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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 592**

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COCHEYSE J. GRIFFIN, ETC., *et al.*,

*Petitioners,*

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, *et al.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## BRIEF FOR PETITIONERS

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### Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 322 F. 2d 332, is printed at pages 209-236 of the record. The opinions of the district court, reported sub nom. *Allen* v. *County School Board of Prince Edward County* at 198 F. Supp. 497 and 207 F. Supp. 349, are printed at pages 52-65, and at pages 70-81 of the record. The opinion of the Supreme Court of Appeals of Virginia, reported sub nom. *County School Board of Prince Edward County* v. *Griffin* at — Va. —, 133 S. E. 2d 565, is set forth in full as an appendix to the memorandum of the United States filed in December, 1963, urging that the petition for the writ of certiorari be granted in this case.

## Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). The decree of the court of appeals was entered on August 12, 1963 by a divided court in reliance upon the doctrine of federal abstention (R. 237). Application was made to this Court for a stay pending the filing and disposition of the petition for writ of certiorari (R. 238). That application was granted on September 30, 1963, in an order signed by Mr. Justice Brennan.

On December 2, 1963, the Supreme Court of Appeals of Virginia rendered an authoritative determination of the meaning of Virginia's constitutional and statutory provisions requiring the establishment and maintenance of an efficient system of free public schools, as these provisions relate to respondents, leaving no vestige of the doctrine of federal abstention in the way of a final adjudication of petitioners' federal rights and of respondents' Fourteenth Amendment obligations.[1] This Court granted the petition for writ of certiorari on January 6, 1964, without awaiting further adjudication in the courts below, and the cause is here for final determination on the merits.

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[1] While the doctrine of federal abstention is no longer at issue in this cause, its meaning, import and application have been, petitioners respectfully submit, grossly misunderstood and misconceived by both the district court and the court of appeals. Petitioners have urged that the instant case was not appropriate for application of the doctrine and place reliance on McNeese v. Board of Education, 373 U. S. 668; Allegheny County v. Frank Mashuda Co., 360 U. S. 185; Government and Civic Employees Organizing Committee v. Windsor, 353 U. S. 364. Moreover, once relegated to the state courts, a litigant, petitioners have contended, need press for determination of the state law questions only, preserving his right, after such adjudication, to return to the federal courts for final determination of his federal claims. England v. Louisiana State Board of Medical Examiners, — U. S. — , 32 L.W. 4093, decided January 13, 1964. Cf. NAACP v. Button, 371 U. S. 415.

## Questions Presented

1. Whether the refusal of the board of supervisors to levy taxes and appropriate funds to enable the county school board to operate and maintain public schools in Prince Edward County, being admittedly a device to avoid maintaining and supporting public schools free of racial discrimination as required by the federal constitution and by the decisions and mandates of the courts below, constitutes a denial of the Fourteenth Amendment's guarantees of equal protection and due process of law?

2. Whether the failure of the board of supervisors to levy taxes and appropriate funds for the maintenance and operation of public schools in Prince Edward County, as it is empowered to do under the constitution and statutes of Virginia, constitutes a violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, in the light of the fact that a publicly supported school system is functioning in all other parts of the state?

3. Does the failure of the state board of education, superintendent of public instruction, the county school board and board of supervisors to keep public schools open in Prince Edward County, while a public school system is maintained, operated and supported throughout the state, constitute a denial of petitioners' rights to equal protection and due process of law under the Fourteenth Amendment to the Constitution of the United States?

4. Are federal constitutional rights violated when tax credits, tuition grants or other public funds are used, either for the direct or indirect support of any public or private school which practices racial discrimination, or to frustrate and defeat the declared rights of Negro children to unsegregated public education?

## Statement

### 1. Summary History of the Litigation

This suit was instituted in the district court in 1951 by Dorothy Davis and some hundred other minor plaintiffs.[2] It was argued here along with the other school segregation cases, was decided on the merits in *Brown* v. *Board of Education,* 347 U. S. 483, and was remanded to the district court in a subsequent decision for implementation of petitioners' constitutional rights with all deliberate speed, 349 U. S. 294. Since that time, there have been five decisions by the district court [142 F. Supp. 616 (1956); 149 F. Supp. 431 (1957); 164 F. Supp. 786 (1958); 198 F. Supp. 497 (1961); 207 F. Supp. 349 (1962)] and three decisions by the court of appeals [249 F. 2d 462 (1957); 266 F. 2d 507 (1959); 322 F. 2d 332 (1963)]. In addition, the Supreme Court of Appeals of Virginia has rendered two decisions in this controversy, *sub nom. Griffin* v. *Board of Supervisors,* 203 Va. 321, 124 S. E. 2d 227 (1962); and *County School Board* v. *Griffin,* — Va. — , 133 S. E. 2d 565 (1963). Despite the prolixity of judicial pronouncements in ten long years of litigation, Dorothy Davis and an entire generation of Negro children of public school age have forever lost their constitutional rights to a public school education unimpaired by the burden of racial discrimination.[3] Standing in the place of their predecessors are the present petitioners who seek and hope to enjoy, as their forerunners were unable

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[2] The proceedings commenced as Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (ED. Va. 1952) against the county school board and division superintendent. The commonwealth moved to intervene as a party-defendant, and pursuant thereto, an order was entered on September 14, 1951, making it a party to these proceedings. See Davis v. County School Board (No. 191, October Term, 1952, R. 36-37). After decision by this Court, the state no longer actively participated in this cause.

[3] In 1958, Eva Allen and others intervened and continued these proceedings. See (164 F. Supp. 786). The appeal to the court of appeals, see (322 F. 2d 332), and to this Court is being pursued by a third set of complainants.

to do, equal educational opportunities in the public schools of Prince Edward County, as commanded by the Constitution of the United States.

**2. The Basic and Uncontroverted Facts**

The facts pertinent to adjudication of this cause are not in dispute. On May 3, 1956, the respondent board of supervisors adopted a resolution (R. 50) declaring it to be its policy and intention that:

> . . . no tax levy shall be made upon the said people nor public revenue derived from local taxes shall be appropriated for the operation and maintenance of public schools in said county wherein white and colored children are taught together under any plan or arrangement whatsoever.

