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Colloquium in Legal, Political, and Social Philosophy

**Conducted by
Liam Murphy and Samuel Scheffler**

**Speaker: Seana Valentine Shiffrin, UCLA
Paper: Affirmative Action and the Mission of the University**



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Affirmative Action and the Mission of the University

I. Introduction

Affirmative action is often understood, by critics and proponents, as an exception to, departure from, or a refinement of a competitive, meritocratic baseline. In turn, this baseline is taken to be the default approach to university admissions.² Defenders of affirmative action offer powerful reasons for those departures and refinements, namely that unadjusted, our extant meritocratic measures and procedures are flawed, whether because: the measures or their applications are inconsistently and unfairly applied;³ they fail to correct for unjust starting points; or, as the diversity argument attests, they fail to measure traits and abilities the presence and exercise of which would improve the academic environment.⁴ Further, proponents contend

¹I'm grateful to Molly Brady, John Deigh, Barbara Herman, Larry Sager, Wendy Katz, William Rubenstein, Henry Smith, Rebecca Stone, Galen Strawson, Robert Talisse, and audiences at the Colorado State University, University of Texas, Austin School of Law, and the University of Nebraska, for conversations about these ideas. Sean St. Charles provided extremely helpful and diverse research assistance.

² Throughout this article, 'university' will be used in a capacious way to refer to nonvocational postsecondary institutions of higher learning. So, 'university' will be used to include colleges that do not offer advanced degrees. The line between nonvocational and vocational institutions may be contested, but finding a bright line is not essential to the argument offered here.

³ See e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063, 1075-78, 1081-1101 (2006) (arguing that affirmative action may correct for contemporary biases in admissions procedures).

⁴ The diversity argument became the focal point of discussion and institutional design after it was singled out by Justice Powell as a uniquely constitutionally permissible goal of affirmative action. *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-318 (1978). The argument was endorsed by a majority of the Court in *Grutter v. Bollinger*, 539 U.S. 306, 325-33 (2003), before it was rejected by a majority (at least with respect to how it was applied in Harvard's and UNC's admissions systems) in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214-226 (2023).

that even were our meritocratic measures perfect, a departure from their application would be justified as a form of reparations for unjust exclusions⁵ or as a prophylactic corrective to biased, and imperfect channels of access to employment, positions of power, and social mobility that are linked to a university education.⁶ In all these defenses, affirmative action serves as a means of correcting bias (or its effects), compensating for unjust starting points and processes in education or in society at large, or improving the academic environment.

I find the standard arguments powerful, but I am uneasy about the exclusively instrumental framing of affirmative action shared by many proponents and critics that portrays it as a corrective, whether apt or inapt, effective or ineffective, to remedy or refine the operation of the meritocratic baseline or its downstream effects. Here, I want to offer a distinct argument for affirmative action at the university, an argument that represents affirmative action as a permissible and perhaps even morally mandatory component of the mission of the university, but not because it corrects for present bias or past injustice or because it would have salutary effects on the classroom or on labor markets. I mean to be making a moral case for affirmative action in university admissions that derives from the mission of the university. This rationale both strikes me as among the leading, but neglected, rationales for affirmative action and one that is not subject to many of the common moral and legal criticisms levelled against other rationales.

Making prominent a non-instrumental, non-exceptional framing of affirmative action might behoove both the discussion of affirmative action and of the university. For, the common

⁵ For a critical analysis of the success of these arguments, see Kenneth Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 61-62 (2004).

⁶ This argument was rejected as insufficient to allow state-administered affirmative action in university admissions to pass constitutional muster without specific findings of past institutional discrimination in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307-309 (1978) (Powell, J., opinion). For a defense of affirmative action based on its integrationist effects, see Elizabeth Anderson, THE IMPERATIVE OF INTEGRATION, 135-154 (2010).

instrumental framing invites dispute about whether affirmative action is an effective and appropriate means: e.g., whether departures from meritocratic standards for a contemporary community are an appropriate remedy for prior injustices; whether affirmative action really does plug a gap of fair access, or whether it papers over the root structural problems with primary education; whether, affirmative action really does enrich discussions and decisions; and, whether, so understood, the enrichment expectation extracts an overly high price on some members of the student body. These questions are both valid and answerable. At the same time, a resounding consensus on them seems elusive, to put it mildly.

