

## THE CONSCIENCE OF VIRGINIA: JUDGE ROBERT R. MERHIGE, JR., AND THE POLITICS OF SCHOOL DESEGREGATION

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The United States Supreme Court's 1954 landmark decision in *Brown v. Board of Education* declared that segregation in public education violated the Fourteenth Amendment to the United States Constitution.<sup>1</sup> For the millions of African Americans who had endured decades of separate and unequal schooling, this decision was a resounding reaffirmation of the nation's commitment to equal justice under the law. But those who expected segregated schools to end overnight were in for a rude awakening. The National Association for the Advancement of Colored People ("NAACP"), which had led the legal assault against segregation since its founding in 1909, was encouraged by the Court's ruling. But its attorneys would soon realize that their initial optimism had been premature and that they had greatly underestimated white southern resistance. Perhaps few could have predicted that it would take nearly twenty years before school desegregation would begin in earnest in the states of the former Confederacy—and only then because of the determined actions of a few courageous judges willing to place principle above prejudice. Judge Robert R. Merhige, Jr., of Virginia was one of them.

A native of New York, Judge Merhige studied at High Point College in North Carolina before attending the University of Richmond's T.C. Williams School of Law in 1942. After serving in the Army Air Corps during World War II, Judge Merhige returned to Richmond where he began practicing criminal law. On July 17, 1967, President Lyndon B. Johnson appointed Judge Merhige to the United States District Court for the Eastern Dis-

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

trict of Virginia. Judge Merhige would be involved with many cases during his more than thirty years on the bench, but it was his controversial rulings on school desegregation that would come to define his career and shape his judicial legacy.<sup>2</sup>

For most of the Deep South, the Supreme Court's ruling in the *Brown* decision had not only been ignored, but had been met with fierce and determined opposition that became known as "Massive Resistance," in which Virginia had taken the lead.<sup>3</sup> In his fiery editorials, James J. Kilpatrick of the *Richmond News Leader* constantly railed against the evils of integrated classrooms, a position strongly reinforced by the Commonwealth's powerful political establishment often referred to as the "Byrd Organization."<sup>4</sup> Yet, the steely determination of Virginia's NAACP attorneys, led by Oliver W. Hill, Samuel W. Tucker, and Henry L. Marsh, meant that the issue of school desegregation would continue to be pressed in the federal courts, forcing some judges, such as Judge C. Sterling Hutcheson, to resign from the bench rather than enforce the *Brown* decision.<sup>5</sup> Even after "Massive Resistance" had ended, southern school districts continued to resist, substituting token compliance for outright resistance. By creating such schemes as pupil placement boards and freedom of choice plans, southern school districts gave the appearance of acting in good faith when in reality, school segregation remained as firmly entrenched as ever. By the mid-1960s, Virginia's Pupil Placement Board, which had assigned only a handful of black students to white schools and no white students to black schools, had finally been exposed for what it was.

In 1968, the United States Supreme Court ruled in *Green v. New Kent County* that the county's freedom of choice plan did not constitute adequate compliance with the school board's responsibility to end segregated schools and that the school board would have to devise other plans that would produce meaningful deseg-

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2. See generally RONALD J. BACIGAL, *MAY IT PLEASE THE COURT: A BIOGRAPHY OF JUDGE ROBERT R. MERHIGE, JR.* (1992) (giving a detailed discussion of the life of Judge Merhige).

3. *Brown at 60: The Southern Manifesto and "Massive Resistance" to Brown*, NAACP LEGAL DEFENSE FUND, [www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown](http://www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown) (last visited Sept. 27, 2017).

4. Adam Bernstein, *James J. Kilpatrick, 89, Dies; Conservative Columnist Formerly on '60 Minutes'*, WASH. POST (Aug. 17, 2010), [www.washingtonpost.com/wp-dyn/content/article/2010/08/16/AR2010081602555.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/08/16/AR2010081602555.html); *Byrd Organization*, ENCYCLOPEDIA VA., [https://www.encyclopediavirginia.org/Byrd\\_Organization](https://www.encyclopediavirginia.org/Byrd_Organization) (last visited Sept. 27, 2017).