On May 5, 1959, the court of appeals ordered the desegregation of the public schools in Prince Edward County to commence in September, 1959 (266 F. 2d 507). On June 3, 1959, the respondent board of supervisors met and refused to approve a budget for the operation of the public schools in the county for the 1959-60 school term and authorized the issuance of a public statement as follows:

> The action taken today by the Board of Supervisors of Prince Edward County has been determined upon only after the most careful and deliberate study over the long period of years since the schools of this county were first brought under the force of Federal Court decree. It is with the most profound regret that we have been compelled to take this action. We do not act in defiance of any law or of any court. Above all we do not act with hostility toward the negro people of Prince Edward County. (sic)
>
> On the contrary, it is the fervent hope of this Board that the friendly and peaceful relations between the white and negro people of this county will not be further impaired (sic) and that we may in due time be able to resume the operation of public schools in this county upon a basis acceptable to all the people of this county.

> The School Board of this county is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that principle and, at the same time, maintain an atmosphere conducive to the educational benefit of our people.
>
> We are also deeply concerned that we should not bring about conditions which would most certainly result in further racial tension and which might result in violence of a nature which would be deeply deplored by all of our people and would destroy all hope of restoring the peaceful and happy relations of the races in this county.
>
> Our action is in accord with the will of the people of the county repeatedly expressed during the past five years and is in promotion of the peace and good order and the general welfare of all the people of Prince Edward County.[4]

Since the date that announcement was made, no public schools have been in operation, and approximately 1800 Negro children have been without a public school education in Prince Edward County (R. 55, 73).

In September, 1959, the Prince Edward School Foundation opened a private, nonsectarian elementary and secondary educational institution for white children (R. 58). During the first year of operation, no tuition was charged, approximately 1,300 white children were enrolled (R. 58), and practically all the white public school teachers in the county were employed as teachers in the schools of the Foundation (R. 59). The Foundation's secondary school was accredited by the state board of education in 1961 (R. 60). For the 1960-61 school term, however, a tuition of $240 per year was established for the

[4] This statement was filed in the Supervisors' Record Book 9 at page 65.

elementary grades and $265 per year for the secondary grades. 1,327 white children enrolled in these schools, and for each high school student and for each elementary school student, state and county tuition grants of $250.00 and $225.00, respectively, were made available (R. 59, 195).[5]

Approximately $130,000 was paid out of the county treasury for the education of white children in the Foundation schools during the 1960-61 school term (R. 62, 189). In addition, $56,000 was allowed in the form of tax credits for contributions made to this institution.[6]

Training centers were set up for the Negro children in 1959. Since no systematic formalized education was offered, however, these centers were not eligible for support under the state or county tuition grant program. They were operated principally for morale purposes, and about one-third of the Negro children of public school age attended (R. 60), leaving the overwhelming majority without any semblance of education whatsoever. On the initiative of the United States, formal educational opportunities are now being made available to these children in the county for the first time since the end of the 1958-1959 school term.

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[5] These grants were made pursuant to Section 22-115.30, Code of Virginia, 1950 (1962 Cum. Supp.) providing for state subsidies and Sections 22-115.31–22-115.36 authorizing local scholarship aid. In accord with the state law, the board of supervisors on July 18, 1960, enacted an ordinance permitting tuition grants of at least $100 per child for education at a private "nonsectarian school located within the County of Prince Edward or in public schools located within the State * * *" (R. 108-111).

[6] On July 18, 1960, the county adopted an ordinance providing for tax credits not to exceed 25% of the total county real and personal property taxes for contributions made to private, nonprofit, nonsecretarian schools located within the county (R. 111-114).

**3. Decisions of the Courts Below**

On May 5, 1959, the court of appeals ordered desegregation of the public schools to commence in September, 1959 (266 F. 2d 507). The following month the board of supervisors refused to provide funds for the continued operation of the public schools. The district court's order on the mandate of the court of appeals was not entered, however, until April 22, 1960 (R. 18), approximately eleven months after the board of supervisors had publicly announced its refusal to finance public schools in the county.

Petitioners filed a supplemental and an amended supplemental complaint, adding the county board of supervisors, the county treasurer, the state board of education and the state superintendent of public instruction as defendants and requesting that they be enjoined from refusing to maintain and operate public schools in Prince Edward County, from expending public funds for the support of any private schools or in reimbursement of money paid for attendance at any private school that excludes petitioners by reason of race, and such further and additional relief as the court deemed justifiable (R. 2-5, 20-27). A trial on the merits was had in the district court, July 24-27, 1961, inclusive (R. 8-9).

On August 23, 1961, the district court filed the first of its memorandum opinions (R. 52), in which it held that the schools in the county had been closed to avoid compliance with court ordered desegregation; and that public monies were being used for the support and maintenance of elementary and secondary schools for white children, operated by the Prince Edward School Foundation. In its decree entered on November 16 (R. 66), the court enjoined the use of tuition grants and tax credits for the support and maintenance of private, nonsectarian schools in Prince Edward County for so long as the public schools remained closed (R. 66). The court refused to decide whether public schools could be abandoned in order to avoid compliance

with the law of the land. To answer that question, interpretation of Virginia's constitution and statutes was considered necessary. The court, therefore, invoked the doctrine of federal abstention, withholding judgment pending final determination by the state courts (R. 58).

Petitioners pursuant to the court's suggestion, instituted mandamus proceedings in the Supreme Court of Appeals of Virginia to determine whether the state constitution and/or laws placed a mandatory duty on the respondent board of supervisors to levy taxes and appropriate funds for the maintenance and operation of public schools in Prince Edward County. The court held that mandamus would not lie to compel the board of supervisors to provide funds for public schools.[7]

Thereupon, invoking their right to pursue their federal claims in the federal courts, *England* v. *Louisiana State Board of Medical Examiners,* — U. S. —, 32 L. W. 4093, January 13, 1964, petitioners, on March 26, 1962, filed a motion for further relief in the district court (R. 123). After hearing, that court on July 25, 1962, ruled that the federal constitution forbade operation of a statewide system of public schools, while the public schools in Prince Edward County remained closed (R. 70-81). It directed the county school board to present by September 7, 1962, plans for the admission of pupils in the public elementary and secondary schools without regard to race or color for the 1962-1963 school term. Assuming that respondents would voluntarily comply, the court declined to afford injunctive relief (R. 80). At the September, 1962, hearing, no plans were submitted, and it was clear that the schools would not be reopened except under legal compulsion.