What gives me greater pause than the persistence of dispute is that the parties to these debates, working in this framework, accept two premises that seem misguided, namely:

- (a) As a default, a competitive, meritocratic approach to university admissions is consonant with the university's mission.⁷ While specific versions of this approach may require revision and departures from it may or may not be warranted, given contemporary and past injustices, nonetheless, a competitive, meritocratic baseline is the appropriate anchoring point for admissions procedures.

⁷ Even critics of meritocracy such as Michael Sandel do not locate any tension between competitive meritocratic measures and the *intellectual* mission of the university. Sandel's complaints center on the socially divisive follow-on effects of creating high-stakes climates of competition in which there are recognizable winners and losers, especially in the economy and where the consequences of winning or losing have long-term effects that ramify over a lifetime. See Michael Sandel, *THE TYRANNY OF MERIT* (2021). Daniel Markovits' criticism of meritocracy also focuses on the economic and social costs of meritocracy. Markovits advocates for greater inclusion of students from families from the bottom two-thirds of the income distribution and argues this would advance the 'core mission' of universities by 'reopen[ing] the pipelines through which schools and universities provided social mobility and rekindle the luster that even the most exclusive schools once held in the general imagination.' Daniel Markovits, *THE MERITOCRACY TRAP* 275-279 (2019).

(b) Affirmative action is *merely* a means of correcting or improving flawed procedures or unjust conditions, and not an essential component of the university's mission.

These premises go hand in hand with, and seem motivated by, an increasingly dominant perspective that treasures university education predominantly for its instrumental value or, perhaps, for a particular sort of instrumental value. On this conception, for the individual, a university education prepares one for and renders one eligible for a variety of forms of employment and positions of power, gateways to income, wealth, and social mobility. For the society, educated citizens are prepared to contribute more effectively to the economy, to produce better goods and services, and to expand our cache of knowledge in order to contribute more effectively to the economy and to produce even better goods and services.

Where these forms of employment are available primarily on a competitive basis that appeals to meritocratic criteria, then it may feel natural to use exclusively competitive, meritocratic criteria to allocate access to the commonly used qualifications for such positions, including a university education. But I think these perspectives on admissions and the value of an education allow other institutions' contingent uses and estimations of the importance of a university education improperly to dominate our understanding of the mission of the university.⁸

An alternative perspective begins with the idea that the accumulated knowledge of humanity is a public good, a substantial portion of which universities house and maintain. The

⁸ Christopher Kutz similarly complains that “the market-valued products of the university have come to overshadow [its] intrinsically valued public goods,” and this has generated “destructive pressures...to see the university in purely instrumental terms rather than as itself a distinctive kind of public community that is an end in itself.” Christopher Kutz, *PUBLICS IN ACTION: MAKING CIVIC LIFE TOGETHER*, Chapter 4, p. 182 (*forthcoming*).

university is a trustee of our intellectual heritage and as such, it must be the mission of the university to facilitate the public's access to this public good. This perspective on the university's central mission concomitantly reflects a once prominent conception about the value of a university education, that has unfortunately receded from public discourse, namely that for the individual, it is good for its own sake and not only because of the economic and vocational consequences associated with its possession. That is, knowledge itself (generally) enhances the mental life, experiences, self-understanding, relationships, and judgments of its possessor. Further, for the society, its possession by its members is good for its own sake and for our moral relations, and not solely good because of how its members may use that knowledge to produce goods, services, or other economic and vocational benefits. A higher level of education among society's members may facilitate a richer cultural life, better mutual understanding, better understanding of humanity's circumstances and its social institutions, and better judgment about them.

