BARRIERS TO ENTRY: A MARKET LOCK-IN MODEL OF DISCRIMINATION

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The Justice Department yesterday filed an antitrust suit against members of the majority race, alleging that the group has harmed the public, consumers, and rivals by excluding Black and Latino/a competitors from the law school admissions market.[1] *The Department alleges that a monopoly by whites has restricted competition and stifled innovation in legal education and the broader profession.*

The government's central claim focuses on historical misconduct, rather than any contemporary wrongdoing. The complaint alleges that whites at the turn of the century monopolized the benefits of law school admissions for nearly one hundred years, by keeping nonwhites out of law schools.

Specifically, the Department charges that the cartel's early monopoly power became self-perpetuating because the cartel imposed law school admission criteria that favored whites. According to the complaint, "[b]ecause whites were able to bar entry for minorities early on in modern legal education, they were able to impose their own standards for competition, and to chart a path for legal education very different from the path that might have been taken had people of color been permitted to compete."

[1] Although this press report is entirely fictional, courts have approved the use of antitrust laws to recover for conspiracies to restrain trade that were motivated by racism, where the plaintiffs were excluded competitors. See, e.g., Organization of Minority Vendors v. Illinois Cent. Gulf RR, 579 F. Supp. 574, 604 (N.D. Ill. 1983). Linda Wightman conducted a recent study to determine the racial composition of law schools in the absence of affirmative action. See Linda F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1, 49–50 (1997). Using demographic data on recent admissions, she projected admissions under a "numbers-only" model of admission that relied on a combination of LSAT and undergraduate GPA. Id. According to her findings, a mere forty-one percent of students of color who were offered admission to law school in 1990–91 would have been admitted under the combination model. See id. at 50. When Asian students were excluded, that number dropped to 32 percent. See id. Only 10 percent of black applicants who gained an offer of admission could have been admitted under the combination model. See id. at 50–51.

Like the Department's allegations in its case against Microsoft, the government argues that this competitive standard has now become locked into the law school admissions market via self-reinforcing mechanisms called "increasing returns." Specifically, a law school must adopt the standard set of criteria to gain access to the network of legal institutions and organizations that make up the legal profession. That institutional network, in turn, reinforces the law school's use of the standard, because the standard becomes more entrenched when the legal profession continues to use it.

In a telephone interview, the Assistant Attorney General for the Antitrust Division remarked that this so-called "network standard" creates significant barriers to entry for minorities. "Law schools aren't likely to completely revise their admissions standards or overhaul their institutions to make them more open to minorities—they might lose access to the professional network, and then they risk things like their place in the rankings and/or their ability to place their graduates in prestigious firms. Because law schools aren't likely to switch, Black and Latino/a applicants will continue to be disproportionately excluded from law school admissions," she said.

"America's law school consumers, law firms, and the public in general have lost out," said the Attorney General at a news conference yesterday. "They have lost the benefit of vigorous competition among a wide range of law school applicants, who bring diverse cultural approaches and perspectives to the study and practice of law. The country has not enjoyed the innovation that competition brings." Spokespersons for whites said they would fight the suit. They maintain that anyone who has applied for law school knows that law school admissions are among the most competitive in the country.

INTRODUCTION

THE traditional story that we tell about race and meritocratic competition is based on the familiar neoclassical model of the market. Like firms in a market competition, candidates compete for an opportunity on the basis of ability or merit, which varies widely among individuals. In an efficient market, the employer or college chooses the superior candidate based on the candidate's performance on interviews, test scores, and grades. For markets with a limited number of opportunities, meritocratic com-

petition promotes efficiency—it selects the applicants who will maximize the value of a job slot or an educational opportunity, achieving the best outcome with limited resources.[2]

Conversely, race-conscious distribution is understood to be anti-competitive and inefficient, because race is not thought to be related to productivity.[3] According to the conventional story, the colorblind market will produce the most efficient outcome, because it distributes opportunities and resources exclusively on the basis of ability.

Building on the conventional model, many economists have argued that the market, if left to itself, will naturally drive out racist institutions because racism is inefficient. Nobel Laureate Gary Becker argues that, assuming that people of color are equally qualified to do a particular kind of work, the market will drive out discriminating institutions because indulging a "taste" for discrimination is costly—for example, all-white firms will bear the cost of paying higher wages to hire from a more limited selection pool of whites.[4]

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[2] See Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 Duke L.J. 705, 707. Duncan Kennedy describes this neoclassical market model of meritocracy as "colorblind meritocratic fundamentalism." See id. at 707–09.

[3] See Robert Cooter, Market Affirmative Action, 31 San Diego L. Rev. 133, 137–38 (1994) (noting that race-conscious discrimination is inefficient because it distributes on the basis of race, which is irrelevant to productivity); see also Norman Daniels, Merit and Meritocracy, 7 Phil. & Pub. Aff. 206, 209–10 (1978) (arguing that the underlying justification for merit is maximum productivity). For the argument concerning the relationship between affirmative action and productivity, see Jim Chen, Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny, 59 Ohio St. L.J. 811, 898 (1998); see also Clint Bolick, The Affirmative Action Fraud: Can We Restore the American Civil Rights Vision? 60 (1996) (discussing the costs in lost productivity from affirmative action); Barry R. Gross, Discrimination in Reverse: Is Turnabout Fair Play? 114–116 (1978) (arguing that efficient hiring should usually be based on merit, rather than other reasons such as race); Myrl L. Duncan, The Future of Affirmative Action: A Jurisprudential/Legal Critique, 17 Harv. C.R.-C.L. L. Rev. 503, 529–32 (1982) (challenging the argument that affirmative action reduces productivity, but conceding that the argument demonstrates a flaw in the social utility rationale for affirmative action); Michael Selmi, Testing For Equality: Merit, Efficiency and The Affirmative Action Debate, 42 UCLA L. Rev. 1251, 1251–52 (1995) (noting an underlying assumption that affirmative action is inconsistent with profit maximizing).

[4] See Gary S. Becker, The Economics of Discrimination 43–45 (2d ed. 1971).

Of course, thirty years have passed since Becker first laid out his argument, and market forces have yet to eliminate discrimination or inequality. A new generation of law and economics scholars has proposed some form of market irregularity to explain persistent racial disparities. Richard Epstein has argued that race-conscious government interventions—in particular, racist Jim Crow laws and federal civil rights laws—have impeded the operation of Becker's purifying market mechanisms.[5] Richard McAdams argues that market forces are not strong enough to overcome the force of coercive social norms and social payoffs, which operate to police discriminatory behavior in racist cartels.[6]

Similarly, John Donohue proposes that transaction costs, like limited worker mobility and the cost of acquiring precise information about applicants, may interfere with the market's function.[7] Cass Sunstein suggests other externalities—for example, third parties (such as clients) with a taste for discrimination,[8] a worker's rational unwillingness to invest in human capital in light of discrimination—that may explain why the market has not eliminated discrimination.[9] Regardless of the type of market failure, these theories all rely on the standard model of colorblind meritocratic competition, in which each competitor has an equal opportunity to compete on the basis of ability regardless of race.

But concepts from antitrust doctrine and economic theory can be used to tell another, far more radical, market failure story about persistent racial disparity—a story of monopoly, in which whites anticompetitively excluded people of color to monopolize competition, and then used that monopoly power to lock in standards of

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[5] See Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 93–94, 159–67 (1992). Epstein also suggests that some forms of discrimination are rational because they help to make institutions competitive. See id. at 59–78.

[6] See Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003, 1046–48 (1995).

[7] See John J. Donohue, III, Employment Discrimination Law in Perspective: Three Concepts of Equality, 92 Mich. L. Rev. 2583, 2596 (1994).

[8] The concept of a preference or "taste" for discrimination was developed by Gary Becker. See Becker, supra note 4, at 14–17.

[9] See Cass R. Sunstein, Why Markets Don't Stop Discrimination, *in* Free Markets and Social Justice 151, 153–54, 157–58 (1997).

competition that favored whites.[10] Conventional neoclassical theory teaches that, like racism, monopoly power is unstable. Over time, market forces will eliminate monopoly profits because other firms will enter the market if the monopolist raises the price, unless there are barriers to entry.[11] Recent and controversial work in economics and antitrust theory, however, suggests that natural market forces under certain conditions can create barriers to entry that make monopolies quite durable.[12] Of particular interest is the research on de facto standards, demand-side increasing returns, and network externalities.[13]

This literature describes circular market mechanisms called positive feedback loops, or increasing returns, which can produce a self-reinforcing advantage for the dominant competitor that becomes locked into the market.[14] In a market that exhibits positive feedback loops, an initial advantage or increase feeds back on itself to create an even larger advantage or increase.[15] In a market characterized by feedback loops, a small initial advantage can translate into enduring market dominance.[16]

Computer-related markets often exhibit positive feedback loops. In the computer software market, for example, software authors

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[10] Robert Cooter has described discriminatory market power in terms of monopoly theory and antitrust law, to argue in favor of market-based affirmative action programs similar to transferable property rights. See Cooter, supra note 3; see also Kennedy, supra note 2, at 732 (arguing that whites not only monopolized the benefits of competition, but also monopolized the ability to structure the competition).

[11] See Joseph E. Stiglitz, Economics 410 (1993).

[12] See Thomas A. Piraino, Jr., An Antitrust Remedy for Monopoly Leveraging by Electronic Networks, 93 Nw. U. L. Rev. 1, 3 (1998) (arguing that the feedback-loop monopolies in "computer software, banking, and telecommunications are even more durable than the monopolies in steel, oil, transportation, and other basic industries that prevailed at the end of the nineteenth century").

[13] For an excellent introduction to this literature, see W. Brian Arthur, Increasing Returns and Path Dependence in the Economy (1994); Michael L. Katz & Carl Shapiro, Network Externalities, Competition, and Compatibility, 75 Am. Econ. Rev. 424 (1985) [hereinafter Katz & Shapiro, Network Externalities]; Mark Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 Cal. L. Rev. 479, 488–99 (1998) [hereinafter Lemley & McGowan, Legal Implications]; Symposium, "New" Issues Raised By Information Technology Industries, 43 Antitrust Bull. 547 (1998).

[14] See infra Section I.B for a discussion of feedback loops.

[15] See id.

[16] See id.

will prefer to write compatible programs for the operating system with the largest market share, which currently is Windows.[17] As the selection of compatible software grows larger, future users are more likely to choose Windows, because they prefer a broader array of available software. As more buyers purchase Windows, the operating system increases its lead, which again induces software authors to write more compatible software, and the cycle continues to feed back on itself to increase Windows' lead. At some critical point in this dynamic feedback process, Windows may pull away from its competitors to become the de facto standard governing competition. In addition, Microsoft's advantage may become sufficiently large that other competitors cannot possibly catch up, and the leader's dominant position then becomes "locked into" the market.[18]

The Windows story provides a good example of the benefits that networks can provide to market competitors. Network markets create increasing returns because of the potential for connecting to other users through a common standard.[19] A network market, like an ATM or credit card market, uses some compatible interface to connect entities and institutions. For example, banks and bank users are connected in the ATM network via the CIRRUS system; software authors, computer users, and computer manufacturers are connected to each other via Windows.[20] As the network of institutions grows up around the network standard, the standard becomes more entrenched because positive feedback loops both reflect and

[17] The feedback-loop analysis for Windows and the operating systems market is taken from Lemley & McGowan, Legal Implications, supra note 13, at 500–07.

[18] See id. Experts for the government in *United States v. Microsoft* described this positive feedback loop in the market for operating systems, arguing that network effects strengthened and reinforced Microsoft's monopoly power. "The more users a particular operating system has, the more applications software developers will write for that operating system; and that, in turn, will make the operating system more attractive to more users, resulting in positive feedback reinforcing its dominance." Memorandum of the United States in Support of Motion for Preliminary Injunction, United States v. Microsoft (D.D.C. 1998) (No. 98-1232) (citing Declaration of Franklin Fisher, ¶ III.A.3) (on file with the Virginia Law Review Association).

[19] See infra Section I.B for a discussion of network markets.

[20] Network interfaces vary and include user-user, user-supplier, and supplier-supplier configurations.

reinforce its use. Thus, network markets in which de facto standards operate can be particularly resistant to change.

This Article will use the lock-in model as an analogy to the dynamics of racial economy in the "network" of the legal profession. Specifically, I will argue that we might usefully understand white dominance in legal education and employment to be the product of a locked-in, culturally specific network standard that favors whites. Anticompetitive conduct by whites during the segregation era created an overwhelming initial advantage, if not an outright monopoly, in early market competition. This monopoly, which lasted well over a century, may have produced a de facto standard that favors white cultural performances and disproportionately excludes people of color.

Institutional networks of interdependent professional organizations have now grown up around this culturally specific standard to lock the standard in. To gain access to the legal profession network, for example, law schools have had to adopt the industry standard that favors whites. For example, schools that want to maintain their national ranking or place graduates in lucrative positions must admit students based on their Law School Admission Test ("LSAT") scores, because legal professionals recognize the test as a signal of "quality." Over time, the standard has become progressively more embedded into the network, creating significant barriers to entry for people of color whose cultural performances do not conform to the standard.

Beyond this central argument, a lock-in model of discrimination will have several more general implications. First (and most controversially), it suggests that current admissions standards are not race-neutral, efficient products of market competition, but rather are the product of earlier anticompetitive conduct by whites. Because such anticompetitive behavior will not necessarily produce the superior or efficient market outcomes, there is no guarantee that professional standards in law school admissions produce applicants who are the most efficient legal problem-solvers or even the best law students.

Second, the model will suggest that racial disparities persist because communities of color do not enjoy true equal opportunity to compete. At the turn of the century, whites intentionally excluded people of color from participating in the establishment of the de

facto standard in the legal profession. Currently, a culturally specific standard that is locked into the market creates significant barriers to entry for people of color. Far from a level playing field, competition takes place in markets where white monopoly power may have become self-reinforcing.

Finally, the model will propose a politically useful metaphor or analogy for discrimination and affirmative action. A market lock-in analogy frames racism in antitrust terms, as deliberately anticompetitive conduct that foreclosed competition and created continuing barriers to entry. Moreover, the model explains the intuition that when it comes to race, the country's history of slavery and segregation continues to matter. The model will trace these entry barriers to pervasive racism and segregation, when whites routinely and uncontroversially excluded nonwhites from legal education and the broader profession. Likewise, the analogy will redescribe affirmative action in less apologetic and more robust terms. Unlike the conventional picture of affirmative action as a temporary remedy addressing deficiency, the model will present affirmative action as a type of antitrust remedy designed to dismantle a locked-in white monopoly on opportunity and resources.

More generally, this Article will demonstrate that mainstream categories of legal thought, like antitrust and law and economics, can be deployed to support the radical critique of merit advanced by Critical Race Theory ("CRT").[21] In a previous article, I suggested that CRT scholars should instrumentally use existing

[21] For projects setting forth the radical critique of merit, see Patricia Williams, The Alchemy of Race and Rights (1991); Richard Delgado, Rodrigo's Tenth Chronicle: Merit and Affirmative Action, 83 Geo. L.J. 1711 (1995); Kennedy, supra note 2; Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 85 Cal. L. Rev. 1449 (1997) [hereinafter Roithmayr, Deconstructing the Distinction]; see also Robert L. Hayman, Jr., The Smart Culture: Society, Intelligence, and Law 19–26 (1998) (discussing the "mythology of 'smartness'"); Yxta Maya Murray, Merit-Teaching, 23 Hastings Const. L.Q. 1073, 1080–81 (1996) (attempting "to transform the meritocratic ideal by including what has been up to now excluded"). For a discussion of some of the critiques of the radical position on merit, see Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law 52–71, 75–78 (1997); Nancy Levit, Critical of Race Theory: Race, Reason, Merit, and Civility, 87 Geo. L.J. 795, 802–08 (1999). The radical critique of merit is associated with critical race theory. See Critical Race Theory: The Key Writings That Formed the Movement at xv–xvi, Part Three Introduction (Kimberlé Crenshaw et al. eds., 1995) (previewing the critique of merit in the context of the debate over affirmative action).

categories of legal thought as weapons in the cultural war, to advance their own local and radical political commitments, like the commitment to affirmative action.[22] Although the antitrust/law-and-economics model may not be a perfect fit on all points, it nevertheless may translate important concepts from CRT into terms that antitrust practitioners and law and economics scholars, among others, might recognize and find persuasive.

In the tradition of translation, Part I of this Article will provide a primer on market lock-in, positive feedback loops, standard setting, and related concepts. In this Part, I will provide the uninitiated with an accessible explanation of these concepts for purposes of the Article. In Part II of this Article, I will argue that in the legal education market, whites' early anticompetitive behavior during Jim Crow segregation created a white monopoly on resources and opportunities in law schools. This anticompetitive conduct, and the resulting monopoly on resources and opportunity, created a de facto industry standard that favors white performances and excludes people of color.

In Part III, I will argue that the legal profession network has now locked the standard into the law school admissions market, because the standard is the interface that connects the law school to other important organizations and individuals. As the relationships in this network become more complex over time, the de facto standard becomes progressively more entrenched, for three reasons. First, admitting students who conform to the de facto standard (hereinafter "on-standard students") enhances or maintains a law school's reputation in the national rankings. By using the standard, a law school can signal the "quality" of its program to a wide range of legal professionals—prospective employers and their clients, alumni, the legal community of practitioners at large, and other law schools. Schools that want to maintain or improve their ranking, in turn, will continue to use the conventional standard.

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[22] See Daria Roithmayr, Guerrillas In Our Midst: The Assault on Radicals in American Law, 96 Mich. L. Rev. 1658, 1682–83 (1998) (reviewing Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law (1997)).

Second, admitting on-standard students gives the law school access to a centralized admissions database that enables it to signal "quality" to law school applicants. Access to the database, in turn, makes it more likely that the law school will admit on-standard students because the database uses standard criteria to measure merit. Finally, a law school's use of the de facto standard permits the intra-school network of faculty administrators and members to reach consensus in decisionmaking on admissions. Law schools seeking to modify or reformulate admissions standards face a collective action problem if faculty members do not agree on the use or precise meaning of an alternative standard.

