The Law of Unintended Consequences Revisited:

The Case of Ricci v. DeStefano

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Deciding it necessary to review the earlier ruling of the Second Circuit court, on January 9, 2009 the U.S. Supreme Court granted certiorari in the case *Ricci v. DeStefano*. The case originates from New Haven, Connecticut where a group of firefighters argue that city officials violated their Title VII rights by dismissing the results of tests they had taken for consideration in job promotion., After reviewing the results city officials feared that they had unintentionally created a disparate racial impact, as those of white backgrounds tended to outperform other racial groups. Consequently, they threw out the test results believing it necessary so as to not violate the Supreme Court precedent put forth in *Griggs v. Duke Power.*

The 1971 *Griggs v. Duke Power* decision ruled that employment tests that created a disparate racial impact violated Title VII provisions of the 1964 Civil Rights Act. Furthermore, the Supreme Court declared that a specific intent to discriminate was not necessary in order to find a particular test in violation. Rather, any test that had even unintentionally created a disparate impact based on race was outlawed.

In *Ricci v. DeStefano*, the plaintiffs argue that the proposition put forward under *Griggs* is flawed. The main question for the Court will be whether a municipal government can legitimately decline certification of test results for promotion that would disproportionately enhance the chance for promotion among whites. While the outcome will certainly have enormous economic implications, this brief paper explores the impact of *Griggs* on higher education since the 1971 decision and argues that an affirmation of *Griggs* in the forthcoming *Ricci* case would actually exacerbate the problem of growing inequalities between racial groups in America.

Legislative actions as well as executive and judicial decisions of governments often have unintended consequences –results not foreseen or wanted at the time of the initial policy action. On occasion, these unforeseen results clash with the intent of the policies as originally formulated. It is our contention that this is precisely what has happened as a consequence of the *Griggs v. Duke Power* decision and the related judicial and legislative developments.[1] Moreover, we believe the historical evidence suggests that if this Court upholds the decision of the Court of Appeals in *Ricci,* that these unintended consequences will be magnified. In particular, economic opportunities for minority groups may be severely compromised in a way that the majority supporting the passage of the Civil Rights Act of 1964 would have viewed as disastrous to their objectives.

More specifically, *Griggs* very substantially raised the cost of certifying the competence of potential employees. Even when testing appeared to be permissible

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[1] This paper builds upon a previous publication: O'Keefe, Bryan, and Richard Vedder. Griggs v. Duke Power: Implications for College Credentialing. Raleigh: John William Pope Center for Higher Education Policy, 2008. Available at: http://www.centerforcollegeaffordability.org/uploads/Griggs_vs_Duke_Power(1).pdf.

under *Griggs,* legal uncertainties and the possibility of expensive legal actions "induced many companies…to curtail testing programs or abandon them entirely," thus relying on alternative means of certifying the skills of potential workers.[2] One study, whose results were published in 1974, surveyed businesses in a range of industries to better understand the impact of *Griggs* on testing. Of their 60 usable respondents, 15.1 percent reported that they had "dropped testing altogether."[3] Firms that continued to use testing often adopted new procedures to ensure they were not in violation of the Court's decision. The study's sample shows a 25 percent increase in the number of firms validating all of their tests.[4] Validation was costly and the study observes a 60 percent increase in the number of firms using outside consultant psychologist and statistician services to validate tests in an effort to reduce this cost.[5]

Increasingly, employers looked to college diplomas as a signaling device for the competence of potential employees.[6] Enrollment rates of high school graduates in college rose markedly from 49.2 percent in 1972 to 66 percent in 2006.[7] Individuals completing a college education typically have attributes desirable for a wide variety of occupations: high cognitive skills, at least an average amount of drive and ambition, an ability to articulate reasonably well verbally and in writing, at least a moderate level of dependability, etc. Those attributes are far less present in those with lower levels of educational certification, such as a high school diploma. As the proportion of jobs requiring higher levels of skills has grown over time, the demand for college graduates has risen sharply – more so, however, than would have been the case if employers thought they could safely and cheaply test for those skills through various forms of employee testing.

Hence, the demand for college graduates rose faster than the supply. Obtaining a college degree is expensive, particularly if one considers the four years or more of full time employment foregone while in school. Moreover, in the pre-*Griggs* era, *employers absorbed much of the cost of certifying worker competence*. In effect, as more and more persons felt the need to obtain a college diploma, *those certification costs became borne by the applicant* –and they were vastly higher than the costs of employer testing. The cost of attending a four year state university, *including income foregone while attending*

