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## Toward a Definitive History of Griggs v. Duke Power Co.

David J. Garrow

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# REVIEW ESSAY

## Toward a Definitive History of *Griggs v. Duke Power Co.*

David J. Garrow\*

THE CRUSADE FOR EQUALITY IN THE WORKPLACE:  
THE *GRIGGS V. DUKE POWER* STORY

Robert Belton, edited by Stephen L. Wasby.  
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I.	INTRODUCTION.....	198
II.	THE ORIGINS OF <i>GRIGGS</i> .....	200
III.	<i>GRIGGS</i> AND <i>QUARLES</i> IN THE DISTRICT COURTS .....	208
IV.	JOHN MINOR WISDOM AND FREEZING .....	213
V.	<i>GRIGGS</i> ON APPEAL .....	216
VI.	<i>GRIGGS</i> IN THE SUPREME COURT .....	220
VII.	THE <i>GRIGGS</i> OPINION.....	227
VIII.	<i>GRIGGS</i> 'S RECEPTION, IMPACT, AND REBIRTH .....	230
IX.	CONCLUSION: HOW COURTS MAKE LAW.....	234

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## I. INTRODUCTION

When *Griggs v. Duke Power Co.*<sup>1</sup> was unanimously<sup>2</sup> handed down by the U.S. Supreme Court on March 8, 1971, the decision did not draw prominent headlines.<sup>3</sup> The *New York Times* accorded the ruling only a two-sentence summary on page twenty-one,<sup>4</sup> and the *Wall Street Journal* gave it modest attention on page four.<sup>5</sup> The *Washington Post* did give the decision front-page coverage,<sup>6</sup> but *Gillette v. United States*,<sup>7</sup> a Selective Service Act case, was awarded a prominent, top-of-the-page, two-column headline<sup>8</sup> while *Griggs* received secondary attention.

Notwithstanding how modest the contemporaneous news coverage was, knowledgeable judges, scholars, and litigators quickly acknowledged how *Griggs* actually had an import far beyond *Gillette* and, at least in some eyes, also beyond a half dozen or more historically notable rulings that likewise were handed down during the first six months of 1971.<sup>9</sup> Interviewed on July 1, 1971, just one day after the conclusion of the Supreme Court's 1970 Term, Chief Justice Warren E. Burger was asked to name "a case or two that to you stand

1. 401 U.S. 424, 425 (1971).

2. *Id.* at 425 (with Justice Brennan recused).

3. Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 455 (2005) ("*Griggs* did not garner the big headlines in newspapers when the decision was announced by the Court."); Albert W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972) ("issued without fanfare").

4. *Supreme Court's Actions*, N.Y. TIMES, Mar. 9, 1971, at 21.

5. *Supreme Court Bars Employment Tests That Result in Anti-Negro Discrimination*, WALL ST. J., Mar. 9, 1971, at 4.

6. *Job Tests Held in Violation of Rights Act*, WASH. POST, Mar. 9, 1971, at A1.

7. 401 U.S. 437 (1971).

8. John P. MacKenzie, *Court Rejects CO Status in Specific War; Jurists Refuse to Broaden Draft Law*, WASH. POST, Mar. 9, 1971, at A1.

9. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 733 (1971) (denying a request for injunctive relief to prevent the *New York Times* from publishing the contents of a classified government document); *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971) (concluding that state aid paid to teachers of church-related educational institutions was unconstitutional); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395 (1971) (reversing the dismissal of the petitioner's action for damages against federal agents for violating his Fourth Amendment rights); *Cohen v. California*, 403 U.S. 15, 21 (1971) (refusing to require a protestor to remove clothing containing explicit language on First Amendment grounds); *United States v. Vuitch*, 402 U.S. 62, 71 (1971) (holding that a District of Columbia statute prohibiting most abortions was not unconstitutionally vague so long as the statute's exception for a woman's "health" was interpreted to include a woman's psychological health in addition to physical health); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28-29 (1971) (upholding the district court's integration plan for a Charlotte school district); *Younger v. Harris*, 401 U.S. 37, 47 (1971) (holding that plaintiffs who feared violations of their constitutional rights did not have standing to challenge a state criminal statute because they had not yet been indicted).

as kind of landmarks” from his first two years on the Court. Rather than citing either the Pentagon Papers case, issued just the day before,<sup>10</sup> or the famous school-busing case handed down on April 20,<sup>11</sup> Burger instead responded that

I think there is one case that has been commented on a great deal by others as having been . . . a “sleeper” . . . . It was Griggs against Duke Power Company having to do with equal employment opportunities. I wouldn’t want to say that was one of the terribly important cases but experts in that field of law considered it so, but it is not the kind of a case that received any public attention.<sup>12</sup>

Just as Burger indicated, legal academics more than shared his view. Writing some years later, but still prior to *Griggs’s* twentieth anniversary, the distinguished employment-law scholar Alfred W. Blumrosen declared that “[f]ew decisions in our time—perhaps only *Brown v. Board of Education*—have had such momentous social consequences” as *Griggs*.<sup>13</sup> Subsequent scholarly commentators termed the ruling an “icon,”<sup>14</sup> a “landmark,”<sup>15</sup> a “milestone,”<sup>16</sup> and “a watershed decision.”<sup>17</sup> Likewise, arguably the most knowledgeable and widely experienced civil rights litigator of the 1960s and 1970s, Jack Greenburg, who was the Director-Counsel of the NAACP’s Legal Defense and Educational Fund (“LDF”) from 1961 to 1984, echoed Blumrosen’s characterization, stating that “[i]n terms of the impact of the change wrought, [*Griggs*] was almost on a par with the campaign that won *Brown*.”<sup>18</sup>

Yet the high regard in which some jurists, law professors, and lawyers held *Griggs* did not mean—just as on the day it first came

10. See *N.Y. Times Co.*, 403 U.S. at 748.

11. See *Swann*, 402 U.S. at 1, 28–29 (validating a Charlotte school system’s integration plan).

12. *Conversation with the Chief Justice* (ABC News Transcript), quoted in ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY 329 n.10 (Stephen L. Wasby ed., 2014).

13. Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 1 (1987).

14. Earl M. Maltz, *The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353, 1370.

15. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006).

16. NANCY MACLEAN, FREEDOM IS NOT ENOUGH 108 (2006).

17. Samuel Estreicher, *The Story of Griggs v. Duke Power Co.*, in EMPLOYMENT DISCRIMINATION STORIES 153, 167 (Joel Wm. Friedman ed., 2006).

18. JACK GREENBERG, CRUSADERS IN THE COURTS 412 (1994); see also Belton, *supra* note 3, at 433 (“Aside from *Brown v. Board of Education*, the single most influential civil rights case during the past forty years that has profoundly shaped, and continues to shape, civil rights jurisprudence and the discourse of equality is *Griggs v. Duke Power Co.*”); James E. Jones Jr. *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 1 (1976) (“It is appropriate to compare its potential impact to that of *Brown*.”).

down—that the case was significantly memorialized far and wide. Perhaps the best and most fully informed scholarly history of the Burger Court, written by the late Bernard Schwartz,<sup>19</sup> never even once mentions *Griggs*, and the best-known biographies of the Justices who heard the case likewise without exception fail to ever mention it.<sup>20</sup> Indeed, despite the best efforts of an energetic and enterprising journalist covering *Griggs*'s twentieth anniversary to plumb historians' interest in the case, a complaint from this Essay's author summed up his findings: "Even though *Griggs* is a huge touchstone, there's little history about it."<sup>21</sup>

## II. THE ORIGINS OF *GRIGGS*

*Griggs v. Duke Power Co.* emerged from the immediate aftermath of the enactment of Title VII of the Civil Rights Act of 1964. The legislative history of the Act's consideration, debate, and amending in both houses of Congress has been revisited many times,<sup>22</sup> but it bears strong emphasis that Title VII, targeted at eliminating discrimination on the basis of race, color, religion, sex, or national origin in the employment arena, was "by far the longest and most

19. BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM* (1990).

20. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005); DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998); BRUCE ALLEN MURPHY, *WILD BILL* (2003); ROGER K. NEWMAN, *HUGO BLACK* (1994); JUAN WILLIAMS, *THURGOOD MARSHALL* (1998); TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN* (1992). No serious biography of either Chief Justice Burger or Justice Potter Stewart has yet been written.

21. Drew Jubera, *How Willie Griggs Changed the Workplace*, ATLANTA J.-CONST., July 1, 1991, at B1 (quoting David Garrow).

22. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA 125–52* (1990) (describing the obstacles that the Civil Rights Act of 1964 overcame on its path to becoming law); David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 9–32 (Bernard Grofman ed., 2000) (overviewing the legislative process surrounding the 1964 Civil Rights Act); see also NICK KOTZ, *JUDGMENT DAYS 112–52* (2005) (detailing the battle to get the 1964 Civil Rights Act through the Senate); ROBERT D. LOEVY, *TO END ALL SEGREGATION* (1990) (explaining the legislative strategy used to obtain Congressional approval of the Civil Rights Act of 1964); ROBERT MANN, *WHEN FREEDOM WOULD TRIUMPH 185–208* (2007) (exploring the events leading up to the Senate's passage of the Civil Rights Act of 1964); PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION 199–230* (1997) (describing the Civil Rights Act of 1964's path through Congress); MICHAEL I. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 61–62* (1966) (same); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* (1985); John G. Stewart, *The Civil Rights Act of 1964: Tactics I*, in *THE CIVIL RIGHTS ACT OF 1964*, at 211–64 (Robert D. Loevy ed., 1997) (detailing the "final drive" for cloture and "the unanticipated problems faced by the pro-civil rights senators in the 'post-cloture' environment on the Senate floor"). Graham's book is rich and invaluable, but it is not without weaknesses and biases. The most extensive review of Graham's work is Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723 (1991), a forty-two-page review essay. See also David J. Garrow, *Uncle Sam vs. Jim Crow*, WASH. POST BOOK WORLD, May 20, 1990, at 9 (reviewing Graham).

complicated” title in the Act.<sup>23</sup> One contemporaneous commentator, an attorney in the Department of Justice’s Office of Legal Counsel, rightly highlighted how “discrimination in employment is the most widespread and undoubtedly the most harmful to its victims and to the nation as a whole” of the multiple evils that the overall Act banned.<sup>24</sup> But the extensive Senate floor debate about Title VII, including the defeat or adoption of multiple proposed amendments, meant that the Title’s final language, as President Lyndon B. Johnson signed into law on July 2, 1964, left most well-informed participants and onlookers uncertain of how the Title’s application and enforcement would play out.<sup>25</sup>

The primary uncertainty involved the Equal Employment Opportunity Commission (“EEOC”), newly created by Title VII<sup>26</sup> and initially envisioned as having “principal enforcement responsibility” for the Title’s statutory prohibitions.<sup>27</sup> Civil rights proponents had originally sought to ensure that the EEOC would have meaningful enforcement authority of its own, independent of the Department of Justice’s Civil Rights Division, but that goal had been a notable casualty of Senate floor compromises required to maintain the support of Republican Minority Leader Everett M. Dirksen.<sup>28</sup> Individuals who

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23. Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 63 (1964).

24. *Id.* at 62.

25. *See id.* at 64–68, 81 (describing the Civil Rights Act of 1964’s legislative history and noting that “it may be that an amendment to Title VII will be found necessary [to resolve the Act’s potential problems] after there has been some experience with the statute”); George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 690–96 (1980) (arguing that the presumption in favor of class certification in Title VII class actions “has insufficient basis in congressional intent as revealed in Title VII and its legislative history”); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS & COM. L. REV. 431, 433–58 (1966) (detailing Title VII’s convoluted legislative history and questioning whether that legislative history will “be of material assistance in the administration of the act”); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 431–34, 469 (1965) (summarizing Title VII’s legislative history and concluding that “[d]espite the inherent problems in implementing any fair employment legislation, it should be possible to enforce title VII”).

26. Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 258 (codified as amended at 42 U.S.C. § 2000e-4 (2012)).

27. Berg, *supra* note 23, at 81.

28. *See* Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Report*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 317 (Herbert Hill & James E. Jones Jr. eds., 1993) (quoting a January 4, 1973, interview with Joseph L. Rauh regarding “the cease-and-desist powers that Senator Dirksen had removed as the price of enactment of Title VII”); *see also* Wolfgang Saxon, *Joseph Rauh Jr., Groundbreaking Civil Liberties Lawyer, Dies at 81*, N.Y. TIMES (Sept. 5, 1992), <http://www.nytimes.com/1992/09/05/us/joseph-rauh-jr-groundbreaking-civil-liberties-lawyer-dies-at-81.html> (noting Rauh’s “strenuous Capitol Hill lobbying” on behalf of the Civil Rights Act); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, CELEBRATING THE 40TH ANNIVERSARY OF TITLE VII, PANEL I (2004), available at [www.eeoc.gov/eeoc/history/40th/panel/40thpanels/panel1/transcript](http://www.eeoc.gov/eeoc/history/40th/panel/40thpanels/panel1/transcript)

believed themselves to be victims of discriminatory employment practices could file written complaints with the Commission, but if the EEOC, after investigating, adjudged that the allegation was true, Title VII authorized it only to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion," and no more.<sup>29</sup> One subsequent commentator asserted that "Title VII was a carefully crafted compromise that sought to accommodate both the perceived need for federal action against employment discrimination and concerns about preservation of employer autonomy."<sup>30</sup> Others, however, were less sanguine: a contemporary observer concluded that the Senate floor action had "emasculated"<sup>31</sup> the EEOC, and a veteran Justice Department attorney and Title VII expert later recalled how "the leadership of the civil rights community was disappointed with Title VII and felt that it was largely unenforceable."<sup>32</sup>

Title VII's language did authorize the Justice Department, as distinct from the EEOC, to initiate federal civil suits against employers using discriminatory practices.<sup>33</sup> It also empowered the Attorney General to move for the appointment of special three-judge district courts whose rulings would be directly appealable to the Supreme Court,<sup>34</sup> but even sympathetic Justice Department attorneys forecasted that it was highly doubtful that the Department's Civil Rights Division, already committed to litigating public accommodations, voting, and school desegregation cases, "will be able to devote as much attention to enforcement of Title VII as the

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.html (Professor Michael H. Gottesman recounting how "it was necessary to agree that the EEOC would not have either decision-making or enforcement power.").