In Part IV, I will argue that the network standard has become locked into the law school admissions market because it imposes two significant barriers to entry for people of color. First, the standard creates high "switching costs" for law schools—costs incurred by those law schools that might switch to standards more favorable for applicants of color. Because switching costs impose competitive disadvantage, law schools are unlikely to voluntarily revise their admissions standards or make more than minor structural modifications to diversify their law school populations.

Second, the industry standard gives incumbent whites an advantage by lowering their costs of cultural production. Whites internalize white cultural practices at a relatively low cost, through cultural transmissions from their families and communities. In comparison, people of color looking to acquire white "cultural capital"[23] must invest resources—for example, tuition or relocation expenses to move to a white neighborhood and attend a predominantly white school. These cultural adjustment costs fall more heavily on families whose cultural performances deviate most from white practices.

In Part V, I will argue that the market lock-in model has several important implications for race relations and government policy. First, the model may usefully frame discrimination as a path de-

[23] Although cultural capital might be understood to include class components as well as racial ones, this Article refers to cultural capital traceable only to race, independent of class. See infra note 24 (racial differences strongly correlate to differences in scoring on IQ tests, even after controlling for parental wealth and education).

pendent process in which segregation played a central evolutionary role that continues to affect current market outcomes. Second, it suggests that because discrimination is in large part a structural phenomenon, racial disparities will continue to exist even in the absence of ongoing intentional discrimination. Third, it implies that current standards in law school admissions may be inefficient or "sub-optimal," because they can be traced directly to anticompetitive conduct. Finally, the model predicts the small size and limited nature of current affirmative action programs and suggests that more intensive affirmative action may be needed to dismantle market lock-in.

I. AN INCREASING RETURNS PRIMER

A. Preliminary Assumptions

Before outlining a lock-in model of discrimination, I should identify several assumptions that are central to the model. First, I assume that whites and minorities differ in culturally and historically specific ways, and that those differences explain racial differences in standardized test scores and other measures of academic ability.

Scholarly literature suggests that a racial group's history and culture affects members' world views, habits, styles, skills, values, preferences, the way they think about unfamiliar questions, and perhaps the penchant they have for manipulating ideas as an academic exercise—all of which might affect strategies for legal or academic problem-solving.[24] Evidence indicates that historical and

[24] See Christopher Jencks, Racial Bias in Testing, *in* The Black-White Test Score Gap 55, 69 (Christopher Jencks & Meredith Phillips eds., 1998). In a now-dated but important early study, Robert Kaplan concluded that variations in language and culture produce important differences in cognitive filters, behavior patterns, thinking styles and modes of expression. See Robert B. Kaplan, Cultural Thought Patterns in Inter-cultural Education, 16 Language Learning 1 (1966). Comparing the written expression of three language groups, he found that Arabs wrote in paragraphs that consisted of a complex set of parallel constructions, Asian groups developed their paragraphs in ever-widening circles rather than through linear or parallel sequences, and those who spoke Romance languages developed complex paragraphs with web-like interconnections, with many ideas and concepts that would be characterized as irrelevant or digressive in comparison to more linear styles of writing. See id. at 6–13.

cultural differences produce a significant portion of racial differences in standardized test scores between blacks and whites. Scholars have concluded, for example, that the race of the family raising a child strongly correlates to scores on IQ tests, even after controlling for parental wealth and education.[25] Most remarkably, the highest scoring nonwhite children, on average, are those raised in white homes.[26]

Moreover, the test score gap between black and white children appears well before they enter kindergarten and persists far into adulthood.[27] The gap does not appear to be affected or caused by variations in the type of schools attended, or differences in parental education, income or wealth. Differences diminish only slightly when children attend the same schools,[28] and when parents occupy the same economic class.[29] In light of these findings, culture cer-

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While some may question the simplicity of his characterizations, his work stands as a precursor to subsequent research on cultural differences in learning.

[25] In a study conducted by Elsie Moore, black children adopted by white middle-class parents demonstrated IQ scores 13.5 points higher than black children adopted by black middle-class parents. See Christopher Jencks & Meredith Phillips, The Black-White Test Score Gap: An Introduction, *in* The Black-White Test Score Gap, supra note 24 at 1, 16–17 (citing Elsie G.J. Moore, Family Socialization and the IQ Test Performance of Traditionally and Transracially Adopted Black Children, 22 Dev. Psychol. 317 (1986)); Richard E. Nisbett, Race, Genetics, and IQ, *in* The Black-White Test Score Gap, supra note 24, at 86, 93 (same). Similarly, mixed race children who lived only with a white mother scored 11 points higher than mixed-race children who lived only with a black mother. See Jencks & Phillips, supra, at 17 & n.41 (citing Lee Willerman et al., Intellectual Development of Children from Interracial Matings: Performance in Infancy and at 4 Years, 4 Behav. Genetics 83 (1974)). Because the IQ test score gap between blacks and whites averaged 15 points at the time this research was conducted, four-fifths of the gap may be attributable to some sort of racialized cultural factors that are independent of wealth or parental education. See id. at 17.

[26] See Nisbett, supra note 25, at 93–94 (citing three adoption studies, although noting that small sample size and possible selection biases may limit any conclusions on "the question of the heritability of the IQ difference between blacks and white").

[27] See Jencks & Phillips, supra note 25, at 1.

[28] See id. at 2.

[29] See id. at 2 (family income and wealth); Meredith Phillips et al., Family Background, Parenting Practices, and the Black-White Test Score Gap, *in* The Black-White Test Score Gap, supra note 24, at 103, 104 (parental education and income); id. at 118–19 (wealth). Phillips suggests that other family environmental differences may account for a large portion of the test score gap. See id. at 104 (addressing indicators such as "grandparents' educational attainment, mothers' household size, mothers' high school quality, mothers' perceived self-efficacy, children's birth weight (a proxy for prenatal environment), children's household size, . . . mothers' parenting practices" and "mothers' cognitive skills").

tainly seems a quite plausible explanation for the test score gap, albeit not the only one.

With regard to education specifically, Barbara Shade and her colleagues have suggested that race affects the way in which students approach problem-solving and learning in school.[30] Their research documents that, compared to whites, students of color are more oriented towards team problem-solving as opposed to individual learning, and active, hands-on, application-based learning with concrete examples as opposed to passive, lecture-based learning that emphasizes abstract principles.[31] Students of color also appear to be more attuned to social justice and balance of power issues embedded in a particular problem.[32]

In this Article, I make no assumptions about the source of cultural differences or the reason that they produce differences in academic performance. Rather, I merely assume that cultural differences exist, and that they explain at least part of the disparities in performance. Nor do I articulate with any more concreteness the nature of the cultural difference—for example, I do not describe with any particularity what "Latina/o legal problem-solving" might look like. In sum, this Article starts with the assumption that different groups "supply" different cultural performances and approaches, much as different competitors in the market offer different products or services or technologies.

In any event, I should most certainly not be read to adopt the now largely disproved position that cultural differences constitute deficiencies or pathologies. Research discounts the idea of a "culture of poverty" as an explanation for differences in performance, in large part because the test score gap persists even for the children of affluent black families.[33] More importantly, this Article suggests that any negative assumptions about the value of cultural

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[30] See generally Culture, Style and the Educative Process (Barbara Shade ed., 2d ed. 1989) (discussing differences between black emphasis on collective and kinship responsibility and white emphasis on individualism, and differing non-verbal communications and social cues, preferences for kinesthetic active learning versus passive classroom learning, group cultural values, and attitudes towards power and authority).

[31] See id. at 32.

[32] See id.

[33] Jencks & Phillips, supra note 25, at 10.

difference are wholly unwarranted. In light of segregation and early anticompetitive behavior by whites, differing cultural approaches may not have had a fair opportunity to compete on the market. Indeed, the market may have labeled cultural differences as competitively "inferior" only because anticompetitive conduct by whites imposed a different culturally specific performance standard.

Second, I assume for purposes of this project that racial and ethnic groups are the relevant agents of economic decision making, and that these groups can collude to exercise monopoly or cartel power. Recent work by Robert Cooter analogizes antidiscrimination to antitrust and monopoly theory to argue that racial cartels can engage in predatory and exclusionary strategies for economic benefit.[34] This Article relies on Cooter's racial cartel model to argue that during the segregation era whites' cartels actively excluded people of color from the legal education market (as well as the more general legal profession). Subsequent Sections suggest that the cartel's effects have become self-reinforcing because the cartel imposed a de facto standard that favors white cultural performances.

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[34] Cooter notes that

> [j]ust as producers collude to fix prices and obtain monopoly profits, so social groups sometimes collude to obtain the advantages of monopoly control over markets. To enjoy the advantages of monopoly, a social group must reduce competition from others by excluding them from markets. In this way, the more powerful social group can shift the cost of segregation to its victims, and more costs besides, so that the victims of discrimination are worse off and the discriminators are better off.

Cooter, supra note 3, at 150. Cooter and Jennifer Roback argue that Jim Crow segregation laws served to prevent defectors from breaking ranks with the cartels and hiring or admitting people of color into their institutions. See id. at 156; Jennifer Roback, Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?, 51 U. Chi. L. Rev. 1161, 1163–70 (1984). Richard McAdams and others propose that coercive social norms function to police cartels against defectors or free-riders. See McAdams, supra note 6, at 1046–48; see also John J. Donohue III & James J. Heckman, Re-Evaluating Federal Civil Rights Policy, 79 Geo. L.J. 1713, 1728–29 (1991) (hypothesizing that formal segregation laws and informal social methods may have served to enforce social norms of segregation); J. Hoult Verkerke, Free to Search, 105 Harv. L. Rev. 2080, 2091–94 (1992) (reviewing Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1992)). Although this Article relies on Cooter's general description of cartels, it does not depend on any particular theory of cartel formation or maintenance.

B. Some Basic Concepts

Recent literature in economics and antitrust law—involving work on path dependence, positive feedback loops, network externalities, and market lock-in to de facto standards—helps to lay the foundation for a market lock-in model of discrimination. The path dependence concept argues that "history matters" a great deal to the workings of an economy.[35] Borrowed in part from evolutionary theory, path dependence suggests that even small historical events, particularly those that occur early in the formation of an industry, can have unexpectedly long-lasting effects on market outcomes.[36] If the market is sufficiently sensitive to historical conditions, those early events can produce a path far different from the one taken in the absence of those early events.[37]

The QWERTY keyboard, the standard arrangement for typewriter (and now computer) keyboards, provides an oft-cited example of path dependence. According to Paul David, the keyboard was initially arranged in its current configuration, with letters that appeared together frequently coming from opposite hands on the keyboard, mainly to prevent the metal keys from jamming.[38] David argues that the QWERTY configuration became dominant primarily because of a typing contest, staged in the early part of the industry's history, in which the winner used the

[35] Stanley M. Besen & Joseph Farrell, Choosing How to Compete: Strategies and Tactics in Standardization, 8 J. Econ. Persp. 117, 118 (1994); Nicholas Economides, The Economics of Networks, 14 Int'l J. Indus. Org. 673, 694 (1996).

[36] For excellent discussions of the concept of path dependence, see Paul A. David, Understanding the Economics of QWERTY: the Necessity of History, *in* Economic History and the Modern Economist 30 (William N. Parker ed., 1986); S. J. Liebowitz & Stephen E. Margolis, Path Dependence, Lock-In, and History, 11 J.L. Econ. & Org. 205 (1995); Mark J. Roe, Chaos and Evolution in Law and Economics, 109 Harv. L. Rev. 641, 643–52 (1996).

[37] See Liebowitz & Margolis, supra note 36, at 210.

[38] See David, supra note 36, at 35–36. To be sure, the QWERTY account of path dependence has been disputed and is not universally accepted. For an account that challenges the superiority of the Dvorak keyboard, see S. J. Liebowitz & Stephen E. Margolis, The Fable of the Keys, 33 J.L. & Econ. 1 (1990). The QWERTY example, however, remains quite useful as a simple illustration of the relevant concepts.

QWERTY keyboard.[39] David claims that the contest results gave the QWERTY a strong initial market advantage, which superior keyboard formulations like the Dvorak keyboard later were unable to overcome.[40]

How do early historical events create such outcome-dispositive effects? According to recent work by economist Brian Arthur, history shapes market outcomes by way of the positive feedback loop, a dynamic process in which a slight advantage in the market can feed back on itself to further magnify the advantage.[41] "[I]ncreasing returns are the tendency for that which is ahead to get farther ahead, [and] for that which loses advantage to lose further advantage. They are mechanisms of positive feedback that operate—within markets, businesses, and industries—to reinforce that which gains success or aggravate that which suffers loss."[42]

In the QWERTY story, for example, the keyboard obtained a small initial advantage because of the typing contest and then parlayed its lead into an even larger market share. Professional typists preferred to train on the keyboard because it increased their marketability.[43] In turn, employers were more likely to buy the keyboard on which more typists had been trained.[44] Thus, the QWERTY keyboard's typing contest advantage, which was relatively small at the outset, eventually enabled it to capture the market via a positive feedback loop between the keyboard and typist training.

Brian Arthur identifies four general types of positive feedback loops: (1) large start-up or fixed costs, which reduce the costs for each item as output increases (the conventional economies of

[39] In the typing contest, which was held in 1888, the winner used the touch-typing method to achieve a decisive victory over his competitor, who used the hunt-and-peck method on an alternative keyboard arrangement of seventy-two keys. See David, supra note 36, at 40–41, 45.

[40] See id.

[41] See W. Brian Arthur, Positive Feedbacks in the Economy, *in* Increasing Returns and Path Dependence in the Economy, supra note 13, at 1, 1 [hereinafter Arthur, Positive Feedbacks] ("positive feedback magnifies the effect of small economic shifts").

[42] W. Brian Arthur, Increasing Returns and the New World of Business, 74 Harv. Bus. Rev. 100, 100 (1996).

[43] See David, supra note 36, at 42–46.

[44] See id. at 45–46 (noting that employers cared about the stock of touch-typists).

scale); (2) learning effects, which increase the amount of information about products, or lower their costs, as the number of past users increases; (3) coordination effects (including network effects), which give the user some sort of an advantage from an increase in contemporaneous users; and (4) adaptive expectations, where success on the market breeds the expectation of further success.[45]

The first type of self-reinforcing mechanism, the economy of scale, is not a new idea. Basic economics texts discuss the increasing returns accompanying economies of scale.[46] In typical economies of scale, high fixed or start-up costs—for example, the cost of publishing a book—dictate that production is more efficient on a larger scale.[47]

In contrast, the remaining types of increasing returns that Arthur discusses are demand-side increasing returns, which come from a different source.[48] For demand-side increasing returns, returns increase in response to demand—more consumers buy the product in response either to earlier demand or to a large number of contemporaneous users.[49]

For example, learning effects produce positive feedback from an increase in demand by providing more information from past users' experience, or simply by signaling a large number of previous buyers.[50] More information about a technology increases its appeal

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[45] W. Brian Arthur, Self-Reinforcing Mechanisms in Economics, *in* Increasing Returns and Path Dependence in the Economy, supra note 13, at 111, 112 [hereinafter Arthur, Mechanisms].

[46] See Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 223–24 (4th ed. 1998).

[47] See Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 59 (2d ed. 1994). With increasing returns to scale, a competitor's average cost of production for each unit falls as the amount of production increases, because the fixed costs are spread over a larger number of units. See id.

[48] See Lemley & McGowan, Legal Implications, supra note 13, at 484.

[49] See id. at 483–84.

[50] See Marcel Kahan & Michael Klausner, Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate"), 83 Va. L. Rev. 713, 719–20 (1997) [hereinafter Kahan & Klausner, Standardization] (discussing learning benefits that provide more data); Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683, 720–22 (1999) (describing informational cascades in which individuals are influenced by their perceptions of the opinions held by others). The latter form of learning benefit is sometimes called

because it reduces a buyer's uncertainty or costs in gathering more information.[51] Arthur calls this consumer learning effect "information contagion."[52]

Similarly, coordination effects provide benefits to the consumer when other people adopt the technology.[53] Network benefits are a type of coordination effect involving interconnected users, for example, the telephone and ATM machine, or more recently, e-mail and instant messaging on the computer.[54] In network markets, as more people use the technology, the network becomes larger and more valuable to the next buyer, which in turn increases the demand for the technology.[55]

In general, networks and other markets that exhibit demand-side positive feedback loops possess several important qualities. *First*, these markets are potentially very sensitive to historical events—they are "path dependent." Different markets exhibit varying degrees of sensitivity to historical events, but markets exhibiting demand-side increasing returns appear to be particularly vulnerable to events in the early history of an industry.[56] Because the self-reinforcing feedback loop tends to magnify the effect of these early historical events, small changes in market conditions

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"herd behavior," because the buyer disregards his own information to imitate the actions of others. Marcel Kahan & Michael Klausner, Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases, 74 Wash. U. L.Q. 347, 355 (1996). Kuran and Sunstein demonstrate that "herd behavior" can be harmful if users look not at the information passed on by previous users, but only at the number of previous users. See Kuran & Sunstein, supra, at 722.

[51] See W. Brian Arthur & David A. Lane, Information Contagion, *in* Increasing Returns and Path Dependence in the Economy, supra note 13, at 69, 70.

[52] Id. See also Michael Klausner, Corporations, Corporate Law and Networks of Contracts, 81 Va. L. Rev. 757, 787 (1995) (reducing the uncertainty of the meaning of contract provisions based on information from previous judicial constructions increases the term's appeal).

[53] See Arthur, Positive Feedbacks, supra note 41, at 10.

[54] The telephone is an example of what is called an actual network good—"owning the only telephone or fax machine in the world would be of little benefit." Lemley & McGowan, Legal Implications, supra note 13, at 488; see Katz & Shapiro, Network Externalities, supra note 13, at 424. Markets for computer software exhibit properties of a "virtual network[]"—the software is valuable independently on its own, but its value also increases with additional users if the software can communicate with others. Lemley & McGowan, Legal Implications, supra note 13, at 491.