If we understand a central mission of the university as one of preserving and transmitting our shared intellectual heritage to the public, then affirmative action, by which I roughly mean the use of demographically sensitive criteria as both a constraint and a guide in admissions procedures, should be seen as an ongoing, continuous component of the end of the university. Affirmative action, so understood, should be used, independent of whether it is an apt form of reparations and independent of its downstream effects on generating a fair economic playing field or improving classroom discussion. Demographically sensitive admissions criteria ensure the university shares our heritage with a wide cross-section of the public and not only with a discrete segment of the public. An approach to distributing this public good that is attentive to whether it reaches salient, demographic communities should seem relatively unexceptional, as is

our *attitude* (if not our practice) toward public goods such as health care, clean air, and parks. Further, if the primary mission of the university is to transmit our shared intellectual heritage to all of us, then we should regard competitive, meritocratic criteria with some suspicion, as in need of special justification, rather than weaving them tightly into our implicit understanding of how we generate our university community. If competitive, meritocratic criteria are suspect, then departures from their application should not raise alarms.

That's an overview of the argument. Now, I'll slow down a bit and work through the components. I'll offer a short, positive argument for affirmative action that is independent of the prominent arguments⁹ for affirmative action in that it focuses on the university's mission in transmitting knowledge and the role affirmative action plays in that mission's realization. Then, I'll dive a little deeper into the relationship between the model of the university as a public trust and the use of meritocratic criteria of admissions. After developing the argument further by working through some objections, I'll conclude.

II. The Obligations of the University as a Public Trust

⁹ To help ensure that the argument is independent in that way, we can give ourselves the pleasure of imagining a better world by engaging in some utopian thinking. Suppose that, contrary to the facts: the elementary educational opportunities offered to all children were fair and equal; adequate measures were in place to prevent implicit bias from influencing admissions criteria and decisions; classrooms were transparently open and equal to all students of all backgrounds; for safety as well as emotional and educational support, students did not need a cohort of demographically similar peers; fully sufficient reparation for prior discrimination had been made in other social venues; and, finally, downstream competitive markets for employment and other positions of power were embedded in contexts that truly offered fair equality of opportunity. It is a little harder to use utopian resources to wish away the premises associated with the diversity argument, as even in this world, people from different demographic backgrounds might well make distinctive contributions to the classroom or bring different experiences to their evaluation of arguments and data; but perhaps at the outset, you could temper the utopianism with a touch of the dystopian -- imagine that all classes at the university are massive and structured without opportunities for audience participation; even worse, they are all online so there is little opportunity for meaningful student interaction. Taken together, if true, these assumptions would deflate the impetus for affirmative action, on standard accounts.

One of the most important ends of the institution of the university is to transmit humanity's intellectual legacy to the public and to ensure its absorption and appreciation by future generations. By "humanity's intellectual legacy," I mean its accumulated knowledge, wisdom, the meta-knowledge of how to access, evaluate, and appreciate this knowledge and its pursuit (including our commitments to academic freedom, free speech, and freedom of thought), and a wide range of other intellectual, artistic, cultural, and other expressive materials. "Intellectual legacy" may seem like a highfalutin term. I use it not to be pompous but just to stay pithy and because 'intellectual output' and 'intellectual property' sound too industrial. Sometimes, I'll refer to our 'intellectual heritage' or our 'accumulated learning' or 'knowledge.' In all cases, I mean to gesture at a very broad class of intellectual material that includes but goes beyond the justified apprehension of actual facts, however widely metaphysically construed the category of facts is taken to be. So, I intend to encompass our current apprehension of facts about the world, our history, and ourselves (whether accurate, inadvertently mistaken, comprehensive or partial), our philosophical ideas, our apprehended mistakes, the skills and languages humanity has developed, the questions, the methodologies, the opinions, the ideologies, and lines of inquiry we have pursued – fruitful and misbegotten - as well as the myriad forms of expression we engage and have engaged in, including stories, poems, narratives, art, music, and dance.

