

Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It, by Richard Sander and Stuart Taylor Jr. New York: Basic Books, 2012, 348 pp., \$28.99 hardbound.

The Vindication of Thomas Sowell

Russell K. Nieli

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At the very beginning of the affirmative action era in the early 1970s powerful voices were raised against racial preference policies not only on grounds of fairness and color-blind ideals of justice, but out of concern with the concrete harms such preferences might impose on their intended beneficiaries. Economist Thomas Sowell, based on his experiences with racial preferences at Cornell University, where he taught in the late 1960s, was the most influential of these early critics. Many of the black students admitted to Cornell, Sowell found, were on academic probation or

otherwise struggling with their academic work because their high school background and training had not prepared them to succeed in the hothouse intellectual atmosphere of a top-rated university like Cornell.

But most of these struggling students, Sowell discovered, had SAT scores above the national average for American college students and were clearly capable of handling college-level work. The real problem was the preference regime at Cornell, which had accepted black students who could meet the normal entrance standards at innumerable lesser schools but encountered enormous difficulties trying to survive in a school composed mainly of the nation's highest academic achievers. The special black admits at Cornell, Sowell said, were "mismatched" by being placed in a competitive Ivy League setting where they had to struggle just to keep their heads above water. Though not motivated by ill will, Cornell's racial preference policy, Sowell concluded, was doing great harm to the very people it was intended to benefit.

Sowell's term "mismatch" quickly caught on among preference policy opponents, and even the most influential supporters of such policies had to take seriously Sowell's charges. Valiant efforts were made to discredit

Russell K. Nieli is a lecturer in the Department of Politics, Princeton University, Princeton, NJ 08544; russniel@princeton.edu.

Sowell's claims by preference supporters—including most notably William Bowen and Derek Bok in their influential study, *The Shape of the River*¹—and in their own minds, at least, they succeeded.

Other voices were raised in the early 1970s besides Sowell's, decrying the harms of racial mismatching not only in undergraduate programs but in professional and graduate programs as well. Yale law professor Clyde Summers, for instance, wrote an important law review article at this time explaining how preference policies at elite law schools like Harvard and Yale, which admitted students who could meet the normal admissions standards at institutions just below the top level, deprived these lower institutions of the presence of such fully qualified students.

The minority students given preferences at Harvard and Yale law schools, Summers wrote,

would meet the normal admissions standards at Illinois, Rutgers, or Texas. Similarly, minority students given preferences at Pennsylvania would meet normal standards at Pittsburgh; those given preference at Duke would meet normal standards at North Carolina; and

those given preference at Vanderbilt would meet normal standards at Kentucky, Mississippi and West Virginia....In sum, the policy of preferential admissions have a pervasive shifting effect, causing large numbers of minority students to attend law schools whose normal admissions standards they do not meet, instead of attending other law schools whose normal standards they do meet.²

This "pervasive shifting effect" was harmful for many reasons, Summers argued, not the least of which was its tendency to draw attention away from the real problem of low minority achievement at the high school and undergraduate college level.

From the early 1970s on into the new millennium, mismatch criticism of racial preference policies came to be associated in the minds of left-leaning academics and college administrators with political conservatives like Sowell and for this reason was often dismissed. The Bowen and Bok study convinced many that there were no empirical grounds for believing that preferential admission caused harm to its intended beneficiaries, and in many quarters the mismatch theory was viewed as discredited. This was despite

¹William G. Bowen and Derek Curtis Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton, NJ: Princeton University Press, 1998).

²Clyde Summers, "Preferential Admissions: An Unreal Solution to a Real Problem," *University of Toledo Law Review* 2 (1970): 384.

the fact that at least two important studies in the respected journal *Research in Higher Education* had demonstrated the powerful effect of “science mismatch” in discouraging students, especially blacks, from pursuing their initial goals of majoring in a STEM subject (science, technology, engineering, mathematics).³

The landscape changed abruptly in late 2004 and early 2005 by virtue of a long article appearing in the prestigious *Stanford Law Review* by UCLA law professor and economist Richard H. Sander, which confirmed many of the misgivings of early preference critics like Sowell and Summers.⁴ “A Systemic Analysis of Affirmative Action in American Law Schools” was one of those blockbuster pieces of empirical research that—like Daniel Moynihan’s *The Negro Family: The Case for National Action* published forty years earlier—was so well developed in its central argument and so well supported by relevant data that

it touched off a firestorm of controversy especially among those who found its conclusions for one reason or another politically unacceptable.

