

The Stylized Critique of Mismatch

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Perhaps I'm biased, but I think the debate over "mismatch" in higher education has an importance beyond its immediate concern with the efficacy of large admissions preferences as a matter of college and university admissions policy. There are few areas, I think, where basic academic values of honesty, openness, academic freedom, and free inquiry are so much at stake. The Kidder–Onwuachi-Willig (KOW) review, published a few months ago in the *Texas Law Review*, inadvertently but rather cleanly raises some of these questions. In this Response, I will discuss the nature of the meta-debate on mismatch as well as the specifics in KOW's review and, I hope, put both into a useful perspective. My goal is threefold: first, to rebut KOW's main arguments, second, to illustrate how the KOW critique follows a stylized pattern of ideological attack, where the structure of the argument proceeds predictably regardless of the accuracy or falsehood of any particular assertion, and third, to suggest sources to consult, and questions to ask, that can help disinterested readers make up their own mind about the mismatch issue.

I. The State of the Mismatch Debate

When my first article on law school mismatch¹ appeared in the *Stanford Law Review* in late 2004, the public reception was decidedly hostile. Law reviews published over a dozen critiques that appeared over the ensuing eighteen months;² not a single one of these articles even conceded that I had identified an important and potentially serious problem (aside from a response to critics written by me³). Virtually all of this work

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1. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

2. Some of these critiques attempted their own empirical analyses of mismatch issues and were thus more influential in the debate. See Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *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); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); see also Katherine Y. Barnes, Essay, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649 (2008).

3. Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005).

was published in law journals; most of it was sneeringly dismissive of mismatch. Many journalists wrote about “mismatch,” but almost none agreed with it, and some implied that I was not-quite-all-there mentally.⁴ During this same period, the remarkable work by several other social scientists studying mismatch in other parts of higher education was completely ignored, both by other academics and by journalists.⁵

The landscape nearly a decade later is quite different. Dozens of scholars have now published peer-reviewed articles finding compelling evidence of various mismatch effects.⁶ A whole series of academic conferences on affirmative action have devoted a substantial portion of their proceedings to the mismatch question.⁷ The United States Commission on Civil Rights has issued not one, but two reports on mismatch topics, concluding both times that mismatch is a sufficiently serious potential problem to require action, not just by higher education, but by Congress.⁸ The response of public intellectuals to *Mismatch* (the book) was overwhelmingly favorable.⁹ The *Economist* magazine, in a cover story and editorial on affirmative action in April 2013, cited the mismatch effect as a leading reason for scaling back the use of racial preferences by colleges and

4. See, e.g., Emily Bazelon, *Sanding Down Sander*, SLATE (Apr. 29, 2005, 11:25 AM) http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/sanding_down_sander.html; Katherine S. Mangan, *New Issue of ‘Stanford Law Review’ Will Rebut a Critic of Affirmative Action*, CHRON. HIGHER EDUC. (Apr. 22, 2005), <http://chronicle.com/article/New-Issue-of-Stanford-Law/35121>.

5. I will return to these works *infra*. But for a discussion of much of this early work and the academic and media neglect of it, see RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 33–48 (2012).

6. For example, in September of 2012, the Brookings Institution held a conference on affirmative action titled “The Effects of Racial Preferences in Higher Education on Student Outcomes,” where peer-reviewed papers were discussed. See *The Effects of Racial Preferences in Higher Education on Student Outcomes*, BROOKINGS, <http://www.brookings.edu/events/2012/09/21-race-education>. Peter Arcidiacono has also written extensively on the subject and has published a number of peer-reviewed papers. For a list of his publications, see *Peter Arcidiacono*, DUKE U., <http://public.econ.duke.edu/~psarcidi/>. Project SEAPHE maintains an archive of a number of peer-reviewed papers and studies on mismatch. For a list of those publications, see *Papers & Studies*, PROJECT SEAPHE, http://seaphe.org/?page_id=24.

7. These include the September conference at the Brookings Institute, discussed *supra* note 6, as well as an April 2009 conference at Duke University, a January 2014 conference at the University of Pennsylvania, and a February 2014 conference at the University of Michigan.

8. See U.S. COMM’N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, 141–46 (2007) (discussing the mismatch hypothesis and concluding that Congress should take at least some action); U.S. COMM’N ON CIVIL RIGHTS, ENCOURAGING MINORITY STUDENTS TO PURSUE SCIENCE, TECHNOLOGY, ENGINEERING AND MATH CAREERS, 3–5 (2010) (discussing the mismatch hypothesis and concluding that schools should be required to disclose more information on STEM programs to students).

9. For example, note the number of positive editorial blurbs that were received when the book was published, including reviews submitted by Judge Posner, the *Wall Street Journal*, the *Washington Times*, the *New York Journal of Books*, and many more. See *Reviews: Mismatch*, PERSEUS BOOKS GROUP, <http://www.pbgtoolkit.com/reviews.php?isbn=9780465029969>.

universities.¹⁰ Malcolm Gladwell, our preeminent popularizer of social science, devoted a chapter of his most recent book, *David and Goliath*, to the mismatch effect, concluding, “I am now a good deal more skeptical of affirmative action programs.”¹¹ Journalistic accounts of the mismatch issue, even those appearing in liberal publications, are thoughtful and usually sympathetic.¹²

In December 2013, the California Supreme Court ruled unanimously in favor of me and my co-plaintiffs in *Sander et al. v. State Bar of California*,¹³ holding that even government entities (like the State Bar) that were exempt from the state’s FOIA-type laws were nonetheless subject to a common law right of access.¹⁴ The opinion represents a landmark in public-access law because no court of the California Supreme Court’s stature had ever explicitly endorsed the common law right of access before—and certainly not so emphatically or in such clear detail.¹⁵ An important part of the Court’s test goes to the public interest in the data sought, and here the Court weighed in on the mismatch issue itself:

The public does have a legitimate interest in the activities of the State Bar in administering the bar exam and the admissions process. In particular, it seems beyond dispute that the public has a legitimate interest in whether different groups of applicants, based on race, sex or ethnicity, perform differently on the bar examination and whether any disparities in performance are the result of the admissions process or of other factors.¹⁶

Intelligence Squared, the leading forum for important public debates in the United States,¹⁷ decided in the fall of 2013 to sponsor a debate on affirmative action. It was initially inclined towards a traditional “for” or “against” debate on the moral case for affirmative action, but after further investigation of current work on the issue, decided rather to focus on the *effectiveness* of current preference strategies.¹⁸ The actual debate, on the

10. *Time to Scrap Affirmative Action*, ECONOMIST (Apr. 27, 2013), <http://www.economist.com/news/leaders/21576662-governments-should-be-colour-blind-time-scrap-affirmative-action>; see also *Unequal Protection*, ECONOMIST (Apr. 27, 2013), <http://www.economist.com/news/briefing/21576658-first-three-pieces-race-based-preferences-around-world-we-look-americas>.

11. MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* 287 (2013); see also *id.* at 96 (discussing mismatch).

12. See, e.g., Dan Slater, Op-Ed., *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?pagewanted=all>.

13. 314 P.3d 488 (Cal. 2013).

14. *Id.* at 505–07.

15. See *id.* at 504 (discussing whether California’s common law recognized the presumptive right of public access and concluding that, previously, it had not).

16. *Id.* at 505.

17. See *About*, INTELLIGENCE SQUARED DEBATES, <http://intelligencesquaredus.org/about>.

18. See *Affirmative Action on Campus Does More Harm than Good*, INTELLIGENCE SQUARED DEBATES, <http://intelligencesquaredus.org/debates/past-debates/item/1054-affirmative-action-on>

proposition, “Affirmative action on campuses does more harm than good”—in effect, a debate on mismatch—was hosted by Harvard Law School, featured U.S. Civil Rights Commissioner Gail Heriot and me on the affirmative, and Randall Kennedy and Ted Shaw on the negative.¹⁹ Although much of the audience was plainly strongly sympathetic to affirmative action (Harvard professor Kennedy was lustily cheered when he was introduced), the affirmative argument carried the debate.²⁰

None of this is to say that “mismatch” has become a new orthodoxy; as we shall see, there are both analytic and data-access reasons for why a great deal is still unknown about mismatch.²¹ The point, rather, is that the sets of issues collectively referred to as “mismatch” are not only legitimate issues but properly belong near the center of any discussion of affirmative action policies. When thoughtful people from any part of the political spectrum think honestly about the evidence on the mismatch issue, they generally agree that there is something there.

Why is the current debate on mismatch so dramatically different from the one that occurred in 2004–2005? This will perhaps become an interesting topic when future scholars write about the intellectual history of our era. As Chapter 5 of *Mismatch* discusses, the 2004–2005 debate was almost entirely confined to the legal academy.²² Within that academy, a relatively small group of professors and activists—of whom William Kidder was a minor but very energetic part—assembled a coordinated attack that did its very best to kill discussion of mismatch.²³ Some of those within this group urged scholarly journals not to publish my work, on the grounds that it was manifestly incompetent and incorrect.²⁴ Some accused me of “stealing” embarrassing data while others accused me of suppressing or hiding the data I did have (both claims were ridiculous and eventually withdrawn).²⁵ Still others went to considerable lengths to make sure that the official bodies of legal education did not release further data relevant to studying mismatch. And a fair number of scholars wrote law review

campus-does-more-harm-than-good (asking, “But is [affirmative action] achieving its stated goals and helping the population it was created to support?”).

