

# LOCKED IN INEQUALITY: THE PERSISTENCE OF DISCRIMINATION†

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*In this Article, I argue that the practice of charging school fees to attend public school is an example of locked-in discrimination that persists over time, even in the absence of intentional discrimination. Exploring the lock-in model of discrimination in the unique context of South Africa, I make two central points. First, discriminatory practices often become locked into institutional structures because high switching costs—the costs of moving from a discriminatory practice to an inclusive one—make it too difficult for an institution to discontinue discriminating. Even when institutional actors are fully committed to eradicating racial disparity, they may be constrained from doing so by high switching costs. Second, contemporary anti-discrimination law in the U.S. may be particularly ill equipped to deal with locked-in discrimination. U.S. equal protection jurisprudence only prohibits discrimination that can be traced to an individual or group of individuals who intend to discriminate, and does not address locked-in discrimination that persists even after institutional actors no longer intend to discriminate.*

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## INTRODUCTION

Unlike most national constitutions, the South African constitution guarantees both an affirmative right to basic education and the right to equality under the law.<sup>1</sup> Despite these constitutional guarantees, however, the South African government disproportionately excludes poor Black learners from attending public school, by charging private tuition or “user fees.”<sup>2</sup> Nearly all public schools charge fees, and fifteen percent of schools charge more than 500 Rand (“R500”) per year.<sup>3</sup> Indeed, many of the historically White schools, located in the wealthiest communities, charge as much as R10,000 per year, far beyond the means of all but the most well-to-do families. Predictably, the user fee system in South Africa reproduces much of the racial and class inequality in access to education that marked the apartheid era, despite a statutory exemption process designed to provide access for the poor.<sup>4</sup> Why would the new, Black-majority government continue to charge user fees for education, when doing so reproduces the very racial disparities that the new government sought to eradicate? In this Article, I argue that the South African government has retained the practice of charging school fees because it does not want to pay the prohibitive switching costs associated with a more egalitarian funding policy. More generally, I argue that the practice of charging private fees to finance South African public

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1. S. AFR. CONST. ch. II, § 29; S. AFR. CONST. ch. II, § 9. Section 29 of the South African constitution guarantees to all people “the right to a basic education, including adult basic education.” *Id.* Section 9 of the constitution guarantees a right to equality before the law. *Id.*

2. For a general discussion by South African scholars about the practice of charging user fees, see Salim Vally & Yolesa Dalamba, *Racism, ‘Racial Integration’ and Desegregation in South African Public Secondary Schools*, in S. AFR. HUMAN RIGHTS COMMISSION COMBINED REPORT 47 (1999).

3. See S. AFR. DEPARTMENT OF EDUCATION, ANNUAL REPORT (1999). At exchange rates in August 2002, approximately 10 South African rand to the dollar, 500 rand equals approximately 50 dollars.

4. See *infra* Part III (discussing the income-based exemption scheme created by national statute). For a more doctrinal discussion about racial and class inequalities produced by school fees in South Africa, and possible constitutional challenges to the practice of charging fees, see Daria Roithmayr, *The Constitutionality of User Fees in South African Public Education*, 19 S. AFR. J. HUM. RTS. (forthcoming 2003).

education constitutes an example of the “market lock-in” model of discrimination. The market lock-in model, which I have developed in earlier work, draws from recent work in antitrust and economic theory on the durability of monopolies.<sup>5</sup> Lock-in literature argues that, even in the absence of continuing anticompetitive behavior, market monopolies can persist over long periods of time and eventually become “locked” in place.<sup>6</sup>

For example, scholars have used the lock-in model to explain how Microsoft’s early advantage in computer operating systems became self-reinforcing over time.<sup>7</sup> In the operating systems market, institutional links between software authors and operating systems permitted Microsoft’s early monopoly advantage to reproduce itself. Software authors, who wanted the biggest market for their products, increasingly wrote programs specifically for Windows®, the more popular operating system. In turn, consumers, who wanted the widest choice of software, increasingly purchased Windows® as their operating system of choice. More authors produced more Microsoft-specific software, thereby producing even more consumers, and so on. Microsoft’s early lead grew exponentially, without the need for further innovation or unfair conduct, and Windows’® dominance in the operating systems market eventually became locked in.<sup>8</sup>

Just as Microsoft’s early advantage has become locked into the market, the market lock-in model of discrimination argues that a racial group’s early monopoly advantage can become self-reinforcing and ultimately locked in, particularly when the racial monopoly operates for a long time. More specifically, the lock-in model argues that in the U.S., as in other countries, Whites monopolized access to jobs, housing, education, and wealth, in a racial monopoly that lasted for over three hundred years. The lock-in model suggests that this White monopoly advantage may have become self-reinforcing and perhaps locked in.

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5. See Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000) [hereinafter *Barriers to Entry*].

6. See *id.* at 742–53. The market lock-in model draws from a range of lock-in literature that covers various concepts, including de facto standards, increasing returns, and network externalities. See, e.g., W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 7–8 (1990); W. Brian Arthur, *Increasing Returns and the New World of Business*, 74 HARV. BUS. REV. 100 (1996); 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); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985); Mark Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488–99 (1998).

7. ARTHUR, *supra* note 6, at 102.

8. *Id.*

This Article explores further implications of the market lock-in model in a wholly different context: public education financing in post-apartheid South Africa. South Africa appears to be a particularly compelling place to explore the contours of the market lock-in model of discrimination for two reasons. First, the transition out of apartheid is relatively recent; the country's first democratic elections were held in 1994.<sup>9</sup> Given that timing, it may be much easier to trace discriminatory practices to their apartheid-based roots in order to determine whether path dependence plays a role in continuing discrimination. By comparison, it is more difficult to link current practices to earlier historical practices of racial exclusion here in the U.S. because "transition" occurred more than forty years ago.<sup>10</sup>

In addition, intentional discrimination is less likely to explain persistent inequality. Given that the Black-majority African National Congress ("ANC") has controlled the South African government since 1994, intent by the government to discriminate is less likely to be a motive behind any decision to retain an apartheid era practice.<sup>11</sup> Thus, it might be easier to link discriminatory practices to structural forces of market lock-in.<sup>12</sup>

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9. In parliamentary style elections, the African National Congress ("ANC") was elected to power, although initially it was required to share power with other parties in a "government of national unity." See Jenni Karlsson et al., *A Critical Examination of the Development of School Governance Policy and Its Implications for Achieving Equity*, in THE STATE, EDUCATION AND EQUITY IN POST-APARTHEID SOUTH AFRICA 139 (E. Motala & J. Pampallis eds., 1999) [hereinafter *School Governance Policy*]. In the more recent 1999 elections, the ANC retained power in all branches of elected government except in one province, where the Inkatha Freedom Party retained a stronghold. After that election, the "new" National Party formed an alliance with the Democratic Party to exclude the ANC in the Western Cape. See Susan Daley, *Mandela Turns Over South African Presidency*, CHIC. TRIB., June 15, 1999, at 4; Dean E. Murphy *Anger Boils in Province After Coalition Excludes The ANC*, L.A. TIMES, July 3, 1999, at A2.

10. At the same time, the shorter amount of time may make a less compelling case for lock-in. To pronounce an institutional process to be locked-in after only eight years may be a bit premature. I thank Professor Michelle Adams for this insight. Telephone interview with Michelle Adams (May 13, 2003).

11. In spite of the party's success, however, increasing numbers of South Africans are becoming disaffected with the ANC. See Tom Nevin, *Mbeki Grows Bigger Than ANC*, AFRICAN BUSINESS, Feb. 1, 2003, at 44.

12. In South Africa, as in most places with a history of legally enforced segregation, class significantly correlates with race. The correlation, of course, is not perfect. It is important to note, for example, that many historically White, former Model C schools currently enroll significant numbers of Black learners, who come from a relatively small but growing Black middle class. Nevertheless, it is possible to discuss race and class together as the locus of discrimination in public education. Indeed, a recent study conducted on school financing in the Eastern and Western Capes demonstrates the extremely strong correlation between the racial composition of a school, the poverty of the surrounding community, and the amount of fees collected by a school governing body. See Edward B. Fiske & Helen F. Ladd, *Financing Schools in Post-Apartheid South Africa*:

In this Article, I use the South African school fee system to develop two central arguments about locked-in discrimination. First, I develop more fully the idea that racist practices can become locked into institutional structures because switching costs make it too costly to adopt a less discriminatory set of practices. Second, I argue that U.S. constitutional jurisprudence fails to address locked-in discrimination because the Equal Protection Clause only focuses on intentional discrimination and not on institutional discrimination.

The first argument about switching costs proceeds largely as an empirical description of South African politics. In particular, I argue that the new South African government has chosen to retain user fees in public education, not because it intends to discriminate, but because the government would find it too costly to fund public education without relying on such fees.<sup>13</sup>

The history of the user fee system, and its path dependence, is central to understanding the switching costs argument. The apartheid regime under the National Party ("NP") at the end of the 1980s originally adopted user fees in education as part of its effort to retain White control over White public education even after transformation.<sup>14</sup> More specifically, the NP adopted school fees as part of a broader unilateral shift from national control over education to local control.<sup>15</sup> Research confirms that at the end of apartheid, many of the so-called model C schools (historically White schools) charged fees that completely excluded Black learners. In 1993, the average Model C primary school charged R1100 and the average secondary school charged R1600.<sup>16</sup> Thus, fees for one child cost an average Black family more than fourteen percent of its income, but only 3.5% of an average White family income.<sup>17</sup> It is not surprising that after 1994, the new democratic government immediately did away with formal Black enrollment limitations in public schools.<sup>18</sup> Public schools were prohibited from imposing any limitation whatsoever on the number of Black students who could attend a particular school.<sup>19</sup>

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Initial Steps Towards Fiscal Equity (June 2002) (unpublished manuscript, on file with author) [hereinafter *Financing Schools*].

13. See *infra* Part IV.A.1 (discussing switching costs).

14. See *infra* Part II (describing the decision by NP Minister of Education, Piet Clase, to adopt the Model C school format, which depends heavily on parent-supplied school fees).

15. See *id.*

16. See *id.*; see also Leon Tikly & Thabo Mabogoane, *Marketisation as a Strategy for Desegregation and Redress: The Case of Historically White Schools in South Africa*, 43 INT'L REV. EDUC. 157, 168 (1997).

17. *Id.*

18. See *id.*

19. See *infra* Part II (describing the lifting of racial restrictions and repeal of all segregation laws relating to education).

Given the racist history of the user fee system and its impact on poor Black learners, however, it is remarkable that the user fee system remains very much in place today, nine years after the transformation from apartheid. It is even more surprising to learn that the ANC, after studying the problem at length, deliberately adopted a school financing mechanism that relied heavily on user fees.<sup>20</sup>

This Article argues that the ANC government chose to retain the user fee system because prospective switching costs made any move to a more redistributive system potentially too costly.<sup>21</sup> A switch to a system that did not rely on user fees inevitably would have produced one of two types of switching costs—either massive increased spending for public education or White flight from public schools. Initially, in the absence of user fees, a move to equalize funding levels upwards to the level of White schools would have required the government to increase its education budget significantly.<sup>22</sup> Indeed, available evidence indicates that the government would have had to expend a significantly greater portion of the domestic budget on education. Given the country's recently adopted emphasis on fiscal austerity, however, any increase in the education budget would have had significant political and economic repercussions for the new government.<sup>23</sup>

Alternatively, in the absence of user fees, a move to equalize downward to the level of non-White schools would have risked White flight from public schools.<sup>24</sup> In turn, any such exodus of middle and high-income “opinion-makers” and “decision-makers” might have triggered further reductions in spending, and endangered the overall health of public education.<sup>25</sup> In light of the unacceptably high switching costs associated with either choice, the new government opted instead to retain the user-fee system, despite the ANC's intent to eradicate the racial stratification that characterized apartheid.<sup>26</sup>

The second argument in this Article is less descriptive and more normative, in that it criticizes the effectiveness of U.S. anti-discrimination law. In particular, I argue that U.S. law does not address locked-in discrimination because the U.S. Equal Protection Clause does

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20. See *infra* Part IV.A.1 (describing the decision by the Minister of Education and Parliament to retain the user-fee features of the Model C school in new school financing legislation).

21. See *infra* Part IV (detailing the argument on switching costs and describing the operation of positive feedback loops).

22. See *id.*

23. See *id.*

24. See *id.* (describing the prospective loss of funding per learner for students at former Model C schools in the absence of a government decision to budget more national revenue for education).

