (300 U.S. at 413). Likewise, Sutherland concluded:

It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to become substantially the same, the right to make any contract in respect of wages will have been completely abrogated (300 U.S. at 413-414).

Thus, Sutherland disputed the central theses of the majority's claims and argued that the Washington statute was an unconstitutional violation of the Fourteenth Amendment. Additionally, while the majority of the Court clearly rejected the doctrine of liberty of contract in *West Coast Hotel*, the Court would have to confront this doctrine in many subsequent cases, such as *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955) or *Ferguson v. Skrupa*, 372 U.S. 726 (1963). However, the Court continued to reject this doctrine throughout the 1940s, 50s, and 60s.

### **Social Darwinism and Social Darwinism in American Thought: Hofstadter and Bannister**

The development and demise of the liberty of contract doctrine can clearly be seen in the Court's minimum wage and maximum hours jurisprudence from the turn of the century. However, what is unclear is the influence of social Darwinism upon these developments. Thus, a more thorough discussion of the three principal views of social Darwinism is required in order to investigate this matter further. I will adopt Hawkins' view as the principal framework within which I will assess the influence of social Darwinism on the turn-of-the-century Court. However, I will draw from Bannister's view as well to provide contrast to Hawkins' view. Despite their different contentions about social Darwinism, I believe that, given the Court's rhetoric, both views suggest that social Darwinism was not significantly influential to the Court's development and use of the liberty of contract doctrine in its minimum wage and maximum hours jurisprudence.

## Hofstadter and Social Darwinism

Mid-twentieth-century historians, such as Richard Hofstadter, argue that Darwinism had a profound impact on American thought in the late nineteenth and early twentieth centuries (1944). For Hofstadter, though Darwinism impacted a number of disciplines, one of its most profound effects was its influence on American social thought, which was becoming deeply conservative at the time (1944, pg. 5). Indeed, Hofstadter explains that, though Darwin's evolutionary theory was akin to a "Copernican" revolution in the biological sciences and had thus impacted its practitioners, practitioners of the social sciences were influenced by this new theory as well (Hofstadter 1944, pg 4). On this point, Hofstadter writes:

Darwinism established a new approach to nature and gave fresh impetus to the conception of development; it impelled men to try to exploit its findings and methods for the understanding of society through schemes of evolutionary development and organic analogies... Almost everywhere in western civilization, though in varying degrees according to intellectual traditions and personal temperaments, thinkers of the Darwinian era seized upon the new theory and attempted to sound its meaning for the several social disciplines. Anthropologists, sociologists, historians, political theorists, economists were set to pondering what, if anything, Darwinian concepts meant for their own disciplines (1944, pg. 4).

In addition, Hofstadter argues that, though Herbert Spencer was one of the very early thinkers to articulate the social implications of evolution, Spencer's theory was not grounded in Darwin's conceptualization of evolution (1944).

Moreover, though Darwin and Spencer were influential in their native England, both of these thinkers' ideas were greeted in the United States by a public that showed

great interest in adopting the concepts of these theories into their own conceptual lexicon (Hofstadter 1944). Parallel both to the emergence of Darwin's and Spencer's ideas and to the acceptance of these ideas into American intellectual thought, the United States was undergoing immense political, economic, and social changes. These changes, according to Hofstadter, led America into a "mood" which was predominantly "conservative" (1944, pg. 5). Though there were "challenges" to this conservatism, the dominant "feeling" of the late nineteenth century was that it was a time for political, social and economic "acquiescence" rather than a time for "reform" (Hofstadter 1944, pg 5). Thus, Hofstadter argues,

Darwinism was seized upon as a welcome addition...to the store of ideas to which solid and conservative men appealed when they wished to reconcile their fellows to some of the hardships of life and to prevail upon them not to support hasty and ill-considered reforms...Darwinism was one of the great informing insights in this long phase in the history of the conservative mind in America. It was those who wished to defend the political status quo, above all the laissez-faire conservatives, who were first to pick up the instruments of the social argument that were forged out of the Darwinian concepts (1944, pgs 5-6).

Furthermore, Hofstadter contends, the impact of Darwinism on the predominant late-nineteenth-century American conservative "outlook" was twofold (144, pg. 6). One, Hofstadter claims, the catchphrases "survival of the fittest" and the "struggle for existence," which were "popular" notions found in Darwin's writings, provided a "natural law" foundation to the notions that the lives of individuals in society were guided by natural forces which allowed the "best competitors" to survive in "competitive situations" and that this process would lead, in turn, to "continuing improvement" (1944, pg. 6). In addition to the impact of these "catchwords" on conservative thought, Hofstadter argues, Darwin's notion that continual development and improvement took

eons bolstered the notion in “conservative political theory” that “sound development must be slow and unhurried” (Hofstadter 1944, pgs. 6-7). Thus, for the conservatives, “society could be envisaged as an organism...which could change only at a glacial pace at which new species are produced in nature” and that “all attempts to reform social processes were efforts to remedy the irremediable... [because] they interfered with the wisdom of nature” (Hofstadter 1944, pg. 7). In the view of the Darwin-informed conservative, reform could only lead to “degeneration” of society (Hofstadter 1944, pg. 7).

