Section 6 of Article I of the Virginia Bill of Rights as drawn by George Mason and continued in the Constitution of Virginia throughout its history down to the present day, provides as follows:

> "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage, and *cannot be taxed* or deprived of, or damaged in, their property for public use, *without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.*" (Emphasis supplied)

Section 5 of the same Bill of Rights provides as follows:

> "That the Legislative, Executive and Judicial Departments of the State should be separate and distinct; * * *"

The division of the Legislative, Executive and Judicial Departments on the federal level is provided in the Constitution of the United States and the principle requiring consent through the representatives of the people to all taxes is carried into the Constitution of the United States in Section 7, Article I:

> "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills."

As we said above, the principle of consent through elected representatives as a fundamental prerequisite for the

imposition of taxes has never been directly challenged. The matter was discussed, however, in the case of *Thomas* v. *Gay*, 169 U.S. 264, 42 L.ed 740. Here the question arose with respect to the application of a tax imposed upon each head of cattle grazing upon certain territorial lands under the jurisdiction of the territory of Oklahoma. The claim was made that the people of the territory had no representative who had consented to the tax. The court said:

> "The most fundamental of these objections is found in the assertion that, so far as nonresident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the tax." * * *
>
> "But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be taxed, unless he was represented by someone for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out." * * *

We cite the case merely to show that the principle is recognized as fundamental.

The petitioners undertake to surmount this barrier by citing a series of cases which have absolutely no application to the issue here raised.

In every one of the cases cited in the brief of the petitioners on page 33, and by the Attorney General in "III 2." of its brief, there was involved a contract and a mone-

tary judgment thereon. The law on this subject is stated thus in 12 Am. Jur., § 418, page 50:

> "§418. Taxing Power as Inherent Part of Contract. —In accord with the general rule that existing laws become an integral part of the obligation of a contract, the laws relating to the rights of enforcement existing at the time of the issuance of municipal bonds under the authority of which they are issued enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfilment hampered or obstructed by a change in the law. As a result, when a contract is made with a municipal corporation on the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition as to the impairment of the obligation of contracts. Therefore, the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or if they are changed, a substantial equivalent must be provided. Likewise, where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States and is null and void. This rule is applicable regardless of whether the legislative action is taken by the municipality or by state legislation which repeals or limits the statute authorizing the municipality to levy

> taxes. The creditors of the municipality does not always have a right to have the taxes collected in the same manner as they were always collected, but he does have the right under his contract to have taxes collected in as prompt and efficacious a manner as provided at the time the contract was executed. Thus, any act which attempts to put off or retard the enforcement of a municipality's obligations by postponing the power of the city to levy taxes impairs the obligation of contract."

There is no question in these cases involving the consent of the legislative body to the levy of the tax. In these cases contracts either for the issuance and payment of bonds were entered into not in the governmental capacity of the political subdivision, but in its corporate capacity, and the contract having been entered into, the consent to pay the obligation and therefore to levy the tax necessary to pay is an inherent part of the contract itself and any change in the law with respect to the taxing power of the municipality is regarded as a prohibited impairment of the contract under the Constitution of the United States, and any refusal to levy the tax is likewise regarded as an impairment of the contract obligation, all of which is in violation of express provisions of the Constitution of the United States.

In short, the consent and obligation to levy the tax was fixed by the acceptance and commitment of the contract to pay. The enforcement by mandamus of a levy of the tax becomes in such cases a mere "ministerial act" which the courts under recognized principles of law may direct to be done.

These cases do not meet in any way the question which is suggested by the petitioners that the judiciary has the power to compel the levy of taxes without the consent of those to be taxed. Until some act may be pointed to which constitutes a consent and a commitment of the legislative tax levying authority or of the people themselves to the levy of the tax, no court has yet assumed the power as a part of its judicial authority to issue an order directing such a tax levying body to make a levy of taxes and to appropriate the revenue therefrom to a governmental purpose.

See the following authorities upon the subject of Judicial Control of the legislative power:

Where the legislative act is discretionary:

34 Am. Jur., Mandamus, § 66, 67, 68, 854 through 858

Where the legislative act is mandatory:

11 Am. Jur., Constitutional Law, § 76, 694
11 Am. Jur., Constitutional Law, § 200, 902
16 C. J. S., Constitutional Law, § 151(1), 721
Anno: 136 ALR 677
Anno: 140 ALR 439
Anno: 153 ALR 522

Levy of taxes is a legislative act not subject to judicial control:

51 Am. Jur., Taxation, § 46, 76
84 C.J.S., Taxation, § 7, 51
Anno: 32 LRA (NS) 1020

The famous case of *Virginia* v. *West Virginia,* 246 U.S. 565, 62 L.ed 882, 38 S.Ct. 400, is cited as authority to support such a power in the court. A recitation of the facts from which that case arose will make clear that it does not apply here.

