

# 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.

## CORPORATE SOCIAL RESPONSIBILITY: KICK THE HABIT

By Jane Anne Morris

WHAT TO EXPECT NEXT FROM corporate sponsors of the WTO? There's a well-thumbed page in the corporate playbook, ready to go. Whether or not it works depends on us.

The last time there was a scuffle as worrisome as the Seattle demonstrations, Richard Milhous "Tricky Dick" Nixon was in the White House. Nearly everybody else was in the streets.

We were millions, and we demanded freedom, justice, equality, peace, clean air and water, and the right to choose our

own hairstyles. We knew the joy of thinking it was all possible.

We also knew the raw fear wrought by the pop of tear gas canisters, the glint of sun on gunmetal, and the meltdown of a peaceable crowd being attacked by the forces of law and order.

But it is only at a distance of a quarter century that I begin to recognize the depths of another fear, just as visceral. As I pore over the writings by and about the

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**Editor's Note:** Corporate managers have long used their own and government violence to repress dissent and keep people in line, to pollute civic aspirations for democracy and justice, and to enfeeble organized resistance and advocacy strategies. They have poured their shareholders' money into manipulating public opinion in general and resisting activist opinion in particular.

During the 1960s and '70s, popular critiques of corporate domination flourished. Citizen groups (and even many US senators and representatives), targeted, among others: the International Telephone and Telegraph Corporation (ITT) for leading the attack against the elected Allende government in Chile; the Dow Chemical corporation for the production of the herbicide, agent orange, which the US Government spewed across Vietnam; General Motors—the largest corporation in the world—for its constant assaults upon life, liberty, democracy, and property; and, of course, the seven sister oil companies for pushing everybody around, everywhere.

Today, consciousness of corporate obstruction of democracy is again on the rise. This is a good moment to review corporate manipulation techniques—of language, ideas, and culture. In concert with general browbeating and relentless violations of workers, communities, and nature, these manipulations are sweeping the land with the help of the best opinion makers and shakers tax deductible corporate money can buy.



## Kick the Habit

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corporate elite of that day, a simple fact stares out at me: they were scared witless.

### By What Authority

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Readers are encouraged to get back to us with comments, questions and suggestions. Please include a way for us to contact you, should BWA want to quote you with attribution.

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While we wove our hopes into songs, and scrawled our demands onto placards, they spelled out their fears in journal articles and speeches at chambers of commerce.

The corporation was "under attack as never before,"<sup>1</sup> subject to a "tidal wave" of "dissident groups, structured into onslaught vehicles of unrelenting social action,"<sup>2</sup> according to corporate literature. The future looked "grim."<sup>3</sup> Corporations were about to "lose their autonomy, power and influence."<sup>4</sup> Some managers doubted that large corporations would even be "permitted"<sup>5</sup> in the future. The significance of profit margins shrank as the CEO of one of the U.S.'s largest corporations wondered whether "the corporation as we know it...will survive into the next century."<sup>6</sup>

For those whose greed commanded the rudder of the ship of state, the sight of people in the streets—and not for shopping, mind you—was terrifying.

WHAT A DIFFERENCE a generation makes. Great corporations have more than survived the tumult of the Nixon era. Today, a tiny fraction of the human population, in its role as corporate managers, has been exceedingly successful in using the legal fiction of the corporation to expand its autonomy, power and influence. How did they accomplish this?

While we huddled in coffeehouses and church basements debating strategy, corporate managers plotted in boardrooms. Their diagnosis unfolded into a plan. From their perspective, a Great Danger threatened: government action spurred by public demands. A tried-and-true strategy beckoned: make a show of voluntarily Doing Something and publicize it shamelessly.

**This was a strategy with a thousand faces: corporations as socially responsible, corporations as "citizens" with civic duties, corporations as "good neighbors," corporate executives as "trustees" for the public interest, corporations as "good neighbors," corporate executives as "trustees" for the public interest, "business leaders" offering voluntary codes of conduct, and so on.**

There were three pillars to the corporate plan. (1) placate; (2) co-opt; (3) reframe issues so that in the future, people would "demand" something that corporate managers want to "give."

Corporate donations and other forms of "corporate social responsibility" pacified portions of the community by softening the edges of some of the most egregious and most visible corporate harms. In a quasi-behaviorist twist, they rewarded "good" behavior and disadvantaged "bad" behavior on the part of showcased community and charitable organizations. But most of all they enabled corporate managers to reshape public "questions" so that the "answers" were to come not from a self-governing people but from "corporate good citizens."

