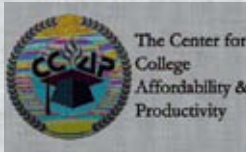


*Griggs v. Duke Power:*  
Implications for  
College Credentialing



Bryan O'Keefe  
and  
Richard Vedder



Center for College Affordability and Productivity  
1150 17th Street N.W., Suite 910  
Washington, DC 20036  
Tel: 202-375-7831 | Fax: 202-375-7821

THE JOHN WILLIAM  
**POPE  
CENTER**  
FOR HIGHER  
EDUCATION POLICY

John W. Pope Center for Higher Education Policy  
333 E. Six Forks Road, Suite 150  
Raleigh NC 27609  
Tel: 919-828-1400 | Fax: 919-828-7455

# *Griggs v. Duke Power:*

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## TO THE READER

This paper raises a provocative question: Does the increase in college enrollment over the past 30 years partly reflect the changing pressures on employers based on a 1971 court case? And if so, could these pressures also explain the much-touted increase in earnings that comes from a college education?

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Bryan O’Keefe was associate director of the Center for College Affordability and Productivity until this summer. Previously, he was a researcher at the American Enterprise Institute, studying domestic politics, public opinion polling, and labor issues. His writing on labor issues has appeared in publications such as the *New York Post*, the *Philadelphia Inquirer*, the *New York Sun*, *Labor Watch*, *Doublethink*, and Tech Central Station. O’Keefe also worked as a labor consultant in the labor relations practice of Burton-Marsteller. O’Keefe, who graduated from George Washington University, is attending law school.

Richard Vedder is Distinguished Professor of Economics at Ohio University, a visiting scholar at the American Enterprise Institute, and founding director of the Center for College Affordability and Productivity. A prominent voice in current movements for reform of higher education, Vedder served on the Secretary of Education’s Commission on the Future of Higher Education and is the author of *Going Broke By Degree: Why College Costs Too Much*. In addition to writing on higher education, Vedder has explored many economic topics; he is co-author with Wendell Cox of *The Wal-Mart Revolution: How Big Box Stores Benefit Consumers, Workers, and the Economy*.

# *Griggs v. Duke Power:*

## Implications for College Credentialing

By Bryan O'Keefe and Richard Vedder

**T**his paper is about a court case decided by the U. S. Supreme Court in 1971. Although attorneys recognize that the case is important to businesses, its impact on colleges and universities has been explored by only a few. As this paper will show, *Griggs v. Duke Power* may have enormously boosted the number of students in college and may have increased the differential in income between high school and college graduates. It may have led to higher tuition, without providing commensurate additional value.

Indeed, it could even be a judicial decision whose economic implications have been matched by only a few far more celebrated cases in history such as *Gibbons v. Ogden* (1824), the Dred Scott decision (1857), and the Schechter Poultry case (1935). The hypothesis of this paper is that *Griggs* turned a college degree into a “credential.” The content of the education did not change, but the degree—the sheepskin—became a necessary first step for a decent job.

Today, for many jobs, only a degree opens the doors of potential employers' offices. It does not ensure a job—college graduates often say that it is just a “fishing license”—but it assures the employer that an applicant has at least a minimum level of skill and accomplishment. In the eyes of an employer, a degree demonstrates that the applicant passed a certain number of classes, completed outside reading, wrote at least a couple of papers, thought critically, and was able to manage his or her life in a way that led to graduation. Such skills—determination, critical thinking and writing, organization, and independence—are often valued by employers.

Providing such assurance to employers did not always require a college degree, and this credentialing function did not happen by chance. Through a series of court rulings and subsequent legislation, a cumbersome set of legal rules has developed that make it difficult for employers to use testing to find out if an applicant is intelligent, capable, and diligent. As we will see, fear of litigation is always in the background. For many jobs, a college degree has become an alternate means of “testing.”

This paper will describe *Griggs*, the environment from which it emerged, and the subsequent judicial and political activity that created such great constraints on testing. It will discuss testing today and then provide economic information suggesting the magnitude of the changes that *Griggs* may have instigated. While this paper does not “prove” the educational and economic consequences of *Griggs*, it suggests that additional scholarly work on the impact of *Griggs* on higher education is appropriate.

## Employment Testing and the 1964 Civil Rights Act

To understand the importance of *Griggs*, we need to go back to the 1964 Civil Rights Act, and, in particular, Title VII, which dealt with employment issues. The nation was attempting to address decades of racial discrimination, and the Civil Rights Act was seen as a major vehicle for correcting the wrongs of the past. The most important section of this law in relationship to employers was 703(a)(1), and 703 (a)(2), which spelled out constraints on their actions.

These sections read:

“It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”<sup>1</sup>

***To understand the importance of Griggs, we need to go back to the 1964 Civil Rights Act, and, in particular, Title VII, which dealt with employment issues.***

At the time of the law’s passage, employers routinely tested prospective employees, leading at least one researcher to conclude that “it is probably safe to say that there are more ability tests given annually in the United States than there are people.”<sup>2</sup> One survey in 1963 found that 84 percent of employers were using some type of personnel test, up from 64 percent in 1958.<sup>3</sup> Another study found that 2,171 such tests were printed in the year 1964 alone.<sup>4</sup> This

does not even take into account the civil service testing system, which the government had widely used since the 1870s.

The civil rights community was concerned that some employee testing was being done to intentionally exclude minority job candidates. The business community defended employer testing and claimed that it was fundamental to ensuring a qualified workforce.