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[2] Hale, Matthew. "History of Employment Testing." Ability Testing: Uses, Consequences, and Controversies. Washington: National Academy P, 1982. 31-31.
[3] Petersen, Donald J. "The impact of Duke Power on testing." Personnel 1974: 30-37. ILLiad. Alden, Athens. 24 Feb. 2009
[4] Ibid.
[5] Ibid.
[6] There is a wide literature supporting the notion that educational degrees (such as a college diploma) serve as positive signaling devices to potential employers. See for example: Spence, Michael. "Job Market Signaling." The Quarterly Journal of Economics 87 (1973): 355-74.
[7] U.S. Census Bureau, Statistical Abstract of the United States, Table 267. Available at: http://www.census.gov/compendia/statab/cats/education/higher_education_institutions_and_enrollment.html.

school, now often exceeds $100,000 including room and board.[8] For individuals with low incomes, the cost of becoming certified as competent for employment has risen dramatically relative to the era before *Griggs.* Individuals from middle and upper income families are more likely to overcome this financial barrier to employment certification, so *Griggs* has contributed to the observed rising wage and income inequality in the United States that nearly coincides with the Court's decision in this case.[9]

When demand rises relative to supply, prices rise. And the price of the services of college-educated workers –their compensation—has risen sharply relative to those with only high school diplomas, as Figure 1 illustrates. It took several years after the *Griggs* decision for its effect to be felt in labor markets fully – after all, it takes at least four years (and often more) for a high school graduate to earn a baccalaureate degree. Note that in the two decades before 1977, the income differential between high school and college graduates did not show a tendency to rise. Indeed, a prominent Harvard economist wrote a book in 1976 –before Griggs could have much of an impact -- entitled *The Overeducated American,* arguing that perhaps America had reached a point where the returns to college education were beginning to fall.[10]

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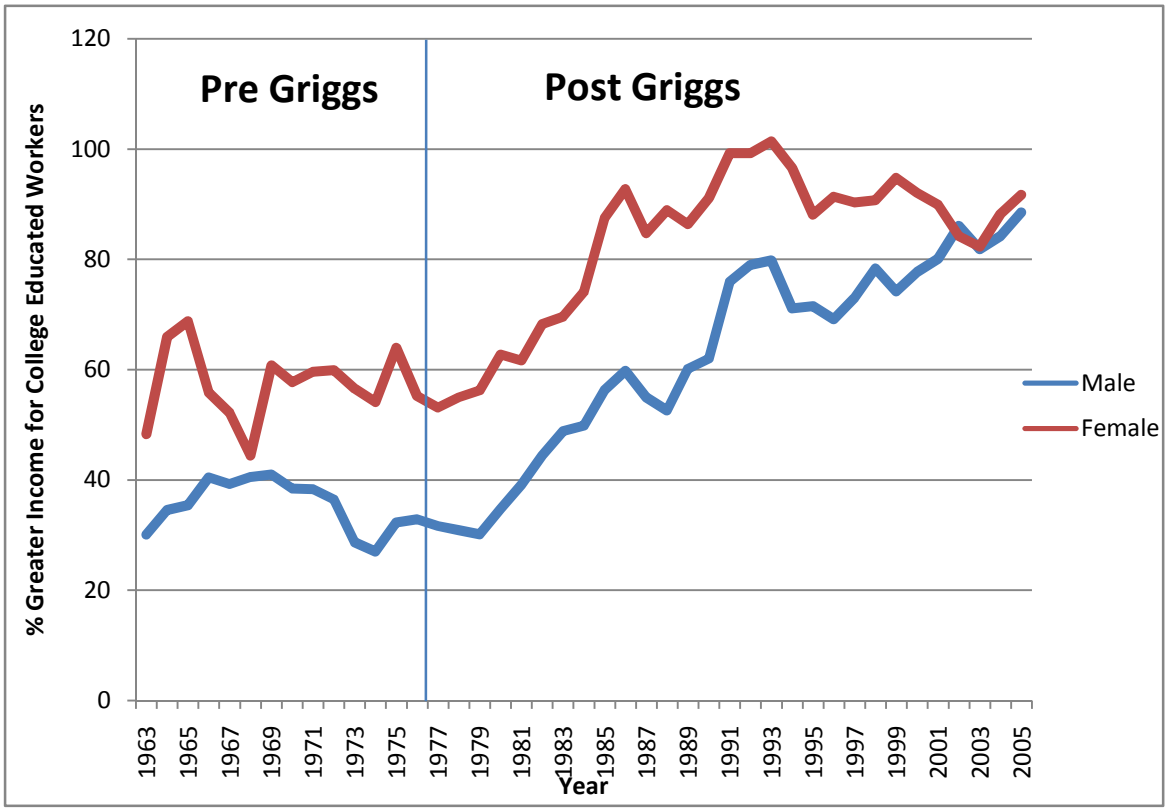
[8] This figure was calculated by the authors using 2007 mean income data for 18-24 year old U.S. male and female workers with only a high-school diploma and data for the average tuition/fees and room/board charges charged at four-year public institutions. See: http://www.census.gov/hhes/www/income/histinc/p28.html (accessed February 5, 2009), and: http://nces.ed.gov/programs/digest/d07/tables/dt07_321.asp?referrer=list (accessed February 5, 2009).