25. See *id.*

26. See *id.*

not invalidate discrimination that is not intentional. Under *Washington v. Davis*,<sup>27</sup> the U.S. Supreme Court has held that the Equal Protection Clause does not address discrimination other than that which can be traced to individual or institutional intent to discriminate.<sup>28</sup> Because locked-in discrimination occurs at the institutional and not individual level, U.S. constitutional law cannot remedy this type of inequality. In contrast, South African constitutional law permits plaintiffs to challenge government action that was not intended to discriminate, but which has the effect of creating racial disparity.<sup>29</sup> Thus, the South African Equality Clause may be far more effective at dismantling the legacy of apartheid than the U.S. Equal Protection Clause is at eradicating the legacy of Jim Crow.<sup>30</sup>

The following sections develop these arguments in the context of user fees. In Part I, I outline the basic elements of the market lock-in model, with a particular emphasis on switching costs, positive feedback, and path dependence. In Part II, I sketch the outlines of the user fee system in its current form and highlight the key provisions from the South African Schools Act and the administrative regulations from the South African Department of Education. In this section, I also review the history of the user fee system, tracing its roots to the end of apartheid, when the NP attempted to retain White control over education funding. In Part III, I describe the current racial and class inequalities that characterize public education at the primary and secondary levels in South Africa. Here, I link those inequalities to disparities in funding created by the user fee system.

In Part IV, I argue that the user fee system and its accompanying inequalities now have become locked into the structure of public education because switching costs make any non-user fee system too difficult to adopt. I also argue here that switching costs have become self-reinforcing over time because of the relationship between funding and the presence of middle and high-income families in the system. In addition, I explore potential remedies for locked-in discrimination in South African public education financing. In particular, I propose a partial ceiling on user fees, wherein the government continues to permit user fees and private contributions, but redistributes a portion of the resources received above a certain threshold to historically disadvantaged schools. In Part V, I conclude by examining the implications of the lock-in model of discrimination for anti-discrimination law. In this section, I compare the U.S. legal model, which focuses on discrimination as an intentional phenomenon, with the South African model, which focuses

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27. 426 U.S. 229 (1976).

28. See *infra* Part V.A (discussing *Washington v. Davis* in detail).

29. See *id.*

30. See *id.* (analyzing school fees under the South African constitution).

both on intent and effects. I conclude by arguing that U.S. constitutional law cannot effectively address locked-in discrimination because it requires that discrimination be intentional.

### I. THE MARKET LOCK-IN MODEL OF DISCRIMINATION: A PRIMER

In previous work, I have sketched out the market lock-in model of discrimination. The model suggests that discrimination persists because segregation-era discriminatory practices have become structurally locked into institutional processes.<sup>31</sup> It will be useful to rehearse those elements of the lock-in model that have relevance here.

The market lock-in model of discrimination draws heavily from recent work in economics, antitrust theory, and complex systems theory.<sup>32</sup> This literature argues that market monopolies can become self-reinforcing, locked in, and ultimated under certain circumstances. For example, in markets characterized by positive feedback, an early competitive advantage can feed on itself to produce a perpetually increasing lead that ultimately becomes impossible to overcome. To illustrate, search engines typically rank websites on the basis of how popular they are with consumers, in this case, by measuring how often a particular document is cited by other web pages.<sup>33</sup> In the website market, a small advantage over other competitors may become automatically self-reinforcing because citations on other web pages will produce a higher search engine ranking, and a higher search engine ranking in turn will produce more citations on other web pages. Thus, the website's advantage can progressively reinforce itself without any further improvements or innovations.<sup>34</sup> Over time, the more popular web page accrues such a commanding lead that competitors cannot catch up. When that occurs, we say that the product has become "locked-in" to its monopoly or market leader position.

The market might also become locked-in because of high switching costs—the costs of switching from the incumbent's product to a competitor's product. Lock-in can occur when switching costs can become too high to permit consumers to move away from the incumbent's product and toward a competitor's product, even when the latter is more

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31. See generally *Barriers to Entry*, *supra* note 5.

32. See *id.* at 732, 742.

33. See Sergey Brin & Lawrence Page Official Webpage, *The Anatomy of A Large-Scale Hypertextual Web Search Engine*, at <http://www7.scu.edu.au/programme/fullpapers/1921/com1921.htm> (last visited Nov. 24, 2003) (describing the algorithm used to obtain the function "Page Rank," which is derived in part from the number of citations to a document on other web pages).

34. See *Barriers to Entry*, *supra* note 5, at 743 (describing the positive feedback loops created by increasing returns).



innovative.<sup>35</sup> When consumers switch from a VCR to a DVD player, for example, they must pay the cost to buy the new player. Because the VCR and DVD are both “network” products, however, consumers must also pay two additional switching costs: the cost to recreate their video library in DVD format and the cost of losing access to a network of video suppliers, such as friends, family, or video stores, if other users have not yet made the switch. Such additional switching costs may lock in consumers to a product even when alternative technology is more desirable.

Markets characterized by switching costs and self-reinforcing positive feedback also frequently exhibit a characteristic called “path dependence.”<sup>36</sup> In path-dependent markets, historical events that occur early in the formation of the industry can have a significant effect on market outcomes.<sup>37</sup> For example, in the context of software development, the first competitor to bring a particular innovation in software to the market (the so-called “first mover”) frequently develops a significant advantage, like being the first to set the industry standard that will link other users to each other.<sup>38</sup> This advantage might become self-reinforcing if customers choose the product for the increasingly large number of network users—each new customer makes the product progressively more valuable.<sup>39</sup> Accordingly, a market competitor might achieve a monopoly or near-monopoly position because the competitor was the first mover. This is true even when the market competitor has not engaged in predatory behavior.<sup>40</sup>

Building from the concept of a locked-in market monopoly, I have developed the lock-in model of discrimination to explain why White

35. See *id.* at 747 (citing A. Douglas Melamed, *Network Industries and Antitrust*, 23 HARV. J.L. & PUB. POL’Y 147, 150 (1999)) (describing switching costs).

36. See *Barriers to Entry*, *supra* note 5, at 742. With reference to the notion 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 *Barriers to Entry*, *supra* note 5, at 742 (citing S. J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-in and History*, 11 J.L. ECON. & ORG. 205 (1995)).

38. See Marvin B. Lieberman & David B. Montgomery, *First-Mover Advantages*, 9 STRAT. MGMT. J. 41 (1988) [hereinafter *First-Mover Advantages*]; Marvin B. Lieberman & David B. Montgomery, *First-Mover (Dis)advantages: Retrospective and Link with the Resource-Based View*, 19 STRAT. MGMT. J. 1111 (1998). But see Rajshree Agarwal & Michael Gort, *First-Mover Advantage and the Speed of Competitive Entry, 1887–1986*, 44 J.L. & ECON. 161 (2001) (arguing that in recent history, being first to market confers less competitive advantage than before).

39. See *First-Mover Advantages*, *supra* note 38, at 41–47 (discussing first mover advantages from technological leadership, research and development, patents, pre-emption of scarce assets and switching costs).

40. See *Barriers to Entry*, *supra* note 5, at 738.

“monopolies” or “cartels” might persist, even in the absence of intentional discrimination.<sup>41</sup> Using this model, I argue that Whites monopolized access to resources and opportunities during slavery and segregation, and this early White monopoly advantage has now become locked into institutional structures and processes.

For example, in earlier work, I have argued that discriminatory practices in law school admissions have become locked in because of switching costs associated with moving away from the use of standardized testing in admissions.<sup>42</sup> Over time, law schools increasingly have come to rely on the Law School Admissions Test (“LSAT”), despite the fact that the test disproportionately and unfairly excludes applicants of color. As has been true during the entire time the LSAT has existed, reliance on LSAT scores disproportionately excludes Black and Latino applicants on the basis of race and class.<sup>43</sup> Even in the face of the test’s discriminatory impact, however, few law schools have stopped using the LSAT in their admissions process.

This is largely because any law school choosing to eliminate the test or reduce its weight would face significant potential switching costs in doing so.<sup>44</sup> In particular, a school risks a potentially significant drop in its ranking in *U.S. News and World Report*, and thereby risks a corresponding loss of reputation, enrollments, employability of graduates, and funding from alumni donors.<sup>45</sup>

The LSAT example also demonstrates the role that positive feedback can play in locking in early White monopoly advantage.<sup>46</sup> The more highly placed a law school is in the rankings, the more easily it will attract candidates with high LSAT scores. In turn, the higher the LSAT scores, the better a law school does in the rankings. Thus, the law school’s position in the rankings depends on LSAT scores and LSAT scores in turn depend on rankings.<sup>47</sup> Because of this self-reinforcing feedback loop, conventional law school criteria become progressively more locked in and harder to dismantle, despite the fact that they disproportionately exclude Blacks, Latinos, and other racial groups.<sup>48</sup>

Third, continuing White dominance in economic and educational opportunities exhibits the quality of path dependence. Again, path dependence is the notion that early historical events play a significant role in determining market outcomes long afterwards.<sup>49</sup> In the LSAT

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41. See *id.* at 754–55.

42. See *id.* at 775–78.

43. See *id.* at 763.

44. See *id.* at 774–75.

45. See *id.* at 767–69.

46. See *id.* at 764–75.

47. See *id.*

48. See *id.*

49. See *id.* at 764.

example, I pointed out that law schools developed and adopted the LSAT during the turn of the century, at a time when it was routine and uncontroversial to exclude people of color from legal institutions.<sup>50</sup> Moreover, historical evidence indicates that standardized tests were developed for the explicit purpose of excluding minorities.<sup>51</sup>

Given that history, it comes as no surprise that the LSAT continues disproportionately to exclude applicants of color.<sup>52</sup> In particular, the lock-in model suggests that racial exclusion early during the formation of contemporary law schools provided Whites with a significant advantage that has become self-reinforcing over time. Accordingly, this advantage has now become locked into law school admissions because law schools are not willing to pay the significant switching costs of eliminating the test.

In general, the market lock-in model of discrimination illustrates two important points. First, existing racial disparities can be traced in very specific ways to earlier discriminatory events, when one group has manipulated the law and other social institutions to gain an unfair advantage over another.<sup>53</sup> Second, in the presence of certain dynamic forces, racial disparities can become self-reinforcing and ultimately locked into institutional structures and relationships, even in the absence of continuing intentional discrimination.<sup>54</sup> The next section describes the early historical events surrounding the South African government's decision to charge school fees for public schools.

## II. THE USER-FEE SYSTEM, PRESENT AND PAST

### A. *The Regulatory Framework of Public School Financing*

The South African Schools Act ("SASA") and its accompanying administrative regulations govern public school financing at the national level.<sup>55</sup> Passed in 1996, SASA attempts to redress inequities by relying on private parental resources for wealthier schools to make up funding

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50. See *id.* at 758–61.

51. See *id.*

52. See *id.* at 762–63; see also Daria Roithmayr, *Deconstructing the Distinction Between Merit and Bias*, 85 CAL. L. REV. 1449 (1997) (arguing that the LSAT's disproportionate impact on applicants of color can be traced to the fact that aptitude tests were adopted by institutions at the turn-of-the-century to exclude Jews and people of color).

53. See *Barriers to Entry*, *supra* note 5, at 785–87 (arguing that segregation played an important path-dependent role in charting the subsequent evolutionary development of race relations in the U.S.). In the U.S. context, the model has focused on current discriminatory practices that were originally developed during the Jim Crow era but that persist today, even after the enactment of civil rights legislation.

54. See *id.* at 788 (arguing that because discrimination is self-reinforcing, it persists even in the absence of continuing intentional discrimination).

55. South African Schools Act, No. 84 (1996) [hereinafter SASA].

shortfalls, and redistributing a relatively small portion of state funds to needy schools. SASA funds school budgets from two different sources: private sources and state funds. For many schools, particularly those that were historically White, a substantial source of funds comes from school fees.<sup>56</sup>

Indeed, SASA actually requires communities to supplement state funds: by charging privately generated user fees, by soliciting voluntary contributions, or by supplementing resources in some other way. These supplemental funds are then administered by the local school governing body ("SGB").<sup>57</sup> More specifically, Section 36 of SASA mandates that an SGB "take all reasonable measures within its means to supplement the resources supplied by the state in order to improve the quality of education provided to all learners at the school."<sup>58</sup>

Within the framework of this mandate for supplemental resources, SASA grants discretion to the local community and SGB to decide whether to charge fees. Section 39 of SASA permits schools to charge fees if a resolution is adopted by a majority of parents attending the school budget meeting.<sup>59</sup> Parents are permitted to determine both the amount of the fees and the specific equitable criteria to exempt those parents who are unable to pay them.<sup>60</sup> Section 37 requires that school fees be paid into the school fund, to be used only for educational purposes. Under a 1997 amendment to SASA, Parliament expressly provided that such fees could be used to hire additional educators, who are employed directly by the SGB.<sup>61</sup>

In an effort to temper the intrinsic discriminatory effect of school fees, SASA requires partial or full exemption for families who cannot afford to pay fees. At least in theory, the regulations prohibit SGBs from excluding learners who cannot pay fees, although it is extremely important to note that parents can be sued for failure to pay.<sup>62</sup> Under these regulations, SGBs must fully exempt parents whose income is less than ten times the annual school fee, and partially exempt those whose

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56. See S. AFR. DEPARTMENT OF EDUCATION, A REVIEW OF THE FINANCING, RESOURCING AND COSTS OF EDUCATION IN PUBLIC SCHOOLS 84 (2003) [hereinafter 2003 FINANCING REPORT] (stating that private expenditures account for thirty-five percent of funding for historically advantaged schools, but only eight to eleven percent of overall funding).