5. See Robert R. Merhige, Jr., *A Judge Remembers Richmond in the Post-Brown Years*, 49 WASH. & LEE L. REV. 23, 24 (1992).

regation.<sup>6</sup> During the era of “Massive Resistance,” rural Farmville, Virginia in Prince Edward County had gained national attention by closing its schools for nearly five years rather than integrate.<sup>7</sup> By the early 1970s, however, the focus would shift to Richmond’s public schools, which symbolized one of Virginia’s best examples of the failures of token compliance.

The public schools in the City of Richmond (the “City”) were among the most segregated in the Commonwealth of Virginia, and the school board had been under court order to create a unitary school system since the early 1960s.<sup>8</sup> On March 10, 1970, attorneys for the African-American plaintiffs in Richmond’s ongoing lawsuit filed a motion for further relief in light of the Supreme Court’s recent opinion in *Green*.<sup>9</sup> They argued that the City’s freedom of choice plan, in effect for four years, had failed to convert the public schools into a non-segregated, unitary system.<sup>10</sup> Enrollment figures validated their assertion: As of May 1, 1970, Richmond’s public school system enrolled approximately 52,000 students. Of the seven high schools, three were 100% black; one was 99.3% white; one was 92% white; one was 81% white; and one was 68% black. Of the nine middle schools, two were 100% black, one was 99.9% black, and three ranged from 88% black to 69% black. Three other middle schools were 91%, 97%, and 98% white. In forty-four elementary schools, seventeen were 100% black; four others were over 99% black; one was 78% black; two were 100% white; thirteen others were at least 90% white; two were roughly 86% white; and five were between 53% and 70% white. The figures for faculty and staff showed even less integration.<sup>11</sup> The evidence was compelling: freedom of choice had failed to produce a unitary school system in Richmond.<sup>12</sup> United States District Court Judge Robert R. Merhige, Jr., would have to rule on the feasibility of any future desegregation plans offered by the school board.

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6. *Green v. Cty. Sch. Bd. of New Kent*, 391 U.S. 430, 441–42 (1968).

7. *The Closing of Prince Edward County’s Schools*, VA. HIST. SOC’Y, <http://www.va-historical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/closing-prince> (last visited Sept. 27, 2017).

8. *See generally Green*, 391 U.S. 430 (recounting the history of noncompliance to desegregate Virginia schools).

9. Gary C. Leedes & James M. O’Fallon, *School Desegregation in Richmond: A Case History*, 10 U. RICH. L. REV. 1, 15 (1975).

10. *See Bradley v. Sch. Bd. of Richmond*, 317 F. Supp. 555, 558 (E.D. Va. 1970).

11. *Id.* at 560 (providing all of the above statistics).

12. *See generally* ROBERT A. PRATT, *THE COLOR OF THEIR SKIN: EDUCATION AND RACE IN RICHMOND, VIRGINIA 1954–89* (1992) (describing the history of school segregation in Richmond).

The Richmond School Board responded by proposing a couple of new plans that it claimed would produce better results, but Judge Merhige rejected the plans, saying in effect that Richmond's history of residential segregation would make it difficult, if not impossible, to achieve acceptable levels of desegregation.<sup>13</sup> Judge Merhige wrote that:

[I]n spite of the lifting of public discriminatory practices as a result of the repeal of White supremacy laws, congressional action and judicial pronouncements, no real hope for the dismantling of dual school systems appears to be in the offing unless and until there is a dismantling of the all Black residential areas.<sup>14</sup>

Judge Merhige reasoned that if residential segregation was the major impediment to school desegregation, only a plan that could bridge the neighborhood gap would have any chance of success.<sup>15</sup> Searching for some viable alternatives to the City's failed plans of the past, Judge Merhige was keenly aware of a school desegregation case in North Carolina that was currently before the United States Supreme Court.