These arguments made their way into the debate over the 1964 Civil Rights Act and, in particular, the sections of the proposed legislation cited above. From the start of the debate, Senator John Tower of Texas objected that the proposed legislation could unfairly limit an employer's right to test employees. In floor debate, Senator Tower buttressed his point by citing the specific and recent example of a state hearing officer in Illinois who

had ruled that a standard ability test that the Motorola corporation had used for years was illegal because the test was unfair to "disadvantaged groups."<sup>5</sup>

Supporters of the legislation strongly discounted these concerns. Senators Hubert Humphrey of Minnesota and Clifford Case of New Jersey criticized Tower's example, with Humphrey saying that it was an isolated case. Case labeled it a "red herring" and said that the proposed civil rights legislation was "completely different" from the Motorola instance.<sup>6</sup>

Civil Rights Act proponents went even further in downplaying the idea that the bill would limit employee testing. In a lengthy memo that Chase and Senator Joseph Clark of Pennsylvania prepared in defense of the bill, the senators argued that:

There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and educations, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualification as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

To make the point clearer, the senators eventually added section 703(h) to the legislation, which directly addressed employment tests. The relevant language reads in part that a "professionally developed ability test" will not be unlawful,

***The civil rights community was concerned that some employee testing was being done to intentionally exclude minority job candidates. The business community defended employer testing and claimed that it was fundamental to ensuring a qualified workforce.***

provided that:

such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.”<sup>7</sup>

A fair reading of this text, coupled with the legislative history, would indicate that employment tests are perfectly legal as long as the tests are not being “designed, intended or used” to discriminate against minorities. It seemed that Congress had properly addressed the issue by eliminating tests that were “designed, intended or used” to discriminate, but not completely forbidding testing altogether.

While it seemed that a reasonable compromise had been struck, some hard-line opponents of the bill were skeptical. For example, Senator Tower said at the time,

I feel that the regulations, lawsuits, and federal pressures placed upon private business by this title are utterly unacceptable in a free economy, particularly since these pressures can be placed upon any firm at any time in presuming the firm guilty until it proves itself innocent.<sup>8</sup>

His words would turn out to be an accurate prediction of the future.

### *Griggs v. Duke Power (1971)*

**G** *riggs v. Duke Power* was the first major case that questioned the applicability and reach of Title VII of the Civil Rights Act of 1964 in employment testing.

Before Title VII was enacted in 1964, Duke Power had discriminated against black employees either through not hiring them or keeping them in low-paying jobs. In 1955 the company instituted a policy that required a high school diploma in order to be placed or promoted to higher paying jobs. This policy did not directly affect black workers because they were not given promotion opportunities in any case—explicitly on racial grounds.<sup>9</sup>

On the date that Title VII became effective—July 2, 1965—Duke Power changed its policy and made the high school equivalence requirement binding on all workers, black and white. This allowed black workers promotion opportunities they had not had. The new promotion rules also provided that workers could meet the high school requirement by achieving minimum scores on two widely used aptitude tests: the Wonderlic Personnel Test and the Bennett Mechanical Composition Test. The minimum scores required for these

tests basically corresponded to the scores of the average high school graduate at the time.<sup>10</sup>

The Wonderlic Personnel Test is a twelve-minute, fifty-question intelligence test that assesses a person's aptitude and ability to problem-solve in a wide range of activities. The test is best known today for its use in evaluating the intelligence of professional football players. Almost every professional football team uses a player's Wonderlic score when evaluating that individual's talent potential.<sup>11</sup>

The Bennett Mechanical Composition Test focuses more narrowly on mechanical concepts and the application of physical laws. The test-makers claim that the test is "especially well-suited for assessing job candidates for positions that require a grasp of the principles underlying the operation and repair of complex devices."<sup>12</sup>

In order to help ease the transition to equal opportunity, Duke also instituted a program, open to all races, by which the company would pay for two-thirds of the cost of education for employees who did not have the required credentials for promotion.<sup>13</sup> In essence, the company had ended its policy of discrimination. It tried to institute objective requirements for promotion and agreed to assist employees financially in obtaining scores that would meet these new requirements.

The plaintiffs in the *Griggs* case argued that the diploma and testing requirements discriminated against African-Americans and thus violated Title VII. They further claimed that section 703(h) in the Civil Rights Act of 1964, quoted in part above, required that a test measure only the actual ability to do a specific job. The law, they contended, would forbid more general and abstract intelligence tests such as the ones employed by Duke Power.

Initially, the district court dismissed the action, finding that a test was acceptable under Title VII as long as there was no intentional discrimination on the part of the employer. Despite the past history of discrimination at Duke Power, it was agreed that the company was no longer discriminating intentionally.

Then, however, the Fourth Circuit Court of Appeals reversed in part. That court held that the added requirements for promotion (the aptitude tests) were in violation of Title VII because African-Americans had been confined to lower-paying departments before 1965. But the court qualified its ruling, saying

***The plaintiffs in the Griggs case argued that the diploma and testing requirements discriminated against African-Americans and thus violated Title VII.***

that if the tests were not employed to continue past discrimination, there would not be a Title VII issue.<sup>14</sup>

In essence, the appeals court was trying to distinguish between two classes of black workers—those hired before 1965 and those hired after. For the first set, the court said that the testing requirement was discriminatory because some white workers had advanced without taking the test. But for the second class of workers, those hired after 1965, the testing requirements had been imposed for all employees. The appeals court held that these employees were not victims of unlawful discrimination.<sup>15</sup>