29. § 706(b). The statute also imposed a confidentiality requirement concerning all such EEOC efforts and even threatened Commission staff with *criminal* penalties should that stricture be violated: "Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year." § 709(e).

30. Maltz, *supra* note 14, at 1358.

31. Comment, *supra* note 25, at 430.

32. David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1133 (1989); see also James E. Jones Jr., *Some Reflections on Title VII of the Civil Rights Act of 1964 at Twenty*, 36 MERCER L. REV. 813, 820 n.35 (1985) (noting that a former senior U.S. Labor Department attorney recounted how he "was bitterly disappointed with the compromise which emerged from Congress" and "expected the new Act to be strangled to death in litigation in hostile federal district courts in the South").

33. § 707(a).

34. § 707(b).

Commission could have” had it been accorded actual enforcement powers.<sup>35</sup>

Title VII also authorized victims of employment discrimination whose complaints the EEOC found valid but was unable to successfully conciliate to file federal civil suits against the alleged offenders and also authorized the Justice Department to intervene in support of such claims if the Attorney General so decided.<sup>36</sup> In retrospect, some civil rights attorneys believed that “[w]hen Title VII passed, the role of private enforcement was expected to be minimal,”<sup>37</sup> but contemporaneous commentators voiced uncertain expectations. One Justice Department attorney stated that “[i]t seems questionable that much can be accomplished through suits in federal court by persons aggrieved by acts of discrimination,”<sup>38</sup> in large part because “it cannot be expected that many complainants will undertake the burden of a lawsuit.”<sup>39</sup> He and others noted that “[w]hether class actions are permissible is unclear,” as Title VII failed to expressly address that question.<sup>40</sup> One prescient writer predicted that “substantial litigation under Title VII may be anticipated” and asserted that “enforcement of Title VII has been thrust squarely upon the federal judiciary” given the final version of the statute.<sup>41</sup>

That writer, like others, frankly acknowledged that at bottom “the conduct proscribed is vaguely defined”<sup>42</sup> given Title VII’s profusion of language, but several particular provisions of section 703(h) appeared likely to prove crucial. One phrase authorized employers to use “a bona fide seniority or merit system” in differentiating between employees.<sup>43</sup> A subsequent sentence, added on the Senate floor following extensive debate over two amendments offered by Texas Republican Senator John Tower, similarly provided

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35. Berg, *supra* note 23, at 88; *see also* Rose, *supra* note 32, at 1137 (“The Civil Rights Division of the Justice Department decided after passage of the Civil Rights Act to give priority first to public accommodations, then to voting, and then to school desegregation. As a result, only two employment law suits were brought in 1965 and 1966 by the Division . . .”).

36. § 706(f).

37. BELTON, *supra* note 12, at 30.

38. Berg, *supra* note 23, at 96.

39. *Id.* at 97.

40. Comment, *supra* note 25, at 455; *see also* Berg, *supra* note 23, at 86–87 (discussing the “peculiar problems” with class actions in employment discrimination); Rutherglen, *supra* note 25, at 695 (“[T]he importance of class actions was not anticipated at all.”).

41. Comment, *supra* note 25, at 453–54.

42. *Id.* at 458; *see also* Timothy L. Jenkins, *Study of Federal Effort to End Job Bias: A History, A Status Report, and A Prognosis*, 14 HOW. L.J. 259, 309–10 (1968) (noting that the author of § 703(h) “never explained it,” which has “perpetuate[d] the lack of clarity”).

43. § 703(h); *see also* George Rutherglen, *Disparate Impact Under Title VII*, 73 VA. L. REV. 1297, 1305–07 (1987) (discussing the Towers amendment).



that it would not "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate" in distinguishing amongst employees.<sup>44</sup> However, as that early commentator discerningly suggested regarding seniority practices, "even if the system is 'bona fide,' an employer's management of it may be held discriminatory."<sup>45</sup> Similarly, the precise wording of the subsequent sentence still "allows a court to hold that the use of even an unbiased professionally developed test was discriminatory."<sup>46</sup> Given just how much interpretive leeway Title VII, and particularly that crucial section 703(h), left open for subsequent fact finders, "the courts must fashion a new body of federal case law" once suits began to be filed.<sup>47</sup>

With a full calendar year scheduled to elapse between when the 1964 Act was signed into law and when the primary sections of Title VII would take effect,<sup>48</sup> equal employment enforcement considerations took a decided back seat on the federal civil rights agenda. Far more immediately pressing concerns—prompt implementation of Title II's prohibition of racial discrimination in public accommodations; the early August 1964 discovery that three civil rights workers had indeed been murdered in Neshoba County, Mississippi;<sup>49</sup> President Johnson's fall reelection campaign against Republican nominee and Civil Rights Act opponent Senator Barry Goldwater; and the early 1965 demonstrations in Selma, Alabama, which prompted Johnson to offer a comprehensive voting rights bill to Congress<sup>50</sup>—demanded "front burner" attention from Johnson and his administration. Given all that was transpiring, journalists and interested observers were not wholly astounded when President Johnson waited until May 10, 1965, to nominate the five commissioners who would oversee the EEOC, which would begin work

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44. § 703(h).

45. Comment, *supra* note 25, at 464 n.226.

46. *Id.* at 465 n.227.

47. *Id.* at 454; see also Berg, *supra* note 23, at 88 ("Much will depend on the extent to which effective relief proves available in suits brought in [private] suits . . .").

48. § 716(a), (b).

49. Claude Sitton, *F.B.I. Finds 3 Bodies Believed to Be Rights Workers*, N.Y. TIMES, Aug. 5, 1964, at 1 (reporting on the discovery of the bodies of three murdered civil rights workers in Philadelphia, Miss.).

50. See generally DAVID J. GARROW, *PROTEST AT SELMA 1* (1978) ("[T]he story of how southern blacks finally won equal voting rights cannot be fully appreciated without an understanding of how . . . protest helped them to achieve the remarkable gains they made.").

on July 2.<sup>51</sup> The Senate quickly confirmed those nominees, but well-informed news coverage depicted a situation of “near anarchy” as the new commissioners, lacking even office space, sought to create from scratch an entirely new federal agency tasked with addressing “a complex and ambiguous statute.”<sup>52</sup> In a prominent *Wall Street Journal* story, the NAACP LDF’s Director-Counsel Jack Greenberg called Title VII “weak, cumbersome, probably unworkable,” and in need of amendment by Congress. He explained that the LDF would soon launch a southwide grassroots effort to inform black citizens of the new statute and to encourage them to file complaints of race discrimination in employment with the brand-new EEOC: “We think that the best way to get it amended is to show that it doesn’t work.”<sup>53</sup> The LDF formally announced that summer project the day before Title VII took effect,<sup>54</sup> but a front-page *New York Times* story underscored the widespread doubts about the provision’s potential, stating that “the law is cumbersome, possibly riddled with loopholes, and gives the agency administering it . . . no enforcement powers.”<sup>55</sup>

Over the ensuing four months, however, the beginnings of a well-targeted LDF litigation campaign to maximize Title VII’s enforcement potential, and particularly to overcome the serious possible hurdles written into section 703(h), slowly but seamlessly emerged from the southwide summer project that had originated out of Greenberg’s belief that Title VII could *not* work. Within the first four weeks after the statute took effect, the LDF, in tandem with the NAACP, collected and filed with the EEOC more than fifty complaints alleging racially discriminatory employment practices.<sup>56</sup> Many of them

51. See Cabell Phillips, *Franklin Roosevelt Jr. to Head Equal Job Opportunity Agency*, N.Y. TIMES, May 11, 1965, at 1, available at <http://select.nytimes.com/gst/abstract.html?res=F50817FE3D5F147A93C3A8178ED85F418685F9> (reporting on President Johnson’s initial appointees to EEOC).

52. James Harwood, *Battling Job Bias: Rights Groups May Ask Stiffening of '64 Law's Employment Provisions*, WALL ST. J., May 28, 1965, at 1.

53. *Id.*; see also BELTON, *supra* note 12, at 35–37 (describing LDF’s “educational and outreach phase”); GRAHAM, *supra* note 22, at 157–59, 177–80, 189–201 (describing initial enforcement and staffing challenges of the EEOC); GREENBERG, *supra* note 18, at 413–14 (recounting LDF’s campaign to develop Title VII case law).

54. See *Panels to Press Job Rights Cases*, N.Y. TIMES, July 2, 1965, at 32 (reporting on NAACP’s project to test fair labor provisions).

55. John Herbers, *Bans on Job Bias Effective Today*, N.Y. TIMES, July 2, 1965, at 1, 32. Contemporary news stories presented Title VII’s prohibition of sex as well as race discrimination as an opportunity for ribald humor. “What about sex?” EEOC Chairman Franklin Roosevelt Jr. was asked at a July 1 press conference. “‘Don’t get me started,’ Mr. Roosevelt replied with a laugh. ‘I’m all for it.’” *Id.* at 32.

56. *Complaints Filed Under Rights Act*, N.Y. TIMES, July 30, 1965, at 23 (reporting on earliest claims alleging discriminatory employment practices).

cited major national corporations; one from Wilmington, N.C., named A&P Food Stores, and in less than two months the EEOC upheld the complaint against A&P, thereby authorizing a federal court suit. Both Jack Greenberg's own rich historical memoir and the winsome autobiography of top Greenberg deputy Michael Meltsner touch briefly on the very first Title VII case that emerged from that effort, *Brinkley v. Great Atlantic & Pacific Tea Co.*,<sup>57</sup> but only the late Professor Robert Belton's almost definitive history of early employment equality litigation, *The Crusade for Equality in the Workplace*, addresses in full detail both that case and the others that soon followed in its wake.<sup>58</sup>

The class action complaint that Meltsner drafted for *Brinkley*, Professor Belton reports, "served as a model for practically all the complaints that the LDF, its cooperating attorneys," and other litigators would file in subsequent employment discrimination cases.<sup>59</sup> *Brinkley* was settled within three months of its filing, but the young North Carolina attorney who actually brought the case, Julius LeVonne Chambers, was quickly emerging as a remarkably energetic and productive litigator. Only twenty-nine years old at the time, Chambers had been editor in chief of the law review and graduated first in his class at the University of North Carolina Law School in 1962, earned an additional L.L.M. degree at Columbia Law School, and then chose a one-year internship at the LDF over a job offer from the U.S. Department of Justice.<sup>60</sup>

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57. GREENBERG, *supra* note 18, at 413 (discussing *Brinkley v. Great Atl. & Pac. Tea Co.*, Civ. A. No. 1107 (E.D.N.C. filed Oct. 8, 1965)); MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* 20 & 271 n.1 (2006) (same).

58. BELTON, *supra* note 12, at 56–57. Professor Belton, who taught at Vanderbilt Law School for thirty-four years, from 1975 until his retirement in 2009, died at age seventy-six in early 2012; a newspaper obituary described him as "a popular and beloved teacher and mentor." *Pioneer Now Legacy, Professor Belton Lived So Others Could Achieve*, TENN. TRIB., Feb. 10, 2012, <http://tntribune.com/education/880/>.

59. BELTON, *supra* note 12, at 57.

60. L. Joseph Mosnier, *Crafting Law in the Second Reconstruction: Julius Chambers, the NAACP Legal Defense Fund, and Title VII 98–125, 163–96* (2005) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with Davis Library, University of North Carolina at Chapel Hill). Chambers died at age seventy-six in August, 2013. See Douglas Martin, *Julius Chambers, 76, Dies; A Fighter for Civil Rights*, N.Y. TIMES, Aug. 7, 2013, at A20; Mary C. Curtis, *In the Presence of Justice: Remembering Julius Chambers*, WASH. POST, Aug. 9 2013, <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/08/09/in-the-presence-of-justice-remembering-julius-chambers/>; Dannye Romine Powell & David Perlmutter, *Pioneering Civil Rights Attorney Julius Chambers Dies*, CHARLOTTE OBSERVER, Aug. 4, 2013, <http://www.charlotteobserver.com/2013/08/04/4211103/civil-rights-leader-julius-chambers.html>; see also DAVISON M. DOUGLAS, *READING, WRITING AND RACE* 108–11 (1995) (chronicling Chambers's upbringing, legal education, and career and describing the development of the *Swann* litigation). The Mosnier dissertation is a superbly and impressively rich beginning of a full scale biography of Chambers, a project that merits the highest importance. Surprisingly, no other serious work has ever surveyed Chambers's remarkable legal career.