19. *Id.*

20. In these debates, the audience votes on the proposition at the beginning of the debate, and then votes again at the end of the debate. The winner is determined based on which side changed the most minds during the debate. In this case, net gain in votes “for” the proposition was twice as great as the net gain “against.” Those watching the debate online were more than 2-to-1 for the proposition. For the results, see *id.*

21. See *infra* Part II.

22. See SANDER & TAYLOR, *supra* note 5, at 76–85 (discussing the critics—all of whom are professors—that published critiques of the original article).

23. See sources cited *supra* note 2.

24. See, e.g., Mangan, *supra* note 4 (quoting Michele Landis Dauber, an associate professor at Stanford Law School, as saying, “[Sander’s article] never should have been published and has no merit of any sort”).

25. SANDER & TAYLOR, *supra* note 5, at 73–75.

articles that claimed to show that the “mismatch” argument was wrong—and indeed, often contended that the entire theory was a great hoax I was attempting to perpetrate on law professors and law students.²⁶

These attacks were in some ways remarkably effective. Discussion of mismatch virtually ceased, for a while. A national study on whose board I served asked me, with considerable embarrassment, if I would resign, on the grounds that my presence would preclude their receiving funding from major organizations like the Law School Admissions Council.²⁷ The California State Bar, despite the strong interest of its psychometricians in studying mismatch, decided to refuse access to its data for that purpose.²⁸

This history is very much relevant to a discussion of KOW’s review of *Mismatch*. Because although the debate on these issues has, in many ways, changed dramatically, and although there is little doubt that mismatch-related issues will remain a central part of the affirmative action debate, those who were part of the early attacks on mismatch are still around, and the legal academy still seems particularly susceptible to their influence.

KOW’s review has very much the tone of the bad, old attacks of the 2004–2005 debate. There is no hint anywhere in the review that any idea connected with mismatch is a serious one. Rather, mismatch is presented as a form of sublimated racism that has been overwhelmingly rejected by respected scholars. In Parts IV through VI of this Response, I will answer specific criticisms of *Mismatch* made by KOW and explain why their arguments are not simply wrong, but pretty clearly made in bad faith. More broadly, however, I would like to show that there are really two mismatch debates: one based on genuine intellectual inquiry, illustrated by the examples above and elaborated in Part VII, below, and one marked by ideological Zealots who cling to conventional affirmative action policies with almost religious fervor and see their attacks on mismatch as a sort of holy war. The Zealots have become increasingly marginalized, especially as data-driven labor economists have assumed a larger role in the issue. But since most readers of this law review do not have the empirical training to evaluate many of the relevant arguments, a response that focused only on point-by-point rejoinders²⁹ might be unpersuasive. The question I ultimately attempt to answer in this Response is this: How can an interested non-social scientist evaluate the mismatch debate?

26. See, e.g., Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1899–901, 1914 (2005).

27. SANDER & TAYLOR, *supra* note 5, at 73.

28. *Id.* at 242.

29. See discussion *infra* Parts IV–VII.

II. The Mismatch Issue

Before going further, it is important to be more specific about what we mean by “mismatch” and about the general claims of mismatch scholars. The mismatch idea, as applied to education, is not a single hypothesis but rather a family of hypotheses, which have in common an interest in the peer effects of learning: does a given student benefit or suffer from a learning environment where the student’s academic preparation is far below, or far above, his or her median peer? One can usefully distinguish three very distinct mismatch ideas:³⁰

(a) “Learning mismatch” occurs if a student actually learns less in class because that student’s level of academic preparation is far below, or far above, the average level of her peers.³¹ This might happen if teachers aim instruction at the middle of the class, covering material in a way that is boring to a student with exceptionally strong preparation, or that is too fast and confusing to a student with weak preparation.³² The direct test of learning mismatch is whether actual measured student learning goes up when a student is among similar peers.³³

(b) “Competition mismatch” occurs if a student gets bad grades and becomes discouraged because her academic preparation puts her at a competitive disadvantage with her classmates.³⁴ This is illustrated by so-called science mismatch, which can happen when a student interested in pursuing a “STEM” field (Sciences, Technology, Engineering, and Math) receives a large preference and finds herself surrounded by students with higher test scores or more

30. The general schema of mismatch ideas discussed in the following paragraphs arose in conversations between the author and Peter Arcidiacono. For an elaboration of the principles, see Richard H. Sander & Aaron Danielson, *Thinking Hard About Race-Neutral Affirmative Action*, 47 MICH. J.L. REFORM (forthcoming 2014).

31. For valuable introductions, see Esther Duflo et al., *Peer Effects, Teaching Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 AM. ECON. REV. 1739 (2011), and Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools*, 10 J. EMPIRICAL LEGAL STUD. 171 (2013).

32. Williams, *supra* note 31, at 176–77.

33. See *id.* at 178–79 (discussing how to measure the effects of mismatch and concluding that a direct test would measure the acquired knowledge of the mismatched students).

34. This idea has been around in some form for decades. 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, 21, 25–27 (1966) (presenting findings that support the notion that “feelings of success in relevant courses are a factor in” deciding whether to pursue a “high-academic performance career field,” even more so than whether the student chose to attend an elite institution). For the book that made the Davis idea (and others) far more tangible and applied it to the affirmative action context, see STEPHEN COLE & ELINOR BARBER, *INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS* 100–38 (2003).

advanced preparation.³⁵ A little bit of “competition mismatch” might actually be a good thing, stimulating a student to push herself and truly excel. But severe competition mismatch is likely to produce poor grades and discouragement. In the case of science mismatch, it seems to cause the vast majority of science-interested students (if they receive large preferences) to abandon STEM fields.³⁶

(c) “Social mismatch” is a hypothesis about the academic links to social interaction on campus.³⁷ Some very careful, peer-reviewed studies have found that students at college are significantly more likely to make friends with other students who have similar levels of academic preparation and academic performance.³⁸ Creating, through the use of admissions preferences, large gaps in academic preparation across distinct ethnic groups on campus can thus directly undermine the specific benefits campus diversity is supposed to achieve.³⁹

These three hypotheses concern “first-order effects” of large preferences. If they occur, they may lead to “second-order effects,” such as lower graduation rates or lower wages for students experiencing mismatch. Students who learn less because of learning mismatch or who get lower grades because of competition mismatch may then be less likely to graduate from college. But not necessarily. If a selective, elite college decides as a matter of policy to come as close as possible to a 100% graduation rate, then one is unlikely to observe graduation mismatch at that college. Similarly, if an employer tends to hire from selective schools and has

35. See 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) (finding that underprepared applicants are more likely to have a lower class rank, which in turns leads them to drop out of science, math, and engineering majors).

36. See Rogers Elliot et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. HIGHER EDUC. 681, 682 (1996) (showing through a variety of analyses the effect of peer achievement on persistence in science and the negative effect of having levels of academic preparation well below those of one’s peers); Smyth & McArdle, *supra* note 35, at 373 (finding that if all the underrepresented minority students had enrolled in colleges where their high school grades and academic achievements were median with the institution, 45% more women and 35% more men would have persisted in science, math, and engineering majors);

37. See generally Peter Arcidiacono et al., *Representation Versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?*, 95 J. PUB. ECON. 1 (2011) (studying the question of mismatch in the social context).

38. *Id.* at 2 (noting their finding that interracial interaction depends on similar academic backgrounds); see also Peter Arcidiacono et al., *Racial Segregation Patterns in Selective Universities*, 56 J.L. & ECON. 1039, 1040–41 (2013) (same).

39. Arcidiacono et al., *supra* note 37, at 13 (noting their finding that because students tend to form friendships with those who are academically similar, large race preferences may exacerbate social mismatch and cause more discrimination); see also Arcidiacono et al., *supra* note 38, at 1058–59 (“[R]ace-based admissions preferences may limit interracial friendships by increasing racial differentials in academic background.”).

specific diversity goals, then graduates from selective colleges who have received large preferences might do well in the job market—at least in the short term—even if they have worse grades and have learned less than they would have if they had attended a less selective school.⁴⁰

It is well understood in the empirical literature that mismatch is hard to measure. There are a couple of reasons for this. One is the problem of “selection bias.”⁴¹ Proper mismatch studies need to compare students with similar academic preparation who are in different peer environments, which usually means trying to find comparable students attending schools with sharply differing levels of eliteness.⁴² Comparability is usually determined by matching on a few measures that are in available datasets, such as SAT scores and high school grades.⁴³ But university admissions offices use many more variables in selecting students, such as written essays, courses taken, high school quality, AP scores, and many other factors.⁴⁴ It is almost invariably the case that between two students with similar “observed” characteristics (the ones, like SAT scores, that are used for comparison), the student at the more elite school will have stronger “unobserved” characteristics when these can actually be measured.⁴⁵ This means that nearly all mismatch comparisons are stacked in favor of the more elite school and, therefore, stacked against a finding of mismatch.

A second challenge in mismatch studies is the blurriness of available data. Studies to date of law school mismatch have had to rely on data collected by the Law School Admission Council (LSAC) in the 1990s, assembled in a database that measured such things as school eliteness and bar performance quite crudely.⁴⁶ Studies of college performance tend not to take into account the radical differences between grading in most science fields compared with humanities fields; studies of college graduation often fail to differentiate between on-time (four-year) attainment of a bachelor’s degree and delayed graduation.⁴⁷ It is straightforward to show that

40. For a showing that although African-Americans receive large preferences in the hiring process by law firms, significant evidence suggests that it backfires upon them through disproportionately low promotion to partnership, very possibly through a mismatch process inside the firms, see Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1756, 1758–59 (2006). See also Jee-Yeon K. Lehmann, *Job Assignment and Promotion Under Statistical Discrimination: Evidence from the Early Careers of Lawyers* 1–2 (Munich Pers. Research Papers in Econ. Archive, Paper No. 33,466, 2011).