On the issue of the tests themselves, the circuit court noted the actual language of the statute as well as the legislative history of the act. It held that tests do not need to be job-related, and it specifically rejected Equal Employment Opportunity Commission guidelines that, in the court’s words, were “contrary to compelling legislative history.”<sup>16</sup>

Despite these court rulings and the legislative history, the Supreme Court reversed. In a unanimous decision, the Court took a much broader view of section 703(h), saying that Congress had required:

the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification . . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *The touchstone 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.*<sup>17</sup> (italics added)

***The Court established a multi-pronged threshold. If the test is shown to have a “disparate impact” then it must have a direct “business necessity” to be allowed.***

In laying out this rationale, the Court then established a multi-pronged threshold for employment tests. If the test itself is shown to have a “disparate impact”—meaning that different groups perform differently on it even without intentional discrimination by the employer—then the test itself must have a direct “business necessity” in order for an

employer to administer it. In applying this broad principle to the case before it, the Court found:

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.<sup>18</sup>

In arguing that the tests themselves were permitted under 703(h), Duke cited specific language of the act, which permitted “professionally developed ability tests” that are not “designed, intended, or used to discriminate because of race.” The Court, however, dismissed that reading of the statute and instead deferred to the Equal Employment Opportunity Commission (EEOC). The Court noted that at the time of the case the Commission

has issued guidelines interpreting 703 (h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference.<sup>19</sup>

Thus, the effects of *Griggs v. Duke Power* were multi-fold. First, the Court held that there need not be a specific intent to discriminate in order to prove a case under Title VII and 703(h). Furthermore, the results of the test itself were enough to prove discrimination. Essentially, discrimination could be proved simply by showing that one racial group performed worse than another.

Most important, once the discriminatory impact has been established, the burden falls upon the employer to demonstrate that the test is “job-related” or a “business necessity” in order for the test to be valid. General intelligence and mechanical tests would have a difficult time meeting these demanding standards.

At the time of the decision, there was criticism of this “business necessity” burden. In an analysis of *Griggs*, a note published in the *Columbia Law Review* stated that, “Perhaps the most important holding of *Griggs* is that once a discriminatory effect is shown, the burden of establishing that the test is job-related passes to the defendant. The Court, however, neither cited any legislative history nor proposed any legal theory for this interpretation.”<sup>20</sup> The writer also noted that it was possible that the Court was simply endorsing a “social policy favoring plaintiffs in fair employment cases.”<sup>21</sup>

## Deference to EEOC Guidelines

One of the most important parts of the *Griggs* ruling was the deference to the Equal Employment Opportunity Commission guidelines, especially in regard to the definition of “business necessity” and the validation of employment tests.

Because employment tests are often judged in the context of “disparate impact,” it is important to recognize what EEOC guidelines consider disparate impact. The EEOC has endorsed what is known as the 80-percent rule, which states:

A selection rate for any race, sex, or ethnic group which is less than four-

fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.<sup>22</sup>

Practically speaking, the rule works in the following way. Suppose that a factory imposes an employment test on which 60 percent of white applicants receive a passing score, but only 40 percent of African-American workers do. The ratio of African-American success to white success would be 40/60, or about 66 percent, which would not meet the 80-percent rule. The test would be said to have a “disparate impact.”

If this threshold level of “disparate impact” has been met, the Court said, it would allow such tests if they met the standard of “business necessity.” The Court relied on EEOC guidelines in defining the key terms “business necessity.” As legal scholar Richard Epstein notes,

The words *business necessity* were not casually chosen, for they have real bite in practice. They have been strictly construed in the EEOC guidelines on the subject, which have received general acceptance in the courts. Although there is some variation in the level of rigor found in various cases, one common formulation of the concept provides that the practice must be essential, the purpose compelling. On this view it is not enough that a test is perfectly reasonable and plausible in the sense of cost effective: virtually any test in common use meets this standard. More must be shown....<sup>23</sup>

To be allowed, tests must be validated by the same EEOC guidelines, which only allow three methods of test validation. These are: content studies, construct studies, and criterion validity studies. They will be briefly summarized here.

*Content studies* aim to measure direct abilities of employees in relationship to the job at hand. Can a welder actually weld? Can a UPS driver lift heavy packages? The advantage to these studies is that they are straightforward and relatively non-controversial. But they are limited in that they cannot test beyond the extremely narrow range of skills specified for the job. Sometimes the physical job itself is only one component of what the overall job will entail.<sup>24</sup>

*Construct studies* are similar to content studies but far more complex. Employers try to establish a connection between traits desired in an employee and their connection to the job at hand. But the EEOC warns that developing a valid construct test is next to impossible. Its guidelines state that validating such studies “is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices.”<sup>25</sup>

The third form of test validation is the *criterion validity study*. These studies “seek to relate the use of the selection device with success on the job.”<sup>26</sup> The EEOC guidelines are cumbersome here too, spanning six pages of difficult-to-understand concepts, all of which, in Epstein’s words, “ostensibly protect against every possible form of bias, overt or hidden.”<sup>27</sup> The EEOC is particularly concerned with any written test, specifically warning that “[c]riterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.”<sup>28</sup>

In the end, the EEOC’s interpretation of disparate impact and business necessity imposes significant burdens on employers wishing to perform testing. Epstein concludes that part of this can be traced to the agency’s zealous mission in not only enacting the law that was passed, but also trying to go above and beyond and eliminate any and all discrimination in the workplace.<sup>29</sup>

## The Equal Opportunity Employment Act of 1972

**O**n its face, there is a plausible case to be made that the Supreme Court’s decision in *Griggs* misinterpreted the original intent of the Civil Rights Act. But rather than clarify the situation, Congress subsequently adopted legislation that endorsed *Griggs*. This took the form of the 1972 Equal Opportunity Employment Act.