With financial assistance from the LDF, Chambers returned to North Carolina in June 1964 and on July 1 opened a decidedly humble law office in Charlotte, some sixty miles from his family's hometown.<sup>61</sup> Little over six months later, he filed a school desegregation case that would go on to become the most notable and decisive such case since *Brown* itself: *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>62</sup> And during the course of 1965 and 1966, he went on to file multiple other school desegregation and employment discrimination cases all across North Carolina. As the best-informed student of Chambers' legal career has correctly stated, "Chambers would do more to shape the contours of evolving civil rights law than . . . perhaps . . . any other attorney of this period save . . . Jack Greenberg."<sup>63</sup>

By the end of 1966, no fewer than eleven of the LDF's overall total of thirty-plus employment discrimination actions had been filed by Chambers in North Carolina.<sup>64</sup> The first actually reported case, however, and a crucial achievement for LDF's litigators, came in central Tennessee in March 1966, when U.S. District Judge Frank Gray Jr. certified class action status in a suit against the Werthan Bag Corporation brought two months after *Brinkley*.<sup>65</sup> Judicial acknowledgment that the victims of racially discriminatory employment practices were indeed a class, not just discrete individuals, was a decisive milestone for the LDF attorneys,<sup>66</sup> and during the early months of 1967, most of the suits that Chambers had brought in North Carolina federal courts during 1966 were accorded class action status.<sup>67</sup>

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61. Mosnier, *supra* note 60, at 257.

62. See 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd*, 402 U.S. 1 (1971). See also of course DOUGLAS, *supra* note 60 (focusing generally on the desegregation of Charlotte's public schools after *Brown* and through the early 1970s).

63. Mosnier, *supra* note 60, at 246.

64. *Id.* at 309.

65. *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 188 (M.D. Tenn. 1966).

66. See BELTON, *supra* note 12, at 60–64 (discussing potential obstacles to class certification of claims brought under Title VII and describing "the benefits of efficiency and economy," as well as "enhance[d] settlement possibilities," of the class action device); Rutherglen, *supra* note 25, at 706–12 (pointing to a series of cases in which "the Fifth Circuit transformed the reasoning of *Hall* into a doctrine supporting certification of 'across-the-board' Title VII class actions").

67. BELTON, *supra* note 12, at 355 n.27; see also *Robinson v. Lorillard Corp.*, 319 F. Supp. 835 (M.D.N.C. 1970), *aff'd in part, rev'd in part*, 444 F.2d 791 (4th Cir. 1971) (enjoining discriminatory practices by the defendant-employer in another class action claim brought under Title VII).

## III. GRIGGS AND QUARLES IN THE DISTRICT COURTS

One of those cases, which Chambers had filed in the Middle District of North Carolina on October 20, 1966, was on behalf of thirteen black laborers at a Duke Power Company plant in Rockingham County who had remained frozen into a racially separate, lower-paid tier of employment despite Title VII's enactment. Encouraged by a local NAACP activist, the black workers had first met with Chambers in February 1966 and on March 1, 1966, had delivered a written petition demanding changes to the plant's superintendent, J. Donald Knight. The superintendent spoke politely but unyieldingly with the men, and one evening several days later, the workers all signed identical "Charge of Discrimination" forms that Chambers' younger colleague Adam Stein had previously mimeographed for similar complainants employed at Lorillard Tobacco Company in nearby Greensboro. The EEOC received the Duke Power charges on March 15, and just over a month later, two EEOC investigators, Yancy Thompson and Harold Kramer, arrived at the plant to conduct interviews.<sup>68</sup>

Prior to the publication of Professor Belton's *The Crusade for Equality*, only one sadly disappointing book, originally written by Robert Samuel Smith as a Ph.D. dissertation at Bowling Green State University in 2002 and published in revised form in 2008, had sought to provide a full history of the beginnings of *Griggs v. Duke Power Co.*<sup>69</sup> Professor Belton's account of *Griggs's* origins is far superior to Smith's, in measurable part because Professor Belton, unlike Smith, was aware of and utilized Joseph Mosnier's superbly researched unpublished 2004 Ph.D. dissertation on Julius Chambers. Mosnier alone had obtained access to Duke Power's own private files on *Griggs*,<sup>70</sup> which among other documents contained a copy of the EEOC investigators' "Final Investigation Report" detailing the "continuing practice of segregation" at the Duke Power plant.<sup>71</sup> That document also reported how plant managers "were reluctant to cooperate . . . and gave misleading answers"<sup>72</sup> and how when the investigators then

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68. See BELTON, *supra* note 12, at 107–16 (recounting "the factual setting" giving rise to the *Griggs* litigation); MOSNIER, *supra* note 60, at 342–65; Barry Bearak & David Lauter, *Tense Steps to Ending Racial Bias*, L.A. TIMES (Nov. 3, 1991), [http://articles.latimes.com/1991-11-03/news/mn-1562\\_1\\_north-carolina](http://articles.latimes.com/1991-11-03/news/mn-1562_1_north-carolina) (discussing *Griggs* in the first of a series of articles on affirmative action); ROBERT SAMUEL SMITH, RACE, LABOR AND CIVIL RIGHTS 53–59, 81–88, 110–12 (2008) (describing the openly discriminatory hiring and placement practices of Duke Power).

69. SMITH, *supra* note 68.

70. Mosnier, *supra* note 60, at xi, xxi, 396.

71. *Id.* at 366.

72. *Id.* at 365.

traveled to Duke Power's corporate headquarters in Charlotte, they received hardly better responses from the vice president, A.C. Thies, and the company attorney, George W. Ferguson Jr. These two company officials asserted that for the entire prior decade, Duke Power had relied upon test results, not race, in selecting employees for promotion, but the EEOC investigators judged that claim "to be completely false."<sup>73</sup> Two days later, however, Thies sent a memo—cited by both Mosnier and Professor Belton—instructing all Duke Power plants to immediately eliminate racially segregated employee locker rooms. Almost two years after enactment of the 1964 Civil Rights Act, and thanks only to the EEOC investigators' visit, did a company as prominent as Duke Power finally move to end visibly segregated practices.<sup>74</sup>

In early September 1966, some four months after the investigators' visit, the EEOC formally endorsed the thirteen Duke Power workers' complaints and informed them that the Commission's "heavy workload" had prevented it from attempting any informal conciliation with Duke Power.<sup>75</sup> The following month, after an EEOC conciliator *did* meet unproductively with Duke Power officials,<sup>76</sup> Chambers filed *Griggs*, with the thirteen plaintiffs selecting the member of their group who was the youngest and presumably least worried about retaliatory termination, Willie Griggs, as the first named complainant. Duke Power's attorney Ferguson, Mosnier reports, jokingly but presciently jotted to a colleague that "[w]e need more practice before the U.S. Sup. Ct.,"<sup>77</sup> and in the months ahead, Duke Power officials more than once rebuffed settlement discussions proffered by Chambers and the LDF.<sup>78</sup> Duke Power's Thies advised Ferguson that "[b]ased on Mr. Chambers' overall approach to this matter, I would suggest that we see him in Court."<sup>79</sup>

Sixteen months would go by before *Griggs* was finally set for trial in February 1968, and in the interim, increased public and judicial attention came to focus on large companies' ongoing maintenance of racially separate white and black employee-promotion practices.<sup>80</sup> In May 1967, what would become by far the most

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73. *Id.* at 366–67.

74. *Id.* at 368–69; *see also* BELTON, *supra* note 12, at 110.

75. Mosnier, *supra* note 60, at 370–71; *see also* SMITH, *supra* note 68, at 113.

76. BELTON, *supra* note 12, at 118.

77. *Id.* at 125; Mosnier, *supra* note 60, at 372.

78. BELTON, *supra* note 12, at 125–26, Mosnier, *supra* note 60, at 373–74.

79. Mosnier, *supra* note 60, at 374.

80. James P. Gannon, *U.S. Prodding Plants to Merge Negro, White Job Promotion Lists*, WALL ST. J., Jan. 5, 1967, at A1.

influential early district court Title VII case, *Quarles v. Phillip Morris Inc.*, went to trial in Richmond, Virginia, before Judge John D. Butzner Jr. The history of the LDF's efforts in *Quarles* is richly summarized and recounted in Professor Belton's *The Crusade for Equality*,<sup>81</sup> and just weeks after the case was tried, Judge Butzner was nominated and confirmed for a seat on the Fourth Circuit Court of Appeals.<sup>82</sup>

Thus when the decision in *Quarles* came down on January 4, 1968, it was authored by a circuit judge sitting by retroactive designation in the district court. Prior to Title VII's enactment, Philip Morris, along with Local 203 of the Tobacco Workers Union, had maintained racially segregated employment classifications, and postenactment, black employees with seniority were still barred from transferring into previously all-white departments. Hence Judge Butzner was able to state *Quarles's* decisive issue acutely: "Are present consequences of past discrimination covered by the act?"<sup>83</sup> Judge Butzner detailed how the present seniority system "limits on a nondiscriminatory basis the transfer privileges of individual Negroes assigned to the prefabrication department years ago pursuant to a policy of segregation which has long since been abolished."<sup>84</sup> Judge Butzner explained that his analysis of the case had been significantly informed by a "perceptive" student note published in the *Harvard Law Review* in April 1967, upon which he had "freely drawn."<sup>85</sup> Given how Title VII's plain language did not exclude from coverage "present discrimination that originated in seniority systems devised before the effective date," Judge Butzner concluded that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory

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81. BELTON, *supra* note 12, at 76–93. As Belton notes, *id.* at 90, *Quarles* was the first case in which the EEOC filed an amicus brief on its own, independent of the Justice Department; EEOC attorney David Cashdan recounted how that came to pass in U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 28. See also BENJAMIN W. WOLKINSON, BLACKS, UNIONS, AND THE EEOC 48 (1973) (describing unsuccessful conciliation attempts between the EEOC and the Crown Zellerbach Corporation in the course of another union discrimination case); Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOC. 709, 731–32 (2004) (explaining that the EEOC faced strong incentives "to work closely and cooperate with civil rights advocates . . . pushing for liberal interpretation of discriminatory seniority systems" in the years following Title VII's enactment).

82. John D. Butzner Jr., FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=337&cid=999&ctype=na&instate=na> (last visited Dec. 17, 2013).

83. *Quarles v. Philip Morris Inc.*, 279 F. Supp. 505, 510 (E.D. Va. 1968).

84. *Id.* at 515.

85. *Id.* at 510 (citing Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967)).

patterns that existed before the Act.”<sup>86</sup> With specific reference to section 703(h), Judge Butzner held that “a departmental seniority system that has its genesis in racial discrimination is not a *bona fide* seniority system” within the protective language that the Senate had added to Title VII.<sup>87</sup> He thus stated accordingly, “Present discrimination may be found in contractual provisions that appear fair on their face, but which operate unfairly because of the historical discrimination that undergirds them.”<sup>88</sup>

With little delay, Judge Butzner’s holding in *Quarles*, from which the defendants did not appeal,<sup>89</sup> became a recurring touchstone, as first the Justice Department filed suit in *United States v. Local 189, United Papermakers* against racially discriminatory employment practices at a large Crown Zellerbach Corporation papermill in Bogalusa, Louisiana,<sup>90</sup> and then *Griggs* itself came to trial before District Judge Eugene Gordon in Greensboro. Robert Belton joined Julius Chambers in putting on the *Griggs* plaintiffs’ case. Belton had joined the LDF as an attorney in December 1965, just six months after his graduation from Boston University School of Law, and by early 1966, he had major responsibility for the LDF’s Title VII cases.<sup>91</sup> His book *The Crusade for Equality* provides a detailed account of the obstacles the two young attorneys encountered.

Belton’s most difficult challenge involved the last-minute unavailability, and indeed temporary disappearance, of his scheduled expert witness, Columbia University educational psychologist Robert L. Thorndike. Following the case’s first day of testimony, Belton had to fly to New York City to locate either Thorndike or some acceptable replacement before an unhappy Judge Gordon reconvened the trial

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86. *Id.* at 515, 516.

87. *Id.* at 517; *see also* Note, *supra* note 85, at 1272 n.65 (“‘Bona fide’ . . . would seem to mean absence of discriminatory intent . . .”).

88. *Id.* at 518.

89. GREENBERG, *supra* note 18, at 417; BELTON, *supra* note 12, at 96. On *Quarles*, *see also* William H. Lewis Jr., Note, *Civil Rights—Racially Discriminatory Employment Practices Under Title VII*, 46 N.C. L. REV. 891, 891–95 (1968); William B. Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969).