41. Williams, *supra* note 31, at 174.

42. See *id.* (noting that the selection-on-unobservables bias makes it hard to determine if students have similar academic preparation).

43. See *id.* at 178.

44. See *id.* at 174, 189.

45. See Sander, *supra* note 3, at 1971–73.

46. Williams, *supra* note 31, at 178; see also Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, J. ECON. LIT. (forthcoming 2014) (manuscript at 14 & n.12, 18) (on file with author).

47. See Arcidiacono & Lovenheim, *supra* note 46 (manuscript at 37–38).

mismatch is harder to demonstrate with blurry, inexact data than with precise data. That is part of the reason why finding better data is a high priority for mismatch scholars.

Given these challenges, there is a remarkable pattern in mismatch research. *Every study I have encountered of the three first-order mismatch hypotheses has found strong evidence of mismatch.* I do not know of a single peer-reviewed critique—and almost no critiques of any kind—of these first-order mismatch findings. In other words, research on the fundamental mechanisms of mismatch is virtually unanimous and undisputed.

The actual debate over mismatch concerns two other matters. First, the second-order effects of mismatch, such as the effect of mismatch on graduation rates, are genuinely (and often in good faith) disputed. This is not surprising because (as noted above) there are additional confounding factors in studying second-order effects, and institutions can counter-program against the first-order effects of mismatch by, for example, raising the graduation rate of all students. Second, no one really knows how large an admissions preference must be to cause mismatch problems. It is clear that students admitted with very big preferences (i.e., comparable to 200 SAT points or 10 LSAT points) are very vulnerable to first-order mismatch effects.⁴⁸ But relatively small preferences might be benign or even have positive effects—by challenging students without overwhelming them. Here again, better data are needed to measure these important distinctions.

III. The Indicia of Zealotry

There are a number of thoughtful critics of mismatch. Scholars like Thomas Espenshade (a sociologist/economist at Princeton) and Jeffrey Smith (a labor economist at the University of Michigan) have published justly admired works⁴⁹ that find evidence of the positive effect of admissions preferences and are skeptical about broad mismatch claims. A defining characteristic of good scholarship and honest inquiry is that they lead toward consensus over time. I think Espenshade, Smith, and other honest mismatch critics would find much to agree with in the overview I presented in Part II because that overview helps explain the pattern of findings in the field over the past decade.

The sort of work represented by KOW's review of *Mismatch* is quite different. I contend that this is not a serious work of scholarship, but is

48. See *id.* (manuscript at 53) (“The literature clearly shows positive average effects of college quality on a host of outcomes. This suggests that mild racial preferences will have a positive impact on minority outcomes. The issue is whether racial preferences in their current form are so strong that mismatch effects may arise.”).

49. See generally THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 226–62 (2009); Dan A. Black & Jeffery A. Smith, *Estimating the Returns to College Quality with Multiple Proxies for Quality*, 24 J. LAB. ECON. 701 (2006).

instead a polemic authored by Zealots. But how can one substantiate such a charge? How do we know zealotry when we see it?

First, the Zealots are not interested in shades of gray. They paint the debate about mismatch as a contest between good and evil, truth and falsehood. They are not interested in whether some mismatch hypotheses are strongly supported, while others are weaker—they insist that the mismatch argument is wrong from beginning to end.⁵⁰ This sort of absolutism is typical of zealotry, but it is also strategically important to the anti-mismatch Zealots. If they concede that there is anything at all to mismatch, that raises immediate implications that they consider unacceptable. After all, if mismatch is partly right, then shouldn't there be a high-status, well-balanced commission to investigate it? Shouldn't universities and foundations support efforts to produce more and better data to evaluate the mismatch issue? No, acknowledging any truth to the mismatch argument is, to the Zealots, the same as opening Pandora's Box just a crack.

Second—and this follows from the first point—the Zealots studiously avoid direct engagement with the strongest evidence supporting the mismatch hypothesis. Of course, if one really has intellectual confidence in one's position, one should be eager to deal with the strongest argument and evidence of the “opposition.” Certainly, this is what I and other mismatch defenders have done in the law-school-mismatch debate: we have taken apart the specific findings of the strongest empirical critics of law school mismatch, such as Ian Ayres and Richard Brooks, Jesse Rothstein and Albert Yoon, and Katherine Barnes, reanalyzed the exact data and models they use, and shown exactly where errors of analysis or interpretation occurred.⁵¹ Our conclusions are readily available for anyone to dispute; and tellingly, the authors themselves have not even attempted to rebut us. In contrast, one looks in vain through the work of the Zealots for engagement

50. See William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind “Mismatch,”* 92 TEXAS L. REV. 895, 940–41 (2014) (book review) (attempting to dismantle the entire mismatch theory); see also Lee C. Bollinger, *The Real Mismatch*, SLATE (May 30, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/supreme_court_and_affirmative_action_don_t_make_schools_trade_race_f_or_class.html (contending that the mismatch theory is nothing but an argument “cloaked in new data and rhetoric”); Erwin Chemerinsky, Op-Ed., *Why Affirmative Action Matters to Minorities*, ORANGE COUNTY REG., Nov. 1, 2013, <http://www.ocregister.com/articles/students-534224-affirmative-action.html> (stating that the mismatch theory is “nothing but a rationalization for denying African-American and Latino students admission to the nation’s elite college and universities”).

51. See, e.g., SANDER & TAYLOR, *supra* note 5, at 67–90 (responding, point-by-point, to various critics of mismatch); Sander, *supra* note 3, at 1978–2013 (same); Williams, *supra* note 31, at 173–76 (reviewing and critiquing the literature by Ayres & Brooks, *supra* note 2, and Rothstein & Yoon, *supra* note 2). See generally Doug Williams, Richard Sander, Marc Luppino & Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 NW. U. L. REV. 813 (2011) (conducting an in-depth critique of Barnes, *supra* note 2).

with any of the work of Peter Arcidiacono, the Duke economist whose scholarship is preeminent in the field; Frederick Smyth and John McArdle, who used one of the best available datasets to study science mismatch; or Stephen Cole and Elinor Barber, authors of a landmark study on the role of academic mismatch in depleting the pipeline of African-American professors.⁵² These scholars, whose work is the gold standard of mismatch research, are virtually ignored by the Zealots.

Third, Zealots generally oppose the release of data. This is of course rather damning, since observers often correctly infer that the Zealots are afraid of what better data will show.⁵³ To a Zealot, however, more data simply empower the critics. As noted above, Zealots lack intellectual confidence in what the data will show; what they do have is emotional confidence that their cause is just. This combination means that Zealots have an ambivalent attitude towards data and certainly—in the context of the mismatch debate—oppose broad transparency in higher education.

Fourth, Zealots consistently impugn the motives behind those finding evidence of mismatch. In particular, they often allege, with varying degrees of directness, that those who believe mismatch to be a problem are simply racists, eager to shut minorities out of elite institutions and return to a system of de facto segregation.⁵⁴

Last, but certainly not least, Zealots have a problem with accuracy. Because they see themselves as serving a righteous cause in which facts are merely instruments of war, they tend not to be careful with factual claims. Sometimes this involves inventing claims out of whole cloth. More often, it means that arguments and evidence are distorted, sometimes a full one hundred eighty degrees. The Zealots are so misleading and selective in the evidence they present that they rarely provide a reliable guide to any topic they discuss.⁵⁵

Both Kidder and Onwuachi-Willig are certainly Zealots in good standing. Both have repeatedly engaged in reckless attacks on mismatch, filled with wildly misleading and often factually erroneous claims.⁵⁶ Their

52. See sources cited *supra* note 6.

53. SANDER & TAYLOR, *supra* note 5, at 233.

54. See Chemerinsky, *supra* note 50 (“The mismatch theory is patronizing. It is advanced by conservative opponents of affirmative action, most of whom are white, to justify denying admission to elite colleges and universities to minority students on the ground that it is not good for them.”).

55. See, e.g., Richard Sander, Angela Onwuachi-Willig: The Shotgun Approach to Scholarly Exchange (February 2014) (unpublished handout) (on file with author) (providing factual comment on a series of claims Onwuachi-Willig made about mismatch at the 2013 Association of American Law Schools meetings in New Orleans); Richard H. Sander, Polemics Without Data: A Response to the Chambers et al. Critique (Jan. 14, 2005) (unpublished manuscript) (on file with author) (giving a point-by-point analysis of an early critique of law school mismatch written largely by Kidder).

56. See sources cited *supra* note 55.

collaboration in reviewing *Mismatch* pretty much guarantees that their review will be high on ideological fervor and very low on factual accuracy and social-scientific competence. The three Parts that follow examine, in reverse order, what I take to be the three main points of the KOW review.

IV. Are Mismatch Hypotheses Racist?

An example of Zealot characteristic number 4—impugning the motives of mismatch scholars—comes near the end of KOW’s review:

[T]he one-sided nature of Sander and Taylor’s arguments—the very way in which the two authors seem to pay no attention to white students with grades and scores that are comparable to those of allegedly “mismatched” students of color—exposes a fatal flaw about claims in their research. After all, if mismatch were such a problem, why would Sander and Taylor specifically link their analyses predominantly to race and affirmative action? . . . [For example,] they could make broader claims that include legacies—nearly all white students who find themselves “mismatched” at their institutions.