[55] See Lemley & McGowan, Legal Implications, supra note 13, at 488–89.

[56] See Arthur, Mechanisms, supra note 45, at 112–13.

may in fact determine who wins in the marketplace and who loses.[57] In comparison, in a diminishing returns market, the effects of small events on the market are far less relevant to market outcome because they do not produce changes in the demand curve, which is the primary determinant of market outcome.[58]

Second, positive-feedback-loop markets are capable of producing multiple outcomes, which are unpredictable in advance.[59] Unlike diminishing returns markets, which settle into equilibrium regardless of initial historical events in the market, increasing returns markets may produce multiple equilibrium points, and it is not possible to say ex ante at which equilibrium point the market will arrive.[60] The contingency of historical events, the direction in which those events will push the market, and the phenomena of feedback loops, all make multiple outcomes possible and the final outcome unforeseeable.

Third, once the market has charted a particular direction from many possibilities, markets with feedback loops are potentially inflexible.[61] Because of the self-reinforcing nature of the feedback loop, markets can become locked into a dominant technology. That is, one technology may gain such a strong, self-reinforcing advantage that it is very difficult, if not impossible, for a competitor to catch up or close the gap, regardless of any change in strategy.[62] This critical point, at which it is nearly impossible for competitors to catch the market leader, is called "tipping."[63] Increasing returns

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[57] See W. Brian Arthur, Competing Technologies, Increasing Returns, and Lock-In by Historical Small Events, *in* Increasing Returns and Path Dependence 13, 16–24 [hereinafter Arthur, Competing Technologies].

[58] See id.

[59] See Arthur, Mechanisms, supra note 45, at 112.

[60] See Katz & Shapiro, Network Externalities, supra note 13, at 425, 439 (noting that network markets with competing incompatible products produce multiple equilibria, which may not be predictable in advance). For a general discussion of increasing returns and multiple equilibria, see Kenneth J. Arrow & F. J. Hahn, General Competitive Analysis 57–58, 152–53 (1971).

[61] See Arthur, Mechanisms, supra note 45, at 112–13..

[62] See Arthur, Competing Technologies, supra note 57, at 25–26; Stanley M. Besen & Joseph Farrell, Choosing How to Compete: Strategies and Tactics in Standardization, 8 J. Econ. Persp. 117, 119 (1994); Michael L. Katz & Carl Shapiro, Systems Competition and Network Effects, 8 J. Econ. Persp. 93, 105–06 (1994) [hereinafter Katz & Shapiro, Systems Competition] (discussing tipping).

[63] Katz & Shapiro, Systems Competition, supra note 62, at 106.

markets do not always tip or become locked in—they can be partially flexible or open to the possibility of consumer switching to competing technologies.[64] But given the right circumstances, markets can become wholly inflexible and closed to change when a competitor has captured the market.

Fourth, markets with feedback loops are potentially inefficient. Because success in the market may reflect the contingency of path dependence, and the subsequent inflexibility of positive feedback, it is less certain that competition will produce efficient market outcomes. The market may well lock in a technology that appears superior early on but in the long run is inferior to a slower-developing technology.[65] In addition to the QWERTY example, scholars routinely cite the example of light-water nuclear reactors, which developed an early advantage because of particular historical events and early promising results,[66] but which in the long run may have been technologically inferior to high-temperature, gas-cooled reactors.[67]

Increasing returns markets may become locked into an inferior technology because consumers incur high switching costs in moving from the market leader to an alternative technology. "Switching costs" are simply the costs incurred by a buyer to switch to a different and less well-known or less valued product or by a competitor to induce the buyer to switch.[68] Switching costs come from several sources, but generally speaking, buyers prefer estab-

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[64] See Arthur, Competing Technologies, supra note 57, at 25–26.

[65] See id. at 24–25; Lemley & McGowan, Legal Implications, supra note 13, at 496–97.

[66] Robin Cowan cites several historical factors, including the U.S. Navy's search for a power source for submarines, the National Security Council's desire to get a reactor working very quickly after the 1949 Soviet nuclear weapon test, and the predilections of a key official. See Robin Cowan, Nuclear Power Reactors: A Study in Technological Lock-in, 50 J. Econ. Hist. 541, 559–63 (1990); see also Arthur, Competing Technologies, supra note 57, at 25 n.16 (noting that the light-water reactor "was lighter, and hence better suited to early nuclear submarines"); Arthur, Positive Feedbacks, supra note 41, at 10–11 (discussing Cowan's article, and the impact of the 1957 *Sputnik* launch).

[67] See Cowan, supra note 66, at 541, 546.

[68] See A. Douglas Melamed, Network Industries and Antitrust, 23 Harv. J.L. & Pub. Pol'y 147, 150 (1999). The cost of retraining on new software is a good example. See Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 476 (1992).

lished products to new products[69] because they are more familiar with the product and require less instruction or training. Consumers who switch to new software, for example, will not only have to invest additional resources to learn a new program, but will also lose comfort and familiarity.[70]

According to Joe Bain, switching costs may force a competitor to either charge a lower price or to incur higher costs to induce consumers to switch.[71] To convince people to switch from Word to WordPerfect, for example, Corel might have to offer it at a discounted price. Alternatively, it might have to pay more for advertising and aggressive marketing to compensate for the consumer's relative lack of familiarity.

In network markets, consumers incur the additional cost of losing their connection with a pre-established network of users if they switch to an alternative standard. For example, consumers switching from Word to WordPerfect would lose the formatting of WordPerfect documents from their old files or of files from other WordPerfect users.[72]

Because switching costs favor incumbents, later entrants may face significant barriers to entry—that is, they may have a harder time entering the market and becoming competitive.[73] This is par-

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[69] See Joe S. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries 116 (1956) ("[A] general tendency of buyers to prefer established products to new products may place potential entrants to a differentiated-product industry at a disadvantage as compared to firms already established in the industry.").

[70] See Mark A. Lemley, Antitrust and the Internet Standardization Problem, 28 Conn. L. Rev. 1041, 1050 (1996). In fact, a simple upgrade on the same software can cause significant switching costs, as a recent mass upgrade at the University of Illinois College of Law demonstrated.

[71] See Bain, supra note 69, at 116 (noting that costs to entrants in a differentiated-product market may include a discounted price or a higher selling cost or some combination of the two).

[72] See Lemley, supra note 70, at 1050; cf. Kahan & Klausner, Standardization, supra note 50, at 727–28 (describing switching costs resulting from converting from IBM PCs to Apple Macintoshes).

[73] For examples of antitrust cases that discuss switching costs as a barrier to entry, see United Farmers Agents Ass'n v. Farmers Ins. Exch., 89 F.3d 233, 238 (5th Cir. 1996) ("Information and switching costs . . . were virtually nonexistent."); Digital Equip. Corp. v. Uniq Digital Techs., 73 F.3d 756, 761–63 (7th Cir. 1996) (rejecting antitrust claim where information and switching costs were insignificant); Image Technical Serv. v. Eastman Kodak Co., 903 F.2d 612, 616 (9th Cir. 1990) (noting

ticularly true in increasing returns markets, where entrants with less market share by definition will have a less-valued product, at least initially. Moreover, for increasing returns markets, switching costs become larger over time. The consumer who buys WordPerfect in a market already tipping toward Word risks becoming "stranded" with incompatible software.[74] That risk grows over time unless consumers can overcome the collective action problem so that everyone in the network switches simultaneously.

Because switching costs and lock-in discourage change, an increasing returns market may possibly become locked into an inefficient product.[75] It is very important to note at the outset, however, that feedback loops do not always produce inefficiency. The economics of a particular market may well dictate that a dominant product or standard is the most efficient, even in the presence of increasing returns and tipping.[76] Even if the market tips to an inferior standard, the outcome might be more efficient than any other available standard, or having no standard at all.[77]

The issue of increasing returns in general is quite an indeterminate field of research for normative purposes. Economists are not able to determine ex ante whether a market will exhibit the property of increasing returns, although it is easier to identify general market characteristics that exhibit positive feedback.[78] Nor is it possible to determine in the abstract whether increasing returns and tipping produce sub-optimal or inefficient outcomes.[79] Thus, governments should be cautious about any sort of intervention into increasing returns markets.[80] As Lemley and McGowan note, decisionmakers should not conclude that positive feedback has produced an inefficient or sub-optimal outcome without significant evidence to that effect.[81]

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disagreement over whether "equipment owners can[] economically replace their current equipment"), aff'd, 504 U.S. 451 (1992).

[74] Cf. Lemley, supra note 70, at 1059 (discussing Betamax/VHS).

[75] See Arthur, Mechanisms, supra note 45, at 112.

[76] See Lemley & McGowan, Legal Implications, supra note 13, at 497.

[77] See id.

[78] See Arthur, Mechanisms, supra note 45, at 113–14.

[79] See Lemley & McGowan, Legal Implications, supra note 13, at 497.

[80] See id.

[81] See id. at 609–10.

C. First-Movers, Standardization, and Anticompetitive Conduct

Under certain circumstances, markets that "tip" toward a dominant product may create a "de facto industry standard."[82] Industry standards are also sometimes the cause, and not just the product, of tipping. That is, standards can initiate, create, or accelerate the tipping process by giving a competitive edge to the competitor who controls or defines the standard. "In the case of a standard that effectively requires the use of a proprietary technology, the standard, if adopted [whether de facto or by formal process], can imbue the technology with market power that it previously lacked."[83]

Adopting the de facto industry standard can confer many benefits. In their recent work on de facto standards, Marcel Kahan and Michael Klausner list several different types of benefits that accompany the use of standardized terms in drafting contracts.[84] First, using a standardized term produces three types of learning benefits: (a) more efficiency in drafting a contract, including less time to formulate a precise term and fewer errors; (b) more certainty over the meaning of the term because prior judicial opinions have provided explanatory information; and (c) lower costs and better-quality advice to the client because lawyers, other professionals, and the investment community will be more familiar with standardized terms.[85]

More importantly for purposes of this project, using standardized terms can also create network benefits by creating connections within an institutional network. Adopting a standardized term

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[82] See Katz & Shapiro, Systems Competition, supra note 62, at 107; see also Sean P. Gates, Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting, 47 Emory L.J. 583, 597–98 (1998) ("*[D]e facto* standards arise when an industry adopts a standard because of market force or historical accident."); Carole E. Handler & Julian Brew, The Application of Antitrust Rules to Standards in the Information Industries—Anomaly or Necessity?, 14 Computer Law. 1, 2–3 (Nov. 1997) (defining a "de facto standard" as the dominance of a particular technology resulting from the operation of market forces, including network effects).

[83] James J. Anton & Dennis A. Yao, Standard-Setting Consortia, Antitrust, and High-Technology Industries, 64 Antitrust L.J. 247, 261 (1995).

[84] See Kahan & Klausner, Standardization, supra note 50, at 719–28.

[85] See id. at 719–24.

permits other members of the relevant contractual community—lawyers, contracting parties, and judges—to communicate because the term facilitates a shared understanding about the parties' meaning and intent.[86] Network benefits can also exist inside the firm because using a standardized term enables lawyers within the same firm to understand one another.[87]

Standards can be quite useful and "procompetitive"—they can convey information, regulate quality, reduce inefficient variety, and ensure compatibility.[88] De facto standards can arise quite innocently, when market forces converge to produce a single superior technology or a historical accident gives the competitor an initial advantage. But de facto standards can also result when a competitor acts anticompetitively to gain an early advantage. For example, a standard-setting body or firm may intentionally manipulate a standard to exclude rival technologies during the formative stages of an industry.[89] Or a competitor may engage in predatory pricing to ensure its initial (and ultimately locked-in) market advantage.[90] If the technology dominates the market for a long period, it is more likely to become the industry standard because of lock-in.[91] Thus, predatory conduct that would not make economic sense in most markets may be far more lucrative, and more tempting, in an increasing returns market.[92] Predatory behavior in a competition for standards suddenly becomes a potentially rational strategy.[93]

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[86] See id. at 724.

[87] See id. at 728.

[88] Gates, supra note 82, at 583.

[89] See id. at 600.

[90] See David S. Evans & Bernard J. Reddy, Some Economic Aspects of Standards in Network Industries and Their Relevance to Antitrust and Intellectual Property Law, *in* Intellectual Property Antitrust 1996, at 177, 192 (PLI/Pat., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G-448, 1996).

[91] See Lemley, supra note 70, at 1050–51 (discussing how resource commitments can push computer software markets toward standardization).

[92] In particular, these markets

> by definition offer potentially lucrative returns to firms that can establish their own products as standards on which competition in the market, or in aftermarkets for complementary goods, will be based. This fact presents the possibility of material first-mover advantages: being the first seller in a market may confer an important advantage over later entrants.

Lemley & McGowan, Legal Implications, supra note 13, at 495 (footnote omitted).

[93] Lemley & McGowan note that

D. Institutional Networks and Increasing Returns

Building on work in increasing returns and market lock-in, Nobel Laureate Douglass North argues that institutions and organizations are arranged in a network structure, and that institutional networks may suffer from market lock-in, which in turn forecloses institutional change.[94] North describes an institutional framework as a collection of organizations—political, economic, social, and educational bodies—that are connected to each other by a set of rules governing their interaction.[95] In North's model, organizations in the network and the framework rules that govern their relationships evolve in tandem: Organizations come into existence and evolve within a pre-existing institutional framework, and, in turn, organizations influence the development of the network's rules.[96]

North argues that the mechanisms for institutional change may lead to a path-dependent pattern of development.[97] According to North, two conservative forces determine the path of institutional change: increasing returns and the subjective mental models of individuals in the related organizations.[98] First, the institutional

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> Predation has quite reasonably been considered an unlikely threat to social welfare because a firm pursuing the strategy would have to recoup predatory losses by raising prices, which in turn would induce entry limiting the firm's ability to recoup. Because returns in strong network markets increase with demand, however, and because consumers' reluctance to abandon the dominant standard may deter entry, recoupment of losses incurred in predating may be easier than has been presumed to be the case in non-network markets.

Mark A. Lemley & David McGowan, Could JAVA Change Everything? The Competitive Propriety of a Proprietary Standard, *in* Second Annual Internet Law Institute 453, 464 (PLI Pat., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G-520, 1998) [hereinafter Lemley & McGowan, JAVA]. See also Francois Bar et al., Interoperability and the NII: Mapping the Debate, 4 Info. Infrastructure and Pol. 235, 236 (1995) (noting that market lock-in makes monopolization more attractive as a market strategy).

[94] See Douglass C. North, Institutions, Institutional Change and Economic Performance 7–8 (1990).

[95] See id. at 4–5.

[96] See id. at 5.

[97] See id. at 7–9. North notes similarities between his work concerning institutional change and Arthur's arguments concerning path dependence in the market results of competing technologies/organizations. See id. at 93–95.

[98] North notes that:

network creates "massive increasing returns" via several different types of self-reinforcing feedback loops, including learning and network effects.[99] For example, with regard to learning effects, an organization likely will replicate the strategies of earlier organizations because it has more access to information about past organizational experience than about alternative strategies.[100]

Second, because of significant transaction costs in obtaining and processing information, organizations and their members will preserve existing subjective models and ideologies,[101] which they use to decipher a complex chaotic flow of information.[102] Institutions will continue to process information that their models deem relevant, and discard any information that does not fit the model.[103] Thus, both increasing returns and "historically derived perceptions" will tend to lock in institutional choices and constrain the path of institutional change.[104]

In the remainder of the Article, I argue that white anticompetitive conduct during the segregation era created a set of de facto standards favoring white cultural performances for legal institutions in general, and law schools in particular. These de facto standards foreclose institutional change towards diversifying law school student populations because they now have become locked into the institutional network through several feedback loops—increasing returns and learning effects—that reflect and reinforce whites' early monopoly advantage.

> The resultant path of institutional change is shaped by (1) the lock-in that comes from the symbiotic relationship between institutions and the organizations that have evolved as a consequence of the incentive structure provided by those institutions and (2) the feedback process by which human beings perceive and react to changes in the opportunity set.
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> The increasing returns characteristics of an institutional matrix that produces lock-in come from the dependence of the resultant organizations on that institutional framework and the consequent network externalities that arise.

Id. at 7–8. See also id. at 95–96.

[99] Id. at 95.

[100] See id. at 74–75.

[101] North defines "ideology" as "the subjective perceptions (models, theories) all people possess to explain the world around them." Id. at 23 n.7.

[102] See id. at 23, 96.

[103] See id. at 23, 95.

[104] Id. at 96.

II. ANTICOMPETITIVE CONDUCT IN LEGAL EDUCATION

This Part sets out the argument that whites created a monopoly by engaging in anticompetitive behavior to bar entry to legal education markets during the segregation era. Whites acted to restrain trade in two ways. First, they enacted both formal Jim Crow segregation laws and informal exclusionary policies to preclude nonwhites from attending law school. Second, they adopted admissions standards and moved legal education to the university setting, in order to drive out alternative forms of legal education serving people of color and immigrants. As a result, whites enjoyed a monopoly in law school admissions, and the market subsequently came to adopt a de facto "industry standard" that disproportionately favored white performances.

As noted earlier, this Part relies heavily on Robert Cooter's recent work analogizing the conduct of "racial cartels"—groups of whites with the social norm of excluding nonwhites—to economic cartel behavior.[105] Drawing heavily from antitrust law and monopoly theory, Cooter argues that discriminatory social groups developed social norms to exclude people of color in much the same way that cartels operate to bar the entry of new competitors.[106] As with economic cartels, racial cartels punished defectors who interacted with people of color, namely by ostracizing or boycotting those who deviated from discriminatory norms.[107] Cooter also points out that white cartels used the law itself—the more formal Jim Crow laws requiring segregation of the races in public education, transportation, and marital relations—to punish deviating defectors.[108]

Richard McAdams supplements Cooter's concept of racial cartels, by pointing out that groups create cartels not only for economic profit but for social profit as well. According to McAdams, white cartel social norms of disparaging and lowering

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[105] See Cooter, supra note 3, at 153.

