

THE
DOCTRINE OF INTERPOSITION

Its History and Application

A
REPORT
on
Senate Joint Resolution 3
GENERAL ASSEMBLY OF VIRGINIA
1956
and related matters

by the
Committee for Courts of Justice
Senate of Virginia



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THE TRANSCENDENT ISSUE . . .

In the *Davis* and companion cases the present Court has uprooted the law long laid down and followed by eminent judges. In doing so, the present Court abandoned all legal precedent and based its conclusions upon the conflicting evidence of psychologists . . .

With this decision, based upon such authority, we are now faced. It is a matter of the gravest import, not only to those communities where problems of race are serious, but to every community in the land, because this decision transcends the matter of segregation in education. It means that irrespective of precedent, long acquiesced in, the Court can and will change its interpretation of the Constitution at its pleasure, disregarding the orderly processes for its amendment set forth in Article V thereof. It means that the most fundamental of the rights of the States and of their citizens exist by the Court's sufferance and that the law of the land is whatever the Court may determine it to be by the process of judicial legislation.

—Report of the Virginia Commission on
Public Education, November, 1955.

INTRODUCTION

On February 1, 1956, the General Assembly of Virginia adopted a Resolution "interposing the sovereignty of Virginia against encroachment upon the reserved powers of this State, and appealing to sister States to resolve a question of contested power."

This Resolution was carried by a vote of 36-2 in the State Senate of Virginia, and by a vote of 90-5 in the Houses of Delegates.

Subsequent to the adoption of the Resolution, the Senate, recognizing a widespread interest in the issue of "States' Rights" thus revived, instructed its Committee for Courts of Justice to prepare a Report covering the history and application of the doctrine of interposition. Senate Resolution 14 directs the committee also to include in its Report "such statistical and narrative material, dealing with the public schools of Virginia and the problems attendant upon compulsory integration of the races therein, as shall, in the committee's opinion, be calculated best to inform sister States and the public generally of the school problem before us."

It is this report which follows.

The Doctrine of Interposition

I

The right of a State to interpose its sovereign powers against encroachment by the Federal Government rests upon certain basic assumptions in history and in law. These are:

First, that when the colonies dissolved the political bands that had connected them with Great Britain, they became precisely what they declared themselves to be: Free and Independent States.

Second, that in uniting under the Articles of Confederation, and later under the Constitution of 1787, the States acted as separate, individual States.

Third, that the people of the States, in agreeing to the constitutional compact, have delegated only certain enumerated powers to the general government, and have reserved all other powers to their States or to themselves.

Fourth, that when the general government usurps powers not delegated, the States have an inalienable right to interpose their sovereign powers so as to arrest the progress of the evil.

Fifth, that the question of such encroachment cannot properly be decided by an agency of the general government itself, but can only be decided by the States themselves as parties to the compact.

Such are the primary assumptions upon which Virginia predicated her Resolution of 1956. In the view of this committee, the assumptions are valid assumptions, deeply and firmly rooted in the soil of constitutional history and interpretation. Nowhere have these doctrine been advanced more consistently, or defended more strongly, than in Virginia; and the committee believe that upon the preservation of these doctrines, which now are so gravely jeopardized, depend the vitality of our government and indeed the most cherished liberties of the people. The committee perceive no way to preserve these foundation stones of our constitutional structure but to make timely challenge against those who would undermine them. Just such a timely challenge was intended by the Virginia Resolution of 1956.

Recognizing, however, that while the Resolution encountered some commendation, it encountered much criticism also, especially in the Northern press and among some of our sister States outside the South, the committee have undertaken a fresh examination of the Resolution. Our purpose, following humbly the example of Mr. Madison in 1799, is to examine fully the several objections and arguments which have appeared against the Resolution, and to inquire "whether there be any errors of fact, of principle, or of reasoning, which the candour of the General Assembly ought to acknowledge and correct."

Virginia's Resolution of February 1, 1956, begins with a resolve

That the General Assembly of Virginia expresses its firm resolution to maintain and to defend the Constitution of the United States, and the Constitution of this State, against every attempt, whether foreign or domestic, to undermine the dual structure of this Union, and to

destroy those fundamental principles embodied in our basic law, by which the delegated powers of the Federal Government and the reserved powers of the respective States have long been protected and assured.

This opening paragraph echoes the language of the opening paragraph of the Virginia Resolution of 1798. Now, as then, it was the Assembly's intention to express at the very outset its devotion to the Constitution of the United States. The express purpose is to maintain and to defend the Constitution against forces antagonistic to it. These forces are defined as forces which may attempt "to undermine the dual structure of this Union," and more particularly, as forces which may tend to destroy certain fundamental principles asserted to be embodied in our basic law.

These principles are spelled out in the two resolves that follow.

The second resolve is

That this Assembly explicitly declares that the powers of the Federal Government result solely from the compact to which the States are parties, and that the powers of the Federal Government, in all its branches and agencies, are limited by the terms of the instrument creating the compact, and by the plain sense and intention of its provisions.

This is followed closely by the third resolve:

That the terms of this basic compact, and its plain sense and intention, apparent upon the face of the instrument, are that the ratifying States, parties thereto, have agreed voluntarily to delegate certain of their sovereign powers, but only those sovereign powers specifically enumerated, to a Federal Government thus constituted; and that all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

We may now pause to examine these particular assertions, which likewise are adapted from this Assembly's Resolution of 1798, to determine if the passage of years has disclosed flaws in reasoning or interpretation not apparent then. In this examination, we have benefited from Mr. Justice Story's *Commentaries*, on the one hand, and from the views of such distinguished writers as John C. Calhoun and Abel Parker Upshur, on the other. We have inquired whether the melancholy events of 1861-65, and the subsequent changes made in the Constitution, have in any wise affected the fundamental principles asserted to be still embodied in our basic law. Our conclusion is that the first three resolves continue to expound, in 1956 as they did in 1798, the true nature of the Federal Government and the relationship of the States to it.

