

# By What Authority

A Publication of the PROGRAM ON CORPORATIONS, LAW & DEMOCRACY

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*By What Authority*, the name of our publication, is English for *quo warranto*.

*Quo warranto* is the sovereign's command to halt continuing exercise of illegitimate privileges and authority. Evolved over the last millennium by people organizing to perfect a fair and just common law tradition, the spirit of *By What Authority* animates people's movements today.

We the people and our federal and state officials have long been giving giant business corporations illegitimate authority.

As a result, a minority directing giant corporations privileged by illegitimate authority and backed by police, courts, and the military, define the public good, deny people our human and constitutional rights, dictate to our communities, and govern the Earth.

*By What Authority* is an unabashed assertion of the right of the sovereign people to govern themselves.

Private

OR

PUBLIC?

By Mike Ferner

WHAT IS THE PURPOSE OF PUBLIC EDUCATION?

To foster critical thinking and the skills needed to participate in democratic decision-making? To enable young persons to develop their fullest potential? Or to prepare them for their prescribed places in a society where the few govern the many in a corporatized world?

From yesterday's effort to make Dartmouth a public college to today's efforts to keep corporations out of public education, the fundamental question is who designs our institutions and shapes our common life. This question is obscured, however, by politicians' and media focus on school uniforms, standards and discipline.

Take "America 2000," for instance, the six national goals for public education unveiled by President George Bush in 1989. Depending on your perspective, these would save the U.S. educational system from imminent collapse or dangerously accelerate private influence over public education. Arkansas Governor Bill Clinton supported America 2000, and as president

added two goals and convinced Congress to pass the "Goals 2000: Educate America Act" in March, 1994.

Within a month of its passage, the ideological foundation of Goals 2000 was revealed in "Reinventing Education: Entrepreneurship in America's Public Schools," co-authored by Louis Gerstner. A renowned educator with 30 years experience in public schools? No, the CEO of the IBM Corporation. Gerstner et al defined students as "human capital," and urged schools to compare themselves to each other as "Xerox compares itself to L.L. Bean for inventory control."

A Goals 2000 follow-up meeting held in 1996 at IBM Corporation headquarters boasted a Fortune 500 planning committee from the IBM, AT&T, Eastman Kodak, and Procter and Gamble corporations. Officials from the American Enterprise Institute and the Heritage Foundation, think tanks formed to push a corporate agenda, were invited as "resources."

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# PUBLIC

or

# Private?

By Peter Kellman

DO YOU WANT YOUR CHILD TO BE A WTO MINISTER? Big time banker, corporate lawyer, CEO or foundation president? Secretary of state, treasury, Supreme Court justice or even president of the United States? Then here's a heads up: send your child to private school. Of course, we're not talking about tracking your children to Christian Academy High School and on to Bob Jones University. We're talking about Phillips Exeter Academy and then on to Harvard (founded in 1636), William & Mary (1693), Yale (1701), Princeton (1746), Columbia (1754), University of Pennsylvania (1755), Brown (1765), Rutgers (1766), or Dartmouth (1769).<sup>1</sup>

What do these nine private schools have in common? They were organized in the colonial period, subsidized by the public, and have been and still are the training ground for the elite who run the country. Through these private schools they exercise *affirmative action* for their children.<sup>2</sup>

Send your children to private Harvard, Yale or Dartmouth and they will argue cases before or even sit on the U.S. Supreme Court. Elite private school gradu-

ates make the law. Public school graduates obey the law.

Today we rarely question the role of these private schools in determining the direction of our society. However, this has not always been the case. In 1779 the new legislature of the State of Pennsylvania revoked the charter of the *private* University of Pennsylvania and created the *public* University of the State of Pennsylvania. After ten years the

revolutionary movement dissipated and the original charter was reinstated by the legislature.

Shortly thereafter another movement arose, called "Jeffersonian Democracy," and the push to make *private* colleges *public* reappeared.



THE STORY BEGINS IN 1816 when the New Hampshire legislature passed a law which changed the

