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## "The People Who Own the Country Ought to Govern It": The Supreme Court, Hegemony, and Its Consequences

Anthony Walsh  
*Boise State University*

## **“The People Who Own the Country Ought to Govern it:”<sup>\*</sup> The Supreme Court, Hegemony, and Its Consequences**

Anthony Walsh, Ph.D.<sup>\*\*</sup>

### **Introduction**

In 1637, Rene Descartes published one of the great books of intellectual history—*Discourse on Methods*.<sup>1</sup> This book attempted to lay the foundation for the philosophical tradition known as rationalism. It contained epistemological rules for arriving at “certain” truth. Descartes asserted that truth is derived from two mental operations: intuition and deduction. Upon these indubitable rocks would be built an edifice of knowledge enduring forever.

Had Descartes possessed political clout commensurate with his intellectual prestige, and were he and his followers so inclined, they might have founded something called the “Supreme Rationalist Council” designed to maintain the Cartesian purity of subsequent knowledge. Under such an overarching system, peer review would have been the basic principle by which future scientific knowledge was accepted or rejected, but if major questions of appropriateness arose, the Council alone would have ruled on them. The Council would have declared work deemed in violation of rules set forth in the *Discourse* “unCartesian” and consigned it to scientific limbo. The work, of course, would have to be interpreted, and such interpretations might have varied considerably over time and with the composition of the Council. Some Council members might have been more open than others, and some might have possessed idiosyncratic reasons for voting for the publication of papers with which they did not fully agree.

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<sup>\*</sup> Quoted in Richard Hofstadter, *The American Political Tradition* 15-16 (1948).

<sup>\*\*</sup> Associate Professor of Criminal Justice, Boise State University. B.A., Eastern Michigan University, M.A., University of Toledo, Ph.D., Bowling Green State University. I would like to thank my colleague, Professor A. Robert Corbin, for his helpful critical review of this manuscript. I also acknowledge a debt of gratitude to editors Tom Gallagher and Anne Johnson for their heroic efforts to help me to come to terms with the legal system of footnoting.

1. See generally Rene Descartes, *A Discourse of a Method for the Well Guiding of Reason and the Discovery of Truth in the Sciences* (1649).

If such a Council existed, it would have effectively stifled scientific progress by binding it to outmoded concepts. By making science, or any other body of knowledge, conform to a set of rules viewed as inviolable, it would have erected boundaries around what is perforce an open-ended endeavor. Empiricism triumphed over rationalism as a more useful epistemology in science because it allowed for the writing and rewriting of the scientific "rule book" by those who work by it. The only test of the "appropriateness" of the rules of empiricism is how well they work in the furtherance of knowledge.

The value orientation of this article is consistent with Michael Parenti's view that democracy, like science, is an open-ended endeavor upon which "[o]ne should not try to impose, as a precondition . . . , particular class relations, economic philosophies or other substantive arrangements . . . ." <sup>2</sup> The drafters of the United States Constitution imposed preconditions, however, and they established a council of jurists drawn from the same class as themselves to sanctify and protect those preconditions. The preconditions set forth in the U.S. Constitution were the ideas of the ruling class, and the Supreme Court has been the priesthood which has interpreted and defended these ideas against heresy and apostasy since its creation in 1789.

The purpose of this article is to demonstrate the existence of ideological hegemony in the United States and to explore how the Supreme Court has been instrumental in its establishment and perpetuation. Given sociology's interest in the power of values, morals, customs, and traditions to generate behavior, its lack of interest in the role of the Supreme Court is puzzling. An extensive search of the literature reveals no paper dealing with the concept of hegemony in the United States that even mentions the Supreme Court. Yet, it is this body which serves as gatekeeper, cultivator, reinforcer, and legitimizer of the very values, morals, customs, and traditions with which sociologists concern themselves.<sup>3</sup>

In an article characterizing the study of law as the "intellectual stepchild" of sociology,<sup>4</sup> Talcott Parsons decried the sociological neglect of law because "[l]aw is significant, above all, as an

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2. Michael Parenti, *Democracy for the Few* 61 (1977).

3. See Richard Funston, *The Supreme Court and Critical Elections*, 69 Am. Pol. Sci. Rev. 795 (1975). We note that as early as the mid 19th century Alexis de Tocqueville wrote that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Alexis de Tocqueville, *Democracy in America* 280 (Phillips Bradley ed. 1945).

4. See Talcott Parsons, *Law as an Intellectual Stepchild*, 47 Soc. Inquiry 11-58 (1977).

institutional instrument of 'social control'.<sup>5</sup> The law as interpreted by the Supreme Court is important to an understanding of social processes because it demands behavioral, if not attitudinal and valuative, conformity. For Parsons, "[t]he focal point is that the law of the state is *binding* in the sense that not only is compliance defined as 'obligatory' but coercive sanctions are also threatened or applied in case of noncompliance."<sup>6</sup> It is clear that American<sup>7</sup> value orientations in such areas as slavery, abortion, social welfare legislation, pornography, and civil rights wax and wane with Supreme Court decisions. Using National Opinion Research Center data sets, David Barnum showed that when the Court legitimizes formerly illegitimate practices (e.g., abortion), public attitudinal support for those practices increases over time, and when it strikes down a former practice as unconstitutional (e.g., school prayer), public support for the practice tends to wane.<sup>8</sup> A recent experimental study by the present author and A. Robert Corbin found that a sample of older United States citizens were significantly more likely to endorse a series of nine controversial but hypothetical proposals when the source of those proposals was given as the Supreme Court as opposed to the Congress or an unattributed source.<sup>9</sup>

### Hegemony

The basic formulation of the idea of hegemony was presented by Karl Marx and Fredrick Engels in their book *The German Ideology*: "The ideas of the ruling class are in every epoch the ruling ideas; i.e., the class, which is the ruling material force of society, is at the same time its ruling intellectual force."<sup>10</sup> Most authors who

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5. *Id.* at 12.

6. *Id.* at 34 (emphasis in original).

7. The use of "America" or "American" to denote the United States and United States citizens may be considered offensive to Canadians, Mexicans, and Central and South Americans who also consider themselves Americans. However, in the absence of a satisfactory synonym to fit all contexts I will continue to use these terms with apologies to those whom it may offend.