This act expanded the original legislation to include firms with more than eight employees, down from twenty-five in the Civil Rights Act. It also extended coverage to employees of federal, state, and local governments as well as workers at educational institutions, and it increased the enforcement capabilities of the EEOC. *Griggs* was now legislatively enshrined.

***Rather than clarify the situation, Congress adopted legislation that endorsed Griggs and increased the EEOC’s enforcement capabilities.***

In retrospect, the 1964 Civil Rights Act can be seen as well-thought out, thoroughly debated, and construed in a way that avoided excesses. But as Epstein points out, the 1972 Equal Opportunity Employment Act was void of these characteristics.

...the legislative history of the 1972 act reflects a consensus moral certitude about social rights and wrongs that stands in stark contrast to the closely fought, tightly reasoned struggle over the 1964 act. In a sense it offers powerful evidence that *Griggs* anticipated the mood of the 1972 Congress. There are explicit approving references to *Griggs*, and the Senate report even discusses the change in orientation from the 1964 debates.<sup>30</sup>

## *Wards Cove Packing v. Antonio*

**A**fter *Griggs*, a number of decisions addressed the issues that it raised. They include the 1975 case *Albemarle Paper Co. v. Moody*, *Dothard v. Rawlinson* (1977), *Connecticut v. Teal* (1982), and *Watson v. Fort Worth Bank & Trust* (1988). The general effect of those decisions was to confirm restraints on the use of job application tests.

***In 1989, however, the tide began to turn. Wards Cove Packing v. Antonio would have more far-reaching consequences, although its effects were short-lived.***

In 1989, however, the tide began to turn. *Wards Cove Packing v. Antonio* would have more far-reaching consequences, although its effects were short-lived. Indeed, by moving in a different direction, the case may have motivated members of Congress to intervene.

*Wards Cove Packing*<sup>31</sup> operated salmon cannery plants in Alaska. The jobs at the plants were divided between “cannery jobs,” which usually involved unskilled labor, and “noncannery jobs,” which were classified as skilled labor positions. The cannery jobs were predominantly filled by nonwhites, including Filipinos and native Alaskans. The noncannery positions were held primarily by white workers, and they paid more than the cannery ones.<sup>32</sup>

The respondents, who were challenging this situation using disparate impact analysis under Title VII, claimed that the “hiring and promotion practices were responsible for the racial stratification.”

On the disparate impact question, the Court said that simply comparing the number of jobs held by whites versus nonwhites in the selected categories—as the plaintiffs had done—was “nonsensical.” The better comparison was between the “racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market.”

But the Court did not stop there. It radically redefined the business necessity standard as well. Since *Griggs*, the employer had held the complete burden of proving that a test that had a disparate impact on employees was a “business necessity” or “job related.” This strict interpretation of the standard deterred employers from testing prospective employees for fear of encountering litigation. The decision in *Watson* at least hinted that the Court in the late 1980s—decidedly more conservative than its predecessor in the mid- and late 1970s—might have a less stringent view of this standard. *Wards Cove Packing* confirmed this suspicion.

The Court ruled that the plaintiffs in such cases carried the burden of persuasion, “for it is he who must prove that it was because of such individual’s race, color etc. that he was denied a desired employment opportunity.”

The Court noted the difficult position employers faced:

The burden of persuasion, however, remains with the disparate-impact plaintiff . . . . There is no requirement that the challenged practice be “essential” or “indispensable” to the employer’s business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet and would result in a host of evils.<sup>33</sup>

Knowing that this “persuasion” point was a radical departure from the *Griggs* standard, the Court also addressed prior rulings saying that:

The plaintiff bears the burden of disproving an employer’s assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. *We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employer’s “burden of proof” with respect to a legitimate business justification defense, they should have been understood to mean an employer’s production—but not persuasion—burden.*<sup>34</sup> (*italics added*)

The Court gave plaintiffs an opportunity to still challenge employment practices even if they passed the new thresholds, but it left the burden of proof with the plaintiffs themselves. The Court said that if an employer does prevail on the “legitimate employment goal” threshold, the plaintiffs could still have a plausible case if they proved that there were available “alternative practices to achieve the same business ends, with less racial impact.”<sup>35</sup>

The Court’s decision in this matter was groundbreaking, essentially tossing out the *Griggs* “business necessity” standard and restricting the disparate impact analysis commonly used. It appeared to allow employers once again to institute their own employment practices, including tests, without fear of expensive and lengthy disparate impact litigation.

## 1991 Civil Rights Act

**T**he celebration from employers was temporary. Democrats in Congress, encouraged by liberal activists, were upset over *Wards Cove* and the apparent death of the more stringent “business necessity” clause.

In February 1990, less than one year after the *Wards Cove* decision, Senator Ted Kennedy (D-MA) introduced S. 2104, which would “amend the

Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.”<sup>36</sup>

Kennedy’s legislation initially sought to overturn *Wards Cove* entirely, codify *Griggs*, and also offer a stringent definition of business necessity. Republicans

lined up against the bill, fearing that it would mandate employer racial quotas. Over the next two years, hundreds of hours were spent debating the legislation, adding amendments, threatening vetoes, and trying to reach a compromise among Kennedy, Senate Republicans, and President George H. W. Bush.