90. *United States v. Local 189, United Papermakers*, 282 F. Supp. 39 (E.D. La. 1968), *aff’d*, 416 F.2d 980 (5th Cir. 1969). On Bogalusa, *see* Adam Fairclough’s superb RACE AND DEMOCRACY 344–80 (1995), Peter Jan Honigsberg’s impressive and wonderfully evocative CROSSING BORDER STREET 21–57, 71–78, 104–09, 134–48 (2000), and Timothy J. Minchin’s impressively researched THE COLOR OF WORK 14–15, 63–66, 93–98, 103–06, 150–51, 165–67 (2001). *See also* JOEL WILLIAM FRIEDMAN, CHAMPION OF CIVIL RIGHTS 131–38 (2009); LANCE HILL, THE DEACONS FOR DEFENSE 78–164 (2004).

91. BELTON, *supra* note 12, at 38–39. On Belton’s earlier life, *see id.* at 39–40 and Robert Belton, *Brown as a Work in Progress: Still Seeking Consensus After All These Years*, 34 STETSON L. REV. 487, 489–91 (2005).



several days later.<sup>92</sup> Belton was more than fortunate to secure Dr. Richard Barrett, an industrial psychologist, as his new expert, and with less than twenty-four hours' notice, Barrett flew to Greensboro and reviewed the evidence and deposition testimony Chambers and Belton had gathered regarding Duke Power's employment practices. Duke Power put on an expert witness of its own, but otherwise, the only live testimony at the *Griggs* trial was from Duke Power's A.C. Thies, whom the EEOC investigators had questioned almost two years earlier.<sup>93</sup> Professor Belton reports that all thirteen of the plaintiffs were present at trial, but the attorneys introduced their depositions rather than put on any live testimony beyond Dr. Barrett. Belton and Chambers prepared a substantial posttrial brief, and in late June, Judge Gordon heard posttrial arguments and took the case under advisement.<sup>94</sup>

Hardly six weeks after the *Griggs* trial, Judge Frederick J.R. Heebe, the Louisiana federal district judge handling *Local 189*, the Justice Department's lawsuit against Crown Zellerbach and the Louisiana papermill's union, issued a strongly worded preliminary injunction ordering the abolition of racially discriminatory seniority practices at the plant. Citing Judge Butzner's opinion in *Quarles*, Judge Heebe held that the mill's "seniority and recall system . . . perpetuates the consequences of past discrimination, and is unlawful under Title VII . . . Obviously, that seniority system was not a *bona fide* seniority system within the meaning of § 703(h)." Expressly rejecting the union's contention that Title VII could not alter seniority practices, Judge Heebe stated that "[w]e agree wholeheartedly with the conclusion in *Quarles*."<sup>95</sup>

Come mid-July 1968, the LDF, with Robert Belton and his younger colleague Gabrielle Kirk in the lead, convened a two-day conference of over one hundred interested attorneys in New York City to discuss Title VII litigation. The LDF and cooperating attorneys now had fifty-four active employment cases, and one of the attorneys told reporters that intelligence tests and seniority provisions were "the most frequently used means of discrimination against minority-group

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92. BELTON, *supra* note 12, at 127-31.

93. *Id.* at 130-34; RICHARD S. BARRETT, CHALLENGING THE MYTHS OF FAIR EMPLOYMENT PRACTICES, at xi, 2 (1998); see also SMITH, *supra* note 68, at 121-22; Belton, *supra* note 3, at 443.

94. BELTON, *supra* note 12, at 134-38.

95. *Local 189*, 282 F. Supp. at 44. Judge Heebe proceeded to a trial in the case on April 30, 1968, and fourteen months later issued extremely extensive Findings of Fact, Conclusions of Law, and a very detailed Decree. *United States v. Local 189, United Papermakers*, 301 F. Supp. 906 (E.D. La. 1969).

workers.” LDF Director-Counsel Jack Greenberg explained that

[t]he problem of seniority is how to unravel threads of discrimination which existed for years. Separate seniority lines are a clear violation of the act, but in many cases it is not clear what is the best way that segregated seniority lines can be merged or connected without destroying the seniority system.<sup>96</sup>

As if to illustrate those difficulties, in late September, Judge Gordon issued his decision in *Griggs*, rejecting entirely the evidence of discriminatory practices Belton and Chambers had put before him. Judge Gordon noted that two black employees, both high school graduates, had been promoted into previously all-white jobs before *Griggs* was filed. “It is obvious that where discrimination existed in the past, the effects of it will be carried over into the present,” Judge Gordon acknowledged, but he asserted that the behavior of Duke Power, which refused to admit any pre-Title VII discrimination against black employees, was “distinguishable from” Philip Morris’s conduct as revealed in *Quarles*.<sup>97</sup> Expressly rejecting Judge Butzner’s analysis, Judge Gordon declared that “[i]f the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise.” Duke Power’s instituting of intelligence tests as well as a high school diploma requirement for interdepartmental promotions, Judge Gordon concluded, were entirely reasonable.<sup>98</sup>

#### IV. JOHN MINOR WISDOM AND FREEZING

In subsequent months, contending parties in other ongoing Title VII federal district court cases marshaled dueling precedents, as plaintiffs invoked both *Quarles* and Judge Heebe’s holding in *Local 189*, while defendant-employers cited Judge Gordon’s conclusions in *Griggs*.<sup>99</sup> But the next major development in the evolving law of employment discrimination took place only in late July 1969, when Judge John Minor Wisdom, writing for a unanimous Fifth Circuit Court of Appeals panel, strongly affirmed Judge Heebe’s findings and decree in *Local 189*. Judge Wisdom framed the key Title VII issue succinctly, almost echoing Jack Greenberg’s statement from a year

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96. C. Gerald Fraser, *Tactics Planned on Job Bias Fight*, N.Y. TIMES, July 20, 1968, at 17.

97. *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 248, 249 (M.D.N.C. 1968), *aff’d in part, rev’d in part*, 420 F.2d 1225 (4th Cir. 1970), *rev’d*, 401 U.S. 424 (1971).

98. *Id.* at 249, 250.

99. See *United States v. H.K. Porter Co.*, 296 F. Supp. 40, 62, 63, 75 (N.D. Ala.), *vacated*, 491 F.2d 1105 (5th Cir. 1968) (noting that defendants relied on *Griggs* as to the subject of transfers of employees to other departments).

earlier: "how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday's* built-in racial discrimination."<sup>100</sup>

Judge Wisdom's opinion almost immediately cited *Quarles* and noted how it had "heavily relied on" the 1967 *Harvard Law Review* note: "In this case we draw heavily on *Quarles* and the note."<sup>101</sup> Wisdom quoted at length from Judge Butzner's analysis of the section 703(h) "bona fide seniority systems" issue and observed that "[t]he crux of the problem is how far the employer must go to undo the effects of past discrimination."<sup>102</sup> The controlling standard, Judge Wisdom concluded, would be "*business necessity*. When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose."<sup>103</sup> At Crown Zellerbach, "[j]ob seniority, embodying as it does, the racially determined effects of a biased past, constitutes a form of present racial discrimination." Judge Wisdom explained that the seniority issue was not the first time that the Fifth Circuit had been confronted with "a change in system that is apparently fair on its face but in fact freezes into the system advantages to whites and disadvantages to Negroes."<sup>104</sup> Judge Butzner had implicitly invoked that same concept in *Quarles* when he too had used the word "freeze,"<sup>105</sup> but Judge Wisdom explained it far more fully, citing to his own well-known 1963 opinion for a special three-judge district court in an important voting rights case titled *United States v. Louisiana*.<sup>106</sup>

In the *Louisiana* case, the panel had rejected the state's effort to institute a new, objective, but very difficult voter registration test, one far more demanding than Louisiana's previously quite lax actual registration standards. Any test "more demanding than those previously applied," Judge Wisdom had written there, "will have the

100. Local 189, *United Papermakers v. United States*, 416 F.2d 980, 982-83 (5th Cir. 1969) (emphasis added), *abrogated by* *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 555 (5th Cir. 1988).

101. *Id.* at 982-83 n.2; *see also* *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1967*, 84 HARV. L. REV. 1109, 1158, 1161 (1971) (observing how the 1967 Note "has played a significant role in the development of the law" and how "[t]he most influential early case was *Quarles*").

102. *Id.* at 987-88.

103. *Id.* at 989 (emphasis added).

104. *Id.* at 990.

105. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968).

106. 225 F. Supp. 353, 393-94 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965); *see also* David J. Garrow, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 YALE L.J. 1219, 1220-21 (2000) (discussing Judge Wisdom's landmark ruling in *United States v. Louisiana*).

effect of perpetuating the differences created by the discriminatory practices of the past.”<sup>107</sup> As he went on to explain,

The cessation of past discriminatory practices cannot justify the imposition of new and onerous requirements, theoretically applicable to all, but practically affecting primarily those who bore the brunt of previous discrimination. An appropriate remedy therefore should undo the results of past discrimination as well as prevent future inequality of treatment.<sup>108</sup>

Concerning voter registration, any new, higher standard would “freeze the result of past *illegal* practices.”<sup>109</sup>

Judge Wisdom’s analysis was adopted by the Fifth Circuit just a few months later, with Chief Judge Elbert P. Tuttle writing in *United States v. Duke* that “[t]he term ‘freezing’ is used in two senses.” When illegal discrimination ends, “but a new and more onerous standard is adopted before the disadvantaged class may enjoy” what already is enjoyed by others, “this amounts to ‘freezing’ the privileged status for those who acquired it during the period of discrimination, and ‘freezing out’ the group discriminated against.”<sup>110</sup> Less than a year later, after hearing a direct appeal of the *Louisiana* case, the U.S. Supreme Court adopted Judge Wisdom’s analysis and affirmed the district court panel, with Justice Hugo Black writing on behalf of a unanimous bench that “the court has not merely the power, but the duty, to render a decree which will, so far as possible, eliminate the

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107. 225 F. Supp. at 393.

108. *Id.*

109. *Id.* at 393–94 (emphasis added). Judge Wisdom’s analysis had been foreshadowed seven weeks earlier in an opinion by his Fifth Circuit colleague Judge Richard Rives in a voter registration case from Dallas County, Alabama: “Freezing results when there have been past discriminatory practices, these practices are discontinued, but some action is taken which is designed to retain the status quo, the position of advantage which one class has already obtained over the other.” *United States v. Atkins*, 323 F.2d 733, 743 (5th Cir. 1963). Unlike Judge Wisdom’s analysis in *Louisiana*, Judge Rives’s language in *Atkins*—“designed”—appeared to bar only new practices adopted with discriminatory intent. *Id.* Five months later, after Judge Wisdom’s *Louisiana* opinion had been issued, Judge Rives tellingly eliminated any invocation of purpose when he restated his *Atkins* language and adopted some of Judge Wisdom’s in a dissenting opinion in *United States v. Ramsey*, 331 F.2d 824, 837 (5th Cir. 1964):

Freezing results when there have been past discriminatory practices, these discriminatory practices are discontinued, but new and more onerous requirements are imposed. While theoretically applicable to all, these new requirements primarily affect those who bore the brunt of previous discriminations and tend to maintain the position of advantage which one class has already obtained over the other.”

Once again employing the distinguishing word, Rives stated that “the nondiscriminatory use of stricter standards does not rectify the freezing effect caused by past injustices . . .” *Id.* at 838.

110. *United States v. Duke*, 332 F.2d 759, 768 (5th Cir. 1964). The “Duke” in this case, Panola County, Mississippi circuit court clerk Leonard Duke, was entirely distinct from Duke Power Co.

discriminatory effects of the past as well as bar like discrimination in the future."<sup>111</sup>

In his 1969 *Local 189* opinion, Judge Wisdom built directly upon the analytical foundation created to remedy discriminatory voter registration practices: "When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination." In addition, citing Judge Gordon's 1968 district court opinion in *Griggs*, the Fifth Circuit panel declared that "[t]o the extent that *Griggs* departs from that view, we find it unpersuasive."<sup>112</sup>

### V. GRIGGS ON APPEAL

The LDF's appeal from Gordon's ruling in *Griggs* had been argued to a panel of Fourth Circuit judges by Jack Greenberg in April 1969, three months before the Fifth Circuit publicly rejected Gordon's decision.<sup>113</sup> As Professor Belton's *The Crusade for Equality* richly and originally describes, however, at conference immediately following the oral arguments, the three panel members, Judges Simon E. Sobeloff, Herbert S. Boreman, and Albert V. Bryan Jr. were unable to reach any conclusion about how to decide *Griggs*. Relying upon the comprehensive case file retained and publicly available in Judge Sobeloff's papers, Professor Belton narrates how initially Judge Sobeloff, the senior member of the panel, took responsibility for drafting an opinion but then, overloaded with other cases, asked the Circuit's Chief Judge to reassign it to one of his colleagues, whereby it was given to Judge Boreman.<sup>114</sup> More than five months then passed

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111. *Louisiana v. United States*, 380 U.S. 145, 154 (1965); see also FRIEDMAN, *supra* note 90, at 117, 277; *Gaston County v. United States*, 395 U.S. 289, 297 (1969) ("[T]hroughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. 'Impartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form"); Owen M. Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379, 382 (stating that the freezing principle "invalidates standards that would perpetuate or continue the effects of past discrimination").