For Hofstadter, the history of social Darwinism deserves examination because it represents a significant transformation in conservative thought which rests on two principal notions. First, Hofstadter claims that the American conservatism, which was driven by social Darwinism, was unique from its earlier forms both because it was “secular” rather than “religious” in nature and because its “chief conclusion” was that the “positive functions of the state should be kept to the barest minimum, and it was devoid of that center of reverence and authority which the state provides in many conservative systems” (Hofstadter 1944, pg. 7). Second, social Darwinism constituted a conservatism that attempted to “dispense with sentimental or emotional ties” (Hofstadter 1944, pg. 7).

### **Revisionist Views of Social Darwinism: Bannister**

Though Hofstadter’s study of social Darwinism in American thought had a profound impact on the understanding of this notion, later historians were less certain about Hofstadter’s claims. In fact, revisionist historians such as Robert Bannister argue

that the orthodox historiography of social Darwinism—such as that presented by Hofstadter—appear not to reflect the reality of turn-of-the-century America (1979).

Although Hofstadter and others had a profound impact on the historiography of American social Darwinism for several decades, by the 1960s, as Bannister observes, others began to challenge their historical narrative of its impact (1979). For example, Bannister argues that, contrary to Hofstadter’s view, Darwinism did not fuel a conservative movement that was grounded in this secular theory. This thesis was, in fact, part of a grand mythology of Darwinism’s effect on social thought (i.e., social Darwinism) (Bannister 1979). According to Bannister, progressive historians such as Hofstadter overstate the case for the predominantly conservative mood in America in the late nineteenth and early twentieth centuries (1979). Furthermore, Bannister argues, rather than supporting a conservative movement, Darwinism bolstered the reform ideas which were taking shape in the late nineteenth century (1979). According to Bannister, the consensus which developed around the implications of Darwinism was grounded in its reform characteristics, while the conservative implications of social Darwinism were so exceptional to the rule that one might conclude that the version of social Darwinism which Hofstadter and others envisioned was a myth more than a reality (1979). For Bannister, the conventional “story” of social Darwinism—which Hofstadter has played a significant role in constructing—is a story which claims that

[i]n the post-Civil War decades...misapplied Darwinism bolstered laissez-faire, individualism, and Horatio Algerism. For defenders of the industrial order such phrases as the *struggle for existence*, *natural selection*, and *survival of the fittest* provided explanation and excuse for poverty and exploitation. By the 1890s imperialists, racists, and militarists, also appropriated Darwinism...[a]t the same time, progressive reformers turned the new biology to their



own advantage in calling for industrial regulation and social welfare. In this *reform Darwinism*...the new catch words were *adaptation, mutual aid, and the struggle for the life of others* (1979, pgs. 3-4).

Although this seems to be the dominant account of the origins and impact of social Darwinism, Bannister claims that “[a]greement on the use of the term... was not always so clear” (1979, pg. 4). In fact, social Darwinism has been defined in a number of different ways by a number of different scholars at both proximate and dissimilar points in American and European history (Bannister 1979). Bannister observes that social Darwinism “described a variety of evils” from its first appearance in Europe around 1880 to the time it found its way into American thought twenty years later (1979, pg. 4). For example, while some early commentators identified social Darwinism as “brutal individualism” similar to that “advocated” by Herbert Spencer, others insisted that it provided a “new rationale for socialism and the class struggle”—and even for “eugenics”—or an explanation for the “rising tide” of imperialism and militarism in the late nineteenth century (Bannister 1979, pg. 4). By the 1940s, American historians such as Merle Curti further “expanded” the definition of social Darwinism, using it to refer to any theory which applied the notions of the struggle for existence or survival of the fittest to society in general. As Hofstadter had defined it, social Darwinism was not confined to the “technical provinces of philosophy” but instead referred to “the more general adaptation of Darwinian, and related concepts, to social ideologies.” However, even in its expanded form, some historians displayed dissatisfaction with Hofstadter’s definition, viewing it as incomplete, unclear, or generally lacking “conceptual discrimination” (Bannister 1979, pg. 5). Bannister notes that one of Hofstadter’s most significant errors was his failure to make a clear distinction between Darwinism and Spencerianism (1979,

pg. 5). To some of Hofstadter's critics, this lack of distinction was significant because it created difficulty in differentiating between mere practitioners of social science and those who were truly social Darwinists (Bannister 1979, pg. 5).