The primary value of the (partial) possession and apprehension of this (broadly construed) is not its instrumental, vocational value to its individual possessor, such as that it renders someone more qualified or attractive for employment. Its primary value is its apprehension itself and the ways in which apprehension of knowledge illuminates, enriches, and deepens a person's experience, their understanding of themselves and the natural and social

world in which they are situated, as well as their understanding and appreciation of other people – past, contemporary, and future. This knowledge about ourselves and our social and natural worlds enriches the life and relationships of its possessor. It may honor the memory and the contributions of prior generations. It also contributes to fully informed democratic decision-making, something each of us is entitled to and required to perform.¹⁰

This accrued intellectual knowledge is a public good, indeed, a public treasure.¹¹ For the most part, excepting the temporary and only partial grants of copyright and patent over corners of this vast range of material, it belongs to all of us. That is, most of our accrued intellectual reserves lies inside the intellectual commons. Unlike some public goods, due to the inextinguishable character of its contents, the intellectual commons is not in danger of depletion through overuse. Indeed, it is a public good whose value is enhanced through widespread and regular use.¹² But, the value of the commons may be subject to other threats, including that its

¹⁰ See Seana Valentine Shiffrin, *DEMOCRATIC LAW* (2021) (ed. by Hannah Ginsborg) and Seana Valentine Shiffrin, “Democratic Representation as Duty Delegation,” *Proceedings of the American Philosophical Association* (2022).

¹¹ Compare the more religiously phrased sentiments of Fichte: “The university has been invented expressly by the human race to guarantee the uninterrupted continuance of this ongoing development [of the intellect]: it is the one point in which, deliberately and following a rule, every generation hands on its highest intellectual culture to the succeeding generation, so enabling this latter generation to add to its achievement and bequeath it to the next, and so on, to the end of days...[So understood, the university] is the most important and sacred [institution] possessed by the human race. In holding fast to everything of the Divine that ever emerged in mankind, and preserving and transmitting it at least in its conclusions, there lives in it the actual essence of humanity in its uninterrupted and imperishable life; ... the university is the visible representation of the immortality of our race, in which nothing that genuinely exists is allowed to die out. Since in the university, over and above this transmission, and by elements that are added to its contents, what is divine is constantly developing into a new and fresh life...” Johann Gottlieb Fichte, “Concerning the Only Possible Disturbance of Academic Freedom,” Rector address at Berlin University, October 19, 1811, *draft translation, forthcoming in J.G. Fichte, The Art of Philosophical Seeing: Last Writing, Diaries, and Letters (1810-1814), Edited and Introduced by David W. Wood, translated by David W. Wood & Graham J. Harrison (Albany/New York: State University of New York Press, forthcoming 2025)*. Galen Strawson alerted me to the Fichte passage, which he also cites in his *SELVES* xvii (2009).

contents or their modes of access may be forgotten, misplaced, damaged, obscured, or require rare training or scarce material resources to access.

Universities act as trustees of the intellectual commons. Through developing a staff, an engaged community, and an infrastructure dedicated to the recording, cataloging, maintenance, and appreciation of advanced knowledge, they play a crucial role in the preservation and transmission of the most advanced and sophisticated elements of our intellectual heritage to the public. In some part, they do this in conjunction with public libraries, by hosting and maintaining libraries that serve as a repository of recorded accounts of our intellectual heritage. Beyond this, by constituting a faculty, they cultivate a cadre of knowledgeable people whose energies may be directed at honing a keen sense of our repository's contents as well as how to access it and to relate and contextualize its contents in relation to each other. Through teaching, universities enable the transmission of our intellectual heritage in myriad ways – for instance, by imparting skills, vocabularies, and techniques necessary to access and understand some of our amassed knowledge, by providing context and interpretation, and through informed, if decentralized, curation – processing and selecting various bits of the intellectual common to highlight and make salient.

So, the university is a central gateway through which the advanced components of the intellectual commons are accessed and bequeathed to the public. Because the intellectual commons belongs to all of us, this bequeathal should be directed to the entire public, not a discrete segment of society.¹³ In essence, I am arguing that the intellectual commons is a public

¹² I discuss the implications of this feature for Lockean intellectual property rights claims in Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY*, ed. Stephen R. Munzer, 138-67 (2001).

