

---

Volume 48

Number 2 *Diversity in Legal Education and The  
Legal Profession: A Symposium Honoring  
Indiana Chief Justice Randall Shepard*

pp.555-584

---

*Diversity in Legal Education and The Legal Profession: A Symposium  
Honoring Indiana Chief Justice Randall Shepard*

### Mismatch and The Empirical Scholars Brief

Richard Sander

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Education Commons](#), and the [Education Law Commons](#)

---

#### Recommended Citation

Richard Sander, *Mismatch and The Empirical Scholars Brief*, 48 Val. U. L. Rev. 555 (2014).

Available at: <https://scholar.valpo.edu/vulr/vol48/iss2/8>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



## MISMATCH AND THE EMPIRICAL SCHOLARS BRIEF

Richard Sander\*

### I. INTRODUCTION

In April 2013, the Valparaiso University Law Review held a symposium on diversity in legal education, commemorating the contributions of Justice Randall Shepard and featuring a number of distinguished speakers.<sup>1</sup> I was invited to participate in a panel on *Fisher v. University of Texas*, a then-pending Supreme Court case that seemed likely to revise the rules under which universities can consider race in higher education admissions. The conference organizers generously allowed me to participate by videoconference, as did my co-panelist Professor Eboni Nelson. They and I agreed that my talk should explore some of the empirical issues that might frame how the Supreme Court viewed *Fisher*.

I approached the event with some concern. I had been the *bête noire* of many diversity advocates ever since 2005, when the *Stanford Law Review* published my long analysis and critique of law school affirmative action programs.<sup>2</sup> I had advanced, and since steadfastly defended, something called “the mismatch hypothesis,” which postulated that very large preferences—racial or of any other kind—may undermine student learning, because professors tend to teach to the middle of their class, and students far below the middle will have trouble keeping up and advancing as concepts build day by day.<sup>3</sup> Critiques of my essay had been many, but I had answered them, and an increasingly broad array of other scholars had published articles that found other strong evidence of mismatch in a wide variety of academic contexts.<sup>4</sup> Certainly, the evidence for mismatch was mixed—at least in some contexts—and social

---

\* Professor of Law, UCLA; Ph.D. (economics) Northwestern University.

<sup>1</sup> See generally Kevin Brown, *Tribute to Randall Shepard*, 48 VAL. U. L. REV. 585 (2014) (commemorating Justice Shepard); María Pabón López, *The ICLEO Legacy of Chief Justice Randall Shepard: An Essay*, 48 VAL. U. L. REV. 611 (2014) (discussing Justice Shepard’s impact on the legal community through the ICLEO program); Michael Hunter Schwartz, *50 More Years of CLEO Scholars: The Past, the Present, and a Vision for the Future*, 48 VAL. U. L. REV. 621 (2014) (discussing the national CLEO and ICLEO programs and calling for a new model in the future).

<sup>2</sup> See generally Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (criticizing affirmative action programs and explaining the effect racial preferences have on minorities).

<sup>3</sup> See Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1966–78 (2005) (explaining the mismatch hypothesis as it relates to affirmative action policies).

<sup>4</sup> See *id.* at 1978–2014 (addressing criticisms advanced by Michele Dauber, Ian Ayres, Richard Brooks, David Wilkins, and Chambers et al.).

## 556 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

scientists who found evidence of mismatch never argued—to my knowledge—that the existence of mismatch should preclude affirmative action policies. But just as certainly, universities tended to completely ignore the mismatch problem, and this was quite disturbing. The Supreme Court’s decision to review the Fifth Circuit’s holding in *Fisher*—and to thus reconsider the constitutionality of university racial preferences—increased the level of interest and anxiety about mismatch research.

Lawyer and journalist Stuart Taylor, Jr., had joined forces with me to write a broadly accessible book on the effects of racial preferences, called *Mismatch*, which appeared in October 2012.<sup>5</sup> That, along with two briefs that Stuart and I wrote as *amici curiae* to the Court on *Fisher*,<sup>6</sup> helped to elevate the mismatch hypothesis to a prominent place in the public discussion of *Fisher*. *The New York Times*, *The Economist*, the *Wall Street Journal*, and NPR’s *All Things Considered* all ran prominent articles on mismatch, generally treating it as, at the very least, an idea to be reckoned with seriously.<sup>7</sup> The general tone was well-captured by *The New York Times*’ David Brooks, who wrote: “[A]ffirmative action programs . . . perpetrated some noteworthy wrongs . . . . The evidence on this is hotly disputed, but Richard Sander and Stuart Taylor Jr. make a compelling case . . . .”<sup>8</sup>

Yet at law school events during the 2012–2013 academic year, when I was invited to speak about any aspect of *Fisher*, a strangely repetitive pattern emerged. Regardless of whether the topic at hand was

<sup>5</sup> See generally RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2012).

<sup>6</sup> See generally Brief Amicus Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Sander & Taylor Supporting Petitioner] (arguing that empirical evidence calls for rethinking and clarifying the Court’s jurisprudence on racial preferences); Brief Amicus Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief for Sander & Taylor Supporting Neither Party] (suggesting that empirical evidence on the operation and effects of racial preferences, and the absence of socioeconomic diversity, call for a rethinking of the Court’s jurisprudence on racial preferences).

<sup>7</sup> E.g., *Affirmative Action: Unequal Protection*, *ECONOMIST* (Apr. 27, 2013), [www.economist.com/news/briefing/21576658-first-three-pieces-race-based-preferences](http://www.economist.com/news/briefing/21576658-first-three-pieces-race-based-preferences); *All Things Considered: How Does Affirmative Action Impact Colleges?*, NPR (Oct. 9, 2012), [www.npr.org/2012/10/09/162591214/how-does-affirmative-action-impact-colleges](http://www.npr.org/2012/10/09/162591214/how-does-affirmative-action-impact-colleges); Richard Sander & Stuart Taylor, Jr., *The Unraveling of Affirmative Action*, *WALL ST. J.* (Oct. 13, 2012, 6:14 PM), <http://online.wsj.com/news/articles/SB10000872396390444799904578050901460576218>; Dan Slater, *Does Affirmative Action Do What It Should?*, *N.Y. TIMES* (Mar. 16, 2013), [http://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html?\\_r=0](http://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html?_r=0).

<sup>8</sup> David Brooks, *Speed of Ascent*, *N.Y. TIMES*, June 25, 2013, at A21.

mismatch, or some entirely different part of the affirmative action issue, panel members who disliked my mismatch research would start to recite from a document known as the “Empirical Scholars Brief.”<sup>9</sup> This document, they would suggest, was the definitive refutation of Richard Sander, the other “mismatch” researchers, and all that we were taken to represent. Often they would distribute copies of the Empirical Scholars Brief to the audience, like revivalists passing out the Gospel of St. James. But—and this was the oddest part—these panelists were never interested in engaging or debating any of the claims that were actually in the Empirical Scholars Brief (which I will sometimes, as shorthand, refer to as the “ESB”). One panelist, at an AALS panel in a large ballroom, disclaimed any intention of getting into the details. “I’m not a trained quantitative empiricist,” she said, “instead I’m compelled to rely on critiques by other empiricists.”<sup>10</sup> Pretty much exactly the same thing happened at the Valparaiso symposium.<sup>11</sup> Professor Nelson began our panel with a very thoughtful discussion of the “deference” issue—that is, when and to what degree the Supreme Court should defer to the educational judgment of universities in evaluating their diversity programs.<sup>12</sup> Professor Sumi Cho followed with some rather discursive remarks on the importance of diversity. I then spoke about some of my empirical findings on university behavior—a sort of empirical comment on some of the same issues Professor Nelson had raised.<sup>13</sup> When we

---

<sup>9</sup> See generally Brief of Empirical Scholars as Amici Curiae in Support of Respondents, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter Brief of Empirical Scholars] (arguing against the mismatch hypothesis).

<sup>10</sup> Angela I. Onwuachi-Willig, Univ. of Iowa Coll. of Law, 40 Years After *Rodriguez*, 35 Years After *Bakke*: Education, Equality and Fundamental Rights (Jan. 4, 2013) (transcript on file with author).

<sup>11</sup> This was particularly exasperating, since I had anticipated such a problem. I had pointed out to the conference organizers that it was quite likely Professor Cho would invoke the ESB or some other general critique of mismatch in her remarks, and they therefore needed to schedule my remarks to come after Cho so that I had a fair opportunity to respond. They provisionally agreed, and when Cho objected to speaking before me, the law school administration became involved and ultimately gave Cho an ultimatum. But, as the reader will see, this arrangement did not end up giving me a fair opportunity to respond to Cho’s attack or to allow the participants in the symposium to hear a reasoned debate on the issues.

<sup>12</sup> For more information regarding Professor Nelson’s perspective, see Eboni S. Nelson, *Reading Between the Blurred Lines of Fisher v. University of Texas*, 48 VAL. U. L. REV. 519 (2014).