[106] See id. at 153–57.

[107] See id. at 153–54.

[108] See id. at 156. Similarly, Jennifer Roback argues that informal sanctions were not enough to prevent defection, hence the requirement that whites pass formal laws requiring segregation. See Jennifer Roback, Racism as Rent Seeking, 27 Econ. Inquiry 661, 673–75 (1989); Roback, supra note 34, at 1162–70.

the status of nonwhite groups produce a payoff for the cartel in the form of increased social status.[109] The first two Sections in the following discussion argue that white cartels excluded nonwhites in legal education for both economic and social profit, by using formal laws and informal social policy to police against defectors, and by moving to standardize legal education while relocating it to the university setting. The third section argues that this anticompetitive conduct created a de facto standard for law school admissions that favored white applicants.

A. Formal and Informal Rules: Segregation and Jim Crow

White cartels succeeded in barring entry to the legal profession for people of color—blacks, Latino/as, Asian-Americans, American Indians, "immigrant agricultural workers . . . and recent political and economic refugees from the Caribbean, Latin America, and Asia"—until the 1960s.[110] At the turn of the century, most law schools formally or informally excluded all nonwhites.[111] As late as 1939, thirty-four of the eighty-eight accredited law schools had formal policies excluding blacks and other nonwhite groups.[112] Until the mid-1940s, the University of South Carolina was the only state-supported law school in the South that had *ever* admitted African-Americans.[113] In the South, white cartels maintained an almost exclusive monopoly on law schools until the early 1950s.[114]

Just after the Civil War, whites informally shut out blacks from any southern public institution, but white groups soon shifted to a system of legal segregation after the passage of the Fourteenth

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[109] See McAdams, supra note 6, at 1044. The cartel also polices itself using intracartel status for enforcement—group members who comply with discriminatory social norms are held in high esteem while defectors are disparaged, ostracized and sometimes boycotted. See id. at 1027–29, 1046.

[110] Richard L. Abel, American Lawyers 99 (1989).

[111] See id.

[112] See J. Clay Smith, Jr., Emancipation: The Making of the Black Lawyer 1844–1944, at 50 (1993).

[113] See id. at 36 (noting that even those admissions dated back to reconstruction); see also Abel, supra note 110, at 100 ("Until 1935, no law school south of the District of Columbia was racially integrated.").

[114] See Smith, supra note 112, at 66 n.29 (1993) (citing George M. Johnson, Legal Profession, *in* The Integration of the Negro into American Society 87, 90 n.12 (E. F. Frazier ed., 1951)).

Amendment.[115] White legislatures in many states passed segregation laws to prohibit nonwhite children from attending the newly created free public schools, and they also authorized the creation of separate schools for nonwhite children.[116]

Frequently, these segregation statutes directly addressed institutions of higher learning. For example, in both Texas and Oklahoma, state statutes and constitutions required separate institutions of higher education for blacks and whites.[117] In other states, like Missouri, state universities cited primary and secondary school segregation statutes to defend the state's non-statutory policies requiring the segregation of the state's law school.[118]

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[115] See Howard Rabinowitz, From Exclusion to Segregation: Southern Race Relations 1865–1890, 63 J. Am. Hist. 325 (1976), *reprinted in* 4 Race, Law and American History 1700–1990, at 352, 352 (Paul Finkelman ed., 1992).

[116] From the literature, it appears that many states passed segregation laws shortly after reconstruction legislatures had ratified the Fourteenth Amendment. For example, less than one month after a reconstruction legislature had ratified the Fourteenth Amendment, the Alabama legislature enacted legislation segregating the public school system, providing "[t]hat in no case shall it be lawful to unite in one school both colored and white children ...." Acts of Alabama, p. 148 (1868). In connection with the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), states ratifying the Fourteenth Amendment were asked to collect information on various state practices relating to segregation in education, including a list of statutes requiring segregation in education. For a state-by-state account, see Segregation and the Fourteenth Amendment in the States: A Survey of State Segregation Laws 1865–1953 (Bernard D. Reams, Jr. & Paul E. Wilson eds., 1975).

[117] See Okla. Const. art. XIII, § 3 (repealed 1966); Tex. Const. art. VII, § 7 (repealed 1969); Tex. Const. art. VII, § 14 (providing, before amendment in 1984, "for the maintenance of a College or Branch University for the instruction of the colored youths of the State"); Okla. Stat. Ann. tit. 70, §§ 5–5, 5–6 (West 1950) (repealed 1965); Tex. Rev. Civ. Stat. Ann. art. 2643b (Vernon 1965) (repealed 1971); art. 2719 (repealed 1969); Sweatt v. Painter, 339 U.S. 629, 631 n.1 (1950); Sipuel v. Board of Regents, 180 P.2d 135, 136–37 (Okla. 1947), rev'd, 332 U.S. 631 (1948). Oklahoma statutes actually made it a crime for the authorities of any white school to admit a black student, or for a teacher in a white school to give instruction to black students. See *Sipuel*, 180 P.2d at 137.

[118] See, e.g., State ex rel. Gaines v. Canada, 113 S.W.2d 783, 785 (Mo. 1937) (citing to segregation statute providing that "it shall hereinafter be unlawful for any colored child to attend any white school, or for any white child to attend a colored school"), rev'd, 305 U.S. 676 (1939). Missouri had also passed statutes in the 1870s establishing a teacher training program and then a separate undergraduate college for blacks. See id. at 786. However, no statute directly required that higher education institutions be segregated.

States exerted significant efforts to mitigate the impact of the Fourteenth Amendment. To avoid having to integrate state law schools, several southern states opened separate law schools, including North Carolina (North Carolina Central University), Texas (Texas Southern University), and Louisiana (Southern University).[119] Even after the United States Supreme Court had ruled it unconstitutional to deny blacks admission to the University of Oklahoma law school,[120] the Oklahoma legislature amended its segregation statutes to permit the admission of blacks only in cases where such institutions offered courses not available in the black schools. Moreover, the amendment provided that "in such cases the program of instruction 'shall be given at such colleges or institutions of higher education upon a segregated basis.'"[121]

Beyond exclusionary legislation, white racial cartels also excluded nonwhites from legal education in more informal ways. Even northern law schools had informal policies against admitting nonwhites. John Mercer Langston, who subsequently became a successful lawyer and the dean of Howard Law School in the late 1800s, was refused admission to a private law school in New York unless he "consented 'to pass' as a Frenchman or a Spaniard.... sit 'apart from the class; ask no questions [and] behave ... quietly.'"[122] He refused, and went on to apprentice and become a member of the Ohio bar.[123] Similarly, Thurgood Marshall was refused admission at the University of Maryland on the basis of race.[124]

Of course, exclusion in legal education reflected the social norm of segregation in the larger profession. White state bars and professional organizations practiced discrimination in admissions quite openly in the early 1900s. For example, when the ABA inadvertently admitted three black lawyers, the organization rescinded their admission, but then permitted the lawyers to remain as mem-

[119] See Abel, supra note 110, at 100.
[120] See Sipuel v. Board of Regents, 332 U.S. 631 (1948).
[121] McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637, 639 (1950).
[122] Smith, supra note 112, at 34 (footnotes omitted).
[123] See id.
[124] See Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, at 9 (1994).

bers (although, not surprisingly, they subsequently resigned).[125] Thereafter, the ABA required applicants to identify their race, and admitted no blacks until 1943.[126] Similarly, the Philadelphia bar required a mandatory photograph of applicants and bar examinees, and no nonwhites were admitted between 1933 and 1943.[127]

B. The Move to Standards and the University

In the Northeast, white cartels excluded nonwhites from legal education in three ways. First, law schools adopted admissions standards using criteria that excluded people of color. Second, legal professionals campaigned to move legal education from apprenticeships to the university, and from a skills-oriented program to science- and theory-based instruction. Third, leaders of the profession drove out night, part-time, and private programs that catered to people of color and immigrants.

Legal historians tie the adoption of competitive admissions standards in the early 1900s to racist and anti-immigrant sentiment.[128] White administrators in elite northern law schools adopted the use of aptitude testing in admissions standards during the early twentieth century.[129] Not coincidentally, this was also at the height of post-war efforts to keep nonwhites out of professional institutions.[130]

Prior to the 1920s, most elite law schools admitted anyone who applied and could afford the tuition.[131] In the early 1920s, law schools began to require that applicants have attended some college beyond a high school degree.[132] Law schools also began to

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[125] See Abel, supra note 110, at 100; Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America, 65–66 (1976).

[126] See Abel, supra note 110, at 100; Auerbach, supra note 125, at 66.

[127] See Abel, supra note 110, at 100.

[128] See Auerbach, supra note 125, at 108.

[129] See Thomas O. White, LSAC/LSAS: A Brief History, 34 J. Legal Educ. 369, 369–70 (1984).

[130] Compare Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 160–61 (1983) [hereinafter Stevens, Law School] (discussing adoption of aptitude testing in the 1920s) with Auerbach, supra note 125, at 109–29 (discussing efforts in the 1920s to keep Jews and other non-Anglo-Saxons and immigrants out of the profession).

[131] See Stevens, Law School, supra note 130, at 160–61.

[132] See id.

explore the use of aptitude testing during the 1920s. Columbia experimented with testing beginning in 1921 and adopted it as part of its admissions process in 1928, and Yale adopted a similar testing process at around the same time.[133] In 1925, law schools commissioned the West Publishing Company to develop the Ferson-Stoddard test, an updated version of earlier IQ tests, for use in law school admissions.[134] The first version of what is now the Law School Admission Test was developed in 1947 from tests developed for the Pepsi-Cola Scholarship program and the Navy.[135]

The history of aptitude testing provides ample support for the notion that the tests embodied the race-conscious social norms of the times. The pioneers of ability testing were the founders of biological determinism, a political movement claiming that blacks and dark-skinned immigrants were inferior because of genetic traits.[136] These scientists developed the prototypes of aptitude testing explicitly to prove the hypothesis that blacks and other nonwhites were inferior to whites.[137] Many policymakers found biological determinism to be politically quite useful. Government officials used the results of Army aptitude testing to justify the racial hierarchy of status within the military.[138] Legislators used IQ and aptitude test results, along with biological determinism, to defend segregation laws and the Immigration Restriction Act of 1924 as scientifically based.[139]

Beyond aptitude testing, northern whites also barred nonwhites from legal education in two other ways: by moving legal education into the university setting, and by driving out alternative forms of legal education that had catered to people of color. Up until the turn of the century, the majority of lawyers obtained their legal

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[133] See id. at 161 (Columbia); id. at 161, 169 n.54 (Yale); White, supra note 129, at 369 (Columbia experiments).

[134] See Stevens, Law School, supra note 130, at 221 n.38. See also White, supra note 129, at 369.

[135] See White, supra note 129, at 370–71.

[136] See Steven J. Gould, The Mismeasure of Man 20, 68 (1981); James Reed, Robert M. Yerkes and the Mental Testing Movement, *in* Psychological Testing and American Society 1890–1930, at 75, 77 (Michael M. Sokal ed., 1987).

[137] See Gould, supra note 136, at 174–75, 189–91. For a more detailed account, see Roithmayr, Deconstructing the Distinction, supra note 21, at 1488–89.

[138] See Gould, supra note 136, at 224–25.

[139] See id at 231–32.

training via apprenticeship.[140] Although relatively few in number, blacks were able to pursue apprenticeships under the tutelage of white practitioners.[141] At the end of the 1800s, legal reformers like Christopher Columbus Langdell successfully argued to move legal education from the law office to the law school, and to affiliate the law school with the university.[142] Jerold Auerbach has suggested that this move was very much tied to the virulent racism and anti-immigrant sentiment in the profession, and was part of an even broader social move to insulate racial and economic privilege for white elites from people of color, immigrants, and the working class.[143]

Similarly, Robert Stevens argues that the campaigu by the professional leaders to standardize and to eliminate part-time unapproved law schools was motivated in large part by the desire to keep nonwhites out of the profession.[144] Stevens traces the beginning of the campaigu to 1917, when the ABA requested that A.Z. Reed of the Carnegie Foundation prepare a report similar to the Flexner Report on medical schools, which had called for the elimination of part-time schools.[145] Contrary to expectations, Reed argued to retain night and part-time programs on a different "track" to preserve legal access for immigrants and minorities.[146] Unhappy with Reed's conclusions, the ABA Committee on Legal Education issued a competing report proposing to eliminate proprietary law schools and part-time programs (including night

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[140] See Charles C. McKirdy, The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts, 28 J. Legal Educ. 124, 125–26 (1976).

[141] See Kenneth S. Tollett, Black Lawyers, Their Education and the Black Community, 17 How. L.J. 326, 327–28 (1972).

[142] See Albert J. Harno, Legal Education in the United States 53–60 (1953), *reprinted in* Readings in the History of the American Legal Profession 217, 219 (Dennis R. Nolan ed., 1980).

[143] See Auerbach, supra note 125, at 106–08.

[144] See Stevens, Law School, supra note 130, at 92; see also Smith, supra note 112, at 42 (ABA members intended the move to standards to exclude Jews, immigrants, and "city-dwellers").

[145] See Robert Stevens, Two Cheers for 1870: The American Law School, *in* Law in American History 403, 449–450 (Donald Fleming & Bernard Bailyn eds., 1971) [hereinafter Stevens, Two Cheers]; Stevens, Law School, supra note 130, at 112–123.

[146] See Stevens, Two Cheers, supra note 145, at 452; Stevens, Law School, supra note 130, at 114.

programs) in order to integrate legal education fully into the university setting.[147]

Thereafter, the ABA and then the AALS began to issue a list of approved or accredited schools.[148] The accreditation campaign contributed in large part to the closing of three black law schools: John Mercer Langston Law School (Freylinghuysen University, Washington, D.C.) in 1927; Virginia Union in 1931; and Simmons (Kentucky) in 1932.[149] Although nineteen black law schools had formed between 1869 and 1939, many of them had closed by 1945, in large part because of the ABA's push for "standards."[150] Similarly, Howard University School of Law experienced a dramatic drop in enrollment at the time the law school was seeking accreditation,[151] in part because it was forced to close its part-time evening program.[152] The ABA's move to close other alternative types of legal education disproportionately affected African-Americans and other nonwhites, for whom part-time evening programs and private law schools had offered the only entry into legal education.[153]

In keeping with Cooter's cartel arguments, Richard Abel argues that the profession's activities described above were part of a broad effort to close the profession socially to outsiders in order to increase earnings and status for those already in the profession.[154] And of course, the move to close the profession was part of a much broader social norm to protect economic privilege, which was distributed along racial lines.[155]

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[147] See Stevens, Law School, supra note 130, at 115.

[148] See id.

[149] See id. at 195, 201 n.34; Smith, supra note 112, at 60–63 (recounting the history of black law schools).

[150] Smith, supra note 112, at 65.

[151] Howard's enrollment dropped from 135 students in 1923 to 44 in 1932, in part because of the Depression, but also in part because of the accreditation process. See Abel, supra note 110, at 101.

[152] See Smith, supra note 112, at 49.

[153] See Stevens, Law School, supra note 130, at 193–95.

[154] See Abel, supra note 110, at 40–73.

[155] See Auerbach, supra note 125, at 65; see also Abel, supra note 110, at 30–34 (discussing Marxist analysis of professions).

C. De Facto Industry Standards in Legal Education

This Section argues that white anticompetitive conduct succeeded in closing the legal profession in part by creating a de facto standard for law school admissions that favored whites' performance. Conventional standards in law school admissions have consistently disfavored the performance of people of color. Between 1914 and 1936, only 784 black students were granted law school degrees, and two-thirds of those were from black law schools like Howard.[156] In the 1950s, whites enjoyed a virtual monopoly on admissions slots in legal education, and as late as 1965, law students of color constituted little more than 1% of the total enrollment of 65,000 law students.[157] In 1971, shortly after the first affirmative action programs were implemented, black students still constituted only 4.10% of the law school population, while Latino/as accounted for 1.27%, Native Americans 0.15%, and Asian-American and Pacific Islanders 0.53%.[158]

Currently, admissions standards continue to exclude applicants of color disproportionately. In 1993–94, 27.7% of white applicants scored at or above 160 on the LSAT (the median LSAT range for law schools ranked in the top twenty-five), but only 11.1% of Chicano/a applicants and 3% of African-American applicants scored as well.[159] In 1993–94, the average LSAT score for a black applicant was 142.9, compared to a score of 154.6 for a white student.[160] Similarly, the average GPA for black applicants was a 2.76, compared to 3.13 for Caucasians.[161] In 1997–98, the mean GPA for black applicants was 2.82 and their mean LSAT score was 142.7, compared to a mean GPA of 3.18 and mean LSAT score of 153.5 for white applicants.[162] These racial differences in scores and grades, which

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[156] See Smith, supra note 112, at 7.

[157] See Abel, supra note 110, at 100.

[158] See Gabriel J. Chin et al., Rethinking Racial Divides: Asian Pacific Americans and the Law—Panel on Affirmative Action, 4 Mich. J. Race & L. 195, 234–35 (1998).

[159] Cf. Law School Admission Council, 1993–94 National Statistical Report at F-1 (Caucasian/whites), G-1 (Chicano/as), E-1 (blacks) (1999) (publishing scores for applicants with scores of 120-180, excluding earlier test-takers whose scores had been scaled from 10–48).

[160] See id. at F-1 (Caucasian/whites) and E-1 (blacks).

[161] See id.