For many of [the critics of affirmative action], their concerns are not so much about merit and consistency but rather about whom they view (whether consciously or unconsciously) as belonging and not belonging at selective institutions⁵⁷

If one had never read *Mismatch*, or other work by mismatch scholars, this might sound like a persuasive argument. Someone familiar with my work, however, would know that KOW are as wrong as they can be. For example, early in *Mismatch*, Stuart Taylor and I address this issue squarely:

How do racial preferences compare with other sorts of preferences used by colleges, such as those for athletes and legacies?

Liberal arts colleges extend admissions preferences to all sorts of applicants for a wide variety of reasons. At least some scholars have argued that athletic and legacy preferences are comparable in size to racial preferences. If preferences cause mismatch, why are we focusing on *racial* preferences?

The reasons include the long-standing visibility of racial preferences as a hotly contested political and legal issue that has roiled state and national politics and repeatedly engaged the Supreme Court, the nation’s tortured history on issues of race, plus the unavailability of much reliable data on legacy and athletic preferences. The vast majority of datasets about higher education and college students—including nearly all those we draw from for this book—identify the race of students but do not identify whether a

57. Kidder & Onwuachi-Willig, *supra* note 50, at 936–38 (footnotes omitted).

student is a legacy or received an athletic preference. We therefore know a great deal about the operation and effects of racial preferences but relatively little about athletic and legacy preferences. The limited data we have seen and the secondary sources that discuss legacy and athletic preferences often tell contradictory stories as to the size and pervasiveness of these preferences. Such data as we have seen plus much anecdotal evidence suggest, if inconclusively, that legacy preferences and many athletic preferences affect many fewer students, and are on average significantly smaller than racial preferences.

What does seem true is that the mismatch operates in much the same way across racial lines. Whenever we have documented a specific mismatch effect, we have found that it applies to all students who have much lower academic indices than their classmates. One can imagine reasons why mismatch might be mitigated in the case of some athletes (because the school provides them with targeted academic support) or some legacies (because they received a stronger secondary education than their numerical indices suggest), but our limited evidence suggests that these groups, when they receive large preferences, are vulnerable to the same mismatch effects we document for racial minorities.⁵⁸

Given this prominent passage in the book, how could KOW make the argument they do? One possibility is that neither of these authors actually read *Mismatch*, even though they wrote a lengthy review of the book. Another possibility is that they simply do not care whether what they write is accurate—that they are writing to the converted, to people who want to hear their preexisting attitudes about affirmative action and mismatch confirmed and will not question the source of confirmation too carefully. In either case, KOW's willingness to make such a toxic claim in the face of contrary evidence pretty much sums up why they should be dismissed as Zealots.

Although nothing more need be said to dispose of KOW's claim on this point, it is worth lingering for a moment on the broader subject of the underlying racial implications of mismatch. In my view, the thrust of mismatch research is racially progressive. Education scholars have puzzled for decades over large racial disparities in such things as college grades, bar passage, and STEM degree attainment.⁵⁹ A basic finding of much

58. SANDER & TAYLOR, *supra* note 5, at 27.

59. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 77 (1998) (discussing “a troubling phenomenon often called ‘underperformance.’ Black students with the same SAT scores as whites tend to earn lower grades”). For a similar discussion in Kidder's own work, see Chambers, Clydesdale, Kidder & Lempert, *supra* note 2, at 1877–81, stating: “Sander is wrong when he concludes that the current lower performance by African Americans in law school is ‘a simple and direct consequence of the disparity in entering credentials between blacks and whites.’ It is not. Exactly why African Americans perform somewhat less well in law school than

mismatch research is that these differences can be *completely* explained in nonracial terms, as consequences of the operation of admissions preferences. My original article on law school mismatch stressed that racial differences in both law school grades and bar passage fully disappeared, or at least became trivial, when one controlled for preferences.⁶⁰ Smyth and McArdle showed that black, Hispanic, and white rates of STEM degree attainment similarly vanished when one controlled for preferences.⁶¹ Arcidiacono and his colleagues showed that when one took into account both preferences and the attrition from technical majors that often accompanies large preferences, racial differences in undergraduate grades at Duke vanished.⁶² In every case, these works have *emphasized* these findings about racial equality. All this work powerfully rebuts the idea that racial differences in academic performance are mysterious or inexplicable.

Similarly, when sufficiently good data can be found to study mismatch among white students, the underlying dynamics are strikingly similar. Jane Bambauer and I wrote an entire, well-known article about the career tradeoff between attending a more elite law school and attending a less elite school where one gets better grades.⁶³ Bambauer and I limited much of our analysis to whites—specifically to avoid confounding race and mismatch—and found strong and consistent evidence that students attending more elite schools at the price of performing well academically had worse job-market outcomes.⁶⁴

V. KOW as Empiricists

Much of KOW's review engages with very little of the actual empirical work presented in *Mismatch*. When they do, KOW's discussions are either deliberately misleading or completely clueless—and sometimes both at the same time. In this Part, I will examine in detail KOW's most extensive and specific critique of my scholarship: the debate over whether affirmative action bans “chill” or “warm” minority interest in the affected schools.⁶⁵

their credentials would predict remains unclear.” Interested readers should see my response, Sander, *supra* note 3, at 1967–69.

60. See Sander, *supra* note 1, at 429, 444–45.

61. Smyth & McArdle, *supra* note 35, at 371–74.

62. Peter Arcidiacono et al., *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 IZA J. LAB. ECON., Oct. 9, 2012, no. 5, at 1, 19–20.

63. See Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. EMPIRICAL LEGAL STUD. 893, 894 (2012).

64. *Id.* at 896–97, 925.

65. This is not only the subject of Chapter 8 of *Mismatch* but also of a separate article. See generally SANDER & TAYLOR, *supra* note 5, at 131–42; Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the “Chilling Effect,”* 15 AM. L. & ECON. REV. 252 (2013). For KOW's critique, see Kidder & Onwuachi-Willig, *supra* note 50, at 921–35.

For over a decade, many of the staunchest defenders of affirmative action have argued that the reduction or elimination of racial preferences would have a “chilling effect” on minority students—that black and Hispanic students would tend not to apply to schools where they were present in smaller numbers and, if they did apply, would be less likely to enroll even if they were offered admission.⁶⁶ California’s adoption of Proposition 209 (Prop. 209) provided a unique opportunity to test this theory rigorously, since, in 1998, undergraduate admissions at the University of California (UC) abruptly changed from a system that used large racial preferences to one that officially did not consider race.⁶⁷ In 2008, a group of labor economists (including me) obtained detailed data from UC on admissions and enrollment before and after 1998. Kate Antonovics, a labor economist at the University of California, San Diego, undertook a series of studies of the “chilling effect”; I coauthored the first of these studies, which appeared in the *American Law and Economics Review* in the summer of 2012. Antonovics and I found that, contrary to the chilling effect hypothesis, Prop. 209 seemed to create a “warming effect”—that is, *ceteris paribus*, minority applicants were substantially *more* likely to accept an offer of admission from a given UC school after Prop. 209 than before.⁶⁸ This was especially true at the most elite campuses that had, before Prop. 209, used the largest preferences.⁶⁹ An implication of our research is that black and Hispanic high school students might actually prefer to go to college on a campus where it was known (or at least believed) that preferences had not been used in admissions.⁷⁰

Part of what made our study important, and credible to economists who reviewed the manuscript,⁷¹ was the data we had and our study design. We had information on essentially all freshman applicants to all eight of the University of California campuses for the three years before and the three years after the implementation of Prop. 209.⁷² We knew all the campuses to which students applied, which campuses had offered them admission, and which ones they had accepted and attended.⁷³ On the other hand, we did not know (because the university would not disclose) whether the students labeled “underrepresented minorities” in our data were blacks, Hispanics, or

66. Antonovics & Sander, *supra* note 65, at 252–53.

67. *Id.*

68. *Id.* at 253–54, 295.

69. *See id.* at 272, 278.

70. SANDER & TAYLOR, *supra* note 5, at 156.

71. The *American Law and Economics Review* is considered a leading peer-reviewed journal in legal academics; peer reviewers closely scrutinize the logic of the argument to make sure the conclusions are well-supported, both conceptually and empirically. *See About the Journal*, AM. L. & ECON. REV., http://www.oxfordjournals.org/our_journals/alecon/about.html.

72. Antonovics & Sander, *supra* note 65, at 253–54.

73. *Id.*

Native Americans, and our data were grouped into three-year cohorts rather than single years.⁷⁴ We could not, therefore, estimate warming effects for individual minority groups or individual years.