112. *Local 189, United Papermakers v. United States*, 416 F.2d 980, 994 (5th Cir. 1969), *abrogated by Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 555 (5th Cir. 1988); see also FRIEDMAN, *supra* note 90, at 133-35, 324-25 (discussing Wisdom's analysis in *Local 189*)

113. Mosnier, *supra* note 60, at 379 (noting that Julius Chambers argued *Swann v. Charlotte-Mecklenberg Board of Education* to the Fourth Circuit the preceding day, April 9, 1969); see also BELTON, *supra* note 12, at 150.

114. BELTON, *supra* note 12, at 150-51. Mosnier, *supra* note 60, at 380 (quoting from the notes Judge Sobeloff jotted down during the oral argument and preserved, including "Present effects of past discrimination must be shot down."). Judge Sobeloff had served as Solicitor General of the United States from February 1954 until he was nominated and confirmed as a judge of the Fourth Circuit Court of Appeals in 1956. Regrettably, although almost 400 boxes of

before Boreman circulated an initial draft opinion stating that Duke Power's promotional practices were valid under Title VII. While Judge Bryan joined it the very next day, Judge Sobeloff waited several weeks before telling his colleagues that he would be writing an alternative opinion.<sup>115</sup> When Judge Boreman, following long-standing Fourth Circuit practice, then shared his draft opinion with all of his colleagues, Judge John Butzner, who almost two years earlier had authored *Quarles*, circulated a memo to Judge Boreman and all the other judges pointing out both a June 1969 *Harvard Law Review* article published after the *Griggs* oral argument as well as Judge Wisdom's Fifth Circuit opinion that had come down in late July. The memo specifically quoted how the Fifth Circuit had characterized the *Griggs* district court opinion as "unpersuasive."<sup>116</sup>

The *Harvard* article, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, measuring in at more than eighty pages,<sup>117</sup> was authored by Columbia University law professor George Cooper and University of Michigan law professor Richard B. Sobol, both of whom had come to represent the black workers in the *Local 189* case through the good offices of the Lawyers' Constitutional Defense Committee.<sup>118</sup> Judge Wisdom had added several citations to the article to his Fifth

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Judge Sobeloff's papers reside in the Library of Congress's Manuscript Division, no biography of Sobeloff as yet exists. See Warren E. Burger, *A Tribute to Judge Simon E. Sobeloff*, 34 MD. L. REV. 483, 483 (1974) ("He contributed richly to the law, and he will be sorely missed."). Judge Sobeloff's opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 148 (4th Cir. 1970), is just as deserving of historical prominence as is his role in Title VII's history.

115. BELTON, *supra* note 12, at 150.

116. *Id.* at 151-52.

117. George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). Professor Belton writes that "[t]he article provided a powerful theoretical foundation that supported an argument that specific intent or proof of 'evil motive' was not the only theory of discrimination applicable to employment claims under Title VII," BELTON, *supra* note 12, at 142, but any present day reader is likely to find the article exhaustive.

118. See BELTON, *supra* note 12, at 105 (summarizing the careers of Cooper and Sobol). The now little-remembered LCDC, led by Henry Schwarzschild, played a valuable role in southern civil rights legal work from 1964 through 1970. The only existing history of the organization is Thomas M. Hilbink, *Filling the Void: The Lawyers' Constitutional Defense Committee and the 1964 Freedom Summer* (1993) (unpublished undergraduate honors thesis, Columbia University). See also HONIGSBERG, *supra* note 90, at 2-3, 71-78 (describing the author's personal experience working at the LCDC). For more on the life of Schwarzschild, see MILNER S. BALL, *THE WORD AND THE LAW* 7-16 (1993); Eric Pace, *Henry Schwarzschild, 70, Opponent of Death Penalty*, N.Y. TIMES, June 4, 1996, at B8, available at <http://www.nytimes.com/1996/06/04/us/henry-schwarzschild-70-opponent-of-death-penalty.html>; and Thomas M. Hilbink, *Essay, A Moralist in a Legal World: A Memorial Essay for Henry Schwarzschild*, 23 N.Y.U. REV. L. & SOC. CHANGE 199, 199 (1997).

Circuit opinion before he issued it,<sup>119</sup> and prepublication copies of the article had informed LDF attorneys' arguments prior to 1969.<sup>120</sup> Both authors had joined in assisting the LDF lawyers with the appeal of *Griggs*, and Professor Belton credits Cooper with "a major role," reporting that "Cooper wrote an outstanding draft" of the plaintiffs' brief in the Fourth Circuit, one that was filed following "only a few minor substantive changes."<sup>121</sup>

Within a week of the circulation of Judge Butzner's memo, Judge Sobeloff circulated a draft of his opinion, telling his colleagues he hoped it could win support and become the panel's majority opinion but that in the alternative, it would be his dissent. Two days later, Judge Bryan, after commending Judge Sobeloff for his efforts, stated he would remain with Judge Boreman. Yet another entreaty from Judge Butzner was also unavailing. Judge Boreman, now clearly peeved, circulated a strongly worded memo calling Duke Power's policies "valid" and "genuine" and declaring his certitude that "Congress did not intend . . . to give Negroes preferential treatment or privileged treatment."<sup>122</sup>

*The Crusade for Equality's* account of these intracourt exchanges and debates is both telling and fascinating; when on January 9, 1970, the two-to-one panel ruling was publicly issued, with Judge Sobeloff concurring in part and dissenting in part, a clear majority of the Fourth Circuit's active judges had privately indicated their preference for Judge Sobeloff's opinion rather than Judge Boreman's.<sup>123</sup> The panel majority reversed the district court in part, ordering that promotional opportunities be accorded to six of the individual plaintiffs,<sup>124</sup> but otherwise affirmed that Duke Power's use of intelligence tests and a high school diploma requirement were "valid under Title VII."<sup>125</sup> Yet the opinion that ultimately carried the

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119. *Local 189, United Papermakers v. United States*, 416 F.2d 980, 982 n.2, 986 n.7, 987 n.8 (5th Cir. 1969), *abrogated by* *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 555 (5th Cir. 1988); see also FRIEDMAN, *supra* note 90, at 135-38 (discussing Wisdom's inclusion of references to Cooper and Sobol's article in the footnotes of *Local 189*).

120. BELTON, *supra* note 12, at 84.

121. *Id.* at 43, 141-43. Belton states that "Cooper had a keen interest in working on *Griggs*." *Id.*

122. *Id.* at 151-55.

123. *Id.* at 155-56. Judge Butzner told Judge Sobeloff that his dissent "will command wide respect" and was significant given how Title VII "is one of the most important statutes of recent years." *Id.* at 154; see also SMITH, *supra* note 68, at 156 (quoting further from Judge Butzner's November 19, 1969, letter that Judge Sobeloff's analysis "will help people get jobs commensurate with their ability, and it will strike the mark of race that all too often banishes them from advancement").

124. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1236 (4th Cir. 1970).

125. *Id.* at 1235.

day and illuminated the path of the law was Judge Sobeloff's, which built upon the previous opinions of Judges Butzner and Wisdom in the *Quarles* and *Local 189* cases, respectively, both of whom Judge Sobeloff cited by name.<sup>126</sup> The opinion also relied upon the Cooper and Sobol *Harvard Law Review* article, which Judge Sobeloff additionally cited.<sup>127</sup>

Judge Sobeloff began his opinion by declaring that “[t]he decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years” and highlighting how Judges Boreman and Bryan’s upholding of Duke Power’s tests and diploma requirement notwithstanding their impact on black employees “puts this circuit in direct conflict with the Fifth.” At issue was whether Title VII “shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric” and whether “practices that are fair in form but discriminatory in substance” would pass muster under the law. “The critical inquiry is *business necessity*,” Judge Sobeloff wrote, “and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end.”<sup>128</sup>

A business necessity standard, Judge Sobeloff said, would void employment requirements that disfavor African Americans “unless they have significant relation to performance on the job.” Allowable “standards must be ‘job-related,’” and “educational and cultural differences caused by that history of deprivation may not be fastened on as a test for employment when they are irrelevant to the issue of whether the job can be adequately performed.” With Duke Power’s practices, the Judge explained, “there is an utter failure to establish that they sufficiently measure the capacity of the employee to perform any of the jobs” promotion to which required meeting the heightened employment standards. By instituting new, higher standards, just like in the voting cases, “this policy disadvantages those who were not favored with the lax criteria used for whites” in earlier years. Thus, he reasoned, “a neutral superstructure built upon racial patterns that were discriminatorily erected in the past comes within the Title VII ban.”<sup>129</sup>

Quoting by name Judge Butzner’s sentence using the word “freeze” in *Quarles*, Judge Sobeloff explained the parallel, writing that

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126. *Id.* at 1237, 1241 n.9.

127. *Id.* at 1237 n.2. Samuel Estreicher asserts that Judge Sobeloff “relied” upon the Cooper and Sobol article but omits any reference to Judge Sobeloff’s by-name citations to Judges Butzner and Wisdom. Estreicher, *supra* note 17, at 155 n.10.

128. *Id.* at 1237–38.

129. *Id.* at 1239, 1240, 1247.



"[t]he 'freezing principle' (more properly, the anti-freezing principle) developed by the Fifth Circuit in voting cases is analogous." Quoting at length from Chief Judge Tuttle's opinion in *United States v. Duke*, where that court voided "new, unquestionably even-handed . . . requirements which had the effect of excluding new applicants," Judge Sobeloff concluded by insisting that Title VII too should bar "'freeze outs' . . . where the 'freeze' is achieved by requirements that are arbitrary and have no real business justification."<sup>130</sup>

## VI. GRIGGS IN THE SUPREME COURT

The Fourth Circuit result in *Griggs* left the LDF lawyers and their allies divided over whether to petition for Supreme Court review of the decision. Both George Cooper, the Columbia law professor who was playing such an influential, if unheralded, role in Title VII litigation, and John Pemberton Jr., the ACLU's former executive director who had subsequently become the EEOC's deputy general counsel, initially opposed asking the high court to accept *Griggs*. Both men contended that the case's factual record was more weakly developed than others that had not yet been addressed by the federal courts of appeal. Allied attorneys at the Department of Justice also opposed the LDF petitioning for review of *Griggs*, but Robert Belton, who in late 1969 had moved from New York to join Julius Chambers' small law firm in Charlotte, returned to Manhattan to discuss the issue face-to-face with LDF Director-Counsel Jack Greenberg. After a brief discussion, Greenberg agreed that a petition for certiorari should indeed be filed.<sup>131</sup> Belton later recalled that Judge Sobeloff's "powerful opinion"<sup>132</sup> "was the deciding factor that convinced the LDF to seek review."<sup>133</sup>

The LDF's petition, written primarily by George Cooper, was filed in the Supreme Court on April 9, 1970, followed a month later by Duke Power's response.<sup>134</sup> The LDF emphasized that "[t]he

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130. *Id.* at 1247, 1248.

131. BELTON, *supra* note 12, at 8, 159, 161–64; GEORGE COOPER & HARRIET RABB, *EQUAL EMPLOYMENT LAW AND LITIGATION* 495–500 (1972); GRAHAM, *supra* note 22, at 385–86, 551 n.79, GREENBERG, *supra* note 18, at 419; SMITH, *supra* note 68, at 158; Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 942–43 (1978); Belton, *supra* note 3, at 453. On Jack Pemberton, see Bob Egelko, *Jack Pemberton Dies, Led ACLU in Turbulent '60s*, S.F. CHRON., Oct. 27, 2009; Douglas Martin, *John Pemberton Jr., Civil Rights Crusader, Dies at 90*, N.Y. TIMES, Oct. 30, 2009.

132. BELTON, *supra* note 12, at 159.

133. Belton, *supra* note 3, at 453.

134. *Id.*; BELTON, *supra* note 12, at 43, 142, 164–65, SMITH, *supra* note 68, at 158.

importance of this case was eloquently stated in Judge Sobeloff's dissent," which it proceeded to quote from multiple times at some length.<sup>135</sup> The petition also stressed how the panel majority's holding conflicted with what the LDF called "the leading case" on Title VII, Judge Wisdom's *Local 189* opinion for the Fifth Circuit,<sup>136</sup> which it noted the Justices had declined to review just six weeks earlier.<sup>137</sup> The Justices discussed the case on May 22, 1970, and decided to request from Solicitor General Erwin Griswold the executive branch's view of whether *Griggs* should be heard.<sup>138</sup> In mid-June, Griswold, joined by the head of the Justice Department's Civil Rights Division, Assistant Attorney General Jerris Leonard, filed a brief supporting the LDF's petition and telling the Court that the issue in *Griggs* "is one of high importance."<sup>139</sup> Employment practices like Duke Power's were "widespread," the government said, notwithstanding how "those criteria bear no demonstrable relationship to employees' abilities to perform the jobs for which they are used."<sup>140</sup> Such standards, the government stated, disqualify "substantially higher proportions" of blacks than whites, and thus "the use of such criteria needlessly perpetuates the effects of past discrimination" and is prohibited by Title VII.<sup>141</sup>

Less than two weeks after receiving the Justice Department's full-bore endorsement of the LDF's petition, the Supreme Court granted certiorari,<sup>142</sup> with at least seven Justices voting to grant and only one—Chief Justice Warren E. Burger—opposed.<sup>143</sup> In mid-August, the petitioners filed their brief, followed three weeks later by the Justice Department's amicus brief on the merits. The plaintiffs' brief, which Professor Belton relates was again written almost entirely by Columbia law professor George Cooper,<sup>144</sup> stressed that *Griggs*, the

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135. Petition for Writ of Certiorari, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 1405), in COOPER & RABB, *supra* note 131, at 508, 514. This petition, unlike subsequent briefs, is not available in online databases, but it is accessible in COOPER & RAAB, *supra* note 131, at 501–17.