[9] The most common statistic used to measure income inequality is the Gini coefficient, which takes the value of zero with perfect equality (everyone has the same income) and one with perfect inequality (one person or household has all the income). Looking at households, the Census Bureau estimates that the Gini coefficient rose from 0.395 in 1974 to 0.463 in 2007. See http://www.hhes/www/income/histinc/h04.html, accessed February 3, 2009.

[10] See Richard Freeman , *The Overeducated American* (New York: Academic Press, 1976).

Figure 1: Median Income Differential, College vs High School Educated Male and Female Workers 25+ Years of Age[11]



Note that the college/high school graduate earnings differential for male adults was around 30 to 40 percent in the two decades before the *Griggs* impact on the adult population. Within 15 years the differential rose to about 80 percent and then at a slower rate of ascent since.[12] For females, that income differential was already about 60 percent in the pre-Griggs era, but rose to about 100 percent in the 15 years or so after *Griggs* began impacting, only to ease off modestly in the past 15 years. The differential today however remains about 30 percentage points greater than when the *Griggs* impact began to be felt.

As the financial advantages of a college education increased sharply, the demand for college admission rose, which, *ceteris paribus*, led to increases in college tuition fees.

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[11] Figure derived from data provided by U.S. Census Bureau, Tables P-17 & P-20. Available at: http://www.census.gov/hhes/www/income/histinc/p17.html
and: http://www.census.gov/hhes/www/income/histinc/p20.html.

[12] A number of factors likely contribute to the observed gap between the actual 1971 decision and the observed effects. One possibility is that post *Griggs*, a college degree became more important to securing entry level positions. Despite a moderately higher starting salary than those with only high school diplomas, the greater advantage of a college degree was increased prospects at promotion which bring higher wages. Thus, this transition took time creating a lag between the Court's decision and the observed growing earnings differentials.

Colleges could raise their fees substantially and still maintain enrollments (indeed, enrollments increased, albeit at a much slower rate than in the era before *Griggs* had an impact).[13] The economic barriers to post-high school attendance have risen significantly since the early 1980s. On average, real (inflation-adjusted) tuition costs have risen roughly three percent a year since 1978 using the tuition fee component on the Consumer Price Index for All Urban Consumers (CPI-U), the most commonly used price index (the one used, for example, to adjust Social Security payments for the cost of living).[14]

The rise in tuition fees almost certainly exceeded the rate in the pre-*Griggs* era, although the Bureau of Labor Statistics did not explicitly track this statistic before 1978. William Bowen estimated increases in real tuition fees of about two percent a year at Ivy League schools in the period 1905 to 1965, a somewhat lower rate than observed in the post-*Griggs* period.[15] Looking at total tuition fees per college student adjusted for inflation (by the CPI-U) in the last full pre-*Griggs* decade, the 1960s, we find that they rose by 31.39 percent, or by a compounded annual rate of growth of 2.77 percent a year. For the first full post-*Griggs* decade, the 1980s, the rate of increase rose substantially, to 53.22 percent for the decade, or a compounded annual rate of 4.36 percent per annum.[16] While we would not claim that *Griggs* was the only factor that might have impacted the rise in college costs, it certainly was one of them, and that decision coincided with a marked rise in the growth rate in student fees adjusted for inflation.[17]

It is true that another phenomenon in recent decades somewhat mitigated the economic hardship that rising college costs created. Over time incomes rose with economic growth, although the degree of increase varied with economic status. A different way to assess changing college burdens than by simply looking at rising tuition costs is to relate current total charges, including in some cases room and board charges (paid by a large proportion of students) to income. The College Board has calculated changing total college charges by type of institution beginning with the academic year

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[13] Evidence of increased postsecondary enrollments is available from the Digest of Education Statistics: 2007, Table 178. Available at: http://www.nces.ed.gov/programs/digest/d07/tables/dt07_178.asp?referrer=list (accessed February 5, 2009).

[14] See, for example, Richard Vedder, *Going Broke By Degree: Why College Costs Too Much* (Washington, D.C.: American Enterprise Institute Press, 2004).