Corporate executives were advised that they "should...be able to gauge with some accuracy the degree of social responsiveness that will satisfy the community..."<sup>7</sup> They were warned: "If corporations fail to exert considerably more social initiative, they will be compelled to do so..."<sup>8</sup> "The less voluntary social action U.S. companies take, the more it will be imposed by big government."<sup>9</sup> There were fears that public pressure would "compel legislative response."<sup>10</sup> (Heaven forbid that this should ever occur in a democracy.)

The beneficiaries of "corporate social responsibility" were selected for maximum effect. Corporate managers who lent financial support were well aware that they were "ingratiating themselves with recipients, or pacifying a pressuring public. A corporate gift can be a bribe, paid in return for a gadfly group's promise to keep still and refrain from criticism of corporate policies."<sup>11</sup> On the other hand, "...some business givers have...withheld grants from groups identified with causes they consider to be too militant, or unfriendly to corporate interests."<sup>12</sup>

For some, the success of another round of "corporate social responsibility" was a foregone conclusion. "The social responsibility payoff has been attested to time and again. The most patent cost justification is a simple matter of good stickmanship—sidestepping the penalties of

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# You've Heard of Santa Clara, NOW MEET DARTMOUTH

By Peter Kellman

WE HAVE A GREAT SYSTEM of government. Amending the Constitution is a very different process for wealthy citizens as opposed to the majority of us. If the common people want to change the US Constitution we lobby Congress and get two-thirds of both houses to propose an amendment which must then be approved by three-quarters of the state legislatures. Interestingly, freedom of speech, freedom of the press, freedom from unreasonable search and seizure, the right to a speedy trial, trial by jury, the ending of slavery, the right to vote, and the requirement that US senators be elected by the people rather than appointed by state legislatures all came into being through the amendment process.

The wealthy group of white men who gathered in a closed meeting in 1787 to write our Constitution didn't think any of these rights were important enough to be included. It was left to Anti-federalists and mass movements of African Americans, Populists, workers and women—mass movements of the people—to amend the Constitution in ways they hoped would protect the majority of people from a wealthy minority.

There are four ways to change the Constitution: first is by revolution; a second was mentioned above; the third is through a Constitutional convention which can be called by two-thirds of the states; and the fourth is by a process called judge-made law.

The purpose of this article is to introduce our readers to a key Supreme Court case from a working class historical perspective. The Dartmouth College case wrote into the US Constitution the propertied class's vehicle, the corporation, for concentrating economic and political power. Since few people today examine the Court's actual decisions (which we will do in future BWAs), we focus on how Supreme Courts that followed Chief Justice Marshall's Court of 1819 interpreted Marshall, and Justice Story's supporting opinion, to foster powerful anti-democratic realities:

- (1) gifts of special privilege for the rich to organize their own economic and political institutions, fostered and protected by "the entire strength of the nation;"
- (2) denials of common people's fundamental right and power to organize their institutions.

A good example of judge-made law is the Santa Clara case of 1886, in which the Supreme Court ruled that a corporation is a person under the law and is therefore entitled to equal protection under the Fourteenth Amendment.<sup>1</sup>

An earlier example of judge-made law is the Dartmouth College case of 1819.<sup>2</sup> The word corporation is not mentioned in the Constitution or in any of its 27 amendments. However, Article 1, Section 10 of the US Constitution, known as the Contracts Clause, declares that no state shall make any "Law impairing the Obligation of Contracts..." Chief Justice Marshall, writing for the majority in the Dartmouth case, stated in reference to the corporate status of the college that: "The Opinion of the Court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired,

without violating the Constitution of the United States." That is, a corporation is a contract and therefore is protected by the Constitution.

BUT THERE IS MORE TO THE STORY, a story which laid the legal groundwork for the growth of corporate power at the expense of public education and with it the future of our democracy.

In 1816, a class of small property owners and skilled artisans, who believed in the vision of Thomas Jefferson and many other founding revolutionaries that the United States should have a republican form of government, elected a like-minded governor in the State of New Hampshire. Now the basis of Jeffersonian republicanism rests on

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a society primarily composed of small farmers who own their own land. An important component of republican philosophy is that a republican form of government requires an educated populace. These republicans wanted to insure that a college education would be available for their children and that the content of education would be determined by a public process, not a private one.

However, colleges during that period were mainly private schools such as Yale, Harvard and Dartmouth, holdovers from the colonial days. These schools were linked to the past by class and religion. They were, by design, not republican in nature. Their purpose was to perpetuate the monarchy and class structure of the British Empire, impose Christianity on Native populations, train local clergy to keep the new converts in line, and educate the children of the elite.