¹³ This approach is in keeping with the treatment of other resources held in the public trust. *Cf.* California Coastal Act which articulates, as part of California's responsibility in managing the

trust that universities, as trustees, manage and maintain.¹⁴ They also both enable and regulate

public trust in the lands and waters around the coastline, a legal obligation to “*maximize* public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resource conservation principles and constitutionally protected rights of private property owners.” CAL. PUB. RES. CODE § 30001.5 (2023) (emphasis added). This commitment complements the instructions in the California Constitution that “No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the *most liberal* construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof” (emphasis added). California Constitution, Article X, Section 4. The commitment to maximizing public access and to environmental justice is understood to require attention to whether demographic groups enjoy access, with an explicit reference to race and income levels. See Section 30107.3 of the California Coastal Act (“Environmental justice” means the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies”). For a worry that inequitable racial patterns of access to a public resource represent a failure by the public trustee in the context of beach access, see Dan R. Raineman, Lisa M. Wedding, Eric H. Hartge, Winn McEnery, Jesse Reiblich, *Coastal Access Equity and the Implementation of the California Coastal Act*, 36 STANFORD ENVIRONMENTAL L. J. 89, 94 n. 23 (2016) (“If one group is systematically prevented from achieving equal opportunities for use of the resource (as a result of large scale, structural, societal issues), it implies a failure of the sovereign to fairly undertake its responsibility as the trustee for a public resource.”)

¹⁴ Although the concept of the public trust has most often been applied to navigable waters and shorelines and in many jurisdictions to a range of other material public goods such as parks, other lands, air, and wildlife, there is no reason to limit its scope to tangible property. The broadcast frequencies have also been treated as a public trust. See, e.g., *FCC v League of Women Voters of California*, 468 U.S. 364 (1984); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 383 (affirming and citing a Senate Report that declared that “broadcast frequencies are limited and therefore, they have been necessarily considered a public trust.”); *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994, 1006 (1966) (declaring there is a “public trust inherent in every [broadcast] license”); see also *Communications Act of 1934*, 47 U.S.C. 309(k)(1)(A), 336(d), et al (describing obligation of telecommunications entities to serve the “public interest, convenience, and necessity”). But see Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 212-230 (1982) (writing as chair of the FCC and criticizing the public trustee conception of the government’s relation to the airwaves). Aziz Huq proposes that we regard the collective store of data collected through new smart technologies as forming a public trust. See Aziz Huq, *The Public Trust in Data*, 110 GEORGETOWN LAW REVIEW 333 (2020). Although some material public goods need the protection of a public trust to avoid material erosion, contamination, or exclusive occupation by a private entity, issues that may not arise for intangible goods, there are parallel threats to public

access to it by the public. As with other public trusts, that is, with other forms of property kept in trust for the public, their use, disposition, and distribution by its trustee(s) must be guided by what benefits the public and prioritize public use benefits over purely private uses and benefits.¹⁵

To make vivid the idea that our accrued intellectual history is a public good to which the entire public should have access, just consider the discipline of history and of US history in particular. The diversity arguments have it right that a demographically representative student and faculty body will likely provide the impetus and the perspectives to improve our body of knowledge about these events. But bracket the production side and simply focus on the consumption or audience side. Imagine for a moment that we somehow had a complete understanding of these events. It would be more than strange if our best understandings of slavery, Reconstruction, the annexation of Mexico, and Native American dispossession were not available to members of all groups who experience their consequences and who are a product of those events (given the dependence of discrete events of conception on all manner of historical happenstance). That shared history and our understanding of it belongs to everyone. It would be a misuse of that knowledge for it to be handed down only to some subsets of the population or

access and the preservation of intangible public goods that call for the protection of a public trust. See discussion *infra*.

¹⁵ The legal doctrines associated with public trusts arose initially to acknowledge and enforce the public's irrevocable right of access to coastal and other navigable waters and the land underneath them. See, e.g., John W. Bruce, John W. Ely, Jr., and Edward T. Brading, *THE LAW OF EASEMENTS & LICENSES IN LAND* § 6:3; Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 U. HAW. L. REV. 261 (2016); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 488 (1970). They were enforced against both public and private owners. In many, but not all, jurisdictions, the public trust doctrine has been more widely applied. See e.g., HAW. CONST. art. XI, §§ 1, 7 ("All public natural resources are held in trust by the State for the benefit of the people."). It is controversial whether and when states may declare that other privately owned resources (apart from coastal and navigable waters and shores) are public trusts without offering owners compensation, but that controversy is outside the scope of this article. My argument is that universities, whether private or public, *should regard* themselves as public trusts and tailor their admissions practices accordingly.