On April 20, 1971, in the case of *Swann v. Charlotte-Mecklenburg Board of Education*, the United States Supreme Court ruled unanimously that school districts could use busing to help achieve desegregation.<sup>16</sup> The Court's rationale, which mirrored Judge Merhige's own thinking, was that given the nation's long history of residential segregation, busing was an appropriate remedy for the problem of racial imbalance in the public schools.<sup>17</sup> As early as January 1971, Judge Merhige had ruled that the level of desegregation achieved in Richmond's schools was "less than remarkable" and that "further delays in affording the plaintiffs what these defendants owe them under the Constitution . . . cannot be justified either by precedent or by practicality."<sup>18</sup> Judge Merhige continued, "The Constitution is satisfied only when an integration plan 'works' in practice and not merely on paper."<sup>19</sup>

On April 5, 1971, fifteen days before the Supreme Court's decision in *Swann*, Judge Merhige ordered into effect a new desegregation plan that provided for pupil and faculty reassignments and

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13. *Bradley*, 317 F. Supp. at 566.

14. *Id.*

15. *See id.*

16. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

17. *Id.* at 14, 29-30.

18. *Bradley v. Sch. Bd. of Richmond*, 325 F. Supp. 828, 831, 834 (E.D. Va. 1971).

19. *Id.* at 847.

free city-wide transportation in the City of Richmond.<sup>20</sup> The new plan stipulated that the school board would have to assign pupils so that the ratio of black to white in each school would be based on the city-wide ratio for the groups; teacher assignments were to be made in a similar manner.<sup>21</sup> Of far greater significance, though, was Judge Merhige's decision to extend busing to all pupils within the City, including kindergarten and elementary school students.<sup>22</sup> Judge Merhige's decision had effectively ended seventeen years of legal maneuvers and shenanigans, and the City was now on the fast track to end its segregated school system. But while many applauded Judge Merhige's decision, not everyone saw this as a time for celebration.

Judge Merhige's desegregation plan set off an immediate series of protests by white parents and parent-teacher associations across the City.<sup>23</sup> For example, the day after Judge Merhige announced his busing plan, nearly two hundred parents and area residents met to express their desire to return to freedom of choice, withdraw their children from the schools in protest, and even amend the United States Constitution to curb federal judicial power. Others suggested contacting their elected state and federal representatives to urge the removal of those officials who "do not meet the needs and wishes of the people."<sup>24</sup> Even the Supreme Court's affirmation of Judge Merhige's decision did little to quiet the City's anti-busing forces who were determined that their children would not be bused.<sup>25</sup>

In addition to the negative views expressed by many white parents on the subject of busing (perceptions that were stoked by two of Richmond's daily newspapers which frequently printed articles and letters citing the alleged genetic inferiority and immorality of blacks), demographics further complicated Judge Merhige's busing plan. Decades of white migration to the suburbs and black migration to the City had produced what some began to refer to as the "chocolate city vanilla suburbs" phenomenon, as the City of Richmond was surrounded by the overwhelming white Counties of Chesterfield and Henrico.<sup>26</sup> And while the desire for

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20. Leedes & O'Fallon, *supra* note 9, at 18–20, 34.

21. *Id.* at 19–20.

22. *See id.* at 20.

23. PRATT, *supra* note 12, at 57–58.

24. *Id.*

25. *Id.* at 58.

26. *See* Reynolds Farley et al., "Chocolate City, Vanilla Suburbs:" *Will the Trend To-*

better economic opportunities was perhaps a primary motivation for both migrations, it is apparent that the furor over the City's busing plan clearly served as a catalyst for white residents leaving the City, especially as the earlier trickle turned into a fast-flowing stream in the early 1970s.<sup>27</sup> In a 1975 article, two University of Richmond professors noted the extent to which "white flight" had contributed to resegregation within the Richmond metropolitan area:

While the overall population figures have decreased in Richmond and increased in the counties, the percentage of blacks in each jurisdiction has changed inversely. Containment of blacks within Richmond, rather than significant black immigration, accounted for the increased percentage of blacks in the city. Although black immigration exceeds emigration . . . *the primary factor responsible for the increased proportion of blacks [within the city] is continual white emigration.*<sup>28</sup>

With fewer white students in Richmond's public schools, Judge Merhige's desegregation plan for the City would yield few positive results.