Dartmouth College had been chartered by the King of England in 1769 as an Indian Charity School "with a view to spreading the knowledge of the great Redeemer among their savage tribes."<sup>3</sup> It soon evolved into a school "to promote learning among the English, and be a means to supply a great number of churches... with a learned and orthodox ministry."<sup>4</sup>

After the defeat of the British, American revolutionaries and Jeffersonian republicans led a movement to turn the colonial colleges into public schools. For example, the Colony of Pennsylvania had granted a charter to the University of Pennsylvania in 1755, under which the university would be run by a self-perpetuating board, similar to the Dartmouth College board. Following the revolution in 1779 the legislature revoked the charter of the private University of Pennsylvania and in its

The US Supreme Court was not interested in education. The Court was set up to be the final protector of a propertied class.

place established the public University of the State of Pennsylvania.

In New Hampshire the newly elected Governor William Plumer, an ally of Thomas Jefferson, introduced "An Act To Amend The Charter And Enlarge And Improve The Corporation of Dartmouth College." The text of the law, passed on June 27, 1816, begins:

"Whereas knowledge and learning generally diffused through a Community are essential to the preservation of free Government, ...extending the opportunities and advantages of education is highly conducive to promote this end..."

The legislature made private Dartmouth College into public Dartmouth University and ordered the new university to set up public colleges around the state.

Governor Plumer promoted the change, arguing that the original provisions of Dartmouth College "emanated from royalty and contained principles... hostile to the spirit and genius of free government."<sup>5</sup> However, the trustees of Dartmouth objected to the charter change and took the state to court.

The New Hampshire Supreme Court ruled that the legislature had

the authority to change the charter of the college,

"...because it 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."<sup>6</sup>

The decision was appealed to the US Supreme Court, which reversed the state court. As a result, the corporate form was given Constitutional protection and the formation of public colleges in the United States was set back for 50 years.

THE US SUPREME COURT was not interested in education. The Court was set up to be the final protector of a propertied class. Think of it from a working class perspective. A group of wealthy white men goes behind closed doors for a couple of months and comes up with a form of government to protect and promote whom? The people they fear most: slaves, women, indentured servants, Native people and people with little or no property? Not likely.

The founders set up a government with a legislature composed of two bodies: the House of Representatives, elected by the people (the people at that time being, for the most part, white men who owned property), and the Senate with members appointed by state legislatures. So, if the "people's house" passed legislation that benefited the common people at the expense of the ruling elite, it could be prevented from becoming law by the Senate. And, should legislation promoting the interests of the majority over the interests of the wealthy minority be passed in both House and Senate,



there was a president elected by an electoral college, not directly by the people, who could veto the legislation. If all this failed, and the House, Senate and president or a state legislature passed laws detrimental to the ruling elite, the case against that legislation could be taken to the Supreme Court. The justices of this Court are lawyers appointed for life, lawyers who, for the most part, had distinguished careers representing the wealthy.

Imagine how the Supreme Court would have ruled in Dartmouth if it were composed of shop stewards, teachers, homemakers and librarians. But it wasn't. The Supreme Court delivered for the ruling elite, arguing that a corporation is a *private* contract not a *public* law. The Court decreed that although the state creates the corporation when it issues a charter, it is not sovereign over that charter but is simply a party to the contract. All of which means that the corporation is protected from state interference by the Contracts Clause of the Constitution because the relationship is a private not a public one. And so Dartmouth University, a *public* school, once again became *private*. The republican notion that "We the People" required an education in order to have a truly republican form of government was defeated, at least temporarily.

TEN YEARS LATER, Pennsylvania workers declared:

"...Let the productive classes, then, unite for the preservation of their free institutions, and by procuring for all the children in the Commonwealth Republican Education, ... Our government is republican; our education should be equally so."

## THE UNION VERSUS THE TRUST



Cartoon by F. Opper in the New York American circa 1900

The steel combine: "Drop that banner; we have a right to combine but you haven't."

**Public education and the ten-hour day were the two goals of the labor movement in the 1830s. These two demands, made by working people, brought to the fore a question we should be asking today: if we have to spend all our hours working to make ends meet, when will we do the work of self-governance?**

In 1886 the US Supreme Court ruled in the Santa Clara v. Southern Pacific Railroad case that corporations are persons under the law and are therefore entitled to equal protection under the 14th Amendment to the Constitution. This meant that corporate activity to protect and promote the interests of a wealthy minority was protected activity. This is significant because in 1886, women, Native Americans and, once again, most African Americans were denied the right to vote and equal protection of the law.