57. SASA requires that each public school create a "school governing body" of parents, teachers, and learners, whose charge it is to administer and control the property of the school and make decisions regarding school operating procedures. See SASA, *supra* note 55, § 16.

58. See *id.* § 36.

59. See *id.* § 39.

60. See *id.*

61. Education Laws Amendment Act 100 of 1997 at 4-5 (amending § 20 of Act 84 of 1996) in 389 Government Gazette (No. 18480).

62. SASA, *supra* note 55, § 41.

incomes are less than thirty times, but more than ten times, the fee.<sup>63</sup> Partial exemptions are granted at the discretion of the SGB.<sup>64</sup> However, if parental incomes are more than thirty times the fee, parents cannot qualify for any exemption.<sup>65</sup> The regulations also provide for conditional exemptions, which exempt families who can plead special circumstances, either relating to a parent's ability to pay fees or ability to collect information about income.<sup>66</sup>

In addition to private supplemental resources, SASA funds public schools through state funds. These funds fall into one of three categories: personnel funding, capital funding, and non-personnel, non-capital ("NPNC") funding used for operation and maintenance of schools. With regard to NPNC funding, which makes up eight to ten percent of a school's expenses,<sup>67</sup> SASA directs the government to create some form of equitable redistribution to target the most disadvantaged schools.<sup>68</sup> Under this mandate, the Norms and Standards for School Funding ("Norms and Standards") redistributes funds by equitably targeting funding on the basis of "need." The regulations direct the government to determine need by assessing the school's current capacity and quality.<sup>69</sup> More specifically, the Norms and Standards sets forth a "resource targeting table," which

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63. See *id.* § 39 at paras. 129 (full exemption) and 131 (partial exemption). The administrative regulations provide detail on the exemption procedures. Parents wishing to qualify for an exemption must apply in writing, or in person if desired. See S. AFR. DEPARTMENT OF EDUCATION, EXEMPTION OF PARENTS FROM PAYMENT OF SCHOOL FEES REGULATIONS para. 4 (1998). When submitting an application, parents must provide evidence of income, assets and liabilities, and other information requested by the SGBs. Governing bodies must render a decision within twenty-one days of the application, and if the governing body denies a request for exemption, parents have the right to appeal. Although the exemption policy looks quite sound on paper, *id.* at paras. 5–7, as this Article later discusses, the exemption regulations do not work well enough to provide access to quality education for those who cannot pay.

64. See S. AFR. DEPARTMENT OF EDUCATION, NATIONAL NORMS AND STANDARDS FOR SCHOOL FUNDING para. 132 (1998) available at <http://www.polity.org.za/html/govdocs/policy/norms&standards.html> [hereinafter NORMS AND STANDARDS]. The Norms and Standards are administrative regulations, issued by the Department of Education to implement the requirements of SASA.

65. *Id.* at para. 133.

66. *Id.* at para. 134. In essence, this regulation makes it clear that exemptions do not waive the parents' liability on any debt incurred for unpaid fees.

67. 2003 FINANCING REPORT, *supra* note 56, at 32 (stating that "[i]n most provinces, personnel expenditure accounts for over 90% of public ordinary school expenditure").

68. In particular, Section 34(1) of SASA instructs that "[t]he state must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision." SASA, *supra* note 55, § 34(1).

69. See NORMS AND STANDARDS, *supra* note 64, at paras. 98–104, fig. 2 (targeting schools for funding on the basis of need, which is defined to include an assessment of the physical condition and crowding in the existing school, as well as an evaluation of the relative poverty of the community served by the school).

allocates a certain percentage of resources to schools based on their ranking in a hierarchy of need.<sup>70</sup> According to the statutory table, the poorest twenty percent of school districts receive about thirty-five percent of available NPNC resources, while the wealthiest twenty percent, which are historically White, receive only five percent of the resources.<sup>71</sup>

As the next section will discuss, although the Department of Education designed the Norms and Standards to target poor learners, poor learners still receive less NPNC funding from the government than do wealthier learners. This disparity is in part traceable to differing allocations from the national education budget to each province, and in part to the differing ability of each province to raise supplemental provincial tax revenue internally.<sup>72</sup>

In contrast to the progressive targeting of NPNC costs, until very recently, the Norms and Standards have not equitably allocated funding for personnel costs, which make up over ninety percent of school budgets, and an even greater percentage in the poorest schools.<sup>73</sup> Until this year, all public schools received per teacher funding with regard to personnel costs, which included salaries for teaching and non-teaching personnel. These salaries were uniform across schools and varied only to reflect differences in seniority and qualifications.<sup>74</sup>

Although the Norms and Standards regulations acknowledged significant historical inequities in personnel,<sup>75</sup> they left the crafting of a remedy to negotiation between the Ministry of Education and the teachers' unions.<sup>76</sup> Beginning in 2003, however, teaching positions will be

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70. *Id.* at fig. 2.

71. *Id.*

72. See 2003 FINANCING REPORT, *supra* note 56, at 22–23.

73. See Katerina Nicolaou, *The Link Between Macroeconomic Policies, Education Policies and the Education Budget*, in *THE STATE, EDUCATION AND EQUITY IN POST APARTHEID SOUTH AFRICA: THE IMPACT OF STATE POLICIES* 53, 84 (Enver Motola & John Pampallis eds., 2002).

74. Historically White schools still employ a disproportionately high percentage of the better-qualified teachers in public education. Early attempts to re-deploy the most experienced teachers to the neediest schools failed completely, because those predominantly White teachers elected to take voluntary severance packages rather than teach in historically disadvantaged schools. For a detailed history of teacher rationalization and its failures, see Salim Vally & Console Tleane, *The Rationalization of Teachers and the Quest for Social Justice in Education in an Age of Fiscal Austerity*, in *THE STATE, EDUCATION AND EQUITY IN POST-APARTHEID SOUTH AFRICA: THE IMPACT OF STATE POLICIES* 178 (Enver Motola & John Pampallis eds., 2002) [hereinafter *Rationalization*].

75. See NORMS AND STANDARDS, *supra* note 64, at paras. 34, 37.

76. See *id.* at paras. 31, 38. Paragraph thirty-one provides for leaving the teaching personnel funding to agreements between national teacher unions and Ministry of Education, while paragraph thirty-eight commits the Ministry of Education to work on norms for non-teaching personnel. Elsewhere, the regulations make clear that they do not deal with personnel costs in provincial education departments, aside from establishing a set of vague, aspirational principles to guide provinces in managing their budgets. See *id.* at paras. 23–44.

allocated in provinces according to an index of need. The index is calculated based on a number of factors, including available funding and the size of the school, among other things.<sup>77</sup> In addition to using the index, the government will also allocate teaching posts according to the poverty of the school, based on the resource tables that apply to non-personnel funding.<sup>78</sup> As Part III elaborates, school fees create racial disparities in expenditures per learner. Fee rich schools generate significantly higher expenditures per learner than do fee poor schools. This supplemental system of fee financing did not originate with the new government's drafting of SASA or the Norms and Standards. Rather, as the next section makes clear, the origins of the user fee system can be traced directly to the end of apartheid and to efforts by the NP to lock in White privilege in education even after transformation.

### B. *The Evolution of Private Financing for Public Schools*

#### 1. Bantu Education During the Apartheid Regime

A carefully detailed early history of the school fee system is central to understanding the lock-in argument in the context of user fees. At the end of apartheid in the early 1990s, South Africa financed its public schools in ways that varied according to the type of school. State schools relied completely on the state for funding.<sup>79</sup> For these schools, funding varied significantly. The relatively well-resourced schools attended by Whites, Coloureds, and Indians received generous state allocations. In comparison, schools serving Black learners received far less money to serve a greater number of students.<sup>80</sup>

More specifically, the state provided all funds for the country's exclusively White schools, which were overseen by the House of Assembly. Compared to other non-White state schools, these schools garnered a dramatically disproportionate share of state resources.<sup>81</sup> Although White schools served only ten percent of the country's population, they captured R4.3 billion in financing, almost four-fifths of

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77. See Government Notice 23783/2002 at 7–11, available at <http://www.gov.za/gazette/notices/2002/23783.pdf> (last visited Nov. 27, 2003).

78. See *id.*

79. See S. AFR. DEPARTMENT OF EDUCATION, REPORT OF THE COMMITTEE TO REVIEW THE ORGANISATION, GOVERNANCE AND FUNDING OF SCHOOLS § 3.6 (1995) [hereinafter HUNTER COMMITTEE REPORT] (on file with the Michigan Journal of Race & Law).

80. Although Black learners make up about eighty-five percent of the country's learners, Black schools received 5.2 billion rand in state funding, only one billion more than the amount allocated for White learners. See *id.* § 3.9.

81. See SOUTH AFRICA INSTITUTE OF RACE RELATIONS, RACE RELATIONS SURVEY: 1989/90, 785–95 (1990) [hereinafter SOUTH AFRICA SURVEY 1989/90].

the total amount allocated to Black learners.<sup>82</sup> Compared to the White schools, the House of Delegates schools (serving Indian learners) and the House of Representatives schools (serving Coloured learners) received significantly less per capita.<sup>83</sup>

At the other end of the spectrum, the government allocated dramatically less funding to schools serving Black students. A segmented and chaotic set of bureaucratic structures provided one education ministry for each of the ten Bantustans and another ministry for Black communities outside the Bantustans.<sup>84</sup> Black schools served by the Department of Education and Training (serving Blacks in White-designated areas) received significantly more funding than those served by government education departments in the independent and non-independent homelands.<sup>85</sup>

Unlike state schools, community schools in Black homelands were subsidized only partly by the state, and depended on severely impoverished communities for the rest of their funding.<sup>86</sup> In yet another category, farm schools serving the children of Black farm workers were wholly subsidized by the state, much like state schools. Because farm schools provided education for Black families, farm schools were among the poorest and most poorly resourced in the country under the apartheid regime.<sup>87</sup>

In the final category, private or “independent” schools received varying subsidies from the state. Independent schools ranged from well-resourced schools serving an affluent elite to poorly resourced inner-city schools catering to families seeking to escape the chaos of public education. The category also included religious schools and other special group schools, some of which were quite progressive in their decision to admit Black students in spite of the government’s opposition.<sup>88</sup>

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82. See *id.* at 769.

83. See *id.* at 766. Historically, South Africans have been classified into one of four racial categories: White, Coloured, Indian and Black. The evolution of the category Coloured, which loosely refers to persons of mixed descent, is chronicled in IAN GOLDIN, *MAKING RACE: THE POLITICS AND ECONOMICS OF COLOURED IDENTITY IN SOUTH AFRICA* (1987).

84. See *School Governance Policy*, *supra* note 9, at 147. According to the Columbia Encyclopedia: “In 20th-century South African history, [Bantustans were defined as] territory that was set aside under *apartheid* for black South Africans and slated for eventual independence. Ten bantustans (later generally referred to as homelands), covering 14% of the country’s land, were created from the former ‘native reserves.’” THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001). Four were proclaimed independent—Transkei (1976), Bophuthatswana (1977), Venda (1979), and Ciskei (1981)—but no foreign government recognized them as independent nations. *Id.*

85. See *School Governance Policy*, *supra* note 9, at 147.

86. See HUNTER COMMITTEE REPORT, *supra* note 79, § 3.11.

87. See *id.*

88. See *id.* § 3.28.



## 2. Transition: "Choosing" Model C Schools and Fees

At the time that South Africa began its transition out of apartheid, 1983 schools, approximately thirteen percent of the total number of South African schools, served the country's White learners.<sup>89</sup> Ostensibly to facilitate a smooth transition, the apartheid government agreed to negotiate with working groups over the future of these schools. However, the government refused to consider integrating these schools until a newly elected Black government was in place.<sup>90</sup> Apartheid officials declared that opening state schools to all races would lead to tremendous chaos, because students needed to be separated in order to attend to cultural needs.<sup>91</sup>

Even so, in the early 1990s, the NP began to take early steps to partially desegregate White state schools. In 1990, President F.W. de Klerk announced that White schools could begin to admit Black students if a majority of parents approved an appropriate admissions policy for the individual school.<sup>92</sup> To facilitate such a change, the Minister of Education declared that the government would allow parents to vote to change their school's legal status to permit Black enrollment.<sup>93</sup>

Parents voted on one of three alternative models. Voting to become a Model A school made a state school completely private.<sup>94</sup> Model B schools remained state schools, but could admit Black students up to fifty percent of the school's maximum enrollment.<sup>95</sup> Model C schools were designated as state-aided schools. These schools received seventy-five percent of their budgets via state funding and were responsible for supplying the remaining twenty-five percent through user fees and private voluntary donations.<sup>96</sup> Model C schools could also admit Black students, but also only up to fifty percent of the school's enrollment.<sup>97</sup> In 1992, the Minister of Education added a fourth alternative, the Model D school. Model D schools would be allowed to recruit an unlimited

89. See *School Governance Policy*, *supra* note 9, at 145.

90. The government did agree, in the interim, to increase spending on Black education. See Jakes Gerwel, *Keynote Address: Back to Learn*, in THE 1992 NATIONAL EDUCATION CONFERENCE 24 (1993) (on file with author).