136. COOPER & RABB, *supra* note 131, at 513.

137. *Local 189, United Papermakers v. United States*, 397 U.S. 919 (1970).

138. *Griggs v. Duke Power Co.*, 398 U.S. 926 (1970).

139. BELTON, *supra* note 12, at 167.

140. *Id.* at 168.

141. *Id.* at 166–68; *U.S. Backs Job Test Protest by Blacks*, N.Y. TIMES, June 18, 1970, at 35. It may bear noting that while Solicitor General Griswold had been nominated to that post by President Lyndon B. Johnson, Assistant Attorney General Leonard, like Attorney General John N. Mitchell, had been named by President Richard M. Nixon.

142. *Griggs v. Duke Power Co.*, 399 U.S. 926 (1970).

143. BELTON, *supra* note 12, at 168 (citing to Justice William O. Douglas's case file).

144. *Id.* at 43, 105, 142, 164–65, 168, 212. Other attorneys, Professor Belton writes, "made only a few suggested changes or additions to Cooper's draft." *Id.* at 168.

first Title VII case the Court would hear, "follows five years of experience under this landmark statute during which courts have been enlightened and perceptive in giving it a broad and flexible interpretation." *Griggs* would be the Justices' "first opportunity to affirm or reject an important general course which the lower courts have taken," and the LDF brief, quoting by name the first sentence of Judge Sobeloff's dissent, echoed his emphasis by underscoring how the Court's ruling would "fundamentally determine the future direction of Federal fair employment law."<sup>145</sup>

The Solicitor General's brief highlighted how the Guidelines on Employment Testing Procedures, which the EEOC had perfected over the past four years, permitted only employment tests that were "job-related" and prohibited "employment screening devices which do not measure abilities to perform specific jobs but do seriously limit employment and promotion opportunities for Negroes."<sup>146</sup> Just as the plaintiffs had, the government too stressed that "[l]ower federal courts have consistently endorsed the proposition that the ongoing effects of past racial discrimination may be remedied under Title VII."<sup>147</sup> Jurists should focus not on an employer's motive, the government argued, but on its need, for "the congressional purpose in enacting Title VII was . . . to accomplish economic results, not merely to influence motives or feelings."<sup>148</sup> Addressing in particular how the language of section 703(h) emerged from Senate floor action, the Solicitor General stated that "[t]here is no basis for inferring from this history that the job-relatedness standard . . . was not to apply to the tests authorized" as lawful.<sup>149</sup>

Duke Power's reply brief was filed in mid-October 1970,<sup>150</sup> but from mid-summer into late fall, additional lower federal court rulings continued to apply the Title VII standards that Judges Butzner, Wisdom, and Sobeloff had articulated in *Quarles*, *Local 189*, and *Griggs*. Writing for a Fourth Circuit panel in a case where a North Carolina company had maintained racially segregated employee facilities as late as mid-1967, Judge Harrison L. Winter held that the

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145. Brief for Petitioner at 16, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 70-124), 1970 WL 122448.

146. Brief for the United States as Amicus Curiae at 4, *Griggs*, 401 U.S. 424 (No. 70-124), 1970 WL 122637.

147. *Id.* at 11.

148. *Id.* at 15-16.

149. *Id.* at 29. Samuel Estreicher asserts, relative to *Griggs's* outcome, that "[p]erhaps the most important factor was the position of the Nixon Administration, as evidenced by the Solicitor General Griswold's *amicus* brief in support of the plaintiffs," but does not support that contention by citing to the brief's content or arguments. Estreicher, *supra* note 17, at 163.

150. Brief for Respondent, *Griggs*, 401 U.S. 424 (No. 70-124), 1970 WL 136686.

law “provides a remedy for the present and continuing effects of past racial discrimination,” quoting in full and by name Judge Butzner’s “freeze” sentence from *Quarles*.<sup>151</sup> Judge Butzner was a fellow panel member, but, perhaps more strikingly, so was Judge Boreman, yet there was no dissent from Judge Winter’s declaration that “[p]resent policies and practices which . . . no matter how neutral in appearance, perpetuate the effects of past discrimination are unlawful and should be immediately enjoined.”<sup>152</sup>

Similarly, in mid-August, a Tenth Circuit Court of Appeals panel ruling in a case involving a trucking company noted how “[s]ince *Quarles*, numerous cases have held that superficially neutral policies violate Title VII if their effect is to perpetuate past racial discrimination.”<sup>153</sup> Noting the Fifth Circuit’s adoption of the “business necessity” standard and quoting from its opinion in *Local 189*, the Tenth Circuit held that “[t]he remedial nature of Title VII requires the adoption of the business necessity test. . . . When a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business.”<sup>154</sup>

Come early November, Eastern District of Louisiana Judge Heebe, who already had encountered Title VII in the *Local 189* case, ruled in similar case involving a different union local at Crown Zellerbach that the “business necessity” standard applied and noted how the Fourth Circuit panel’s majority opinion in *Griggs* “has been rejected in this circuit.” Specifically addressing the language of section 703, Judge Heebe quoted the statute’s language authorizing tests that “are not ‘designed, intended or used to discriminate’” before declaring that Crown Zellerbach’s “tests are ‘used to discriminate’ because they greatly prefer whites to Negroes without business necessity.” Citing by name to what he termed Judge Sobeloff’s “incisive” dissenting opinion

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151. *United States v. Dillon Supply Co.*, 429 F.2d 800, 803 (4th Cir. 1970). In subsequent years, both Professor Belton and Julius Chambers would forcefully insist that “[t]he major force pushing litigation has been private litigation, not government-initiated litigation” and that “private litigation established principles before the federal government decided even to request these principles in its litigation.” J. LeVonne Chambers & Barry Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 LAB. LAW. 235, 256, 257 (1985); see also BELTON, *supra* note 12, at 29–30; Belton, *supra* note 131, at 924. *But see* Rose, *supra* note 32, at 1169–70 (“I disagree with my colleagues who suggest that from the outset of Title VII ‘the major force pushing litigation has been private litigation, not government-initiated litigation.’”). A quarter century later this disagreement seems passé, but there is no denying how many Justice Department-initiated cases, like *Dillon* and *Local 189*, resulted in significant federal court opinions.

152. *Dillon Supply Co.*, 429 F.2d at 804.

153. *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 248 (10th Cir. 1970).

154. *Id.* at 249.

in *Griggs*, Judge Heebe stated that “Judge Sobeloff carefully and extensively analyzed the legislative history of § 703(h) and demonstrated that Congress had no intent to sustain tests which are not justified as job related.”<sup>155</sup>

With the Supreme Court oral argument in *Griggs* set for December 14, 1970, the petitioners submitted their short reply brief nine days prior. In its concluding sentences, the attorneys declared that Duke Power’s ostensibly race-neutral practices, “whether maliciously intended or not,” had “denied petitioners the opportunity which Title VII extends to every man and woman—the right to be judged on his or her own individual merits rather than under arbitrary and discriminatory requirements,” and should, accordingly, be held unlawful.<sup>156</sup>

Come December 14, the LDF’s Jack Greenberg presented the argument on behalf of the *Griggs* plaintiffs, and in his very first sentence he stressed that the ruling below was “a decision in which Judge Sobeloff dissented.”<sup>157</sup> Twice noting that Duke Power had adopted its intelligence-testing policy on July 2, 1965—the very date that Title VII took effect<sup>158</sup>—Greenberg nonetheless stressed that “any employer may use tests and educational requirements which predict whether an employee, or prospective employee, can do the job.”<sup>159</sup> Questioned from the bench about Duke Power’s employment numbers, Greenberg said that at issue here were “workers frozen in the Labor Department by the test requirement of July 2, 1965, and by the fact that they have no high school education.”<sup>160</sup>

After Greenberg reserved the balance of his time, George W. Ferguson Jr., who four years earlier had joshed to colleagues that “[w]e need more practice before the U.S. Sup. Ct.,”<sup>161</sup> rose on behalf of Duke Power. He proceeded to assert that “once the employer establishes a legitimate business purpose for an employment practice, testing or otherwise, then that practice is non-discriminatory even if it operates to prefer whites over blacks.”<sup>162</sup> Ten of the respondent’s thirty

155. *Hicks v. Crown Zellerbach Corp.*, 319 F. Supp. 314, 320 (E.D. La. 1970).

156. Reply Brief for Petitioners, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (No. 70-124), 1970 WL 136688, at \*13.

157. Transcript of Oral Argument, *Griggs*, 401 U.S. 424 (No. 70-124), available at [http://www.oyez.org/cases/1970-1979/1970/1970\\_124](http://www.oyez.org/cases/1970-1979/1970/1970_124); see also BELTON, *supra* note 12, at 174–78 (describing and excerpting the arguments offered by Greenberg, by Ferguson, attorney for Duke Power, and by Cohen, attorney for the U.S. Chamber of Commerce, before the Supreme Court).

158. *Id.*

159. *Id.*

160. *Id.*

161. See *supra* text accompanying note 77 (giving the context for the joke).

162. Transcript of Oral Argument, *supra* note 157.

minutes of argument time had been yielded to Lawrence M. Cohen, who argued on behalf of the U.S. Chamber of Commerce in support of Duke Power's position. Cohen clearly posed to the Justices the difference between a "legitimate business purpose" test and the far more daunting "business necessity" test Judge Sobeloff had voiced, and he alluded as well to the "safe and efficient operation of the employer's business" formulation that the Tenth Circuit panel had articulated four months earlier.<sup>163</sup> Justice Thurgood Marshall, Greenberg's immediate predecessor as LDF Director-Counsel, pressed Cohen about the rightfulness of imposing new educational requirements for promotion from laborer to coal handler. When Cohen cited legitimate business purpose as an acceptable rationale for an employer to do so, Marshall immediately responded, "But he did it knowing fully well that he had a prior policy of rigid segregation and exclusion. He is not writing on a clean slate. . . . And he put this rule in, as I understand it, the day the bill became effective."<sup>164</sup>

When Jack Greenberg returned to the podium, he immediately emphasized that *Griggs's* record "nowhere demonstrates that this high school education or the ability to pass the test is related to any job that is from labor to coal handler or from coal handler to anywhere else."<sup>165</sup> In contrast, Greenberg stressed, "If these Petitioners were taking a job validated, job related test and they could not pass the test, and not passing the test indicated that they could not do the job, we would not be here today."<sup>166</sup> One justice named Judge Sobeloff as agreeing with Greenberg's argument, and Chief Justice Burger posed several queries about hospital jobs as time expired.<sup>167</sup>

Four days later, on December 18, the Justices met in conference to discuss *Griggs*. Chief Justice Burger began by characterizing the case as "difficult and close," Justice William O. Douglas's notes on the discussion record. "Tests and standards must be related to jobs. If there was no history of past discrimination," Burger "would have no problem" affirming the Fourth Circuit panel majority, but the "arbitrary requirement of high school diploma has a severe impact." Two earlier summaries of the *Griggs* conference have

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163. *Id.*; see also *supra* text accompanying note 154 (describing the "safe and efficient operation of the business" holding of *Jones v. Lee Way Motor Freight, Inc.*); *Developments in the Law*, *supra* note 101, at 1138 (perceptively noting how "there should be a substantial difference between a legal standard requiring that job relatedness be shown and a standard that can be satisfied by showing any business purpose").

164. Transcript of Oral Argument, *supra* note 157.

165. *Id.*

166. *Id.*

167. *Id.*

relied upon only Justice Douglas's jottings,<sup>168</sup> but Professor Belton's *The Crusade for Equality* also utilizes Justice Harry A. Blackmun's notes. Justice Douglas's summary indicates that Chief Justice Burger "can affirm if Sobeloff's standards were accepted," and Blackmun's notes report Burger saying he "could affirm if standards were stated along Sobeloff's route."<sup>169</sup> Justice Hugo L. Black, speaking next as the most senior of the Associate Justices, said he was "inclined to affirm" the ruling below, but Justice Douglas stated that he would vote to reverse, as the employer had the burden of showing job relatedness, and that "Sobeloff had the right approach." Justice John M. Harlan said that he agreed with Justice Douglas and that "Sobeloff's view of the act is right." Justice Potter Stewart stated he agreed with Justices Douglas and Harlan and would reverse, as did Justices Byron White and Thurgood Marshall. Speaking last, Justice Blackmun said he too was "inclined to reverse," but Chief Justice Burger spoke up again to say that "[a]n employer has a right to test for more than a particular job." Signaling that he intended to assign *Griggs* to himself to write, Burger said, "I am flexible, and can do the job by reversal or affirmance."<sup>170</sup>

What transpired within the Chief Justice's chambers between December 18 and when he first circulated a printed draft on January 26, 1971, remains almost entirely unknown.<sup>171</sup> While the papers of all eight of the other Justices who were on the Court as of early 1971 are now publicly available to scholars, Chief Justice Burger's files will remain closed until 2026.<sup>172</sup> One well-known book of mixed repute, which nonetheless has proven almost always accurate and reliable, reported in 1979 that "[o]ne of his clerks did virtually all of the research and drafting,"<sup>173</sup> but efforts by this Essay's author to plumb for helpful present-day recollections have proven unavailing.<sup>174</sup> *The Brethren* reports that Justice Potter Stewart, one of that book's

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168. THE SUPREME COURT IN CONFERENCE (1940–1985), at 732 (Del Dickson ed., 2001); BELTON, *supra* note 12, at 178; Mosnier, *supra* note 60, at 386. Dickson, Mosnier, and Belton all render Justice Douglas's notoriously difficult-to-decipher handwritten jottings slightly differently from each other.