The committee do, indeed, perceive the Constitution to be "a compact to which the States are parties." It is well to recall, in this connection, precisely how the Constitution was created, and by whom it was ratified and ordained. The briefest review of our political development will disclose that the people always have exercised their sovereignty as citizens of separate States—"free and Independent States," in the language of the Declaration of Independence—and that only in this capacity can the ultimate powers of sovereignty be exercised to this day.

That our Union was created by the people of separate States, acting separately as States, would appear to be a truth so fully supported by

clear and unequivocal history as not to require prolonged examination. The events which led to the colonies' separation from Great Britain resulted in the rebirth of the colonies as individual political entities, as separate as children, born of a common mother, who are free to find their separate ways. Their alliance of 1774 was an alliance of distinct political bodies, for distinctly limited purposes. So, too, was their union under the Articles of Confederation in 1777. Here they styled themselves (as earlier they had styled themselves in the Declaration of Independence), the "United States of America," not as the "Republic of America," or as the single "State of America," but as *States united*. Lest there be misunderstanding, the members of that Confederacy agreed positively in the second article of their compact: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." The language is important for two reasons—first, that it locates "sovereignty" expressly within *each* State; second, that the verb "delegated," thus carefully employed, takes on a meaning in this context too clear to be obscured in our own day.

Throughout the eight years of "perpetual union" under the Articles of Confederation, each of the member States continued to exercise those powers of individual sovereignty by which separate States may be recognized. Their status as such was confirmed, it may be noted in passing, by the very terms of the treaty that ended the Revolutionary War. His Majesty concluded no treaty with the "United States of America" as a single nation. It is interesting to recall the exact language:

His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island, Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia to be free, sovereign and independent States . . .

It was in this capacity, as free, sovereign and independent States, that the States (or most of them) dispatched delegates to Philadelphia in the summer of 1787. The results of their deliberations were transmitted to the Congress on September 16, 1787, with a recommendation that the proposed new Constitution be submitted not to all the people at large, but rather to conventions in each of the States. At such separate conventions, it was proposed, delegates "chosen in each State by the people thereof" would decide whether their State would, or would not, ratify the Constitution and assent to its provisions. The vote of a delegate in Georgia would have no weight at all in binding Virginia; the wide margin by which Delaware might ratify would be of no value in achieving victory in New York. Voluntarily, each State was to decide for itself; for the Constitution was not established "among people" but "between the States so ratifying the same."

It is useful to note that in so exercising their highest sovereign powers, the people of the States acted with independence and with deliberation. From the time that Delaware ratified the Constitution on December 7, 1787, until Rhode Island became the last of the thirteen original States to join the new Union on May 29, 1790, nearly two and one-half years elapsed. The United States of America, under the Constitution as we know it today, was established when New Hampshire, on June 21, 1788, became the ninth State to ratify; but for almost two years thereafter, Rhode Island was, in fact and in law, a foreign nation, as politically separate from the other States as any Italy or France. Late

in his life, Jefferson described the relationship succinctly when he termed the Constitution, in a letter to Edward Everett, as "a compact of independent nations."

Accepting, then, that our Constitution is in fact "a compact to which the States are parties," the committee have reexamined the proposition that "the powers of the Federal Government result solely" from it. The truth of this assertion, in the committee's view, is self-evident, for the powers of the Federal Government can result from nothing else. Before the action of the States in the summer of 1788, there was no President, no Supreme Court, no Congress in which representatives voted as individuals. Had the States refused to ratify, conceivably there would have been none to this day. It proceeds from this that whatever powers these gentlemen in high office may exercise, they are powers that result from the existence of the Constitution. They are powers delegated voluntarily to the Federal Government by the sovereign States. The continued exercise of these powers is wholly dependent upon the continued assent of the States to their delegation.

We must ask, then, what is the nature of these powers? Are they unlimited? Or are they not, as the Resolution asserts, "limited by the terms of the instrument creating the compact, and by the plain sense and intention of its provisions"? Clearly, the latter statement is the correct one.

If the powers of the Federal Government were in fact unlimited, Congress could at will perpetuate its members in office, abolish State lines, provide for an executive chosen for life, and make it a crime for the press to criticize its despotic acts. To acknowledge that the Congress cannot do such things is to acknowledge that Congress has no power to do them; which is to say, that the powers of Congress are limited. And if it be agreed, as it must be agreed, that the powers of the Federal Government are in fact limited in some degree, it remains to discover in which degree, and by what means, these powers are limited.

The Resolution states the case explicitly: "The powers of the Federal Government, in all its branches and agencies, are limited by the terms of the instrument creating the compact, and by the plain sense and intention of its provisions." Here is the reason that members of the Congress may not vote to retain themselves indefinitely in office, because the Constitution places a limit of two years upon the term of a Representative and six upon that of a Senator. The Congress may not abolish State lines, because it is provided that no State, without its consent, may be deprived of suffrage in the Senate, nor may States be consolidated "without the consent of the Legislatures of the States concerned." Similarly, the tenure of a President is limited by the plain language of the Constitution, and the freedom of the press is guaranteed by the peremptory command that Congress shall make no law abridging the freedom of speech or of the press.

These are hornbook examples, to be sure, but the committee perceive nothing wrong with hornbook law, save that it is often ignored in these sophisticated times. Thus we comprehend that the powers of the Federal Government are in truth limited by the terms of the Constitution and to add that these terms are to be construed by their "plain sense and intention" is to add simply that words and phrases ought not to be perverted to lend them a meaning and purpose utterly unintended by those who have honorably consented to them.

The terms of our basic compact, the Resolution declares, are apparent upon the face of the instrument: The intention on the part of the ratifying States was "voluntarily to delegate certain of their sovereign powers, but only those sovereign powers specifically enumerated," to the Federal Government they created. Surely this understanding of our government was held by every witness to its formation. It was the understanding of Jefferson, who warned in many of his writings against the usurpation of power by Federal authority. This was the understanding of Madison, who repeatedly asserted in his *Federalist* essays that powers not delegated were reserved. It was the view of Pendleton and Marshall, of Edmund Randolph and John Taylor of Caroline. This concept is consistent with the magnificent declaration of 1776 that "governments derive their just power from the consent of the governed," and that the people, in establishing a government, have the inalienable right of "organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness."