91. See SOUTH AFRICA SURVEY 1989/90, *supra* note 81, at 769.

92. See PAM CHRISTIE, *OPEN SCHOOLS: RACIALLY MIXED CATHOLIC SCHOOLS IN SOUTH AFRICA 1976-86* (1990).

93. De Klerk's minister of education, Piet Clase, described the change as a strategy that "would make it possible for parents to exercise their choice with regard to admissions policy for a specific school." See SOUTH AFRICA SURVEY 1989/90, *supra* note 81, at 769.

94. See *School Governance Policy*, *supra* note 9, at 146.

95. *Id.*

96. See SOUTH AFRICA INSTITUTE OF RACE RELATIONS, *SOUTH AFRICA SURVEY: 1996/97* (1997) [hereinafter *SOUTH AFRICA SURVEY 1996/97*].

97. See *Where There's A Will . . .*, FINANCIAL MAIL (Johannesburg), Jan. 15, 1993, at 18.

number of Black students, in part to compensate for a declining enrollment of White students in these particular schools.<sup>98</sup>

At the end of the voting period, the majority of parent bodies in White schools had voted to remain state, or “status quo” schools (either Model B, C, or D). Roughly one-third (692 schools) voted to become Model B schools, one school voted to become a Model A school, six schools voted to become Model D schools, and fifty-one schools had opted for Model C status.<sup>99</sup> But in February 1992, the government unexpectedly demanded that all Model B schools convert to the Model C form and to charge fees.<sup>100</sup> When restructuring was complete, in April 1992, ninety-six percent of White schools operated under the Model C form and charged fees.<sup>101</sup>

Jenni Karlsson and her coauthors argue that the government undertook such unilateral restructuring for two primary reasons. First, Karlsson argues that the government shifted to a Model C user fee system because it needed to supplement inadequate state revenues for education.<sup>102</sup> Because economic growth had been sluggish, the government needed supplemental financial contributions from the private sector to finance White schools at their generous apartheid-era levels.<sup>103</sup> Second, and more controversially, Karlsson argues that by restructuring in such a manner, the apartheid government was trying to shift control of schools to local White communities and out of the hands of a soon-to-be-elected democratic government which was certain to be majority Black.<sup>104</sup> At the time of restructuring, Black activists who participated in pre-transition negotiations levied the same accusations. Devan Pillay’s commentary reflected the views of many of his colleagues:

Within the education sphere, the classification of most [W]hite schools as Model C schools, which gives [W]hite parents a decisive say in admissions criteria under the guise of self-determination or local community democracy, falls squarely within the logic of privatisation. What used to be under the control of the central government will in future be

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98. See *School Governance Policy*, *supra* note 9, at 146. These schools would have operated under the aegis of the White Department of Education and Culture.

99. See *id.*

100. Specifically, the government declared that on April 1, 1992, all White schools, except for Model D schools, would be required to convert to the Model C option unless parents voted by a two-thirds majority to remain status quo state schools or Model B schools. Most schools did not vote to retain their earlier status. See *id.*

101. See *id.*

102. See *id.* at 146–47.

103. See *id.* at 147.

104. See *id.*

under the control of local [W]hite elites (and in some cases [B]lack elites).<sup>105</sup>

Those education activists who had participated in the struggle to eradicate educational inequality found the switch to the Model C form and to school fees to be a move towards racial stratification.

### 3. Transformation: The Hunter Committee

Such was the state of affairs when the ANC-led government took the reins of power in 1994. The new Black-majority government pledged to reorganize the above-described categories of schools, to eliminate segmentation, and to merge what were previously fifteen separate systems into a unified education system.<sup>106</sup> In addition, the ANC promised to create new national and provincial educational departments.<sup>107</sup>

As part of its platform, the new government also pledged to modify the user fee system in former Model C schools. In the government's First White Paper on Education, the Minister of Education announced that he intended to reform the user fee system to make it equitable.<sup>108</sup> In that paper, the government explicitly acknowledged that the charging of school fees was at odds with the concept of a free education.<sup>109</sup> Indeed, the government quite openly recognized that the user fee system was likely to create inequality and to pose potential constitutional problems under the South African constitutional guarantee of a right to education.<sup>110</sup>

Shortly after transition, the government commissioned a panel of experts to conduct an in-depth inquiry into education governance and financing. The Department of Education appointed the Hunter

105. Devan Pillay, *Negotiating a Way Out of the Education Crisis*, in 1992 NATIONAL EDUCATION CONFERENCE 40 (1993) (on file with author).

106. See HUNTER COMMITTEE REPORT, *supra* note 79, § 3.1.

107. See S AFR. DEPARTMENT OF EDUCATION, *White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System* pt. 3, ch. 9 (1995), available at <http://www.gov.za/whitepaper/1995/education1.htm> (last visited Nov. 27, 2003) [hereinafter *White Paper I*].

108. See *id.* § 13(3) (describing user charges). The system inherits a completely unsystematic pattern of user charges, from grade school through the university level, which is linked to the former ethnic organization of provision. This must be reviewed from top to bottom and re-designed in an equitable, sustainable, market-related and publicly acceptable way. The urgent priority has been to begin meeting the commitment to free and compulsory general education in a way that is seen by the people as both fair and necessary, even if this involves the encouragement of voluntary contributions by parents to school development funds to supplement the state provision. See *id.*

109. See *id.* § 15(3).

110. See *id.*

Committee (a panel of government officials, education activists, and outside experts) to evaluate three different school financing models.<sup>111</sup>

Option One, the “minimalist-gradualist” approach, gradually phased in requirements to equalize both personnel and non-personnel funding. At the same time, Option One left in place pre-existing designations of schools as state or state-aided.<sup>112</sup> Under this option, some public schools would have been able to levy compulsory fees from parents, but other schools would not.<sup>113</sup>

Option Two, the “equitable school-based formula” approach, emphasized an immediate move toward per capita equity in funding. Towards that end, this option generated a formula to allocate resources on the basis of student enrollment.<sup>114</sup> The government was expected to equalize per capita state expenditures across the board, so that all schools would receive an allocation of funds based strictly on student enrollment.

Option Three, the “partnership funding” approach, emphasized the use of parent-generated tuition fees and voluntary contributions from the community. Option Three advocates argued that relying on parents to supplement state funding would allow the government to target state funds towards the neediest schools. Option Three specifically proposed generating supplemental funds through user fees, in the form of mandatory fees, voluntary fees, or some combination thereof.<sup>115</sup>

The Hunter Committee ultimately endorsed Option Three as the alternative which “offered the most advantages as a strategy for financing schools in the period of transition . . . The approach provide[d] a framework within which parents who can afford to, both Black and White, are required to make contributions to the education of their children.”<sup>116</sup> The Committee also recommended that all categories of schools collapse into two categories: public (to include all pre-existing categories receiving funding from the state except private) and independent (or private).<sup>117</sup>

The Committee conceded that “the implementation of an obligatory school fee [was] in tension with policy commitments to free and compulsory schooling.”<sup>118</sup> Accordingly, the Committee insisted on a

111. See HUNTER COMMITTEE REPORT, *supra* note 79, § 1.1 (describing the appointment and constitution of the Committee).

112. See *id.* §§ 7.24–7.30.

113. See *id.* § 7.29.

114. See *id.* § 7.31–7.37.

115. See *id.* § 7.47.

116. See *id.* § 7.70.

117. See *id.* §§ 5.13–5.16.

118. See *id.* § 7.48. The Hunter Committee Report states:

While this could be interpreted as in some way compromising the commitment to free and compulsory education, this approach will in fact ensure that free and compulsory education is available to all who require it. . . . This option would ensure that students from poorer families could have access to

provision to prevent children from being expelled for non-payment of fees, a requirement that was ultimately codified in SASA.<sup>119</sup> Despite its reservations, the Hunter Committee ultimately endorsed user fees as a way to supplement government funding shortfalls. In defending its choice, the Committee stressed the state's inability to fully fund quality education for all.<sup>120</sup> The Committee noted that the state could not afford to increase the total education budget in order to equalize expenditures for students: it would not be "possible, without a significant increase in real budgetary allocations over the next five years, to meet the requirements of restructuring, and of providing for qualitative improvements in the under-resourced schools . . . ."<sup>121</sup>

#### 4. Enter the Experts

After receiving the Hunter Committee report, the Department of Education solicited additional advice from two international consultants, Luis Crouch and Professor Christopher Colclough.<sup>122</sup> In contrast to the Hunter Committee, the international consultants' final report expressed a strong preference for a version of Option Two, the equitable formula option. The experts' report also strongly recommended that schools be permitted to charge user fees to parents who could afford to pay.<sup>123</sup> Colclough and Crouch argued that the practice of charging user fees was necessary to "assure the long-term fiscal health of public education, and would more likely result in keeping important stakeholders fully engaged

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basic education in a range of public schools, and not be restricted to lower quality, fee-free schools.

*Id.* § 7.71.

119. *See id.*

120. *See id.* § 7.15.

121. *See id.* In choosing user fees as the preferred source of additional funds, the Committee considered, but rejected, the possibility of additional taxation to mobilize additional resources: "In view of the pressures on the revenue base, and difficulties in ensuring that tax revenue is allocated to education, [the Committee] favours parental contributions." *Id.* § 7.46.

122. John Samuel, the Deputy Director General of Systems and Resources within the Department, and Trevor Coombe, also the Deputy Director General of Systems and Resources, specified the scope of work undertaken by the consultants. LUIS A. CROUCH, SCHOOL FUNDING OPTIONS AND MEDIUM-TERM BUDGETING FOR EDUCATION IN SOUTH AFRICA 3 (Nov. 1995) (unpublished consultants' report) (on file with author) [hereinafter EXPERTS' REPORT]. Luis Crouch is an education economics expert employed by the Research Triangle Institute in North Carolina in the U.S., while Christopher Colclough is a professor of economics at the University of Sussex in the United Kingdom. *Id.*

123. *See id.* at 1 ("The modification we propose would be that school governance committees should be able to levy fees that are in some sense compulsory but not exclusionary of those without ability to pay.").

with public education, leading to better budgets and accountability.”<sup>124</sup> In particular, the consultants argued that user fees were essential to avoid the flight of middle and high-income families (almost all of whom were White) from public to private education. In their view, user fees were necessary to prevent “key technocrats and opinion-makers” from transferring their children out of public education to private or “independent” schools.<sup>125</sup> According to the experts, this group of key people included those at the “upper end of the income spectrum,”<sup>126</sup> not just the very rich, but also the top four or five rungs of civil service, the upper middle-income professions, and members of teachers’ unions.<sup>127</sup>

For Luis Crouch it was important to “keep [this group] reasonably happy”<sup>128</sup> in order to prevent them from deserting public education in favor of private schools. According to Crouch, opinion-maker departure would mean lower levels of funding overall for public education:

It is important to emphasize that the criterion on ‘prevention of opinion-maker flight’ is not based on what some might judge an inappropriately tender concern for the wealthy or the upper middle class. It is based instead on the very real fact that strong redress requires relatively high levels of spending on education, and such levels of spending will only materialize, or remain available to the public sector, if the opinions of budget-makers are favorable to the public system, which means that they must feel personally committed to it.<sup>129</sup>

Moreover, according to the experts, lower funding levels were linked in turn to a potential collapse of public education. In their view, eliminating fees would trigger a two-step dynamic process that would cause public education to collapse. In the first step, reductions in funding would cause middle and high-income parents to relocate their children to private schools in response to any significant reduction in funding.<sup>130</sup> According to Colclough and Crouch, in the absence of user fees, the wealthiest ten percent of the population would flee public education for private schools at a point when their willingness to pay for education was more than twice the level of available state support.<sup>131</sup> In the experts view, this tendency would be further exacerbated if state spending was

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124. See *id.*

125. See *id.*

126. See *id.* at 10 (evaluating in chart form the fiscal sustainability of Option 2).

127. See *id.* at 9.

128. See *id.* at 10.

129. See *id.* at 12.

130. See *id.*

131. See *id.*

targeted toward the neediest sectors of the population, because it would reduce the amount of state support available for the wealthy.<sup>132</sup>

In the second step, these defections of the middle-class and wealthy opinion-makers would trigger a reduction in government spending for public education. More specifically, the experts assumed that educational funding as a share of Gross Domestic Product ("GDP") spending would drop by one percent for every ten percent of the total student population who fled to the private sector.<sup>133</sup> The experts predicted that this would happen because the most vocal advocates for public spending would no longer be in the system to agitate for more funding.<sup>134</sup>

Moreover, Colclough and Crouch predicted that this two-step process of defections followed by reductions would become self-reinforcing. Each round of defections would produce further reductions, which in turn would produce even more defections.<sup>135</sup> According to the experts, this downward spiral ultimately would result in the collapse of the public education system.<sup>136</sup> To avoid such collapse, the experts recommended keeping the level of funding constant for those most likely to defect, primarily via user fees.<sup>137</sup>

## 5. The Evolution of SASA

The government appeared to agree completely with the experts in its second White Paper on Education in 1996.<sup>138</sup> The Ministry of Education incorporated the experts' arguments relating to opinion-maker flight and reductions in government spending.<sup>139</sup> The government also

132. See *id.*

133. See *id.* at app. B-1 ("We assume that support to education as a share of GDP will decline one percentage point for every ten percentage points that the proportion of the population in private schools goes up . . .").