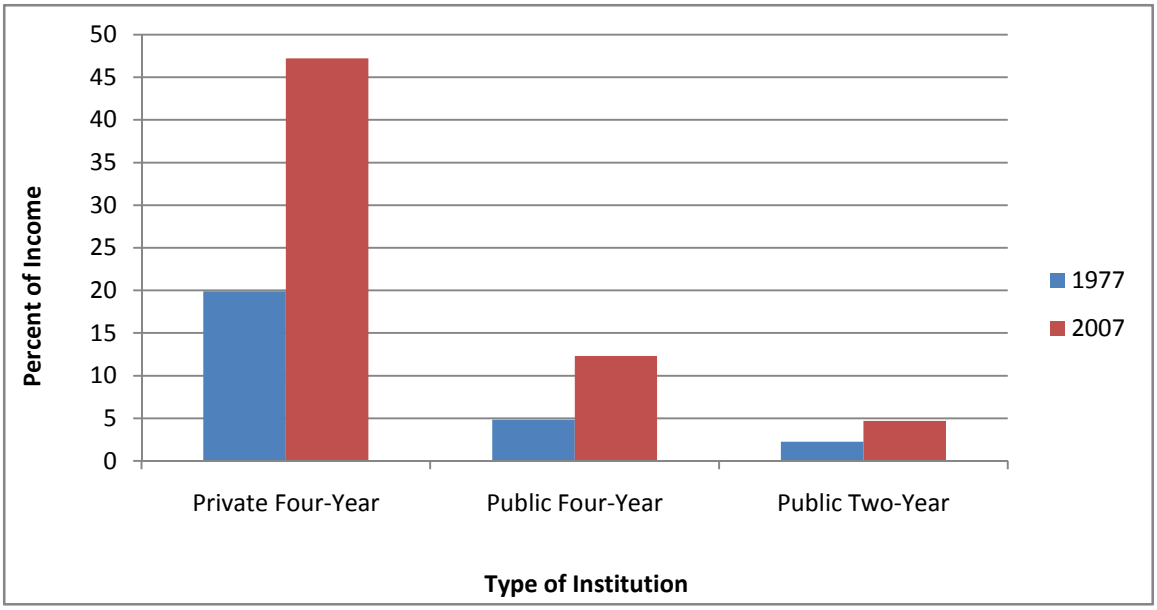
[15] William G. Bowen, *The Economics of the Major Private Universities* (Berkeley, CA: Carnegie Commission on Higher Education, 1968).

[16] The calculations were done by the authors using data as reported in the 1976 *Statistical Abstract of the United States*, p. 140, the 1994 *Digest of Education Statistics,* p. 175, and the 2008 *Economic Report of the President,* p. 295. Total tuition and fee revenues were divided by total college enrollments to get tuition fees per student, and then those numbers were deflated by the CPI-U.

[17] Data in current figures from the Digest of Education Statistics: 2007, Table 320. Available at: http://www.nces.ed.gov/programs/digest/d07/tables/dt07_320.asp?referrer=list.

1977-78, which is just as *Griggs* began having a significant impact.[18] Figures 2 and 3 below give the results both including and excluding room and board charges. As can be seen, in general, burdens rose for Americans – even as the financial ability of Americans to meet obligations was increasing with economic growth.

Figure 2: Average Published Tuition and Fees as a Percentage of Median Household Income[19]



In Figure 3, we look at the same data as in Figure 2 but adding in room and board charges, and looking at just Americans in the lowest quintile in the income distribution. The table shows the burden of going to college in general rose even more substantially for those in the lowest quintile. This quintile is disproportionately occupied by members of minority groups – African-Americans, Hispanics, and immigrants, for example.[20] To the extent the rise in burden of colleges on lower income Americans was an unintended consequence of *Griggs* and would be aggravated by the upholding of the lower court decisions in *Ricci,* the effect of that decision would be to adversely impact the economic status of groups that the Civil Rights Acts of 1964 were designed to help.

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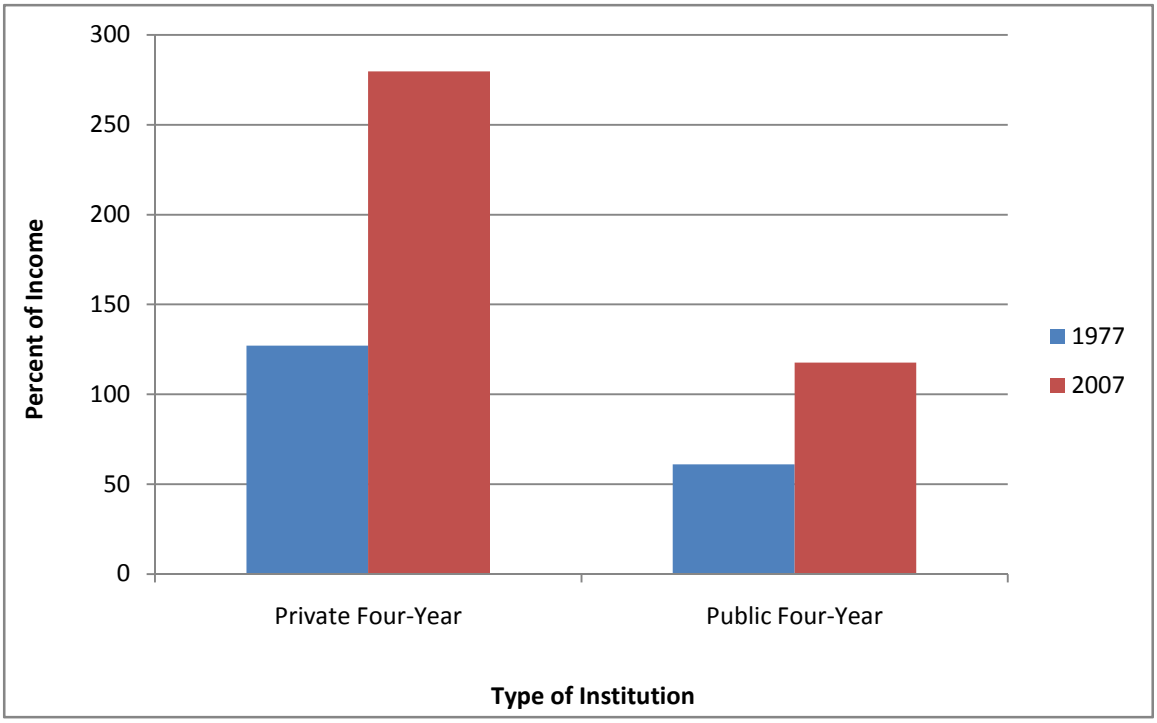
[18] Tuition, fee and room and board data are from The College Board, *Trends in College Pricing: 2007* (New York: College Board, 2008), pp. 10-11; data on median household income are from the U.S. Census Bureau, at http://www.census.gov/hhes/www/income/histinc/h09AR.html, accessed February 3, 2009.