The General Assembly of Virginia many times has enunciated its solemn conviction on this point. We may desirably allude, also, to the resolution of ratification adopted by the Virginia Convention of 1788, in which the delegates sought to

declare and make known that the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will.

This assertion on the convention's part was accompanied by recommendations for a Bill of Rights and for a score of clarifying amendments to the Constitution. And the very first amendment sought by the Virginia Convention was a declaration

That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Federal Government.

This unambiguous statement of the nature of the Federal compact was accepted, of course, in the Tenth Amendment to the Constitution. The understanding thus made permanent was *not* that some powers were retained and all others were delegated, but conversely, that some powers were delegated and all others were retained.

If only "some" powers were delegated, and this seems undeniable, we must ask what powers were delegated? Obviously, the powers delegated by the States are the powers enumerated in the Constitution. And while it may be somewhat beyond the scope of the committee's assignment, an observation may be interpolated at this point that the framers of the Constitution sought to draw a distinction between powers to be exercised exclusively by the Federal Government, and powers that could be exercised simultaneously by both the States and the Federal Government. This distinction may be grasped when it is reflected that the Constitution not only delegated to Congress the power to coin money, but positively denied that power to the States. The fact that the States delegated to Congress a power "to regulate commerce among the several States" was never understood, until recently, to have been a delegation of *all* power by the States to regulate their commerce. The creeping doctrine of "preemption" must rank high among the antagonistic forces to which the Assembly addresses its protest.

The powers delegated to the general government by the Constitution are enumerated chiefly in Article I, Section 8. Some of these powers, for example the power to coin money, are absolute. Others are qualified. Thus every State, in general, is prohibited from laying any impost or duty upon imports or exports, but a State is not entirely prohibited in this regard: A State may levy "what may be absolutely necessary for executing its inspection laws." Similarly, no State may engage in war, but even this prohibition is not total: A State may, as a State, "engage in war (if it be) actually invaded or in such imminent danger as will not admit of delay." In many other respects, the States utilized the constitutional compact simply as a binding compact among themselves in matters unrelated to the establishment of a general government. Thus, "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and again, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The provision governing extradition of fugitives is yet another example of an agreement *among States*.

From all this, the committee conclude that the States formed the constitutional compact as an agreement among themselves as individual, sovereign political entities; we conclude, further, that the States delegated only certain of their powers to be exercised by their joint creature, the Federal Government, and retained all other powers, not prohibited by the Constitution, to themselves. We do not perceive that the instrument admits any other interpretation.

The Virginia Resolution of 1956 continues with its fourth resolve:

That this basic compact may be validly amended in one way, and in one way only, and that is by ratification of a proposed amendemnt by the Legislatures of not fewer than three-fourths of the States, pursuant to Article V of the Constitution, and that the judicial power extended to the Supreme Court of the United States to "all cases in law and equity arising under this Constitution" vested no authority in the court in effect to amend the Constitution.

Here it may be well to quote Article V. It reads in part as follows:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of the Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

It will be seen that this fourth resolve divides itself into two parts. The first (though it contains one minor error of omission, for amendments to the Constitution may be ratified not only by Legislatures but also by State convention) asserts that which is manifestly true: That the Constitution may be "validly amended" only by the States themselves. The second anticipates the fifth resolve which is to follow, but it contains an expression that warrants careful consideration: It is the assertion that the court's acknowledged jurisdiction to decide cases in law and equity arising under the Constitution vests no authority in the court "in effect to amend the Constitution."

This assertion is basic to the position Virginia takes in her Resolution of Interposition. On this point, the committee respectfully solicit the sober reflection of our sister States.

It is conceded, on every hand, that the Supreme Court of the United States has authority "to interpret" or "to expound" the Constitution, and "to construe" its provisions as they may apply to particular cases. What concerns us here is that boundary line—and there must be some boundary line capable of being fixed and defined by an agency *other* than the court itself—where mere interpretation ceases and substantive amendment begins. If it be left to the court, alone and uncontrolled, to establish this line, then there is no line; the Constitution, as Jefferson warned, must on this hypothesis become "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." That the Constitution would require frequent amendment, in order to serve the needs of a changing society, Jefferson often noted; but modifications in the compact, he insisted, must be made legitimately "by the express consent of the parties themselves, and not by the usurpation of their created agents."

The Virginia Resolution raises this question of usurpation squarely. It inquires if the power claimed by any five judges on a court of nine can in fact be superior to the power reserved by the Constitution to three-fourths of the States. It is apparent that such asserted judicial superiority cannot be permanent or final, as the history of the Sixteenth Amendment demonstrated; in that instance, a majority of the court, by a process of judicial legislation, held that the States had delegated no power to the Federal Government to levy a direct tax upon incomes, and it was necessary for the States to amend the Constitution in order to overcome this ruling by the court. But that question dealt with a power delegated to the general government, and not with a power understood to be reserved to the States respectively. We must inquire, with the utmost diligence, whether judicial superiority may be exercised even temporarily when it may operate to deprive a member of the compact of the right to regulate its own domestic affairs.

Under Article V, it will be noted, the objections of one-fourth of the States plus one are sufficient to defeat any change that may be proposed in our fundamental law. This is a vital provision of the Constitution. It reflects the desire of the framers to protect a minority against the tyranny of the majority. The thirteen smallest States in the Union, in the last census, reported a population of slightly more than 7,000,000; their disapproval would be sufficient to cause the rejection of a constitutional amendment that might be desired by the remaining thirty-five States with a population of 143,000,000 persons. This was the way the framers intended the Constitution to protect what individual States might regard as their most important institutions. Can it be imagined that so essential a provision of the Constitution may be rendered void simply by mandates of five judges on a court of nine?

That is the question implicitly raised by the Virginia Resolution. It asks if, notwithstanding the objections of one-fourth of the States plus one, the Supreme Court by "interpretation" may effectively amend the Constitution so as to nullify their objections. In the view of the committee, no such power ever was delegated to the Supreme Court of the United States. Rather, the committee believe that when the court says "this particular power is prohibited to the States by the Constitution," and a State responds by saying, "no, we do not agree that this particular power is prohibited to us by the Constitution," the Supreme Court cannot possibly be permitted to resolve the question. As Jefferson pointed out in the Kentucky Resolution of 1798, this would place the discretion of five judges above the will of the States themselves.