This case was before the Supreme Court of the United States on nine different occasions and nine different opinions were rendered before the court rendered the opinion at the citation above given.

The litigation involved the demand of the State of Virginia that the State of West Virginia pay its proportionate part of certain indebtedness in bonds, outstanding obligations of the State of Virginia at the time West Virginia was carved out of the State of Virginia and became a separate state. The grounds of the claim are stated in an opinion by Mr. Justice Holmes in 220 U.S. 1, 25, 55 L.ed 353, 357. In substance, they are as follows:

After Virginia adopted its ordinance of secession, citizens of the area which became West Virginia organized a government which was recognized as the restored State of Virginia by the government of the United States. A convention of this restored state was convened and adopted an ordinance for the formation of a new state, which ordinance obligated the new state to "take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861." A constitution was framed for the new state which provided "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this state." Finally, Congress,

by an act of December 31, 1862, Chapter 6, 12 Stat. L. 633, gave its consent to the admission of the State of West Virginia with express approval of the consent of the restored State of Virginia to pay its part of the debt as provided by the ordinance above referred to and the constitution above quoted from. Upon this basis, the court held that the above quoted provisions of the ordinance of the restored State of Virginia and the Constitution of the new State of West Virginia with the approval by Congress constituted a binding obligation and promise of West Virginia to pay to Virginia her proportionate part of the public debt aforesaid. It was upon the basis of this contractual obligation that the court proceeded to determine through commissioners the fair proportion of the public debt of Virginia which should be paid by West Virginia, and after determining the amount the judgment was fixed for a sum in excess of $12,000,000.00. West Virginia continued recalcitrant to pay this judgment.

It was upon this background that the last opinion rendered by Chief Justice White at 246 U.S. 565, must be judged. We note the fact that there is no question in that case, or in any of the opinions, of the agreement of West Virginia to pay the debt. There is no question but that the Constitution of West Virginia provided that it should pay the debt, and there is no question of the fact that Congress admitted West Virginia with the understanding fixed in its Constitution that it would pay the debt. It, therefore, appears that there was fixed in the fundamental law of West Virginia through its duly elected representatives to a Constitutional Convention a consent to the obligation, and, therefore, a consent to pay the obligation. Upon this basis therefore, the question is eliminated from the case

of *Virginia* v. *West Virginia* of imposing a tax without the consent of the representatives of the people upon whom the tax was to be levied. Consent to the tax had been given in the highest form of representation known, namely, in its Constitution, and the obligation to impose the tax to pay the debt assumed was thus fixed in its Constitution. The case, therefore, is clearly distinguished from the case here before the court.

The case is further distinguished from the issue here by the fact that the Constitution of the United States expressly confers upon the Supreme Court jurisdiction to render judgments in controversies between states, and the judgment having been rendered, the court was then confronted with the problem of how to enforce it. With respect to the exercise of judicial power upon the sovereignty of the state, the court made the following observation:

> "As it is certain that governmental powers reserved to the states by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were subject to judicial power, that is, to be impleaded, it must follow that when the constitution gave original jurisdiction to this court to entertain at the instance of one state a suit against another, it must have been intended to modify the general rule; that is, to bring the states and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision."

It is, therefore, submitted that the opinion recognized that the sovereignty or political powers of the state are not

subject to judicial process except in the exceptional instance where jurisdiction is conferred directly upon the Supreme Court of controversies between states.

The court then proceeds, at page 600, to discuss the appropriate means for the enforcement of its judgment. It divides the possible means of enforcement into the legislative powers of Congress and the judicial power of the court. Congressional powers to enforce the judgment are predicated upon the approval of Congress, of the agreement between the restored State of Virginia and the new State of West Virginia; and the court concludes that the power to make valid that agreement carried with it Congressional powers to enforce it.

Without quoting at length from the opinion, at every point in the opinion the court returns to the foundation of the obligation as resting upon contracts consented to by the authorized representatives of the State of West Virginia.

In an article by Professor *Thomas Reed Powell,* 17 Mich. Law Review 1, "Coercing A State To Pay A Judgment: Virginia v. West Virginia," he concludes that the mandamus asked for by Virginia and appropriate to the case would have been a mandamus to require West Virginia *to pay the judgment*. Since, as he points out, West Virginia could pay the judgment either by levying a tax for the purpose of paying or by issuing bonds for payment. As to these alternative methods, West Virginia would have discretion, but under the judgment of the court West Virginia had no discretion as to payment.