169. BELTON, *supra* note 12, at 178, 181.

170. THE SUPREME COURT IN CONFERENCE, *supra* note 168, at 732.

171. BELTON, *supra* note 12, at 182.

172. See *Warren Burger Collection*, WM. & MARY (2013), <http://swem.wm.edu/research/special-collections/warren-burger-collection>.

173. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 122–23 (1979); David J. Garrow, *The Supreme Court and The Brethren*, 18 CONST. COMMENT. 303, 318 (2001).

174. Theodore Garrett, Email to David J. Garrow, Nov. 3, 2013 (on file with the author); David Bickart, Email to David J. Garrow, Nov. 3, 2013 (on file with the author); David J. Garrow, Email to John M. Harmon, Nov. 3, 2013 (on file with the author).

primary sources,<sup>175</sup> “was surprised by Burger’s draft. It was well-written with first-rate reasoning. He was staggered, however, by the sweeping language of the opinion.”<sup>176</sup> As Professor Belton’s *The Crusade for Equality* reports in full detail, Justice Stewart, along with Justice Harlan, asked Chief Justice Burger to make modest specific changes in the draft, all of which the Chief Justice accommodated.<sup>177</sup> The only previous scholar to ponder how Burger’s unanimous opinion for the *Griggs* Court came to be what it was understandably commented that “[w]hy Burger ultimately adopted Judge Sobeloff’s analysis, effectively without important distinctions, remains unclear.”<sup>178</sup> At conference, Burger’s own concluding statement had suggested that he believed Sobeloff’s approach would unduly curtail employers’ testing rights, yet Burger’s draft opinion embraced his fellow Justices’ endorsements of Sobeloff’s view while omitting his own prior caveat.

## VII. THE GRIGGS OPINION

Chief Justice Burger circulated his revised and all-but-final draft on February 5, 1971, and then made one single wording change at the suggestion of Justice Blackmun before *Griggs* was publicly handed down on March 8.<sup>179</sup> The opinion began by explaining clearly how Duke Power had begun requiring a high school education for any jobs above laborers in 1955 and then, on July 2, 1965, made a high school education a prerequisite for transferring from laborer to any higher post and implemented its testing requirements as well.<sup>180</sup> Citing first the District Court’s and then the Fourth Circuit’s analyses of the facts, the Chief Justice noted how “these requirements operated to render ineligible a markedly disproportionate number of Negroes.”<sup>181</sup> Moving then to the heart of the case and the language of Title VII, Chief Justice Burger wrote that under that statute, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” He cited, although not by name, to Judge Sobeloff’s partial dissent in the Fourth Circuit, and while his invocation of the freezing principle did not in

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175. See Garrow, *supra* note 173, at 304.

176. WOODWARD & ARMSTRONG, *supra* note 173, at 122–23.

177. BELTON, *supra* note 12, at 182–84.

178. Mosnier, *supra* note 60, at 387.

179. BELTON, *supra* note 12, at 184–85.

180. *Griggs v. Duke Power Co.*, 401 U.S. 424, 424–28 (1971).

181. *Id.* at 428–29.



any way reference either Judge Butzner or Judge Wisdom, the derivation of the Chief Justice's conclusion was undeniably direct.<sup>182</sup>

"Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed," the opinion explained. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touch-stone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Reiterating that "a demonstrable relationship to successful performance" was required,<sup>183</sup> the unanimous opinion went on to declare that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in-headwinds' for minority groups and are unrelated to measuring job capability." Again directly addressing Title VII, Chief Justice Burger stated that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" and that Congress "placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."<sup>184</sup> The facts of *Griggs*, the Chief Justice observed, demonstrated "the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability."<sup>185</sup>

The next day's *Washington Post* reported that Chief Justice Burger delivered his *Griggs* opinion "in the same off-hand manner" as a previous decision two weeks earlier and quoted him as saying that *Griggs* would chiefly interest "educators and employers."<sup>186</sup> Washingtonians interested in the High Court that morning probably paid those words less heed than they did a column headlined "Dissension Smolders in Top Court," in which unnamed sources alleged that Chief Justice Burger believed Justice Black "should retire," thought of Justice Douglas as "a discredit to the court," and regarded Justice Harlan as "lazy." But columnist Jack Anderson presented himself as having multiple sources, for some Justices "have

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182. *Id.* at 430. Chief Justice Burger also noted how "petitioners have long received inferior education in segregated schools" and cited to *Gaston County v. United States*, 395 U.S. 289 (1969). See also *supra* note 111.

183. *Id.* at 431; see also *id.* at 436 ("demonstrably a reasonable measure of job performance").

184. *Id.* at 432.

185. *Id.* at 433.

186. *Job Tests Held in Violation of Rights Act*, *supra* note 6.

an equally low opinion of Burger” on account of his “arbitrary, sometimes arrogant ways.”<sup>187</sup>

More relevantly, Jack Greenberg told the *Wall Street Journal* that the LDF was “now ready to proceed with scores of cases involving many thousands of workers who have been denied jobs or promotions because of non-job-related tests which have come into widespread use since passage” of Title VII in 1964.<sup>188</sup> One of those cases was *Robinson v. Lorillard Corp.*, which Julius Chambers had filed two months before he had filed *Griggs* and which Judge Gordon had tried in May 1969, but not decided until March 1970, after the Fourth Circuit’s dueling opinions in *Griggs* had been issued.<sup>189</sup> Judge Gordon seemingly was much influenced by what had transpired since his initial experience with Title VII claims, for Professor Belton’s *The Crusade for Equality* reports that the LDF’s unheralded brief writer, George Cooper, “was astounded by Judge Gordon’s decision . . . because it seemed to him the judge was not the same person who had decided *Griggs* several years earlier.”<sup>190</sup> *Robinson* was appealed to the Fourth Circuit and heard by a panel of Judges Sobeloff, Butzner, and Bryan four weeks before Chief Justice Burger’s opinion in *Griggs* was handed down. Several months later, Judge Sobeloff, writing for a unanimous panel, was able to embrace and amplify the *Griggs* standard that Chief Justice Burger’s opinion had adopted from his own earlier dissent.

Terming Judge Butzner’s early decision in *Quarles* “the seminal opinion” and noting “the numerous cases that have followed *Quarles*,” Judge Sobeloff reproved Lorillard’s attorneys, writing that “[t]he terms ‘business necessity’ and ‘business purpose’—used interchangeably in the briefs—do not represent identical concepts.”<sup>191</sup> Instead, “the correct interpretation” is what Judge Wisdom had propounded in *Local 189*, and “[t]he Supreme Court has conclusively adopted this interpretation in *Griggs*” by invoking the freezing principle and targeting the consequences of an employer’s practices rather than the motives. Citing as well the Tenth Circuit’s holding in

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187. Jack Anderson, *Dissension Smolders in Top Court*, WASH. POST, Mar. 9, 1971, at B13.

188. *Supreme Court Bars Employment Tests That Result in Anti-Negro Discrimination*, *supra* note 5.

189. *Robinson v. Lorillard Corp.*, 319 F. Supp. 835 (M.D.N.C. 1970). See also Mosnier, *supra* note 60, at 312–41 regarding Chambers’s litigation of *Robinson*.

190. BELTON, *supra* note 12, at 207.

191. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 795, 796 (4th Cir. 1971). See also *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 658 (2d Cir. 1971), in which Judge Wilfred Feinberg, in an opinion issued June 21, 1971, likewise termed Judge Butzner’s decision in *Quarles* “seminal,” and BELTON, *supra* note 12, at 209 (quoting Judge Feinberg in a July 6, 1971, letter to Judge Sobeloff saying about Judge Butzner’s opinion in *Quarles* that “everyone agrees that it had a tremendous impact”).

*Jones*, which the Supreme Court had declined to review the very same day it decided *Griggs*,<sup>192</sup> Judge Sobeloff stated that

these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business . . . and there must be available no alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.<sup>193</sup>

### VIII. GRIGGS'S RECEPTION, IMPACT, AND REBIRTH

Early academic commentators who addressed *Griggs* full well appreciated the extent to which Chief Justice Burger's decisive opinion was directly rooted in the preceding analyses written by Judges Butzner, Wisdom, and Sobeloff.<sup>194</sup> One student of the employment discrimination landscape expressed strong doubts about the extent to which racial discrimination was being purged from American workplaces because of the large number of complaints that the EEOC found to validly allege violations of Title VII but where no successful conciliation occurred nor any litigation ensued.<sup>195</sup> That pattern began to be ameliorated when the Equal Employment Opportunity Act of 1972 amended Title VII to award the EEOC meaningful enforcement authority.<sup>196</sup> The best-informed observers believed, though, that within two years of when *Griggs* was handed down, the preceding and ensuing plethora of prominent and forceful federal court rulings—from district court judges to the Supreme Court but perhaps most pointedly from the courts of appeal—had already won far more sweepingly wide proactive employer compliance with Title VII's strictures than more casual onlookers appreciated. George Cooper, the craftsman of so much of what the LDF's attorneys had achieved with Title VII in the federal courts, wrote in late 1973 that

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192. *Lee Way Motor Freight, Inc. v. Jones*, 401 U.S. 954 (1971).

193. *Robinson*, 444 F.2d at 798; see also BELTON, *supra* note 12, at 207–08; Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 935 (1993).

194. Alfred W. Blumrosen, *supra* note 3, at 77; Hugh Steven Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of Federal Courts*, 58 VA. L. REV. 844, 854–55 (1972).

195. WOLKINSON, *supra* note 81, at 129–36, especially 132 (“[P]rivate suit action was initiated in less than 10 percent of the cases where it had found reasonable cause but was unable to achieve a settlement.”).

196. On the provisions of the 1972 Act, see Rutherglen, *supra* note 25, at 713–20, and GRAHAM, *supra* note 22, at 443–45.

the extent of change since 1964 “has been extraordinary”<sup>197</sup> and that “the *Griggs* principle” was “a startling breakthrough” that “has revolutionized fair employment law.”<sup>198</sup>

Come 1976, however, with only Thurgood Marshall and William J. Brennan in complete dissent, the Supreme Court signaled at least some discomfort with the breadth of *Griggs*'s application by reversing a D.C. Circuit Court of Appeals decision that had applied the *Griggs* standard in a constitutional case involving federal employees.<sup>199</sup> Much more starkly, one year later, writing for a similar seven-member majority in *International Brotherhood of Teamsters v. United States*, Justice Potter Stewart, who had joined *Griggs* without hesitation, held that “an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.”<sup>200</sup>

The *New York Times* accorded that decision a two-column, front-page, fully capitalized headline declaring, “Supreme Court Backs Seniority Work Rules That May Discriminate”—vastly greater prominence than it had given *Griggs*. The *Times* termed the new ruling “a substantial setback” for civil rights proponents,<sup>201</sup> but the most knowledgeable Title VII scholars and litigators came to believe that *Teamsters* would do African-American workers far less harm than the *Times* story indicated. Alfred Blumrosen, who had followed Title VII's enforcement history as closely as anyone, wrote several years later, on the statute's twentieth anniversary, that “abolishing job segregation . . . had been accomplished to a significant extent before the Supreme Court” issued *Teamsters*.<sup>202</sup> “Statistics persuasively demonstrate,” Blumrosen wrote, “that the pattern of occupational stratification has been shattered” and “how significant a part of the underlying evil which Title VII addressed has been corrected,” such that “more than two million minority workers were in improved

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197. George Cooper, *Introduction: Fair Employment Law Today*, 5 COLUM. HUM. RTS. L. REV. 263, 264 (1973).

198. *Id.* at 265.

199. *Washington v. Davis*, 426 U.S. 229, 238, 239 n.10, 251 (1976).

200. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353–54 (1977).