134. See *id.*

135. See *id.*

136. See *id.*

137. See *id.* at 11 (assessing in chart form the ability of Option 2 to prevent opinion and decision-maker flight, as well as its ability to be implemented).

138. See South African Department of Education, *A Draft Policy Document for Discussion: The Organisation, Governance and Funding of Schools*, General Notice 1229 of 1995, available at <http://www.gov.za/whitepaper/1995/education2.htm> [hereinafter "White Paper II"].

139. See *id.* at 5.24. The committee's version of Option Two would, in (the consultants') view, have a fatal consequence. In the consultants' view, over the five year period during which budgetary allocations to schools are re-organised in favour of equity and redress, the decline in public funding for the previously privileged schools would propel middle-class parents out of the public school sector and into the independent school sector. Among those departing would be many opinion-formers and decision-makers whose influence in favour of sustained or enhanced public funding for public education would consequently tend to diminish. This inference is based on observation of international trends in other transitional economies.

appeared to favor the experts' Option Four and an unequivocal government endorsement followed soon thereafter.<sup>140</sup>

In January 1996, the Department of Education furthered its commitment to fees in a School Finance Task Team memorandum.<sup>141</sup> The Task Team acknowledged that an equitable spending strategy necessarily would produce sharp spending cuts for "historically better funded" schools.<sup>142</sup> And, like the consultants, the Team concluded that an exodus of opinion-makers to private schools would deprive the public system of an important source of private contributions.<sup>143</sup> Declining budgets for education and an eroding base of private support would produce, in turn, "an unstoppable cycle of mediocrity and unaccountability."<sup>144</sup> Like the Hunter Committee, the Team recommended user fees to supplement funding for middle-income and wealthier families.<sup>145</sup>

Shortly after the memo, the Ministry moved to draft provisions adopting the experts' funding model. In March 1996, Parliament tabled a bill that adopted most features of Option Four, the consultant-generated model that focused on school fees.<sup>146</sup> Public reaction to draft legislation was swift and critical. Speaking on behalf of many commentators, the educational policy units ("EPU's") from several universities pointed out that Option Four extended the basic financial feature of the Model C system, the use of private fees to supplement state funding, to the entire system. The EPUs unanimously rejected the concept of user fees, arguing that this feature perpetuated existing inequalities in access to education. According to the University of Witwatersrand Education Policy Unit, "[t]hose who have benefited from the system in the past . . . will continue to have access to superior education (though admittedly they would have to make larger contribution out of their own pockets)."<sup>147</sup>

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140. See White Paper II, *supra* note 138, at 5.27 (describing the consultants' option as "thought provoking" and "serious"). However, the government noted that it had not yet had time to fully digest the international consultants' report, and promised to issue a separate paper on financing. See *id.* at 5.4.

141. See South African Department of Education, *A Draft School Finance Policy, Council of Education Ministers and Portfolio Committee on Education* (Feb. 26–27, 1996) (on file with author) [hereinafter *School Finance Task Team Memo*]. The Task Team was made up of members from the Financial and Fiscal Commission, several government departments, the Hunter Review Committee and the international consultants. See *id.* at 1.

142. See *id.* at 8.

143. See *id.*

144. See *id.*

145. See *id.* at 9 (noting that "[t]he solution would seem to be to make public spending on education as progressive as is reasonably possible . . . while making it possible for the middle and higher income earners to commit sufficient private funds to their children's schools to provide them with the incentive to stay within the public system").

146. See Memorandum from the Educational Policy Unit at the University of Witwatersrand to Department of Education 4.2 (March 15, 1996) (on file with author).

147. *Id.*



In addition, the EPU's complained that the redistributive potential of fee-charging schools was inherently limited. In the EPU's view, each school had a financial incentive to admit fewer poor parents who could qualify for an exemption from fees, or so-called free riders who would benefit from facilities without contributing.<sup>148</sup> The EPU's predicted that, if the number of exempted families increased beyond a certain number, middle-class and wealthy parents would become increasingly likely to shift their resources to independent schools.<sup>149</sup>

Despite similar objections from the teachers' unions and many public interest groups, Parliament passed the SASA in substantially the same form as the earlier draft legislation.<sup>150</sup> The Act retained the user-fee system from the former Model C schools, extending the option of charging fees to all public schools in the system. The accompanying Norms and Standards also required the progressive redistribution of school funding for NPNC funds, but left in place the funding of personnel at a flat rate amount per teacher or staff member.<sup>151</sup>

The school fee system has operated in South Africa for the last seven years. Recently, in 2003, the South African Department of Education conducted an inquiry investigating the effect of school fees on school financing, and shortly thereafter issued a Plan of Action designed to remedy some of the problems associated with fees.<sup>152</sup> The Plan of Action proposed eliminating school fees for the country's poorest schools and created a national resource table to equalize NPNC funding across provinces.<sup>153</sup> None of the Plan's provisions have yet been enacted.

### III. SCHOOL FEES IN ACTION: MEASURES OF INEQUALITY

The user fee system creates significant disparities between the rich and poor, and relatedly between Blacks and Whites. Middle and high-income White communities can afford to pay user fees and solicit private contributions, and fee-rich communities provide a significant amount of private funds to finance additional school resources. In contrast, poor and working-class Black communities, who do not have similar access to private funds, cannot afford to provide the same additional resources. The differences between fee-rich and fee-poor communities create corresponding racial disparities in access to quality education.

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148. See *id.*

149. See *id.*

150. See SASA, *supra* note 55.

151. See NORMS AND STANDARDS, *supra* note 64, §§ 98–103 (redistributing NPNC allocations); §§ 31–34 (addressing personnel funding).

152. See 2003 FINANCING REPORT, *supra* note 56.

153. S. AFR. DEPARTMENT OF EDUCATION, PLAN OF ACTION (June 15, 2003) (on file with author).

Of course, inequality has pervaded the financing of South African public education for much, if not all, of the country's history. In the early 1990s, at the end of apartheid, the government was still allocating nearly five times as much money to the nation's White students as to its Black ones.<sup>154</sup> Nine years after transition, significant racial and class disparities still exist in public school funding. The Department of Education has conceded that school fees provide significant resources to fee rich schools and thereby create dramatic disparities in expenditures per learner.<sup>155</sup>

Specifically, the Department's report estimates that school fees in 2002 contributed between R3.5 and R5.0 billion to schooling, or between eight percent and eleven percent of all expenditures on public schools.<sup>156</sup> In the wealthiest twenty percent of the population, contributions from school fees make up thirty-five percent of total expenditures.<sup>157</sup> In the poorest sixty percent of families, fees contribute only between .5% and 2.5%.<sup>158</sup> Most importantly, total public plus private expenditures per learner are fifty percent higher for the wealthiest twenty percent of learners than for the other eighty percent.<sup>159</sup>

Research at the provincial level confirms the Department of Education's findings of disparity. A recent study conducted by scholars at the University of Witwatersrand Educational Policy Unit in the Gauteng province concluded that user fees contributed significantly to inequalities in expenditures per learner.<sup>160</sup> In this regard, the study confirmed several relevant facts. First, the vast majority of Gauteng schools receive no or negligible income through parental contribution via school fees.<sup>161</sup> Not surprisingly, these "fee-poor" schools are located in communities that rank in the bottom three quintiles of the government's assessments of community poverty. In contrast, historically White schools obtain a very high proportion of their budgets through parent contributions. Not surprisingly, they are located in communities that rank in the top two quintiles of community wealth (which are predominantly White).<sup>162</sup>

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154. See 2003 FINANCING REPORT, *supra* note 56.

155. See *id.* at 84.

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.*

160. See K. Porteus et al., *Budget Analysis for the Education Portfolio Committee of the Gauteng Provincial Legislature, Budget Statement 2001/2002: Vote 5 Budget for the Gauteng Department of Education*, 8 Q. REV. OF EDUC. AND TRAINING 3 (2001).

161. See *id.* at 3.

162. See *id.*

Second, the Gauteng research graphically illustrates the dramatic differences that school fees create in total expenditures per learner.<sup>163</sup> Some of the existing disparity is traceable to differences in state funding.<sup>164</sup> Even so, the disparities associated with state funding pale in comparison to the level of inequality in funding traceable to school fees. The research in Gauteng makes clear that a very significant portion of the disparities in funding per learner can be traced directly to the additional funding provided by school fees.<sup>165</sup> As is discussed later, these disparities are still very strongly correlated to race.

Third, the research indicates that disparities in fees translate to disparities in funding for personnel, because fee-rich schools use their fees to hire additional personnel.<sup>166</sup> Supplemental teachers in turn create lower learner to teacher ratios.<sup>167</sup> Likewise, additional fees translate into lower learner to classroom ratios and higher matriculation rates.<sup>168</sup> In addition, the Gauteng research indicates a correlation between the amount of fees that a school collects and both its class sizes and passing rates for matriculation exams.<sup>169</sup> As one commentator noted, "current policy privileges more resourced schools."<sup>170</sup>

Because middle and high-income families can collect more fees, and all fees go directly to the school, schools serving those communities can spend more per learner. Using hypothetical user fees within the range of common practice, the Budget Information Service of the Institute for Democracy in South Africa ("IDASA") confirms the differential impact on a school's budget of its ability to charge fees for learners.<sup>171</sup> IDASA's research compares the annual budget for a hypothetical "rich" and "poor" school with the same number of learners and teachers.<sup>172</sup>

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163. See *id.* at 4 (Fig. 3 depicting the ordinary school fund by school economic rank and Fig. 4 depicting the total school income from state funds and private contributions and showing that the three quintiles at the low end of the socio-economic spectrum compare unfavorably to the top two).

164. Recently completed research on funding demonstrates inequality across provinces in actual expenditures per learner by the government. For example, Gauteng (a relatively wealthy province) allocates thirty percent more in per-learner expenditures than KwaZulu-Natal. See 2003 FINANCING REPORT, *supra* note 56, at 22.

165. See *id.* at 22-23.

166. *Id.* at 22 (Fig. 5).

167. S. AFR. DEPARTMENT OF FINANCE, INTERGOVERNMENTAL FISCAL REVIEW 48 (1999), available at <http://www.treasury.gov.za/documents/ifr/1999/> (last visited Nov. 24, 2003).