KOW's discussion of our warming effect work begins with a breathless unmasking of our work:

Sander and Taylor claim that, under Prop. 209 at UC campuses, . . . [“]race-neutrality attracted many, many more black and Hispanic students than it repelled.” However, the Antonovics and Sander data show that URM yield rates to the *UC system* went down (in absolute and relative terms) after Prop. 209 *even though* URM yield rates purportedly *went up on individual UC campuses*. Thus, as a claim about numbers, Sander and Taylor's claims make little sense . . .⁷⁵

This is a classic Zealot passage, managing to convey in just a couple of sentences the ideas that mismatch scholars are tricky (note the use of the word “purportedly”), inept (“makes little sense”) and wrong (UC yield rates actually went up after Prop. 209!). Once again, KOW are clearly counting on readers not doing any homework. KOW “discovered” that UC yield rates went up by reading our article, but they neglected to quote what we say about it, near the very beginning of our discussion of our results:

[W]e see that yield rates for URMs [after Prop. 209] increased at each of the eight [UC] campuses, but decreased for the UC system as a whole. This apparent paradox is easily explained. If URMs are admitted to a smaller number of UC schools after Prop[.] 209, they may be less likely to attend any UC school, but more likely to attend each school to which they are accepted.⁷⁶

Because of the general increase in applications after Prop. 209's enactment, acceptance rates for all students went down after 1997, but they (of course) went down especially sharply for the URMs who had received significant admissions preferences before Prop. 209. Thus, imagine two otherwise similar students who applied to the University of California, Los Angeles (UCLA, a top national university), and the University of California, Santa Barbara (UCSB, an excellent school but significantly less elite than UCLA), in 1996 (in our “before” period) and in 1998 (in our “after” period). To understand the chilling/warming effect on enrollment, we are interested in whether that student became more likely or less likely to enroll in a UC school if offered admission. To do so, we of course want to hold the student's selection set within the UC system constant. Consider four possible outcomes:

74. *Id.* at 266.

75. Kidder & Onwuachi-Willig, *supra* note 50, at 923 (footnotes omitted).

76. Antonovics & Sander, *supra* note 65, at 270–72.

Table 1

Scenario	Students and Successful Applications		Relevance
1	Student A 1996	UCLA, UCSB	Match relevant for evaluating chilling effect
	Student B 1998	UCLA, UCSB	
2	Student A 1996	UCLA, UCSB	Not a direct match
	Student B 1998	UCSB	
3	Student A 1996	UCSB	Match relevant for evaluating chilling effect
	Student B 1998	UCSB	
4	Student A 1996	UCSB	Not a direct match
	Student B 1998	UCSA, UCLB	

The nature of our analysis, then, is to compare students who had the same UC choice set before and after Prop. 209 and who were otherwise comparable in their academic, socioeconomic, racial, and other characteristics that we could control in the dataset.⁷⁷ The data show that post-Prop. 209, enrollment rates in general went up, but they went up most for URM students, especially at the most elite campuses.⁷⁸

It is not possible that KOW saw our table (where we document the discrepancy between UC-wide and individual-campus yield rates) but did not see our explanation of the “apparent paradox” and why the numbers we use are the appropriate ones for our warming effect analysis. So two things follow. First, KOW realize that their basic criticisms of the warming effect research are wrong; and second, KOW deliberately mislead their readers by

77. *Id.* at 263–65. Any other method would create obvious misleading inferences that would, for example, preclude publication of the analysis in a competent peer-reviewed journal. Suppose, for example, that one compared a student admitted to UCLA and UCSB in the “before Prop. 209” period with an otherwise similar student who was admitted only to UCSB in the “after Prop. 209” period. The “after” student is much less likely to attend *some* UC school because her UC choice set is much less desirable. If she also has a scholarship offer from, say Pomona College, the “before” student may quite likely turn down Pomona to attend UCLA, but the “after” student will probably choose Pomona over UCSB. Now consider, with the same hypothetical, what happens to UCSB take-up rates. These will certainly be higher in the “after” period because some of the students rejected by UCLA will go to the best alternative UC school that admits them (for financial, geographic, or other reasons). So in this comparison, our “warming” estimate for UC as a whole would be distorted downward and our “warming” estimate for UCSB alone would be distorted upward. A correct analysis of the warming effect excludes both of these scenarios and only compares students who faced the same UC choice set before and after.

78. *Id.* at 270–72.

suggesting that Antonovics, Taylor, and I were unaware of the dual sets of numbers.

But there's more. KOW further suggest that we mislead readers by ignoring or concealing a pattern within the data: the strongest URM students were, they suggest, less likely to enroll at higher rates; for these strong students enrollment rates went down, and the enrollment increase occurred only for students in the bottom third of the acceptance pool.⁷⁹ As Kidder wrote in an earlier review of our book:

[The warming effect claim] is based on methodologically questionable statistical adjustments that obfuscate this stubborn fact about freshmen admitted to UCLA: in the four years prior to Proposition 209, 24 percent of the African Americans in the top third of the admit pool chose to come to UCLA. In the first four years after Prop 209 the yield rate plummeted to 8 percent. There were less extreme drops in the middle-third of UCLA's admit pool, and in the top third of black admits at the other UC campuses. In short, after Proposition 209 a larger share of top black students admitted to UC campuses chose to reject offers from UC in favor of selective private universities⁸⁰

The "methodologically questionable statistical adjustments" are not elaborated upon; this presumably is another reference to Kidder's confusion about (or obfuscation of) the difference between UC-wide and individual school-level enrollment rates. But let us examine his claim about the loss of top students:

First, Kidder's use of "thirds" of the admit pool is highly misleading. He is not referring to "thirds" of black admits, but "thirds" of all students. During the years in question, only about 5% of admitted blacks fell in his definition of the "top" of the pool, while something like 75%–80% of admitted blacks fell into the "bottom third."⁸¹ One might reasonably conclude that whatever the internal patterns might be, what happens to the bottom third of admitted blacks is especially important. But in any event, the huge size of the bottom third relative to the top third is at least a relevant fact to lay before the reader! Kidder deliberately conceals this information, again in classic Zealot fashion.

Second, Antonovics and I attempted to replicate Kidder's numbers, but we could not. In our data (which, recall, combined blacks, Hispanics, and

79. See Kidder & Onwuachi-Willig, *supra* note 50, at 926.

80. William Kidder, *A High Target for "Mismatch": Bogus Arguments about Affirmative Action*, L.A. REV. BOOKS (Feb. 7, 2013), <http://lareviewofbooks.org/review/a-high-target-for-mismatch-bogus-arguments-about-affirmative-action#>.

81. According to the data Kidder provided, 3,428 blacks are admitted to UCLA during the period he examines (1994 through 2001), of whom 177 are in the "top third" (the term used in his data), and 2,805 were in the "bottom third." See Reply Memorandum from William Kidder, Univ. of Cal., Riverside, to author (July 29, 2013) (on file with author).

American Indians into one “URM” category at the insistence of UC administrators), the change in yield rates at UCLA before and after Prop. 209 are as follows:

Table 2

Tercile (thirds of all admits) of UCLA URM Admits	UCLA URM Yield Rate, 1995–1997	UCLA URM Yield Rate, 1998–2000
Bottom (9,297)*	42%	54%
Middle (1,806)*	24%	28%
Top (692)*	13%	17%

*The total number of URM students in each tercile is shown in parentheses.

Our data show *increases* in URM yield rates across the spectrum, though the increase is largest for the academically weakest students. We asked Kidder for the data he claimed to have for all eight campuses. He sent us his UCLA data but refused to send his data for the other seven campuses. His data were similar to ours, but did not quite match. We then looked at a third source—the data on freshmen that were posted on a website maintained by UC’s Office of the President (UCOP).⁸² It matched our data but not Kidder’s data. Our data came directly from UCOP (indeed, we paid UCOP for it), has been publicly available for years to any researcher who asks for it, and has been used in several published, peer-reviewed studies and reports.⁸³ Kidder may be right about a decrease in yield rates at UCLA for a handful⁸⁴ of the very top blacks—but if so, there was a far more than offsetting for top Hispanics, and I’m confident there were increases for top blacks at other campuses (the ones for which Kidder will not share his data).

Another point is worth making. Antonovics and I emphasized in our paper that the warming effect *was* strongest for students with lower academic credentials.⁸⁵ We thought this suggested that such students might particularly value attending a school with professedly race-neutral policies since students with lower credentials might be more concerned about being

82. Which are apparently no longer available due to budget constraints. Kidder & Onwuachi-Willig, *supra* note 50, at 913 n.82.

83. See Antonovics & Sander, *supra* note 65, at 265–66; Kate Antonovics & Ben Backes, *Were Minority Students Discouraged from Applying to University of California Campuses After the Affirmative Action Ban?*, 8 EDUC. & FIN. POL’Y 208 (2013).

84. If, arguendo, Kidder is correct about his alleged decline in yield rates for top blacks at UCLA, this translates (by his numbers) into the loss of *three* black students per year. In contrast, the broader warming effect we measured for UCLA translates into *close to one hundred* additional underrepresented minority students enrolling each year.

85. Antonovics & Sander, *supra* note 65, at 293.

stereotyped as a “preference recipient.”⁸⁶ KOW’s implication that this pattern somehow undermines our conclusion is sheer nonsense.

In fact, I hope readers see that KOW’s discussion of the warming effect is much worse than nonsense—it is a series of deliberately misleading distortions of both the data and our (Antonovics’s and my) analysis. Once again, KOW are engaged in zealotry, not reasoned discussion.

VI. Ignoring the Literature

The bulk of KOW’s review is dedicated to the claim that *Mismatch* simply cherry-picks data and studies to fit its arguments: “Sander and Taylor failed throughout their book to look beyond the miniscule number of studies that support their claims and, in so doing, neglected to respond to mountains of research by many of the world’s top social scientists that have found such claims about mismatch to be empirically groundless.”⁸⁷ If true, this would be a powerful critique indeed. But here again, KOW write as Zealots, not as academics. Their “cherry-picking” argument is based on a breathtaking exercise of their own in cherry-picking and irresponsibly distorting the arguments made in a broad swath of mismatch-related research.