8. See David Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. Pol. 652-666. Barnum was concerned with attitudes regarding birth control, segregated schools, women's roles, interracial marriage, abortion, school prayer, preferential treatment, busing, and homosexual activity. The Supreme Court has addressed all of these issues.

9. See A. Robert Corbin & Anthony Walsh, *The U.S. Supreme Court and Value Legitimacy: An Experimental Approach with Older Americans*, 58 Soc. Inquiry 75-86 (1988). We are aware that the Supreme Court does not make proposals, but this distinction is not important to most people. The experimental demands of consistency and parsimony dictated our use of the term "proposed" for each of the experimental conditions.

10. Karl Marx & Fredrick Engels, *The German Ideology* 39 (R. Pascal ed. 1947).

have written about the concept have commented upon the paucity of work in this area and feel that this in itself is "evidence of the hegemonic process operating among intellectual workers."<sup>11</sup> Such circumstantial evidence points to, but does not demonstrate, the existence of hegemony. Similar efforts have been made to document the existence of hegemony in the United States by authors who have simply deduced hegemonic dominance by quoting hegemony-like statements of supporters of the status quo or by surmising it from either the relative absence of antiestablishment ideas or the overwhelming presence of proestablishment ideas in the schools or in the media.<sup>12</sup>

A more fruitful method of demonstrating the existence of hegemony in the United States is to examine the consequences one might theoretically predict from its presence. If hegemony is a way of interpreting reality which is diffused throughout all society, coloring and informing everything it touches, then its consequences should be empirically demonstrable in many areas of social life. It should be possible to prove that benefits and resources in a society alleged to be hegemonic gravitate in a highly disproportionate manner toward those who are deemed by such a system to be most deserving of them. By the same measure, the share of the national resource/benefit pie accruing to the "less deserving" would be commensurably smaller, making for a rather large gap between the "worthy" and the "unworthy."

Demonstrating the existence of resource/benefit gaps between the top and bottom segments of U.S. society in any great detail is unnecessary. Such gaps exist in every society and are patently obvious to all. But resource/benefit gaps, like hegemony itself, are relative concepts. Otherwise stated, hegemony exists on a continuum and is not an either/or condition. A society which best fits the hegemonic "ideal type" would be one in which those members classified by the value system as "deserving" would be seen to be "superior" to the "deserving" members of other societies which fit the ideal type less well. Conversely, those members classified as "less deserving" in such a society will be seen to be "inferior" to their "less deserving" peers in comparison societies which distribute their resources and benefits more evenly. Valid comparisons, of course, require comparing the United States with

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11. David Livingstone, *On Hegemony in Corporate Capitalist States: Material Structures, Ideological Forms, Class Consciousness, and Hegemonic Acts*, 46 Soc. Inquiry 235 (1976). See also David Sallach, *Class Domination and Ideological Hegemony*, 15 Soc. Q. 38 (1974), and Mark Wardell & Ellsworth Fuhrman, *Controversy and Ideological Hegemony in Sociological Theory*, 22 Soc. Q. 479 (1981).

12. See Sallach, *supra* note 11, at 40.

countries with roughly similar political values and levels of development; i.e., highly developed industrialized democracies. Thus, the society best fitting the hegemonic "ideal type," would be simultaneously first and last, or nearly so, among nations of the same general type in areas of social life governed by resource distribution.

This proposition will be examined in four contexts which are rarely addressed in the literature of inequality. Specifically, U.S. performance will be compared with that of other democratic societies in terms of safety and security in the workplace, medical services, education, and sport. In the interest of brevity, income and wealth distribution and criminal sanctions, areas which are frequently examined in the literature, will not be addressed.<sup>13</sup> Although reference will be made to relevant Supreme Court decisions when examining the separate areas, a brief overview of the Supreme Court's role as a major force in the development and perpetuation of hegemony in the United States is in order.

### The Supreme Court and its Role in American Society

It is unnecessary to be more critical of the Founding Fathers

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13. We should, however, make some passing comment on these issues. A 1980 study determined that among the top eight industrialized democracies of the world, only France exceeded the United States in terms of the inequality of income distribution between the highest and lowest income groups in their respective countries. Henry Reuss, *Inequality, Here We Come*, Challenge 24, at 50 (1981). Given the impact of the Reagan "reforms" since that time, it is reasonable to speculate that the U.S. has now surpassed the French income gap. For example, under the Reagan administration the bottom fifth of the population has lost 7.6% of its income, while the top fifth has gained 8.7%. Edward S. Greenberg, *Capitalism and the American Political Ideal* 193 (1985). In a highly critical paper, Theodore Lowi augments Greenberg's analysis regarding the widening income gap in the U.S. See Theodore J. Lowi, *Ronald Reagan - Revolutionary?*, in *The Reagan Presidency and the Governing of America* (Lester M. Salamon & Michael S. Lund eds. 1985).

The Supreme Court consistently asserted its dedication to social inequality in the latter part of the 19th century and early part of the 20th century by repeatedly ruling the income tax, the major tool of income redistribution, unconstitutional. See, e.g., Russell Galloway, *The Rich and the Poor in Supreme Court History 1790-1982* (1982) for an analysis of the Court's attitudes on the issue of the progressive income tax.

Although the United States has the largest incarceration rate of any democratic country, Gerald Robin, *Introduction to the Criminal Justice System* 352 (3d ed. 1987), and serves up the harshest punishments in the world, Francis Cullen & Karen Gilbert, *Reaffirming Rehabilitation* 181 (1981), which fall largely on the heads of the economically deprived, one may reasonably conclude that the Supreme Court has been relatively liberal in deciding criminal justice issues. When class privilege is threatened by challenges to the status quo, however, such as in union struggles and political dissent, the Court has upheld severe punitive sanctions ordered by lower courts. See, e.g., Parenti, *supra* note 2, at 295-305; Galloway, *supra* at 156; and Alan Wolfe, *The Seamy Side of Democracy: Repression in America* 93-124 (1973).

than to say they showed no pronounced enthusiasm for democracy. The historical record of this period abounds with statements attesting to their sentiments, not the least of which was John Jay's prophetic: "The people who own the country ought to govern it."<sup>14</sup> The Founding Fathers distrusted the "empirical," open-ended nature of democracy, and generally held a Calvinist/Hobbesian view of human nature.<sup>15</sup> Long before Karl Marx, no less an establishment figure than John Adams recognized the economic foundation of politics and the nature of the class struggle.<sup>16</sup>