In October, 1962, the district court issued an order (R. 83-87) setting forth its findings that the schools had been closed to avoid operating them without racial discrimina-

[7] See Griffin v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S. E. 2d 227 (1962), printed in the record at pages 99-108.

tion; that they had been closed for three years and would remain closed unless required by law to be reopened; that practically all the Negro children had been denied formal education and that white children had been educated in private schools; that all other children in the state were granted the privilege of being educated in public schools at public expense; that the state constitution of Virginia mandated the maintenance of an efficient system of public schools throughout the state, and contemplated that monies for such schools should be secured, in part, from the General Assembly and, in part, from local sources; that the state board of education, superintendent of public instruction, division superintendents and local school boards were responsible for establishing, maintaining and operating a statewide public school system; that public schools had been established and were being maintained, supported and administered in accordance with state law, primarily on a statewide basis; that a large percentage of the schools' operating funds came from state sources; that textbooks, curriculum, minimum teachers' salaries and many other school procedures were governed by state law; and that responsible school officials could not abdicate their responsibilities by ignoring them or failing to discharge them.

It decreed that the public schools in Prince Edward County could not be closed to avoid compliance with the requirements of the Fourteenth Amendment, while the state permitted other public schools to remain open at the taxpayer's expense. Entry of an order of compliance was deferred, however, pending review by the court of appeals and this Court (R. 87).

Appeals and cross-appeals were filed (R. 88,114). The cause was argued in the court of appeals on January 9, 1963. On August 12, 1963, that court, one judge dissenting, vacated and remanded the judgments of the district court until a final and authoritative determination of the state law questions had been obtained from the state courts. The instant petition was filed to review this judgment and the merits of the cause.

Meanwhile, in a suit instituted in the state courts by respondents, the Supreme Court of Appeals of Virginia, on December 2, 1963, ruled (133 S. E. 2d 565) that the board of supervisors could not be compelled under state law to appropriate funds for the operation of schools in the county; that the state constitution's requirement that the General Assembly establish and maintain a statewide public school system was met when the state had established a system under which public schools could be maintained and operated with local support; that the state board of education and state superintendent of public instruction have no power or duty to operate public schools apart from the will of the people expressed by local governing bodies; and that tuition grants were allowable to private nonsectarian schools under state law without regard to whether public schools are in operation.

## Summary of Argument

The Commonwealth of Virginia is deeply involved in the maintenance and operation of a statewide public school system. Pursuant to a formula established under the state constitution and statutes, public education is being provided throughout Virginia except in Prince Edward County.

The highest court of the state has ruled that the respondent board of supervisors cannot be compelled to provide funds for the operation of schools within the county; that in the absence of such local funds being made available by the board of supervisors, the other respondents are under no constitutional mandate to operate public schools in Prince Edward County; and that without regard to the presence or absence of public education, state tuition grants may be made available under the state's scholarship program. While this must be accepted as an authoritative determination of the state law, it is not a final

settlement of respondents' Fourteenth Amendment duties and obligations.

There is no question but that the board of supervisors has refused to provide funds for the operation of schools in Prince Edward County in order to avoid court compulsion to desegregate the schools, and to defeat the declared rights of petitioners to equal educational opportunities. *Cooper* v. *Aaron,* 358 U. S. 1, made clear that such action is not permissible under the Constitution of the United States; and that respondents may be constrained to provide the necessary funds for the operation of the public school system in Prince Edward County on an unsegregated basis has been made equally manifest. See *James* v. *Duckworth,* 170 F. Supp. 342 (E. D. Va. 1959), aff'd, 267 F. 2d 224 (4th Cir. 1959) cert. denied, 361 U. S. 835; Cf. *James* v. *Almond,* 170 F. Supp. 331 (E. D. Va. 1959), appeal dismissed, 359 U. S. 1006.

As long as the state is supporting, maintaining or operating public schools in the State of Virginia, the equal protection and due process clauses of the Fourteenth Amendment require that the public schools in Prince Edward County remain open and available to petitioners and all other qualified persons without discrimintion. *James* v. *Almond, supra; Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (E. D. La. 1961), aff'd, 368 U. S. 515; *Aaron* v. *McKinley,* 173 F. Supp. 944 (E. D. Ark. 1959), aff'd, *sub nom. Faubus* v. *Aaron,* 361 U. S. 197. The state may not through any arrangement, device or scheme of any kind, including, petitioners respectfully submit, purported abandonment of public schools, tuition grants and tax credits, evade, frustrate or defeat the constitutional rights of petitioners to access to public education unburdened by racial restrictions. *Cooper* v. *Aaron, supra; Aaron* v. *Cooper,* 261 F. 2d 97 (8th Cir. 1958).

Thus, it is not enough that tuition grants and tax credits, shown in this record to be utilized for the support of segregated "private, nonsectarian schools" operated by the

Prince Edward Foundation, should be barred for only as long as public schools in Prince Edward County remain closed. Under no circumstances can public funds be used as a device to perpetuate separate schools for white and Negro children, and, petitioners respectfully submit, a broad injunction prohibiting such use is both warranted and needed in this case.

Tuition grants, while not unconstitutional per se, become so when used to effectuate an illegal or unlawful end, see *Gomillion* v. *Lightfoot,* 364 U. S. 339, and public funds cannot be employed for the support and maintenance of any institution that practices racial discrimination.

Public education is a vital governmental function. In Prince Edward County, there has been an unconscionable experimentation with ignorance. Here, no abstract question of the duty of the state to provide a public education to all its citizens need be decided; nor must the court deal with the power of a state to abandon public schools altogether. While petitioners contend that it is a function of government to provide public educational facilities—a function of critical importance to the perdurance of democratic institutions, see *Brown* v. *Board of Education, supra*—and that state abandonment of this assumed obligation raises serious questions of substantive due process, it is clear that Virginia has not withdrawn from the field of public education. Thus, unquestioned, rather than debatable, issues of due process and equal protection are present in this case.