***In the end, with a presidential election looming and not wanting to appear to be insensitive to minorities, President Bush signed a compromise bill. The compromise restored the business necessity standard articulated by Griggs and returned the burden of proof to the employer.***

In the end, with a presidential election looming and not wanting to appear to be insensitive to minorities, President Bush signed a compromise bill. The compromise restored the

business necessity standard articulated by *Griggs* and returned the burden of proof to the employer. The final bill said that an unlawful employment practice is established when a plaintiff makes a prima facie case of discrimination “and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”<sup>37</sup>

The actual words “business necessity” were not specifically defined in the bill, a clarification that Kennedy and others had sought. Nevertheless, the act referenced the *Griggs* decision and the seventeen years of judicial precedents before *Wards Cove*. It was an implicit endorsement of the same standard that *Griggs* used, and it repudiated the important distinction that *Wards Cove* had made.

## Testing Today

**T**he *Griggs* decision and related cases and statutes made standardized testing in the workplace a complex legal matter, but employment testing did not disappear. As mentioned earlier, teams in the National Football League administer the Wonderlic test every year to prospective players before the NFL draft, giving them a sense of a player’s mental aptitude before handing out multi-million dollar contracts for their services.<sup>38</sup> In fact, according to *Staffing Industry Report*, a human resources newsletter, 65 percent of companies reported using some type of pre-employment screen, up from 34 percent in prior years.<sup>39</sup>

Testing today, however, is radically different from what was commonplace during the original *Griggs* decision. The employment testing industry itself even eschews the word “testing,” preferring the new term “instruments.”<sup>40</sup> Despite the linguistics, the tests or instruments still try to fulfill the same basic goal: providing employers with useful information that helps discern whether an employee is qualified for a job and a good fit.

Employers today have responded and adapted to the *Griggs* decision by focusing most of their tests on narrow subjects that are directly and unambiguously related to the job in question or conducting personality tests that, while more general in nature, still have a straightforward connection to the traits needed for the employment opportunity.

Narrow employee tests are common in the information technology (IT) field, a specialized field that hardly existed at the time of *Griggs*. For example, Brainbench, a Virginia testing firm, now offers over 600 different employee assessment tests, a majority of them dedicated to information technology, computer, or technical skills.<sup>41</sup> These tests are highly specific in nature, usually focusing on a single topic or computer program.

There have been few legal challenges under the *Griggs* standards for these assessments. The tests are narrowly construed, directly related to the actual task the employee will be expected to perform, and developed without any hint of prejudice or racial favor. If, for example, an employee cannot pass a pre-screening test on how to use Microsoft Excel, and using Excel properly is the most important part of that employee’s job function, then it is clear that the test itself is performing a useful function both for the employee and the employer. The employer finds the job candidates best able to perform the necessary work while the applicant can be sure that he or she can satisfy the work requirements. In many ways, the *Griggs* decision and subsequent cases and legislation did not anticipate the type of employee testing that is routinely used in the IT industry.

Personality tests are common, too. These tests are more general in nature and do not, for the most part, enter into the controversial realms of aptitude and competence. Tests in this category—such as the Myers-Briggs Type Indicator, the Predictive Index, and the Leadership Challenge Profile—have become a popular and easy way for employers to make judgments about whether a candidate is truly suited for a particular job. The Myers-Briggs Indicator is widely implemented, with the *New York Times* claiming that 89 out of the Fortune 100 companies use it in some fashion.<sup>42</sup>

***Employers focus most of their tests on narrow subjects directly and unambiguously related to the job in question or conduct personality tests closely connected to the needed traits.***

According to professionals in the testing industry, the modern-day employment tests focus on specific functions and traits. Many test publishers are “creating items that appear directly relevant to the work setting—writing personality items that are framed within the work context,” says Judy Chartrand, director of talent assessment at Pearsons Education, the parent company of Harcourt Assessment, the nation’s most well-known testing company.<sup>43</sup> Chartrand stresses, however, that even for all of the differences, the basic tenets of testing remain the same. “The tests still measure the same underlying concepts.”<sup>44</sup>

Even the most controversial tests of the *Griggs* era can be narrowly used. In the *Griggs* case itself, the use of the Bennett Mechanical Comprehension Test was a central issue, with the majority finding that the way Duke Power used the test was not “directed or intended to measure the ability to learn to perform a particular job or category of jobs.”<sup>45</sup> Harcourt, which continues to administer the Bennett Mechanical Comprehension Test today, says that the test is reasonable to use under the right circumstances. “For example,” says Chartrand, “in a position such as tool maker, mechanical composition is typically a requisite for effective performance. Employers need to use assessments that are directly mapped to job competencies.”<sup>46</sup>

Even if that need is beyond dispute, employment law experts still believe that murky legal waters surround employment testing. In May 2007, the Equal Employment Opportunity Commission held a public meeting on current employment testing issues. The Commission heard from attorneys representing plaintiffs and companies, as well as two widely recognized organizational psychologists.<sup>47</sup>

Kenneth M. Willner, an employment attorney at Paul, Hastings, Janofsky, and Walker, laid out the problems that continue to plague government and legal policy toward testing. He began his testimony by suggesting that misuse by employers is relatively rare. In his experience, “the vast majority of employers use testing for legitimate nondiscriminatory business reasons.”<sup>48</sup>

In fact, Willner claims that the desire to use tests in the first place is not to discriminate but rather to remove subjective—and possibly unfair—judgments from the hiring process. Employers are aware that “unfettered subjective decision-making can lead to allegations of a pattern or practice of employment discrimination, so they search for objective measures.”<sup>49</sup> Even if Duke Power used testing unfairly forty years ago, societal norms have shifted so much in the intervening time period that hardly any company uses testing for that same purpose today.