Though perhaps lacking a clear conceptual picture of social Darwinism, Hofstadter and others had a profound impact on defining the conventional historiography of social Darwinism in American thought. However, Bannister observes, by the 1960s and '70s, historians began seriously to question the conventional view of social Darwinism. As these historians began to reevaluate American conservative thought of the late nineteenth and early twentieth centuries, the list of those from this era who were singled out as social Darwinists began to dwindle (Bannister 1979, pgs. 6-7). Some of these revisionists, such as Irvin G. Wylie, began to argue that, among businessmen, American conservative thought was influenced by the "rags-to-riches mythology with deep roots in Christianity and Enlightenment thought" rather than by Darwinism (Bannister 1979, pg. 6). Other revisionists had also begun to show serious doubt over the influence of Darwinism on conservative thought, bringing about a deconstruction of the paradigm created by Hofstadter and other progressive historians. This, in turn, led to a serious revision of the list of individuals indicted for social Darwinism in the conventional thesis which Hofstadter had helped to create (Bannister 1979, pg 7-8). Finally, Bannister argues that, for some, much of this transformation of the conventional view was guided by a "narrow[ing]" of the definition of social Darwinism based on a distinction drawn between "religious" or "biological" evolutionism on the one hand and the role of "brute force" and "cunning" within the notions of "struggle" and "survival" on the other (1979, pg. 7). Thus, Bannister implicitly or directly challenges Hofstadter's

claims that Darwinism had served as a significant underlying source for a transformation—if there was a transformation at all—in conservative thought in the nineteenth century and that Darwinism was indistinguishable from the “social organicism” of Spencer (1979, pg 5).

**Hawkins and Social Darwinism: Reconciling Orthodoxy and Revisionism; or, Towards a New Understanding of the Term**

Just as revisionist scholarship on social Darwinism has profound implications for both revisionist and orthodox views of the turn-of-the-century Court, criticism of these views carries deep implications as well. Recent scholarship on social Darwinism, presented by Mike Hawkins, suggests that perhaps both the orthodox (progressive) and the revisionist interpretations of the Court employ very narrow and misguided characterizations of social Darwinism.

For Hawkins, the history of social Darwinism is punctuated by a number of controversies (1997, pgs. 3-19). The controversies identified by Hawkins typically revolve around four principal issues: the definition, ideological functions, significance and origins of social Darwinism (1997, pgs. 3-19).

Mike Hawkins argues that some historians, such as both Hofstadter and Bannister, adopt what he refers to as the “catchphrase approach,” in which social Darwinism is reduced to a few key phrases such as “survival of the fittest” (Hawkins 1997, pg. 4). For Hawkins, this approach is problematic because it fails to capture the most crucial elements of social Darwinism—the underlying assumptions from which social Darwinism is constructed. In addition, the insufficiency of this approach is demonstrated by the great deal of contention among scholars of social Darwinism with regard to

whether social Darwinism was either a predominant view or a conservative philosophy (Hawkins 1997). For Hawkins, the specific ideologies that may be bolstered by social Darwinism are of little importance for those who wish to identify proponents of this view. Instead, one should focus on identifying elements of the underlying assumptions of social Darwinism in a particular scholar's work (1997). Specifically, one should pay close attention to the presence of notions consistent with what Hawkins refers to as "scientific determinism," the idea that "biological laws [govern] the whole of organic nature" in both the social and psychological sphere (1997, pg. 30- 31). Therefore, Hawkins' conception of social Darwinism explains why historians such as Bannister and Hofstadter appear to have very different interpretations of social Darwinism in American thought. In addition, Hawkins' view reconciles these two opposing views of social Darwinism by demonstrating that the underlying assumptions of social Darwinism allow for a versatility which may be applied to both reform and conservative ideologies.

### **Defining Social Darwinism – A New Approach: Worldviews, Ideologies, and Social Theories**

For Hawkins, the issue of the definition of social Darwinism has led to a quandary resulting in significant impediments to scholars' ability to distinguish with accuracy between social Darwinists and those who are not social Darwinists (1997, pg. 3). For Hawkins, although this difficulty has a number of sources, much of it stems from the approaches themselves (1997). To illustrate, Hawkins notes that many of the scholars of social Darwinism rely on ill-defined conceptualizations of social Darwinism. In fact, one popular approach, which Hawkins refers to as the "catchphrase approach," presupposes

that social Darwinism can be defined as comprising a list of loosely related or unrelated concepts (1997, pgs 3-19).

Hawkins argues that the reliance on these “catchphrases” has led scholars to make significant mistakes in their identification of social Darwinists. For example, though it is argued that English social Darwinists subscribed to a notion of evolution which was synonymous with “the growth of rationality, “other English thinkers of the late nineteenth century, who were “considered by themselves and their contemporaries to be Darwinists, placed their emphasis elsewhere” (Hawkins 1997, pg. 5). Moreover, as Hawkins notes, Benjamin Kidd asserts that evolution might be “religious” rather than “intellectual” in nature (1997, pg. 5). Thus, though Kidd defined himself as a Darwinist, the catchphrase approach would seem to omit him as an English social Darwinist because his notion of evolution fails to comport with the notion of evolution as the growth of rationality.