[19] Data from: College Board, 2007 Trends in College Pricing and the U.S. Census Bureau, http://www.census.gov/hhes/www/income/histinc/h05.html.

[20] For example, the Census Bureau reports that in 2007, the upper limit of income for the lowest quintile of households in the income distribution for all races was $20,391, but it was only $12,524 for blacks and $17,500 for Hispanics. See http://www.census.gov/hhes/www/income/histinc//h018.html, accessed February 3, 2009.

Figure 3: Average Published Tuition and Fee & Room/Board Charges as a Percentage of the Mean Household Income for the Lowest Quintile of the Population[21]



Given the rising financial burden in part associated with *Griggs*, the disparity in the rate of college participation between whites and other groups has increased over time. In Figures 4 and 5, the difference in the three year moving average of the percent of those entering college within a year of high school graduation is observed with respects to whites and blacks (Figure 4) and whites and Hispanics (figure 5).

In 1976, the three year moving average college attendance rate was not even five percentage points higher for whites than blacks. Throughout the 1980s, as the impact of Griggs became felt, the racial enrollment gap soared, exceeding 18 points by the late 1980s. Despite some decline since, the enrollment gap in 2006 was still well over seven percentage points greater than in 1976 –before Griggs had truly impacted.

For Hispanics, the data are even more startling. There was *no* enrollment gap between whites and Hispanics in the mid-1970s, but as Griggs began having an impact in the late 1970s and 1980s, the enrollment gap soared. Even today, after massive federal student aid programs have taken effect, the enrollment gap is about 12 percentage