Yet the courts and federal agencies such as the EEOC still pursue discriminatory claims against them, often unevenly and using vague guidelines, said Willner. As a result, employers’ efforts “to eradicate subjective practices by adopting uniform and objective selection criteria may lead them, ironically, into a potential liability trap.”<sup>50</sup>

Willner argues for two reforms. First, he proposes that the Uniform Guidelines on Employee Selection Procedure, which have been used by the EEOC in prosecuting employment

discrimination claims, be revised. The guidelines have not been adapted or changed since 1978, despite numerous revisions of other testing standards from major psychological associations such as the American Psychological Association's Standards for Educational and Psychological Tests, and the Principles for the Validation and Use of Employee Selection Procedures.

While *Griggs* was ultimately codified, the 1978 Uniform Guidelines still do not take into consideration the important legal questions that many justices raised in the 1980s cases following *Griggs*.<sup>51</sup>

Willner also recommends "better training of agency investigators and other personnel."<sup>52</sup> The EEOC should use its resources to pursue employers who are actually breaking the letter and spirit of the law, not to harass companies that are using legitimate tests, even when the tests might not yield results that the EEOC desires from a diversity perspective.

"Often," says Willner, "it seems that initial characterization of tests as measuring 'cognitive ability' or 'math skills' leads to assumptions about adverse impact that drive the result, rather than evaluation of actual adverse impact data or validity evidence. It appears that this could be addressed by additional or focused training."<sup>53</sup>

While employers as a whole feel confident using strictly designed tests, it's also equally clear that legal liability exists, even for companies with the best of intentions.

***"The EEOC should use its resources to pursue employers who are actually breaking the letter and spirit of the law, not to harass companies that are using legitimate tests," says Kenneth M. Willner.***

## The Impact on Postsecondary Education

**A**s this legislative and legal history makes clear, since the early 1970s employers have faced significant legal hurdles in administering employment tests. The *Griggs* ruling established the standard that tests could not have a disparate impact and be legally permissible unless they were directly related to the task the employee was being asked to perform, and the burden of showing this fell on the employer.

The import of this history is that employers are deterred by the threat of litigation from using general intelligence tests and aptitude tests to measure job candidates.<sup>54</sup> Yet for jobs that have complex components that will change as conditions change, general intelligence may be more important than specific job skills.

Colleges and universities have stepped in to fill the informational void. A college degree often indicates a certain amount of aptitude and determination. It reveals that a student has met a certain set of standards on a consistent basis over a period of time and thus probably has some valuable aptitudes and skills. It is our contention that many employers have made the college degree a de facto intelligence test and focus on hiring only those applicants who possess it. Of course, many factors contribute to the increase in college attendance in the United States, which went from 5.8 million in 1970 to 17.5 million in 2005.<sup>55</sup> But it is also likely that some of the demand for workers with college credentials can be explained by employers' need for a substitute for general intelligence tests.

Applicants for many jobs are now required to have a college degree. Seldom is that done because the work is so demanding that it couldn't be done by a person who didn't go to college, but instead it is a means of screening out presumably less trainable applicants. For naturally talented candidates, the college degree may not add much value in terms of job capability. Many students who attend college benefit enormously from the academics, discipline, social atmosphere, and maturity that higher education can foster in their lives, but a substantial portion of students are already talented, motivated, driven, and mature before they ever enter a college classroom. For students who desire occupational training rather than a liberal education, college may add very little in terms of long-term value. Because of *Griggs* and its progeny, however, employers have great difficulty identifying these candidates and therefore require college credentials as an initial screening mechanism.

If businesses were allowed to use intelligence testing to screen applicants, that might save all parties involved a tremendous amount of time, money, and other resources. Instead, students must go through college, and employers must wait until the candidate has the college degree to find them. Even then, the most suitable and qualified candidates can still get lost in the shuffle, as they are competing against hundreds of thousands of other students who also have college degrees.

The widespread availability of college education has changed the landscape of employment opportunity. One consequence is that it has arguably made employment more difficult for minorities. Qualified minorities who performed well on an intelligence or aptitude test and would have been offered a job directly thirty or forty years ago are now compelled to attend a college or

university for four years and incur significant costs. For some young people from poorer families, those costs are out of reach.

The unintended economic consequences of *Griggs* on college attendance and labor markets are worthy of further exploration.

## The Possible Economic Impact

One of the striking changes in higher education in the past few decades is the increase in the wage differential between those who attend high schools and those who attend college, as indicated in Figures 1 and 2 on the next page. These figures contain data from the U.S. Bureau of the Census on earnings differentials between high school and college graduates for the years 1958 to 2005.<sup>56</sup> (There was some change in the way the data were classified in 1991, so some caution should be used in interpreting the results after that.)

For both males and females, the earnings differential was relatively stable in the two decades prior to 1978, but the differentials rose sharply after that date. To be sure, there are nuanced differences in the two graphs, but the “bottom line” for both is that the earnings differentials between high school and college

graduates rose significantly from 1978 to 2005, whereas the differential had not risen importantly in the two decades before 1978.<sup>57</sup>

We have marked 1978 as a dividing point, on the assumption that the impact of *Griggs* started to be really felt around seven years after the decision. There likely is a lag of several years between the time a court decision is made and the time it significantly affects labor markets. And if the *Griggs* decision affected the demand for college, we should expect an additional lag of four or five years, the time between deciding to go to college and actually obtaining a degree and entering the labor market.