<sup>13</sup> My essential argument was that, although the sort of deference urged by Professor Nelson might be reasonable in many contexts, in the area of racial preferences it was not, because university behavior in this area was so dogmatic and misleading. When the Supreme Court’s 2003 decisions in *Grutter* and *Gratz* imposed new limitations on racial preferences, many universities—and most law schools—had actually increased their use of racial preferences. When the U.S. Civil Rights Commission issued two reports raising

## 558 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

finished, and the question and answer portion began, Professor Cho distributed a copy of the ESB to the audience, with the standard comment that the audience could better evaluate my comments if they knew what other social scientists thought of my work. With my time up, and on my remote monitor, I was not in a very good position to respond to and engage the ESB claims. I encouraged anyone in the audience to ask me to discuss any specific claim they could identify, but there were no takers. It felt to me like a completely non-substantive, ad hominem, and unfair attack.<sup>14</sup>

It therefore seems appropriate to take the opportunity afforded by the written version of the symposium to provide the sort of thoughtful engagement that I would have liked to provide the live symposium audience. What follows is an assessment—though it may sound more like an expose—of the “Empirical Scholars Brief.” The thrust of my analysis is that the ESB is not just substantively wrong, but it is also a deeply dishonest document that relies on outright falsehoods and misleading claims to support an argument, which should be embarrassing to its signatories, and is entitled to no substantive weight in discussions of mismatch and affirmative action.

## II. A SHORT HISTORY OF THE MISMATCH DEBATE

Sociologists have long been interested in so-called “peer effects” in education—that is, the question of how one’s performance is helped or hurt by the ability of one’s peers.<sup>15</sup> In a famous essay from the mid-1960s, James Davis elaborated the idea of the “Frog Pond” and suggested that careers were often helped by being a comparatively “big frog” in college, rather than being a “small frog” in a bigger pond—that is, a middling student at a more elite college.<sup>16</sup> Once affirmative action came along, it was obvious to many insiders that the systematic use of large preferences to increase minority enrollment at elite schools might create a perverse “frog pond” effect. Christopher Jencks and David Riesman noted this, almost in passing, as early as 1968 in a much more wide-ranging study of higher education called *The Academic Revolution*.<sup>17</sup>

---

strong concerns about the “mismatch” phenomenon, no institution of higher education had even bothered to acknowledge the reports.

<sup>14</sup> Some members of the audience emailed me later, expressing largely the same view.

<sup>15</sup> Roslyn Arlin Mickelson, *Twenty-First Century Social Science on School Racial Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173, 1187 n.72 (2008).

<sup>16</sup> James A. Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 AM. J. SOC. 17, 20–21, 31 (1966).

<sup>17</sup> See generally CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION* (1968) (discussing the future of African Americans in universities).

Clyde Summers, in a 1970 essay, specifically pointed out the danger of mismatch for minority law students,<sup>18</sup> and Thomas Sowell discussed the mismatch problem extensively.<sup>19</sup> However, useful data for examining student outcomes was notoriously hard to come by, and this along with the ideological voltage of the mismatch issue deterred many researchers from studying it.

That changed in the mid-1990s, as new challenges to racial preferences arose,<sup>20</sup> and social scientists became more interested in issues surrounding student outcomes and the “value-added” of college education. Two teams of scholars independently published significant, peer-reviewed studies in 1996; though neither study used the term “mismatch,” each found different types of harms flowing to minority students who received large preferences.<sup>21</sup> Then, in 1998, came the monumental *The Shape of the River*, a book by two eminent former college presidents, William Bowen (formerly of Princeton) and Derek Bok (formerly of Harvard).<sup>22</sup> Bowen headed the Mellon Foundation, and the

---

<sup>18</sup> See generally Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377 (discussing negative implications of preferential admissions).

<sup>19</sup> Sowell has written memorably on this issue a number of times. See THOMAS SOWELL, *The Plight of Black College Students*, in EDUCATION: ASSUMPTIONS VERSUS HISTORY 130 (1986), for an example of such work.

<sup>20</sup> The Fifth Circuit’s 1996 decision in *Hopwood v. Texas* declared university preferences broadly unconstitutional, and the U.S. Supreme Court’s decision not to review the case suggested to many that the Court tacitly agreed with this view. 78 F.3d 932, 934, 948 (5th Cir. 1996), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003). Later that year, California voters passed Proposition 209, the first of a series of state measures (now adopted by five states) that at least nominally prohibited the use of racial preferences in state programs (including state university admissions). See David G. Savage, *Supreme Court Seems to Favor Affirmative Action Ban*, L.A. TIMES (Oct. 15, 2013), <http://articles.latimes.com/print/2013/oct/15/nation/la-na-court-affirmative-action-20131016> (“Since California’s voters approved Proposition 209 in 1996, voters in five other states, including Michigan, have adopted similar laws.”); see also Terence Chea, *California Affirmative Action: Campus Diversity Suffers under Race-Blind Policies*, HUFFINGTON POST (Apr. 21, 2012, 3:28 PM), [http://www.huffingtonpost.com/2012/04/21/california-affirmative-action\\_n\\_1442851.html](http://www.huffingtonpost.com/2012/04/21/california-affirmative-action_n_1442851.html) (discussing California’s decision to prohibit race-based preferences).

<sup>21</sup> See generally Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. HIGHER EDUC. 681 (1996) (discussing the causes of high attrition rates for African American students in science); Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. LAB. ECON. 289 (1995) (discussing the effects of selectivity on graduation rates and earnings for African Americans).

<sup>22</sup> WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Derek Bok, *Terms of Office: 1971-1991 and 2006-2007*, HARVARD U., <http://www.harvard.edu/history/presidents/bok> (last visited Sept. 24, 2013); William G. Bowen, *President Emeritus*, ANDREW W. MELLON FOUND., [http://www.mellon.org/about\\_foundation/staff/office-of-the-president/williambowen](http://www.mellon.org/about_foundation/staff/office-of-the-president/williambowen) (last visited Sept. 24, 2013).

## 560 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

foundation spent millions assembling the first broad longitudinal databases of student backgrounds, college outcomes, and subsequent careers—called the “College and Beyond” data—across twenty-eight colleges that ranged from elite (for example, the University of North Carolina) to very elite (for example, Harvard).<sup>23</sup> Bowen and Bok examined dozens of different aspects of affirmative action and concluded that, in general, the effects of preferences were highly beneficial both to the students who received them and the schools that used them.<sup>24</sup> Notably, however, Bowen and Bok completely ignored the recent studies that had found strong evidence of mismatch, and the Mellon Foundation declined to make the College and Beyond data available to anyone seeking to replicate Bowen and Bok’s results.<sup>25</sup>

Over the next seven years, a moderate but steady flow of research appeared on the effects of college selectivity upon student outcomes. The research was not all of consistent quality, but what I would consider the three strongest studies all found strong evidence of mismatch effects that hurt, on average, students receiving admissions preferences.<sup>26</sup> Strikingly, however, these studies were ignored, not only by the media but also by other academics. In stark contrast to *The Shape of the River*, which received massive media coverage, these studies did not even generate more than a handful of invitations to the authors to give academic talks.

---

<sup>23</sup> See William G. Bowen: *President Emeritus*, *supra* note 22 (discussing Bowen’s role in creating “an in-house research program to investigate doctoral education, collegiate admissions, independent research libraries, and charitable nonprofits”). The database, which Mellon continued to build even after the book’s publication, was called the College and Beyond database. See 1997: *President’s Report*, ANDREW W. MELLON FOUND., [www.mellon.org/news\\_publications/annual-reports-essays/presidents-reports/content](http://www.mellon.org/news_publications/annual-reports-essays/presidents-reports/content) 1997 (last visited Mar. 9, 2014) (discussing the College and Beyond database).

<sup>24</sup> BOWEN & BOK, *supra* note 22, at 256, 279–84.

<sup>25</sup> See generally Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583 (1999) (criticizing Bowen and Bok’s study on several grounds).

<sup>26</sup> See STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 211–12 (2003) (concluding that African American students at elite schools receive lower grades than students with similar levels of preparation, as opposed to African American students at non-elite schools); Peter Arcidiacono, *Affirmative Action in Higher Education: How Do Admission and Financial Aid Rules Affect Future Earnings?*, 73 ECONOMETRICA 1477, 1479 (2005) (concluding that under current affirmative action programs “the percentage of black students falls dramatically at top-tier schools”); Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. HIGHER EDUC. 353, 373 (2004) (concluding that the research conducted on students in the College and Beyond database is consistent with the finding that “race-sensitive admission, while increasing access to elite colleges, was inadvertently causing disproportionate loss of talented underrepresented minority students from science majors”).

This was shocking, because these works had generated very careful evidence that was completely inconsistent with *The Shape of the River*. Stephen Cole and Elinor Barber, for example, had secured the backing of the Council of Ivy League Presidents to launch a major empirical study of the pipeline of minority students into academia.<sup>27</sup> The study's backers and funders were, without exception, strong supporters of affirmative action; Cole and Barber undertook an ambitious but careful study involving over seven thousand students.<sup>28</sup> Their unequivocal finding was that large preferences tended to place promising minority students in institutions where they struggled academically, leading to poor grades and an abandonment of early plans to pursue an academic career.<sup>29</sup> It was a direct, closely reasoned refutation of a key argument in *The Shape of the River*—written by academics who had every incentive to find the opposite—and it was ignored by the very college presidents who sponsored the project.

Similarly, Frederick Smyth and John McArdle, two psychologists at the University of Virginia,<sup>30</sup> managed to secure the very same database Bowen and Bok had used in *The Shape of the River* to test more carefully the question of science mismatch—that is, whether students are less likely to secure a degree in so-called “STEM” fields<sup>31</sup> if they received a large admissions preference. Indeed it did: Smyth and McArdle found that one of the most powerful determinants of a college student's persistence in STEM was the student's level of academic mismatch with his peers.<sup>32</sup> Regardless of whether the recipient of an admissions preference was white, black, or Hispanic, mismatched students had greatly reduced chances of getting a STEM degree.<sup>33</sup> Smyth and McArdle's research was published in a distinguished peer-reviewed journal and even received an academic award—but once again, the media and academic defenders of affirmative action completely ignored a direct rebuttal of *The Shape of the River*.<sup>34</sup>

In November 2004, the *Stanford Law Review* published my study of law school mismatch, in which I argued that large racial preferences

<sup>27</sup> COLE & BARBER, *supra* note 26, at 39–40.