The preeminent issue for Adams, and for the Constitutional Convention as a whole, was whether people or property should govern.<sup>17</sup> Although there exists voluminous literature debating the outcome, the left wing of historiography and political science has tended to view what came out of the Constitutional Convention as the birth of ideological hegemony in America. Gordon Wood, commenting on the ideological outcome of the Constitutional Convention, stated:

[T]he cost to the future of American politics was high. By using the most popular and democratic rhetoric available to explain and justify their aristocratic system, the Federalists helped to foreclose the development of an American intellectual tradition in which differing ideas of politics would be untimely and genuinely related to differing social interests. . . . [Their concept of] democracy in America was no longer something to be discussed skeptically and challenged but a faith to which all Americans and all American institutions must unquestioningly adhere.<sup>18</sup>

The evidence is abundant that alternative visions of sociopolitical reality have had less of a voice in America than in other democracies.<sup>19</sup> William Ebenstein<sup>20</sup> and Seymour Lipset<sup>21</sup> are

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14. Quoted in Richard Hofstadter, *The American Political Tradition* 15-16 (1948).

15. As Hofstadter pointed out: "The men who drew up the Constitution in Philadelphia in 1787 had a vivid Calvinistic sense of human evil and damnation and believed with Hobbes that men are selfish and contentious." *Id.* at 3. A corollary of such an image is that human nature is not to be trusted. Since a democracy is the rule of the people, it follows that democracy is not to be trusted unless limited by parameters advantageous to men of position and property.

16. See Charles Beard, *Economic Origins of Jeffersonian Democracy* 299-321 (1915).

17. Hofstadter, *supra* note 14, at 14-17. See also George Woodin, *The Shady Side of America* 61 (1974).

18. Gordon Wood, *Democracy and the Constitution*, in *How Democratic is the Constitution?* 17 (Robert Goldwin & William Schambe eds. 1980).

19. Anyone visiting any of the European democracies cannot fail to wonder at the contrast between the variety of opinions freely available to the common man there and the meager fare available in the United States. European newsstands typically offer a wide variety of newspapers covering the political spectrum from far right to far left. Even in the biggest of U.S. cities, we are offered a choice of two

among those who have compared the American tolerance for unorthodoxy and American attitudes about civil liberties with the attitudes existing in other democracies and found American attitudes trailing. In comparing American attitudes to those of the British, Ebenstein wrote: "In Britain, there is no special legislation against communist or fascist groups, no House of Commons Committee on Un-British Activities, no Internal Security Act, no Subversive Activities Act Control Board . . . ." <sup>22</sup> Lipset augments Ebenstein when he writes: "This concept of 'un-American activities,' as far as I know, does not have its counterpart in other [democratic] countries." <sup>23</sup> Lipset continued, "[M]ore than any other democratic country, the United States makes ideological conformity one of the conditions of good citizenship." <sup>24</sup> It is important to realize that, while the Supreme Court has often upheld legislation limiting the free speech of dissidents, <sup>25</sup> it has always remained true to its class colors by never striking down as unconstitutional any act of Congress limiting such dissident free speech. <sup>26</sup>

While some theorists assert that there is no significant value consensus in America <sup>27</sup> (without bothering to determine to what extent it does exist relative to other democracies), Michael Mann believes that hegemony requires only that "those actually sharing in societal power need develop consistent societal values." <sup>28</sup> Any lack of value consensus cannot be translated into political action given the lack of meaningful alternatives in American politics, a

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politically similar newspapers at the most, and a host of tabloids revealing the latest fad in diets, love lives of movie stars, and visitors from outer space. In answering his own rhetorical question—Why wasn't there a revolution in the hungry thirties?—Robert Hutchins states: "It is a great tribute to the power of the American educational system that nobody had any other ideas. Everybody believed in the received ideas." Robert Hutchins, *In the Thirties, We Were Prisoners of Our Illusions, Are We Prisoners in the Sixties?*, N.Y. Times Mag., Sept. 8, 1968, at 49.

20. William Ebenstein, *Today's Isms* 151 (1967).

21. Seymour Lipset, *The Sources of the Radical Right*, in *The Radical Right* 267-68 (Daniel Bell ed. 1964).

22. Ebenstein, *supra* note 20, at 173.

23. Lipset, *supra* note 21, at 267.

24. *Id.* at 267-68.

25. See, e.g., *Dennis v. United States*, 341 U.S. 393 (1951). This ruling upholding the Smith Act essentially outlawed the U.S. Communist Party. The Court upheld the deportation of any class of aliens, including alien political dissidents, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); and in *In Re Debs*, 158 U.S. 564 (1895), it upheld injunctions preventing collective action by labor movements.

26. Theodore Becker, *American Government: Past, Present, Future* 81 (1976), cited in Edward Greenberg, *The American Political System: A Radical Approach* 357 (1980).

27. See Herbert McClosky, *Consensus and Ideology in American Politics*, 58 Am. Pol. Sci. Rev. 361-382 (1964). See also Michael Mann, *The Social Cohesion of Liberal Democracy*, 35 Am. Soc. Rev. 423-439 (1970).

28. Mann, *supra* note 27, at 435.



lack which is best demonstrated by the abysmal voter turnout in American national elections relative to the turnout in other democracies.<sup>29</sup>

Because of the highly circumscribed political socialization obtained within American schools and from the American media, Americans do not seem overly concerned with this lack of politically meaningful alternatives.<sup>30</sup> After all, the most effective way of maintaining class dominance is not through overt coercion, but rather "[t]he most effective aspect of hegemony is found in the suppression of alternative views through the establishment of parameters which define what is legitimate, reasonable, sane, practical, good, true, and beautiful."<sup>31</sup>

The power of the judiciary is the keystone to the maintenance of this legitimacy. As Beard pointed out: "The crowning counterweight to an 'interested and overbearing majority,' as Madison phrased it, was secured in the peculiar position assigned to the judiciary, and the use of the sanctity and mystery of the law as a foil to democratic attacks."<sup>32</sup> Like the Grand Inquisitor's church, the Constitution has been shrouded in a mist of mystery, myth, and authority. It must be interpreted by those in whom we have invested esoteric insight, and whose verbal legerdemain obscures the class interests served by them.