Madison comprehended this danger clearly. Let us note what he said in his Report of 1799 to the House of Delegates:

"It has been objected that the judicial authority is to be regarded as the sole expositor of the Constitution. On this subject, it might be observed, first, that there may be instances of usurped powers which the forms of the Constitution could never draw within the control of the judicial department; secondly, that if the decision of the judiciary be raised above the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decisions of that department. But the proper answer to the objection is, that the resolution of the General Assembly relates to those great and extraordinary cases in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, *but that the judicial department may also exercise or sanction dangerous powers, beyond the grant of the Constitution*, and, consequently, that the ultimate right of the parties to the Constitution to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another—by the judiciary, as well as by the executive or legislative."

The committee would propound this issue hypothetically. Let us suppose that the Congress, obedient to the President's recent request, proposes to the States a constitutional amendment to extend the franchise to young men and women at age 18. But let us suppose that twenty-four States agree to this amendment, while twenty-four States reject it decisively. Then let it be imagined that a youth of 18, through an appropriate proceeding, sues for admission to the polls; he contends, we may suppose, that if he is "old enough to fight, he is old enough to vote," or perhaps that he is compelled to pay taxes but has no direct opportunity to vote for the legislators who may impose taxes upon him—in any event, that the action of a registrar in refusing him the ballot is a denial of equal protection of the laws. Let us suppose, then, that his suit makes its way to the Supreme Court of the United States, and there a majority of the court accept his contentions and order him, and all others similarly situated, at once admitted to the franchise.

Are we to understand that in the case supposed, the court's mandate would at once become the supreme law of the land? Are we to understand that the only remedy would lie in a constitutional amendment (if thirty-six States could be found to agree to it) *restoring* the age limit to 21? And that meanwhile, in those States most strenuously opposed to voting by 18-year-olds, election officials would be subject to fine or imprisonment if they refused to obey the mandates of the court?

The hypothesis is remote, but the analogy is close at hand. The committee are satisfied, upon sober reflection, that a jurisdiction extending simply to cases in law and equity cannot possibly have been intended to embrace a power in effect to amend the Constitution itself. The committee are satisfied that the States, who under Article V alone have the power to amend the Constitution, also must have the power to contest effectually an attempted amendment by judicial construction. On any other basis, the most valued power of sovereignty—the power to amend the Constitution—has been surrendered to a majority of the court.

The fifth resolve recites

That by its decision of May 17, 1954, in the school cases, the Supreme

Court of the United States placed upon the Constitution an interpretation, having the effect of an amendment thereto, which interpretation Virginia emphatically disapproves.

Here the Virginia Resolution proceeds from the general to the specific. How does the decision of May, 1954, pass beyond the bounds of mere interpretation and encroach upon the States' amendatory powers? The sixth resolve provides a statement of Virginia's convictions:

That the State of Virginia did not agree, in ratifying the Fourteenth Amendment, nor did other States ratifying the Fourteenth Amendment agree, that the power to operate racially separate schools was to be prohibited to them thereby; and as evidence of such understanding of the terms of the amendment, and its plain sense and intention, the General Assembly of Virginia notes that the very Congress which proposed the Fourteenth Amendment for ratification established separate schools in the District of Columbia; further, the Assembly notes that in many instances, the same State Legislatures that ratified the Fourteenth Amendment also provided for systems of separate public schools; and still further, the Assembly notes that both State and Federal courts, without any exception, recognized and approved this clear understanding over a long period of years and held repeatedly that the power to operate such schools was, indeed, a power reserved to the States to exercise "without intervention of the Federal courts under the Federal Constitution"; the Assembly submits that it relied upon this understanding in establishing and developing, at great sacrifice on the part of the citizens of Virginia, a school system that would not have been so established and developed had the understanding been otherwise; and this Assembly submits that this legislative history and long judicial construction entitle it still to believe that the power to operate separate schools, provided only that such schools are substantially equal, is a power reserved to this State until the power be prohibited to the States by clear amendment of the Constitution.

The ruling of the Supreme Court of the United States in *Brown vs. Board of Education* was essentially this: The Negro plaintiffs were citizens of the United States subject to the jurisdiction of State laws. Under the Fourteenth Amendment, no State may deny to any person within its jurisdiction equal protection of the laws. Racially separate schools are "inherently unequal." Therefore, no State may deny Negro pupils admission to a public school on the grounds of racial separation.

What the court was saying, in brief, was that the Fourteenth Amendment prohibited the States from operating the sort of schools they had been operating for more than eighty years. The court undertook to repudiate both history and precedent, and by judicial fiat to impose its social views upon the supreme law of the land.

The committee would observe, in commenting upon the sixth resolve, that in holding the Southern States' practice unconstitutional, the court was not overthrowing a power said to be delegated to Federal authority. It sought to overthrow a power said to be reserved to the States. Thus, as a landmark case, *Brown* falls in a classification different from such landmarks as *Marbury vs. Madison*, which turned upon the powers of Congress to legislate as to the judiciary, or *Hylton vs. United States*, in which the court held that Congress had no power to impose the sort of tax it had imposed for a hundred years. Rather, the *Brown* case joins such holdings as that in *McCulloch vs. Maryland*, in which a State's power to levy certain taxes upon a Federal instrumentality was prohibited. Yet

the committee can recollect no case, in the entire history of opinions tending to restrict the reserved powers of the States, in which a decision of the court struck more drastically than the *Brown* decision at the most intimate social and political institutions of the States. No opinion relating to taxation or to regulation by the States of commerce—nothing concerned with the validity of State bonds or the title to land—ever touched so many citizens, in so immediate and personal a fashion, as the *Brown* opinion. This is because the public schools occupy a unique place in our civilization and in the daily lives of our people.