<sup>28</sup> *Id.* at 39.

<sup>29</sup> *Id.* at 211–12.

<sup>30</sup> McArdle is now at the University of Southern California. *About: John McArdle*, UNIV. S. CALIF., <http://dornsife.usc.edu/cf/faculty-and-staff/faculty.cfm?pid=1008336&CFID=16867353&CFTOKEN=11061391> (last visited Jan. 6, 2014).

<sup>31</sup> STEM stands for Science, Technology, Engineering, and Math. SANDER & TAYLOR, *supra* note 5, at 34.

<sup>32</sup> Smyth & McArdle, *supra* note 26, at 373, 376.

<sup>33</sup> *Id.* at 376.

<sup>34</sup> Smyth and McArdle's research was published in *Research in Higher Education*. See generally *id.*

## 562 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

could account for fully half of the enormous black/white gap in bar passage rates.<sup>35</sup> Compared to many studies of mismatch, this one was at least arguably unsophisticated; it used very simple models and mathematics. But it documented for the first time some very disturbing phenomena that the official organs of legal education had effectively suppressed, such as the dismal fact that the median black student at elite law schools had grades at the 6th percentile of white students and that a majority (now probably two-thirds) of blacks entering law school did not graduate and pass the bar on their first attempt.<sup>36</sup> It also laid out a simple, five-step argument about law school mismatch that no critic has ever seriously engaged: (1) large racial preferences tend to place black students in schools where their entering credentials will be far below those of most of their classmates; (2) blacks tend to get poor law school grades, overwhelmingly because of large preferences (not because of race per se, since blacks and whites with similar credentials get very nearly the same grades in law school); (3) law school grades are closely associated with bar performance (and thus, implicitly, with law school learning)—when one controls for law school grades and school, blacks do as well as whites on the bar exam, but (4) when one controls only for pre-law credentials (LSAT, undergraduate grades), blacks do far worse than comparable whites on the bar exam.<sup>37</sup> The joint implication of these four facts is (5) large preferences tend to put their recipients in environments where they will learn less than otherwise, and thus, systemically, operate to greatly disadvantage blacks relative to comparable whites in the learning process and thus on bar exams.

I knew my article would be controversial within legal academia, and I went out of my way to solicit input from likely critics. Some of these readers cautioned me to soften my language—I did—but none raised serious substantive objections to the central arguments and conclusions. Soon, however—and many months before the article was even published—word of the article spread, and it quickly became a dominant topic of conversation within legal academic circles. In sharp contrast to the total silence that had met other mismatch work, the article—called *A Systemic Analysis of Affirmative Action in American Law Schools*, or “*Systemic Analysis*” for short—generated extraordinarily intense interest. The journal that published the article—*Stanford Law Review*—experienced unprecedented demand for the piece. When I posted a copy on my

---

<sup>35</sup> See Sander, *supra* note 2, at 418–25 (discussing the impact of racial preferences on bar passage rates).

<sup>36</sup> *Id.* at 426, 454.

<sup>37</sup> See Sander, *supra* note 3, at 1967–69 (summing up the arguments presented in *Systemic Analysis*).

website, it was downloaded tens of thousands of times. *The New York Times* and several NPR programs discussed the article, and I was invited to give dozens of talks.<sup>38</sup>

All of the attention given *Systemic Analysis* did have some effect. Most observers seem to agree that the debate about affirmative action has shifted from being predominantly a moral dispute about the propriety of racial preferences, to one that also considers their practical effects and effectiveness. The U.S. Commission on Civil Rights held a hearing on the article and issued a report urging a variety of reforms and greater transparency.<sup>39</sup> More social scientists became interested in “peer effect” questions, and mismatch research flourished. A growing array of public intellectuals agreed that academic mismatch is a serious problem.

Yet within the legal academy, little or no reform has come about. This is partly because race—and affirmative action—are, of course, extraordinarily sensitive issues. Even academic leaders skeptical about the benefits of existing programs are likely to be hesitant to disturb the status quo. But the inaction has been helped along by the adamancy with which some distinguished academic leaders, including such figures as Lee Bollinger and Derek Bok, have insisted that the mismatch issue is a chimera—that it is merely a hypothesis that simply has no underlying support.<sup>40</sup> Such claims are generally made without any elaboration. But the same sort of claim is made in the “Empirical Scholars Brief,” and at least at first glance, it would appear that its eminent signatories are supporting this claim in detail. I turn, then, to the genesis and content of the ESB.

---

<sup>38</sup> E.g., Slater, *supra* note 7; *Study Disputes Benefits of Affirmative Action*, NPR (Dec. 6, 2004), <http://www.npr.org/templates/story/story.php?storyId=4204293>. Very notably, however, nearly always I was invited to give talks by lawyer organizations or student organizations (often black- or minority-sponsored), and usually the talk was framed as a “debate” with an (often uninformed) critic. Few law school faculties invited me to speak. Indeed, although students at three of the top five law schools invited me to give talks, no top-20 law school faculty did the same. I was told this was because of the political “sensitivity” of the subject.

<sup>39</sup> See generally U.S. COMM’N ON CIVIL RIGHTS, *AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS* (2007), available at <http://www.usccr.gov/pubs/AALSreport.pdf> (discussing the *Systemic Analysis* article and producing several disclosure recommendations).

<sup>40</sup> See, e.g., Lee C. Bollinger, *The Real Mismatch*, SLATE (May 30, 2013, 10:21 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/supreme\\_court\\_and\\_affirmative\\_action\\_don\\_t\\_make\\_schools\\_trade\\_race\\_for\\_class.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/supreme_court_and_affirmative_action_don_t_make_schools_trade_race_for_class.html) (asserting that, contrary to the mismatch theory, respected studies show “that both minority and low-income students who went to top-tier colleges do better later in life than equally smart students who did not”).

## III. THE “EMPIRICAL SCHOLARS BRIEF”

A. *Origins: Fisher Goes to the Supreme Court*

In October 2011, Stuart Taylor and I submitted a brief to the U.S. Supreme Court, urging it to grant certiorari in *Fisher*.<sup>41</sup> At the time, the Court’s dominant guidance on how universities could use “race” as a factor in admissions decisions was its 2003 decision in *Grutter v. Bollinger*.<sup>42</sup> Our general argument was that *Grutter* had not worked out as most of the Justices had probably intended and that it needed to be either clarified or revised. *Grutter* had stipulated various tests to be used in determining whether a college’s use of preferences could survive a court’s strict scrutiny, such as whether admissions officers used “individualized consideration” or formulas using race in a standardized way, and whether a college had made significant efforts to use race-neutral criteria to achieve diversity and was trying to phase out its reliance on race.<sup>43</sup> Our brief argued that, if one looked at the available data, the general picture was that colleges were either ignoring these standards or interpreting them so broadly as to render them meaningless.<sup>44</sup> We documented, for example, that the available data suggested that racial preferences at law schools, at least, had become even larger and more mechanical since *Grutter*, and that many institutions gave little or no weight to diversity factors other than race.<sup>45</sup>

Taylor and I also discussed mismatch, arguing that a rising volume of evidence was finding that large admissions preferences, of whatever kind, tended to hurt, rather than help, the educational outcomes of their recipients.<sup>46</sup> In the context of *Fisher*, our point was not whether “mismatch” had been proven beyond doubt but that the actual benefits of affirmative action were so murky and contestable that courts should not be particularly deferential to a university’s determination that it had

---

<sup>41</sup> Brief for Sander & Taylor Supporting Petitioner, *supra* note 6.

<sup>42</sup> See 539 U.S. 306, 344 (2003) (concluding that race is a permissible factor in admission decisions).

<sup>43</sup> *Id.* at 334, 339–40.

<sup>44</sup> See Brief for Sander & Taylor Supporting Petitioner, *supra* note 6, at 13–18 (explaining the standards set forth in *Grutter* and providing examples of the ways in which university racial preferences have failed to abide by those standards).

<sup>45</sup> *Id.* at 15–16. These and related claims were developed in more detail in an article that I contributed to a collection of essays by political scientists. See generally Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in *NEW DIRECTIONS IN JUDICIAL POLITICS* 277 (Kevin T. McGuire ed., 2012) (discussing the unforeseen effects of *Bakke*, *Gratz*, and *Grutter* on university admissions).

<sup>46</sup> See Brief for Sander & Taylor Supporting Petitioner, *supra* note 6, at 4–8 (discussing a variety of studies that have found evidence supporting the mismatch theory).

a compelling justification to use racial preferences. Our brief attracted a fair amount of attention and discussion,<sup>47</sup> and though we cannot of course know what factors entered into the Court's deliberations, the Supreme Court did grant certiorari to *Fisher* in February 2012.<sup>48</sup> The case would be set for argument in Fall 2012, and probably decided in Spring 2013.