As if to underscore his belief that "[t]he people who own the country ought to govern it,"<sup>33</sup> John Jay, given his choice of any federal office by George Washington, selected the post of Chief Justice of the Supreme Court. He was doubtless aware that from this commanding office he could best secure the compliance of the masses with the wishes of the plutocracy so dear to his heart. From that day forth, the Supreme Court, under a cloak of vacuous democratic verbiage and ritualism, has done its utmost to preserve

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29. Edward Greenberg, *The American Political System: A Radical Approach* 230 (1980).

30. A number of political socialization studies attest to this circumscription or "sugarcoating" of American politics. Speaking of history texts, V.O. Key notes: "Those episodes that redound most to our national glory receive emphasis; and the picture of the past is deficient in cracks and crevices." V.O. Key, *Public Opinion and American Democracy* 317 (1961). Sallach, *supra* note 11, at 43, concurs that: "Teachers, as well as texts, insulate children from political conflict and deviant values or traditions."

31. Sallach, *supra* note 11, at 41.

32. Beard, *supra* note 16, at 161. It is difficult to reconcile the idea of judicial review as expounded by James Madison with the ideals of democracy. As Max Lerner pointed out: "Scratch a fervent believer in judicial supremacy and like as not you will find someone with a bitterness about democracy. The two are as close as skin and skeleton." Max Lerner, *Ideas are Weapons: The History and Use of Ideas* 469 (1939).

33. Hofstadter, *supra* note 14, at 15.

the privilege of the class from which its members have come. As Michael Parenti so well put it:

There is an old saying that the devil himself can quote the Bible for his own purposes. The Constitution is not unlike the Bible in this respect, and over the generations Supreme Court Justices have shown an infernal agility in finding constitutional justification for the continuation of almost every inequity and iniquity, be it slavery or segregation, child labor or the sixteen-hour day, state sedition laws or federal assaults on the First Amendment.<sup>34</sup>

The Court, of course, is not entirely deaf to public opinion. It eventually overturned its most odious decisions. It has, however, consistently delayed social legislation designed to benefit the working classes for decades after similar legislation has been applied in other democracies.<sup>35</sup> The Supreme Court Justices, described by Fred Rodell as "at once the most powerful and the most irresponsible of all the men in the world who govern other men,"<sup>36</sup> continue to serve the interests of the elite to the detriment of the non-elite. This article will now explore the consequences of judicially-inspired hegemony within the areas of workplace safety and security, medical services, education, and sport.

### *Safety and Protection for the Elite and Non-Elite*

The benefits accruing to the elite in American society are perhaps nowhere more obvious than in the areas of the security, safety, and protection of the political elite in relationship to that of the common man or woman. At the top of American society are high government officials and their families, political candidates, and former presidents and their spouses and children, all wrapped in a protective cocoon by the Secret Service whose primary purpose is protection of these officials. The estimated 1986 budget for the Secret Service was \$283,805,000.<sup>37</sup> Taxpayers paid \$10.7 million to protect former presidents Ford, Nixon, and Carter and their families in 1984,<sup>38</sup> and \$27 million to cover the cost of candidate protection during the 1984 elections.<sup>39</sup> In comparison to the protection afforded to U.S. politicians, an article in *Time* magazine

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34. Parenti, *supra* note 2, at 251.

35. *Id.* at 268. Cases illustrating Parenti's assertion follow later in this article.

36. Fred Rodell, *Nine Men: A Political History of the Supreme Court from 1790 to 1955*, at 4 (1955).

37. Executive Office of the President, Office of Management and Budget, 1-S37 (1986).

38. *Dropped Guards*, *Time*, March 25, 1985, at 40 [hereinafter *Dropped Guards*].

39. John Lang, *Grueling Campaign for Secret Service Too*, *U.S. News & World Rep.*, Apr. 23, 1984, at 36.

characterized the protection afforded to the leaders of European democracies as "threadbare."<sup>40</sup>

In contrast to this massive financial outlay to protect a handful of elite citizens, the 1986 budget for the Occupational Safety and Health Administration [hereinafter OSHA] was \$213,859,000, or approximately \$71 million less than that of the Secret Service.<sup>41</sup> OSHA ostensibly exists to protect the common worker from the health and safety risks involved with industrial production, which are undeniably more hazardous than those associated with the political life. Unlike the Secret Service, however, OSHA has never had any real teeth. It is reported that the average fine for a "non-serious" violation of OSHA codes during the period 1972 through 1974 was \$14.99, for serious violations it was \$618.66, and for "willful violations" it was \$866.44.<sup>42</sup>

American occupational safety standards are extremely poor compared with those of other industrialized nations. In the mining industry alone, Edward Greenberg reported U.S. fatality rates twice those of West Germany, three times higher than France, and four times higher than Great Britain.<sup>43</sup> This difference is not limited to fatalities alone. Robert Coles and Harry Huge reported that the pernicious disease of black lung has been virtually wiped out in the strictly regulated mines of Western Europe; they quoted the words of American physician, Dr. Donald Rasmussen, who, after comparing notes with his British and German colleagues, stated: "They are doing so much more there, preventively—it's embarrassing to compare notes with them. If we really wanted to do something about 'black lung' we could."<sup>44</sup>

The good doctor may have been embarrassed, but evidently the Supreme Court felt no reason to blush when in 1978 it set strict limits on OSHA's already feeble enforcement powers in *Marshall v. Barlow Inc.*,<sup>45</sup> and in 1980 on its already inadequate standards in *Indus. Union Dep't. AFL-CIO v. Am. Petroleum Inst.*<sup>46</sup>

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40. *Dropped Guards*, *supra* note 38, at 40.

41. Executive Office of the President, Office of Management and Budget, 1-O17 (1986). The 1986 budget for the Secret Service was \$283,805,000. *Id.* at 1-R33.

42. Dale Beach, *Personnel: The Management of People at Work* 525 (1985).

43. Greenberg, *supra* note 29, at 9.

44. Robert Coles & Harry Huge, *Black Lung: Mining as a Way of Death*, in *Crisis in American Institutions* 321 (Jerome Skolnick & Elliot Currie eds. 1970).