A good place to begin is the caveat with which KOW open their review: “We were assigned a word limit for our Review, . . . so we have narrowed our Review to a few areas in Parts II and III of *Mismatch* . . .”⁸⁸ Yes, indeed. *Mismatch* has eighteen chapters, and KOW focus on half of Chapter 6, parts of Chapter 8 (the “warming effect” issue discussed above), and parts of Chapter 9. How can they then make a claim of what we do “throughout [the] book”? If they really believe that we ignore critics of mismatch, why did they completely ignore Chapter 5, for example, which is titled “The Debate on Law School Mismatch” and is largely devoted to a point-by-point analysis of the major critiques of law school mismatch?⁸⁹ In fact, throughout the book we discuss scholars who have either criticized mismatch or have found contrary evidence, from Ian Ayres to William Bowen to Marta Tienda.⁹⁰ I would guess that for every three scholars we discuss who have found mismatch effects in their research, we discuss two who have critiqued it. Aside from the warming effect and racism issues discussed above, KOW’s review focuses on two types of mismatch effects:

86. *Id.* at 288–90.

87. Kidder & Onwuachi-Willig, *supra* note 50, at 935–36.

88. *Id.* at 896.

89. SANDER & TAYLOR, *supra* note 5, at 67–90.

90. *See, e.g., id.* at 77–87 (discussing Ayres); *id.* at 106–08, 236 (Bowen); *id.* at 107 (Tienda).

graduation rates and post-graduation earnings.⁹¹ This was not an accidental selection. Recall the distinction I drew in Part II between the first-order, direct types of mismatch effect and the second-order, less direct consequences. As I observed, there is an extensive literature on these first-order effects (learning mismatch, competition mismatch, and social mismatch), and it is virtually unanimous in concluding that these various types of mismatch are real and substantial. If KOW wish to argue that mismatch is a chimera, why do they *exclusively* focus on second-order effects? Presumably because only here can they find any support *at all* for their views. Cherry-picking indeed.

It is important to emphasize this fundamental point: the anti-mismatch Zealots are uniform in avoiding any discussion or acknowledgement of the various first-order mismatch effects. For example, in the wave of supposed law-school-mismatch rebuttals published by a variety of scholars in 2004 through 2007, none of the critics engaged with the key mismatch issue: that law school mismatch caused students to learn less and thus to be more likely to fail the bar on their first attempt. As Doug Williams explained in his 2013 peer-reviewed study of law school mismatch, this fundamental learning question was curiously neglected, and yet the evidence for it was overwhelming.⁹²

So, in similar fashion, KOW ignore the vast first-order literature—and the bulk of *Mismatch* itself—to argue that the evidence on such second-order effects as college graduation and post-graduate earnings is mixed. Here, at least, we are in a sort of agreement. As Taylor and I note in *Mismatch*, at the very beginning of our discussion of this literature: “Do black and Hispanic students end up flourishing [at elite] college[s] and graduating at high rates despite whatever mismatch problems may exist? Are the benefits of getting a preference into a more elite school in the end worth the costs? These are big questions—and honestly contested ones.”⁹³

Readers of KOW’s review will, I think, be taken aback by this quote because it is completely at odds with their characterization of our book. Yet it captures the spirit of our discussion of these issues and my own attitude towards them. Indeed, I am happy to report that there has been striking progress over the past year in bringing higher education leaders, science-education specialists, and mismatch critics into a significantly more candid and productive discussion of mismatch, trying to distinguish where it is a

91. See Kidder & Onwuachi-Willig, *supra* note 50, at 897–916 (discussing graduation rates); *id.* at 916–21 (discussing post-graduation earnings).

92. Williams, *supra* note 31, at 176. Another example of the Zealots avoiding any of the first-order mismatch issues, or the literature finding compelling evidence of them, is the Empirical Scholars Brief, discussed *infra* Part VII.

93. SANDER & TAYLOR, *supra* note 5, at 93.

greater or lesser problem and how—short of the complete elimination of admissions preferences—it can be countered.⁹⁴

On the question of graduation mismatch, for example, I think the weight of evidence tilts toward the conclusion that this is not a significant problem at elite private schools or at elite law schools in general. In both cases, graduation rates (and grading scales) are now so high that there is virtually no margin at which mismatch can affect school completion. Yet one must also point out that the problems of learning mismatch and competition mismatch can still make preferences at such institutions quite harmful.

So, we see that this part of KOW's argument starts with two distortions: first, by completely ignoring the overwhelming literature on first-order mismatch effects, and second, by ignoring the nuanced way we view the evidence on second-order effects.

KOW then go on to distort virtually all of the literature on second-order effects. As one might expect of Zealots, they seem incapable of fairly summarizing what any piece of mismatch scholarship shows. There are three types of misrepresentations: they imply weaknesses in work that finds evidence of mismatch; they characterize essentially neutral work as being anti-mismatch; and they ignore deficiencies in works that really do critique mismatch. Let me give a couple of examples of each phenomenon.

Two of the most powerful studies showing mismatch effects in college graduation or earnings are those by Audrey Light and David Strayer (published in the *Journal of Human Resources* in 2000⁹⁵) and by Linda Loury and David Garman (published in the *Journal of Labor Economics* in 1995⁹⁶). KOW suggest that these two studies are too dated to be relevant anymore, on the grounds that the Loury–Garman article is based on “1972 high school seniors” and the Light–Strayer article is based on a “1979 survey.”⁹⁷ This is fatuous. These studies are powerful in part because they are major longitudinal surveys, which follow national panels of young people into adulthood. Longitudinal studies necessarily cover a long period from inception to completion. The “1972” in the Loury–Garman source refers to the year when participants in the “National Longitudinal Study 1972” (known as the “NLS72”) graduated from high school.⁹⁸ This major, federally funded study tracked these students through college and the first stages of their working careers, ending in the late 1980s.⁹⁹ At the time

94. See *supra* notes 6–7 and accompanying text.

95. Audrey Light & Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?*, 35 J. HUM. RESOURCES 299 (2000).

96. Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. LAB. ECON. 289 (1995).

97. Kidder & Onwuachi-Willig, *supra* note 50, at 898, 899 & n.20.

98. Loury & Garman, *supra* note 96, at 294.

99. *Id.*

Loury and Garman did their work, in the mid-1990s, the National Center for Education Statistics called the NLS72 “probably the richest archive ever assembled on a single generation of Americans.”¹⁰⁰ The Light and Strayer work is based on the National Longitudinal Survey of Youth 1979, another major federal study which began in 1979 and is still ongoing.¹⁰¹ Light and Strayer drew on data from 1979 through 1993 in their analyses.¹⁰²

Thus, KOW are intentionally misleading readers when they imply that these economists were somehow selectively using very old data;¹⁰³ the scholars in each case were using relatively recent data from highly respected, state-of-the-art sources. KOW go on to argue that the studies should be discounted because “[u]ndeniably, there have been significant shifts in education and, more so, college admissions, since 1972 and 1979.”¹⁰⁴ But KOW offer no specific reason to think there has been any change that would make these studies no longer germane. Is there any reason at all to think that the basic mechanisms of mismatch have changed in the past thirty years?

The Light and Strayer article remains an important study of graduation mismatch effects in large part because of the care with which the authors handled some of the crucial methodological problems involved in studying mismatch. They had good data for measuring a wide variety of student skills, they estimated individual student levels of mismatch, and they distinguished among many levels of college selectivity.¹⁰⁵ In contrast, most if not all of the most prominent critiques of mismatch do one or more of these things so poorly that I do not believe they could be published today in a well-respected economics journal. For example, the Alon and Tienda article¹⁰⁶ (much-admired by KOW) uses an extraordinarily crude metric for mismatch; most of the analysis is based on a division of all American colleges into two categories, “selective” and “nonselective.”¹⁰⁷ Since nonselective institutions have low graduation rates for a whole host of reasons, this analytic choice essentially guarantees that Alon and Tienda

100. *National Longitudinal Study of 1972: Overview*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/surveys/nls72/>.

101. See Light & Strayer, *supra* note 95, at 306; *National Longitudinal Surveys: The NLSY79*, NAT'L LONGITUDINAL SURVEYS, <http://www.bls.gov/nls/nlsy79.htm>.

102. Light & Strayer, *supra* note 95, at 306.

103. See Kidder & Onwuachi-Willig, *supra* note 50, at 898 (“In fact, the two studies examining ‘broader swaths of American higher education’ that Sander and Taylor use to support their argument about lower graduation rates give the impression of being stuck in a timewarp from ten or fifteen years ago.” (footnote omitted)).

104. *Id.* at 898–99.

105. See Light & Strayer, *supra* note 95, at 308–12 (dividing colleges into “quality quartiles” and using Armed Forces Quality Test scores to measure skill).

106. Sigal Alon & Marta Tienda, *Assessing the “Mismatch” Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOC. EDUC. 294 (2005).