[162] See id. at F-13 (Caucasian/whites) and E-13 (blacks).

replicate early differences in IQ scores and other forms of standardized testing, explain a significant part of racial disparity in law school admissions. Indeed, admissions criteria have always differentially affected African-American and Latino/a applicants from their inception.[163]

Similarly, legal employers, particularly elite law firms, employ standard hiring criteria that disproportionately exclude people of color. Elite firms traditionally use the ranking of the applicant's law school, grades, law review membership, and clerkship experience to screen out applicants in the hiring process.[164] Like the admissions standards on which they are based, these criteria may explain why elite firms continue to remain segregated. Even as late as 1991, blacks and Latino/as made up only 4.3% of associates at elite law firms and a far smaller percentage of partners, even though they constituted 8.7% of students who graduated between 1984 and 1990.[165]

Given the history of early legal education, perhaps it should come as no surprise that conventional admissions standards disproportionately exclude people of color. Whites adopted these standards at a time when excluding people of color was routine and uncontroversial.[166] As a result, people of color could not participate in the definition of the parameters of modern legal education. As the next Part will suggest, this de facto standard favoring whites now has become locked into the network connecting law schools to other legal institutions.

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[163] See Susan E. Brown & Eduardo Marenco, Jr., Mexican-American Legal Defense and Educational Fund (MALDEF), Law School Admissions Study 18–19 (1980) (recounting the disproportionately low scores of blacks and Latino/as on various versions of the LSAT).

[164] See David B. Wilkins & G. Mitu Gulati, Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Firms, 84 Va. L. Rev. 1581, 1653 (1998).

[165] See Lewis A. Kornhauser & Richard L. Revesz, Legal Education and Entry into the Profession: The Role of Race, Gender, and Educational Debt, 70 N.Y.U. L. Rev. 829, 862–63 (1995).

[166] See Gary Peller, Race Consciousness, 1990 Duke L.J. 758, 807.

III. STANDARD LOCK-IN AND FEEDBACK LOOPS

Like the use of a standardized term in a legal contract, the de facto standard for entry into the legal profession serves as a connecting language or interface in the institutional network of law schools, employers, clients, law students, and other practitioners. Using a standard enables the law school to communicate with these network members, because each member is able to recognize the other's signals. But network benefits have their negative side as well. Just as contracting networks may have locked in sub-optimal standardized contract terms, the legal professional network may have locked into the market a sub-optimal standard or interface.

A law school's decision to adopt the de facto admissions standard—primarily, the use of the LSAT and grades—produces several network feedback loops. First, it maintains or improves the law school's position in the national rankings, which signals other members of the network about the quality of the school's program. Second, using the LSAT and grades as admissions criteria permits the law school to use a centralized admissions database to communicate with applicants. Finally, the law school's use of a standardized admissions policy permits law school decisionmakers efficiently to select those students that conform to pre-existing law school culture.

A. The Rankings Game

A law school's national ranking creates a positive feedback loop that reinforces the school's use of the de facto standard. By communicating the law school's "quality," the standard signals employers and practitioners who may hire the law school's graduates, law school applicants who may apply for admission, alumni who may contribute to the law school's endowment, law firm clients who may hire firms with the law school's graduates, and other law schools who may be persuaded that the school is a competitive force. In turn, a school that maintains or improves its rank is more likely to attract students whose performance conforms to the de facto standard.

Historically, elite schools achieved their status by admitting the student with the right social background—the rank and exclusivity

of the school was proportionally related to the race, ethnicity, and wealth of the school's students.[167] Commentators have noted that current law school rankings correspond almost exactly with the pre-existing hierarchy of schools based on social status.[168] More recently, the ranking process has shifted slightly to incorporate whether students have "the right stuff" as measured by the de facto standard criteria.

No set of rankings has generated so much controversy as the *U.S. News & World Report* annual report on graduate schools, which ranks all accredited law schools. First published in 1987, the magazine's ranking depends on a law school's performance in four general categories: student selectivity, reputation, employment success, and resources.[169]

Currently, a full twenty-five percent of a law school's score comes from "student selectivity." A law school's selectivity is based on its students' LSAT scores and undergraduate GPAs, and the school's exclusivity (acceptance rate, with lower rates getting higher scores).[170] "Reputation" constitutes forty percent of the ranking scoring system—twenty-five percent from reputation among other academics, and fifteen percent from reputation among practitioners.[171]

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[167] See Auerbach, supra note 125, at 128.

[168] See Richard Schmalbeck, The Durability of Law School Reputation, 48 J. Legal Educ. 568, 568–69 (1998) (comparing a list produced in 1974 with the 1998 *U.S. News & World Report* reputational survey).

[169] *U.S. News & World Report* published its first survey in 1987 as a one-time exercise, and then began publishing annual rankings beginning in 1990. See id. at 571.

[170] The student selectivity index combines median Law School Admission Test scores (fifty percent of this measure), median undergraduate grade point average (forty percent), and proportion of applicants accepted as full-time J.D. students in the fall 1998 entering class (ten percent). See U.S. News, 2000 Graduate Rankings—Law: Methodology (visited Aug. 21, 1999) <http://www.usnews.com/usnews/edu/beyond/gradrank/gblawmet.htm>. Because the index uses median LSAT and GPA scores—scores at the 25th and 75th percentile—a law school theoretically could admit twenty-five percent of its students without regard to scores, without affecting placement in the ranking. However, because of uncertainty regarding class size and actual acceptance, it would be difficult even with rolling admissions and wait-listing to manipulate admissions to preserve placement.

[171] *U.S. News & World Report* measures reputation for academic quality through two surveys conducted in the fall of the prior year. The dean and three faculty members at each law school—a recent hire, mid-seniority and senior faculty member—are asked to rate the quality of schools from "marginal" (1) to

Employment success and bar pass rates are also quite important to rankings. These measures account for twenty percent of a school's score in the *U.S. News & World Report* survey.[172] This category measures whether a law school's students find employment quickly—immediately after graduation or within nine months.[173] Similarly, the placement success rating also measures how many graduating students pass the bar on their first try.[174] The remaining fifteen percent of the total score is based on a calculation of faculty resources, a category that measures expenditures per student, student-to-teacher ratio, financial aid, and library collections.[175]

Several important points should be drawn from the foregoing description of rankings. First, the measures of performance are all very interrelated. For example, as employment rates and salaries go up, alumni will increase financial contribution to the school,[176]

"distinguished" (5). In 1998, sixty-two percent of those surveyed responded. A separate survey asks practicing lawyers, hiring partners, and senior judges to rate each school along the same criteria. Thirty-nine percent of the practitioners responded in 1998. See id.

[172] See id.

[173] In this category, the magazine typically measures employment rates for the previous year's graduates at graduation (thirty percent of this score) and nine months after graduation (sixty percent). See id. "Employed graduates include those employed; those pursuing graduate degrees; and for the nine-month rate, twenty-five percent of those with unknown status. Both employment rates exclude individuals who are not seeking jobs." Id.

[174] The bar passage rate counts for ten percent of the category. This indicator comprises the ratio of the school's pass rate in a particular jurisdiction compared to the overall rate for first-time test takers for the two previous bar administrations. The jurisdiction selected is that state in which the majority of the school's graduates took the test for the first time. See id.

[175] In the resources category, sixty-five percent of the score is based on average expenditures per student for instruction, library, and supporting student services, for the current and previous year. Student-to-teacher ratios count for another twenty percent; average financial aid and other expenditures per student for ten percent; and the total number of volumes and titles in the law library is five percent. See id. Russell Korobkin in jest presents his own representation of the magazine's formula as "the number of books in the law school library plus the school's annual financial aid expenditure divided by the starting salary of those employed within six months and twelve days of the fortnight before graduation." Russell Korobkin, In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems, 77 Tex. L. Rev. 403, 405 (1998) [hereinafter Korobkin, Rankings Essay].

[176] See John S. Elson, The Regulation of Legal Education: The Potential for Implementing the McCrate Report's Recommendations for Curricular Reform, 1 Clinical L. Rev. 363, 379–80 (1994).

and correspondingly the amount of expenditures per student will likely rise. Employment rates are also likely to rise as student selectivity increases.[177] In short, there are many feedback loops within the ranking system itself, all of which reinforce the success of the law school that chooses to admit on-standard applicants.

Second, law school rankings are an important way for a law school to communicate, using a shared standard, with other organizations in the legal profession network. Law schools using the same standard as those organizations will receive benefits—hiring of graduates (from employers), funding (from alumni), competitive deference in recruiting students (from other law schools), et cetera.

To persuade employers to hire graduating law students, for example, law schools must signal them about the quality of the student. Typically, law firms rely heavily on law school ranking, as well as student performance along a range of on-standard criteria, such as grades, law review membership, and clerkship experience.[178] Students who graduate from a prestigious institution like Harvard are bound to be employed at higher rates because of the school's rank and restrictive admissions standards.[179] "[T]he prestige of a Harvard degree opens doors regardless of the quality of Harvard's instruction."[180] Higher-ranked schools also attract more employers to interview student job-seekers.[181]

Firms may rely on rankings for a number of reasons. First, at a general level, highly ranked schools might produce lawyers who can solve legal problems in the culturally specific way that now characterizes the profession.[182] Second, hiring those students signals the "quality" of the firm in an easily recognizable form to clients

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[177] See id.

[178] See Wilkins & Gulati, supra note 164, at 1653. The authors note that elite firms rely less heavily on the student performance criteria for graduates of the more prestigious schools. See id. at 1653 n.225.

[179] See Elson, supra note 176, at 379–80 (arguing that employers rely on signals of standard admissions criteria, which feed back through employment rates and alumni contributions).

[180] George B. Shepherd & William G. Shepherd, Scholarly Restraints? ABA Accreditation and Legal Education, 19 Cardozo L. Rev. 2091, 2113 (1988).

[181] See Korobkin, Rankings Essay, supra note 175, at 411–12.

[182] See Wilkins & Gulati, supra note 164, at 1654; Elson, supra note 176, at 379 (noting that students with higher admissions numbers can be expected to better meet job expectations).

and other firms.[183] Finally, hiring students from top-ranked schools communicates that the firm is reputable to other students whom the firm wants to recruit.[184]

Thus, a law school has every incentive to use a signal that law firms, clients, and other students will recognize. In his recent essay on rankings, Russell Korobkin argues that law students use rankings to signal the most sought-after legal employers that they are "high quality"[185] because prestigious employers are interested in students who are smart enough to get into a highly ranked school.[186] This Article suggests that law schools use rankings for similar purposes: to signal employers and other members of the legal profession network about the "quality" of their program in order to receive benefits the network members have to offer.

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[183] See Wilkins & Gulati, supra note 164, at 1654–55. Clients' assessments of an "on-standard" lawyer's performance may be self-reinforcing as well. First, the on-standard lawyer is more likely to obtain good results for the client because her performance will be one recognized by judges and other litigants. Second, a client is also likely to look to see how other members of the legal community assess a lawyer's quality, which is likely to be a measure of conformity to the "industry standard." Thus, whether clients are actually assessing a lawyer's quality based on results or on some form of "herd behavior," the on-standard lawyer enjoys a competitive advantage with clients.

[184] See id. at 1655–56.

[185] Korobkin, Rankings Essay, supra note 175, at 408 n.21 ("The term 'high quality' is used here as shorthand for 'the kind of students most desirable to legal employers.' It should go without saying that what legal employers value in their new hires has nothing to do with a student's inherent worth, and that what employers value might or might not bear a strong relationship to raw intellectual power or legal acumen.").

[186] Korobkin notes that

> [b]y choosing a school with a high ranking, the student sends an important signal to future employers: he is brainy or clever enough to be accepted by a more selective school. The higher-ranked school can be more selective because it is higher ranked, which increases the number of "high quality" students who apply. The most selective legal employers respond to the signaling of students by interviewing and selecting students from the top-ranked law schools or at least the most highly-ranked schools in their areas.

Id. at 409–10 (footnotes omitted). Korobkin hints at the feedback loop that keeps rankings in place.

> Like the students, the employers are not motivated by any belief that the highly-ranked schools offer an objectively superior legal education. Rankings exist to create a prestige hierarchy. Because they do this, the system is self-perpetuating and fully rational, regardless of whether the rankings are based on unimpeachable data or cotton candy.

Id. (footnotes omitted).

Accordingly a law school's use of these interrelated standards to communicate with the network creates self-reinforcing benefits that lock in the standard. The more on-standard applicants that a law school admits, the higher the law school will be ranked, because ranking appears to correlate very well to on-standard student selectivity.[187] In turn, the higher the law school is ranked, the greater is its ability to attract more on-standard students, which will reproduce the feedback loop cycle yet again.[188]

As a result, a law school may put its rank and ability to recruit at big risk if it admits a significant number of non-standard students—those with skills or qualities not currently measured by conventional admission instruments. The law school incurs this risk whether the rankings reflect something like objective merit, or merely random and arbitrary traits or characteristics.[189]

B. The Database Game

A law school's use of the de facto standard is self-reinforcing in a second way. By using conventional admissions criteria, the school is able to communicate with law students and other law schools via

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[187] See id. at 410–11 (displaying a table correlating ranking tiers with student LSAT scores). With only one exception (the University of Texas at Austin), the top fifteen schools by overall score were also among the top fifteen by student LSAT scores—albeit in somewhat different order—in the *U.S. News & World Report* rankings for 1998. See U.S. News, 2000 Graduate Rankings—Top law schools (visited Aug. 21, 1999). <http://www.usnews.com/usnews/edu/beyond/gradrank/law/gdlawt1.htm> [hereinafter U.S. News Law Rankings].

[188] See Korobkin, Rankings Essay, supra note 175, at 410. But see Schmalbeck, supra note 168, at 584 (finding "no evidence that prospective students shun law schools that suffer a decline in the overall . . . rankings, nor that they flock to those schools showing improvements in their rankings"). In fact, the (statistically insignificant) data was to the contrary—falling rank produced an increase in the median LSAT scores for the following year, and an increase in the overall rank produced no change in LSAT scores. See id. Schmalbeck speculates that admissions committees may respond to a decline in the ranking by changing admissions standards to boost the median LSAT for the following year. See id. at 584 n.20. It may also be that a change in rankings must be sustained over several years to produce any effect in recruitment. In addition, the possibility of time-lag is not accounted for in Schmalbeck's methodology, which looks only at the year immediately after a decline in rank.

[189] See Korobkin, Rankings Essay, supra note 175, at 410 (arguing that rankings serve a coordination function that matches employers with students, whether or not the rankings measure objectively superior legal education).

an efficient and cost-saving comprehensive database administered by the Law School Admission Council ("LSAC"). Law schools choosing to use alternative standards cannot use the database information and will not enjoy the cost savings associated with it. Likewise, those students whose performance does not conform to the standard cannot signal their abilities to law schools via this database.

LSAC was incorporated in 1947 "to coordinate, facilitate, and enhance the law school admission process" for all accredited law schools.[190] In addition to administering the LSAT, LSAC also distributes application information from almost all applicants to accredited schools. In particular, the Council offers the following services for law schools:

- The administration of the LSAT;[191]
- The Law School Data Assembly Service (LSDAS), which centralizes the collection of applicant information, including test score, college transcript, and basic biographical data. If requested (as it is by most schools), LSAC can create an admissions index using a formula, provided by the law schools, to weight test scores and undergraduate GPAs;[192]
- The Candidate Referral Service (CRS), which is designed to select students according to descriptive information—e.g., LSAT score, GPA, racial/ethnic or geographic background—for law schools to recruit;[193]
- The Law Services Direct Entry System (LSDES), which links personal computers at a law school's admissions office with an LSAC computer. This network provides the school with direct access to applicant information, including their decision status, national statistics on applicants and on test performance, and information about undergraduate institutions.[194]

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[190] Law School Admission Council, Law School Admissions Reference Manual 2.1 (1997) [hereinafter Manual]. The voting membership of the council (the Board of Trustees) is made up of volunteers from ABA-approved law schools and approved Canadian law schools. See id.

[191] See id. at 2.1.

[192] See id. at 3.10.

[193] See id. at 4.1.

[194] See id. at 5.1.

Candidates are also able to use LSAC to get answers to questions about the admissions process or about their file in particular.[195]

Network databases like the LSAC promote two different supply side economies of scale. First, it is more efficient for all law schools to pay LSAC to administer an aptitude test and collect information about law school applicants than to manage the process individually. In an article extolling the value of a nationally standardized test, LSAC founder Willis Reese discussed the barriers that a law school would face in administering its own aptitude test: (i) finding qualified people to construct the test and conduct quality control on the test questions; (ii) acquiring sufficient data with which to validate the test questions or test as a whole, made more difficult by the limited number of applicants and admittees at any one law school; (iii) experimenting to improve the test; and (iv) administering the test to applicants from all over the country.[196] Law schools save a substantial amount in time and money by delegating these tasks to LSAC.

Second, the LSAC network also creates a supply side economy of scale from the perspective of the law school applicant. Applicants are able to apply to multiple law schools with a single submission to the Admission Council, which will then distribute to all "member" law schools the applicant's LSAT score, a summary of the applicant's undergraduate record, and basic biographical information. The LSAC will also compute the student's predictive index for schools that request it.[197]

Taken together, these two network features may have locked in the conventional selection criteria on which the network relies. Law schools that want the advantage in efficiency of using the database are more likely to continue admitting on-standard students. Law schools admitting non-standard students cannot use the database for those students, but instead must develop an individualized

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[195] See id. at 7.1.

[196] See Willis Reese, The Standard Law School Admission Test, 1 J. Legal Educ. 124, 124–25 (1948). Reese was the father of the LSAT and also helped to establish and organize the LSAC. See Father of the LSAT Dead at 77, L. Services Rep., July–Aug. 1990, at 11.

[197] See Manual, supra note 190, at 3.9 (describing the purpose of the Law School Data Assembly Service (LSDAS)).

selection process that would require significant information costs. While theoretically all law schools could demand that the database switch to an alternative standard, the enormous collective action problem of coordinating such a switch makes that highly unlikely.[198] To effect such a switch, schools would have to all agree to use the same alternative standard, and that standard would have to be of the sort easily entered into a database.