Therefore, Hawkins concludes,

what is required for an understanding of social Darwinism is not simply an enumeration of its various components but an indication of how these components relate to one another, and of the importance of each to the overall configuration (1997, pg. 5)

Furthermore, Hawkins argues that “any attempt to define Darwinism by means of a list of concepts—even if there is complete agreement on what is to be included in this list—encounters difficulty in classifying theorists who only subscribe to some of its features” (1997, pg 4). Thus, Hawkins contends that this “catchphrase approach” is an insufficient method for identifying social Darwinists because it forces one to evaluate a given work by comparing it to one or more concepts or catchphrases associated with social Darwinism rather than through the underlying themes from which the catchphrase

approach derives its conceptual substance. Thus, the catchphrase approach misses the real matter, which consists of the interconnected assumptions that underpin the catchphrases themselves. For Hawkins, the true substance which underpins the catchphrase approach is the worldview from which these catchphrases are derived, rather than the catchphrases themselves (1997).

In addition, Hawkins observes that, because of the many controversies surrounding social Darwinism, some have suggested that the term ‘social Darwinism’ should be “avoided... altogether” and that the social implications of Darwinism should thus be ignored (1997, pg 16). However, Hawkins argues that the term is too pervasive in European and American culture to be ignored, observing that the term ‘social Darwinism’ simply “refuses to go away” (Hawkins 1997, pg 16).

### **The Ideological Functions of Social Darwinism and Social Darwinism as a Worldview**

Hawkins argues that there are two principal “positions” in the “secondary literature” on the “discursive functions” of social Darwinism (1997, pg. 7). While one position “links [social Darwinism] to specific ideologies such as laissez-faire liberalism, racism or imperialism,” the other position regards it as “multivalent [and] capable of adaptation to a wide range of ideological stances” (Hawkins 1997, pg. 8). Moreover, Hawkins argues, although these positions on its ideological functions are helpful for understanding social Darwinism, they are inadequate for allowing one better to define its “ideological roles” and “discursive boundaries” (1997, pg. 8). Furthermore, in order better to define both the ideological functions and the discursive boundaries of social

Darwinism, a better definition of the term is required. For Hawkins, a better definition is one in which a clear separation of both the “content” and “functions” of social Darwinism must be undertaken (Hawkins 1997, pg 8). Accordingly, the central framework of Hawkins’ method for identifying social Darwinists is located in what he refers to as a “critical” distinction between his notions of “world view” and “ideology” (1997, pg. 21).

For Hawkins, social Darwinism is not a distinct ideology; rather, it is a worldview based on a number of interdependent concepts which are, in turn, founded on a number of assumptions about the “the order of nature and of the place of humanity with in it, and how this order relates to and is affected by the passage of time” (1997, pg. 21). Hawkins adds that “[a world view] also usually contains a view of social reality and where this fits into the overall configuration of nature, human nature and time” (1997, pg. 21). Hawkins writes that,

[...] as a world view, Darwinism is a powerful rhetorical instrument. Its persuasive and flexible rhetorical resources derive from the existence of indeterminacies within the world view itself, i.e. open- endedness and even ambiguity over the precise meaning either of certain key terms or over how they are to be related to other terms...[and] social Darwinism contains a series of indeterminacies which provide a rich source for different rhetorical uses and interpretations...social Darwinism, as a world view, was deployed as a background to different ideological positions (1997, pgs 17-18).

Thus, as worldviews, both Darwinism and social Darwinism are both highly versatile.

The other component to any social theory, as Hawkins indicates, is the ideological component which “comprises a theory of human interactions and how these are mediated by institutions” (1997, pg. 21). Hawkins argues that the ideological component will have a “descriptive element that purports to explain some of the features of social and psychological existence; a critique of certain aspects of this existence, and probably of

other theories as well; and a prescription for how the socio-political system ought to be organized” (1997, pg. 21). Therefore, “[t]he ideological aspect of a theory thus contains both descriptive and evaluative features which often makes difficult the separation of the empirical and normative claims that are being made” (Hawkins 1997, pg. 21).

According to Hawkins, this distinction between worldview and ideology is an important one for two reasons. First, “it enables the discursive nature and functions of social Darwinism to be grasped”; and, second, “it provides the basis for an understanding of the intellectual context in which social Darwinism appeared” (1997, pgs. 23-24). In addition, Hawkins argues that social Darwinism “represented” both a “contribution” and a “response” to the “difficulties” regarding the changes in the thinking with respect to the “traditionally” perceived role of both human nature and “nature in general” which occurred in the late nineteenth century (1997, pg 24).

### **The Social Darwinist Worldview**

Hawkins argues that “Darwin’s theory of natural selection—the theory that forms the nub of the modern theory of evolution—was embedded within and formed part of a wider world view” (1997, pg. 30). According to Hawkins, “this world view was a configuration of assumptions concerning nature, time and human nature which gave natural selection its relevance and meaning” (1997, pgs. 30-31). In addition, he contends that this worldview is characterized by four principal “elements”:

[the notions that] (i) biological laws governed the whole of organic nature, including humans; (ii) the pressure of population growth on resources generated a struggle for existence among organisms; (iii) physical and mental traits conferring an advantage on their possessors in this struggle (or in sexual competition), could,



through inheritance, spread through the population; (iv) the cumulative effects of selection and inheritance over time accounted for the emergence of new species and the elimination of others (1997, pgs. 30-31).