The fact that the Board of Supervisors of Prince Edward County has refused to authorize any public education in that county does not dispose of these issues. The difference between a locally assumed obligation to provide various forms of public recreational facilities and the state's assumed obligation to provide a statewide public school system with local support, requires no extended discussion. In the one instance, the obligation is totally local in nature,

and in the other, it is a method for effectuating a statewide program controlled, managed and supervised by the state. And while it might be argued, insofar as local recreational facilities are concerned, that the abandonment of such facilities to avoid compliance with a court decree is not constitutionally actionable, even though other localities in the state continue to provide recreational facilities, see *Tonkins* v. *City of Greensboro,* 276 F. 2d 890 (4th Cir. 1960); *City of Montgomery, Alabama* v. *Gilmore,* 277 F. 2d 364 (5th Cir. 1960), it cannot be said here that there has been such a total abandonment of the statewide program of public education, by virtue of the closure of public schools in Prince Edward County, as to insulate respondents' action from the impact of the Fourteenth Amendment. See *James* v. *Almond, supra; Hall* v. *St. Helena Parish School Board, supra.*

In any event, respondents are guilty of attempting to defeat and frustrate petitioners' right to unsegregated education, *Cooper* v. *Aaron, supra; Hall* v. *St. Helena Parish School Board, supra; Bush* v. *Orleans Parish School Board,* 190 F. Supp. 861 (E. D. La. 1961), aff'd, 365 U. S. 569; of discriminating against them and other students in Prince Edward County on a geographical basis, *Gomillion* v. *Lightfoot, supra; Baker* v. *Carr,* 369 U. S. 186; *Wesberry* v. *Sanders,* — U. S. — , 32 L. W. 4142, Feb. 17, 1964; and of unlawfully using the state and local scholarship programs as a device to maintain and continue a public segregated school system in the county. *Cooper* v. *Aaron, supra; James* v. *Almond, supra.* On any and all of these grounds, it is inconceivable that the federal courts are powerless to secure petitioners' personal and present rights and the Constitution's "warrants for the here and the now" *Watson* v. *Memphis,* 373 U. S. 526, 533.

# ARGUMENT

## I.

### A Statewide System of Public Education is Being Maintained and Operated Throughout the Commonwealth of Virginia Pursuant to the Constitution and Statutes of Virginia.

As early as 1867, the Virginia Constitution provided for a statewide system of free public schools,[8] and upon its restoration to the Union in 1870, the Commonwealth pledged that "the constitution of Virginia shall never be so amended or changed so as to deprive any citizen or class of citizens of the United States, of the school rights and privileges secured by the Constitution of said state."[9]

In the Constitution of Virginia of 1902, the present Article IX was adopted, providing for the establishment and maintenance of an "efficient system of public free schools throughout the State," for its administration and control through various state officers, and for its support by appropriations from state and local sources. Title 22, enacted pursuant to constitutional command, is a series of regulations concerning the state board of education, state

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[8] Sec. 3. The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal, and full introduction into all the counties of the state by the year eighteen hundred and seventy-six, or as much earlier as practicable.

Sec. 4. The general assembly shall have power, after a full introduction of the public free school system, to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy.

* * *

Sec. 11. Each city and county shall be held accountable for the destruction of school property that may take place within its limits by incendiaries or open violence.

[9] 16 Stat. 62, 63, 41st Cong., 2d Sess. (1870).

superintendent of public instruction, division superintendents, local school boards, state and local school taxes, teacher qualifications and certification, curriculum, school buildings, compulsory school attendance, and other aspects of a statewide system of public education.[10]

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[10] Title 22, Code of Virginia, 1950 (1962 Cum. Supp.).

Sec. 22-1 requires the maintenance of an efficient system of public free schools in all cities and counties; Sec. 22-2 places administration of the public school system in the hands of a state board of education, state superintendent of public instruction, division superintendents and local school boards; Sec. 22-5 empowers and required a minimum term of 180 days in each school district (at 1956 Extra Session, c. 66, this provision was amended to delete *required*). Sec. 22-21 authorizes and requires the state board "to do all things necessary to stimulate and encourage * * * activities and interest in the improvement of the elementary and secondary schools." Sec. 22-31, et seq., provides minimum standards for division superintendents to be established by the state board, fixes their duties, provides that part of the salary of division superintendent is paid by the state, and empowers the state board to punish for neglect of duties; Sec. 22-45, et seq., prescribes duties of local school boards; Sec. 22-101 provides that interest from literary fund should be retained for exclusive support and maintenance of public school system; Sec. 22-125, permitting 20% of the qualified voters to petition for an election when the board of supervisors refused to make a levy requested by the school board, to determine whether a levy in lieu of that authorized should be made was repealed by Acts of 1956, Ex. Sess. C. 79, Sec. 3; Sec. 22-126 providing that school tax should be not less than 50 cents and not more than $300 per hundred dollars of the assessed value of property was amended by Acts of 1956, Extra Sess. C. 67 by deleting *not less than 50 cents*; Sec. 22-191 empowers the state board to prescribe rules and regulations for the conduct of high schools, requirements for admission, and conditions upon which pupils may attend such schools. Sec. 22-202 provides for state board examination and certification of teachers (Sec. 22-204), and local boards, subject to some exceptions, may employ only teachers so certified. Secs. 22-233 to 22-240 prescribes subjects to be taught. Before 1959, Secs. 22-251–22-275 made attendance at school compulsory. In 1959, Ex. Sess., C. 2, these provisions were repealed and recodified in Sec. 22-275.1, et seq., the burden of which was to leave compulsory school attendance requirements to each county and city.

This Court's decision in *Brown* v. *Board of Education, supra*, invalidated the state constitutional provision (Article IX, Sec. 140) requiring the separation of the races in the public schools. On August 30, 1954, the Governor of Virginia appointed the Gray Commission on Public Education and directed it to study the effect of the *Brown* decision and to make whatever recommendations it might deem appropriate. In 1955, the Supreme Court of Appeals of Virginia in *Almond* v. *Day*, 197 Va. 419, 89 S. E. 2d 851, construed Sec. 141, Article IX of the Virginia Constitution as prohibiting the diversion of public funds from public schools to nonsectarian private schools. Thus, with the *Brown* and *Day* decisions, it became evident that revisions in the constitution and statutes of the state would be necessary, if there was to be any hope of preserving a segregated public school system.

The Gray Commission's final report was submitted on November 11, 1955. In general, it concluded that separate facilities in the public schools were in the best interest of all the people and that compulsory integration should be resisted. It recommended the calling of a special session of the General Assembly to authorize a constitutional convention to amend Section 141 of the constitution to provide for the payment of tuition grants and other expenses to students who might not desire to attend desegregated public schools.[11] It recommended legislation giving school officials broad discretion in assigning children to the public

[11] At this time, Virginia's regular scholarship or tuition grant program consisted of (1) college and university scholarships (including nursing scholarships) which were and are the subject of Chapter 4 of Title 23 (Secs. 23-31–23-38) of the Code of Virginia, 1950, as amended; and (2) aid to persons denied admission, that being the subject of Chapter 2 of Title 23 (Secs. 23.10–23-13), the chief purpose of which is to provide funds by which Negroes denied admission to state institutions of higher learning may receive funds in aid of their education out of the state.

schools and providing for state tuition grants to enable children being required to attend schools with children of another race to enroll in private segregated schools.