45. 436 U.S. 307 (1978). The Court held that an OSHA inspection of business premises without a search warrant violates the fourth amendment. The Supreme Court found that, based on previous experience, requiring warrants to make OSHA inspections would impose no serious burdens on the inspection system or the courts. *Id.* at 311-25.

46. 448 U.S. 607 (1978). OSHA's Secretary had determined that there was a causal connection between benzene (a toxin) and leukemia (a cancer of the white

Andrew Szasz viewed these decisions as major victories for the owner classes in their efforts to further weaken social regulations in a period of declining working class power.<sup>47</sup>

Such anti-worker rulings were hardly new, as a small sampling of such rulings made in this century alone will attest. In *Lochner v. New York*,<sup>48</sup> for instance, the Court struck down minimum hour legislation as unconstitutionally undermining liberty of contract. In *Hammer v. Dagenhart*,<sup>49</sup> it struck down antichild-labor legislation on the pretext that the law went beyond Congress's power to regulate interstate commerce. In *Adkins v. Children's Hospital*,<sup>50</sup> it ruled minimum wage legislation for women and children unconstitutional. The Supreme Court ruled against railroad worker's pensions in *Railroad Retirement Bd. v. Alton R.R. Co.*,<sup>51</sup> and in a series of antiworking class decisions in that same general period, the Court succeeded in undermining much of President Roosevelt's efforts to meliorate the effects of the Depression for the poor.<sup>52</sup>

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blood cells), and subsequently reduced the permissible exposure limit on airborne concentrations of benzene from the consensus standard of 10 parts benzene per million parts of air (10 ppm) to 1 ppm. The Secretary also prohibited dermal contact with solutions containing benzene. The Fifth Circuit Court of Appeals held the standard invalid because it was supported by findings showing it "reasonably necessary or appropriate to provide a safe and healthful employment," as required by statute. *Id.* at 611-62. The Supreme Court affirmed, noting that:

"[S]afe" is not the equivalent of "risk-free". There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe". Similarly, a workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.

*Id.* at 642.

47. See Andrew Szasz, *The Reversal of Federal Policy Toward Worker Safety and Health*, 50 Sci. & Soc. 25-51 (1986).

48. 198 U.S. 45 (1905).

49. 247 U.S. 251 (1918).

50. 261 U.S. 525 (1923).

51. 295 U.S. 330 (1935).

52. The most significant of these anti-working class decisions came in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). This decision threw out Roosevelt's National Recovery Act designed ostensibly to increase industrial production and put workers back to work. The Court invalidated the Frazier-Lemke Act which provided for mortgage relief for farmers in *Louisville Bank v. Radford*, 295 U.S. 555 (1935), and the Agricultural Adjustment Act, which provided price supports for farmers, in *United States v. Butler*, 297 U.S. 1 (1936). Commenting on these and numerous other similar Supreme Court decisions of the New Deal period, Robert H. Jackson wrote:

Two kinds of power seem always in competition in our democracy: there is political power, which is the power of the voters, and there is the economic power of property, which is the power of the owners. Conflicts between the two bring much grist to the judicial mill. The basic grievance of the New Deal was that the Court has seemed un-

More recently the Court ruled against the workers in *Allied Structural Steel v. Spannaus*.<sup>53</sup> In the *Spannaus* case the Court prohibited the state of Minnesota from requiring companies who leave the state to insure pension payments to retired Minnesota employees through the payment of assessments. In *National Labor Relations Board v. Bildisco*,<sup>54</sup> it held that companies could unilaterally breach collective bargaining contracts with unions without waiting for rulings from bankruptcy judges if companies found such contracts to be "burdensome."

One could go on for many pages reciting the litany of the Court's antiworking class decisions. It is more important, however, to view them in the context of the working class struggles in other democracies. As has already been shown, the Supreme Court successfully delayed proworker legislation for generations after similar legislation was enacted in European countries.<sup>55</sup>

The American political elite are also in a favored position vis-a-vis their counterparts in other democracies in terms of job security. The Supreme Court itself is unelected and unaccountable, and its members enjoy lifetime tenure. No Justice has ever been removed from the Court for any reason, with the exception of Ward Hunt (1873-1882) who served for five years while mentally incompetent until a special law allowed him to retire on full salary.<sup>56</sup> One can scarcely imagine a less democratic institution existing in a democracy, a system of government in which the governed supposedly possess the power to hold decision-makers accountable for their decisions.<sup>57</sup>

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duly to favor private economic power and always to find ways of circumventing the efforts of popular government to control or regulate it. Robert H. Jackson, *The Struggle for Judiciary Supremacy* xii (1941).

53. 438 U.S. 234 (1978).

54. 465 U.S. 573 (1984).

55. See Parenti, *supra* note 2, at 311. If, for example, we look at the history of Great Britain in terms of these issues, we find the Shaftesbury Mines Act of 1842 regulating working conditions in mines, the Ten Hours Bill limiting the working day of women and children in 1847, and the Trade Union Act of 1871 in which unions were formally granted legality. See George Trevelyan, *A Shortened History of England* 462, 495 (1942). This latter Act came 63 years before the Wagner Act did the same for American trade unionism in 1934. In the late 19th and early 20th centuries, the Supreme Court frequently ruled against trade unionists in their battles to organize and bargain for contracts. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908), and *Loewe v. Lawlor*, 208 U.S. 274 (1908).