Though Hawkins characterizes Darwinism as consisting of four main assumptions, he contends that social Darwinism merely extends the first principal assumption of social Darwinism, that of “scientific determinism,” to “social existence and to those psychological attributes that play a fundamental role in social life, e.g. reason, religion, and morality” (1997, pg. 31). Thus, for Hawkins,

it is possible to endorse elements (i)-(iv) without adhering to the fifth, either on grounds that such features are unique to mankind, which stands apart from the rest of nature as a divine creation; or, as was increasingly argued by social scientists, because humans are cultural creatures and culture cannot be reduced to biological principles. Social Darwinists, however, are of the view that many (if not all) aspects of culture—religion, ethics, political institutions, and the rise and fall of empires and civilizations in addition to many psychological and behavioral features—can be explained by the application of the first four elements to these domains. Social Darwinists, then, endorse two fundamental facts about human nature: that it is continuous with animal psychology, and that it has evolved through natural selection (1997, pg. 31).

Therefore, as a worldview rather than an ideology, social Darwinism is highly flexible and adaptable to multiple ideological positions. This flexibility is a distinct function of the “indeterminacies surrounding some of its [social Darwinism’s] elements” (Hawkins 1997, pg.32). Moreover, Hawkins notes that one of the most important indeterminacies is the relationship between the fifth element and the “remainder of the world view”—which is “especially pronounced for those whose interest was in social evolution” (1997, pg. 34). Likewise, Hawkins argues that social theorists were then left with “two broad strategies”: they could either be “reductionist” by arguing that “social evolution was

dependent on the biological properties of humans,” or “they could argue that social evolution, while not reducible to biology, nonetheless took place through analogous processes of adaptation, selection and inheritance (1997, pg. 34). However, with respect to both theories, Hawkins observes that “[t]here was always a need to show that the social order in some way mirrored the natural order” (1997, pg. 34). Thus, Hawkins observes that

[t]his created a potential for the production of a whole range of equivalencies, analogies, images, metaphors: that societies are equivalent to biological organisms or that races represent biological species; individuals are equivalent to cells; that war is a manifestation of the struggle for existence; that women and children occupy the same position as ‘savages’ in the scale of evolution, and so on. Metaphors and images were thus central to any social Darwinist enterprise, whatever its scientific pretensions, necessitated by the need to link the first four elements of the world view with the fifth and to show how human nature was governed by inexorable law of nature (1997, pg. 34-35).

Nevertheless, though these indeterminacies give social Darwinism its particular flexibility, this does not mean that this worldview is “so abstract as to indistinguishable from others, or so bland that it could go with anything” (Hawkins 1997, pg. 35). On the contrary, argues Hawkins,

[the social Darwinist worldview] embraces scientific materialism, the rejection of supernatural forces in natural explanation, and a view of humans as having evolved from non-human life-forms and as susceptible to change over time (1997, pg. 35).

Accordingly, these “indeterminacies” allow for “adaptability” rather than “ideological licence”; moreover, “[d]espite its flexibility and the depth of its rhetorical resources, there

were boundaries to both” (Hawkins 1997, pg. 35). According to Hawkins, “these boundaries cannot be arbitrarily specified but must be discovered by an examination of its actual discursive uses” (1997, pg. 35). Indeed, one’s position on any number of issues cannot simply be “deduce[d]” from the knowledge that one holds the social Darwinist worldview because the “indeterminacies” within this worldview “allow for the taking up of quite antithetical positions” (Hawkins 1997, pg. 35).

### **Hawkins and Social Darwinism in American Thought**

As for social Darwinism’s appearance in late-nineteenth and early-twentieth century American thought, Hawkins points to John Fiske, William Graham Sumner and William James as influential examples (1997). Further illustrating the adaptability of this worldview, Hawkins notes that although all of these scholars were influenced by the writings of either Darwin or Spencer, they interpreted the implications of Darwinism or Spencerianism in different ways and adapted their interpretations for different purposes (1997). For example, Fiske interprets Darwin’s notions of evolution to mean that “warfare” would become obsolete as societies evolved (Hawkins 1997, pg. 107). Sumner, on the other hand, argued that war was the natural outcome of evolutionary forces which placed man in the “struggle for existence” (Hawkins 1997, pg. 110). However, though Sumner and Fiske disagreed on the evolutionary implications for societal interaction with respect to issues of war and peace, both were mistrustful of “social engineering,” a quality which both men shared with Herbert Spencer (Hawkins 1997, pg. 109).