168. See Porteus et al., *supra* note 160, at 5-6.

169. See *id.* at 6.

170. See *id.*

171. See *id.* Even with redistribution of non-personnel expenses, schools in the poorer socio-economic brackets still receive less funding per learner than schools in the higher brackets. Specifically, personnel funding still favors historically advantaged schools, primarily because (despite efforts at redeployment) those schools employ more experienced and qualified teachers. See *id.*

172. See *id.*

Their calculations assume that the “rich” school charges R2500 annually per learner, while the “poor” school charges only R50 per learner.<sup>173</sup> According to the calculations, even after taking into account the targeted allocations towards the poor school for non-personnel costs, the rich school spends R4178 per learner, while the poor school spends less than half of that amount, R2046 per learner.<sup>174</sup>

Those who favor school fees argue that the exemption system allows all learners to attend fee rich schools. As discussed above, the Norms and Standards require SGBs to fully exempt from fees those families whose incomes are less than ten times the annual fee, and to exempt partially families whose incomes fall between ten and thirty times the fee.<sup>175</sup> For several reasons, however, the exemption scheme does not adequately address racial or class disparities in expenditures. First, because South African communities and provinces are highly segregated, fee exemptions do not help to eradicate inequality because students are rarely admitted across district lines.<sup>176</sup> More specifically, students are admitted under an informal “soft zoning” admissions process, in which students who apply for admission across district lines are given lower priority. First priority is given to students whose families live within the district or whose parents work in the district.<sup>177</sup>

In operation, most SGBs regulate enrollment so that no more than thirty percent of the population comes from working-class or poor families outside the feeder district.<sup>178</sup> This system excludes predominantly poor Black students from outside the zone, who either are not admitted because all spots have been filled with higher priority students, or are excluded because they cannot negotiate transport to distant schools.<sup>179</sup> Even if an individual student theoretically could get into a fee-rich school, the vast majority of poor and working-class Black learners in rural areas will be unable to attend because these schools are concentrated almost exclusively in big cities.<sup>180</sup>

Second, additional fees create barriers to entry for fee-rich schools. Although the regulatory procedure in theory exempts families from paying onerous school fees, many SGBs separate out secondary fees—fees for

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173. See *id.*

174. See *id.*

175. See NORMS AND STANDARDS, *supra* note 64.

176. For a critique of the soft zoning provisions of SASA, see Editorial, *Between Vision and Practice: Policy Processes and Implementation*, 3 Q. REV. OF EDUC. AND TRAINING 4 (1996).

177. See *id.*

178. Interview with Bram Fleisch, Professor of Education at University of Witwatersrand, Educational Policy Unit and former deputy director general for the Provincial Department of Education in Gauteng (May 23, 2002).

179. See EXPERTS' REPORT, *supra* note 122, at 12.

180. Interview with Bram Fleisch, *supra* note 178.

transport, uniforms, stationery, textbooks, the PTA, exams, activities, and special equipment and programs.<sup>181</sup> In many schools where those secondary fees are calculated separately from attendance fees, the governing body does not make the secondary fees eligible for exemption.<sup>182</sup> According to the Department of Education itself, these so-called “hidden fees” amount to twenty-five percent of the official fees charged by the schools.<sup>183</sup> Therefore, these secondary fees can be almost as onerous, if not more onerous, than fees charged for attendance. A recent statement by the World Bank Director of Education indicates that, for the region, the highest share of household expenditures on education were for secondary fees and not tuition.<sup>184</sup> Indeed, uniform fees can cost an average of R500 for a learner in Grade One; because children grow quickly out of their uniforms, such expenses recur on a relatively regular basis.<sup>185</sup> Similarly, transport fees can cost as much as R1100 per year, depending on the distance to be traveled.

Research confirms that exemption schemes like SASA’s generally do not work well enough to protect the poor from the impact of fees. As many as seventeen percent of all South African schools do not follow exemption procedures at all, and at least fifteen percent of those that do engage in illegal conduct, for example, excluding learners who are exempt from attending school.<sup>186</sup>

Even for those schools that follow exemption procedures to the letter, the exemptions do not offer adequate relief to poor families for several reasons. Income-based exemption schemes do not accurately measure poverty and ability or willingness to pay.<sup>187</sup> In addition, exemption schemes are often implemented in informal and ad hoc ways, and are stigmatizing and dehumanizing, which discourages applications. For example, many families find that applying for exemption requires them to “parade their poverty” in front of school administrators.<sup>188</sup> In other sectors, experience with waivers of user fees has proved less than satisfactory. In the health care sector, for example, very few of those who are

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181. See *id.*

182. See 2003 FINANCING REPORT, *supra* note 56, at 89.

183. See *id.*

184. See Ruth Kagia, Director of Education for World Bank, at [http://www.campaignforeducation.org/\\_html/news/welcome/frameset.shtml](http://www.campaignforeducation.org/_html/news/welcome/frameset.shtml) (last visited Nov. 24, 2003).

185. See Margaret de Paravanici, *Your Million Rand Signature*, at <http://www.school.co.za> (last visited Aug. 15, 2002) (on file with author).

186. See 2003 FINANCING REPORT *supra* note 56, at 95.

187. See Sanjay Reddy & Jan Vandemoortele, *User Financing of Basic Social Services: A Review of Theoretical Arguments and Empirical Evidence* 44–55 (UNICEF Working Paper, 1996).

188. See *id.*

eligible to receive waivers for user fees actually end up receiving the waivers.<sup>189</sup>

In assessing the general state of public school finance, South African education scholars have noted the dramatic impact of fees:

[I]t is clear that the existence of school fees acts as an exclusionary mechanism for poorer parents as does the fact that most of the better-resourced schools are, in general, long distances from the areas where most poorer people live, thus requiring considerable transport costs. . . . The result may well be that the poorest schools remain poor (though some may experience marginal improvements) while the formerly privileged schools will actually improve their resource bases through the contributions of parents.<sup>190</sup>

Indeed, even the Minister of Education has acknowledged the link between user fees and inequality. In a 2001 status report, Minister Kader Asmal recognized explicitly that the reliance on user fees perpetuates educational inequality:

Inequality in education, and more generally, continues to be one of the most vexing issues for the Education Ministry. Income inequality is simultaneously an object of equity strategies and a factor that mediates these strategies. Wealthier parents are able to maintain relative privilege in schools through school fees; poorer parents cannot.<sup>191</sup>

Despite these disparities, the new democratic government shows no signs of moving to equalize expenditures per learner to eliminate the inequality.

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189. According to a seminar conducted in October 1998 by the World Bank Operations Evaluation Department ("OED"), the government of Zimbabwe introduced waivers for the poor to minimize the impact of user fees in health care in the early 1990s. Fewer than twenty percent of the eligible poor ended up receiving the waiver. Similarly, on OED site visits to Mali, officials found no examples of fee waivers being granted by community managed health centers, even though a waiver scheme had been established. See William Newbrander & Timothy Johnston, *Protecting the Poor from the Impact of Increased User Charges: What Works?*, World Bank Health and Poverty Seminar Report 2, available at <http://www.worldbank.org/poverty/health/library/oct98seminar.pdf> (last visited Nov. 24, 2003).

190. See *School Governance Policy*, *supra* note 9, at 175–77.

191. See K. Asmal, *Education Transformation and Change in South Africa: A Review 1997–2001* (2001), available at <http://education.pwv.gov.za> (last visited June 15, 2003).

## IV. BARRIERS TO ENTRY

A. *Locked-In Discrimination: User Fees*

This section argues that the user-fee system in South Africa constitutes an example of locked-in discrimination. Adopted during the apartheid-era to discriminate against people of color, the user-fee system and its accompanying disparities have now become locked into place because the new government is unwilling to pay the significant switching costs associated with a less discriminatory system of funding. The story of user fees in South Africa appears to conform to the lock-in model of discrimination in three ways. First, government decision-makers appear to be motivated to continue the use of discriminatory user fees because of switching costs and not because of any intent to discriminate.<sup>192</sup> Second, the narrative demonstrates that the White monopoly advantage of apartheid appears to have become self-reinforcing over time. Third, the school fee story demonstrates that the not-so-small historical event of apartheid will continue to have significant and persistent effects on educational outcomes in a path dependent manner, even in the absence of intentional discrimination.

B. *Switching Costs*

Knowing that fees would reproduce apartheid-era disparities, the South African government nevertheless decided in 1996 to retain the user-fee system to provide needed funds for public education. The government relied on fees not because it intended to discriminate, but because school fees allowed the government to avoid choosing between increasing the education budget and reducing expenditures per learner for formerly privileged learners. Either of these choices would have incurred significant switching costs.

First, a choice to equalize upwards would have required a significant budget increase. The national government could have chosen to fund all education at the level of the most privileged learners, historically White learners. However, a choice to fund at that level in the absence of fees would have required the government to dramatically increase the education budget. In 1996-1997, the school year that SASA passed, the

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192. Indeed, some would argue that as a Black-majority government, the new administration could not have intended to discriminate against Blacks when it adopted school fees. On the other hand, one might argue that the new government has substituted class discrimination, favoring growing of the middle-class and privileging of the wealthy at the expense of the poor and working class, for racial discrimination. Certainly for the decision makers in question, who as members of the newly emerging Black elite were best positioned to make a move to the historically advantaged schools, these costs were significant. See *School Governance Policy*, *supra* note 9, at 170.

ANC Minister of Education reported that to racially equalize educational funding, the government would need to spend as much as 10.5% of the Gross National Product ("GNP"), as compared to the seven percent expended in that year.<sup>193</sup> Historical racism explained the need for the additional 3.5%. Under the apartheid regime, White schools (and to a lesser extent, Coloured schools) had garnered a dramatically disproportionate level of resources. Indeed, the government had financed White schools at 185% of the national average, the Coloured communities at 159% of the national average, and Indian schools at 161% of the national average.<sup>194</sup> In contrast, the government had provided Black schools with as little as seventy-four percent of the national average in the non-independent homelands, and sixty-seven percent in the independent homelands.<sup>195</sup> Even earlier, in 1991–1992, the government had spent R4448 per annum on White learners but only R1248 per learner on Blacks.<sup>196</sup> Not surprisingly, then, any effort to remedy these gross disparities would have required a significant increase in the education budget if the government were to equalize upwards.

Moreover, at that particular point in time, any government increases in the budget would have incurred a significant political risk. Specifically, such spending would have contravened the new government's self-imposed macro-economic program, Growth, Employment, and Redistribution ("GEAR"). In the mid 1990s, the government had adopted GEAR, a self-imposed structural adjustment program, primarily to avoid dependence on foreign loans and to attract foreign investment.<sup>197</sup> Representing a shift from the prior emphasis on redistribution and redress in its Reconstruction and Development Program ("RDP"), GEAR emphasized fiscal discipline and improving economic infrastructure to encourage economic growth.<sup>198</sup>

Budget increases in education would have signaled a departure from GEAR principles and would have risked the flight of White businesses.<sup>199</sup> The ANC had adopted GEAR in part to avoid a massive flight of (predominantly) White capital from the country, and to attract foreign investment, much of which depended on the domestic investment climate.<sup>200</sup> Because the ANC had been unable to wrest control of the South

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193. See SOUTH AFRICAN SURVEY 1996/97, *supra* note 96, at 171 (citing to remarks by Minister Bengu).

194. See *id.* at 171–72.

195. See *id.*

196. See SOUTH AFRICA INSTITUTE OF RACE RELATIONS, RACE RELATIONS SURVEY: 1993/94 (1994).

197. See Nicolaou, *supra* note 73, at 64–67.

198. See *id.*

199. See *id.* at 67.

200. See HEIN MARAIS, SOUTH AFRICA LIMITS TO CHANGE: THE POLITICAL ECONOMY OF TRANSFORMATION (1988) (on file with author) [hereinafter LIMITS TO CHANGE]. It is worth



African economy from White capital, the ANC needed to reassure business owners by promoting a macro-economic program that emphasized growth instead of redistribution.<sup>201</sup> Accordingly, the government feared that any move to increase budget expenditures for the poor or to redistribute funds in education would have violated the terms of this compromise with White business and encouraged the flight of White capital to the United Kingdom and other countries.<sup>202</sup>

Second, and in the alternative, a choice to equalize downwards would have potentially triggered White flight and endangered overall levels of spending for public education. The national government could have chosen to equalize expenditures per learner at some level below that of historically White schools in order to avoid any increase in the budget. The experts concluded, however, that such a choice would risk triggering the flight of White middle and high-income families from public schools and would endanger the health of the public education system.<sup>203</sup>

More specifically, in the absence of either user fees or additional allocations from the government, the government could only have equalized funding for all by reducing funding for privileged White learners to the level then provided to Indian and Coloured schools.<sup>204</sup> In the experts' view, such significant reductions in available funding inevitably would have triggered defections by wealthy and middle-class families to private schools.<sup>205</sup>

In turn, the government feared that defections by middle and high-income families would have triggered reductions in the overall level of public spending by the government on public education. The consultants' report outlined the relationship between defections and reductions in spending:

In our experience, and we believe empirical evidence would support us, in systems where, say, the top 10% of the decision and opinion-makers abandon the public education sector, fiscal support for the sector becomes more and more difficult, in a worsening spiral of mediocrity, lack of funding, and lack of

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noting that GEAR was adopted the same year that the SAF, a collection of South Africa's top fifty corporations (almost exclusively White-owned), published a critique of government economic policy, calling for a reduction of the budget deficit (among other things). See Jesmond Blumenfeld, *Assessing South Africa's Growth Strategy*, Royal Institute of National Affairs (1999), at <http://www.ciaonet.org/pbei/riia/blj01.html> (last visited Nov. 24, 2003).