Stuart Taylor and I wrote another brief, this time on the merits of *Fisher*, which we filed at the end of May 2012.<sup>49</sup> As with our initial brief, our goal was to put before the Court relevant empirical findings and data we thought would be helpful to their deliberations. Though we were certainly making an argument and urged the Court to tighten or revise *Grutter*, we did not argue that racial preferences should never be used. We tried to point out where the evidence supporting our arguments was stronger or weaker, and we cited research inconsistent with our position.<sup>50</sup> We even went so far as to file our brief "in support of neither party" – an unusual step that signals to the Court that a party's main goal is to present information and ideas, not simply to advance the chances of one side or the other winning.<sup>51</sup>

The respondent, the University of Texas ("UT"), filed its response brief in August 2012,<sup>52</sup> and briefs in support of the respondent were due a week later. It was an impressive collection.<sup>53</sup> In addition to an amicus brief from the United States Solicitor General, UT was supported by briefs from "seventeen U[.]S[.] senators; sixty-six U[.]S[.] congressmen; fifty-seven of the Fortune 100 American corporations; thirty-seven retired military and defense leaders; fifteen states; [and] well over one hundred colleges and universities."<sup>54</sup> Most of these briefs generally

<sup>47</sup> E.g., George F. Will, Op-Ed., *The Unintended Consequences of Racial Preferences*, WASH. POST (Nov. 30, 2011), [http://articles.washingtonpost.com/2011-11-30/opinions/35282841\\_1\\_racial-preferences-minorities-academic-freedom](http://articles.washingtonpost.com/2011-11-30/opinions/35282841_1_racial-preferences-minorities-academic-freedom).

<sup>48</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (2012).

<sup>49</sup> Brief for Sander & Taylor Supporting Neither Party, *supra* note 6.

<sup>50</sup> *Id.* at 9–10.

<sup>51</sup> *Id.* at 1.

<sup>52</sup> Brief for Respondents, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345).

<sup>53</sup> See Mark Walsh, *It Was Another Big Term for Amicus Curiae Briefs at the High Court*, A.B.A. J. (Sept. 1, 2013, 3:30 AM), [http://www.abajournal.com/magazine/article/it\\_was\\_another\\_big\\_term\\_for\\_amicus\\_curiae\\_briefs\\_at\\_the\\_high\\_court/](http://www.abajournal.com/magazine/article/it_was_another_big_term_for_amicus_curiae_briefs_at_the_high_court/) (noting that the ninety-two amicus briefs filed in *Fisher* came close to the record of ninety-six briefs).

<sup>54</sup> SANDER & TAYLOR, *supra* note 5, at 187. For the online version of these briefs, see *Fisher v. University of Texas at Austin*, SCOTUSBLOG, [www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin](http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin) (last visited Mar. 10, 2014). Virtually no establishment organizations filed briefs in support of *Fisher*. SANDER & TAYLOR, *supra* note 5, at 187.

## 566 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

discussed the importance of preserving racial preferences in education. A few briefs, by academics or educational institutions, took on the “mismatch” issue in general and the Sander-Taylor brief in particular.<sup>55</sup> However the ESB quickly became the best known of these attacks and the one relied on almost uniformly by critics in upcoming discussions of the case.

There were eleven signatories to the ESB, and these fell into two groups. Four of the signatories—Ian Ayres, Richard Brooks, Daniel Ho, and Richard Lempert—were law professors with social science training who had written early empirical critiques of *Systemic Analysis*.<sup>56</sup> A fifth, Paul Oyer, was a Stanford Business School professor who had written on a related mismatch issue—the effect of law school eliteness on career earnings—and whose findings had sharply conflicted with my own.<sup>57</sup> The other signatories were for the most part friends and colleagues of these five. They included Guido Imbens, an economist at Stanford Business School; Donald Rubin, a Professor of Statistics at Harvard; Gary King, a political scientist at Harvard; Richard Berk, a distinguished statistician at the University of Pennsylvania; Kevin Quinn, a political scientist at UC Berkeley’s School of Law; and James Greiner, a statistician and law professor at Harvard.<sup>58</sup> It was an eminent group, and the brief emphasized the prestige they brought to the enterprise by giving a short biography of each author. For example, the brief noted:

Gary King is the Albert J. Weatherhead III University Professor at Harvard University—one of only 24 with the title of University Professor, Harvard’s most

<sup>55</sup> E.g., Brief of American Social Science Researchers as Amici Curiae in Support of Respondents at 34–35, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of The American Educational Research Association et al. as Amici Curiae in Support of Respondents at 24–32, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for The National Black Law Students Association as Amici Curiae in Support of Respondents at 5–6, 8–12, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345). See generally Brief of Empirical Scholars, *supra* note 9 (arguing against the Sander and Taylor brief and the “mismatch” theory).

<sup>56</sup> See Brief of Empirical Scholars, *supra* note 9, at 1–7 (listing and providing background information for the eleven ESB signatories). For these signatories’ critiques of *Systemic Analysis*, see generally Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005).

<sup>57</sup> Brief of Empirical Scholars, *supra* note 9, at 6 (providing Paul Oyer’s background). For Oyer’s piece on the correlation between law school eliteness and earnings, see generally Paul Oyer & Scott Schaefer, *The Returns to Attending a Prestigious Law School* (Working Paper, 2009), available at [www.econ.wisc.edu/workshop/selective.pdf](http://www.econ.wisc.edu/workshop/selective.pdf).

<sup>58</sup> Brief of Empirical Scholars, *supra* note 9, at 1–5 (listing and providing background information for the ESB signatories).

distinguished faculty position. He is based in the Department of Government and serves as Director of the Institute for Quantitative Social Science. He has been elected Fellow in six honorary societies (National Academy of Sciences 2010, American Statistical Association 2009, American Association for the Advancement of Science 2004, American Academy of Arts and Sciences 1998, Society for Political Methodology 2008, and American Academy of Political and Social Science 2004) and has won more than 30 “best of” awards for his work, including leading contributions to the statistics of causal inference. He was listed as the most cited political scientist of his cohort. His research has been supported by the National Science Foundation, the Centers for Disease Control and Prevention, the World Health Organization, the National Institute of Aging, the Global Forum for Health Research, as well as numerous centers, corporations, foundations, and other federal agencies.<sup>59</sup>

These names alone gave the ESB an air of credibility and serious purpose.

*B. The Empirical Scholars’ Central Argument*

The general thrust of the ESB is that the Sander-Taylor brief was mere rhetorical puffery and that the social science support we claimed for our views is utterly without merit or substance.<sup>60</sup> It makes this case in a variety of ways, but very clearly the core of the brief lies in its Section 3C, which purports to identify three fundamental methodological flaws in the research by scholars who have found evidence of law school mismatch.<sup>61</sup> Professor Doug Williams, the Chair of Economics at Sewanee University, and I were the principal scholars in question throughout the ESB.<sup>62</sup>

---

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *See id.* at 8–9 (“The Sander ‘mismatch’ research . . . is not good social science.”).

<sup>61</sup> *Id.* at 19–25.

<sup>62</sup> *Id.* at 16–25 (critiquing Williams’s and Sander’s findings on mismatch).

## 1. First Critique

The first ESB critique is that “the primary comparison that Sander and Williams employ is that of black and white students.”<sup>63</sup> The common-sense idea behind this criticism is that if one found, for example, that blacks did worse than whites on bar exams and attributed this to the fact that blacks get admitted with racial preferences and whites do not, then one’s reasoning might be fallacious—the weaker black performance might result not from preferences, but from something else altogether that was associated with race but not associated with preferences (for example, bar exams that tested white cultural knowledge in some subtle way). This criticism had been advanced some years ago about *Systemic Analysis*, which, as noted above, did indeed use an extended black-white comparison as part of its basic argument about the mismatch effect.<sup>64</sup> One simple rebuttal to this criticism is that the tests I present in *Systemic Analysis* are specifically intended to rule out racial causes of the black-white performance gap.

However, the surpassing problem with this first critique is that it is *simply untrue*. In Professor Doug Williams’s detailed and masterful article, *Do Racial Preferences Affect Minority Learning in Law Schools?*, published this past June in the *Journal of Empirical Legal Studies* (“Williams JELS Article”), he presented the results of literally dozens of different analyses of mismatch effects.<sup>65</sup> *In every case, Williams’s analyses compared students within the same racial group or groups!*<sup>66</sup> This is no matter of interpretation or argument: the authors of the ESB simply lie.

Their black/white critique is facially untrue even when limited to my work. In my follow up to *Systemic Analysis*, an essay called *A Reply to Critics*—also published by *Stanford Law Review*—I had responded specifically to the criticism of using white-black comparisons by showing that much the same results occurred when one compared black law students with other black law students, using the “first-choice/second-choice” methodology discussed in greater detail below.<sup>67</sup> In yet another peer-reviewed piece that Williams and I wrote—along with economist Marc Luppino—about the work of Katherine Barnes, we again used

---

<sup>63</sup> *Id.* at 20.

<sup>64</sup> *See supra* notes 35–37 and accompanying text (discussing the methodology and findings set forth in *Systemic Analysis*).

<sup>65</sup> *See generally* Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools?*, 10 J. EMPIRICAL LEGAL STUD. 171 (2013) (analyzing mismatch effects).

<sup>66</sup> *See id.* at 172 (noting that the article is restricted to “within-race analyses”).

<sup>67</sup> *See* Sander, *supra* note 3, at 1973–78 (providing statistical data indicating that African Americans who attended their second-choice school performed significantly better than African Americans who attended their first-choice school).

intra-racial comparisons to demonstrate mismatch effects.<sup>68</sup> And in a third work that I wrote with Jane Bambauer, which was published in the peer-reviewed *Journal of Empirical Legal Studies*, we analyzed the career effects of law school mismatch using data only on white students.<sup>69</sup>

## 2. Second Critique

The second ESB critique is that “Sander and Williams . . . adjust not only for pre-existing characteristics, but also for *outcomes*” in the regressions finding mismatch effects.<sup>70</sup> The apparent idea behind this critique is that if law school preferences cause mismatch by elevating some students to schools that are not optimal for them, then one should measure this effect by controlling only for the pre-law academic characteristics of students, such as LSAT scores and college grades. A sound argument lies at the heart of this critique: if one is studying whether the students who receive large preferences have more trouble passing the bar, then controlling for whether a student graduates from law school could distort the analysis.<sup>71</sup> It is true that, in some passages of *Systemic Analysis*, I drew inferences from one or two regressions that could reasonably be criticized on theoretical grounds—although the inferences could be shown to be empirically true on other grounds. But the thrust of the ESB critique is that Williams and I have not produced valid findings of mismatch in law schools because we have ignored this principle, *and that is clearly false*.