The recommended constitutional convention convened and amended Sec. 141 to permit public funds to be expended for education at private nonsectarian institutions. On August 27, 1956, the General Assembly met in Extra Session, and enacted legislation classified as "massive resistance", designed to prevent the expenditure of public funds for support of schools under compulsory desegregation and to permit the closing of schools desegregated or threatened with desegregation. Title 22 was amended in keeping with this purpose.[12]

In January, 1959, "massive resistance" came to an end with the decision in *Harrison* v. *Day*, 200 Va. 439, 106 SE 2d 636 (1959),[13] and resort was then had to tuition grants and local option programs to insure the continuation of segregated schools in those areas where it was deemed desirable. In the *Harrison* case, the Supreme Court of Appeals held the state was required to support and maintain free schools in which Negro and white children were educated together; that state funds could not be diverted from public schools to the use of children attending private schools; and that Sec. 141, as amended, permitted state tuition grants for attendance at private schools, but not at the public schools' expense. Subsequently, the present

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[12] For a discussion of the events and background of this period, the purpose and intent of massive resistance, see Adkins v. School Board of the City of Newport News, 148 F. Supp. 430, 434-439 (E. D. Va. 1957); NAACP v. Patty, 159 F. Supp. 503, 511-515 (E. D. Va. 1959).

[13] James v. Almond, 170 F. Supp. 331 (E. D. Va. 1959) is also important to this discussion, since it struck down the "massive resistance" statutes enabling the Governor to close schools threatened or required by court order to desegregate. But since it is an intepretation of federal law, it will be discussed more fully, infra.

state and local tuition grant programs were put into effect.[14]

In *Griffin* v. *Board of Supervisors of Prince Edward County, supra,* the Supreme Court of Appeals ruled that the constitution placed no mandatory duty on local boards of supervisors to levy taxes and appropriate money for the support of county free public schools. In *County School Board of Prince Edward Co.* v. *Griffin, supra,* the Supreme Court of Appeals ruled that the General Assembly's mandatory constitutional obligation to establish and maintain an efficient statewide system of free public schools did not require it to operate any schools; and that its obligation was met by setting up a system whereby public schools can be established and maintained with local support. The court also held that the respondent board of supervisors could not be required to provide funds for schools; and that while the state board, state superintendent of public instruction and county school board are agents of the state, they have no duty, power, authority or means to operate the public schools, apart from the will of the local people as expressed by local governing bodies. Finally, the court ruled that state tuition grants are not dependent upon maintenance of public schools.

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[14] The tuition grant program was enacted in its present form in 1960. Section 22-115.29, Code of Virginia, 1950 (1962 Cum. Supp.), recites that the General Assembly "mindful of the need for a literate and informed citizenry" declares it to be the policy of the state to encourage the education of all children. In furtherance of this objective, it is held to be in the public interest to provide scholarships from public funds for the education of children "in nonsectarian, private schools in or outside and in public schools located outside, the locality where the child resides." Authorization is given for levying of local taxes to provide such scholarships.

Section 22-115.30 provides that state grants shall be $125 per child in attendance at elementary schools and $150 per child in attendance at secondary schools. Sections 22-115.31–22-115.36 provide for appropriations for local scholarships and require that local allowances, along with state grants, shall be sufficient to cover the cost of tuition, or a minimum of $250 in elementary school and $275 in secondary school.

With the state law thus settled, the question now presented is whether respondents are similarly free of obligations under federal law.

## II.

### The Denial of Public Educational Opportunities to Petitioners Violates Their Rights to Substantive Due Process and to Equal Protection of the Laws Secured Under the Fourteenth Amendment to the Constitution of the United States.

1. The holding that respondents in failing or refusing to provide public educational facilities in Prince Edward County have breached no state constitutional obligation does not end the matter. The question before this Court is whether any mandate of the Fourteenth Amendment has been violated.

In *Cooper* v. *Aaron, supra,* at page 19, this Court held that the right not to be segregated in the public schools was "so fundamental and pervasive that it is embraced in the concept of due process of law". It ruled that there was a state duty under the constitution to initiate desegregation and to eliminate racial discrimination. Cf. *Taylor* v. *Board of Education of New Rochelle,* 191 F. Supp. 181, 187 (S. D. N. Y. 1961), 195 F. Supp. 231 (S. D. N. Y. 1961), aff'd 294 F. 2d 36 (2nd Cir. 1961), cert. denied, 368 U. S. 940. Mr. Justice Goldberg, speaking for a unanimous Court, stated in *Watson* v. *Memphis, supra,* at page 530: "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools . . ." Nor, petitioners respectfully submit, does the constitution countenance indefinite frustration in the vindication of the rights it guarantees. Those rights

are "not merely hopes to some *future* enjoyment of some formalistic constitutional promise", id. at 533, their effective and realistic implementation is mandated for the present. Thus, the failure or refusal of respondents to undertake to provide petitioners with public education facilities without discrimination would appear to be, in itself, a denial of due process requirements.

Even apart from participation in a statewide program of public education, therefore, the state's attempted abandonment of public education raises grave constitutional questions. *Brown* recognized the unique and fundamental significance of education in a democratic society. Eradication of ignorance is so indispensable to the preservation of our democratic institutions that provisions for public education, available to all on an equal basis, must be viewed as a sovereign function of the state government serving a central and national, rather than a local, purpose. 47 Am. Jur. *Schools,* Sections 6, 7, pages 299, 300; 78 C. J. S. *Schools and School Districts,* Sec. 17, page 632; *Hoskins* v. *Commissioner of Internal Revenue,* 84 F. 2d 627 (5th Cir. 1936). Cf. *Brown* v. *Board of Education, supra,* at 492; *Taylor* v. *Board of Education, supra.* And see the concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357, 372, 375-6 where he stresses a theme recurrent throughout American history that our society places its trust in the power of reason applied through public discussion.

We are not here dealing with a recreational or other publicly supplied facility inviting the utilization of leisure time. The fact that total abandonment of such facilities to defeat declared constitutional rights was held permissible in *Tonkins* v. *City of Greensboro, supra;* and *City of Montgomery, Alabama* v. *Gilmore, supra,* does not mean that such conduct in the more vital area of public education is similarly free from constitutional proscription. Recrea-

tional facilities, their nature, extent and form vary from locality to locality. There is no undertaking to provide such facilities universally or to require adherence to statewide minimum standards or to impose state control and supervision in this field, as is the case with public education. Provision for recreational facilities is still regarded as a local and even private matter—not so with education.