107. See *id.* at 303 tbl.2.

will generate results showing that attending the “selective” institutions is preferable. But it in fact tells us nothing about the actual tradeoffs involved in real-world affirmative action policy. The Fischer and Massey study of mismatch¹⁰⁸ is also often cited (including by KOW) as a work providing strong evidence against mismatch. But this piece is riddled with analytic flaws: it uses samples too small to fairly distinguish well-matched from potentially mismatched minority students;¹⁰⁹ it relies on self-reported data for key academic measures;¹¹⁰ and it attempts to include measures of both “individual” affirmative action and “institutional” affirmative action in the same model.¹¹¹ This creates a mathematical problem in their equations that probably means their measure of “mismatch” is really just a measure of institutional selectivity. This would explain why Fischer and Massey come up with results—such as their finding that minorities who receive affirmative action get better grades than students who don’t¹¹²—which are both nonsensical and contradicted by dozens of other studies.¹¹³

In many ways, the two major recent studies by Arcidiacono and several collaborators on the effects of mismatch and Prop. 209 upon student outcomes at the University of California break new ground.¹¹⁴ They are based on data on many tens of thousands of students—the full population of students enrolled at the University of California¹¹⁵—rather than a mere sample (as most other mismatch studies are). The studies control for many institutional characteristics (since the students are all enrolled at campuses of differing selectivity within the same larger university) as well as a wide range of individual academic characteristics, and one of the studies takes advantage of the natural experiment (the reduction in racial preferences) created by Prop 209.¹¹⁶ KOW only comments on one of these pathbreaking studies to note that it does not attribute all of the dramatic improvements in student outcomes after Prop. 209 to declines in “graduation” mismatch.¹¹⁷ But across both studies, the authors do find that

108. Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 SOC. SCI. 531 (2007).

109. *See id.* at 534 (noting their data come from only 3,924 surveys).

110. *Id.* at 536.

111. *Id.* at 532.

112. *Id.* at 531.

113. *See* sources cited *supra* note 6 and accompanying text.

114. Peter Arcidiacono et al., *Affirmative Action and University Fit: Evidence from Proposition 209* (Aug. 23, 2013) [hereinafter Arcidiacono et al., *University Fit*] (unpublished manuscript), available at <http://public.econ.duke.edu/~psarcidi/>; Peter Arcidiacono et al., *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California* (May 13, 2013) [hereinafter Arcidiacono et al., *STEM Fields*] (unpublished manuscript), available at <http://public.econ.duke.edu/~psarcidi/>.

115. *See* Arcidiacono et al., *University Fit*, *supra* note 114, at 1–2; Arcidiacono et al., *STEM Fields*, *supra* note 114, at 4–5.

116. *See* Arcidiacono et al., *University Fit*, *supra* note 114, at 2–3.

117. *See* Kidder & Onwuachi-Willig, *supra* note 50, at 914–15.

graduation mismatch occurs at significant levels; that minority graduation rates would have improved further had UC authorities used Prop. 209 to decrease levels of individual mismatch further; and that science mismatch effects were quite large.¹¹⁸

KOW prefer to focus on a different study of University of California students, in which Grodsky and Kurleander take advantage of a much smaller natural experiment to compare student outcomes.¹¹⁹ This study, however, involves a tiny fraction of the number of students examined in the Arcidiacono studies, groups all the UC schools into two categories (shades of Alon and Tienda), and has a far less rich set of outcomes to observe.¹²⁰

As I have noted, KOW also distort the work of scholars who are essentially neutral on mismatch issues. For example, they cite Peter Hinrichs for the proposition that “affirmative action bans have modest negative effects . . . on URM’s graduation prospects, particularly at the most selective universities.”¹²¹ Hinrichs actually says just the opposite, if we let him speak for himself:

[T]he results [of regressions on six-year college graduation rates] suggest that there may be a quite sizable effect of affirmative action bans, particularly on the graduation rate of Hispanics. For instance, affirmative action bans are associated with a statistically significant 2.36 percentage point increase in the graduation rate of Hispanics attending public universities in the top two tiers of the *U.S. News* rankings. This effect is reasonably large compared to the base of 66.65% shown [below]. The estimated effect on Hispanic graduation rates at public universities in the top 50 of the *U.S. News* rankings is 3.83 percentage points, although this narrowly fails to be significant at the 5% level. None of the coefficients for blacks [shown below] is significant, although the signs generally point to a positive effect of affirmative action bans on college graduation rates and the magnitudes are larger at more selective colleges.¹²²

The essence of KOW’s distortion here is that they confuse (probably deliberately) the tendency of affirmative action bans to reduce URM *enrollment* at the most selective schools (which logically follows as at least a short-term response to the end of preferences) with the overall success of

118. See Arcidiacono et al., *University Fit*, *supra* note 114, at 23–24, 26–27, 31 tbl.9.

119. See Kidder & Onwuachi-Willig, *supra* note 50, at 915.

120. See Michal Kurleander & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions*, 86 SOC. EDUC. 297–98 (2013) (designating schools as either “highly selective” or “moderately selective” and looking only at data from the fall of 2004 through the spring of 2008).

121. Kidder & Onwuachi-Willig, *supra* note 50, at 916 & n.95.

122. Peter Hinrichs, *Affirmative Action Bans and College Graduation Rates* 14–15 (Nov. 21, 2012) (unpublished manuscript), available at http://www9.georgetown.edu/faculty/plh24/affactionbans-collegegradrates_112112.pdf.

URMs in achieving bachelor degrees. KOW purport to be discussing the second question, and here Hinrichs' work directly undermines, not supports, their conclusion.

The point of this Part is not to adjudicate the question of graduation and earnings mismatch—those questions are too complex to be fairly resolved here. Rather, I have tried in this Part to make some smaller points. First, both graduation mismatch and earnings mismatch are second-order mismatch effects, intrinsically likelier to be smaller and more manipulable than the first-order effects discussed in Part II and overwhelmingly supported by the extant literature. Second, KOW's account of the literature is consistently deceptive; it is an ideological diatribe, not a literature review. And third, one does not resolve social-science questions by simply counting studies on each side of the dispute. All studies are not created equal. In general, studies that use crude controls, broad categories, and imprecise measures of mismatch will not find it; those that avoid these problems generally do find it. As zealotry fades from prominence in the mismatch debate, the strong studies will tend to carry the day.

VII. The Empirical Scholars Brief: A Brief Case Study of Zealotry

In their peroration on the weaknesses of *Mismatch*, KOW sum up their argument by invoking what has become known as the “Empirical Scholars Brief” (ESB), a brief submitted by a group of eminent social scientists in *Fisher v. University of Texas*¹²³ as a critique of the mismatch hypothesis.¹²⁴ This is highly appropriate because the ESB episode (a better word might be *scandal*) captures so much about what I've been trying to say about KOW's review. I have told the story at length elsewhere;¹²⁵ here I will provide a short summary.

Supreme Court amicus briefs are routinely submitted by large numbers of organizations or individuals;¹²⁶ typically there are one or two key authors, and the other signatories are friends, colleagues, or collaborators of the key authors. Because the main goal of most briefs is to make some fairly simple point in the context of a high-profile legal or policy debate, they are more akin to petitions than to academic works, even though they

123. 133 S. Ct. 2411 (2013).

124. See Brief of Empirical Scholars as *Amici Curiae* in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (Aug. 13, 2012) (No. 11-345) [hereinafter Brief of Empirical Scholars]. The brief is discussed in Kidder & Onwuachi-Willig, *supra* note 50, at 920–21.

125. Richard Sander, *Mismatch and the Empirical Scholars Brief*, 47 VAL. U. L. REV. (forthcoming 2014).

126. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752–54 (2000) (discussing the rise in the number of amicus briefs submitted per Supreme Court cases).

have footnotes, references, and much of the other superficial paraphernalia of scholarship.¹²⁷

The core of the ESB was three specific critiques of the law-school-mismatch research conducted by me and (independently) by economist E. Douglass Williams, a labor economist who is chair of the economics department at Sewanee University.¹²⁸ But here's the thing: *all three of these critiques were factually false*.¹²⁹ I don't mean that they were "false" in the sense of "misleading" or "unfair"; they were just wrong, in the same way that KOW's claim that mismatch scholars only focus on blacks as the victims of mismatch is just plainly, demonstrably, wrong.¹³⁰

When I realized how completely the ESB argument disintegrated on close examination, and just how bald were the falsehoods at its core, I contacted the lawyer who was counsel of record for the ESB, Thomas Leatherbury, and asked whether he could transmit to the authors of the brief some comments I had prepared. Leatherbury was quite affable, and though he refused to tell me who the lead author of the brief had been, he was quite willing to pass on any letter I might write. I sent a courteous letter, documenting the errors in detail and requesting an apology.¹³¹ Leatherbury acknowledged receiving and distributing the letter, but there was no further response.¹³² Leatherbury made no response to follow-up emails from me. I reached by email out to one of the authors, Richard Berk, who I knew slightly and who I considered a basically honest academic.¹³³ Berk agreed to talk, but then postponed the conversation, pleading health reasons and a variety of other excuses.¹³⁴ After half-a-dozen postponements, I gave up. A colleague of mine approached two other signatories of the brief, who declined to make any comment. I invited still another signatory, Kevin

127. Briefs are also subject to special rules that essentially immunize their signatories from libel suits, further reducing the costs of signing onto briefs without checking out their factual accuracy. See Eric M. Jacobs, Comment, *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, 147-48 (1981).

128. See Brief of Empirical Scholars, *supra* note 124, at 17, 20-25.

129. Letter from author to Thomas S. Leatherbury, Vinson & Elkins, LLP (July 19, 2013) [hereinafter Letter from author] (on file with author) (laying out, briefly, the problems with the ESB's three critiques).

130. Like KOW, the ESB also purports to discredit all of mismatch research, see Brief of Empirical Scholars, *supra* note 122, at 20-25, but never addresses first-order mismatch effects or the enormous body of research that demonstrate their existence and seriousness.