56. Galloway, *supra* note 13, at 74.

57. There are unelected bodies in other bicameral democracies, but they have only limited powers. These "upper houses" may delay legislation by sending it back to the lower house for "second thoughts." Since they are unelected, however, they cannot make legislation, nor can they void legislation passed by the elected house. See, e.g., Roy Macridis & Robert Ward, *Modern Political Systems: Europe* 83 (1968), for a general discussion of the limits of power placed on unelected parliamentary

Likewise, the American legislature and executive are rather firmly entrenched. Unlike their counterparts in parliamentary democracies, they do not have to face question hours or votes of confidence. Consequently, lacking these formal processes of accountability, their campaign promises are not taken seriously by themselves nor by their constituents, unless, of course, these constituents are the monied lobbyists who financed their campaigns. According to David Livingstone, this lack of reasonable accountability, and the remoteness from the rest of society that it engenders, is one of the hallmarks of hegemony.<sup>58</sup>

Conversely, the average American worker's hold on his or her job is extremely tenuous. Lester Thurow stated: "Nowhere in the world is it easier to fire labor [than in the United States]."<sup>59</sup> The situation has worsened since the *Bildisco* decision and Reagan's destruction of the Professional Air Traffic Controller's Organization. Such actions seem unconscionable and barely imaginable to students of the politics of European democracies. In stating that the problem of unjust firings in the United States is a serious one, Dale Beach added: "European nations are ahead of the United States in providing, by law, protection against unfair dismissal."<sup>60</sup> Moreover, most European nations ascribe to the notion of industrial democracy whereby worker representatives sit on their companies' boards of directors and take an active part in decision-making.<sup>61</sup>

In the area of occupational protection, safety, and security, it appears from the evidence adduced that American elites enjoy a clear-cut superiority over the elites of other democracies, while at the same time America's ordinary workers are commensurably worse off than their peers in other democracies.

### *Medical Attention*

In many respects American medicine is the best in the world. In 1986, the U.S. held the record for the number of Nobel Prizes won in medicine and physiology;<sup>62</sup> the rich and the powerful from all over the world head for American hospitals in search of the fin-

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upper houses. The Supreme Court, on the other hand, has the power to render legislation void by ruling it unconstitutional, thereby engaging in judicial governance.

58. Livingstone, *supra* note 11, at 239.

59. Lester Thurow, *Embattled America: the Struggle for Global Markets*, Saturday Rev., July 7, 1979, at 20.

60. Beach, *supra* note 42, at 579.

61. Robert Mathis & John Jackson, *Personnel: Contemporary Perspectives and Applications* 469 (1982).

62. Guinness Book of World Records 335 (Norris McWhirter ed. 24th ed. 1986).

est medical care money can buy. A total of 1,527 foreign nationals—which included kings, princes, prime ministers, and other dignitaries—from seventy four different countries received treatment at the Cleveland Clinic in 1983.<sup>63</sup> It must be assumed that these dignitaries were referred by their own physicians, a rather clear indication of a medical grassroots consensus that the medical attention available to the elite in America is the world's best.

As opposed to the excellent care provided to those who can afford it, "[a]t any point in time, over 25 million Americans have no health insurance coverage from private health insurance plans or public programs. . . . [S]uch individuals can be and are turned away from hospitals even in emergency situations."<sup>64</sup> The lack of insurance coverage is not evenly distributed across class lines: "The poor are twice as likely to be uninsured as the middle class and three times as likely as those in the upper income groups."<sup>65</sup>

Donald Light stated that "[o]nly the United States among industrialized nations does not provide financial coverage for medical services used by its citizens. Only the United States takes such a punitive approach to care for the poor."<sup>66</sup> The uneven distribution of medical services in the United States is reflected in infant and maternal mortality rates. Among sixteen industrialized democracies, only Belgium, Italy, and New Zealand show higher infant mortality rates than the U.S.<sup>67</sup> None of these comparison nations had a worse record than the U.S. in terms of maternal deaths.<sup>68</sup> What is shameful about these statistics is not the quality of American medical attention, but rather the highly skewed way that the available care is distributed among the "deserving" and the "non-deserving."

As bad as the situation has been for the poor, it is destined to get worse under the Reagan administration's peculiar reimbursement system called Diagnostically Related Groups [hereinafter DRG's].<sup>69</sup> Under this system of cost containment, the poor are in-

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63. Judy Tarjanyi, *Cleveland Clinic Renowned for Royal Treatment*, Toledo Blade, Apr. 19, 1984, at 1, col. 4-5.

64. Karen David & Diane Rowland, *Uninsured and Underserved: Inequalities of Health Care in the United States*, in *The Sociology of Health and Illness* 250 (Peter Conrad & Rochelle Kern eds. 1986).

65. *Id.* at 255.

66. Donald Light, *Comparing Health Care Systems: Lessons from East and West Germany*, in *The Sociology of Health and Illness* 429 (Peter Conrad & Rochelle Kern eds. 1986).

67. U.N. Demographic Y.B., U.N. sales No. E/F. 86. XIII.1 at 364.

68. *Id.* at 370.

69. DRG's are patient groups that are related by similar diagnoses. They classify patients as similarly situated if they are diagnosed with the same disease without consideration of other factors, such as severity of symptomology and time of

creasingly being turned away from proprietary hospitals, a situation which Avedis Donabedian termed "morally reprehensible."<sup>70</sup> He went on to state that there are many who are not concerned with the disparity of medical care available to the rich and the poor, "some who, in fact, have advocated a two-tier system of health care."<sup>71</sup> Of course, there has always been a two-tier system of health care. Now, however, it is being openly advocated as a proper and desirable state of affairs.

Despite this situation, and despite the litany of outrageous medical bills, bankruptcies, and needless deaths recited in the 1972 Senate Health Subcommittee hearings,<sup>72</sup> the Supreme Court has never heard a case in which the access to medical treatment as a right for all citizens was an issue.<sup>73</sup> Perhaps this is not too surprising in a society which believes strongly in the role of the market place, and which views both wealth and poverty as functions of personal merit.<sup>74</sup>

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onset or duration. DRG's emphasize hospital profitability and staffing costs per patient classification level. The general consensus in the medical literature is that DRG's have made hospitals more efficient and profitable, but they have also resulted in the lessening of the quality and quantity of patient care, poor nursing staff morale, and patients being admitted to hospitals later than they should be and being released before they should be. See generally Avedis Donabedian, *Quality, Cost, and Cost Containment*, 32 *Nursing Outlook* (1984).

70. *Id.* at 144.

71. *Id.* at 143.