Sander established in his article four important truths that critics were hard-pressed to challenge:

1. that racial preferences at the most elite law schools set in motion a downward cascading effect that forced law schools at lower tiers that wanted to maintain a substantial black presence to lower their normal standards for black admissions to an even greater extent than at the schools above them on the selectivity scale;
2. that there is a huge learning penalty for any student of any race who is overmatched in a law school too competitive for the student’s individual needs and as a result winds up near the very bottom of the class academically;
3. that blacks do much worse with reference to law school graduation and bar passage rates than whites with the same starting credentials in terms of college GPAs and Law School Admissions Test (LSAT) scores; and
4. that the below-credentials performance of blacks in law schools is largely a result of the mismatch penalty blacks incur for being upwardly ratcheted into

³Rogers Elliot, A. Christopher Strenta, Russell Adair, Michael Matier, and Jannah Scott, “The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions,” *Research in Higher Education* 37, no. 6 (1996): 681–709; Frederick L. Smyth and John J. McArdle, “Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice,” *Research in Higher Education* 45, no. 4 (2004): 353–81.

⁴Richard H. Sander, “A Systemic Analysis of Affirmative Action in American Law Schools,” *Stanford Law Review* 57, no. 2 (2004): 367–483.

law schools where the whites and Asians are much better prepared and the course of instruction is too advanced for their individual needs.

Sander's research indicated that the mismatching of blacks in law schools was responsible for the much higher black dropout rate from law school and for a doubling of the rate at which blacks failed state bar exams. Pedagogically, Sander wrote, it is much better for a student to attend a law school in which his entering credentials place him at least near the middle of the class and where he can reasonably expect to get at least B-range grades than to attend a school where the student is at the bottom of the heap in terms of LSAT scores and undergraduate grades and struggles just to get by with Cs. "Blacks and whites at the same school with the same grades perform identically on the bar exam," Sander explained. "But since racial preferences have the effect of boosting blacks' school quality but sharply lowering their average grades, blacks have much higher failure rates on the bar than do whites with similar LSATs and undergraduate GPAs. Affirmative action thus artificially depresses, quite substantially, the rate at which blacks pass the bar. Combined with the effects of law school attrition,

many blacks admitted to law school with the aid of racial preferences face long odds against ever becoming lawyers."⁵

In a subsequent issue of the *Stanford Law Review* four responses to Sander's "Systemic Analysis" were published—each deliberately chosen for its critical stance—along with Sander's very able and detailed rejoinder.⁶ I think any fair-minded person reading these critical responses, together with Sander's original article and his reply to critics, would have to acknowledge that Sander is superior to any of his challengers in facts, sound reasoning, and common sense. No one has studied this issue with greater honesty, care, and sophisticated statistical acumen than Sander, and as a long-time "bleeding heart liberal" with a past marked by extensive involvement in anti-discrimination housing law and as the concerned parent of a multiracial child, few can bring to the table greater personal bona fides.

For all these reasons Sander was subjected to an often vicious vilification campaign by racial preference supporters, which is described in chilling detail in his new book

⁵*Ibid.*, 373.

⁶Richard H. Sander, "A Reply to Critics," *Stanford Law Review* 57, no. 6 (2005): 1963–2016. See also Sander's account of the harm of mismatching in the hiring of black associates at large law firms: "The Racial Paradox of the Corporate Law Firm," *North Carolina Law Review* 84, no. 5 (2006): 1755–1822.

Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It, which Sander coauthored with Stuart Taylor Jr., one of America's preeminent legal journalists. (*Academic Questions* readers may remember Taylor from *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case*, the study he did with KC Johnson of the case's rogue prosecutor Mike Nifong, reviewed in the Winter 2007–08 *AQ* by George Mason University law professor Michael Krauss.) "Important academics and institutions in legal academia," Sander writes in *Mismatch*,

often reacted as though my work was simply evil—a demagogic, mortal threat to one of their proudest achievements. The thrust of their responses was that my ideas were so flawed that they did not merit serious discussion. A recurring subtheme from both academics and reporters was that I was mentally unbalanced....Regardless of the motives for many of these attacks, their effect was both to discredit me and to warn off the many reasonable observers in the middle.⁷

Mismatch not only lays out the case for the harm done by racial preferences in law schools previously made in Sander's law review article, but also contains much new material on the beneficial effects of reducing the degree of mismatch in the undergraduate divisions of California's eight research universities that resulted from the passage of Proposition 209, which formally outlawed racial preferences in all of California's public institutions. While Sander describes widespread attempts to get around the ban on racial preferences in California universities—including granting automatic admissions to the top 4 percent of students in any California high school regardless of how low-performing the top students might be at many black- and Latino-dominated schools—Proposition 209 substantially reduced the racial gap in entering credentials at all the institutions in the University of California (UC) system. This, Sander shows, produced many wholesome and incontrovertible benefits.

Though many supporters had feared that ending racial preferences would turn black and Latino students away from the UC system, Sander shows that this was not the case. While the black and Latino enrollment loss was large at the high-end institutions—Berkley (-42 percent) and UCLA (-37 percent)—this was offset by gains in black and Latino enrollment at UC

⁷Richard Sander and Stuart Taylor Jr., *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (New York: Basic Books, 2012), 68.

Irvine (+22 percent), UC Santa Cruz (+18 percent), and UC Riverside (+65 percent). As a result of Proposition 209, black and Latino students were now attending institutions in the UC system with whites and Asians closer to themselves with regard to entering credentials such as SAT scores and high school grades, they were encountering less stigma, and they seemed to be reaping much less of a mismatch penalty.

Although there was a slight decline in the total number of blacks and Latinos in the UC system as a whole, their graduation rates rose sharply after passage of Proposition 209 and as a result there were actually *more* blacks and Latinos graduating from the eight UC institutions than before. The elimination of formal racial preferences, Sander writes,

led to increases—not decreases—in the numbers of blacks and Hispanics earning bachelor's degrees at the University of California, and even more dramatic increases in the number earning bachelor's degrees on time....The number of blacks receiving bachelor degrees from UC schools rose from an average of 812 in 1998–2001 [i.e., before Proposition 209] to an average of 904 in 2004–2007 [i.e., after Proposition 209]. For UC Hispanics, the numbers rose from 3,317 to 4,428.⁸

Mismatch contains a wealth of valuable information about racial preference policies in higher education that is too extensive to do justice to in a short review. There are chapters on the huge size of racial preferences, on the politics of such preferences in both the media and academia, on the dishonesty and code of silence that often surrounds discussion and media coverage of preference issues, on the reasons for the large racial disparities in high school and college academic performance, and on the treatment of racial preferences by the U.S. Supreme Court. There is also a chilling chapter on the bullying by accrediting agencies of George Mason University Law School and the forcing of the school to abandon its race-neutral admissions policy in order to enroll more black and Latino students. The coverage of the whole panoply of mismatch issues is always fair-minded and thorough, and even those who have kept up with the controversy over the years will encounter much new material.

The final chapter begins by laying out the major arguments on both sides of the preference debate. Most readers of this journal will find the pro-preference arguments Sander and Taylor describe (which stress the value of preferences at elite institutions in forming a black and Latino leadership class and the value of preferences in fostering multiracial harmony) highly

⁸Ibid., 148, 154.

questionable and feeble—as Sander and Taylor themselves ultimately seem to do. When they present the arguments of those “abolitionists” opposed to preferences they wax more eloquently and impassioned—here, it seems, is where their true heart lies.