The central argument of *Systemic Analysis*—that mismatch accounts for a large portion of the black-white gap in passing the bar—is

---

<sup>68</sup> See generally Doug Williams et al., *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 NW. U. L. REV. 813 (2011) (providing intra-racial comparisons to demonstrate mismatch effects in students with varying credential levels attending different tiered law schools).

<sup>69</sup> See generally Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. EMPIRICAL LEGAL STUD. 893 (2012) (studying the relative effect of attending more—or less—elite schools and often limiting the analysis to white students).

<sup>70</sup> Brief of Empirical Scholars, *supra* note 9, at 22.

<sup>71</sup> Suppose that a low-ranked law school A fails twenty percent of its first-year students to keep its bar passage rate up, while high-ranked law school B graduates even its weakest students. Suppose that School B admits some weak students through racial preferences who graduate but go on to fail the bar. A comparably weak student attending School A might well flunk out, and those students who graduated from School A would have achieved some threshold of performance that would be positively related to their chances of passing the bar. Consequently, an analysis of law school graduates with poor credentials who attended either School A (with no affirmative action) or School B (with affirmative action) might show an advantage to School A students that was due to School A’s flunk-out policy rather than its non-use of affirmative action.

established in regressions or tables that control only for the pre-law characteristics of students.<sup>72</sup> Likewise, the Williams JELS Article used an outcome variable, called “Smooth Passage,” that was specifically designed to measure mismatch outcomes using only pre-law credentials.<sup>73</sup> In this analysis, all students in the dataset who entered law school received a “1” if they graduated and passed the bar on their first attempt; otherwise they received a “0.”<sup>74</sup> The analysis, in other words, examines the central mismatch outcome—do students cleanly graduate *and* pass the bar on their first attempt—controlling only for the “pre-existing credentials” that the ESB calls for. Indeed, although Williams was writing well before the ESB appeared, *he specifically discussed in his article the utility of “Smooth Passage” in avoiding the type of bias ESB claims affects his analysis!* Strikingly, many of the strongest mismatch findings demonstrated in the Williams JELS Article come from this “Smooth Passage” variable.

Indeed, Williams and I analyzed many models that avoided the “intermediate outcomes” issue propounded by the ESB. In my *Reply to Critics*—which I specifically addressed to several of the ESB authors—I conducted an analysis that examined the proportion of the “[e]ntering [c]ohort” of black students who became lawyers, adjusting only for pre-law credentials (i.e., making the adjustment the ESB argued for).<sup>75</sup> The analysis shows a significant mismatch effect experienced by blacks. Similarly, an article in which Williams and I collaborated with two other social scientists—economist Marc Luppino and psychometrician Roger Bolus—re-analyzed the data from a mismatch critic, Katherine Barnes; included analyses that controlled only for pre-law credentials; and again found clear evidence of mismatch effects.<sup>76</sup> This ESB critique, then, was also utter nonsense. Williams and I repeatedly found powerful evidence of mismatch effects with precisely the type of model the ESB claimed we lacked.

It is worth noting in passing that there is nothing wrong with controlling for intermediate outcomes, if one has a good reason to do it. In some of Williams’s analyses, for example, he limits the pool of people he examines to students who have actually graduated from law school and taken a bar exam.<sup>77</sup> He does this because the specific outcome of

<sup>72</sup> See Sander, *supra* note 2, at 428 tbl.5.2, 441 tbl.5.7, 446 tbl.6.2 (utilizing SAT scores, undergraduate GPAs, and academic index level to predict first-year law school grades, measure matriculation rates, and measure bar passage rates).

<sup>73</sup> Williams, *supra* note 65, at 180–83.

<sup>74</sup> *Id.* at 180.

<sup>75</sup> Sander, *supra* note 3, at 1975 tbl.3.

<sup>76</sup> Williams et al., *supra* note 68, at 819, 827–28 tbl.3.

<sup>77</sup> *E.g.*, Williams, *supra* note 65, at 179.

whether mismatched students are more likely to pass or fail the bar *when they attempt the exam* is of intrinsic interest. In Table 6.1 of *Systemic Analysis*, I report a regression on people who take the bar exam, controlling for the law school grades of bar-takers, as a way of demonstrating that blacks with comparable law school performance levels are as likely as whites to pass the bar.<sup>78</sup> These analyses are flawed only if they stand alone—that is, if one does not recognize the need to run analyses with no intermediate variables for purposes of comparison. Social scientists speak of a result being “robust” when it holds up even when one changes the details of the model used to test it. Testing the robustness of one’s results is always a virtue in social science analysis; one of the great virtues of the Williams JELS Article is that the mismatch findings are highly robust to an unusually broad range of models and tests.

### 3. Third Critique

The third ESB critique contended that, to generate valid inferences about mismatch, one must compare students with similar credentials attending schools in different tiers of eliteness.<sup>79</sup>

The credibility of a causal inference depends on the credibility of the assumptions. One natural way forward with the bar-passage data is to compare students with identical observed pre-existing characteristics (*i.e.*, undergraduate GPA scores, LSAT scores, race, and gender) who attend different law-school tiers. . . . Research that applies these principles has not found any substantially and statistically significant effects on bar passage.<sup>80</sup>

Once again, the ESB articulates a reasonable methodological goal. The suggestion that one make “apples to apples” comparison is indeed a good aspirational statement for mismatch research. Once again, however, ESB is simply wrong in implying that Williams and I failed to make appropriate comparisons. Ironically, it cites an example of research—the work of Dan Ho, one of the signatories—that notably fails to make proper comparisons.<sup>81</sup>

---

<sup>78</sup> Sander, *supra* note 2, at 444 tbl.6.1.

<sup>79</sup> Brief of Empirical Scholars, *supra* note 9, at 22.

<sup>80</sup> *Id.* at 24–25.

<sup>81</sup> *Id.* at 25.

## 572 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

This “apples to apples” critique really has two different parts: first, that one must compare students across different tiers of law school—that is, students facing different levels of mismatch; and second, that one must use effective scholastic controls to make sure one is comparing students of similar academic ability. On both counts, the Williams JELS Article stands out as exceptionally careful and effective. Consider the “different tiers” issue first. All of the scholarly literature on law school mismatch relies heavily on the one large dataset, created in the 1990s by the Law School Admissions Council, that tracks students over a long period of time; the dataset is known as the “Bar Passage Study,” or “BPS” for short.<sup>82</sup> The BPS did not reveal law school identities, but it grouped schools into six “tiers” that *roughly* correlated with school eliteness.<sup>83</sup> Because the eliteness of law schools in each tier overlaps with those of adjacent tiers, one cannot be sure that students in adjacent tiers are actually in schools of differing eliteness. To deal with these ambiguities, Williams compared, in one section of his paper, students at the top two tiers with students in the bottom two tiers.<sup>84</sup> He found large mismatch effects—that is, black or minority students in the bottom two tiers had better outcomes than otherwise similar students in the top two tiers.<sup>85</sup>

This brings us to the second issue—what do we mean by “similar” students? There are many different dimensions of academic ability through which we would like to compare students, and available datasets generally have only a limited number of control variables. Williams used what was available, but his work, in conjunction with mine, goes further. In my *Reply to Critics*, I demonstrated that when one uses a limited number of control variables, this tends to bias the analysis against finding mismatch.<sup>86</sup> The reason is fairly obvious; there is something commonly referred to by social scientists as a “selection effect” operating in law school admissions. Suppose we have a sample of law students, all of the same race, who are attending schools of varying levels of eliteness and for whom we only know one academic credential (for example, LSAT scores). Suppose we match pairs of students who have the same LSAT score but who attended schools of differing levels of eliteness. It is not certain, but quite probable, that in any given pair the student at the more elite school has a higher college

---

<sup>82</sup> LINDA F. WIGHTMAN, LAW SCH. ADMISSION COUNCIL, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998), available at <http://www.unc.edu/edp/pdf/NLBPS.pdf>.

<sup>83</sup> *Id.* at 8–9.

<sup>84</sup> Williams, *supra* note 65, at 187–88 & tbl.4.

<sup>85</sup> *Id.* at 188 & tbl.4, 189.

<sup>86</sup> See Sander, *supra* note 3, at 1990–92 (discussing selection bias issues).

GPA than the student at the less elite school. Why? Simply because more elite schools are more academically selective in admissions, and so on any random academic characteristic their students are likely to have a higher level of achievement—that is why they are at the more selective school.

In my *Reply to Critics*, I empirically demonstrated this “selection effect” in the BPS data. It is easy to do. No one has empirically demonstrated otherwise, and scholars in the field with whom I have discussed the issue routinely concede that such a selection effect exists and that it tends to bias “mismatch” analyses against finding evidence of mismatch. In other words, when we simply compare students at schools of differing eliteness and control for their “observed” academic characteristics, the students at the more elite schools usually have stronger “unobserved” characteristics, and the comparison, *a fortiori*, is thus somewhat biased against finding that the student at the less elite school will have, for example, better performance on the bar exam. Consequently, when Williams finds that black students at less elite schools outperform on the bar black students with similar “observed” characteristics at more elite schools, this is an especially powerful finding.