for some segments of the population to learn about it second-hand, rather than for members of those segments to learn about it directly. A similar point may be made about the discipline of law. Although law school is often viewed as a vocational school, knowledge of the law must be accessible to everyone – both because it applies to everyone and because knowledge of the law is essential to democratic participation, oversight and accountability. Thus, access to knowledge about the law must be available to the public and not merely to discrete elite segments of it. These are just obvious examples. Similar points hold true of math, physics, literature, linguistics, sociology, anthropology, and every other branch of human knowledge.

To fulfill this central mission of the university, the admissions system must ensure that the student body is demographically representative, so that our intellectual heritage is shared, generation after generation, with the public and not only with discrete slices of the population. So suppose by affirmative action, we mean ‘the intentional application of demographically sensitive criteria to a choice that may permit or require relevant demographic characteristics to play a decisive (though not necessarily exclusive) role in settling a choice when those criteria are not otherwise satisfied through other decision procedures.’ Then, given the mission of the university, affirmative action should strike us as unexceptional. It is simply the method of achieving the university’s central value, which is, again, transmitting the humanity’s accumulated learning to the public.

Of course, the university has another critical, generative mission as well – to train people to maintain, expand, and use that knowledge. This second mission may suggest admissions criteria that ensure that some segment of the student body has the skills associated with the maintenance and expansion of our store of knowledge. Such criteria are not required by the first

mission, however. The first mission demands only that each individual student have the background and abilities necessary to understand and appreciate our intellectual heritage.

Perhaps one set of criteria is a strict subset of the other. I'm not so sure. In my own experience, often, the students who seem to get the most out of my courses as human beings are not always the ones who I think will advance the field or who have original ideas. To put it in shorthand, strong performers do not always make for strong audience members, although both are essential to successful productions. Sometimes, it seems to me that, often, the sort of restless impatience and focused energy associated with successful exploration of new intellectual territory involves a narrower lens. Whereas, the qualities associated with reflection, deep absorption, integration with other areas of thought and life experience, and sharing ideas with others are more associated with a broader, panoramic perspective, a slower pace, and a less competitive mindset. Of course, the very best, ideal researcher is also the thinker most able to appreciate, absorb, and share the insights of others, across disciplines. But, as a general matter, I'm unconvinced that the exact degree of excellence in one domain translates into the same degree of excellence at another. But this is an anecdotal aside.

My argument does not hinge upon any particular relationship between these criteria. It only hinges upon claims that: that the entire public has a claim on access to our intellectual heritage; it is the mission of universities to serve as the gateway to access to major portions of that heritage; and, the exclusive use of substantive, competitive criteria do not bear any principled relation to the mission of sharing knowledge with the public.

To return to my argument, should the university's effort to pursue its second, generative mission qua public trustee happen to produce a demographically representative student body with sufficient generative talents as well as sufficient skills of appreciation, terrific. Should the

university's effort to pursue its second mission produce a demographically unrepresentative student body, however, then there would be a problem of imbalance. Likewise, there would be a problematic imbalance if the university implemented admissions criteria that failed to admit a critical mass of students interested in and able to maintain and expand our store of knowledge. In either case, one of the university's public trust missions would crowd out the other, even though both are critical missions. The former problem (of the single-minded pursuit of the second mission precluding achievement of the first) is one that the judicious use of demographically sensitive criteria can solve and that can render the two missions of the university compatible. The latter problem (of the single-minded pursuit of the first mission precluding achievement of the second) is one that the judicious use of a particular sort of ability-sensitive criteria can solve and that can render the two public trust missions of the university compatible.

I hasten to add, though, that there has been an alarming shift of the perceived scope of an emphasis within the second mission. It is one thing to say that the university must train people who can educate others, preserve, and expand our repositories of knowledge, and who can render them accessible and relevant to evolving times. It's another thing to say that their mission is to train people to serve the demands of the market, demands that market actors could meet for themselves, much as market actors may prefer for others to sort and train for them.