It is worth quoting their hypothetical anti-preference arguments at some length as they summarize many of the most important themes that *Academic Questions* has been concerned with since its inception:

There is a good reason why most Americans oppose racial preferences; they directly undercut the post-1960s social contract....Far from breeding tolerance, preferences breed resentment and negative stereotypes among Asians and whites, who feel that they are being discriminated against—and they are. Far from breeding a sense of access and social equality among blacks and Hispanics, preferences put these students in environments where they will struggle academically....[Preferences] elevate the importance of skin color at a time when young Americans increasingly see that as an irrelevant distinction. They increasingly single out Asian Americans—a group that has suffered historical discrimination

and includes millions of struggling individuals who do not fit the “model minority” stereotype—for particularly invidious discrimination, to the point that “the Asian penalty” in university admissions has become a term of art among experts. They systematically and enormously favor affluent blacks and Hispanics over working-class Asians and whites...and they provide incentives for every black and Hispanic student to play up, as much as possible, any past experience that can validate her status as a victim deserving compensation.

Placing students into classrooms where they will struggle to compete, all for the purpose of demonstrating a university’s open-mindedness and making sure that the supposed “point of view” of every racial group is heard in the classroom is the quintessence of tokenism....Preferences stigmatize the recipient in the eyes of classmates, teachers, and themselves, and they throw into perpetual doubt the value of the degrees the recipients have earned. Far from preventing tokenism, racial preferences foster a lifetime of it.

The racial preference regime also creates institutional pressures to discriminate in grading and make

grading systems and graduation standards less rigorous. It shifts the preeminent mission of universities from the pursuit of excellence to the pursuit of diversity. It fosters cynical games of campus racial politics. And it distracts us all from the real problem that we must address: the racial gaps in K–12 academic achievement.⁹

Given their obvious sympathy for the anti-preferentialist position, one might think that Sander and Taylor come out for a strong Supreme Court decision in the *Fisher* case mandating color-blindness in all government-run institutions. They do not do this, however, and here is where I think their reasoning leads them astray. Since universities have demonstrated over time their unwillingness to adhere to voter initiatives outlawing racial preferences, they argue, a Supreme Court decision prohibiting race-conscious admissions would probably experience a similar fate. Universities would either ignore the court ruling, or develop clever workarounds like the California and Texas “percent plans” that can make the mismatch problem even worse. A better idea, they say, is for courts and legislatures to allow overt racial preferencing, but set forth two

conditions that require universities to (1) guarantee that the degree of racial preferences not exceed the degree of the socioeconomic preferences they grant, and (2) publish data on the size of their preferences together with the learning outcomes (college GPAs and graduation rates) for past students with similar entering credentials to those who receive current racial preferences.

General transparency requirements of the kind Sander and Taylor recommend are no doubt a good idea, but it is not clear to this reviewer how such requirements could be effectively imposed or monitored by the federal courts. And while it is true that a ban on all race-conscious preferences would lead to evasions and workarounds, such a ban by the U.S. Supreme Court on a nationwide level would send a powerful message that would help to galvanize opposition to racial preferences much the way the *Brown* decision galvanized opposition to segregated education.

The *Brown* decision was indeed evaded in much of the South for a decade, but that did not diminish its effect in stimulating a national debate and changing public opinion. A bright-line rule (e.g., “our constitution is color-blind and neither knows nor tolerates classes among citizens”; “in the eyes of government we are just one race here—it is American”; “the way to stop discrimination on the basis of race

⁹Ibid., 276–77.

is to stop discrimination on the basis of race”) would resonate profoundly with much of the American public and open up a more candid conversation on race than that which has transpired in the forty-plus years of our affirmative action era. And in this conversation opponents of race-based preferences would clearly have the stronger case to make.

With this lone criticism of a misguided final chapter, I urge all *AQ* readers to place *Mismatch* at the top of their must-read list. It raises the affirmative action debate to a new level of data-driven clarity and honesty, and it confirms what Thomas Sowell told us long ago—that racial preferences harm everyone but especially those they are intended to help.

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