One approach to dealing with this selection effect compares pairs of students who are admitted to the same elite school, where one member of the pair actually attends that school and the other member attends a less elite school. In this way, one is probably minimizing differences in “unobservables” since both students in the pair were academically strong enough to be admitted to the more elite school. Alan Krueger and Stacy Dale used this approach in a pair of well-known studies of the effects of elite schooling on earnings;<sup>87</sup> it is also used in a recent study of science mismatch conducted by Marc Luppino and me.<sup>88</sup> The BPS data does not allow us to do something quite this clean, but as economists Ian

---

<sup>87</sup> See generally Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q. J. ECON. 1491 (2002) (finding that students of similar ability earn the same regardless of the selectiveness of the school they graduate from, while lower income students earn more after graduating from a more selective school); Stacy Dale & Alan B. Krueger, *Estimating the Return to College Selectivity over the Career Using Administrative Earnings Data* (Nat'l Bureau of Econ. Research, Working Paper No. 17159, 2011), available at <http://www.mathematica-mpr.net/publications/PDFs/education/returntocollege.pdf> (demonstrating the effects of elite schooling on earnings by extending the authors' earlier work).

<sup>88</sup> See generally Marc Luppino & Richard Sander, *College Major Competitiveness and Attrition from the Sciences* (Working Paper, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2167961](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167961) (accounting for unobservables and finding evidence of mismatch among students pursuing science degrees).

Ayres and Richard Brooks pointed out in 2005, it does permit an analogous sort of exercise.<sup>89</sup> The BPS data includes information from each law student on the number of law schools to which they applied; how many schools offered them admission; whether, if they were offered admission, they decided to attend their “first or only choice,” “second choice,” or “third or lower choice” law school; and if they did not attend their “first-choice” school, why not.<sup>90</sup> It is easy to empirically demonstrate that students who attend their second- or third-choice schools tend to be at less elite schools than otherwise similar students who attend their first-choice schools. When applied to black or minority students, then, this provides a quasi-natural experiment in what happens to students who receive larger or smaller admissions preferences and thus have varying degrees of potential mismatch.

Ayres and Brooks attempted such an analysis in 2005 and found “mixed” evidence in support of the mismatch hypothesis.<sup>91</sup> For reasons I have recounted elsewhere, these results were not particularly trustworthy, and they were not peer-reviewed.<sup>92</sup> Williams replicated their analysis and found quite strong support for mismatch, under a wide variety of specifications; these results are reported in a working paper and in his peer-reviewed article in the *Journal of Empirical Legal Studies*.<sup>93</sup> In conjunction with the many other demonstrations of law school mismatch, the cumulative force of the evidence on this point is overwhelming. Law school mismatch does exist and explains most, or all, of the “unexplained” gap in black and white bar passage rates.

I have offered this detailed discussion of Williams’s analysis partly to explain why it is strong on its own terms but also partly to illustrate the “Alice-in-Wonderland” quality of the ESB. The ESB’s first two critiques of Williams’s work, as we have seen, are simply false.<sup>94</sup> The

---

<sup>89</sup> See generally Ayres & Brooks, *supra* note 56 (relying on the BPS to respond to Sander’s mismatch theory).

<sup>90</sup> See LINDA F. WIGHTMAN, LAW SCH. ADMISSION COUNCIL, USER’S GUIDE: LSAC NATIONAL LONGITUDINAL DATA FILE app. B at 14 (1999), available at [http://www2.law.ucla.edu/sander/Systemic/data/LSAC/bps\\_usersguide\\_layout.pdf](http://www2.law.ucla.edu/sander/Systemic/data/LSAC/bps_usersguide_layout.pdf) (providing the questionnaire that participants of the BPS study completed).

<sup>91</sup> Ayres & Brooks, *supra* note 56, at 1831–38.

<sup>92</sup> Sander, *supra* note 3, at 1986–96 (emphasizing the major flaws in the study Ayres and Brooks conducted).

<sup>93</sup> See Williams, *supra* note 65, at 172, 189–93 (finding evidence of mismatch after conducting a study that separated students who attended their first-choice school from those who attended a lower-choice school). Williams’s analysis included both a multiple regression analysis of “first-choice/second-choice” students, as well as an analysis that used “first-choice/second-choice” as an “instrument” for observing mismatch. *Id.* at 189, 191.

<sup>94</sup> See *supra* Parts III.B.1–2 (discussing ESB’s first two critiques and highlighting the flaws therein).

third critique only makes sense if one concludes that, for some reason, the “first-choice/second-choice” approach is an invalid way of studying mismatch. *But this method, as noted above, was developed by Ian Ayres and Richard Brooks – both signatories of the ESB.*<sup>95</sup> What’s up with that? Have these folks ever heard of estoppel?

A final twist that adds to the oddness of the third ESB critique is its citation of another ESB author, Daniel Ho, as an exemplar of proper mismatch research.<sup>96</sup> Ho’s piece on mismatch was done while he was still in graduate school, and it made elementary errors in analysis. Ho compared students in the BPS who attended adjacent law school tiers; that is, he compared Tier 1 students with Tier 2 students, and Tier 2 students with Tier 3 students.<sup>97</sup> None of his published results compare students who are more than one tier apart. But, as noted earlier, the BPS tiers were inexact, so adjacent tiers included many schools that were, in fact, identical in their level of eliteness. Since Ho “matched” students in adjacent tiers who had identical credentials – such as race, gender, etc. – his comparisons were almost certainly of students who also attended schools of identical eliteness. This fails the first basic test of an appropriate mismatch comparison – to compare students attending schools with markedly *different* levels of eliteness.

#### 4. Reprise

The central argument of ESB is that concern about academic mismatch in higher education has no basis because the research on law school mismatch conducted by Doug Williams and myself commits three fundamental errors of causal analysis.<sup>98</sup> On the first two counts, ESB is simply factually wrong. The third count is, to put it kindly, ridiculous. Williams’s analysis of law school mismatch – which, unlike any of the mismatch critiques, was actually subjected to peer review and published in a top empirical journal – is highly attentive to the exact concerns raised by the critics. Furthermore, its central methodology is built on causal arguments – on the desirability of the first-choice/second-choice approach – first developed by two of the ESB authors. How could these

<sup>95</sup> See *supra* notes 91–93 and accompanying text (discussing Williams’s reliance on Ayres’s and Brooks’s analysis).

<sup>96</sup> Compare Brief of Empirical Scholars, *supra* note 9, at 22 (citing to Daniel E. Ho et al., *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199, 202 (2007) for support), with *id.* at 25 (citing to Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997, 2002–04 (2005) for support).

<sup>97</sup> Ho, *supra* note 56, at 2003 fig.1.

<sup>98</sup> See *supra* Part III.B (discussing the ESB’s arguments against mismatch and explaining why such arguments are flawed).

scholars, with their towering reputations, create such a dishonest set of arguments? We will return to that question below.

C. *Characterizing the Debate: The Other Empirical Scholars Argument*

Since the ESB's central critiques of the law school mismatch scholarship are demonstrably false, the brief's overall argument simply collapses. The remainder of the brief focuses on two other "arguments," to use the word somewhat loosely.<sup>99</sup> One is that the debate about higher education mismatch can be fairly treated as, in reality, a debate about law school mismatch. And the other is that many, many critiques of law school mismatch have been published. The reader can see how these arguments intrinsically fold back on themselves: if law school mismatch has been effectively critiqued, how is it that the only three *specific* critiques made by ESB are all false? But there is an important larger falsehood here, which I shall try to elucidate in the next few pages.

1. The Sander-Taylor Brief on Mismatch

To understand the ESB argument, we need to first briefly discuss the brief I coauthored with Stuart Taylor and its argument about mismatch. The argument section of our brief ran about thirty-six pages; about one-third of that dealt with the mismatch question and sought to give the Court a sense of the breadth of mismatch research.<sup>100</sup> We discussed four general types of evidence about mismatch: "academic mismatch," "science mismatch," the experience of the University of California ("UC") after racial preferences were made illegal by Proposition 209 ("Prop 209"), and "law school mismatch."<sup>101</sup> The Cole and Barber work is the best work on the "academic mismatch" problem, documenting how large racial preferences tend to lead to poor grades and thus erode the interest of promising minority students in academic careers.<sup>102</sup> The Smyth-McArdle work is a fine example of research on "science mismatch," and its basic findings have been replicated in a series of other studies.<sup>103</sup> All of the studies on science mismatch have come to strikingly similar conclusions: students who receive large preferences into academic programs—regardless of race—such that their academic credentials are significantly lower than those of their median classmates,

<sup>99</sup> See Brief of Empirical Scholars, *supra* note 9, at 10–16.

<sup>100</sup> Brief for Sander & Taylor Supporting Neither Party, *supra* note 6, at 2–14.

<sup>101</sup> *Id.* at 5–6, 8, 11–13.

<sup>102</sup> See *supra* text accompanying notes 27–29 (discussing Cole's and Barber's study).

<sup>103</sup> See *supra* notes 30–34 (explaining the Smyth-McArdle study).

are far less likely to graduate with a science degree than otherwise comparable students who attend a less elite school.<sup>104</sup>

In both of these cases, as Taylor and I discuss in *Mismatch*,<sup>105</sup> the findings of these scholars have been completely ignored by defenders of affirmative action, to an almost eerie degree. Even though each of these studies was only possible because the researchers won the cooperation of important proponents of affirmative action—the organization of Ivy League Presidents in one case, the Mellon Foundation in another—these and other institutions essentially ignored the results. I know of no peer-reviewed or even published study that disputes either the “academic mismatch” or “science mismatch” findings.