C. Intra-Law School Benefits

Finally, a law school may enjoy intra-law school feedback benefits that reinforce the use of the de facto standard. At the level of the law school, individual faculty members form a subnetwork of decisionmakers with regard to admissions policies and individual applicants. Using a single standard over time may accord faculty members learning benefits, with regard to the benefit of past experience with the standard, particularly if they themselves were admitted under the standard. Moreover, like the use of standardized contract terms, using a common standard facilitates communication and shared understanding among faculty members, to permit them to reach consensus more efficiently.

Because of positive feedback loops, intra-firm network benefits can create an organization that is increasingly homogenous over time. Scholars have done much recent work in the field of industrial/organizational psychology to document the way in which institutional decisionmakers can replicate the strategic choices of the initial decisionmakers or "founders." Benjamin Schneider has suggested that, by way of the cycle of attraction-selection-attrition ("ASA"), an organization over time will become increasingly ho-

[198] For certain databases, like real estate listings, the positive feedback loop from network benefits is somewhat constrained by competition among users. See David McGowan, Networks and Intention in Antitrust and Intellectual Property, 24 J. Corp. L. 485, 505 (1999). In the LSAC database, law school members prefer not to add any law school users beyond the number necessary to create a viable listing, as is true for law school applicants vis-a-vis other applicants. See id. Positive feedback thus increases with the addition of counterpart users, but competition within each category tempers such feedback, as do the increased search costs that accompany a larger database. See id.

mogenous, and more precisely reflect the founders' culture and strategic choices.[199]

Schneider's model of organizational behavior sets forth three central propositions. First, people are differentially attracted to an organization based on the organization's existing culture and personality.[200] In particular, the organization will attract individuals who share the culture and personality of institutional incumbents, particularly the early founders of the organization.[201] Second, the organization's hiring process will select individuals who are compatible with the organization's culture and personality.[202] Finally, individuals who are not compatible with the organizational culture, and have not been successfully socialized to that culture, will leave eventually, voluntarily or involuntarily.[203] Moreover, those who remain behind will constitute an even more homogenous group than those initially attracted.[204]

These "survivors" of the ASA cycle then will administer subsequent rounds of the selection process. The resulting organization, according to Schneider, will tend to be more homogenous than previous generations, and it will tend to adopt criteria for selection that reproduce the members' common characteristics.[205]

Some evidence supports the notion that law school admissions decisions obey Schneider's principles. First, Schneider's framework suggests that law schools should attract on-standard students, who already display strengths in areas that are defined as appropriate for law school and lawyering, more strongly than others. In fact, evidence exists that legal education historically has attracted a greater proportion of on-standard white students than students of color. At least for the fall of 1979, the admitted first year class for

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[199] See Benjamin Schneider, The People Make the Place, 40 Personnel Psychol. 437, 440–44 (1987) [hereinafter Schneider, People].

[200] See id. at 442–43. See also Benjamin Schneider et al., Personality and Organizations: A Test of the Homogeneity of Personality Hypothesis, 83 J. Applied Psychol. 462, 463 (1998) (discussing how people are attracted to organizations); Benjamin Schneider et al., The ASA Framework: An Update, 48 Personnel Psychol. 747, 749 (1995) [hereinafter Schneider, ASA Update] (same).

[201] See Schneider, ASA Update, supra note 200, at 749, 753.

[202] See Schneider, People, supra note 199, at 444.

[203] See id. at 442; Schneider, ASA Update, supra note 200, at 749.

[204] See Schneider, People, supra note 199, at 442.

[205] See id.

all law schools contained 9.4 percent people of color, proportionally fewer than the 12.7 percent that had graduated as baccalaureates the previous spring,[206] even though law schools were using affirmative action admissions models.

Second, under Schneider's model, faculty members (who themselves are on-standard)[207] should select students who conform to the pre-existing law school culture. As discussed extensively in the foregoing Sections, law schools uniformly use standard selection criteria to admit white students disproportionately.[208] Finally, Schneider would predict that those students who drop out are more likely to be alternative-standard students of color who do not conform to pre-existing law school culture. In fact, research reveals that law students of color drop out of school at higher rates than their white counterparts. Between 1971–72 and 1985–86, an average of ninety percent of white students remained in school, versus eighty percent for students of color, and less than seventy percent for some specific groups.[209]

Using the de facto standard affords the law school significant benefits from other organizations in the institutional network, as well as advantages in decisionmaking within the school itself. Law schools are more likely to place their graduates in lucrative positions, save money by using a centralized database, and maintain or improve their ranking. The next Part argues that network benefits bar entry for communities of color, who can be thought of as "supplying" their performances to law school "consumers."

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[206] See Abel, supra note 110, at 102.

[207] According to Richard Chused, as late as 1980–81, only 2.8% of all full-time faculty members at ABA-accredited law schools were African-American, and 0.5% were Latino/a, even after affirmative action programs had been implemented. See Richard H. Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537, 538 (1988). As late as 1986–87, those numbers had improved only slightly—the typical faculty had 31 members, 30 of whom were white and only one of whom was black, Latino/a or another minority. See id.

[208] See supra Section II.C.

[209] See Abel, supra note 110, at 103.

IV. BARRIERS TO ENTRY

A barrier to entry is "defined as a cost . . . borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."[210] Self-reinforcing network benefits lock in the de facto standard, to the benefit of white applicants and the disadvantage of applicants of color, in two ways. First, law schools wanting to admit alternative-standard students in large numbers will face significant switching costs—the costs of moving from on-standard to alternative-standard students. Second, applicants of color attempting to break into a network market may find it far more costly to become competitive when the de facto standard culturally favors the competition. These costs may constitute significant barriers to entry in legal education for communities of color.

A. Switching Costs

Law schools ("consumers" of law students) face potentially high switching costs in choosing applicants other than those deemed "qualified" by the de facto standard. In particular, law schools may face four types of switching costs: (i) losing the ability to communicate with, and receive benefits from, other members in the legal profession network; (ii) the uncertainty of moving from the standardized status quo to an unknown competitive approach; (iii) the cost of revising their admissions process or developing an alternative process more favorable to non-standard students; and (iv) the cost of revamping law school culture in order to provide the best environment for alternative-standard students.

1. Loss of Network Benefits

Losing the ability to communicate with the legal profession network—the ability to signal "quality" to employers and their clients,

[210] George Stigler, The Organization of Industry 67 (1968). See also Bain, supra note 69 at 6–7, 10–11, 17 (defining a barrier to entry as the extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry). Although the distinction between these two definitions is hotly debated in antitrust literature, see Harold Demsetz, Barriers to Entry, 72 Am. Econ. Rev. 47 (1982), it does not make much of a difference for purposes of this Article.

the larger professional community, prospective law students, and other law schools—is a risk that law schools are unlikely to take voluntarily.[211] First, those law schools that admit a significant number of alternative-standard applicants must contend with the probability that their place in the rankings will drop, in the very likely event that other schools do not similarly revise their admissions process. Schools admitting significant numbers of non-standard students would almost surely take a hit in the national rankings because admissions standards are correlated to the categories of "student selectivity," academic reputation, employment rates, and school resources.[212]

The rankings of predominantly minority law schools bear out the notion that law schools admit a high proportion of alternative-standard students at great risk to their rankings. Howard University School of Law, whose student body is currently eighty-seven percent African-American,[213] is in the "third tier" of law schools, which consists of schools with an overall ranking of ninety or below in the *U.S. News* survey.[214] Similarly, Texas Southern University ("Thurgood Marshall"), whose student body is fifty-eight percent black and twenty-one percent Mexican-American,[215] is ranked in the fourth tier,[216] along with St. Mary's Law School in Texas, which boasts thirty-three percent Latino/as.[217]

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[211] Cf. Lemley & McGowan, JAVA, supra note 93, at 453, 461 (discussing consumers' reluctance to switch from an established standard when they "perceive themselves to be operating in a strong network market").

[212] See supra notes 176–189 and accompanying text.

[213] See U.S. News, Law—Student Body, Howard University (visited Aug. 24, 1999) <http://www.usnews.com/usnews/edu/grad99/dir-law/03033.stude.htm>.

[214] See U.S. News Law Rankings, supra note 187 (click on "Third Tier" to see rankings). The survey does not identify specific rankings within the tier for the bottom two tiers. See id.

[215] See U.S. News, Law—Student Body, Texas Southern University (visited Aug. 24, 1999) <http://www.usnews.com/usnews/edu/grad99/dir-law/03152.stude.htm>.

[216] See U.S. News Law Rankings, supra note 187 (click on "Fourth Tier" to see rankings). The fourth (and bottom) tier in the U.S. News survey includes law schools with an overall ranking of 135 or below. See id.

[217] See id.; U.S. News, Law—Student Body, St. Mary's University (visited Aug. 24, 1999) <http://www.usnews.com/usnews/edu/grad99/dir-law/03151.stude.htm>. North Carolina Central, founded to provide legal education for blacks who were excluded from white law schools (<http://www.nccu.edu/law/index.html>), is also in the fourth tier. See U.S. News Law Rankings, supra note 187. Similarly, other schools with

Moreover, a drop in the rankings might well produce a "downward spiral" in which the decrease in rank feeds back on itself to land the law school at the bottom of the heap. Because rankings affect the type of student who will be attracted to attending the school, which then in turn affects the school's rank, an initial drop can precipitate further drops via negative feedback.[218] Although law schools might attempt to adjust by upwardly revising their admissions policies, such adjustments would likely have only a minimal effect on the selectivity of student population because students with scores above the pre-existing range of the institution would likely choose to attend another, more prestigious institution.[219]

As a law school's ranking drops, so does the level of benefits to the school, because the law school is unable to signal its quality to other network members in a manner that these organizations recognize. For example, a drop in the rankings is likely to produce a corresponding drop in the number of law firms that interview at a law school and subsequently employ its graduates.[220] Similarly, a law school's ability to recruit high-scoring applicants, its level of funding from alumni contributions (and general alumni happiness), and its overall reputation with other law schools and practitioners may diminish in response to a drop in the rankings.

Likewise, law schools using alternative admissions standards would lose their ability to communicate with law students efficiently and at minimal cost via the LSAC database. Law schools that do not rely on the LSAC database would spend much more time and money collecting additional information from a national

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alternative missions have not done well in the rankings. Northeastern Law School in Massachusetts is devoted to social justice and serving the local community, and was formed to provide Boston's first evening law school program for students. See Northeastern University School of Law, NUSL General Info: History of the School of Law (visited Aug. 18, 1999) <http://www.slaw.neu.edu/public/general/history.htm>. Despite its reputation for a progressive curriculum, Northeastern ranks in the third tier of the magazine rankings. See U.S. News Law Rankings, supra note 187.

[218] See supra note 188 and accompanying text.

[219] But see Schmalbeck, supra note 168, at 584 n.20 (suggesting that a school suffering a decline in its overall rank may become more selective with respect to LSAT scores as a way to compensate).

[220] See Korobkin, Rankings Essay, supra note 175, at 411 (noting that the average first-tier school has four times as many on-campus recruiters as the average second tier school, and that fourth-tier schools have one-third the number of recruiters, on average, that third-tier schools have).

base of law school applicants[221] in order to target and recruit particular types of students. These schools are likely to lose at least some applicants who are unwilling to undertake the additional time and expense of participating in an individualized application process (although that number might be somewhat offset by students who were particularly interested in applying to a law school committed to admitting students of color).

In summary, when network members no longer recognize or value the signals that a law school sends, the benefits the school receives from those organizations—prestige and status, employment rates, recruiting selectivity—will diminish as well. As is the case with most collective action problems, those law schools that are first to switch to an alternative set of criteria will incur the biggest loss in benefits, because they face a very strong competitive disadvantage relative to others who have not switched. Thus, schools behave rationally when they choose not to experiment with alternative admissions standards for fear of putting themselves at a competitive disadvantage.

2. Status Quo Bias Costs

Beyond the potential loss of benefits from network members, law schools would also incur other switching costs, including the internal cost of overcoming inertia, in making a transition to alternative standards.[222] Switching schools would have to overcome the "status quo bias," that is, the preference for "maintaining a state of affairs that [it] perceive[s] as being the status quo rather than switching to an alternative state, all else being equal."[223]

Scholars have theorized that status quo bias exists because of a quirky psychological artifact—most individuals experience greater regret when undesirable consequences flow from choosing to act, for example by switching to an alternative option, than when the

[221] See Reese, supra note 196, at 124.

[222] Joe Bain refers to this preference for the status quo as "customer inertia, habit, and loyalty." Bain, supra note 69, at 130.

[223] Russell Korobkin, The Status Quo Bias and Contract Default Rules, 83 Cornell L. Rev. 608, 625 (1998).

same consequences flow from remaining with the status quo.[224] The status quo bias thus appears to favor decisionmaking that avoids the stronger regret associated with action.[225]

This bias can be quite strong in certain instances,[226] and may constitute a significant barrier to entry for applicants of color in the legal education market. Law schools contemplating a change may wish far more to avoid the psychological costs of regret from admitting alternative-standard students than the psychological costs of any regret from retaining conventional admissions criteria. This is particularly true in jurisdictions like Texas, where race-conscious admissions programs are legally prohibited,[227] thus increasing the costs of change.

3. Information Costs

Similarly, institutions might be reluctant to adopt a new admission strategy because the institution would have to pay to formulate a new strategy and would be less certain about its effectiveness. Traditional performance measures likely will not accurately measure the alternative-standard abilities of the applicant.[228] Accordingly, law schools seeking to adopt an alternative standard would be required to formulate an altogether new set of admissions criteria, a substantial undertaking, to be sure. As Willard Reese pointed out with regard to standardized tests, adopting a new set of admissions criteria would entail locating qualified people to construct a set of criteria and conduct quality control, acquiring sufficient data to validate the criteria within a limited number of applicants and admittees at a limited number of law

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[224] See id. at 657 & nn.199–200 (reviewing the literature on regret avoidance theory).

[225] See id.

[226] See id. at 627 (citing Raymond S. Hartman et al., Consumer Rationality and the Status Quo, 106 Q.J. Econ. 141, 144 (1991) (reporting a study in which utility service consumers demanded as payment for reductions in reliability of service four times the amount they were willing to pay for an equivalent increase in reliability, regardless of the level of reliability)).

[227] See Hopwood v. Texas, 78 F.3d 932, 935 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

[228] See supra Section II.C.

schools, continuing research to improve the criteria, and administering the criteria to applicants from all over the country.[229]

Moreover, schools might have to forgo "learning benefits"[230] to either switch to an alternative standard or revise the standard process. In legal education, learning benefits flow from adopting the same standard used by all ABA-accredited law schools over a substantial period of time. Presumably, predictive errors have been corrected and ambiguities refined, all with the help of a centrally funded institution devoted exclusively to researching and improving the process.[231] The industry standard has a great deal of value precisely because it has "survived a 'quasi-Darwinian' process that makes [it] attractive" to law schools and applicants alike.[232]

Because law schools have far more experience with white students, whose performances created the de facto standard (due in large part to exclusion of minorities during the segregation era), they are less likely to admit an alternative-standard individual whose cultural performance is not familiar.[233] Law schools must also take into account the added uncertainty of whether a switch would run afoul of modern affirmative action jurisprudence.[234] These informational differences create significant switching costs for institutions looking to innovate. Not to be overlooked, of course, are the psychological switching costs that might be associated with a loss of rank in the pecking order.[235]

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[229] See supra text accompanying note 196.

[230] See supra Section I.B for an explanation of learning benefits.

[231] The LSAC regularly commissions research on the LSAT and other facets of the admissions and educational process. See, e.g., Linda F. Wightman, Women in Legal Education: A Comparison of the Law Performance and Law School Experiences of Women and Men (LSAC Research Report Series, 1996).

[232] Klausner, supra note 52, at 787.

[233] Under uncertainty about the expected payoffs of admitting people of color, white law school faculty members and administrators choosing to admit people of color would discount any expected benefit by the probability of actually producing that benefit. See Russell Korobkin & Thomas Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. (forthcoming 2000) (manuscript at 11, on file with Virginia Law Review Association) (utility calculations for payoffs of certain options under uncertainty are discounted by the probability of producing that payoff).

[234] See supra note 227 and accompanying text.

[235] Cf. McAdams, supra note 6, at 1044 (noting that esteem is produced by "a claim to superior . . . rank").

Finally, law schools would have to consider whether to revise their current curriculum and pedagogy to respond to a potential lack of fit with alternative admissions standards. Recent scholarship indicates that contemporary curricula and pedagogy in legal education may not fit well with the cultural approaches exhibited by students of color.[236] Kimberlé Crenshaw points out that the dominant approach to legal education assumes that law can be taught "without directly addressing conflicts of individual values, experiences, and world views" and without taking the cultural experiences of students into account.[237] She suggests altering the curriculum to change the way that professors integrate the issue of race into the classroom.[238]

More broadly (and controversially), Kenneth Nunn has argued that law, and the legal profession itself, is a very culturally specific enterprise, incompatible with alternative cultural traditions and worldviews.[239] Other scholars have suggested that law schools hire more faculty members of color,[240] as well as reevaluate their textbooks,[241] tenure standards,[242] methods of grading and evaluation,[243]

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[236] See Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1, 2–3 (1989); Judith G. Greenberg, Erasing Race From Legal Education, 28 U. Mich. J.L. Reform. 51, 72–75 (1994); see also Frances Lee Ansley, Race and the Core Curriculum in Legal Education, 79 Cal. L. Rev. 1511, 1515–18 (1991) (arguing for the centrality of racial discourse to legal education).

[237] See Crenshaw, supra note 236, at 2.

[238] Rather than presenting race in discrete and disconnected instances (most typically in the jury selection, affirmative action, desegregation, and employment law contexts), Crenshaw suggests that professors look more systemically at the connection between racial subordination and the values and interests that law promotes as race-neutral. See id. at 7–8.