Within six months of Judge Merhige's busing decree, black plaintiffs and their attorneys were back in court to demand that Richmond's school system be merged with those of Chesterfield and Henrico counties.<sup>29</sup> Arguing that the Commonwealth had an obligation to eliminate school segregation, and that desegregation could never happen so long as the city schools remained predominantly black and the county schools overwhelmingly white, the plaintiffs proposed a city-county merger where Richmond's public schools, a 43,000-pupil system that was seventy percent black, would be consolidated with Chesterfield and Henrico, each of which had a student population that was over ninety percent

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*ward Racially Separate Communities Continue?*, 7 SOC. SCI. RES. 319, 320 (1978); Leedes & O'Fallon, *supra* note 9, at 22-23.

27. See Leedes & O'Fallon, *supra* note 9, at 23.

28. *Id.* at 22 (emphasis added); see also JOHN V. MOESER & RUTLEDGE M. DENNIS, THE POLITICS OF ANNEXATION: OLIGARCHIC POWER IN A SOUTHERN CITY (1982) (discussing Richmond's 1970 annexation of portions of Chesterfield County); James A. Sartain & Rutledge M. Dennis, *Richmond, Virginia: Massive Resistance Without Violence*, in COMMUNITY POLITICS AND EDUCATIONAL CHANGE: TEN SCHOOL SYSTEMS UNDER COURT ORDER 208-36 (Charles V. Willie & Susan L. Greenblatt eds., 1981) (discussing the desegregation process in Richmond, Virginia); Leedes & O'Fallon, *supra* note 9, at 29.

29. See *Bradley v. Sch. Bd. of City of Richmond*, 338 F. Supp. 67 (E.D. Va. 1972); PRATT, *supra* note 12, at 64.

white.<sup>30</sup> The result would be a single 104,000-pupil unit that would be one-third black.<sup>31</sup>

On January 10, 1972, Judge Merhige handed down his opinion agreeing with the plaintiffs and ordering the merger.<sup>32</sup> Judge Merhige noted the Commonwealth's long history of residential segregation, as well as its complicity in maintaining and perpetuating segregated schools; therefore, the Commonwealth was obliged to create the remedy.<sup>33</sup> As for the actual merger itself, Judge Merhige opined:

The proof here overwhelmingly establishes that the school division lines between Richmond and the counties here coincide with no natural obstacles to speak of and do in fact work to confine blacks on a consistent, wholesale basis within the city . . . . For [these] reasons . . . it is adjudged and ordered that [the governing bodies of Henrico, Chesterfield, and Richmond] . . . take all steps and perform all acts necessary to create a single school division.<sup>34</sup>

Judge Merhige's decision sent shock waves throughout the entire metropolitan area and across the Commonwealth. As expected, officials and residents of both counties were outraged and vowed to appeal the ruling. Some referred to the decision as "personal opinions disguised as law," while others threatened to abandon the public schools entirely if the decision was not overturned.<sup>35</sup> Both of Richmond's major dailies also denounced the ruling, with the *Richmond Times-Dispatch* calling it "the pernicious gibberish of those social engineers who argue . . . that a school system's primary function is to promote racial togetherness. . . ."<sup>36</sup> Thousands of white students took to the streets, waving anti-busing signs in protest, while many teachers threatened to resign.<sup>37</sup> A week after Judge Merhige's decision, several thousand county residents, riding in a 3261-car motorcade traveled from Richmond to Washington, D.C., to denounce the ruling.<sup>38</sup> Not surprisingly, the battle lines had formed mainly along racial

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30. PRATT, *supra* note 12, at 64–65.

31. *Id.*

32. *Bradley*, 338 F. Supp. at 244–45.

33. *Id.* at 94–96.

34. *Id.* at 84, 244, 245.

35. *See* PRATT, *supra* note 12, at 67.

36. *Id.* at 68.

37. *Id.* at 67.