Current newspapers and periodicals reflect a national concern with the quality of public education provided American youth. Survival of our civilization is closely related to governmental ability to provide a broad free public educative process for large numbers of people. American education is under critical examination to determine to what extent it can do a better job of equipping American youth in greater numbers to make meaningful contributions to our society. This is surely not the "moment in history for the state to experiment with ignorance" *Hall* v. *St. Helena Parish School Board, supra.* This is not the time for a state to question the propriety of its support of public education as an appropriate function of government.

Virginia's "experiment with ignorance" is confined to Prince Edward County, but in failing to afford petitioners with public educational facilities without discrimination, respondents have violated their obligations under the Fourteenth Amendment.

2. Equal protection requires that public education be made available in Prince Edward County as long as such facilities are maintained and operated with state support elsewhere in Virginia. *James* v. *Almond, supra,* held that the Fourteenth Amendment forbade the closing of any public school or grade to avoid the effect of the fundamental law, while the state directly or indirectly operates a state school system with public funds, or participates by any arrangement in its management or supervision. Ac-

cord: *Aaron* v. *McKinley, supra.; Hall* v. *St. Helena Parish School Board, supra.*

Under the authority and by virtue of Article IX of the Virginia Constitution and the statutes enacted pursuant thereto, the central and local governments in Virginia have established, and do maintain and operate public free schools in every county except Prince Edward, and did maintain and operate such schools in Prince Edward County until 1959. These schools are financed, supervised and operated jointly by the central and local governments, irrespective of the allocation and division between them of authority and responsibility under Virginia law. The financing of such schools is from general and special tax revenues, including taxes collected from petitioners and other residents of Prince Edward County. Unquestionably, Virginia is still in the business of making public education available on a statewide basis. See *County School Board of Prince Edward County* v. *Griffin, supra.*

The duty to provide unsegregated public education is federal in nature, flowing from the constitutional obligation imposed upon the state to accord equality of privileges to all within its borders. That obligation inhibits the state from providing free public education in other geographical units and divisions in Virginia, while such opportunities and privileges are denied to the children in Prince Edward County. See *James* v. *Almond, supra; Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra. Gomillion* v. *Lightfoot, supra; Baker* v. *Carr, supra; Hall* v. *St. Helena Parish School Board, supra.* Cf. *Wesberry* v. *Sanders, supra.*

All of the respondents are officers, agents, servants or employees of the state or county. Each has a constitutional or statutory responsibility in regard to the establish-

ment, supervision or operation of the public school system. All are agents of the state in the performance of their duties under state law, see *Kellam* v. *School Board of City of Norfolk,* 202 Va. 252, 117 SE 2d 96 (1960); and *County School Board* v. *Griffin, supra,* and their acts in regard to the operation of public schools constitute "state action" within the meaning of the Fourteenth Amendment. See *Cooper* v. *Aaron, supra,* at page 17; *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35-36; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278, 286-287.

*Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, recognized that state action can be accomplished by other than direct and affirmative conduct. In such a case the 14th amendment's safeguards remain operative. For, as this Court stated at page 725 in that case:

> But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . By its inaction, the authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

A surrender of power and authority which effectuates a denial of equal educational opportunities guaranteed by the constitution is as impermissible as a positive act of discrimination. Prince Edward County has no public schools because its board of supervisors prefers to preserve racial prejudices, even at the price of the sponsorship of ignorance. It has refused to exercise its authority to support schools whereby Negro and white children will be educated in the same classroom. The other respondents have made no attempt to step into the breach. Both the refusal of the board of supervisors and the inaction of the other state officials constitute a denial of equal protection of the laws.

See *Cooper* v. *Aaron, supra; Lynch* v. *United States,* 189 F. 2d 764 (5th Cir. 1951); *State of Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; Cf. *Lane* v. *Brown,* 372 U. S. 477; *Catlette* v. *United States,* 132 F. 2d 902, 907 (4th Cir. 1943).

The Supreme Court of Appeals of Virginia has decided that, although the state constitution requires the General Assembly to establish and maintain an efficient free public school system, it has met this obligation by affording each locality an opportunity to become a part of the statewide system, if it chooses to do so. This "local option" program is held to enable a county to close its schools without any remedy being provided under state law.

Local option provisions do not make federal guarantees inoperative. A state may not, consistent with the 14th Amendment's command, refuse to provide public schools in one of its subdivisions in order to frustrate federally secured rights, *Cooper* v. *Aaron, supra;* nor may the state withdraw from the field of education in one county, while it continues to furnish educational facilities in all other areas of the state. *Hall* v. *St. Helena Parish School Board, supra; James* v. *Almond, supra.*

"Local option" cannot insulate respondents from responsibility for closing Prince Edward County's schools, nor can it mitigate an obligation imposed by the federal constitution. Respondents' action or inaction is state action, governed by the 14th Amendment. *Lynch* v. *United States, supra; Burton* v. *Wilmington Parking Authority, supra.* Here respondents have sought to insure, for as long as possible, continued denial of nonsegregated education to Negro school children resident in Prince Edward County, in open and defiant violation of petitioner's constitutional rights and the federal courts' commands. Such activity and its judicial sanction are forbidden pursuant to standards

of the Fourteenth Amendment. See *Shelley* v. *Kraemer,* 334 U. S. 1; *Cooper* v. *Aaron, supra.*

The opinion below disposed of the decision in *James* v. *Almond, supra,* in relation to the issue here raised with the comment, ". . . there was no suggestion that Virginia might not withdraw completely from the operation of schools nor that any autonomous subdivision operating an independent school system might not do so."[15] However, petitioners submit, the issue is not whether Virginia may withdraw completely from the field of public education (although about this petitioners have serious doubts), but whether it can permit school closure in one county, while still participating in a statewide public educational program. *James* v. *Almond, supra,* at page 337, held that the Fourteenth Amendment forbade such action, and, petitioners respectfully submit, this is a correct reading of the law which is determinative of this case.

## III.

### State Action to Frustrate the Operation and Implementation of Equal Educational Opportunities Violates the Fourteenth Amendment to the United States Constitution.