131. See Letter from author, *supra* note 129.

132. See Reply E-mail from Thomas S. Leatherbury, Vinson & Elkins, LLP, to author (July 19, 2013) (on file with author).

133. See E-mail from author to Richard Berk, Professor, UCLA (Mar. 22, 2013) (on file with author).

134. See Reply E-mail from Richard Berk, Professor, UCLA, to author (Mar. 22, 2013) (on file with author); see, e.g., Reply E-mail from Richard Berk, Professor, UCLA, to author (June 18, 2013) (on file with author); Reply E-mail from Richard Berk, Professor, UCLA to author (June 22, 2013) (on file with author).

Quinn of Berkeley, to a public debate; *he* declined as well.¹³⁵ To date, I know of no effort by any of the ESB signatories either to rebut my findings or to apologize for the brief's falsehoods. Tellingly, this group has also (so far as I am aware) made no effort to publish its claims in an academic journal, and (again, so far as I am aware) of the original signatories, only Richard Lempert has continued to participate in the broader debate over mismatch.¹³⁶

I infer from these events that most of the signatories of the ESB were not involved in its actual drafting, signed on as a favor to friends who happened to be mismatch critics, and are now deeply embarrassed to have been associated with it. The principal author was, in all likelihood, Richard Lempert, the most zealous of the Zealots and the author of five other mismatch-related critiques around the same time.¹³⁷ And since Lempert regularly collaborates with William Kidder,¹³⁸ it is quite plausible that Kidder contributed to the ESB as well. It will be interesting, in the course of time, to learn just how the ESB came about. But what we know now is that this document, which is cited by Kidder as the summation of the case against mismatch, is fraudulent to its core.

VIII. What's an Onlooker To Do?

A wise colleague, in discussing with me the behavior of the Zealots, once offered this advice: "Never get in a pissing match with a skunk." It is a good point, and one reason (the other being time) that I ignore many Zealot attacks. It is easy to the point of tediousness to document instances where KOW make dishonest arguments, either do not understand or deliberately misrepresent the literature, and are guided by ideology rather

135. See Reply E-mail from author to Alexander Smith, Berkeley Federalist Soc'y (Nov. 22, 2013) (suggesting a debate with Kevin Quinn for the author's visit to Berkeley); Reply E-mail from Alexander Smith, Berkeley Federalist Soc'y, to author (Nov. 25, 2013) (on file with author) (quoting Quinn as replying, "[T]hat is not something I am interested in participating in").

136. See sources cited *infra* note 137.

137. See William C. Kidder & Richard O. Lempert, *The Mismatch Myth in U.S. Higher Education: A Synthesis of the Empirical Evidence at the Law School and Undergraduate Levels*, in AFFIRMATIVE ACTION AND RACIAL EQUITY: CONSIDERING THE EVIDENCE IN FISHER TO FORGE THE PATH AHEAD (Uma M. Jayakumar & Liliana M. Garces eds., forthcoming 2014) [hereinafter Kidder & Lempert, *The Mismatch Myth*]; Richard Lempert, *Reflections on Class in American Legal Education*, 88 DENV. U. L. REV. 683 (2011); Richard O. Lempert & William C. Kidder, *State Should Clarify Argument in Affirmative Action Case*, DETROIT FREE PRESS, Nov. 3, 2013, <http://www.freep.com/article/20131104/OPINION05/311040010/Michigan%20Affirmative%20Action%20University%20of%20Michigan%20Supreme%20Court%20U-M>; Richard O. Lempert, *University of Michigan Bar Passage 2004-2006: A Failure to Replicate Professor Sander's Results, With Implications for Affirmative Action* (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 12-013, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2120063; Richard Lempert, *Observations on Professor Sander's Analysis of the UCLA Holistic Admissions System* (2013) (unpublished manuscript), available at http://www.newsroom.ucla.edu/portal/UCLA/document/Lempert_Review-Sander.pdf.

138. See, e.g., Kidder & Lempert, *The Mismatch Myth*, *supra* note 137.

than by an actual interest in the underlying question of improving the minority pipeline through higher education. But for readers who do not study the underlying literature—and most readers will either lack the training or the time to do so—the underlying impression may simply be of two irreconcilable viewpoints, with nothing to choose between them. Let me suggest a few ways that readers can make an informed evaluation of the mismatch debate without becoming experts.

First, readers should ask themselves whether my account of Kidder and Onwuachi-Willig as Zealots rings true. Most readers, I assume, are not Zealots and will discount the arguments of Zealots. If one rereads the KOW review, or other things these authors have written on the mismatch debate, I think the degree to which they fit the Zealot profile will jump out—in particular, their insistence on never conceding the existence of *any* mismatch effect, ever, and their attribution of evil motives to mismatch scholars.¹³⁹

In contrast, I think that even a casual reading of the work of scholars—as opposed to affirmative action opponents—who believe mismatch to be a problem is enlightening. Most of these scholars (including myself) are not opposed to affirmative action but rather are concerned about its excesses. Smyth and McArdle end their work by urging college counselors to not glibly urge minority students to attend the most elite school that will have them.¹⁴⁰ Arcidiacono frequently returns, in his work, to the themes that mismatch is a cross-racial phenomenon and that the key issue in this research is not whether students go to college but which school best facilitates students' achievements of their own objectives.¹⁴¹ In recent essays (which I have written with input from higher education leaders), I try to emphasize the importance of finding pragmatic ways that higher-

139. See Kidder & Onwuachi-Willig, *supra* note 50, at 936 (accusing this author of focusing only on black students and not addressing how mismatch would affect white students); see also Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS HIGHER EDUC., Winter 2004/2005, at 102, 103–04 (describing parts of this author's paper as inept, with "unsound" and "unrealistic" assumptions).

140. See Smyth & McArdle, *supra* note 35, at 374 (agreeing with other studies and finding that preferences should not be altogether abandoned but, instead, that secondary school education should help URM students become more qualified to pursue STEM fields).

141. See, e.g., Peter Arcidiacono et al., *Does Affirmative Action Lead to Mismatch? A New Test and Evidence*, 2 QUANTITATIVE ECON. 303, 327–28 (2011) (concluding that letting students know where they sit in the class rank can help them make better choices about achieving their objectives); Arcidiacono et al., *supra* note 37, at 13 (suggesting that current racial-preference practices may have a positive effect but probably exceed what is necessary to increase positive interracial interactions between students); Arcidiacono et al., *supra* note 62, at 19 (finding that black students have more interest in science, math, and engineering majors at the start of college and that this interest will persist through graduation if those students choose a school that best fits their academic background).

education institutions can increase diversity while avoiding self-defeating cycles of mismatch.¹⁴² None of this work has the marks of zealotry.

Second, one can sample the public discussion of mismatch. Watching the Harvard debate on mismatch,¹⁴³ or reading Malcolm Gladwell's discussion of it,¹⁴⁴ are ways to see nuance in the discussion and get a nontechnical sense of the underlying realities in the debate.

Third, one can read more in-depth discussions where mismatch scholars and constructive skeptics directly engage. The *Journal of Economic Literature* (JEL) recently commissioned Peter Arcidiacono and Michael Lovenheim of Cornell to review and assess the mismatch literature.¹⁴⁵ JEL's specific goal in pairing Lovenheim with Arcidiacono was to include, in Lovenheim, a respected labor economist who studies higher education but has not been involved in any way in the mismatch debate.¹⁴⁶ At a less technical level, two mismatch skeptics (Tom Espenshade of Princeton and Stacy Hawkins of Rutgers) are collaborating with two mismatch scholars (Arcidiacono and myself) on a written "conversation" about the mismatch debate.¹⁴⁷ These point-by-point discussions of the substantive issues in the mismatch debate not only leave many issues unresolved but also suggest many areas where real consensus is emerging.

Third, if one dips into the literature, I think the reader will find the distinction between first-order and second-order effects compelling. All the first-order effects are intrinsically logical, even intuitively obvious. The literature exploring them is very nearly unanimous. The battle is over the second-order effects. But it really should not be a battle. We should instead agree that the first-order problems are real, and the task is to make reforms that preserve what is good about current policies while fixing those parts of the policies that directly contribute to the first-order effects. Figuring out a sensible path forward is not really so hard; it just requires a little imagination and a large dose of intellectual honesty.

142. See, e.g., Richard Sander, *A Collective Path Upward: Working Smarter and Cooperatively to Improve Opportunity and Outcomes*, in *NEW PATHS TO AFFIRMATIVE ACTION AFTER FISHER* (Richard Kahlenberg ed., forthcoming 2014).

143. See *Affirmative Action on Campus Does More Harm than Good*, *supra* note 18.

144. See *supra* note 11 and accompanying text.

145. See Arcidiacono & Lovenheim, *supra* note 46. The JEL essay examines several key mismatch debates and tries to distinguish between questions that seem largely settled and those that are not, and in the latter cases, to understand the key reasons the questions are still contested. See *id.*

146. JEL asked me and a mismatch skeptic to review Arcidiacono's original proposal for an essay and decided to include Lovenheim as a coauthor to allay any concerns about balance in the resulting article. For Lovenheim's past bibliography see *Michael Lovenheim*, CORNELL U., <http://www.human.cornell.edu/bio.cfm?netid=MFL55> (follow "Curriculum Vitae").

147. This essay resulted from the involvement of the four of us on a January 2014 panel at the University of Pennsylvania and is scheduled to be published in Volume 17 of the *Journal of Constitutional Law*.