The reason that some of this increase in the wage differential may be due to *Griggs* is that *Griggs* has made it virtually impossible for students without a college degree to get in the door for an interview for a well-paying job. We are suggesting that employers’ shift to demanding a college degree not only encouraged more students to get degrees but also reduced the return to a mere high school degree.

*We have marked 1978 as a dividing point, on the assumption that the impact of Griggs started to be really felt around seven years after the decision.*

This likelihood of a major impact by *Griggs* invites detailed research. Statistical techniques (e.g., some form of multivariate analysis) could be used to try to separate the *Griggs* portion of the rising earnings differential from that caused by other factors, for example the rise in globalization and its impact in suppressing wages of unskilled workers, who are mostly persons without a college education.

Figure 1

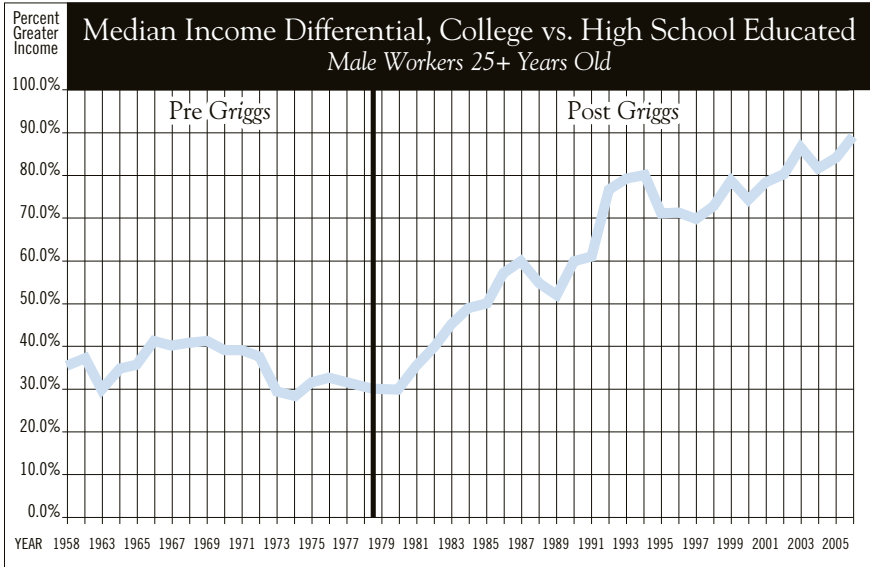
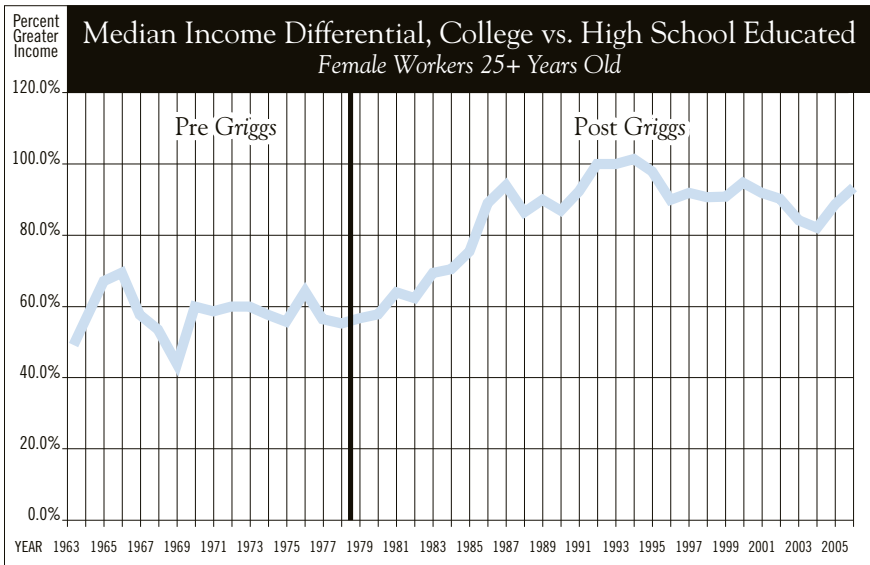


Figure 2



Let us take a minute to speculate on the potential impact of *Griggs*. Assume that *Griggs* and its legal and legislative aftermath explain the 20 percentage-point widening in the high school/college earnings differential. That translates into a roughly \$7,000 annual earnings increment associated with college training (more for males, less for females). If one considers that there are over 25 million workers with four-year college degrees, that implies that at least \$175 billion annually in income has shifted from high school to college graduates on account of *Griggs* and its aftermath. The present value of all such income redistribution in the past three decades is measured in literally *trillions* of dollars. If these estimations—admittedly, speculation at this point—are accurate, *Griggs* may have very important economic implications. For an individual worker, the present value at the time of college graduation of the future stream of earnings associated with the *Griggs*-related portion of the educational earnings differential could be \$200,000 or more. Correspondingly, there may be earnings losses for people who do not obtain college degrees and are therefore compelled to compete for jobs where no degree is required.

The enormous increase in demand for a college degree has had other effects. One is to contribute to an environment of aggressive tuition increases. The Bureau of Labor Statistics data price index based on college tuition fees is available only for the post-*Griggs* era, but the sizable real increase in tuition costs in that era is consistent with the view that *Griggs* has been tuition-enhancing.