Without regard to specific responsibility for the absence of public schooling in Prince Edward County, it is unassailable that public education rather than traditional racial segregation was abandoned. In order to prevent desegregation, the Prince Edward County Board of Supervisors

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[15] The decision by the Supreme Court of Appeals of Virginia fails to even mention James v. Almond. See County School Board of Prince Edward County, Virginia, et al. v. Griffin, supra.

refused to levy taxes for the support of public schools, after it became manifest that such schools would be required to function on a non-discriminatory basis. The authorization of state and local tuition grants and of local tax credits channeled public funds into support of the segregated Foundation schools. Thus, the state continued its denial of equal educational opportunities mandated by the United States Constitution. *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra; Goss* v. *Board of Education of Knoxville,* 373 U. S. 683; *Watson* v. *City of Memphis, supra.* Action by the state which effects, maintains or supports racial discrimination violates the Fourteenth Amendment. *Johnson* v. *Virginia,* 373 U. S. 61; *Watson* v. *City of Memphis, supra; Boynton* v. *Virginia,* 364 U. S. 454; *Browder* v. *Gayle,* 142 F. Supp. 707 (M. D. Ala. 1956), aff'd, 352 U. S. 903.

It is not open to question that discrimination based upon race is invidious and irrelevant, *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192; *Goss* v. *Board of Education, supra,* and that the state must forego such distinctions and provide equal educational opportunities to all persons. *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra; James V. Duckworth, supra; Bush* v. *Orleans Parish School Board, supra.*

Covert schemes to subvert and avoid implementation of federally guaranteed rights are as objectionable as affirmative and overt acts. This principle obtains whether discrimination be attempted in the selection of juries, *Strauder* v. *West Virginia,* 100 U. S. 303; *Smith* v. *Texas,* 311 U. S. 128; the administration of legislation fair on its face, *Yick Wo* v. *Hopkins,* 118 U. S. 356; the use of federal statutory authority, granted as collective bargaining agent, to effect racial discrimination, *Steele* v. *Louisville & Nashville R. R. Co., supra;* sophisticated efforts to restrict exercise of voting rights, *Terry* v. *Adams,* 345 U. S. 461, or the denial of rights

to unsegregated education. *Cooper* v. ***Aaron, supra; Hall*** v. *St. Helena Parish School Board, supra; Aaron* v. *McKinley, supra.*

In *Cooper* v. *Aaron, supra,* which concerned a similar attempt of a state to avoid implementation of equal educational opportunities for Negro children, this Court said at page 17:

> Thus the prohibitions of the Fourteenth Amendment extend to all action of the State taking the action, or whatever the guise in which it is taken. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether "ingeniously or ingenuously."

For the purposes contemplated by the Fourteenth Amendment, it is immaterial whether the acts purposed to frustrate the exercise of federal rights are directly traceable to the central state government or to one of its subdivisions. *Aaron* v. *Cooper, supra; Hall* v. *St. Helena Parish School Board, supra.* The controlling factor is the attempt and intent, by acts of commission or of omission, to effect a denial of equal educational opportunities secured by the federal constitution. *Cooper* v. *Aaron, supra; Aaron* v. *Cooper, supra; James* v. *Almond, supra; James* v. *Duckworth, supra; Aaron* v. *McKinley, supra; Bush* v. *Orleans Parish School Board, supra.*

Mr. Justice Frankfurter stated this principle concisely in *Gomillion* v. *Lightfoot, supra,* at page 347:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Thus, any arrangement, device, scheme or plan, direct or indirect, ingenious or ingenuous, whereby respondents seek to frustrate the orders of the federal courts and to deny petitioners their right to public education without discrimination is forbidden.

Public funds were made available to those attending the segregated white Foundation schools in the form of state and local tuition grants sufficient to discharge all of their tuition charges. Additional public funds reached the Foundation through tax credits. Moreover, the sequence of events leading to statutory authorization of tuition grants and tax benefits shows an overall pattern to substitute state-supported "private" white segregated schools for public biracial segregated schools, the object being the maintenance of segregation at any price. There is more than a suggestion that Virginia's dealings with public education in Prince Edward County are punitively motivated. The right to nonsegregated education, having been initially declared as a result of the efforts of Negro children of Prince Edward County, it is these same children and their successors from whom all publicly financed education has been withdrawn.

The use of public funds to accomplish a denial or frustration of basic constitutional rights is proscribed. See *Cooper* v. *Aaron, supra.* Thus, here, petitioners respectfully submit, it is not enough to condemn use of tuition grants for the education of children in private nonsectarian schools for only as long as the public schools remain closed. Public funds are foreclosed from any institution that practices racial discrimination, and their use is also forbidden to avoid, defeat or frustrate declared constitutional rights.

Since the school closing was clearly designed to accomplish and did accomplish an unconstitutional purpose, its invalidity is beyond question. See *Gomillion* v. *Lightfoot, supra.* The injunction against the employment of

**public monies, petitioners respectfully submit, must be broad enough to prevent their support of schemes and devices to deny what the federal constitution ordains.[16]**

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[16] That the tuition grant and scholarship program may be effectively used to defeat the Constitution's mandate is made clear from Pettaway v. County School Board of Surry County, Civil Action No. 3766, before the United States District Court for the Eastern District of Virginia, unreported, now pending before the United States Court of Appeals for the Fourth Circuit as No. 9286.

It is instructive to quote from the district court's findings of fact:

> Prior to the 1963-64 school session the Surry County School Board operated one school attended by white students only known as Surry School at which both elementary and high school grades were taught.
>
> The School Board also operated New Lebanon School, an elementary school for Negro students, and L. P. Jackson School, an elementary and high school for Negro students.
>
> On June 24, 1963 the State Pupil Placement Board assigned the infant plaintiffs to the Surry School.

## IV.

### By Way of Relief, This Court May Enjoin the Respondents From Refusing to Provide Financial Support For Operation of Free Public Schools in Prince Edward County.

Petitioners' entitlement to affirmative relief from the closing of public schools in Prince Edward County is urged herein on the basis of three fundamental propositions.