The same is nearly as true of research on the UC experience in the wake of Prop 209. It is undisputed that, after the ban on racial preferences, black and Hispanic enrollment fell significantly at the two most elite UC campuses—Berkeley and UCLA—but rose at some of the less elite campuses in the eight (now nine) campus system.<sup>106</sup> It is undisputed that, within a few years of the implementation of race-neutral policies, black and Hispanic enrollment in the total UC system surpassed pre-Prop 209 levels and, within a few more years, had surpassed pre-Prop 209 minority enrollment levels when we take into account the demographic growth of the Hispanic population.<sup>107</sup> It is undisputed that black and Hispanic graduation rates rose sharply in the years after Prop 209 and that the number of black and Hispanic graduate students graduating with bachelor degrees had far surpassed, by the middle of the last decade, levels achieved when race-based affirmative action was widely used.<sup>108</sup> Several scholars have done extensive research on how the end—or at least, substantial reduction—of racial preferences affected blacks and Hispanics in the UC system. A study done by labor economist Kate Antonovics and myself, and published in the peer-reviewed *American Law and Economics Review*, found that minority enrollment levels at the UC did not suffer from Prop 209 as much as expected because black and Hispanic students accepted offers of

<sup>104</sup> COLE & BARBER, *supra* note 26, at 204–06; Smyth & McArdle, *supra* note 26, at 373, 376.

<sup>105</sup> SANDER & TAYLOR, *supra* note 5, at 39–40.

<sup>106</sup> Brief for Sander & Taylor Supporting Neither Party, *supra* note 6, at 11 (citing *University of California Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 Through 2010*, UNIV. CAL. OFFICE PRESIDENT (Mar. 2011), [http://www.ucop.edu/news/factsheets/flowfrc\\_10.pdf](http://www.ucop.edu/news/factsheets/flowfrc_10.pdf)).

<sup>107</sup> *University of California Application, Admissions and Enrollment of California Resident Freshmen for Fall 1989 Through 2010*, UNIV. CAL. OFFICE PRESIDENT (Mar. 2011), [http://www.ucop.edu/news/factsheets/flowfrc\\_10.pdf](http://www.ucop.edu/news/factsheets/flowfrc_10.pdf).

<sup>108</sup> UNIV. OF CAL., DIVERSITY: ANNUAL ACCOUNTABILITY SUB-REPORT 24 & chart 23 (2010), available at [http://accountability.universityofcalifornia.edu/documents/diversity\\_sub\\_report\\_2010.pdf](http://accountability.universityofcalifornia.edu/documents/diversity_sub_report_2010.pdf).

## 578 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

admission at a substantially higher rate after racial preferences ended.<sup>109</sup> Research by economists Peter Arcidiacono, Joe Hotz, Ken Spenner, and Esteban Aucejo found that reduced mismatch after Prop 209 raised graduation rates some and sharply improved the chances that blacks and Hispanics pursuing science and engineering degrees would actually succeed.<sup>110</sup>

Yet again, the positive developments at UC—by far the largest system of elite public universities in the nation—have been ignored to an astonishing degree, both by critics and even by UC officials. The Chancellors and President of the University—a group that strongly opposed Prop 209 and has frequently complained about its inability to use racial preferences—even submitted a brief in the *Fisher* case that highlighted the drops in minority enrollment at Berkeley and UCLA but completely ignored the extraordinarily positive developments outlined above.<sup>111</sup> A few administrators have written articles contending that Prop 209 has had harmful effects on minorities at the UC system, but these pieces are ludicrously weak.<sup>112</sup> It is fair to say that there has been no meaningful scholarly engagement with the UC scholarship finding mismatch effects.

One of the ironic things about the non-engagement of critical scholars with the science mismatch, academic mismatch, and the UC research is that this work is often done with significantly better data than that available on the law school mismatch issue. The Smyth & McArdle piece, for example, was able to precisely measure each individual student's level of "mismatch" (i.e., his or her credential gap with

---

<sup>109</sup> Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the "Chilling Effect,"* 15 AM. L. & ECON. REV. 252, 279 (2013).

<sup>110</sup> See generally Peter Arcidiacono et al., *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California* (Nat'l Bureau of Econ. Research, Working Paper No. 18799, 2013) [hereinafter Arcidiacono et al., *Evidence from California*], available at [http://www.nber.org/papers/w18799.pdf?new\\_window=1](http://www.nber.org/papers/w18799.pdf?new_window=1) (finding that students with relatively weaker entering credentials are more likely to leave the sciences and take longer to graduate).

<sup>111</sup> See Brief Amicus Curiae of the President and Chancellors of the University of California in Support of Respondents at 18–19, 29–33, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (providing information regarding the decline in minority enrollment at the most selective institutions in the UC system).

<sup>112</sup> See, e.g., Susan A. Wilbur, *Investigating the College Destinations of University of California Freshman Admits*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209, at 63, 64–66, 77 (2010) (asserting that the implementation of Proposition 209 has resulted in a loss of top-ranking minority students); Chambers et al., *supra* note 56, at 1875–77 (asserting that gaps between incoming student credentials continue post-Prop 209); William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 55–56, 117–18 (2013) (criticizing Proposition 209).

classmates) at each institution in the database—something that is simply not possible with the Bar Passage Study data.<sup>113</sup> Other science mismatch studies have been able to specifically compare pairs of students who were admitted to the exact same undergraduate institution, where one member of the pair chose to attend a less elite institution.<sup>114</sup>

As I observe, the Sander-Taylor brief devoted the bulk—more than eighty percent—of its mismatch discussion to the academic mismatch, science mismatch, and the UC experience literature. In turning to law school mismatch, we noted the striking difference in that debate:

Unlike the “science mismatch” and “academic mismatch” research discussed above, Sander’s “law school mismatch” research generated extensive public discussion, and many critiques have been published. Although Sander’s data and calculations have been confirmed by replication, several of the critics have advanced alternate empirical models to test whether the mismatch effect is large enough to actually reduce the number of black lawyers produced each year. As economist Doug Williams has pointed out, almost none of these social science critiques have disputed the central contention of the law school mismatch hypothesis: that large preferences undermine learning in law school.<sup>115</sup>

Taylor and I then briefly discussed other critiques of mismatch, and noted:

The social science literature arguing that racial preferences do not hurt the intended beneficiaries has overwhelmingly focused on graduation rates from college. Some studies find that graduation rates are undermined by large preferences, and some find that they are not. But the controversy may be more apparent than real. Graduation rates are under the control of college administrators, who can adjust policies or inflate grades to minimize academic “failures.” This is common at elite private colleges. But a student can graduate and still be harmed by science mismatch,

---

<sup>113</sup> Smyth & McArdle, *supra* note 26, at 364.

<sup>114</sup> See *supra* text accompanying notes 87–88 (discussing scholars who have utilized this approach, including myself).

<sup>115</sup> Brief for Sander & Taylor Supporting Neither Party, *supra* note 6, at 8–9 (footnotes omitted).

academic mismatch, lower grades, lower aspirations, less academic self-confidence and less promising career prospects.<sup>116</sup>

## 2. The ESB Response

The ESB authors, rather than engaging in honest debate on disputed points, play a sort of *ad hominem* shell game, which has two parts. First, they falsely claim that virtually the entire discussion of mismatch in the Sander-Taylor brief was about law school mismatch: “Much of the cited research has been in the law school context. . . . Sander’s and economics professor Doug Williams’s law-school mismatch research . . . dominate the empirical findings of the Sander-Taylor Brief . . . .”<sup>117</sup> Therefore, the ESB “focus[es] the rest of [its] arguments [on law school mismatch].”<sup>118</sup>

The claim that “law school mismatch” dominates the Sander-Taylor brief is, for the reasons just discussed, an outright lie; our discussion takes up two pages in the entire brief.<sup>119</sup> It seems, rather, that the ESB scholars—like all other critics to date of mismatch—do not want to, or do not know how, to take on the “academic mismatch” or “science mismatch” studies and therefore claim that if they discuss the “law school mismatch” research, they have addressed all mismatch research.

But the chutzpah of the ESB authors goes further. They also contend that the Sander-Taylor brief mischaracterizes the body of mismatch research—that we suggest that there have been no critiques of mismatch and that therefore there is a consensus among scholars that mismatch exists.<sup>120</sup> That, of course, is not true. At no point in the brief do we suggest that the mismatch hypothesis has become an accepted, uncontroversial truth. As noted above, we highlighted that law school mismatch has been controversial and that many critiques have been published.<sup>121</sup> We also noted the conflicting evidence on whether mismatch lowers minority graduation rates.<sup>122</sup> We do note, and indeed emphasize, that no one has challenged the “academic mismatch” and “science mismatch” findings.

Consider these specific excerpts from the ESB:

<sup>116</sup> *Id.* at 10 (footnotes omitted).

<sup>117</sup> Brief of Empirical Scholars, *supra* note 9, at 17.

<sup>118</sup> *Id.*

<sup>119</sup> See Brief for Sander & Taylor Supporting Neither Party, *supra* note 6, at 8–9 (discussing law school mismatch).

<sup>120</sup> Brief of Empirical Scholars, *supra* note 9, at 7–8.

<sup>121</sup> Brief for Sander & Taylor Supporting Neither Party, *supra* note 6, at 8–10; see *supra* text accompanying note 50 (acknowledging that the brief cited findings inconsistent with our own).