In fact, according to Hawkins, Sumner was an outspoken advocate of limited government interference in society, maintaining that government should play no role in

legislating for the public welfare (1997). In fact, Hawkins contends that Sumner argued against state-mandated public welfare policies on the basis that these policies ignored the “order” of “nature” (1997, pg. 111). For Sumner, interference with this order meant serious consequences: in the ‘struggle for existence,’ social “reform” only led to the ‘survival of the unfittest,’ so that such policies merely exacerbated the general hardships which they were intended to remedy (1997, pg. 111). Additionally, Hawkins contends that Sumner’s views appeared to make the case that, by eschewing the natural order, social welfare policies were instrumental in “shifting the burden of the struggle [for existence] from some classes onto others” (1997, pg. 111). Thus, Sumner’s view of social welfare policies merely further expressed his notion that the defiance of nature could only bring dire consequences for all.

However, though these aspects of Sumner’s ideas are important to understanding the relationship between Sumner and Spencer, Hawkins argues that it is the writings in which Sumner outlined his “science of society” (1997, pg 115) that are more indicative of actual social Darwinism (1997, pg 117). In his sociological theories, Sumner explained how various “unconscious, uniform, invariable and imperative modes of thought and practice which became the cultural heritage of the group,” or “folkways,” emerged (1997, pg. 117). According to Hawkins, the significance of Sumner’s notion of the development of folkways is that Sumner argues that the development of these are guided by the “struggle for existence” and the “competition for life” (1997, pg. 117). However, as Hawkins observes, his sociological theories suggest that Sumner believed that “social evolution” was “analogous” to, rather than “derivative” of, “organic evolution” (Hawkins 1997, pg. 117). Similarly, Hawkins contends that

[Sumner] sought to explicate the sources of variation and conservation and the cultural mechanisms through which competition and selection took place. He was a determinist because evolutionary laws were inexorable and unavoidable, but he was not a biological reductionist in that the laws in question operated in and through social beliefs, practices and institutions (Hawkins 1997, pg. 117-118).

While Fiske and Sumner were concerned with issues of war and the relationship of government with society, William James was concerned with demonstrating the implications of evolutionary theory on science and religion (Hawkins 1997, pg 118). According to Hawkins, James, along with Charles Sanders Peirce and John Dewey, regarded Darwin's evolutionary theory as having significant implications for scientific method and reasoning (1997, pg 118). James' pragmatism or pragmatic philosophy challenged the earlier conceptions of science in which science was regarded as a method which was employed to achieve certainty, arguing instead that science is, in fact, "probabilistic" in nature (Hawkins 1997, pg. 118). Thus, James rejected the "deterministic" vision of science proffered by thinkers such as Spencer or Sumner (Hawkins 1997, pg. 118). Likewise, this view of science as probability, argues Hawkins, was directly influenced by Darwinian evolutionism (1997, pg 118). Darwin's influence is clearly illustrated in James' reinterpretation of religious schisms and the emergence of multiple and competing sects as reflective of evolutionary processes (Hawkins 1997, pg. 119). James applied evolutionary theory to society as well as to religion and science, contending that evolutionary processes allow for "geniuses" to emerge and thus, guide "social evolution" in its various directions (Hawkins 1997, pg. 119).

Thus, despite the differences in the social theories of each of these thinkers that Hawkins' assesses, the underlying worldview with which each constructed his respective theory was guided by notions of biological or scientific determinism (1997). Additionally, all of these thinkers placed their theories within the context of evolutionary forces, a fact which, for Hawkins, further illustrates both the significance and the versatility of social Darwinism in American thought at the turn of the century (1997).

### **Assessing the Influence of Social Darwinism on the Turn-of-the-Century Court**

Although Hawkins provides examples of the influence of social Darwinism in American thought at the turn of the century, his work does not attempt to examine the rhetoric of the turn-of-the-century Court. Similarly, Bannister provides no detailed evaluation of the Courts under his reinterpretation of the impact of Darwinism on turn-of-the-century thought. Even Hofstadter makes only scant mention of the Court in his text *Social Darwinism in American Thought*. However, Hofstadter echoes the orthodox thesis of the Court in his argument that Spencer's influence on the Court was clearly reflected in its adoption of the liberty of contract doctrine and further evidenced by Holmes' dissent in *Lochner*, in which Holmes indicted the majority for its predilection for Spencer's *Social Statics* (1944, pg. 46-47). Nevertheless, these examinations of social Darwinism, and the subsequent controversies regarding this view, do not significantly address the Court. However, both Bannister's and Hawkins' views help to serve as a starting point for a reexamination of the influence of social Darwinism on the turn-of-the-century Court.

In fact, upon reexamination, both the Court's rhetoric and the outcomes of the cases, specifically the minimum wage and maximum hours cases, suggest that the Court's behavior could be characterized as confused. For example, on the one hand, the Court proceeded to uphold progressive legislation cases such as *Holden*, *Muller*, and *West Coast Hotel*. Thus, in these cases, the Court seems undeserving of the social Darwinist label. On the other hand, the Court overturned many pieces of important progressive legislation in cases such as *Lochner*, *Morehead*, and *Adkins*, suggesting that it may deserve the designation of social Darwinist after all. However, though this disparity is superficially suggestive of confusion, Mike Hawkins' recent scholarship on social Darwinism may help to explain how the Court might have taken such disparate positions in cases dealing with similar pieces of reformist legislation if social Darwinism indeed constituted a significant influence. To be sure, Hawkins' recent scholarship suggests that scientific determinism is a key assumption of social Darwinism and that, because social Darwinism is a worldview rather than an ideology or a distinct social theory, it is highly versatile and adaptable to a number of ideologies and social theories including both reformist (progressive) and conservative social theories. Finally, both the identification of scientific determinism as the key assumption of social Darwinism and the demonstration of the versatility of this worldview may help to explain the Court's apparent vacillation on progressive legislation with regard to its treatment of minimum wage and maximum hours statutes.