38. *Id.* at 68.

lines, with most blacks supporting the ruling and most whites in fierce opposition.<sup>39</sup>

The personal repercussions for the judge were immediate. Overnight, a once venerated jurist had become *persona non grata*, and for the next few years, Judge Merhige and his family endured what seemed like a never-ending nightmare. As hostility to the merger intensified, Judge Merhige became a prime target of abuse. He received a barrage of hate mail, obscene phone calls, and life insurance policies.<sup>40</sup> Threats to his and his family's lives were constant and common, which prompted authorities to station federal marshals at his home for almost two years.<sup>41</sup> The following note sent to the judge was typical:

Look—You Dirty Bastard, We are sick of you Federal Judges playing God. Your knowledge of the law is zero minus a million—your left-wing ideology aid [sic] the malcontents to bring this country into revolution. It would be a good idea to look under [the] hood of your car before starting it. Think about it. You son of a bitch.<sup>42</sup>

In a 1987 interview, Judge Merhige became emotional when discussing what he and his family had to endure during that time.

My family and I went through hell. . . . I remember that at one time there were eleven [federal marshals] living on my property, twenty-four hours a day. They went to school with my son, went to the grocery store with my wife, and they went everywhere with me. The marshals were truly afraid for me, although I was always more concerned about my family. My dog was shot. Our guesthouse, where my then seventy-five year old mother-in-law lived, was burned to the ground. Every other week or so we received a cryptic letter warning that our son Mark would never live to see age twenty-one. I was burned in effigy, spat upon, and occasionally insulted by people who would deliberately walk out of restaurants whenever my wife and I entered. At times it got awfully depressing. But I did what I did not only because it was the law, but also because I believed it was right. And for that, I have no regrets.<sup>43</sup>

The furor over Judge Merhige's controversial desegregation plan proved to be short-lived. On June 5, 1972, the Fourth Circuit Court of Appeals, in a 5-1 decision, overturned Judge Merhige's ruling, holding in effect that a district judge did not have the authority to compel any state or locality to rearrange its political

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39. *See id.* at 71.

40. *Id.* at 69.

41. *Id.*

42. *Id.*

43. *Id.* (quoting an April 1987 interview with Judge Merhige).

boundaries to help facilitate school desegregation.<sup>44</sup> On appeal, the United States Supreme Court split 4-4 on whether to review the case (with Justice Powell recusing himself),<sup>45</sup> thereby leaving the Fourth Circuit's ruling in effect.<sup>46</sup> In 1974, the United States Supreme Court would settle the issue definitively in a similar case in Michigan, where a federal judge had ordered the heavily black schools of Detroit to merge with the surrounding white suburban schools.<sup>47</sup> In a 5-4 decision (this time, Justice Powell in the majority), the Court reached the same conclusion that the Fourth Circuit had in the Richmond case.<sup>48</sup> Coming twenty years after *Brown*, the case of *Milliken v. Bradley* marked the Court's first major retreat from school desegregation.<sup>49</sup>

In his long and distinguished career on the federal bench, Judge Robert R. Merhige, Jr., rendered many important decisions on a wide range of issues. Yet, he will always be best remembered for his rulings on school desegregation in Richmond, Virginia. Indeed, as the years have passed and anger has abated, some of his staunchest critics have come to respect his courage and determination in the face of persistent hostility and threats to his and his family's personal safety. During the early 1970s, Judge Merhige was perhaps the most hated man in Virginia, but his commitment to equal justice under the law has earned him a place alongside the likes of Judges J. Waties Waring, John Minor Wisdom, Richard Taylor Rives, and Frank M. Johnson, who placed dedication to the United States Constitution above politics, popular sentiment, or "southern tradition." For most of the 1970s, Judge Merhige was a prophet without honor in his own country, but during a critical time in our nation's history, he was, in a true sense, the conscience of Virginia.

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44. See *Bradley v. Sch. Bd. of Richmond*, 462 F.2d 1058, 1060 (4th Cir. 1972).

45. Justice Lewis F. Powell was a native Virginian and had served as chairman of Richmond's School Board from 1952 until 1961. See Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES (Aug. 26, 1998), <http://www.nytimes.com/1998/08/26/us/lewis-powell-crucial-centrist-justice-dies-at-90.html?mcubz=0>.

46. See *Sch. Bd. of Richmond v. State Bd. of Educ. of Va.*, 414 U.S. 884 (1973).

47. See *Milliken v. Bradley*, 418 U.S. 717 (1974); PRATT, *supra* note 12, at 83.

48. See *Milliken*, 418 U.S. at 721-22, 752-53.

49. See *id.* at 752-53.