<sup>122</sup> Brief for Sander & Taylor Supporting Neither Party, *supra* note 6, at 10.

According to [Sander and Taylor], a “growing volume of very careful research, some of it completely un rebutted by dissenting work” has found that affirmative-action practices are not having their intended effect. . . . But, as *amici* will show, the principal research on which Sander and Taylor rely for their conclusion about the negative effects of affirmative action—Sander’s so-called “mismatch” hypothesis—is far from “un rebutted.” Since Sander first published findings in support of a “mismatch” in 2004, that research has been subjected to wide-ranging criticism.<sup>123</sup>

“[T]hose relying on mismatch research mischaracterize the state of social-science evidence and describe a consensus that does not exist.”<sup>124</sup> The ESB further states, “[t]he Sander-Taylor Brief misrepresents the acceptance of [Sander’s] hypothesis in the social-science community.”<sup>125</sup>

To prove these claims, the ESB quotes perhaps a dozen different critiques on page after page—but in every case, these are critiques of *law-school* mismatch. A very large proportion of the entire ESB is devoted to demonstrating the existence of these critiques. This seems like a pointless exercise, since there is no disagreement that the critiques exist. But this really seems like an effort to hide the complete lack of substance in the ESB argument. To see this point, consider this simple schematic of the arguments. The Sander-Taylor brief argues: (1) there has been a profusion of recent, careful social science research finding mismatch effects;<sup>126</sup> (2) critics have ignored the abundant evidence on science and academic mismatch and focused their critiques on law school mismatch; much of the research on mismatch, therefore, has been completely un rebutted and unanswered.<sup>127</sup> The ESB response is: (1) law school mismatch dominates the mismatch debate so that is all we will address, and we will pretend the rest of the research does not exist;<sup>128</sup> (2) Sander and Taylor outrageously claim that some mismatch research is un rebutted. What scoundrels they are—let us show you how voluminous law school mismatch has been attacked.<sup>129</sup> This tendency

<sup>123</sup> Brief of Empirical Scholars, *supra* note 9, at 8 (footnote omitted) (citations omitted).

<sup>124</sup> *Id.* at 16.

<sup>125</sup> *Id.* at 27.

<sup>126</sup> See Brief for Sander & Taylor Supporting Neither Party, *supra* note 6, at 2, 5–10 (discussing studies that have found “science mismatch,” “academic mismatch,” and “law-school mismatch”).

<sup>127</sup> *Id.* at 7–8.

<sup>128</sup> Brief of Empirical Scholars, *supra* note 9, at 17.

<sup>129</sup> See *id.* at 8–10, 12–16 (providing examples of criticisms others have advanced).

to blithely ignore the facts and construct more convenient straw men is an ingrained habit among the mismatch critics, and it is one that makes rational debate elusive.

#### IV. SILENCE

When I realized the scale of the errors in the ESB, I was of course quite annoyed. But it also struck me as an opportunity. There were a couple of extremists among the ESB authors, such as Richard Lempert, whose feelings about affirmative action and mismatch were so passionate that they would not particularly care whether they made accurate attacks or not.<sup>130</sup> But many of the signatories were, as they and I have noted, eminent and respected social scientists. Surely some of them had signed the brief merely out of friendship to the principal authors and took on faith what these primary authors claimed about the mismatch debate, not bothering too much with the details.<sup>131</sup> It might be possible to engage these scholars in a more honest discussion of the mismatch question.

In the early summer of 2013, I contacted Thomas Leatherbury, a respected attorney in Texas who was the counsel of record on the ESB—meaning that he had been the author's attorney for purposes of putting the brief into proper legal form and making a timely filing with the Supreme Court. Leatherbury was quite affable; he declined to tell me who had been the principal authors of the brief, but was happy to pass on to all the signatories any information I wanted to share. I then sent him a letter detailing the clear mistakes at the core of the ESB and asking for a retraction and apology.<sup>132</sup> Leatherbury immediately acknowledged receipt and promised to distribute the letter.<sup>133</sup>

---

<sup>130</sup> Lempert, an emeritus law professor at the University of Michigan, has made a virtual second career of attacking mismatch research in general and my work in particular, usually in extremely tendentious and misleading terms. The ESB has all the hallmarks of a Lempert attack. His efforts to upend the publication of my original article on law school mismatch, and to prevent the California State Bar from making its data on legal education and bar passage available to scholars, are detailed in SANDER & TAYLOR, *supra* note 5, at 71-75, 240-41.

<sup>131</sup> Briefs are subject to special rules that essentially immunize their signatories from libel suits, reducing the costs of signing onto briefs without checking out their factual accuracy. See *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine*, 31 AM. U. L. REV. 147, 154-59 (1981) (discussing common law justifications for immunizing private defendants against defamation claims).

<sup>132</sup> See E-mail from Richard Sander to Thomas Leatherbury (July 19, 2013, 12:09 PM PDT) (on file with author).

<sup>133</sup> E-mail from Tom Leatherbury to Richard Sander (July 19, 2013, 12:13 PM PDT) (on file with author).

Then silence. After reading my letter, Leatherbury declined to return later calls from me, perhaps feeling there was nothing he could say that would be consistent with protecting his clients. None of the signatories apologized. I reached out to some of them through intermediaries, offering to have a public debate on the merits; they declined.<sup>134</sup>

Notably, however, most of these signatories appear to have withdrawn from the mismatch debate altogether. There was, for example, no follow-up ESB submitted in response to the brief I submitted in *Schutte v. Coalition to Defend Affirmative Action*. It will be interesting, someday, to learn who wrote the ESB and what exchanges occurred among its signatories after they received my letter, or read this article.

#### V. CONCLUSION

Many academic debates are hard for non-experts to evaluate, either because the issues involved are complex and technical or because the ultimate judgments of the protagonists are to some degree nuanced and subjective. That is not the case here. The ESB's central claims are simply false, and anyone willing to spend a little time parsing the principal documents involved can see this for themselves.<sup>135</sup> The ESB hearkens back to the early days of the debate over law school mismatch, when affirmative action zealots dominated the discussion (and tended to intimidate more moderate voices from entering the debate).<sup>136</sup> Central to the zealot's strategy was to completely dismiss the mismatch hypothesis, and thereby imply that anyone taking mismatch seriously was himself suspect as a scholar. Sadly, this strategy almost worked. But the days when discussion of the mismatch problem might be put back in a bottle have long since passed.

Today, there is not only a very large literature on the mismatch issue, with over two dozen serious scholars contributing to it; there is also emerging a "discussion" literature, in which thoughtful scholars who have expressed skepticism about mismatch are willingly engaging

---

<sup>134</sup> For example, I reached out to Alexander Smith and invited Professor Kevin Quinn to debate me at his home institution (Berkeley Law School) about mismatch. E-mail from Richard Sander to Alexander Smith (Nov. 22, 2013, 2:52 PM PDT) (on file with author). Smith passed along Quinn's response: "Thanks for reaching out to me. I wish you the best with this, but this is not something I'm interested in participating in." E-mail from Alexander Smith to Richard Sander (Nov. 25, 2013, 10:10 AM PDT) (on file with author).

<sup>135</sup> For a list of the key documents in this area, see Papers and Studies, PROJECT SEAPHE, <http://seaphe.org/?page-id=24> (last visited June 5, 2014).

<sup>136</sup> See *supra* Part II (discussing the ESB). These points are developed in more detail in SANDER & TAYLOR, *supra* note 5, at ch. 5.

## 584 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 48]

in careful discussion and debate about the research and its findings. For example, the nation's leading debate society, Intelligence Squared, recently sponsored a debate at Harvard Law School (later rebroadcast on NPR) that largely focused on the mismatch hypothesis.<sup>137</sup> Malcolm Gladwell's most recent book, *David and Goliath*, has a chapter largely dealing with the mismatch idea, in which Gladwell candidly discusses his own intellectual evolution in thinking about the effects of admissions preferences.<sup>138</sup> The *Journal of Economic Literature* has commissioned an in-depth review of the mismatch literature coauthored by a mismatch skeptic and a mismatch proponent.<sup>139</sup> And as part of its symposium on *Fisher*, the *Journal of Constitutional Law* is publishing a dialog on the contours and effects of racial preferences featuring two proponents of the mismatch hypothesis and two skeptics.<sup>140</sup>

This is an enormously important development. As a thoughtful, reasoned "center" emerges in empirical discussions of affirmative action, the empiricism itself will tend to become more important in the larger debate. And the sort of zealotry on display in the ESB will, increasingly, be recognized for what it is—ideology wearing empirical makeup. Once phony critiques are competing with thoughtful ones, they start to look ridiculous—and it is being exposed as silly, rather than merely erroneous, that will ultimately make the zealots fade away.

---

<sup>137</sup> The debate featured Ted Shaw and Randall Kennedy arguing against the proposition "Affirmative Action on Campus Does More Harm Than Good," and Gail Heriot and I arguing for the proposition. For the full debate video, see "Affirmative Action on Campus Does More Harm Than Good," INTELLIGENCE, <http://intelligencesquaredus.org/debates/past-debates/item/1054-affirmative-action-on-campus-does-more-harm-than-good> (last visited June 5, 2014).

<sup>138</sup> MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* ch. 3 (2013).

<sup>139</sup> Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, J. ECON. LITERATURE (forthcoming 2014).

<sup>140</sup> Peter Arcidiacono, Thomas Espenshade, Stacy Hawkins, & Richard Sander, *A Dialog on the Nature and Effects of Racial Preferences*, 17 J. CONST. L. (forthcoming 2014).