[239] See Kenneth B. Nunn, Law as a Eurocentric Enterprise, 15 Law & Ineq. J. 323, 328, 334–38 (1997) (comparing a Eurocentric approach to an Afrocentric approach). In particular, Nunn argues that Western law employs the use of dichotomous rather than holistic reasoning, makes much use of hierarchies, insists on analysis at the simplest level—as distinct from using varying levels of functionality and complexity for inquiry—and exhibits preferences for high levels of objectification and abstraction. See id. at 335–36. For a classic and sophisticated development of these arguments (sans the Afrocentric emphasis) in the context of Western philosophy and literature, see generally Jacques Derrida, Of Grammatology (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967).

[240] See generally Kennedy, supra note 2, at 730–34.

[241] See e.g., Greenberg, supra note 236.

[242] See id. at 87.

and academic support systems.[244] In any event, law schools committed to bringing in large numbers of students of color might incur at the very least the cost of investigating whether to make curricular or structural changes.

B. Advantages in the Costs of Production

Beyond switching costs for law schools, applicants of color in the admissions market may also face another barrier to entry: higher "costs of production." In economic literature on barriers to entry, market incumbents have an advantage in production costs if an entrant firm has to pay some production cost that the incumbent does not.[245] Production advantages may exist, among other reasons, because the incumbent has superior access to or control of some key resource—raw materials or intellectual property—not available to the entrant.[246] For example, "entrant" firms may not have the same access to technical "know-how" as the incumbent because the information is not generally disseminated.[247] Alternatively, entrants may have to pay a price for "know-how" that incumbents do not have to pay.[248]

Assuming that performances in legal education are culturally specific, then in the legal education market, incumbent whites likely possess the equivalent of cultural "know-how" to create the culturally specific performance valued by the market.[249] Communities of color have far less access than do whites to white culture—and to the wealth and power that accompany white cultural per-

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[243] See id. at 105–07 (contrasting legal education's emphasis on written work with an African-American tradition of oral expression).

[244] See id. at 88–90.

[245] Incumbents have an advantage "if the prospective unit costs of production of potential entrant firms are generally . . . higher than those of established firms." Bain, supra note 69, at 144.

[246] See id. at 144–45.

[247] See id. at 148.

[248] Cf. id. at 145 (noting that incumbents may own or otherwise control strategic factor supplies, which forces entrants to purchase materials from incumbents at premium prices).

[249] A fair amount of literature exists comparing cultural practices to intellectual property—"know how," trade secrets, or other types of proprietary information. See generally Michael F. Brown, Can Culture Be Copyrighted?, 39 Current Anthropology 193, 204 (1998) (contemplating the "claim that there exists an inherent, permanent right of cultural ownership and that this right should be guaranteed by new laws that, among other things, define ideas as property").

formance—as resources for market competition. According to Sandra Scarr, "[o]pportunities to acquire the dominant culture may be less available to racial and ethnic minorities than to majority or dominant-group members," especially if that culture has a class component as well.[250]

To the extent that communities of color can gain access to white culture, especially as it relates to professional practices, they probably have to pay more for it. It seems likely that communities of color must invest in acquiring or internalizing white cultural practices in a way that even poor whites do not. Structural costs might include the costs of relocating to participate in white social, political, cultural, and economic institutions—moving to white neighborhoods, transportation and tuition costs to attend white private schools, participating in white cultural activities, and working in white economic enterprises or institutions.[251] More controversially, those costs might include the psychological costs of assimilating or internalizing white cultural practices.[252] Theoretically, both information and psychological costs would be most prohibitive for those communities of color whose cultural performances diverge most from white cultural practice.

To be sure, borders between racial groups are to some extent porous or permeable. It is also true that subordinated groups are far more likely to acquire information about the culture of a domi-

[250] Sandra Scarr, How People Make Their Own Environments: Implications for Parents and Policy Makers, 2 Psychol. Pub. Pol'y & L. 204, 211 (1996) (citing several sociological studies); see also Kennedy, supra note 2, at 724 ("Different communities have different access to wealth and power with which to endow their members.").

[251] See David B. Wilkins & G. Mitu Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis, 84 Cal. L. Rev. 493, 521–22 (1996) (discussing the increased incentive for minority investment in easily observable signals like a diploma to improve their chances of being hired). Gulati and Wilkins argue, quite controversially, that black law students overinvest in acquiring easily observable signals—the "right" law school, grades and traditional academic honors, like law review membership—that increase their likelihood of being hired, at the expense of investing in skills that improve their long-term chances of success. See id. at 546, 554–56.

[252] See Carlos Villareal, Culture in Lawmaking: A Chicano Perspective, 24 U.C. Davis L. Rev. 1193, 1198 (1991) (analyzing the psychological costs of assimilation to include lowered self-esteem, identity conflict and loss of socio-cultural coping skills).

nant majority than vice versa.[253] But communities of color are at a distinct disadvantage in acquiring cultural information about practices other than their own, much like the entrant firm having to license intellectual property from an incumbent firm owning the patents on the technology.[254]

In contrast, white communities transmit their cultural practices more cheaply to the next generation. Social institutions, families, neighbors, and teachers in white communities teach white children these culturally specific practices at no cost to white group members.[255] Residential and cultural association among groups produces racialized patterns of "informal social networks; neighbors . . . work and play together in community organizations such as schools, PTAs, Little Leagues, Rotary Clubs, neighborhood-watch groups, cultural associations, and religious organizations."[256] These informal networks pass along information far more cheaply and efficiently for network users than for outsiders. These networks appear to make a significant difference in test taking, which constitutes a significant component of law school admissions criteria. According to the Elsie Moore study discussed in an earlier Section, the effect of growing up in white homes and neighborhoods is enough to close four-fifths of the test score gap between black and white children.[257]

Professional culture, which is also distributed along racial lines, is transmitted cost-free as well. Lawyers (predominantly white) transmit their professional culture to their children or other rela-

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[253] Subordinated people often learn the norms of the dominant culture as a matter of survival. See Lucie E. White, To Learn and Teach: Lessons from Driefontein on Lawyering and Power, 1988 Wis. L. Rev. 699, 723 n.104, 751.

[254] See Lemley & McGowan, Legal Implications, supra note 13, at 532 (arguing that network externalities can accrue to patent-holders when intellectual property forms the basis for the "industry standard").

[255] Black families do not always transmit exclusively black cultural practices; some choose to relocate to white neighborhoods and attend predominantly white schools. See Joan Maloney, The Black Baby Doll: Transracial Adoption and Cultural Preservation, 59 UMKC L. Rev. 487, 498 (1991). As this Section argues, families of color may thus acquire information on the cultural practices of the dominant majority so that they can compete in the marketplace of opportunity. However, this requires extra expense and investment of resources.

[256] Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1843, 1851 (1994).

[257] See supra note 25 and accompanying text.

tives via exposure to and familiarity with the occupation, particularly for high status families; in one study, fifty percent of law students had at least one relative in law.[258] Thus cultural transmission from generation to generation can become self-reinforcing, as families and communities pass on the technical "know-how" to conform to the de facto standard.

Although production costs may prohibit people of color from breaking into the white-dominated law school admissions market, switching costs likely pose the greater barrier to entry. Law schools choosing to modify their practices risk a potential loss of rank, the uncertainty associated with a new and untested set of admissions criteria, and the loss of network benefits from using the LSAC database. The next Part explores the implications of the resulting market lock-in.

V. IMPLICATIONS: RACE RELATIONS AS PATH DEPENDENT LOCK-IN

A. The Historical Role of Segregation

The foregoing model of market lock-in, with its attendant emphasis on structural barriers to entry, suggests several important changes in the way we think about discrimination. First, we might find it useful to redescribe race relations as a path dependent, dynamic evolutionary process, in which segregation has played a central, outcome-determinative role. Specifically, many modern social institutions grew up and were organized around segregation-era monopolies in social, cultural, and economic spheres. While many commentators believe that the effects of segregation ought to have faded this long after the fact,[259] the model suggests that, because white monopoly is in some sense "hard-wired" into the institutional network, racial disparities may continue absent significant restructuring.

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[258] See Frances K. Zemans & Victor G. Rosenblum, The Making of a Public Profession 36 (1981).

[259] Indeed, the more conservative commentators argue that civil rights laws were redistributive and pursued a radical agenda of group reparations. See, e.g., Bolick, supra note 3, at 49.

Scholars have made similar arguments in areas other than legal education. Richard Ford has suggested that segregation played a central evolutionary role in creating racialized housing patterns that have become self-reinforcing.[260] Ford points out that segregation created separate white neighborhoods where people had higher incomes and correspondingly larger homes, bigger properties, more privately financed amenities, lower taxes for publicly financed amenities, better public schools, and white informal social networks of people with access to wealth and power.[261] Although he does not make the argument in lock-in terms, Ford posits that the racial patterns of neighborhoods became self-reinforcing in three ways: (i) whites with higher income were more likely to move into neighborhoods with larger homes, better amenities, and lower tax rates; (ii) whites obtained higher levels of educational opportunity and correspondingly higher income from better financed schools and wealthier social networks; and (iii) blacks on the average had less income and less collateral (from lesser-valued homes) with which to obtain new mortgages and move into increasingly wealthier white neighborhoods.[262]

Similarly, in exclusionary zoning cases, segregation created homogenous white political communities that now vote to keep neighborhoods zoned for single family housing and large lot properties, both of which preserve racial homogeneity.[263] As Ford recognizes, an inequality in political geography fuels the inequality of resources in a positive feedback loop: "[E]ach condition contributes to and strengthens the others" in a "vicious circle of causation."[264] Segregation served as the evolutionary event that created separate space, and thereby shaped the size of homes, the level of taxes and public services, and the corresponding political and social housing patterns.[265]

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[260] See Ford, supra note 256, at 1850–75.

[261] See id. at 1850–55.

[262] See id. at 1849–52.

[263] See id. at 1870–71.

[264] Id. at 1844.

[265] The positive feedback loops that Ford describes also explain the phenomenon of tipping, in which a formerly all-white neighborhood becomes almost exclusively black or Latino/a. For example, Steven Durlauf proposes a positive feedback loop in which parents' income determines their children's income through neighborhood location,

Evolutionary biologists like Stephen Jay Gould argue that large contingent environmental changes, (for example, a flood or fire or other catastrophic event), will chart subsequent evolutionary development.[266] Like those events, segregation as a century-long evolutionary phenomenon may well have charted a path dependent course for race relations in housing, education, religious institutions, employment, and many other areas. Because so many of our modern socio-legal institutions—higher education, public schools, the professionalization of law practitioners—were formed during the segregation era, persistent racial disparities may be traceable to the racial exclusiveness of those institutions during their formative years.

Moreover, the concept of path dependence suggests that the event need not be of major significance to have long-lasting effects on outcomes. In a system that is sensitive to initial conditions, even insignificant historical events, born of chance or some minor fluctuation of a system, may have outcome-determinative effects.[267] This is particularly true early on, when first-movers are more able to parlay their advantage into increasing returns. While it is by no means certain that segregation produced current market outcomes, it becomes far more likely when one considers the duration and pervasiveness of segregation.

B. Focusing on Structural Discrimination

The lock-in model also suggests that racial disparity may be locked into the market even in the absence of ongoing intentional discrimination or racism. According to increasing returns theory, a locked-in market may continue to reproduce the structure of a

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because neighborhood location determines public financing of education and sociological effects relating to the investment of human capital. Durlauf does not include historical segregation in his account. See Steven N. Durlauf, A Theory of Persistent Income Inequality, 1 J. Econ. Growth 75 (1996); see also Steven N. Durlauf, Neighborhood Feedbacks, Endogenous Stratification, and Income Inequality, *in* Dynamic Disequilibrium Modeling: Theory and Applications 505 (William A. Barnett et al. eds., 1996) (describing feedback effects from neighborhood stratification, leading to inter-generational transmission of relative economic status).

[266] See generally Stephen Jay Gould, Wonderful Life 277–78, 280 (1989) (arguing that contingent events like the collision of an asteroid with the earth determine the path of evolution).

[267] See Arthur, Competing Technologies, supra note 57, at 17–18 (discussing the effect of "'historical small events'").

monopoly with minimum continued input from the monopolist.[268] Thus, even if levels of intentional discrimination have decreased significantly over the past thirty years, the locked-in market will continue to perpetuate racial disparities in outcome.[269] Even if civil rights laws against intentional discrimination were perfectly enforced, market lock-in would perpetuate inequality. This explanation appears consistent with the robust persistence of racialized disparity in almost every measure of success in social institutions—income, employment, education, et cetera—even in the face of government intervention to eradicate intentional discrimination. Because it proposes a more structural explanation, the model implies that we should expand our concept of discrimination, to focus not only on the individual who intentionally discriminates on the irrational basis of skin color, but more broadly on the systemic market structures and processes that reflect and reproduce white monopoly power.[270]

Likewise, because "history matters" in this narrative, the model may also be better at explaining why some racial and ethnic groups are far more disadvantaged than others by professional standards and standardized testing.[271] Differences in the history, resources, and initial competitive position of each group—how they immigrated or were transported as slaves or were invaded, how they were affected by early anticompetitive conduct—may explain their differences in performance.[272] While different groups certainly experience differing levels of current intentional discrimination, differences in early competitive position and past discrimination

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[268] "[A] company in such a position can keep its market power for sometime [sic] with a relative minimum of effort—and without engaging in anticompetitive conduct designed to maintain or extend market power." Lemley, supra note 70, at 1069.

[269] See Ford, supra note 256, at 1844–45 ("[R]acial segregation persists in the absence of explicit, legally enforceable racial restrictions [and] even in the face of civil rights reform.").

[270] See Peller, supra note 166, at 767–69, 779 (distinguishing the integrationist concept of discrimination, as individual irrational bias based on skin color, from a more radical and expansive structural view of discrimination).

[271] See Farber & Sherry, supra note 21, at 59–60 (discussing the relative success of Jews and some Asian groups).

[272] See Deborah C. Malamud, The Jew Taboo: Jewish Difference and the Affirmative Action Debate, 59 Ohio St. L.J. 915, 965–68 (1998) (arguing that Jews succeeded under conventional merit standards because they had socioeconomic advantages that distinguished them from other racial and ethnic groups).

seem far more likely explanations for current differences in position.

C. Sub-Optimal Merit Standards

Third, and most controversially, the market lock-in model of discrimination suggests that market processes in legal education may produce sub-optimal or inefficient results, in two related ways.[273] First, an anticompetitive market that excludes people of color might not meet the full range of market demand. Second, an anticompetitive market characterized by lock-in may fail to produce quality and innovation within legal institutions.

Markets with high barriers to entry for alternative-standard applicants may fail to serve significant segments of market demand. For example, although a host of factors contribute to the fact that the poor and minorities do not have equal access to legal services, evidence indicates that the prevailing cultural approach in legal education discourages law students from pursuing public interest law.[274] In fact, early proponents of affirmative action justified set-asides and racial preferences on the grounds that students of color were more likely to return to their communities or work in public interest law after graduation.[275] Recent research confirms that

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[273] The argument that the market in law practice and legal education is anticompetitive is not new. Richard Abel in his groundbreaking book argued that the elite class moved to professionalize legal practitioners and educators in order to anticompetitively close the market and gain a competitive advantage in production. See Abel, supra note 110, at 20–28. Abel framed his arguments on restraint of trade in terms of both sociological and (to a lesser extent) economic theory. See id. at 14–39; see also Shepherd & Shepherd, supra note 180, at 2095 ("[T]he ABA has exerted monopoly power not only over the market for legal training [to suppress alternative law schools], but also over three related markets: the market for the hiring of law faculty, the market for legal services, and each university's internal market for funding.").

[274] See Kristin Booth Glen, Pro Bono and Public Interest Opportunities in Legal Education, N.Y. St. B.J., May/June 1998, at 20, 20–21. See generally Richard D. Kahlenberg, Broken Contract: A Memoir of Harvard Law School 5–7, 93–95 (1992) (arguing that Harvard Law students initially interested in public interest law were diverted to corporate law careers by law school culture).

[275] See Ernest Gellhorn, The Law Schools and the Negro, 1968 Duke L.J. 1069, 1073–77, 1091–92; see also Earl L. Carl, The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor, 20 J. Legal Educ. 21, 24, 31 (1967) (arguing for support of black law schools on the grounds of community need). The

graduates of color are more likely to practice in underserved minority communities than are white graduates.[276] Similarly, commentators have called for law schools to incorporate more skills-oriented legal problem-solving in the curriculum,[277] once the province of many of the more well-integrated proprietary law schools and part-time and evening programs before they were driven out by professional organizations.[278]

More generally, an anticompetitive market in legal education and practice may not produce the superior quality and innovation typically associated with robust market competition. The Darwinian concept that competition produces the survival of the fittest, or most efficient, is a central assumption underlying neoclassical economics.[279] If increasing returns create barriers to entry that prevent competitors from introducing alternative cultural approaches in legal education and practice, then the market provides no guarantee that the standard and conventional approaches are the most efficient or optimal.[280]

The idea that efficiency is improved by a mix of competing approaches from a diverse student body is supported by evidence relating to diversified faculties in law schools. According to a study conducted recently by Deborah Merritt and Jennifer Cihon,

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University of California at Davis Medical School justified its affirmative action program by arguing that set-asides served to increase the number of physicians practicing in minority communities. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978). For an argument that conventional law school pedagogy and curriculum discourage the return of black lawyers to their communities, see David B. Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 Stan. L. Rev. 1981, 2014–19 (1993).

[276] See William G. Bowen & Derek Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 13, 171 (1998) (discussing graduates of higher education generally).

[277] See American Bar Association Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development—an Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 141–221 (1992) (designating ten skills essential to lawyering that law schools should further emphasize). See generally Elson, supra note 176 (discussing the ABA Report and the responses of the legal community to its recommendations).

[278] See Michael J. Mazza, The Rise and Fall of Part-Time Legal Education in Wisconsin, 81 Marq. L. Rev. 1049, 1055–56 (1998) (noting that night law schools and part-time programs emphasized the "practical" aspects of legal training).