72. See generally Edward Kennedy, In *Critical Condition: The Crisis in America's Health Care* (1983).

73. An interesting related topic is the attitude of the United States on the issue of maternal leave. The United States is a signatory to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. The parties involved agreed to "introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances." Monica Townson, *Paid Parental Leave*, Presentation to the Colloquium on the Economic Status of Women in the Labor Market, Montreal, Quebec at 1 (Nov. 26-28, 1984) (on file with Law & Inequality). This was designed to recognize the great importance of infant/mother interaction during the critical period of neurophysiological growth. See Anthony Walsh, *Neurophysiology, Motherhood, and the Growth of Love*, 17 *Human Mosaic* 51-60 (1983). Yet, the United States, alone among industrial democracies, does not grant such maternal leave. A case is pending before the Supreme Court regarding this matter at the time of writing, as is a parental leave act that would provide for ten weeks of unpaid leave pending in Congress. See David Bergquist, *Who's Bringing Up Baby: The Need for a National Uniform Parental Leave Policy*, 5 *Law & Inequality* 302 (1987). Of course, only those families able to get by without the mother's income would be able to take advantage of this, assuming that it passes. By way of contrast, other industrialized nations already provide paid leave for up to seven months. See, e.g., Karen Berry, *What the U.S. has to Learn about Women*, Ms., July/Aug., 1987, at 165.

74. Jerome Skolnick & Elliot Currie, *Crisis in American Institutions* 102-104 (1976).



*Education*

As of 1980, the U.S. had won 103 of a total of 200 Nobel Prizes awarded in science.<sup>75</sup> The yearly announcements of prize winners in the media since that time has seen American scientists virtually dominating Nobel Prizes in science. One has only to look at the number of American-authored citations in any foreign scientific journal to become aware of the leadership and prestige of U.S. science and scientists, and, by extension, those who support and profit from this leadership.<sup>76</sup> American dedication and support for excellence and achievement among its intellectual elite, particularly in science, is viewed by Richard Quinney as part of an ideological effort to advance the privilege of the elite to the detriment of the non-elite.<sup>77</sup>

Although American predominance in scientific and technological education continues, it is clear that its leadership in elite education is not reflected in the more general educational achievements of average Americans, who come off rather poorly in international comparisons. A 1983 U.S. Department of Education study of nineteen academic tests found that "American [high school] students were never first or second and, in comparison with other industrialized nations, were last seven times."<sup>78</sup> A 1985 study revealed that U.S. students ten to fourteen years of age score lower in reading skills than their age peer students of eight democratic comparison nations,<sup>79</sup> and Torsten Husen's study of math achievement showed American high school students scoring lower than students from all of his eleven democratic comparison

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75. Monte Davis, *A Vintage Nobel Year*, Discover, Dec. 1980, at 35.

76. For example, the author's informal survey of the most recent issues of six British scientific journals revealed that 62% of the citations were from works that were clearly American in origin.

77. Richard Quinney, Critique of Legal Order 12-13 (1974), states:

The modern institutional order finds its legitimation in an ideology that stresses the rationality of science and technology. A generalized belief in the importance of controlled scientific-technical progress gives legitimacy to a particular class—the one that utilizes science and technology. The extent to which this ideology pervades the whole culture limits the possibility of emancipation, limits even the perception of the need for liberation.

78. National Commission on Excellence in Education, U.S. Dept. of Education, *A Nation at Risk* 8 (1983).

79. James Coleman, *International Comparisons of Cognitive Achievement*, 66 Phi Delta Kappan 403, 405 (1985). But see Joe Dan Austin, *International Study of Achievement in Mathematics: A Reanalysis*, 85 Sch. Sci. & Math. 635 (1985) (averages for U.S. students are lower than those in seven countries analyzed, but the difference may be partially attributable to the U.S. educating more secondary school age children than the others).

nations.<sup>80</sup>

The poor test performance of American school children relative to that of foreign school children appears incongruous beside the spectacular achievement of America's intellectual elite relative to their foreign peers. It is possible that this wide achievement gap between the educational elite who win the prizes and the glory for the United States and the average students who were the subjects of the above studies is a function of differential motivation. It would be difficult to explain, however, why the American educational elite are so much more motivated than their foreign peers while, at the same time, the average American student is so much less motivated, without examining the source of this differential motivation. Motivation flows from perceptions of opportunities and rewards, and opportunities and rewards are functions of resource allocations.<sup>81</sup>

The Supreme Court gave its imprimatur to class-based allocations of educational resources in *San Antonio Indep. School Dist. v. Rodriguez*<sup>82</sup> in 1973. The Court held that it was constitutionally permissible for the state to vary the allocation of educational resources according to the variation of taxable wealth available in different school districts. The result of this ruling is that significant differences in per pupil expenditures exist in rich and poor districts. The Supreme Court's apparent dedication to social inequality adds credence to Kenneth Clark's statement that "American public schools have become significant instruments in the blocking of economic mobility and the intensification of class distinction."<sup>83</sup>

### *Sport and Fitness*

It may appear rather incongruous to include the relatively

80. Torsten Husen, *Are Standards in U.S. Schools Really Lagging Behind Those in Other Countries?*, 64 Phi Delta Kappan 455-460 (1983).

81. Motivation is an impetus to action to achieve some goal. In the parlance of psychology, motivation is a conditioned response to stimuli such as incentives and inducements. The goal toward which one is motivated must be perceived as a realistic possibility for the actor if the motivation is to be maintained. If movements toward the goal are not adequately reinforced along the way, the motivation will be extinguished. See generally Roger Ulrich, Marshall Wolfe, & Marland Bluhm, *Operant Conditioning in the Public Schools*, in *Control of Human Behavior* 336-39 (Roger Ulrich, Thomas Stachnik, & John Mabry eds. 1970). For our purposes, the point is that in order to provide motivational reinforcement the incentives have to be made available in the form of resources. If resources are unevenly distributed so will motivation be unevenly distributed.

82. 411 U.S. 1 (1973).

83. Quoted in Jonathan Kozol, *Death at an Early Age*, in *Crisis in American Institutions* 393 (Jerome Skolnick & Elliot Currie eds. 1976).

unimportant area of sport and fitness in this analysis. There are no Supreme Court decisions specifically related to class-based allocations of resources in this area. One could, however, encompass the allocation of sport and fitness resources under the general biased allocation of educational resources made possible by the *Rodriguez* decision noted earlier.<sup>84</sup> Sport and fitness is included to emphasize the pervasiveness of elitism in the American value structure.