201. Lesley Oelsner, *Supreme Court Backs Seniority Work Rules That May Discriminate*, N.Y. TIMES, June 1, 1977, at A1.

202. Alfred W. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. RELATIONS L.J. 313, 346 (1984); see also ALFRED W. BLUMROSEN, MODERN LAW (1993).

circumstances in 1980" compared to where they would have stood absent the federal courts.<sup>203</sup> Reviewing jobs data, Blumrosen concluded that "[t]he extraordinary pace of improvement in occupational status may have slowed because the worst of the pattern of discrimination has been shattered by the law."<sup>204</sup>

Julius Chambers, who succeeded Jack Greenberg as Director-Counsel of the LDF, strongly concurred with Blumrosen's analysis and conclusions. "One of the great achievements of Title VII is that the segregated job patterns were largely undone by the mid-1970s" in many industries, Chambers believed. "During the decade when the *Quarles* ruling," as amplified by *Griggs*, enjoyed adoption across most federal judicial circuits, "many—perhaps most—discriminatory seniority systems were changed by court orders or voluntarily by companies and unions fearful of a lawsuit," Chambers stated.<sup>205</sup> Professor Belton, who litigated *Griggs* alongside Chambers, agreed fully with his colleague and Blumrosen's views, writing in *The Crusade for Equality* that "[b]y 1977, many employers and unions in many industries had made changes in their seniority practices, either voluntarily or by court decrees, that permitted African Americans . . . to transfer with full carryover seniority to jobs and departments historically denied to them because of their race." Those changes had "opened up thousands of jobs for African Americans that had previously been denied to them."<sup>206</sup>

Chambers remarked upon "the good fortune that the Supreme Court did not decide *Teamsters* earlier than it did," but some contemporaneous critics sought to minimize *Griggs*'s significance, although not its impact, by asserting that Duke Power's practices had made the case a highly unrepresentative one. Duke Power was "a company with a history of racial discrimination in employment, a company that added the aptitude test requirement on the very date the law against employment discrimination became effective," one such critic wrote. "The validity of aptitude testing for all employers was thus decided on a factual record evoking suspicion about the

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203. Blumrosen, *supra* note 202, at 347-48.

204. *Id.* at 351.

205. Julius L. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practices*, 49 LAW & CONTEMP. PROBS. 9, 18 (1986); see also Chambers & Goldstein, *supra* note 151, at 247; GREENBERG, *supra* note 18, at 418 (crediting *Quarles* and *Griggs* for "improved employment opportunities for thousands of blacks"); WOLKINSON, *supra* note 81, at 132 (also crediting *Quarles*).

206. BELTON, *supra* note 12, at 277, 226.

motives of the particular employer before the Court.”<sup>207</sup> Another writer, making the same complaint more succinctly, stated that “[i]n hindsight, *Griggs* appears to be a case of obvious pretextual discrimination,”<sup>208</sup> while commentators of a more conservative bent alleged that *Griggs* was the product of a “radical legal strategy” cooked up primarily by attorneys at the EEOC in knowing and intentional defiance of Title VII’s clear language.<sup>209</sup>

Critics of that ilk took pleasure when the Supreme Court, first in *Watson v. Fort Worth Bank & Trust*<sup>210</sup> in 1988, then far more decisively a year later in *Wards Cove Packing Co. v. Atonio*<sup>211</sup> and *Lorance v. AT&T Technologies, Inc.*,<sup>212</sup> temporarily “sounded the death knell for the *Griggs* disparate impact theory”<sup>213</sup> by replacing *Griggs*’s “business necessity” standard with a far more deferential “legitimate employment goals” test.<sup>214</sup> Professor Belton’s *The Crusade for Equality* discusses all of those cases in appropriate detail,<sup>215</sup> but what of course bears far greater emphasis is how congressional passage of the Civil Rights Act of 1991 reversed the impact of those rulings and expressly codified *Griggs*’s disparate impact standard in statutory law.<sup>216</sup> *The Crusade for Equality* gives rich summary coverage to those developments as well, allowing Professor Belton to welcome the rebirth of the doctrine he had helped generate.<sup>217</sup>

207. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 42 (1977); see also Selmi, *supra* note 15, at 713–14 (asserting that “[t]he vast majority of seniority cases . . . involved employers that had previously discriminated explicitly against their African-American employees”).

208. Rutherglen, *supra* note 43, at 1331; see also *id.* at 1302–03 (regarding Michael Evans Gold, *Griggs*’s *Folly*, 7 *INDUS. RELATIONS L.J.* 429 (1985)).

209. GRAHAM, *supra* note 22, at 250, 387; see also Maltz, *supra* note 14, at 1372 (noting that the *Griggs* Court “went beyond the original understanding” of Title VII). *But see* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 *FLA. L. REV.* 251, 255, 294 (2011) (criticizing Graham).

210. 487 U.S. 977 (1988).

211. 490 U.S. 642 (1989).

212. 490 U.S. 900 (1989).

213. BELTON, *supra* note 12, at 282; see also Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 *YALE L. & POLY REV.* 223 (1990).

214. *Wards Cove*, 490 U.S. at 659, 661.

215. BELTON, *supra* note 12, at 282–89.

216. See Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 *DEPAUL L. REV.* 1085 (1992); Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 *NOTRE DAME L. REV.* 955, 990–98 (1993); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, 42 *BRANDEIS L.J.* 597, 597 (2004).

217. BELTON, *supra* note 12, at 300–15.

## IX. CONCLUSION: HOW COURTS MAKE LAW

In 1965, one particularly prescient writer acknowledged that the "enforcement of Title VII has been thrust directly upon the federal judiciary" and appreciated how "the courts must fashion a new body of federal case law."<sup>218</sup> Soon after *Griggs*, another commentator reiterated how "the ultimate enforcement and interpretation of Title VII have been left to the federal judiciary."<sup>219</sup> In 1986, Chambers and a colleague stated that "[w]ithout *Griggs*, Title VII would have had little impact upon the historic problems of discrimination which it was intended to correct" and also emphasized how the degree of change that had taken place was due in significant part to "the interpretation by Judges Butzner, Wisdom and others of Title VII as a remedial statute designed to remove 'barriers' to equal employment opportunity" and not just police employers' motives and intent.<sup>220</sup>

Law professors rightly characterize the *Griggs* opinion itself as "remarkably sweeping"<sup>221</sup> and correctly acknowledge how "[i]n many ways, the *Griggs* revolution has been spectacular and [how] employment practices across America have been influenced by the holding."<sup>222</sup> The entirely accurate assertion that "the theory of disparate impact is a creation of the federal courts"<sup>223</sup> and "an example of federal common law"<sup>224</sup> might seem so transparently obvious as to occasion almost no dissent whatsoever.<sup>225</sup> But the far more fundamental and important truth, yet one rarely acknowledged or adequately emphasized, has been most perceptively appreciated and articulated by Professor Blumrosen.

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218. Comment, *supra* note 25, at 454, 464 n.226.

219. Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 118 (1974).

220. Chambers & Goldstein, *supra* note 205, at 16, 18; *see also* Chambers & Goldstein, *supra* note 151, at 248, 247; Cooper, *supra* note 197, at 265 (answering the rhetorical question, "Who is responsible for these developments?" with "First and most important are the federal courts").

221. Estreicher, *supra* note 17, at 157.

222. Shoben, *supra* note 216, at 598; *see also* BELTON, *supra* note 12, at 322-26 (surveying disparate impact theory's impact beyond employment law); Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L 108 (1998). *But see* Shoben, *supra* note 216, at 622 (allowing that disparate impact "has not been the subject of much reported litigation"); Selmi, *supra* note 15, at 753 (contending that disparate impact theory "has been less transformative than many scholars and advocates assume").

223. Rutherglen, *supra* note 43, at 1345.

224. *Id.* at 1344.

225. *But see* Carle, *supra* note 209, at 294 (incorrectly claiming that "the doctrine was the product of decades of lower-profile development among several generations of civil rights activists and sympathetic regulators," rather than federal judges and federal court litigators).

Writing even well before *Griggs* but in the wake of first Judge Butzner's ruling in *Quarles* and then Judge Heebe's first decision in *Local 189*, Blumrosen spoke of "the radiating effect of broadly and soundly written judicial decisions which can provide a basis for practical results without protracted proceedings."<sup>226</sup> In the rapidly developing law of Title VII, Judge Butzner's analysis in *Quarles* would remain the touchstone upon which Judge Wisdom and later Judge Sobeloff would build, but the "radiating effect" that Blumrosen perceived and understood can be seen in other, even contemporaneous, areas of rapidly developing law. In September 1972, Judge Jon O. Newman had been a U.S. District Judge in Connecticut for barely nine months, but his opinion for a special three-judge district court in an abortion rights lawsuit named *Abele v. Markle*<sup>227</sup> would, in less than three months, prove to have a decisive and indeed arguably determinative influence on several Supreme Court Justices who were actively influencing the composition<sup>228</sup> of the soon-to-be majority opinions in *Roe v. Wade*<sup>229</sup> and *Doe v. Bolton*.<sup>230</sup>

In *Roe* and *Doe*, Judge Newman's district court opinion, thanks primarily to Justices Lewis F. Powell Jr. and Potter Stewart, proved just as influential as did the lower court opinions of Judges Butzner, Wisdom, and Sobeloff in *Griggs*. Supreme Court opinions do not come from nowhere, and far more often than legal academia takes the time and effort to fully plumb, they come, as *Griggs's* history so richly reveals, almost directly from the pens (or keyboards) of the most acute and perceptive judges of the lower federal courts. In the case of Title VII, prior to the publication of Professor Belton's *The Crusade for Equality*, Alfred Blumrosen was far and away the commentator who most fully appreciated a historical record that was hiding, at least from some observers, almost entirely in plain view.

"Title VII law," Blumrosen wrote in 1984, "was developed in important part" by the Fourth and Fifth Circuits and "confirmed" by the U.S. Supreme Court in *Griggs*.<sup>231</sup> Judge Butzner's opinion in *Quarles* had been "particularly influential," but so too were the

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226. Alfred W. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 317 (1969).

227. *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972).

228. DAVID J. GARROW, LIBERTY AND SEXUALITY 565–66, 568, 574, 583, 588, 597 (rev. ed. 1998); David J. Garrow, *Revelations on the Road to Roe*, 22 AM. LAW. 80, 82–83 (2000); David J. Garrow, *Roe Revisited*, 9 GREEN BAG 2D 71, 78–79 (2005); Andrew D. Hurwitz, *Jon O. Newman and the Abortion Decisions: A Remarkable First Year*, 46 N.Y.L. SCH. L. REV. 231 (2003).

229. 410 U.S. 113 (1973).

230. 410 U.S. 179 (1973).

231. Blumrosen, *supra* note 202, at 340.



subsequent opinions written by Judges Wisdom and Sobeloff, as "the Fourth and Fifth Circuit Courts of Appeal wrote a remarkable chapter in the history of statutory interpretation. They created a jurisprudence of Title VII which was calculated to simplify the attack on segregated employment systems" and that other circuits, such as the Tenth and Second, cited and directly followed.<sup>232</sup> "The strong medicine of southern jurisprudence," Blumrosen stressed, "precipitated the abandonment of many discriminatory industrial relations practices" and demonstrated "that unions and employers would give up the 'southern way' in employment without the 'massive resistance' of [the] school segregation cases."<sup>233</sup> *Griggs* "provided authoritative support for the southern jurisprudence which was the bedrock" of the judicial assault on segregative employment practices, and "*Griggs* broadened the substance of Title VII beyond previous expectations and provided the legal foundation for the changes in employment practices which followed."<sup>234</sup>

Blumrosen was entirely correct to emphasize "the immense social and economic consequences of the jurisprudence of the southern circuits in shattering the fabric of discrimination,"<sup>235</sup> and Professor Belton's fine work amplifies and meshes almost seamlessly with the insights and conclusions Blumrosen first articulated over a quarter century ago. *Griggs*, Professor Belton writes, "ushered in one of the greatest social movements in the history of this nation because it opened up jobs and other employment opportunities, previously limited to white males, in both the public and private sectors for millions of African Americans, women," and members of other ethnic minority groups. Such an outcome, Professor Belton emphasizes, "would not have been possible under the traditional intent-based disparate treatment theory of discrimination,"<sup>236</sup> which predominated prior to the lower court cases that culminated in *Griggs*.

Soon after *Griggs*'s twentieth anniversary, in the one thorough effort ever undertaken to survey how all of the still-living members of *Griggs*'s original group of plaintiffs felt about the case's impact on their own lives, every one of them reported that they had obtained better jobs and benefitted economically from the changes the litigation brought about at Duke Power.<sup>237</sup> Professor Belton's *The Crusade for*

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232. *Id.* at 322, 342.

233. *Id.* at 346, 351, 350.

234. *Id.* at 350, 342.

235. *Id.* at 350.

236. BELTON, *supra* note 12, at 3.

237. Juber, *supra* note 21.

*Equality* recounts those stories as well as the case's own formal denouement before Judge Gordon in the years after the Supreme Court's ruling.<sup>238</sup> Once again, the comprehensive breadth and richness of Professor Belton's posthumously published history encompasses not only *Griggs's* own particular story but also all of the related developments and litigation concerning Title VII from the 1960s on through the 1990s. This instructive and invaluable work of history is both a lasting reminder of Professor Robert Belton's distinguished career as a litigator, law teacher, and scholar. It is an enduring tribute to how the often-forgotten efforts of litigators like Julius Chambers and Jack Greenberg and jurists like John Butzner, John Minor Wisdom, and Simon Sobeloff tangibly improved the lives of millions of Americans.

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238. BELTON, *supra* note 12, at 316–22.

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