THE REAL ARGUMENT FOR DEMOCRACY IS, THEN, THAT IN THE PEOPLE WE HAVE THE SOURCE OF THAT ENDLESS LIFE AND UNBOUNDED WISDOM WHICH THE RULERS OF MEN MUST HAVE. A GIVEN PEOPLE TODAY MAY NOT BE INTELLIGENT, BUT THROUGH A DEMOCRATIC GOVERNMENT THAT RECOGNIZES NOT ONLY THE WORTH OF THE INDIVIDUAL TO HIMSELF, BUT THE WORTH OF HIS FEELING AND EXPERIENCES TO ALL, THEY CAN EDUCATE, NOT ONLY THE INDIVIDUAL, BUT GENERATION AFTER GENERATION, UNTIL THEY ACCUMULATE VAST STORES OF WISDOM. DEMOCRACY ALONE IS THE METHOD OF SHOWING THE WHOLE EXPERIENCE OF THE RACE FOR THE BENEFIT OF THE FUTURE, AND IF DEMOCRACY TRIES TO EXCLUDE WOMEN OR NEGROES OR THE POOR OR ANY CLASS BECAUSE OF INNATE CHARACTERISTICS WHICH DO NOT INTERFERE WITH INTELLIGENCE, THEN THAT DEMOCRACY CRIPPLES ITSELF AND BELIES ITS NAME.

—W.E.B. DuBois



charter of private Dartmouth College and created public Dartmouth University. The move to make private Dartmouth College a public university established precedents that not only shaped higher education in the United States, but also determined the relationship between corporations and the states that created them. In changing the charter the legislature exercised public authority over education, declaring:

**“Whereas knowledge and learning generally diffused through a Community are essential to the preservation of free Governments, and extending the opportunities and advantages of education is highly conducive to promote this end...Therefore...be it enacted...”**

The trustees of the private college went to court, arguing that the legislature had illegally taken their property and given it to the trustees of the new public university. The state court disagreed with the trustees on the property question and affirmed the right of the legislature to change the charter of the college. Their reason?

**“Education is a matter of too great moment, too intimately connected with the public welfare and prosperity, to be thus entrusted in the hands of a few. The education of the rising generation is a matter of the highest public concern, and is worthy of the best attention of every legislature.”**

The Program on Corporations, Law and Democracy looks at two interweaving historical streams: one is democracy, which disperses power; the other is corporate control, which concentrates power. Up to this point the Dartmouth case is about democ-

cracy. The governor of New Hampshire and a majority of the legislature did not believe there could be a democratic form of government if a few wealthy people decided who and what would be taught in the state’s largest college. The governor and the legislature insisted that the public had both the right and the responsibility to define education.

On the other hand, the trustees of the *private* college argued that they alone should decide who would be admitted to the college, and they alone would define the goals, structure and curricula of the college; it was their *right* to decide *what* the college would produce and *how* it should be produced. Moreover, the trustees, through a private process, would determine their own successors. In this manner they would make sure the policies set by this elite would continue, cutting off the possibility that the state could appoint representatives of the majority, like public school teachers, carpenters, homemakers, farmers, or populist politicians.

The trustees maintained that when the state stepped in and unilaterally changed the charter of the college, the state violated the trustees’ property rights and their right to contract. In so doing, they argued, the state violated Article 1, Section 10. [1] of the U.S. Constitution, known as the “contracts clause” (“No State shall... pass any...Law impairing the Obligation of Contracts”), and the state constitutional right of “...acquiring, possessing, and protecting, property...”

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IT IS THE HISTORY of **property as power** that brings us to the

Dartmouth case. One definition of property is **the ability to keep others out**. If something is your property it means you control it. Property can be further divided into two classes based on function.<sup>3</sup> The function of your fence is to keep dogs out. However, when property is amassed and consolidated in the hands of an individual or class, it takes on a function different in nature from just keeping others out. It becomes something else; it becomes power over others to determine what they think, where they work, what they breathe, whether they live in a community culture or a consumer culture, and whether they live in peace or at war.

For example, the managers of the General Motors Corporation used the vast resources of the corporation to buy up and bankrupt trolley systems in the major cities of this country. They replaced the trolleys with their buses and cars, cramming the city streets with vehicles and polluting the air. As a result the middle class deserted the cities for the suburbs, General Motors Corporation sold millions of cars, and the public transportation system was replaced with a private one. The managers of General Motors Corporation didn’t just make cars, they created a car culture.

James Madison, primary author of the Constitution, defined everything, even speech, in terms of property. Defining speech as property may seem unrelated to this case until one listens to Daniel Webster, who argued for the trustees of private Dartmouth College before the United States Supreme Court. Webster made the case that even though the



trustees do not own stock in the corporation—that is, they don't have any tangible property at stake—they have a **propertied interest, protected by the U. S. Constitution, in the vote or franchise they exercise over college policy.**

U.S. Supreme Court Justice Story explained this in his Dartmouth Supreme Court opinion:

"It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections; it is as sacred a right, and whatever might have been the prevalence of former doubts, since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege."