If there remains any question in your mind as to the role the Courts have played in advancing the preeminence of the Constitutional rights of a propertied class over the human rights of everyone else, consider the following:

**1. THE 14TH AMENDMENT SPECIFIES,** "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." This amendment was added to the Constitution in 1868 to protect freed slaves. But as Supreme Court Justice Hugo Black pointed out, "Of the cases in this court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one

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percent invoked it in protection of the Negro race, and more than fifty percent asked that its benefits be extended to corporations.” For Black, this was undeniable evidence that “the judicial inclusion of the word ‘corporation’ in the Fourteenth Amendment has had a revolutionary effect on our form of government.”<sup>8</sup>

**2. IN MINOR V. HAPPERSETT (1875),** women from Ohio argued that under the Fourteenth Amendment’s protection of due process, the US Constitution established that their right to vote could not be denied by the state.<sup>9</sup> The US Supreme Court rejected that argument. Women received Constitutional protection for the right to vote 48 years later when a people’s movement for equal rights was instrumental in the enactment of the 19th Amendment to the Constitution in 1920. It established that the right to vote could not be denied on the basis of sex and that the Congress had the power to enforce the amendment by passing appropriate legislation.

**3. WHILE THE COURTS WERE EXTENDING “rights” to incorporate “persons” and denying them to women, they had, by 1920, struck down roughly 300 labor laws, laws that were passed by state legislatures for an eight-hour day, laws against requiring people to work on Sunday, and laws against the payment of wages in company scrip.**

**4. MORE THAN 1800 INJUNCTIONS** against labor strikes were issued by the Courts between 1880 and 1931.<sup>10</sup> An injunction is a judge’s order prohibiting a party from a specific course of action. In the labor cases referred to here, it usually meant that workers would break an injunction

*Of the cases in this court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one percent invoked it in protection of the Negro race, and more than fifty percent asked that its benefits be extended to corporations.”*

—Justice Hugo Black

if they went on strike. Many labor people at the time considered injunctions against striking to be a violation of the 13th Amendment to the US Constitution which states, “Neither slavery nor involuntary servitude... shall exist within the United States...”

**5. OF THE 118 LABOR INJUNCTIONS** “heard” in Federal courts between 1901 and 1928, 70 of them were issued *ex parte*, i.e., without hearing the defendants, never notified of the hearing process.<sup>11</sup> Of course, all defendants in these cases were labor unions, union officials, and union members.

**The Dartmouth College case put the corporation on the legal map. Subsequent Supreme Court decisions protected and promoted “rights” for the institutions of the rich and consistently suppressed the rights of all other people, including the right to vote, the right to organize their institutions, and the right to work no more than eight**

hours a day. So which class had a head start? Why should inequalities today be a surprise?

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### Endnotes

1. Santa Clara County V. Southern Pacific Railroad (1886) - 118 U.S. 394.
2. The Board of Trustees of Dartmouth College v. Woodward (1819) - 17 U.S. 518.
3. Elsie W. Clews, *Education, Legislation and Administration of the Colonial Governments*, New York: Macmillan Company, 1899, p. 171.
4. Clews, p. 173.
5. Governor Plumer’s message to the New Hampshire legislature, June 6, 1816.
6. *Reports of Cases Argued and Determined in the Superior Court of Judicature, State of New Hampshire*, 1816 - 1819, p. 135.
7. “Circular to the Working Men of the City and County of Philadelphia,” issued by the Working Men’s Republican Association of the Northern Liberties, *Mechanics’ Free Press*, April 17, 1830.
8. Connecticut General Life Insurance Company V. Johnson, Treasurer of California (1938) - 303 U.S. 77.
9. *Minor V. Happersett (1875)* - 88 U.S. 162.
10. For a listing of the court cases and statistics on labor injunctions, see William E. Forbath, *Law and the Shaping of the American Labor Movement*, Harvard University Press, 1991, Appendix A & B.
11. Leon Fink, from the article “Labor, Liberty and the Law: Trade Unionism and the Problem of the American Constitutional Order.”

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A future issue of *By What Authority* will take on later critiques of the Dartmouth case. For those of you who can’t wait, go to the nearest law library and dig out *The Bank of Toledo v. The City of Toledo and John R. Bond (1853)* - 1 Ohio St. 622. In this case the Ohio Supreme Court took on the Dartmouth decision and how it was interpreted, finding both the decision and its interpretations wanting. This case is a must read for anyone who wants to challenge the legal concept of the corporation.