The results of the 1984 Olympic Games in Los Angeles reflect the superiority of the United States in the sporting world. The U.S. won a total of 174 medals, 115 more than its closest rival, West Germany.<sup>85</sup> The athletes who performed so well to enhance the prestige of the United States are the recipients of privileges, such as university scholarships and expensive training facilities which are the envy of athletes in other democracies who do not enjoy them. So, with the possible exceptions of the U.S.S.R. and East Germany, American athletes sit at the pinnacle of world-class sports.

In stark contrast to American superiority in sport among the world's best athletes, the fitness of the average American school child is abysmal. Glen Kirchner noted that ever since the first large-scale comparisons of fitness levels between American and European children were made in 1953, the level of fitness of the American children was consistently found "[s]ignificantly inferior to a comparable group of European children."<sup>86</sup> While there may be many explanations for the poor showing of American school children in this area other than an uneven distribution of resources, these explanations would not be able to simultaneously account for the superb showing of America's top class athletes.

Sport plays "[a] major role in expressing and illustrating our values."<sup>87</sup> William Morgan states that "sport supplies specific answers to important ideological questions. . . in a manner reminiscent to some extent of Gramsci's hegemony theory, as a way of life, a lived consciousness of the various features and aspects of human life."<sup>88</sup> America glorifies the excellence of the talented few, but "a decent society must provide adequate opportunities for

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84. See *supra* notes 82-83 and accompanying text.

85. *Olympic Results*, Idaho Statesman, Aug. 13, 1984, at 15, col. 1.

86. Glen Kirchner, *Physical Education for Elementary School Children* 146 (1981).

87. Robert Simon, *Sport and Social Values* 15 (1985).

88. William Morgan, *Review Essay of Sport and Political Ideology*, by John Hoberman, 12 J. Phil. Sport 90 (1985).

healthy exercise for all its citizens."<sup>89</sup> The most popular American sports (e.g., football and basketball) are realistically open only to those blessed few sitting at the upper extreme of the height and weight distributions, while we remain relatively unimpressed with the more physically egalitarian game of soccer, so beloved by the rest of the world. This, as Morgan pointed out, is another indication, albeit a relatively innocuous one, of the pervasiveness of the ethic of providing a disproportionate allocation of resources to the elite to the detriment of the rest in our schools and colleges.<sup>90</sup>

### Discussion

A society characterized by the rule of hegemony is one so structured that the ideas of the ruling class impinge on all its institutions, both public and private, from top to bottom. Ideologies regarding what is right and proper are designed to benefit the class that define them. This article has shown that America's elite—whether referring to a political, socio-economic, intellectual, or sporting elite—receive such a bounty from the American belief system that they are indeed blessed in comparison to the elites of other similar nations. By itself, this could be interpreted as being simply a function of the richness of resources available in the United States; however, in conjunction with the evidence that America's disadvantaged (or perhaps simply the "non-elite") are commensurably worse off than the disadvantaged or non-elites of the same comparison nations, a different explanation is needed.

The explanation offered here is that the hegemony of the ruling class is more of a reality in America than it is in comparison nations. Further, the Supreme Court of the United States, remote and aloof from the people, has played a major role in the development and perpetuation of this class ideology. Time and again the Court has used the Constitution to hammer the lower classes into ideological submission. It would be difficult to devise a more useful method of achieving ideological conformity than a revered, almost holy, document and an untouchable priesthood charged with interpreting it.

This is not to suggest that the Court generates public attitudes and values in the same way that educational institutions and the mass media do; rather, the Court perpetuates class hegemony in its role as the legitimizer and reinforcer of attitudes and values supportive of the status quo. James Eisenstein pointed out that

89. Simon, *supra* note 87, at 98.

90. See Morgan, *supra* note 88, at 91. (The Left is hostile to sport because it diverts the bourgeois' attention from freedom and work).

the awe and sanctity of the Court assures that its rulings become "visible to the general public, [and] its beliefs in the myths are reinforced."<sup>91</sup> On the other hand, if an idea, value, or attitude becomes mobilized and focused by organizations opposed to the class status quo (e.g., Populists, trade unions, Socialists, Communists) the Court has illegitimized them by upholding actions by the other two branches of government aimed at destroying the perceived threat.<sup>92</sup>

As Quinney pointed out, the real tragedy is that those who suffer under the hegemonic structure do not even perceive the need for liberation.<sup>93</sup> They continue to salute the flag and cite the credo of the Founding Fathers with the firm belief that they too benefit from life in God's country. Americans of all classes seem to believe that if someone is living in poverty, that person is lazy and shiftless. If infants and mothers die during the birthing process, it is because ignorant mothers neglect prenatal care. If the poor are turned away from hospitals, it is because they neglected to insure themselves. If people are injured and killed in unsafe work environments, they have the freedom to choose to quit. If children don't learn or lack fitness, they are not motivated or disciplined. In short, social problems are individualized and the victim is blamed for his or her own victimization. Only by blaming victims of the class structure can the beneficiaries of the same structure legitimize their privileges as deserved.

The available data demonstrates that the consequences that one would predict from the presence of a hegemonic class structure exist in the U.S. As a nation, the U.S. is simultaneously at or near the top and at or near the bottom in terms of safety and security in the workplace, medical attention, educational achievement, and physical achievement in relation to other democratic industrialized nations. The Supreme Court has legitimized this hegemonic class structure whenever called upon to do so. It has used the alchemy of judicial review skillfully to undermine the march of democracy whenever it has perceived democracy's threat

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91. James Eisenstein, *Politics and the Legal System* 321 (1973).

92. It is interesting to note here how the established order has dealt with political third-parties which threatened its rule. Speaking of the unconscionable destruction of a growing Socialist party in 1919, Charles Dunn writes:

After the Socialists won control of some thirty-two municipal governments, their headquarters in several cities were ransacked, their funds confiscated, their leaders jailed, and their newspapers denied mailing privileges. Some immigrant members were deported. Winning candidates were even denied seats in state legislatures and Congress.

Charles Dunn, *American Democracy Debated* 262 (1982).

93. See Quinney, *supra* note 77, at 12-13.

to privilege. Much more research is needed in the neglected area of hegemony and of the Supreme Court's role in its perpetuation. The role of the Supreme Court has been accepted too long as a value-neutral integral part of American democracy by sociologists and laypeople alike. An analysis of its historical role does not support the myth.