III. Is Competitive Meritocracy an Appropriate Distribution Method for a Public Trust?

The argument thus far has surfaced a tension between the university's mission as a public trustee and its extensive reliance on competitive meritocratic admissions criteria. Our failure to

recognize this tension has, I contend, contorted the affirmative action discussion. Frequently, the dispute about affirmative action involves some disagreement about whether its use involves some unfair compromise of the university's competitive meritocratic standards for admission. Its opponents regularly contend that affirmative action involves an unfair and regrettable departure from competitive meritocratic standards. Its proponents either argue that the application of the particular meritocratic standards in circulation are unfair metrics of competition in the circumstances or that they are flawed *as meritocratic* standards, either because they do not accurately measure all applicants' abilities or because they have an inaccurate or incomplete picture of the relevant abilities that would contribute to the excellence of the university environment. What these positions share is an acceptance that competitive meritocratic standards for admission are appropriate for distributing access to the university and that they comport with the university's mission.

I am skeptical that competitive academic meritocratic standards represent the appropriate *default* and *dominant* criteria for allocating university spots. Perhaps some play an appropriate role, just as *perhaps* the university may consider athletic achievement as important for some slots (or a park may dedicate a day of its use to a race for elite athletes). But if one thought a central mission of the university was to share and transmit the humanity's accumulated knowledge to the public, it is unclear why one would think in terms of a competition. Access to a public good is not a prize. It matters that those granted access be able to enjoy, appreciate, or use that good, but that criterion is a threshold and not an ordinal matter.¹⁶

¹⁶ One potentially relevant, nonmeritocratic but possibly ordinal consideration may be the comparative level of interest an applicant shows in receiving an education, just as the level of patient need or the likelihood of compliance with medical advice may play a role in allocating access to the public good of health care.

Consider other public goods, such as access to basic health care or to public monuments. These are public goods that also involve human creations. For these public goods, it seems rather obvious that the entire public should have access to them. It is a problem if it turns out that some social groups have greater access to them than others, whether or not that differential access is the product of inadvertence or intentional discrimination. To be sure, we are plagued by these problems, and we have yet to take decisive action to solve them. But no one suggests that it is justified that there are racial inequities in health care provision or that it is somehow wrong to pay attention to whether there are racial disparities in health care provision. It is understood to be a problem that must be addressed.

Witness the commitment in the National Institutes of Health Revitalization Act of 1993 that the Director of the NIH must ensure that “members of minority groups are included as subjects” in clinical research and that the Director of the NIH “shall conduct or support outreach programs for the recruitment of women and members of minority groups as subjects.”¹⁷ The Food and Drug Administration Safety and Innovation Act requires the FDA to form and maintain a “communication plan to inform and educate health care providers and patients on the benefits and risks of medical products, with particular focus on underrepresented subpopulations, including racial subgroups.”¹⁸ This requirement is part of the general effort of the Department of Health and Human Services to reduce racial and ethnic health disparities in the provision of health care.¹⁹

Consider further how strange it would be to suggest that basic health care should be allocated on the basis of an accomplishment or ability-based competition. I suspect the reason

¹⁷ 42 U.S.C.A. § 289a-2 (West 2023).

¹⁸ 21 U.S.C.A. § 399f (West 2023).

¹⁹ Dep’t. Health & Hum. Serv., HHS Action Plan to Reduce Racial and Ethnic Health Disparities (2011).

this would be so strange is that we all understand that health care is not a prize nor something that some of us deserve and others do not. It's something we all need and can use in virtue of our status as embodied beings that require periodic maintenance and repair. Likewise, it would be strange to think that health care should be allocated based on what accomplishments one foresees the patient could achieve with their good health in the future. It is true that, as with education, good health makes a difference to what one can accomplish. Certain people, whether due to their physical or social or their cultivated circumstances, will achieve more in athletic or vocational contexts if healthy than others will. Yet, what one can achieve with one's good health seems secondary to the primary importance of health care – that it facilitates living well and perhaps living longer in one's body and one's mind.