The magnitude of the possible effect here suggests that further research is needed. In addition to removing the impact of other factors to determine the *Griggs* impact on college attendance, good measures of tuition increases before and after *Griggs* should be developed. This would permit analysis of the impact of that court decision and the later judicial and legislative actions on college costs.

Returning to the legal issues, there is another question that *Griggs* spawned but that has not yet been considered by our legal system. At the time of *Griggs*, a high school diploma was one of the requirements for employment in the Duke power plant. Today, a college degree performs much the same role. Any cursory glance at help wanted ads in the newspaper reveals that many employers will not consider applicants who do not have college degrees for many positions. It is not clear that having a college degree requirement is legal under the *Griggs* standard.

Recall that the problem in *Griggs* was that the specified requirements for job applicants were not clearly and directly related to the actual demands of the work. If challenged, could employers who have set the college degree as a requirement show that it has anything at all to do with the “business necessity” of the employer or are “job-related”? That is very doubtful. Employers have grown to rely upon a new credential that is imperfect and probably rules out many qualified candidates. If the EEOC and the courts were to scrutinize the college degree requirement, they might well conclude that it has a “disparate impact.”

## Conclusion

Over the years, the explosion in college enrollment and higher education costs has been attributed to many factors. But largely overlooked have been the 1964 Civil Rights Act and the *Griggs* case and its related rulings. Yet these may have made major contributions to these developments. If so, the law of unintended consequences will have been proven correct once again.

This increase in college tuition has disproportionately harmed minorities and the poor, as many members of these socio-economic groups are unable to afford college today, even with financial aid. Thus, in spite of the outspoken goals of improving minority employment that presumably motivated the long series of cases and political lobbying described in this paper, it is possible that the *Griggs* decision has made it *harder* for some minority candidates to secure jobs.

The long-term policy and legal challenge might be to remove higher education from this vocational credentialing role, allowing employers to test job candidates so long as the tests are fair and do not intentionally discriminate, and return the Ivory Tower to its core missions, which have been lost in the incessant zeal for college degrees over the last thirty-five years.

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## ABOUT THE CENTER FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY

The Center for College Affordability and Productivity (CCAP) is an independent, not-for-profit center based in Washington, D.C. It is dedicated to research on the issues of rising costs and stagnant efficiency in higher education, with special emphasis on the United States.

“Affordability” means not only rising tuition and other costs to the consumer of education services, but, more broadly, the burden that colleges impose on society. “Productivity” refers not only to the costs and resources needed to educate students and perform research, but also to the measurement and quality of educational outcomes. CCAP is also concerned about finding new ways to do things better—to improve affordability and productivity. It is interested in how the forces of the market can be used to make higher education more affordable and qualitatively better. The Center disseminates its findings in many ways, such as through written studies, conferences, opinion pieces, electronic media interviews, and a blog.

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## ABOUT THE POPE CENTER

The John William Pope Center for Higher Education Policy is a nonprofit institute dedicated to improving higher education in North Carolina and the nation as a whole. Located in Raleigh, North Carolina, it is named for the late John William Pope, who served on the Board of Trustees of the University of North Carolina at Chapel Hill.

The Pope Center has multiple aims. It seeks to make higher education more accountable and transparent, to increase the diversity of ideas on campus, to improve the quality of teaching, to encourage student commitment to learning, and to spur cost-effective administration and governance. The center issues reports, publishes articles, gives presentations, and works with students and reformers. Its communication is directed at students, prospective students, parents, policy-makers, and taxpayers to let them know what is actually happening on campus. For more information, see [www.popecenter.org](http://www.popecenter.org) or contact Jane S. Shaw, the president.



*Griggs v. Duke Power: Implications for College Credentialing*  
By Bryan O'Keefe and Richard Vedder

Does the increase in college enrollment over the past 30 years partly reflect the changing pressures on employers based on a 1971 Supreme Court decision? And if so, could these pressures also explain the much-touted increase in earnings that comes from a college education?

"*Griggs v. Duke Power: Implications for College Credentialing*," by Bryan O'Keefe and Richard Vedder, explores the impact of the *Griggs v. Duke Power* decision on today's college enrollment. In *Griggs*, plaintiffs argued that Duke Power's reliance on two aptitude tests discriminated against minority groups. Subsequent cases and statutory law have changed the environment for testing and may have increased the pressure to attend college.

The paper is jointly published by the Pope Center for Higher Education Policy and the Center for College Affordability and Productivity.



**Bryan O'Keefe** was associate director of the Center for College Affordability and Productivity until the summer of 2008. Previously, he was a researcher at the American Enterprise Institute, studying domestic politics, public opinion polling, and labor issues. His writing on labor issues has been widely published. O'Keefe, who graduated from George Washington University, is currently attending law school.



**Richard Vedder** is Distinguished Professor of Economics at Ohio University, a visiting scholar at the American Enterprise Institute, and director of the Center for College Affordability and Productivity. A prominent voice in higher education reform, Vedder served on the Secretary of Education's Commission on the Future of Higher Education and is the author of *Going Broke By Degree: Why College Costs Too Much*.



The Center for  
College  
Affordability &  
Productivity

Center for College Affordability and Productivity  
1150 17th Street N.W., Suite 910  
Washington, DC 20036  
Tel: 202-375-7831 | Fax: 202-375-7821



John W. Pope Center for Higher Education Policy  
333 E. Six Forks Road, Suite 150  
Raleigh NC 27609  
Tel: 919-828-1400 | Fax: 919-828-7455