This is no new phenomenon. Public schools existed at the time the Fourteenth Amendment was pending in Congress, and the amendment's possible application to the schools was discussed. But a reading of the debates of the 39th Congress makes it completely evident that no one—not even the most radical Northern sponsors of the amendment or the patrons of the companion civil rights bill—ever conceived that the amendment, of and by itself, would prohibit the States from operating racially separate institutions. The universal understanding was that the provisions requiring "due process" and "equal protection" related only to the freed Negro's right to hold and convey property, to sue and be sued, to appear as a witness in court. Thaddeus Stevens is sufficient authority for the assertion that the amendment "does not touch social or political rights."

The reasons for this understanding are abundantly clear. If it had been imagined that the Fourteenth Amendment, of and by itself, would serve to prohibit the States from maintaining racially separate schools, the amendment would have been rejected by *Northern States whose ratifications were vital to its adoption*. New York, Ohio and Pennsylvania, to name only three States, were then operating segregated schools. They continued to operate segregated schools long after the amendment was proclaimed a part of the Constitution. No one conceived this to be "unconstitutional."

This, then, was the agreement—the "plain sense and intention" of the amendment—as it was to be construed in terms of both the rights of a citizen and the powers of a State. Certainly the highest State and Federal courts so comprehended the meaning of the amendment over a long period of years. The sixth resolve of the Virginia Resolution quotes from the unanimous opinion of the Supreme Court as recently as 1927, in *Gong Lum vs. Rice*, but many similar expressions by appellate tribunals could have been cited with equal appropriateness.

Were not the States entitled to rely upon the permanence of this understanding? Were not they entitled to believe that the exercise of a State power, so long sanctioned by the highest authority, would continue to be reserved to them until expressly prohibited by specific new amendment of the Constitution? If in matters of this magnitude, there can be no reliance upon established constructions of our basic law, then law becomes a mockery and the Constitution but a hollow shell.

The Resolution sums up Virginia's position in the seventh resolve:

That with the Supreme Court's decision aforesaid and this resolution by the General Assembly of Virginia, a question of contested power has arisen: The court asserts, for its part, that the States did, in fact, in 1868, prohibit unto themselves, by means of the Fourteenth Amendment, the power to maintain racially separate public schools, which power certain of the States have exercised daily for more than

eighty years; the State of Virginia, for her part, asserts that she has never surrendered such power.

The committee call special attention to the declaration of "a question of contested power," for the phrase attracted some critical attention during debate on the Virginia Resolution, in January of 1956, in the House of Delegates. We can find no reasonable objection to the phrase. The prospect of such contests, questioning whether a particular power had been delegated to the Federal Government or reserved to the States, was envisioned in the very letter of transmittal with which Washington forwarded the work of the convention in September, 1787. The question was considered by Jefferson, Madison and Hamilton thirty years before it was pondered by Calhoun. To assert that a question of contested power exists is simply to assert that the locus of a power is in contest—that is, that it is questioned.

The committee firmly believe that every State has a clear constitutional right as a party to the compact, to allege an infraction of the compact. To allege is not to prove; to allege is not to nullify; to allege is not to threaten armed resistance. It is simply to charge an infraction. This is no more than what Jefferson had in mind when he wrote, in the Kentucky Resolution of 1798, "that the Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

Attention also may be directed to the categorical declaration in the seventh resolve that Virginia "has never surrendered" the power to operate racially separate schools. It may be urged, syllogistically, that if Virginia has never surrendered the power, then Virginia has it still; and if Virginia has the power, then Virginia may continue to exercise it; and if Virginia may continue to exercise it, then the Assembly has only to direct that segregated schools be continued as usual, and they shall be so continued. But the committee caution that no such authority is contended for in this language. It is true that Virginia never has voluntarily surrendered such power; the question, however, is whether the power has been validly seized from us. The resolution, the committee would emphasize, is by no means intended as an assertion of any power in the Assembly's hands legally to nullify the Supreme Court's decision. The court says a power is prohibited to us by the Constitution; the Resolution asserts that the power is not prohibited to us by the Constitution, and therefore is reserved to us under the Tenth Amendment. It is necessary to state the question thus categorically in order to achieve a proposition on which the ayes and noes might be taken, and to make clear the precise issue which Virginia respectfully seeks to have resolved by her sister States.

With the issue so stated, the particular allegation follows: The powers reserved to the States can be prohibited to them only by the States, through constitutional process, and not by the court. The eighth resolve asserts:

That this declaration upon the part of the Supreme Court of the United States constitutes a deliberate, palpable, and dangerous attempt by the court itself to usurp the amendatory power that lies solely with not fewer than three-fourths of the States.

And this is followed immediately by the ninth resolve:

That the General Assembly of Virginia, mindful of the resolution it adopted on December 21, 1798, and cognizant of similar resolutions adopted on like occasions in other States, both North and South, again asserts this fundamental principle: That whenever the Federal Government attempts the deliberate, palpable and dangerous exercise of powers not granted it, the States who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for preserving the authorities, rights and liberties appertaining to them.

It will be seen that both the eighth and the ninth resolve echo the language of the Virginia Resolution of 1798. Special attention may be directed to the description of the alleged infraction as a "deliberate, palpable and dangerous" usurpation by the court. Mr. Madison discussed this phrase so lucidly in his Report of 1799 that the committee, unable to improve upon his language, quote him at some length here:

"It appears to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that, where resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitima^e and solid foundation. The States, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.

"It does not follow, however, that because the States, as sovereign parties to their Constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed, either in a hasty manner, or on doubtful and inferior occasions. Even in the case of ordinary conventions between different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole, it is always laid down that the breach must be both wilful and material to justify an application of the rule. But in the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially affecting the vital principles of their political system.

"The resolution has accordingly guarded against any misapprehension of its object, by expressly requiring for such an interposition, the case of a *deliberate, palpable and dangerous* breach of the Constitution, by the exercise of *powers not granted* by it. It must be a case, not of a light and transient nature, but of a nature *dangerous* to the great purposes for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and *palpable*. Lastly, it must be a case not resulting from a partial consideration, or hasty determination; but a case stamped with a final consideration and *deliberate* adherence."