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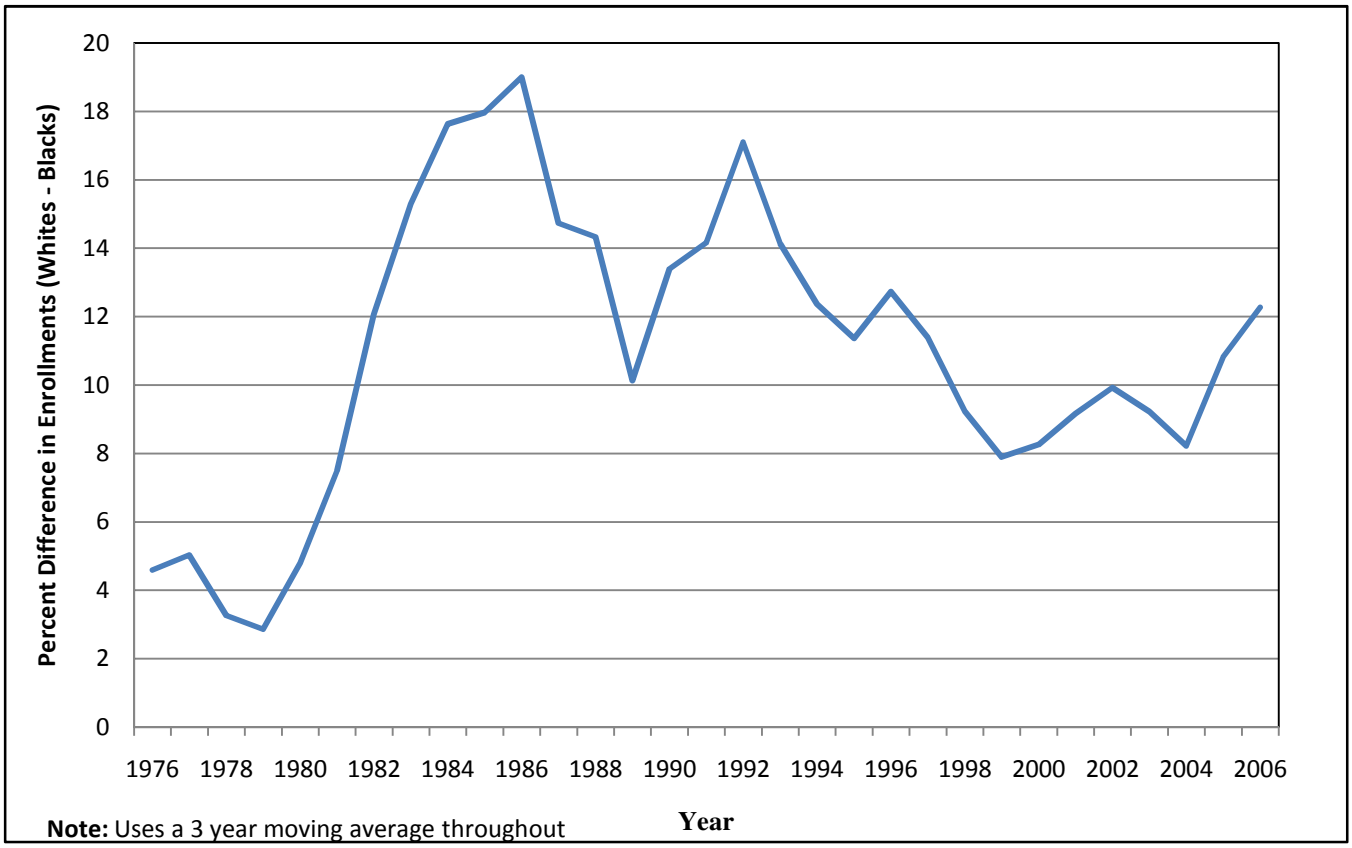
[21]Data from College Board, 2007 Trends in College Pricing and the U.S. Census Bureau, http://www.census.gov/hhes/www/income/histinc/h03AR.html.

points, and it has not been below 10 points for any prolonged period in well over two decades.

Figure 4: The Enrollment Gap between Whites and Blacks Entering College within 12 Months of High School Graduation[22]