In other words, according to Story, the right to sit on the board constituted a propertied interest and was protected by the court.<sup>4</sup>

The attorney defending the state law in front of the state court argued that the governor or anyone elected or hired to perform a governmental function does not have a property right in that function. The state court agreed and found that:

"The office of trustee of *Dartmouth College* is, in fact, a public trust, as much so as the office of governor or of a judge of this court... The trustees have the same interest in the corporate property, which the governor has in property of the state... Nor is it any concern of theirs, whether their powers, as corporators, shall be extended or lessened, any more than it is our private concern whether the jurisdiction of

this court shall be enlarged or diminished. *They have no private right in the institution, except the right of office...*" (italics added)

The U.S. Supreme Court took a different view of the Dartmouth case. Chief Justice Marshall spoke for the majority of the court, stating: "The points for consideration are:

1. Is this contract protected by the Constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?"

In setting up the questions this way, the Court was saying that the **states' responsibility to the people to create a functioning democracy was less important than the states' responsibility to preserve the sanctity of private contracts.**

Chief Justice Marshall wrote:

"On the judges of this Court, then, is imposed the high and solemn duty of protecting, from even legislative violation, *those contracts which the Constitution of our country has placed beyond legislative control; and however irksome the task may be, this is a duty from which we dare not shrink.*" (italics added)

The question the court decided to address was, "Is there a contract?" The majority agreed that there was a contract and that it was violated. They also agreed that when the contract was violated the contracts clause of the Constitution was violated as well. It all seems so simple, but it is not.

Marshall, speaking for the majority, said there was a contract there someplace but he did not really say where. Then along came Justice Story, who supported Marshall's opinion and also

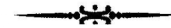
issued his own: "... [T]he grant of a state is a contract, within the clause of the Constitution now in question, and... it implies a contract not to reassume the rights granted." In other words, the relationship between the state and the corporation is a *private* contractual one. Once a contract is created, it cannot be changed unless both parties (in this case the state and the college) agree.

Story also reasoned that if a state law reserves the right to alter or abolish a charter at any time, for any reason, it can do so. A majority of the court *did not* support Justice Story's opinion. Yet from his opinion in the Dartmouth case come two fundamental principles of corporate law:

1. The relationship between the state and a corporation is a private contractual one; therefore, the state is not sovereign over its creation, the corporation, but a party to a private contract.

2. As a party to the contract the state can **reserve the right to change the contract/charter unilaterally.**

After the Dartmouth Case, states began passing "reserve clauses," reserving the right of a state to change or abolish corporate charters. This is tactically very important because it gives us a constitutional venue to challenge corporate authority. Amending or revoking charters can be initiated by citizens, the legislature, or the office of attorney general, depending on the language in a particular state's "reserve clause." So far so good.



HOWEVER, WITH STORY'S CLAIM that the corporation is a private



contract with the state, real violence has been done to our democracy. This assertion opened the door to the privatization of our culture by laying the groundwork for future court decisions that granted the corporation the rights of individual persons, such as the right of free speech; the right to be secure in their houses, papers and effects and against unreasonable searches and seizures; the right not to have the state deny them life, liberty or property without due process of law.

The foundation of corporate constitutional protection is the contracts clause. Once the Court granted this protection it gave future courts the legal basis to finish painting the picture we know today as corporate personhood.

Before Dartmouth every corporation was created by a specific law which gave a group of individuals the legal authority to act as one to perform a particular function that would promote the public good, like operating a bank, building and operating a bridge, or manufacturing textiles. The emphasis was on the legislature passing a law that would contribute to the public good: we need bridges, banks and textiles. Once Story's version was accepted, **that the relation between a state and the corporation was a private contractual one**, the emphasis shifted from public good to private gain. **The role of a state was no longer that of a sovereign over the corporation, but that of a partner in a private contract.** Accordingly, the states legitimated and protected the activities of those wealthy enough to participate in corporate

activity. This was done at the expense of the states' constitutional responsibility to protect and promote the "general Welfare" and the public good.

Are these private schools performing a public function? If they are, **do not the people through our legislatures have a right and obligation, greater than the property right of any individual, to bring a public function under public authority?**

The effect of this Court-created law is summarized in the following paragraph taken from today's Dartmouth College web-site, *A brief history of Dartmouth College*.

"The Dartmouth College case, as it came to be known, is considered to be one of the most important and formative documents in United States constitutional history, strengthening the contracts clause of the Constitution and thereby paving the way for all American private institutions to conduct their affairs in accordance with their charters and without interference from the state."

Had the flow of history taken a different direction, a public college, Dartmouth University, might post on its web-site today:

The Dartmouth University Case, as it came to be known, is considered to be one of the most important and formative documents in United States constitutional history. This case strengthened the "establish justice and promote... the general Welfare" language in the Preamble to the Constitution, and in so doing paved the way for all U.S. institutions to conduct their affairs in accordance with the will of the people and without interference from a propertied class.