The committee submit that the infraction charged by the State of

Virginia in its Resolution of 1956 clearly measures up to the criteria as defined by Mr. Madison in 1799. Nothing could be more dangerous to the great purpose of a limited Union, in the committee's view, than usurpation by the court of what is, in practical effect, an almost unlimited power to amend the Constitution as it deems sociologically advisable. Neither is there any doubt of the palpable nature of the court's decision: The opinion of May 17, 1954, expressly repudiated the plain constitutional understanding of eighty-six years. Also, the court moved with deliberation; every opposing argument, advanced by able counsel over a period of three years, left members of the court unmoved. They were determined to cast aside both the precedent of law and the instruction of history; deliberately, they attempted to prohibit to the States a power certain of the States have been exercising for generations—a power which “deeply and essentially affects the vital principles of their political system.”

The committee would direct particular attention to the declaration in the ninth resolve, taken verbatim from the Resolution of 1798, that States “have the right and are in duty bound” to interpose against trespasses by agencies of the Federal government. This right has been exercised many times in Virginia, sometimes by the General Assembly through protests, memorials, and countervailing legislation; sometimes by the courts of this State, as in the case of Lord Fairfax's lands; sometimes by executive action.

Indeed, as early as November of 1790, we find a resolution by the General Assembly declaring a debt resumption act, recently passed in the Congress, “repugnant to the Constitution of the United States, as it goes to the exercise of a power not granted to the general government.” On December 16, 1790, the Assembly renewed its assault upon the act as impolitic, unjust, and dangerous, but the Assembly said this also:

During the whole discussion of the federal constitution by the convention of Virginia, your memorialists were taught to believe that “every power not granted was retained.” Under this impression, and upon this positive condition, declared in the instrument of ratification, the said government was adopted by the people of this Commonwealth; but your memorialists can find no clause in the Constitution, authorizing Congress to assume the debts of the States! As the guardians then of the rights and interests of their constituents, as sentinels placed by them over the ministers of the federal government, to shield it from their encroachments, or at least to sound the alarm when it is threatened with invasion, they can never reconcile it to their conscience silently to acquiesce . . .

Two years later, the General Assembly of Virginia rebuked the Supreme Court of the United States for accepting jurisdiction in a suit which the Assembly believed to have been settled finally thirteen years earlier. The Assembly declared flatly that the court's jurisdiction did not extend to the case, and that the court's action was “a dangerous and unconstitutional assumption of power.”

The following year, Virginia joined Georgia and other States in objecting to the high court's willingness to hear a suit brought by citizens of South Carolina against the State of Georgia. The Assembly asserted:

That a State cannot under the Constitution of the United States be made a defendant at the suit of any individual or individuals, and that the decision of the supreme federal court, that a state may be placed in that situation, is incompatible with, and dangerous to the

sovereignty and independence of the individual states, as the same tends to a general consolidation of these confederated republics.

The language of that resolution is especially notable in its reference to the "sovereignty and independence of the individual States," and in its description of the Union as a coming together of "confederated republics." The resolution itself, of course, was directed to what came to be known as the "Chisholm Case." When the Supreme Court entered a judgment against Georgia, the defendant State vigorously interposed her powers, refused to pay and took the issue to the other States. The result was the Eleventh Amendment to the Constitution, upholding the view taken by Virginia and Georgia.

Virginia's interposition against the Alien and Sedition Acts of 1798 and 1799 is so well known that further comment upon it would be superfluous. The text of the Assembly's Resolution of 1798, together with the Resolutions of Kentucky on the same subject, appear in full in the Appendix. These documents, amplified and expounded by Mr. Madison's Report of 1799, make up the "Doctrine of '98," which the committee perceive to embrace admirably certain of the "fundamental principles" to which our State Constitution, in Section 15, advises us frequently to recur.

The committee would also direct attention, in this brief review, to the Resolution adopted by the General Assembly on February 1, 1820, relative to the admission of Missouri under terms and conditions different from those enjoyed by other States. The preamble to this Resolution offers a clear and cogent discussion of the nature of a state, and especially of the sovereignty and separateness of the American States.

A spirited controversy between Virginia and the Supreme Court in 1821 grew out of the "Cohens Case." This involved the conviction of two men who sold, in Norfolk, lottery tickets authorized by the Congress for a lottery in the District of Columbia. The defendants appealed their conviction to the Supreme Court, which entered an order directing the Commonwealth of Virginia to appear and show cause why the convictions should not be reversed. The General Assembly adopted a resolution of solemn protest, denying the court's asserted power to exercise appellate jurisdiction over a State court. It was as a result of this celebrated case, in which Chief Justice Marshall asserted the court's full power, that Mr. Jefferson wrote this:

The judges are practicing on the Constitution by inferences, analogies, and sophisms, as they would on an ordinary law. They do not seem aware that it is not even a Constitution, formed by a single authority, and subject to a single superintendence and control; but that it is a compact of many independent powers, every single one of which claims an equal right to understand it, and to require its observance. However strong the cord of compact may be, there is a point of tension at which it will break. A few such doctrinal decisions, as barefaced as that of the Cohens, happening to bear immediately on two or three of the large States, may induce them to join in arresting the march of government, and in arousing the co-States to pay some attention to what is passing, to bring back the compact to its original principles, or to modify it legitimately by the express consent of the parties themselves, and not by the usurpation of their created agents. They imagine they can lead us

into a consolidate government, while their road leads directly to its dissolution.

In 1826, the Assembly spoke again in the language employed in the Resolutions of 1798 and 1956, to denounce the imposition of a protective tariff for the purpose of financing internal improvements. The appropriation by the Congress of funds "to construct roads and canals in the States," said the Assembly, "is a violation of the Constitution." This protest was renewed by the Assembly in March of 1827, in a long and excellently reasoned report directed to the limited powers of the Federal Government and the broad reserved powers of the States.

Virginia again interposed in 1829, in a report and resolution against the enactment by Congress, the preceding year, of the "Tariff of Abominations." Here, again, the Assembly asserted that

The Government of the United States has ever been regarded by the sovereignty of Virginia, as federative in character, and limited in power; as deriving its powers from concessions by the States, which concessions were clear and explicit, plainly declarative of all which was delegated, and actually containing a specific enumeration of every power designed to be transferred.