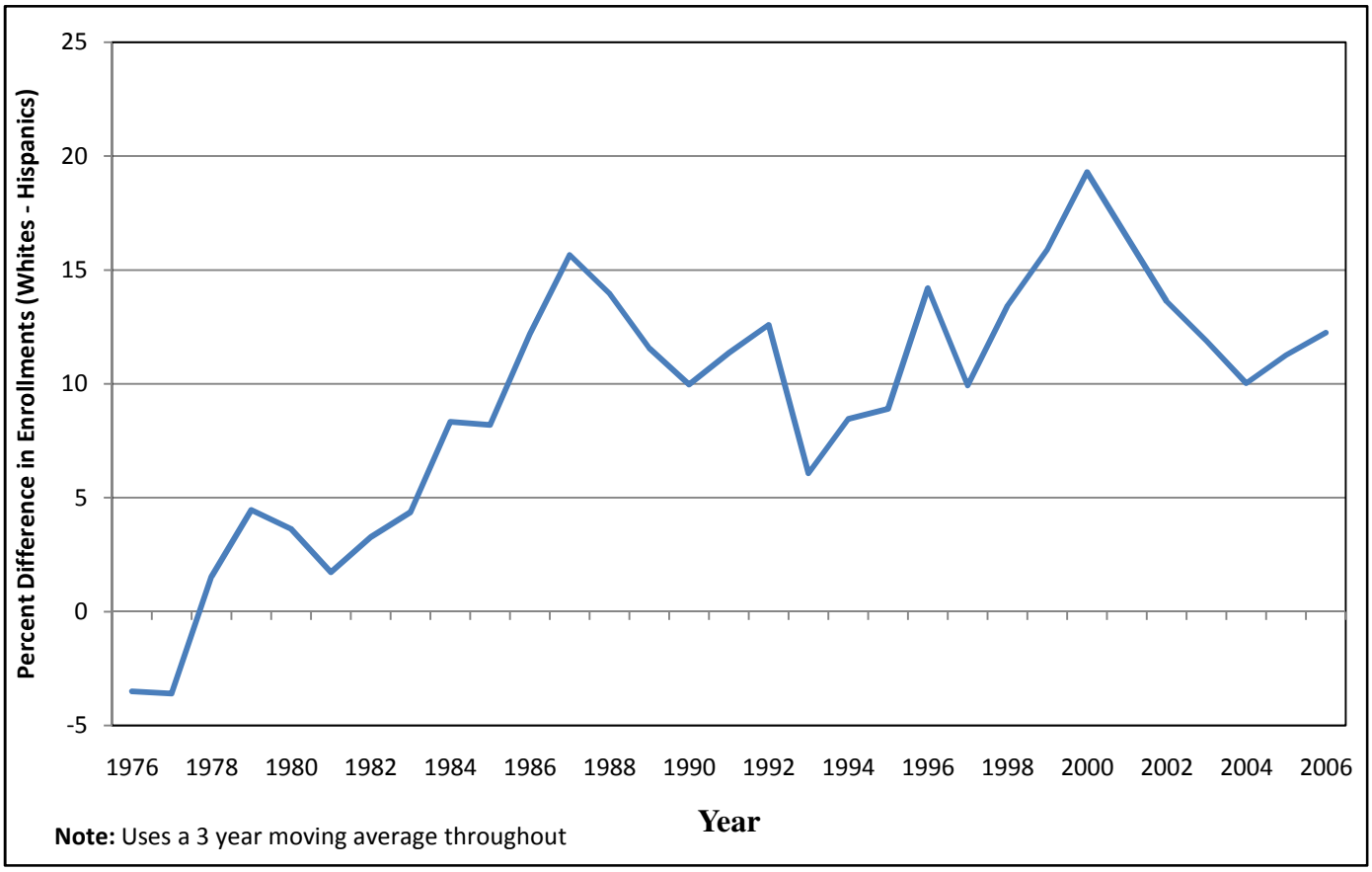


Arguably, what is important for economic success is not enrolling in college, but *graduating* from one. As Figures 6 and 7 show, the enrollment gap for adult Americans with college degrees coming from groups ostensibly protected by the Civil Rights Act of 1964, compared with the white majority, has actually *expanded* over time. Figures 6 and 7 look specifically at the gap between whites and African-Americans, and between whites and Hispanics, in the proportion of the population aged 25 years or over with bachelor's degrees or more. The numbers represent the white degree completion rate minus the minority degree completion rate (e.g., if the white rate was 25 percent and the Hispanic rate was 17 percent, the difference, 8, would be the recorded gap).

[22] Data from U.S. Census Bureau, Statistical Abstract of the United States, Table 267.

Note that since Griggs began to take effect in the mid to late 1970s, the gaps have risen. The supreme irony is that in attempting to deal with employment "disparate impact," in *Griggs,* a series of unintended consequences was unleashed (greater demand for college degrees, rapidly rising college costs, greater burden on lower income individuals that were disproportionately minorities). This has created a real and growing "disparate impact" with respect to obtaining a diploma, which has had increasing economic value attached to it because of *Griggs.*

Figure 5: The Enrollment Gap between Whites and Hispanics Entering College within 12 Months of High School Graduation[23]