201. See *id.*

202. See *id.*

203. See EXPERTS' REPORT, *supra* note 122, at 9–12.

204. See *id.* at 9.

205. See *id.*

accountability to the astute and powerful as well as to the majority.<sup>206</sup>

Likewise, the Department of Education's School Finance Task Team argued that user fees were necessary to "ensure the continued interest and personal participation in public education of [a] key segment of the emerging middle class."<sup>207</sup> Indeed, the team concluded that the middle-class constituted the "bulwark needed to maintain the fiscal base of public education, which in turn [was] the only way to ensure a unified system of education capable of significantly raising the floor on the education the poorest receive."<sup>208</sup>

Thus, in the government's view, any decision to abandon school fees risked the fiscal health of public education. According to the experts and the Task Team, any significant drop in the quality of education for White middle-class and wealthy families would compel them to flee public education for private schools and to abandon their interest in education as a public good. Without these important "opinion-makers" and leaders to lobby for increased spending for education, the experts predicted that the quality of public education would decline precipitously as funding levels decreased.<sup>209</sup> To avoid this switching cost, the government opted instead to supplement state funding with significant private funding in the form of user fees.

Triggering White flight in public education would also have been politically risky for the new South African government. The transition to a new democratic order had promised an improvement in public education for all. Indeed, it had offered the possibility that Black students would be able to attend well-resourced, historically White schools. Given the very large number of previously disadvantaged schools, any move to equalize state spending without fees would have created dramatic reductions in funding for White schools, but would not have significantly improved the schools that served the Black African majority.<sup>210</sup> From a political perspective, the ANC could not afford to reduce funding to White learners, with little or no appreciable increase in funding for Black schools to justify such reductions.

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206. *Id.* at 9.

207. *See School Finance Task Team Memo, supra* note 141, at 9.

208. *Id.*

209. In fact, as Karlsson and her co-authors note, it is probably more likely that the advocacy of middle and high-income parents on behalf of public spending for education is likely to weaken because these parents can more directly influence the wealth of their childrens' school via private fees. *See School Governance Policy, supra* note 9, at 177.

210. *See id.* at 157.

*C. Self-Reinforcing Advantage*

The user fee story also looks like a story of locked-in discrimination in a second way—early White monopoly on educational resources has now become self-reinforcing. Certainly Whites enjoyed monopoly power over educational resources during the apartheid era in South Africa. But White monopoly on resources and opportunities now persists because of the institutional relationship between White political power and school fees. More specifically, institutional relationships in education tie the fiscal health of public school funding to White “opinion-maker” presence in the public system, in a self-reinforcing cycle of positive feedback. In their report to the government, experts Crouch and Colclough described the two mutually reinforcing components of this feedback loop.<sup>211</sup> First, the experts noted that reduced expenditures per learner would trigger the flight of middle and high-income families from public schools. According to the experts’ estimates, these families would defect to private schools if state funding dropped below a particular threshold level. In particular, families would defect when the amount they were willing to pay out of pocket equaled or exceeded twice the level of state support.<sup>212</sup> So, for example, if state funding dropped from R2500 to R1500 per student, families who were willing to pay R3000 or more would flee to private schools.<sup>213</sup>

Second, the experts pointed out that middle and high-income White families will lobby for high expenditures per learner, and the absence of these families reduces expenditures per learner. According to the experts, for every ten percent of students who flee to the private system, the share of education funding as a proportion of the GDP would drop by one percent.<sup>214</sup> Moreover, each decrease in the level of educational funding would trigger another round of defections, which in turn would produce more spending reductions.<sup>215</sup>

To continue with the previous example, if the number of defecting families reached ten percent of the student population, public spending on education would drop by one percent of the GDP. This reduction would produce a corresponding reduction in expenditures per learner, and in turn would trigger another round of defections. So if expenditures

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211. See EXPERTS’ REPORT, *supra* note 122, at apps. A, B. It is very important to note that the experts did not have time to quantify the model in the report and did not provide empirical data from Latin America or anywhere else to support their assumptions. *Id.* at app. B-1.

212. See *id.* at app. A-4.

213. In the experts’ view, this flight of opinion-makers would be further exacerbated if state funding targeted needier schools and parents were not able to supplement shortfalls through user fees. See *id.* at apps. A-6, A-7.

214. *Id.* at app. B-1.

215. See *id.*

per learner dropped again from R1500 to R1000, the reduction (according to the experts' formula) would produce another round of defections, this time by those families willing to pay R2000 or more out of pocket. Thus, each drop in spending creates a round of defections to private schools. In turn, each round of defections produces a corresponding drop in spending and then another round of defections. Ultimately, when spending and defections have cycled through the public school population, the public education system eventually collapses.

This cycle of positive feedback constitutes an example of self-reinforcing privilege for Whites. During the apartheid era, Whites monopolized the advantages of a superior educational system to secure significant advantages in terms of income, wealth, and political sophistication. Over time, this competitive advantage has become self-reinforcing, because the continued health of public education has come to depend on the presence of these White middle and high-income families who are sufficiently politically sophisticated to lobby for adequate levels of spending. The presence of these families depends on user fees, which reproduce their privilege. This is true even in the absence of any continuing intent to discriminate by the government or these families.

#### D. Path Dependence

Beyond the notion of switching costs and self-reinforcing feedback, the user fee story also fits within the lock-in model of discrimination in a third way—it illustrates the notion of path dependence. As with the standard, English language QWERTY keyboard, the current “market dominance” of funding for White learners in public education can be traced to early historical events that significantly influenced the path of development with regard to education financing. Having evolved during apartheid in the context of a White monopoly on institutional power, the public education system now has become structurally dependent on that monopoly. It is not possible to dismantle the monopoly without threatening the health of the system or the fiscal health of the country.

In the case of school fees, the government's decision to shift to the Model C format at the beginning of the 1990s has had far-reaching and long-term consequences. As Karlsson and her colleagues have noted, this strategic move permitted Whites to retain local control over public education even after the new Black-majority government had transitioned into power.<sup>216</sup> Circumstances have now transformed what might have been a temporary arrangement into a self-reinforcing institutional practice. Because government revenues are insufficient to equalize education for all at a high level, public education has come to depend on the ability

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216. See *School Governance Policy*, *supra* note 9, at 147.

of the wealthier schools to collect school fees. Having inherited this particular evolutionary path, the new government must pay significant switching costs to chart a more egalitarian path.

In comparison to the U.S., it is perhaps less controversial to argue that current institutional structures in South Africa are path-dependent, that is, affected in fundamental ways by apartheid-era institutional practices. Indeed, it is difficult to imagine that the financing of public education in South Africa would not be affected by these very recent historical events. Certainly the evolutionary story of public education financing confirms the central role that apartheid played, and continues to play, in structuring the current user-fee system.

#### V. IMPLICATIONS OF THE LOCK-IN MODEL FOR U.S. EQUAL PROTECTION LAW

In this section, I examine whether U.S. equal protection law can address locked-in discrimination. In particular, I compare South African and U.S. equal protection law and explore a hypothetical constitutional challenge to school fees under both regimes. This comparative analysis suggests two insights. First, U.S. anti-discrimination law is particularly ill-equipped to address locked-in discrimination because the U.S. Equal Protection Clause prohibits only intentional discrimination and does not prohibit institutional lock-in. In contrast, the South African Equality Clause does not restrict its focus to intentional discrimination by an individual or institution.<sup>217</sup>

Second, U.S. constitutional law (as well as South African law) is able to take into account the notion of switching costs. Both the U.S. Equal Protection Clause and the South African Equality Clause require courts to determine whether the government is justified in limiting rights to equality.

##### A. *South African Equality Clause Jurisprudence*

In a hypothetical challenge to school fees under the South African Equality Clause, school fees might be unconstitutional because they reproduce race and class inequalities. Under the South African Constitution, Equality Clause analysis takes place in two steps. First, a court determines whether the government has engaged in a *prima facie*

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217. Although there are a number of federal statutes and state constitutional clauses in the U.S. and South Africa that might prove useful, I have restricted the discussion to constitutional equality clauses because constitutional equality law is the most easily comparable and the most directly relevant.

violation of the right to equality under Section 9.<sup>218</sup> Second, the court determines whether such a violation is nevertheless justified under Section 36, the General Limitations Clause.<sup>219</sup> The following sections analyze each step in turn.

### 1. Equality Clause: Unfair Discrimination

Section 9 of the South African Constitution has several sub-clauses, the most relevant of which is Section 9(3). This clause provides in relevant part that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, race . . . ethnic or social origin, [or] colour . . . .”<sup>220</sup> In making its initial claim under the Equality Clause, a class of plaintiffs challenging school fees would not need to allege intentional discrimination in the first instance to make out a *prima facie* case under Section 9.<sup>221</sup> To assert a claim of unfair discrimination under Section 9, plaintiffs need only allege two elements. First, plaintiffs must allege that a government decision discriminates on prohibited grounds, either a ground that is specified in the statute (for example, race or colour) or an unspecified ground.<sup>222</sup> Second, plaintiffs must allege that such discrimination is unfair, that is, that it adversely affects certain groups of people in a way that significantly diminishes their dignity.<sup>223</sup>

Hypothetical plaintiffs could argue that fees constitute discrimination on the prohibited grounds of race, class, or both. South African law supports these types of linkages. In earlier decisions, the South African Constitutional Court has held that discrimination on the basis of geographical residence may constitute racial discrimination where geographical patterns of residence are strongly correlated to race.<sup>224</sup>

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218. See *President of the Republic of South Africa v. Hugo*, 1997 (4) SA 1 (CC); see also THE BILL OF RIGHTS HANDBOOK (De Waal et al. eds., 4th ed. 2001) [hereinafter BILL OF RIGHTS HANDBOOK].

219. See *Hugo*, *supra* note 218, at 66–67.

220. S.AFR. CONST. ch. II, § 9.

221. In *Pretoria City Council v. Walker*, 1998 (2) SA 363 (CC), the South African Constitutional Court explicitly decided that plaintiffs need not allege intent to discriminate in order to bring an unfair discrimination claim under § 9(3) of the South African Constitution. See *id.* at para. 43–44. To be sure, the *Walker* court also held that the intent to discriminate was relevant in assessing the nature and purpose of government conduct, but the court found that intent was not dispositive. *Id.*

222. See BILL OF RIGHTS HANDBOOK, *supra* note 218.

223. See *id.*

224. In *Walker*, the Constitutional Court found that geographical differentiation that corresponded to former segregation patterns constituted indirect discrimination on the basis of race. 1998 (2) SA 363. In particular, the Court found that the Pretoria City Council had discriminated on the basis of race when it charged flat utility rates to two townships, but charged metered rates to residents of Old Pretoria.

Likewise, plaintiffs in a school fees case can point to research that demonstrates a very strong correlation between race, attendance at formerly racially categorized school, and fee-based expenditures per learner. For example, in a recent study conducted in the Eastern Cape, researchers found that seventy-nine percent of South African students remained in formerly Black schools, ninety-four percent of Coloured students remained in so-called Coloured schools, and 100% of White students remained in formerly White schools.<sup>225</sup> Predictably, fees charged at different schools were strongly correlated to the former racial status of each school. Black schools charged an average of R45 per year per learner, Coloured schools charged R99, and White schools charged R2077, over forty-five times the rate of Black schools.<sup>226</sup> Moreover, this research confirms that expenditures per learner vary significantly according to the fees charged, the racial composition of the school, and its former racial classification.

Plaintiffs would have a fairly strong argument with regard to the second element as well, which requires that they prove the discrimination is unfair. Under South African equality law, government practices that create racial disparities are *presumed* to be unfair, regardless of whether such disparities were intended.<sup>227</sup> This presumption requires the Court to consider the discrimination in historical context, to situate the alleged violation in the country's social history, and to calculate the degree of injury to individual dignity.<sup>228</sup>

In past cases, the South African Constitutional Court has, therefore, looked to three factors to assess whether discrimination is unfair: (i) the position of complainants in society and whether they have suffered in the past from patterns of disadvantage; (ii) the nature of the provision of power and the purpose sought to be achieved by it; and (iii) the extent to which the discrimination complained of impairs the complainants' fundamental human dignity or other human interest.<sup>229</sup>

In the case of school fees, plaintiffs can make a strong case that school fees are unfairly discriminatory under these three factors. In terms

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The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may be in fact racially discriminatory. In this case, its impact was clearly one that differentiated in substance between Black residents and White residents. The fact that there may have been a few Black residents in old Pretoria does not detract from this. *Id.*

Similarly, the relationship between race and the income of families attending a school, and the corresponding ability of a school to charge fees, would be sufficient to mount a Section 9 challenge.