[279] See Roe, supra note 36, at 641–42.

[280] Cf. Arthur, Competing Technologies, supra note 57, at 14 (discussing potential inefficiency as a familiar property of increasing returns).

schools with a higher percentage of faculty of color and women on their tenure-track faculty were more innovative than other schools, offering more new course offerings than their counterparts, and in areas other than discrimination and outsider groups.[281] In addition, legal scholarship has become remarkably more innovative and diverse as more applicants of color are hired for tenure-track faculties.[282]

It is very important to reiterate, however, that increasing returns and de facto standards are not necessarily inefficient. Much depends on whether the law school admissions market is more efficient with plural, competing standards or a single standard. For example, if law schools and the legal profession benefit from a high degree of uniformity, then the de facto standard can be efficient even though it works to limit competition. If the legal education market constitutes a natural monopoly market, where the most efficient standards for legal education are culturally specific, then efficiency may well dictate that whites supply those standardized performances.

If standardization is not desirable in the legal education market, however, then law schools might benefit from a mix of competing

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[281] See Deborah Jones Merritt & Jennifer Cihon, New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey, 47 J. Legal Educ. 524, 532 (1997). The top five areas of curricular innovation included international and comparative law, business and commercial law, discrimination and disfavored groups, health law, and constitutional law. See id. at 537. The authors distributed surveys to AALS law school deans for academic affairs, asking them to list new course offerings for three years, and to provide information about the faculty teaching the courses. See id. at 525–26. The correlation of innovation with the percentage of women faculty was statistically significant; the correlation with the percentage of minority faculty narrowly missed achieving statistical significance at the conventional level, but the authors concluded that these results also indicated a real association. See id. at 532. It bears noting that innovation was also positively correlated to high student LSAT scores, although the study did not make it clear whether this relationship could be explained by some correlation between scores and school resources. See id. at 529.

[282] See Deborah Jones Merritt & Barbara F. Reskin, Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring, 97 Colum. L. Rev. 199, 283 n.255 (1997) ("[T]he influx of female and minority scholars onto law faculties has coincided with a dramatic increase in scholarship drawing upon feminist or critical race theory. Some of those articles are among the most cited and influential works in legal scholarship today.").

approaches to legal education.[283] Even if conventional standards do benefit consumers in the legal education market, the market might nevertheless have settled on the wrong standard because of switching costs, market lock-in, and barriers to entry for a more efficient alternative.[284] Likewise, even if competition would have settled on a standard favoring whites, it might have been more efficient had a number of alternate suppliers competed to set that standard.[285] Ian Ayres and his co-authors have argued that competition from alternative suppliers or fringe competitors may promote efficiency by pushing incumbents to lower prices, bid more aggressively, or be responsive to a wider range of consumer demand, or by forestalling a complete monopoly by the dominant competitor.[286]

The central point is that it is impossible to determine in the abstract which set of market conditions or outcomes best promotes efficiency or benefits consumers. This is particularly true where, as here, market lock-in may have shaped market demand itself and foreclosed the development of alternative competitive approaches, making any direct comparison between multiple options difficult.[287]

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[283] Cf. Lemley & McGowan, Legal Implications, supra note 13, at 567 (discussing the conclusion drawn from network theory that the absence of a standard is the optimal outcome where standardization is undesirable).

[284] Cf. Lemley & McGowan, JAVA, supra note 93, at 462 ("[E]ven in markets where standardization maximizes social welfare there is at least a theoretical risk that the 'wrong' standard will be adopted. . . .").

[285] "[I]f companies competing to set an industry standard are offering different technology, this competition may serve a temporary market-disciplining purpose, allowing consumers to choose the best technical standard . . . ." Lemley, supra note 70, at 1055.

[286] In particular, Ayres and his co-authors have conducted empirical research demonstrating that affirmative action programs like set-asides push majority-owned firms to bid more aggressively, which increases the efficiency of the overall transaction and benefits consumers. See Ian Ayres & Peter Cramton, Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition, 48 Stan. L. Rev. 761, 764, 799 (1996); see also Ian Ayres & John Braithwaite, Partial-Industry Regulation: A Monopsony Standard for Consumer Protection, 80 Cal. L. Rev. 13, 23–25 (1992) (demonstrating the efficiency of subsidizing an alternate, higher-cost supplier ("second-sourcing") in order to forestall complete monopoly by a dominant incumbent).

[287] Cf. Lemley, supra note 70, at 1074–78 (noting that barriers to entry allow anticompetitive practices, such as predatory pricing and monopoly leveraging, resulting in victory other than on the merits of competing technology).

At the same time, decisionmakers should presume that locked-in monopolies produced by deliberately exclusionary conduct probably are not optimal. In antitrust "standard" cases, evidence linking the standard to anticompetitive conduct may constitute evidence that the standard is sub-optimal, on the grounds that anticompetitive conduct otherwise would not have been necessary to secure the success of optimal standards.[288] As a result, although courts give industry standards and increasing returns market outcomes wide latitude in general, they are much more willing to intervene if there is evidence of deliberate anticompetitive manipulation,[289] as there appears to be in the case of legal education.

D. Affirmative Action

Predictably, the model has much to say about affirmative action. The obvious question that arises under the model is why affirmative action exists at all, in light of the model's predictions that law schools would be reluctant to admit alternative-standard students of color. Of course, most law schools began to voluntarily adopt affirmative action programs shortly after Congress passed Title VI of the Civil Rights Act of 1964,[290] prohibiting discrimination against people of color in higher education.[291]

In fact, the model predicts that for schools wanting to admit alternative-standard students, affirmative action programs are the best way to diversify student population while avoiding switching costs. First, most schools admit students in conjunction with the standard admissions process by taking race into account as an additional or separate factor.[292] Second, most affirmative action

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[288] See Lemley & McGowan, JAVA, supra note 93, at 462 (showing that evidence that the owner of a standard has taken action to "bias" the choice may be evidence that the standard is sub-optimal).

[289] See Gates, supra note 82, at 584.

[290] Codified as amended at 42 U.S.C. §§ 2000d to 2000d-6 (1994).

[291] See Albert Y. Muratsuchi, Race, Class and UCLA School of Law Admissions, 1967–1994, 16 Chicano-Latino L. Rev. 90, 91 (1995) (observing that affirmative action programs were adopted in the early 1960s in response to the political climate created by the civil rights movement).

[292] Most law school affirmative action programs retain the standard admissions criteria but take race into account in various ways, including preferential admission

programs choose the students who have been able, primarily because of economic resources, to acquire white cultural capital.[293] Because affirmative action programs typically admit only a small number of high-scoring students of color, schools are able to minimize the program's effect on national rankings.[294] Deborah Malamud points out that by choosing the "cream of the high-scoring crop," schools admit people of color with the "least [switching] cost" to their reputation.[295] In addition, by choosing the highest scoring applicants of color, affirmative action produces a "close swap" of students of color for white students.[296] Thus, affirmative action programs, as historically constituted, probably do not create sufficient competitive pressure to promote innovation and change.

Theoretically, a much more intensive affirmative action program might be the most efficient "antitrust intervention" to reduce barriers to entry for alternative-standard applicants. By lowering switching costs and costs of production, massive affirmative action programs might create "seed" programs that trigger feedback loops favoring applicants of color. In a recent article, Randal Picker has suggested that it might be possible to overcome market lock-in by experimentally seeding alternative standards in concentrated "clusters," in the hope that a superior or competitive standard or norm would then propagate throughout the system via positive feedback loops.[297]

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programs, aggressive recruitment, and financial aid. See Okechukwu Oko, Laboring in the Vineyards of Equality: Promoting Diversity In Legal Education Through Affirmative Action, 23 S.U. L. Rev. 189, 196 (1996).

[293] See Deborah C. Malamud, Assessing Class-Based Affirmative Action, 47 J. Legal Educ. 452, 455 (1997).

[294] See id.

[295] Id.

[296] See id.

[297] Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms, 64 U. Chi. L. Rev. 1225, 1228 (1997). Picker notes that

> [t]he seeding of norm clusters might jump-start the transition from old to new, causing a "norm cascade." In this scenario, the government—or, for that matter, charities, for-profit organizations, or you and I—would encourage experimentation; and, if the conditions were right, the seeded norms would take root and spread, and society would successfully move from the old norm to the new norm. If the old norm really should survive, the experiment fails, and society loses very little.

Picker demonstrates empirically that if the cluster is the right size, a system under certain conditions will "jump start" a switch to the superior norm or standard, even if the vast majority of the system is operating under the old inferior norm.[298] Picker anecdotally points to an example of seeding norm clusters, in the form of a local antifootbinding society in China that precipitated the end of footbinding in China over the course of a single generation.[299] For Picker, the value of experimenting locally with norm-seeding is its low risk, and he recommends that "the government should embrace test policies or norms or take steps to foster social meanings in particular local contexts as a way of testing whether a superior approach can take root and spread."[300]

Likewise, government-sponsored affirmative action programs of different sizes might constitute low-risk experimental seed programs designed to remedy white monopoly lock-in. By concentrating people of color in an institution to some desired critical mass, and by increasing their number beyond those admitted under conventional standards, affirmative action programs might "tip" competition more towards people of color and away from locked-in white monopoly power.

For example, affirmative action programs could help to create a critical mass of future professors of color on law school faculties and administrations. Those admissions decisionmakers subsequently will be more likely to admit applicants of color whose

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Id. (footnote omitted). Picker creates several models to demonstrate that lock-in is much less likely because superior norms are fairly robust—that is, they will dominate over a wide range of initial conditions. See id. at 1227–28, 1286.

[298] See id. at 1284. Picker sets up dramatic simulations of his computer models (illustrated in the article and on his Web sites (http://www.law.uchicago.edu/Picker/AworkingPapers/norms.html) (footnote 52: SixCluster start) in vibrant color with easily visible dynamic movement) to demonstrate that a cluster of six players adopting the superior norm in a "sea" of 10,195 players adopting the inferior norm can nevertheless under certain conditions propagate a norm transition to the superior norm via increasing returns. See id. Picker's model only deals with network externalities in the form of collective action problems, and does not take into account any other sort of switching costs aside from the early movers' costs of adopting a disfavored social norm. See id. at 1288. The term "norm cascade" is Cass Sunstein's, meant to describe a rapid shift in norms, perhaps the product of fragile social conditions. Id. at 1228 (citing Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 909 (1996)).

[299] See id. at 1284–85 (citing Gerry Mackie, Ending Footbinding and Infibulation: A Convention Account, 61 Am. Soc. Rev. 999, 1000–02 (1996)).

[300] Id. at 1285.

cultural performances resemble their own, and to challenge the entrenchment of a de facto standard that disfavors applicants like them.[301] Moreover, the mere existence of "fringe competitors" might help to persuade mainstream law schools to adopt a more inclusive set of standards, much like the existence of Apple as a fringe competitor has induced software authors to create a more universal operating system and code in Linux and JAVA.[302]

It is questionable whether law schools could be persuaded (or directed) to adopt affirmative action at such high levels, particularly in the current legal climate.[303] Given the form that affirmative action has historically taken, with small numbers and no significant change to the mainstream admissions process, affirmative action is not likely to produce significant changes or tipping in favor of communities of color. But for schools willing to engage in massive affirmative action, that option might present one way of maximizing the likelihood of producing a real institutional change.

CONCLUSION

Government intervention to dismantle market lock-in is a very tricky business, at least from the standpoint of efficiency. Accord-

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[301] Cf. supra notes 281–282 and accompanying text (discussing the effect of female and minority faculty on curricula and scholarship). Faculty members of color were selected to staff affirmative action programs in law schools in the late 1960s and early 70s, after the enactment of Title VI. For example, the University of Washington specifically routed applications by black applicants to two committee members, one of whom was a first-year black law student. See DeFunis v. Odegaard, 416 U.S. 312, 323 (1974). The Medical School of the University of California at Davis created an affirmative action program staffed by a separate admissions committee made up of members of nonwhite racial and ethnic groups. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272 n.1, 274 (1978). Similarly, the University of Texas minority admissions subcommittee was truly a minority subcommittee, with two of three faculty members and both student members belonging to a nonwhite racial group. See Hopwood v. Texas, 861 F. Supp. 551, 560 & n.20 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

[302] See generally Ayres & Braithwaite, supra note 286, at 47 (commenting that the presence of fringe competitors encourages competitive pricing). JAVA is a programming code that is capable of operating on otherwise incompatible systems platforms. See Lemley & McGowan, JAVA, supra note 93, at 457.

[303] See, e.g., Hopwood v. Texas, 78 F.3d 932, 935 (5th Cir.) (concluding that the University of Texas Law School "may not use race as a factor in law school admissions"), cert. denied, 518 U.S. 1033 (1996).

ing to most commentators on increasing returns in the antitrust context, policymakers should be extremely reluctant to intervene to impose a remedy in the case of market lock-in.[304] Mark Roe points out the inherent dangers associated with trying to centrally steer what is by definition a set of dynamic processes with no centralized controller.[305] He argues that theories about increasing returns and positive feedback (and path dependence) are not sufficiently well developed to prescribe with confidence any sort of remedy.[306] Under an economic model with multiple potentially efficient outcomes, it seems obvious that government should tread lightly.

The uncertainty surrounding market lock-in highlights a more general uncertainty plaguing any characterization of discrimination as a product of path dependence: It may be affirmatively inefficient or undesirable, given the course of evolutionary events, to backtrack to the original point of decision and take another path.[307] Although legal education might well have benefited in the early going from competition by alternative cultural approaches from people of color, law schools may now have organized too many institutional structures and processes around white approaches to introduce effective competition.

In particular, the barriers to entry discussed above may make it exceedingly costly either to switch to alternative standards or modify existing ones. For the barriers to entry related to rankings and the LSAC database, the biggest hurdle would seem to be the collective action problem of coordinating all law schools to switch or modify criteria at the same time. However, if law schools agreed that it was desirable to adopt a standard more favorable to people of color, then a central coordinating authority like LSAC might

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[304] See Lemley & McGowan, Legal Implications, supra note 13, at 497 ("The conclusion that a standard . . . is sub-optimal should be approached with caution.").

[305] See Roe, supra note 36, at 666; see also The Economy as an Evolving, Complex System II, at 4 (W. Brian Arthur et al. eds., 1997) (noting that one of the six features of the complexity model of the economy is that no global entity controls interactions).

[306] See Roe, supra note 36, at 667.

[307] See Daniel L. Rubinfeld, Antitrust Enforcement in Dynamic Network Industries, 43 Antitrust Bull. 859, 869 (1998).

prove helpful to coordinate negotiated or mandatory changes.[308] More difficult is the collective action problem at the larger network level. Switching must happen not only at law schools and the LSAC database, but also with legal employers, clients, and other members of the profession as well. Even if law schools adopted admissions standards favoring alternative cultural approaches, those approaches might not produce results at the level of the employer because white-monopoly-created institutions have come to define success in culturally specific ways at that level as well.

The foregoing discussion suggests that the problem is not only one of collective action and network effects but also of "cumulative effects." Many of the legal profession's practices—the pedagogy in the law school, the rules of argument in the courtroom, the kinds of conversations a lawyer has with her client—have grown up around the de facto standard. As a result, switching might entail not only restructuring the network itself, but also restructuring many of the internal workings of organizations, as Nunn's critique of the profession implies.[309]

Of course, the biggest barrier to switching likely is the widespread conviction among predominantly white law school faculty members and administrators that merit standards are culturally neutral, that they accurately reflect an individual's abilities and productivity, and that communities of color still lack the appropriate educational resources to achieve to their full potential. But the radical critique of merit, offered by scholars who are themselves the fruit of the "seed program" of affirmative action, suggests that racial inequality will persist even in the face of fully equalized educational resources and perfectly enforced civil rights legislation.

Although this Article suggests that alternative standards may not be compatible with the de facto standard, it may well be that a working relationship of sorts can be fashioned so that several competitive standards can operate competitively but compatibly. Rankings could be expanded to include categories that measure

[308] Cf. Arthur, Mechanisms, supra note 45, at 118 (theorizing that when coordination effects cause lock-in, a negotiated or mandatory changeover by fiat can provide exit from lock-in).

[309] See supra note 239 and accompanying text.

the quality of alternative admissions standards and curricula.[310] Administrators could expand the LSAC database to include the results of a wider range of alternative predictive indicators to supplement the LSAT and undergraduate grades, although as noted earlier, schools choosing to rely on alternative indicators to the exclusion of conventional criteria would face collective action problems.[311] Admissions professionals committed to diversity should search long and hard for ways to make competing standards compatible, or for a more "universal" or "open" standard or mode of network communication.[312]

Inevitably, however, efficiency concerns must be balanced against normative notions of competitive and distributive justice. If cultural standards are truly incompatible, and a single standard is in fact the most efficient in the legal education market, then "efficiency" might restrict remedies to limited affirmative action programs at the point of entry, or to educating students of color more vigorously at the primary education level to assimilate white cultural practices. But ideas about cultural identity should make policymakers quite reluctant to adopt the assimilation approach, particularly when the inefficiency of switching can be traced directly to anticompetitive conduct by whites.

Although that discussion is beyond the scope of the antitrust analogy, the market framework may help to capture the fundamental unfairness of having anticompetitively excluded people of color from competing to create the foundational standards of modern legal education. While many conservative antitrust scholars reject competitive fairness and the equality of opportunity to compete as a rationale for antitrust law, others acknowledge that it is, or should be, part of the antitrust calculus. In either event, antitrust and market lock-in analysis should compel us to consider the relationship between early anticompetitive conduct and current racially disparate market outcomes.

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[310] Just adding some measure of diversity in the categories to calculate national rank might prove helpful.

[311] See supra note 198 and accompanying text.

[312] Compare, for example, JAVA, an open standard of computer software programming code "'capable of operating on many different, otherwise incompatible systems platforms.'" Lemley & McGowan, JAVA, supra note 211, at 457.

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