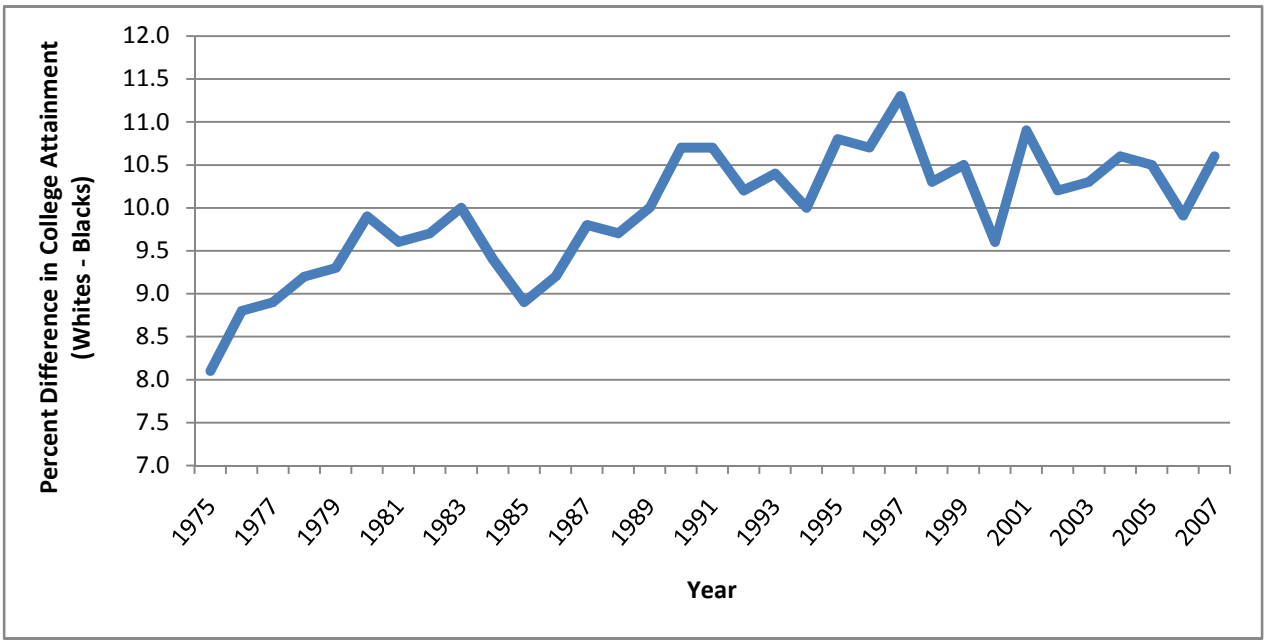


Upholding *Ricci* would strengthen and aggravate these unintended consequences. It would promote the further abandonment of legitimate testing of potential employees for skills, further increasing the value of external, extremely expensive but relatively legally unchallenged, forms of certification of skills –particularly college education. Far from helping minorities achieve equality of opportunity *and* results, it would likely have the opposite impact –making it more difficult for minorities

[23] Data from U.S. Census Bureau, Statistical Abstract of the United States, Table 267.

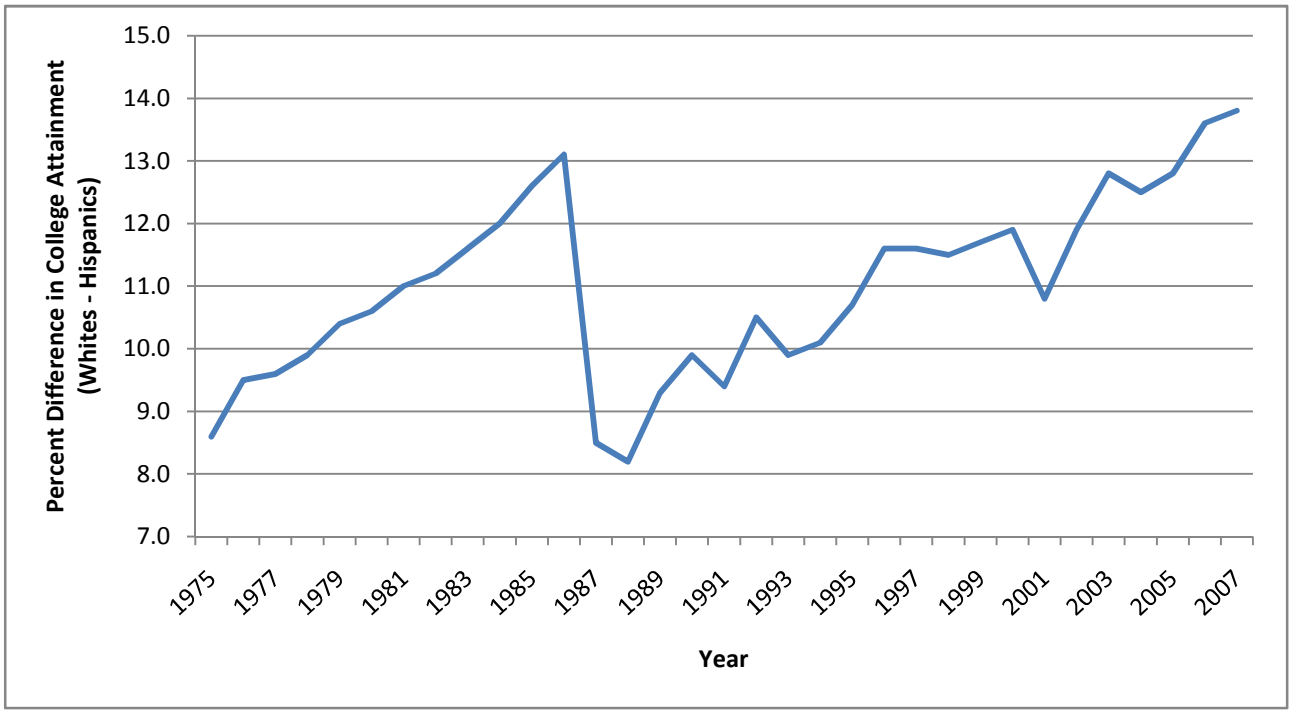
to obtain the very expensive "ticket" (a college diploma) to economic success. It is not a coincidence, we think, that the gap between the rich and poor, disproportionately minorities, has expanded in the post-*Griggs* era despite expensive remedies attempted to reverse this troubling trend.

Figure 6: The Educational Attainment Gap between Whites and Blacks (The percentage of people 25+ years who have completed 4 years of college or more)[24]



[24] Data from U.S. Census Bureau, Educational Attainment, Table A-2. http://www.census.gov/population/www/socdemo/educ-attn.html.

Figure 7: The Educational Attainment Gap between Whites and Hispanics (The percentage of people 25+ years who have completed 4 years of college or more)[25]



[25] Data from U.S. Census Bureau, Educational Attainment, Table A-2. http://www.census.gov/population/www/socdemo/educ-attn.html.