In *Muller*, the Court clearly alluded to notions of scientific determinism in its rationale for upholding the Oregon statute which limited the work hours for laundresses. Additionally, in *West Coast Hotel*, the Court plainly suggested that the protection of the

health and safety of women was clearly within the states' power because of the weakness of their bargaining position compared with that of some other classes. However, the Court in *West Coast Hotel* did not, as it had in *Muller*, point to such notions as either woman's particular weakness in the struggle for "subsistence" or her unique role in the survival of humanity in order to underscore the reasons for her special protections. Nevertheless, the Court made clear that the protection of the health of women is within the public interest. Thus, though the appeal to the notions of evolutionary forces or scientific determinism is less apparent in *West Coast Hotel* than in *Muller*, the notions are at least implied by the Court's allusions to the importance of healthy women in society. However, the evidence for the influence of evolutionary ideas or scientific determinism in *West Coast Hotel* is very weak.

However, though the evidence that the Court was guided by the notion of scientific determinism is clearly evident in *Muller* and is somewhat supported by *West Coast Hotel*, the rhetorical evidence for the influence of scientific determinism or evolutionary notions is not as clearly supported by the other cases presented here. Thus, Hawkins' recent scholarship could explain the Court's contrary positions on similar legislation if it could be shown that the Court was consistently influenced by social Darwinism. However, this scholarship may not be helpful in demonstrating that the Court's vacillation on progressive minimum wage and maximum hours legislation actually follows from the versatility of this worldview.

Add to this, given Bannister's revision of the orthodox view on social Darwinism's influence in American thought, cases such as *Muller* or *West Coast Hotel* may merely reflect that the Court may have been influenced by the reform characteristics



of Darwinism—if the Court was influenced by Darwinism at all—rather than by social Darwinism as it is defined by recent scholars such as Hawkins or earlier scholars such as Hofstadter. Indeed, these cases may perhaps serve as examples of how Darwinism influenced the reform movement rather than serving as the antithesis of it. Bannister’s scholarship, in which he disputes the notion that Darwin’s ideas contributed to the rise of conservative social theory in America at the turn of the century, presents further challenges to interpreting the turn-of-the-century Court’s maximum hours and minimum wage jurisprudence. However, it does not suggest that the Court was not influenced by this worldview. Instead, it merely diminishes the strength of the case based on the rhetoric of the cases presented here.

Bannister’s view of the influence of Darwinism on American thought suggests that *Muller* is explainable if the Court was influenced by Darwin’s ideas because the Court upheld reform legislation while apparently being influenced by Darwinian notions. Furthermore, Bannister’s thesis that Darwinism was influential to reform notions rather than brutal individualism or extreme conservative social and economic ideologies or theories appears to be further supported by the fact that explicitly Darwinian notions do not seem to be the underlying framework for the Court’s decisions in cases such as *Lochner* or *Adkins*, in which the Court dealt major blows to attempts at progressive reform. Thus, this fact suggests that, at least given the rhetorical evidence from *Lochner* and *Adkins*, the majority of the Court in these cases was influenced by something other than Darwinism. That is, since *Lochner* and *Adkins* appear not to have been influenced by evolutionary notions, they must have been influenced by other ideas, such as American traditions or laissez-faire economics, as some scholars have suggested. In fact, the case

that the Court was influenced by notions of laissez-faire or Spencerian notions of limited government interference is supported by the rhetoric of several of the cases—*The Slaughterhouse Cases*, *Munn*, *Allgeyer*, *Lochner*, *Adkins*, and *West Coast Hotel*, for example. Thus, given Bannister’s thesis, there is not a strong case based on the rhetoric of the cases presented here that the Court was influenced by Darwinism, except in *Muller*, where the majority of the Court appears to be appealing tangentially to evolutionary notions. Additionally, because of his contention that social Darwinism was a myth, Bannister’s view may in fact confirm the revisionism of the Court’s behavior, in which it is argued that the turn-of-the-century Court was influenced by American traditions rather than social Darwinism.

Despite the differences between Bannister and Hawkins, both scholars’ work could help to explain *Muller* or, to a lesser extent, *West Coast Hotel*. The problem posed by the other cases, such as *Lochner*, *Adkins*, and *Morehead*, is that they indicate that the Court might have been influenced by some theory other than Darwinism. If the Court can be shown to have been influenced by evolutionary ideas, Hawkins’ view could explain the vacillation or disparity between the Court’s handling of the different cases.