> Shortly thereafter a mass meeting of the white citizens of Surry Countly convened at the Community Center. . . .
>
> The situation concerning the assignment of the Negro students to Surry School was discussed and the possibility of a private school for the white students was mentioned. . . .
>
> A second mass meeting of the white citizens of the County was called soon. . . . The persons attending the meeting decided to organize a private school and made preliminary arrangements to accomplish this. They also recommended to the School Board that public schools be continued.
>
> * * *
>
> The officers and directors of Surry County Educational Foundation organized and established a school. . . .
>
> * * *
>
> All of the white pupils who formerly attended Surry School enrolled in the Foundation's school. Negro pupils who had been assigned to the Surry School sought admission to the Foundation's school and were denied. Enrollment in the school is by invitation of the officers of the Foundation. No white child who has applied for admission has been denied. No Negro child who has applied for admission has been enrolled.
>
> On August 24, 1963 the School Board closed Surry School due to lack of sufficient pupils to justify its operation and released all of the teachers in that school from their contracts. These teachers were employed by the Foundation's school.
>
> * * *
>
> The tuition at the Foundation's elementary school is $375 and at its high school $380. State and County tuition grants made available by § 22-115.29 et seq. of the Code of Virginia, 1950, as amended, provide $250 for elementary school children and $275 for high school children. The balance of the cost is being paid by the parents of the individual students upon various terms.

Firstly, public education in Prince Edward County was discontinued to abrogate, frustrate, avoid, and circumvent implementation of petitioners' right to equal educational opportunities. Cf. *Cooper* v. *Aaron, supra; Bush* v. *Orleans Parish School Board, supra.* Secondly, the Commonwealth of Virginia is providing, supporting, and maintaining public schools in all localities of Virginia except Prince Edward County, thereby discriminating geographically against all students in the county. *Gomillion* v. *Lightfoot, supra; Baker* v. *Carr, supra; Hall* v. *St. Helena Parish School Board, supra; Wesberry* v. *Sanders, supra.* And finally, in making public funds available to the white only Prince Edward Foundation schools by means of tuition grants and authorization of tax credits, the state is furnishing education to white children in the county and denying it to Negroes. That such discrimination is prohibited by the Fourteenth Amendment's equal protection and due process clauses is not even arguable. *Bolling* v. *Sharpe,* 347 U. S. 497; *Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra; Goss* v. *Board of Education, supra; Peterson* v. *Greenville,* 373 U. S. 244. Cf. *Colorado Anti-Discrimination Com.* v. *Continental Air Lines,* 372 U. S. 714.

Petitioners do not question the conclusions of the state court as to the purpose and effect of state law. Admittedly, the state has broad powers in determining how a privilege of the state shall be bestowed, but where it acts to alter or destroy a federally guaranteed right, that action is subject to review and the consequent injury is subject to reparation by the federal courts.

Petitioners' right to nonsegregated education is patent. *Brown* v. *Board of Education, supra.* Equally evident is the obligation of the state to accord its benefits on a nondiscriminatory basis. *Cooper* v. *Aaron, supra.* Given this correlative constitutional right and duty, this Court may order such equitable relief as will effectuate the reopening of schools in Prince Edward County. Any remedy, to be adequate, must accomplish a vindication of petitioners'

rights and compliance with the law by state officials. Such redress and obeisance can be achieved only by enjoining the respondents from failing to take the necessary steps—*i.e.,* levying the required taxes and appropriating sufficient funds for the operation of the public schools in Prince Edward County for the school year commencing in September, 1964 and thereafter. There is no doubt that this Court may render such relief. Cf. *Cooper* v. *Aaron, supra.*

In *Sterling* v. *Constantin,* 287 U. S. 378, 403, this Court said:

> If the matter is one of judicial cognizance, it is because of an alleged invasion of a right, and the judicial power necessarily extends to the granting of the relief found to be appropriate according to the circumstances of the case.

Federal courts have such power as would secure the preservation and protection of rights guaranteed by the United States Constitution, and this Court is commissioned to enforce such decrees as it may enter. *Virginia* v. *West Virginia,* 246 U. S. 565; *Sterling* v. *Constantin, supra.* Moreover, that power is not limited because its exercise would require a subdivision of a state to levy taxes. There is ample decisional authority for requiring political subdivisions to levy taxes in order to protect constitutional rights. *Labette County Commissioners* v. *Moulton,* 112 U. S. 217; *Graham* v. *Folsom,* 200 U. S. 248; *Supervisors* v. *United States,* 71 U. S. (4 Wall) 435; *Walkley* v. *City of Muscatine,* 73 U. S. (6 Wall) 481; *Von Hoffman* v. *City of Quincy,* 71 U. S. (4 Wall) 425; *Cherokee County* v. *Wilson,* 109 U. S. 621; *Riggs* v. *Johnson County,* 73 U. S. (6 Wall) 166. That the power to levy taxes for the support of schools is discretionary with the board of supervisors does not mitigate against this Court's capacity to require that it be done. See *City of Galena* v. *Amy,* 72 U. S. (5 Wall) 705, 708, where the city refused to levy taxes it was authorized to raise, leaving debtors unpaid, and this Court held: "Under such circumstances, the discre-

tion thus given cannot, consistently with the rules of law, be resolved in the negative". The rights of the creditors, justice and the law were held to demand affirmative action. And it should not be forgotten that here the board of supervisors' refusal is expressly designed to defeat and frustrate petitioners' constitutional rights to unsegregated education. Under such circumstances, relief, in the form of an affirmative requirement that sufficient taxes be levied, is patently within the competence of the federal courts. See *Cooper* v. *Aaron, supra; James* v. *Duckworth, supra.*

Moreover, it is respectfully submitted, a decree should be entered barring the use of public funds to support any institution that practices discrimination or from employment in aid of any attempt and effort to avoid or frustrate the fundamental rights of children to public educational facilities without racial restrictions.

Injunctive relief is not precluded by the Eleventh Amendment, although affirmative action is required. Respondents have, through a cooperative effort, deprived petitioners of their rights to nonsegregated public education. Although the more obvious intransigence is on the part of the county board of supervisors, their recalcitrance has been aided, abetted and acquiesced in by the local school board, the state board of education and the state superintendent of public instruction. Dispositive of this issue is the nature of the right invaded. Acts in defiance of constitutional inhibitions or policies threatening federal rights, remove this case from the limitations of the Eleventh Amendment. See *Ex parte Young,* 209 U. S. 123; *Osborne* v. *The Bank of the United States,* 22 U. S. (9 Wheaton) 738.

## CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this Court should enter a judgment ordering and requiring: (1) that respondents take all necessary steps, individually and collectively, to reopen and operate the public schools on a non-discriminatory basis in Prince Edward County by September, 1964 and thereafter; and (2) that no state or local tuition grants, tax credits or other public funds be used to underwrite attendance at any institution in Prince Edward County, or in the state of Virginia, that practices racial discrimination, and (3) that the district court, upon remand, retain jurisdiction in order to implement, promptly and effectively, this Court's decree and mandate.

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