The resolution concluding this report once more echoed the conviction of Jefferson

That the Constitution of the United States, being a federative compact, between sovereign States, in construing which no common arbiter is known, each State has the right to construe the Compact for itself.

During the Nullification Crisis of 1832-33, the General Assembly had occasion once more to declare that it "continues to regard the doctrines of State sovereignty and State rights, as set forth in the resolutions of 1798, and sustained by the report thereon of 1799, as a true interpretation of the Constitution of the United States, and of the powers therein given to the general government." But the Assembly added significantly:

but that they do not consider them as sanctioning the proceedings of South Carolina indicated in her said ordinance; nor as countenancing all the principles assumed by the president (Mr. Jackson) in his said proclamation, many of which are in direct conflict with them.

The committee, in offering this brief and incomplete review, have in mind, first, to suggest the diversity of actions by the Federal government deemed to be encroachments upon the sovereignty of States, and second, to establish the consistency with which Virginia has adhered to the constitutional doctrines asserted in the Resolution of 1956. Yet it should be emphasized that Virginia has not been alone—far from it!—in asserting a right to interpose.

Perhaps the most notable (certainly the most prolonged) action of States to resist Federal authority occurred among Northern States in the three decades preceding the War for Southern Independence, when by every device of legislative and executive ingenuity they sought to evade the laws of Congress and the mandates of the Supreme Court relating to the return of fugitive slaves. At another period in our history, the sovereign State of Ohio exercised her sovereign powers against the

Bank of the United States. Kentucky interposed strenuously on an issue involving title to land. As recently as 1859, Wisconsin expressly approved the Doctrine of '98 in a resolution directed against the Supreme Court.

Here Wisconsin declared that a "positive defiance" by the States is the "rightful remedy" against actions of the Federal government deemed to be violations of the Constitution. Massachusetts, in 1858, also assailed the Supreme Court (for its opinion in the Dred Scott case), and asserted that Massachusetts would "never be bound" by that opinion. Maine and Vermont also solemnly asserted that the court's opinion in that historic case was "not binding" upon them. Well after the War for Southern Independence, when it was assumed by some that State sovereignty had been extinguished, Iowa did not hesitate to assert her powers, through her judiciary, against mandates of the Supreme Court. During the period of Prohibition, when the plain terms of the Eighteenth Amendment established a "supreme law" beyond peradventure, the State of New York and its political subdivisions set upon a planned course of resistance which was instrumental in bringing, in 1933, the repeal of that amendment. In recent months, the State Supreme Courts of Georgia and Florida have expressed their reliance upon State sovereignty in language too clear to be misunderstood.

The committee would emphasize that the Virginia Resolution of 1956 does not contemplate the "positive defiance" recommended by Wisconsin a century ago. It does not suggest, as Kentucky suggested in 1825, that the Governor "call forth the physical power of the State to resist the execution of the decisions of the Court." The resolution does not go so far as Massachusetts, Maine and Vermont went in declaring that a decision of the court would be "not binding" upon them. Rather, the Virginia Resolution of 1956 asserts the right and duty of interposition against Federal usurpation for one purpose only—"for *arresting* the progress of the evil." That was Mr. Madison's verb, and it precisely conveys the intention of the Virginia Resolution. The effort is to bring enforcement of the court's challenged mandates to a pause, to an intermediate position where matters may be held for a time *in statu quo* until opportunity may be had for careful consideration of Virginia's appeal. Again, the committee earnestly disavows the idea of forceful resistance against the court. Our appeal is explicitly directed to our sister States; it is generally directed to public opinion. And we are most deeply hopeful that if other States ponder the transcendent importance of reserving to ourselves the authority over our local institutions so clearly contemplated when the Union was formed, our appeal will find a thoughtful and sympathetic response.

The tenth resolve undertakes to express the foreseeable consequence if the States permit their reserved powers to be extinguished by judicial legislation. It reads:

That failure on the part of this State thus to assert her clearly reserved powers would be construed as tacit consent to the surrender thereof and that such submissive acquiescence to palpable, deliberate and dangerous encroachment upon one power would in the end lead to the surrender of all powers, and inevitably to the obliteration of the sovereignty of the States, contrary to the sacred compact by which this Union of States was created.

The committee can add nothing to this language. It speaks for itself. So, too, does the eleventh resolve:

That in times past, Virginia has remained silent—we have remained too long silent!—against interpretations and constructions placed upon the Constitution which seemed to many citizens of Virginia palpable encroachments upon the reserved powers of the States and wilful usurpations of powers never delegated to our Federal Government; we have watched with growing concern as the power delegated to the Congress to regulate commerce among the several States has been stretched into a power to control local enterprises remote from interstate commerce; we have witnessed with disquietude the advancing tendency to read into a power to lay taxes for the general welfare a power to confiscate the earnings of our people for purposes unrelated to the general welfare as we conceive it; we have been dismayed at judicial decrees permitting private property to be taken for uses that plainly are not public uses; we are disturbed at the effort now afoot to distort the power to provide for the common defense, by some Fabian alchemy, into a power to build local schoolhouses.

The committee recognize and acknowledge that not every member of the Assembly, or every reader of this report, will agree with every criticism implicit in the eleventh resolve. Yet it is the committee's feeling that throughout this republic, many thousands of American citizens share in general the apprehensions here particularized. It appears to the committee beyond question that the past several decades have witnessed a phenomenal expansion of Federal authority at the expense of State responsibility—an expansion achieved not by obedience to the restraints of the Constitution, but in defiance of them. The Resolution of 1956 was adopted by the General Assembly on February 1. Within the next three months, the Supreme Court undertook to seize from New York that State's power to fix the qualifications of public employees; from Pennsylvania that State's power to punish sedition; and from Illinois that State's power to regulate her own appellate procedures. These decisions tend still further to undermine the States and to rend the fabric of our federative Union. They encourage that massive centralization of governmental power which contributes to the decline of the family as a unit of society, and the substitution of the state for the role once served by the family, the local community, and the governments of the States.