Ultimately, however, the rhetorical evidence from all of the cases presented here apart from *Muller* seems not to suggest that evolution or scientific determinism or evolutionary ideas formed the underlying worldview from which the Court constructed its legal opinions. However, the opinions themselves perhaps contain insufficient information from which to construct a clear enough picture of the justices’ worldviews in order to determine their influences, social Darwinism or otherwise.

Nevertheless, given Hawkins' conceptualization of social Darwinism, it at least appears that the influence of social Darwinism and its progressive influences on the Court cannot be entirely dismissed. On the other hand, given Bannister's view, one could interpret the Court's behavior in some of its cases as merely reflecting the progressive traits of Darwinism, thus further demonstrating the inadequacy of the orthodox thesis in which the Court is labeled social Darwinist. Thus, again, the turn-of-the-century Court's behavior may require further study. Indeed, given the Court's fluctuation on its treatment of minimum wage and maximum hours legislation and its appeal to scientific determinism in *Muller*, the influence of social Darwinism should not be dismissed. Instead, more insight into the Court's thinking may be required than that which can be obtained from the few cases under examination here. Further study of this issue could perhaps include the justices' personal papers or writings, from which greater insight into their worldviews may be gained.

However, the *Lochner*-era Court and the cases most often cited as evidence of social Darwinism do not appear to contain substantial evidence of this view. Nevertheless, the fact that there is little evidence of this view in these cases does not indicate that social Darwinism was not an influence. Rather, this lack of evidence may only suggest that the opinions may be an insufficient source to examine for intellectual influences—social Darwinism or otherwise. Perhaps the limitations of the opinions, as sources for determining intellectual influences, derive from the institutional constraints on the Court itself. That is, because the Court's opinions are couched in the language of the law and must derive their power from precedent, legal principles, or the Constitution rather than from the justices' personal social or economic philosophies, the Court's

rhetoric may be limited as a source for examining the justices' worldviews. Though the justices' personal philosophies may guide their decisions in practice, the opinions of the Court are intended to be grounded in the law, so that the Court's opinions may provide few insights into the justices' extra-legal or extra-constitutional intellectual antecedents or influences. Thus, while the opinions may be of some use in assessing the justices' legal antecedents and legal influences, any research of the Court based solely on the opinions themselves will encounter significant limitations when the researcher attempts to go beyond legal assessments. Indeed, the project presented here reflects these limitations. Nevertheless, it appears that the influence of social Darwinism on the turn-of-the-century Court is an open question which, like the term 'social Darwinism' itself—at least, as Hawkins suggests—refuses to go away.

## **Conclusion**

The turn-of-the-century Court has been accused of social Darwinism by a number of critics. However, revisionists have explained the Court's behavior as following from American traditions rather than from social Darwinism. Nevertheless, critics have demonstrated that the revisionists' interpretations of the evidence are faulty and thus maintain that the Court was indeed social Darwinist.

This controversy over whether the turn-of-the-century Court was social Darwinist is further complicated by the fact that, not unlike the contention surrounding both the activism of the turn-of-the-century Court and its influences, there is a great deal of contention over social Darwinism as well. Although recent scholarship on social

Darwinism reconciles many of these problems related to this lack of consensus, even this recent scholarship is problematic in light of the cases presented here because the rhetoric of the cases which have been most cited as evidence of social Darwinism appear to contain little indication of the influence of Darwinian or evolutionary ideas. This is problematic whether one assesses the turn-of-the-century minimum wage and maximum hours cases under Hawkins' view or under Bannister's view. To illustrate, if one assesses these cases in light of Bannister, it appears that these cases merely confirm both of Bannister's contentions that social Darwinism in American thought is a myth and that Darwinism bolsters reform rather than conservative ideas. Thus, if one interprets the Court in light of Bannister, the Court does not appear to be the bastion of social Darwinism that some critics have suggested. Likewise, if one examines the Court in light of Hawkins' reinterpretation of social Darwinism, there appears to be little indication that social Darwinism was the underlying worldview in the rhetoric of the turn-of-the-century Court's construction or use of the liberty of contract doctrine. In fact, only the rhetoric from *Muller* suggests that the Court may have been guided by anything approaching a social theory informed by Darwinian discourse.

Nevertheless, though there appears to be very little evidence that the turn-of-the-century-Court was influenced by social Darwinism, I believe that the thesis that social Darwinism influenced the Court should not be dismissed entirely. Instead, the limitations of the Court's opinions as sources for researching the Court's intellectual antecedents present significant problems for assessing the Court's extra-legal or extra-constitutional influences. Thus, the issue of the influence of social Darwinism on the turn-of-the-century Court requires further research. Such research might draw from other sources,

which should include, but should not be grounded exclusively in, the Court's legal opinions. Nevertheless, at least within the rhetoric of the minimum wage and maximum hours cases themselves, there is little reason to believe that social Darwinism was a significant influence, if it was influential at all, or played any substantial role in the jurisprudence of the so-called *Lochner*-era Court.

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