Professor Powell says at page 22 of Volume 17 Mich. Law Review:

"The duty which the legislature of West Virginia is now asked to perform is enjoined upon it by the law of West Virginia as embodied in its Constitution. The legislature is subject to the law of the constitution as the municipality is subject to the law of the legislature. The legislature is in the present situation an 'inferior authority' in the same sense in which the cases and the text-writers have used that term in referring to persons subject to mandamus. The duty is imposed upon it by the superior authority of the Constitution."

So that *Virginia* v. *West Virginia* is distinguished from the case here before the court in that there is a consent of the representatives of the people to the obligation which the jurisdiction of the Supreme Court of the United States reduced to judgment, and a mandamus requiring the payment of the judgment would not be a mandamus requiring an act to which the people of West Virginia had not consented through their representatives.

Virginia v. *West Virginia* stands for the proposition that while under the particular facts of that case the Supreme Court of the United States could direct the payment of the judgment, it could not control the discretion of West Virginia as to the method of payment. That is, it could not direct, on the one hand, that the legislature levy a tax, or, on the other hand, that the legislature issue bonds. It could only require under the broadest interpretation of the opinion cited that the legislature make provision for the payment of the judgment.

Even if the opinion in *Virginia* v. *West Virginia* were applicable here (and we think it is not because the element of consent to the payment of the judgment was implicit in the West Virginia Constitution), it would only authorize

a federal court to say that the Constitution and law of Virginia requires education, and it might follow therefrom in a proper case that a mandamus could be directed to the appropriate state officers to provide education, but where the State Constitution and State law authorize education to be provided either by the operation of public schools or by the payment of scholarship funds to parents in furtherance of education in schools of the parents' choice or by a combination of both methods, a mandamus could not lie to control the legislative discretion as to the method by which education is provided.

Such a mandamus is not required in this case for the obvious reason that Virginia is providing education within the terms of Virginia's Constitution and Virginia's law. The people of Virginia in her Constitution and in the enactments of the Legislature have consented that Virginia should provide education. They have not consented, however, that any county or city must provide education in any particular manner, and since the method and manner by which education is to be provided is within the reserved powers of the state, a federal court is not authorized to control the legislative discretion by directing that it be provided in a particular manner; namely, by the operation of publicly owned and maintained schools, and much less is it authorized without the consent of a legislative body to direct that taxes be levied and money be appropriated to operate such public schools.

It is further respectfully submitted that the language of the Fourteenth Amendment is negative and prohititory. It gives the federal courts and the federal Congress power to prevent the denial of life, liberty or property without due process of law and to prevent the denial of equal protection of the law by the state. Such a provision, under the

decisions of this court, cannot be converted into authority to prescribe what a state must provide. In other words, a prohibition that no state shall deny equal protection of the law is not authority to Congress or to the federal courts to prescribe and affirmatively impose upon the states the laws which shall be enacted to provide equal protection or due process. So the Fourteenth Amendment has been interpreted from the beginning. Civil Rights Cases, 109 U.S. 1, 27 L.ed 836, ...S.Ct........ See *Wilkerson* v. *Rahrer,* 140 U.S. 546, 35 L.ed 572; *Barbier* v. *Connolly,* 113 U.S. 27, 31, 28 L.ed 924; *Ownby* v. *Morgan,* 256 U.S. 94, 112, 65 L.ed 837; *United States* v. *Harris,* 106 U.S. 629, 27 L.ed 290; *McPherson* v. *Blacker,* 146 U.S. 1, 36 L.ed 869.

CONCLUSION

Virginia law gives each locality the option to choose the method by which education will be provided for its residents. The Virginia scholarship statutes are predicated upon the constitutionally protected right of each individual parent to select the schools in which his child is educated. It eliminates the element of compulsion which results where parents may only choose between integrated public schools and private education at the parents' expense. It is the only constitutional means which has been found which holds out real hope that the educational problem of our country resulting from the radical changes wrought by *Brown* v. *Board of Education* may be solved. It is characteristic of the genius of our Constitution that the solution of such problems lie in the broadening and extending of American freedom and not in its constriction.

We close this brief with the earnest prayer that this freedom which Virginia law tries to foster will not be

taken away by this Court and with the following wise and eloquent quotation from the opinion of the late Mr. Justice Jackson speaking for the Court in *West Virginia State Bd. of Ed.* v. *Barnette,* 319 U.S. 624, 640, 87 L. ed. 1628, 1639, 63 S. Ct. 1178:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First

Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."

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NOTE: The limitations of time have contributed to the imperfections of this brief. It is too lengthy and the material is inadequately organized and presented. This we regret and ask the indulgence of the court.

In its preparation we have drawn whole sections from the work of Collins Denny, Jr., who was counsel for the School Board of Prince Edward County until his death on January 14, 1964. His magnificent talent and legal ability is a loss to the adequate presentation of the important constitutional issues here before the court. We acknowledge our indebtedness to him in the effort here made.

J. SEGAR GRAVATT