The committee have no hesitation in deploring the trend thus described. To the extent that the Federal government assumes obligations of the States and of the people, to that extent have we exchanged a responsible republican form of government, based upon old ideals of individual responsibility, for the phantom benefits of a collectivist society.

This conviction is embodied in the twelfth resolve:

That Virginia, anxiously concerned at this massive expansion of central authority, nevertheless has reserved her right to interpose against the progress of these evils in the hope that time would ameliorate the transgressions; now, however, in a matter so gravely affecting this State's most vital public institutions, Virginia can remain silent no longer; recognizing, as this Assembly does, the prospect of incalculable harm to the public schools of this State and the disruption of the education of her children, Virginia is in duty bound to interpose against these most serious consequences, and earnestly to challenge the usurped authority that would inflict them upon her citizens.

The language of this resolve, it will be seen, again reflects Mr. Madison's Report of 1799. Our public schools are indeed our "most vital public institutions," and the court's mandate does "gravely affect" them. The State's system of elementary and secondary schools dates from that period, immediately following Appomattox, when the South struggled to overcome the bitter consequences of the war. The abject poverty of this postwar period cannot well be imagined in so thriving an era as the 1950's, but it is vividly remembered by men still alive in Virginia today. That any system of public schools could have been established is in itself remarkable; that the system thus painfully brought into being should have been a racially segregated system was clearly authorized by the plain understanding of the Fourteenth Amendment.

Little by little, that school system began to develop—but always within the difficult limitations of the South's agrarian economy. There was little enough money for the construction and maintenance of any schools, white or Negro. During the depression decade of the Thirties, even this slow progress was arrested; and during the years of World War II that followed, improvements necessarily were halted almost altogether.

With the end of World War II, however, Virginia and the other Southern States tackled the job anew. Applying to their schools a far greater percentage of total taxable wealth than any other region in the country so applied, the South set about the task it recognized had to be done. A statement of appropriations for public school purposes in Virginia during the last twenty years is set forth in the Appendix. Here in Virginia, salaries of white and Negro teachers were brought to an exactly equal scale. The number of white and Negro teachers, the aggregate salaries paid them, and pupil-teacher ratios for white and Negro schools are included in the Appendix. Millions of dollars were dedicated to erection of new schools for Negro children. An earnest effort was launched to bring the schools to that level of substantial equality that is acknowledged to be required under the Fourteenth Amendment.

There were in the State, for the school year 1955-1956, 750,075 school children enrolled in the schools, of whom 564,818 or 75.3 per cent were white children, and 185,257, or 24.7 per cent, were Negro children. Enrollments by counties and cities are tabulated in the Appendix. At the end of the fiscal year in June, 1956, total school property in Virginia was valued at \$526,000,000, of which \$416,000,000, or 79 per cent, was represented by white schools, and \$109,000,000, or 21 per cent, was represented by Negro schools. This is not perfect equality, but in terms of total school property it is very close to it; and while some Negro schools (and some white schools, too) are still woefully inadequate, Virginia's system of public schools is one in which our people take much pride. The committee have appended to this report photographs of several schools recently constructed and put in operation for the use of Negro pupils. Assuming the continuation of the trend represented by these photographs, the committee express their conviction that very shortly this State will be meeting, in full, what always has been conceived to be, prior to May 17, 1954, our constitutional obligation.

This obligation, again, is perceived to be simply this: That the State will not deny to any citizen under its jurisdiction equal opportunity to share in the programs and enterprises of the State. But the committee would emphasize, once more, that this right of a citizen to share in the public ventures of a State never was understood to mean a right of any citizen to sit in the identical classroom. The power of a State

to maintain racially separate schools was a power reserved by the States respectively, North and South, at the time of the Fourteenth Amendment's adoption. There was good reason for this then, in the committee's view, and wholly apart from the constitutional sanction, the committee perceive good reason for this today.

Senate Resolution No. 14, by direction of which this report is being prepared, instructed the committee to include in its report "such statistical, and narrative material, dealing with the public schools of Virginia and the problems attendant upon compulsory integration of the races therein, as shall, in the committee's opinion, be calculated best to inform sister States and the public generally of the nature of the school problem before us." It is with no wish to offend Virginia's Negro people, who include among their number many valuable citizens, that the committee submit data to support their profound conviction that the two races ought not to be mingled in the intimacy of the public schools of this Commonwealth. The schools offer an experience that is not educative alone, but social also; they bring together young people in the formative years of their adolescence, before they have had an opportunity to fashion a bridle of maturity by which the passions and impulses of inexperience may be governed. The palpable differences between white and Negro children in intellectual aptitudes have been demonstrated repeatedly by careful examinations conducted by responsible educational authorities. A summary of recent findings in this regard appears in the Appendix. To bring together such disparate groups in a massive integration of classrooms (and in the smaller, rural counties, having only two or three high schools, massive integration could not be avoided by any devices of gerrymandering), would be to create an educational chaos, impossible of satisfactory administration, which would lower the educational level for white children and inevitably create race consciousness and racial tensions. A more cruel imposition upon the children of both races, and upon the tranquility of their communities, could not be imagined.

Beyond these problems of teaching and curriculum lie other problems, stemming from generations of custom, tradition, and perhaps from anthropological considerations also, which figure heavily in the reasoning of the State in decreeing continued segregation in the schools. In 1955, the most recent year for which data is available, 21.7 per cent of all Negro births in Virginia were illegitimate births; the rate among white persons was 2.3 per cent. A table summarizing these figures appears in the Appendix. The Negro people regularly account for an entirely disproportionate percentage of crime, especially crimes of violence. These records also are summarized in the Appendix. The incidence of venereal disease among the Negro race is such that in Virginia, Negroes account for nearly 84 per cent of all venereal disease though they comprise but 25 per cent of total population. This problem is summarized in the Appendix.

The committee are not suggesting, of course, and would not be misunderstood on this point, that *all* Negroes are more promiscuous and less educable than all whites. Emphatically not! The attainments of many individual Negro citizens in education, in business, in law, in sports, and in the humbler occupations of our economy, are well known to the committee and are warmly commended. Nor are the committee unconscious of manifest shortcomings among segments of the white population. The