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#### ENDNOTES

1. Harvard and Yale were created by the General Court of Massachusetts and Connecticut respectively. The others were created by royal charter except for the University of Pennsylvania, which was granted a charter by the lieutenant governor of Pennsylvania.
2. Of these original nine schools, one, Rutgers, has become public.
3. There are other definitions and concepts of property, like that of intangible property, that are not discussed here.
4. The Merriam-Webster 9th Collegiate Dictionary defines property as "the exclusive right to possess, enjoy, and dispose of a thing."

ON BEHALF OF POCLAD AND OUR READERS, ROSES TO VIRGINIA RASMUSSEN, WHO HAS EDITED THE FIRST FIVE ISSUES OF *By What Authority*. AS THE NEW EDITOR, I AM REAPING THE BENEFITS OF HER EXPERIENCE AND THE PROXIMITY THAT FACILITATES OUR CONTINUING COLLABORATION.

—Mary Zepernick



The following examples from my hometown indicate how such staggering ransom is collected. When Owens-Corning Corporation officials threatened to move company headquarters just outside the city limits, Toledo taxpayers coughed up a \$25 million tax break, worth \$1.2 million annually, plus a \$10 million cash grant. Company directors used the first two years' tax savings to pay CEO Glen Hiner's bonus.

DaimlerChrysler Corporation officials, sitting on \$30 billion in cash reserves, proposed to rebuild Toledo's existing Jeep factory. In exchange they demanded and got \$250,000,000 in public assistance from local and state governments. Included were tax abatements that robbed two local school districts of \$85 million. Barely a year after the deal, one of the districts announced that to repair leaking school roofs, it needed voters to pass a levy to raise an amount similar to the abatement. The other district proposed canceling bus service after voters defeated an operating levy.

AS AN ELECTED OFFICIAL IN TOLEDO, I used to see two big problems with such corporate tax relief: school revenues took big hits and we hapless human persons remaining on the tax rolls had to make up the difference. But what I see now troubles me even more. As the public purse is pauperized, so is self-governance. We citizens spiral downward into an ever-diminishing democracy, exercising less and less political power until it appears there's no solution but corporate charity to rescue and thus define our "failing public institutions."



Like many reversals, it happens little by little. In Toledo's hardscrabble south end, administrators affix a sign to Jones Junior High, thanking the bank that "adopted" the school. At a Chamber of Commerce breakfast, three school officials approach the head table and reach up with outstretched hands to accept their \$10,000 gifts from eminent local tax dodgers Owens-Corning Corporation, DaimlerChrysler Corporation and other Chamber members.

Of course, when schools need more than mere handouts, they ask voters to raise taxes. With astounding audacity, the boldest corporate tax evaders then help bankroll the campaign to pass the levy—from everyone without an abatement!

How is it that corporate officials now decide which levies are supported and which schools get desperately needed funds? What if the DaimlerChrysler's corporate board graciously offers "free" transportation to those grade school students left without bus service? By what authority could they even make such an offer? And what do students at Jones Jr. High learn? That "we the people" are sovereign over schools, government and corporations? Or that supposedly democratic institutions are in fact orphans, grateful to be adopted by generous and powerful business benefactors?

Schools around the nation are subject to similar corporate onslaughts. One district sponsored "art contests," grade school students designing ads for soft drink and hamburger companies, with winning entries painted onto school buses. Hundreds of districts have signed chump change contracts with soft drink companies that trade student health for priceless brand loyalty. In one bizarre example of municipal fascism, a student was suspended for wearing a Pepsi Cola t-shirt on "Coca Cola Day."

For-profit corporations now run 200 schools with 100,000 students. Edison Schools, Inc., operates 79 of these, leading the effort to cash in on a \$700 billion "education industry." Edison founder Christopher Wittle introduced Channel 1, a mix of cable TV news and commercials wired into thousands of schools seeking a "free" supplement for shrinking budgets in return for a guaranteed student audience for corporate programming.

The corporate assault on public education, like the corporate assault on democracy itself, has the single-mindedness of a steamroller. However, public resistance to it is building. As with other such assaults, from toxic chemicals to toxic organizations like the WTO, demands for public education must address the illegitimate power of corporations and challenge the public officials who are complicit in the usurpation of our democracy.

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**ENDNOTES**

1. As quoted by Susan Ohanian in *Kappan*, the journal of Phi Delta Kappa International, Jan. 2000.
2. *Cleveland Plain Dealer*, Feb. 25, 2000.
3. Keynote to Massachusetts Association of Superintendents, 1997.