225. Financing Schools, *supra* note 12, at 19, tbl. 5.

226. *See id.*

227. *See* S. AFR. CONST. § 9(5) (discrimination based on a listed ground, including race, is presumed to be unfair unless proved otherwise by defendants).

228. *See id.*

229. *See* BILL OF RIGHTS HANDBOOK, *supra* note 218.

of the first and third factors, plaintiffs' position in society and the degree to which their dignity is reduced, plaintiffs would stand on solid ground. As discussed earlier, current disparities in educational expenditure appear to reproduce almost exactly the racial differences of the old apartheid system. Indeed, in light of available research, the user fee system appears merely to recreate the pre-apartheid Bantu education system in another form, because the ability of each school to charge fees and to spend money on each learner correlates very strongly to racial identity.<sup>230</sup>

Thus, in both the Bantu system and the school fee system, Whites receive the highest expenditures per learner in public education, followed by Coloureds, Indians and then, at the far end of the spectrum, Black Africans. The South African user fee system almost exactly reproduces the racial stratification of access to quality education that characterized the apartheid-era school system. In terms of the second factor—the nature and purpose of the government provision at issue—government can offer some arguments to justify school fees, as is more fully discussed in the next section on the Limitations Clause.

## 2. Limitations Clause: Justifications to Charge School Fees

Plaintiffs might have a slightly more difficult time countering the argument that school fees are reasonable and justifiable despite their discriminatory effect. In the second stage of constitutional analysis, a court must assess under Section 36 (the Limitations Clause) whether presumably unfair conduct is nevertheless rendered fair because it serves some important government interest.<sup>231</sup> More specifically, the court must determine whether practices that are presumed unfair are “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”<sup>232</sup>

Under Section 36, the government likely will attempt to justify the user fee system as reasonable and justifiable on three grounds. First, the government could argue that it must charge school fees in order to avoid either a significant budgetary increase or White flight and the potential collapse of public education as a whole. As noted earlier, most commentators agree that equalizing expenditures per learner across racial categories would have required the government to increase government expenditures significantly, something that the government has been unwilling to contemplate given the current emphasis on fiscal austerity.<sup>233</sup> According to a report to Parliament in 1996, the Department of Education had concluded that, “the education budget, for the foreseeable

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230. See Financing Schools, *supra* note 12.

231. See S.AFR. CONST. § 36.

232. *Id.*

233. See *supra* note 96 and accompanying text.



future, [would] in no way be in a position to fund all schools at the level of the historically most costly. Any equitable distribution of public funds [would], therefore, [have] result[ed] in a sharp decline in the allocations of the historically better funded parts of the system.”<sup>234</sup> Thus, the government might argue that school fees are necessary to avoid such sharp declines, the potential defection of middle and upper-income families, and the potential collapse of public education as a whole.

Second, the government could argue that it relies on fees in order to redistribute funds to the poor, by permitting the state to redirect funds away from wealthier families and towards poor learners. In a recently released report on school financing, the Department of Education emphasized that the government had designed the school fee policy to permit the targeting of needy learners with money the government had saved by collecting from private sources instead of national or provincial coffers.<sup>235</sup> Third, the government might argue that school fees promote civic participation, local control, and the accountability of public education to its constituency. The Department of Education’s report on school financing argued that in addition to providing financial benefits to learners, school fees were desirable because they promoted community participation and civic accountability.<sup>236</sup>

By no means is it clear whether the Constitutional Court would decide that these competing interests justify the racially disproportionate impact of school fees. In many ways, the Limitations Clause analysis under Section 36 resembles the U.S. Supreme Court’s constitutional balancing in cases where strict scrutiny is invoked. Both constitutional courts must weigh the value of the right to equal protection against competing governmental interests, to see whether governmental action that limits the right to equal protection might nevertheless be consistent with the country’s vision of a constitutional order.

Whether or not the Constitutional Court finds that such limitations are justifiable, however, plaintiffs can make out a *prima facie* claim without having to allege intentional discrimination. In contrast, allegations about intent are absolutely central under U.S. law, as the next section discusses.

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234. See Memorandum from S. Afr. Department of Education to Portfolio Committee on Education and Council of Education Ministers on Draft School Finance Policy, February 26, 1996 at 8 (on file with author).

235. See *id.*

236. See *id.* In some U.S. cases, courts have held that school financing schemes that relied on local property taxes for funding also promoted local control. See, e.g., *San Antonio v. Rodriguez*, 411 U.S. 1, 49 (1973).

## B. U.S. Equal Protection Law

Under traditional equal protection analysis, it is far less certain that a court applying U.S. law would strike down South African school fees as unconstitutional. In assessing school fees under U.S. law, courts would apply strict scrutiny to determine whether government school fees were constitutional. Under strict scrutiny, a court would conduct a two-step analysis, to determine (i) whether the governmental action at issue discriminates against a suspect class or creates disparities with regard to a fundamental right; and (ii) whether the government can assert a compelling governmental interest for doing so.<sup>237</sup>

With regard to the first element, the U.S. Supreme Court's decision in *Washington v. Davis*<sup>238</sup> held that only intentional discrimination violates constitutional equal protection law.<sup>239</sup> In *Davis*, the Court upheld the constitutionality of a literacy test administered to police officers.<sup>240</sup> The Court explicitly rejected the notion that plaintiffs could make out a prima facie constitutional violation merely by demonstrating evidence of racial disparities in employment populations.<sup>241</sup> The Court held that because plaintiffs could not allege that the police department intended to exclude minority applicants by using selection tests, the literacy test did not violate the Equal Protection Clause.<sup>242</sup> This was true despite the fact that the test excluded significantly more Black applicants than White ones.<sup>243</sup>

Given the racial composition and political commitments of the new democratic government in South Africa, it would be difficult to allege that the South African government intended to discriminate when it

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237. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

238. 426 U.S. 229 (1976).

239. See *id.* In *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court modified its assessment of what constitutes intent to discriminate when evaluating a facially neutral government act. In an earlier era, the Court had demanded plaintiffs provide evidence of animus, that is, intent to harm a particular racial group. See *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). More recently, after the Court's decision in *Shaw*, it is enough if plaintiffs show that the government intended to create a racial classification, whether or not it intended to adversely affect a particular racial group. In either event, it remains constitutional to retain a program that disproportionately excludes people of color if the program is retained by a new government because it is too expensive to switch to a more egalitarian program. See *id.*

240. 426 U.S. 229.

241. *Id.* at 239 (holding that the Fourteenth Amendment's protections were not co-extensive with those of Title VII).

242. Similarly, the Court recently determined that federal statutes prohibiting discrimination in federally covered programs (like public education) do not prohibit unintentional discriminatory conduct. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001).

243. 426 U.S. at 235.

decided to adopt user fees.<sup>244</sup> As this Article has argued, the government chose to continue to charge fees, not because of any animus against Blacks, but in order to avoid switching costs, including the potential collapse of the public education system.

In the absence of any evidence indicating an intent to discriminate, courts applying U.S. law likely would dismiss any claim that the South African government violated equal protection law. Indeed, the U.S. Supreme Court has already once rejected an explicit equal protection challenge to school financing mechanisms that create inequalities in expenditures per learner. In *San Antonio v. Rodriguez*,<sup>245</sup> the Supreme Court upheld as constitutional the practice of financing public schools through local property taxes that varied quite significantly with the wealth of the district, even though there was evidence of significant inequality in educational opportunity across the state.<sup>246</sup> Courts would also likely dismiss a challenge to fees under U.S. Law.

### C. Comparing U.S. and South African Law Through the Lens of Lock-In

Viewing U.S. and South African equality law through the lens of the lock-in model yields two important insights. First, and most importantly, South African law is far more able to address “unintentional” locked-in discrimination than is U.S. law. Of course, the South African Constitutional Court likely will consider whether discrimination is intentional in assessing whether such discrimination is unfair. But the intentional nature of discrimination is at best a peripheral and related consideration in South African legal analysis. Under the South African Equality Clause, the analysis centers on whether government conduct that creates racial disparities can be justified as consistent with the new constitutional order and its emphasis on equality and dignity.

In comparison, U.S. equal protection law, with its focus on intentional discrimination, is poorly equipped to address discrimination of the sort exemplified by school fees. Because U.S. law targets an individual or institution that intends to discriminate, the law cannot

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244. See *supra* note 9 and accompanying text (discussing politics of Black-majority government).

245. 411 U.S. 1 (1973).

246. See *id.* In *Rodriguez*, the Court declined to subject the property-tax system to strict constitutional scrutiny for two reasons. First, the Court found that plaintiffs had not sufficiently alleged discrimination against a well-defined and recognized suspect class and that wealth did not constitute a suspect class. *Id.* at 28–29. Second, the Court held that, because education was not a fundamental right, plaintiffs’ allegation of discrimination in education triggered only rational basis, not strict scrutiny, review. *Id.* at 37–39. Under the more lenient rational basis test, the Court found that the state’s interest in local control over education sufficiently justified existing inequalities. *Id.* at 54–55.

address an institution that continues to engage in once intentionally discriminatory practices for currently non-discriminatory reasons.

Second, both U.S. constitutional law and South African law potentially can accommodate the argument relating to high switching costs. Under both versions of equality law, the government can argue that charging fees is “reasonable and justifiable” (or serves a “compelling” interest) because doing so avoids a significant budgetary increase and economic injury, or alternatively avoids White flight and the collapse of the system.

Although South African courts are directed to read the right to equality against the backdrop of the legacy of apartheid, they still might find that the right to equality can justifiably be limited because of prohibitive switching costs. Similarly, U.S. courts might justify the discriminatory impact of fees by finding that such fees serve a compelling government interest by preserving the health of public education. Ultimately, both courts would have to assess the societal “switching” costs associated with moving from a discriminatory policy to a more egalitarian one.

## CONCLUSION

Building on the foundation of earlier work, this Article focuses on three important points about the lock-in model of discrimination. First, switching costs can play a very significant role in explaining why discrimination persists even in the absence of intent. To be sure, given the racial composition of the ANC-led government, even critics of the South African government would find it difficult to argue that the government intended to discriminate by relying on school fees. If switching costs can induce even a Black-majority government to engage in practices that reproduce the racial disparities of the apartheid regime, then such costs are even more likely to play a role in the predominantly White U.S. government.

For that reason, the notion of switching costs may help rhetorically to reframe the discrimination debate in more useful terms. Opponents are more likely to find common ground if they can agree that well-meaning policymakers might nevertheless continue to discriminate for non-discriminatory (and perhaps laudable) reasons—to avoid budget increases or preserve the public education system, for example. Explaining how discrimination becomes locked-in via switching costs is less likely to elicit the sort of emotional response that often accompanies allegations of intentional racism. In addition, the task of identifying and reducing those switching costs that impede a move towards equality might prove far more useful than merely identifying bad intentional actors.

Second, and relatedly, the lock-in model explains in concrete terms why focusing exclusively on intentional discrimination may not be

enough to eradicate racial disparities. Critical Race Theorists have long argued that the focus of U.S. law on intentional discrimination is too narrow to address persistent structural racism.<sup>247</sup> Although these writers have tapped into a widely-shared intuitive belief about the inadequacies of an intentionalist model, the lock-in model provides a more concrete story about why the U.S. intentionalist approach is deficient.

In particular, the lock-in model demonstrates that even in the absence of intent to discriminate, discrimination persists because of institutional history and structural relationships. Historical events like apartheid and segregation chart an early course of discriminatory practices in institutions. These practices become self-reinforcing over time because institutions are structured around such practices. As a result, institutions find the costs associated with switching to non-discriminatory practices too high to pay. Having taken the discriminatory fork in the road earlier on, institutional actors find it too difficult to attempt to chart a different path.

To be sure, this Article's focus on locked-in discrimination at the institutional level should not be interpreted to mean that intentional discrimination is no longer an issue. It may be true that the ANC's decision to rely on school fees was really an intentional decision to pay less attention to the needs of poor Black learners, in order to pursue a strategy of growing the Black middle class. But this Article proposes that for any society trying to negotiate a relatively recent transition to equity and anti-discrimination, the lock-in model and the concept of switching costs may help to explain why racial disparities might persist over time even in an ideal world where intentional discrimination has been eliminated.<sup>248</sup>

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247. See, e.g., Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978) (presenting one of the earliest and best formulations of this argument).

248. See Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (arguing that even in a hypothetical world without intentional discrimination, segregated patterns of housing would persist because of a self-reinforcing relationship between neighborhood and income).