Thinking of university education as, like health care, a public good meant to be distributed among the public might alter our perspective about affirmative action. For, some of the energy behind the idea that affirmative action is both unjust and an inadequate, unfair method of addressing flaws in the extant meritocratic criteria is the idea that demographic characteristics should not be taken as evidence of what talents, abilities, viewpoints, or characteristics an individual has. This concern lies at the core of Justice Roberts' recent majority opinion in *Students for Fair Admissions v. President & Fellows of Harvard College*²⁰ in which he complains, in essence, that the diversity argument for race-sensitive admissions stereotypes. On Justice Roberts' view, the diversity argument assumes that individuals have particular perspectives, experiences, or viewpoints based on their skin color. His complaint is that race-sensitive admissions criteria do not treat individuals as *individuals*, but instead assume other things are true of them in virtue of their race.²¹ One detects a whiff of a First Amendment

²⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

concern – that the diversity rationale assumes that individual candidates are expected to think a certain way or to say specific things and these expectations fail to treat them as *free thinking* and *free speaking* individuals.

That complaint resonates, if at all, if one understands the diversity argument as confined to claims about the anticipated distinct content of what particular students will say. But there is more to the diversity argument. For one thing, commonly, the diversity argument stresses the fair and equitable social conditions that facilitate learning and challenges of having a different social background in an otherwise homogeneous environment.²² Further, the diversity argument should be understood as valuing the distinctive reservoir of experience students may draw upon in their capacity as intellectual *recipients*, in absorbing and evaluating the content of what they are taught, given the social treatment, preparation, hurdles, and anxieties associated with their demographic backgrounds. Thus, one might better understand the diversity argument as also advancing a contention about the various perspectives from which knowledge claims and common pedagogical methods of transmitting knowledge (rather than as solely about how to uncover new knowledge) should be tested. Diversity in the student body may also prompt *instructors* to think more carefully about how to design curricula and examples to touch upon and to communicate successfully with the full demographic range of the population.²³ The

²¹ *Students for Fair Admissions*, 219-221.

²² See e.g., *An Open Letter to Scotus from Professional Physicists* (2015) at http://eblur.github.io/scotus/?_gl=1*hb4diz*_ga*NTM1OTYwMjYzLjE3MDk0OTk5NzM.*_ga1CCM6YP0WF*MTcwOTQ5OTk3My4xLjEuMTcwOTUwMDM0Mi4zNC4wLjA. This letter was issued in response to Justice Roberts’ question at oral argument in *Fisher v. Texas* (2016), when Justice Roberts asked, “What unique perspective does a minority student bring to a physics class?” See Transcript of Oral Argument at 55-56, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (U.S. Dec. 9, 2015), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-981_onjq.pdf

contrast here is that between asking whether specific knowledge claims and common pedagogical methods of transmission resonate equally well with people from a range of backgrounds, versus asking what new things will people from different backgrounds have to say that will add to or fill in the gaps of our current knowledge claims.

Even this broader characterization of the diversity argument may not satisfy many critics of race-based affirmative action. Their underlying worry is that judgments about individuals (whether as contributors or audience members) on the basis of their social group's general experience is stereotyping and that racial stereotyping has a sufficiently pernicious history that it should be eschewed even when it appears to be a benign practice.

The mission-based argument for affirmative action does not depend upon taking a stand on this issue. For the thrust of my answer to Justice Roberts' complaint that affirmative action does not treat individuals as individuals is in essence to question whether, in light of its central mission, it is appropriate for university admissions to evaluate individuals as individuals. Indeed, I am suggesting there is something suspect about evaluating individual applicants *as individuals*. There is a tension between thinking that we all have a baseline claim to access to a public good, as members of the public, and thinking that our access should be regulated by deep and particularized consideration of our qualities as distinct individuals.

So too, one need not understand the use of demographically sensitive criteria in university admissions as proxy criteria - that is, as criteria that target traits not because they are desired for themselves, but because they are generally associated with another trait that is more difficult to select for directly. Given the mission of transmitting the intellectual commons to the

²³ See e.g., Jedidah C. Isler, *The 'Benefits' of Black Physics Students*, NYT (Dec. 15, 2015). This editorial was also written as a response to Chief Justice Roberts' question in the oral argument in *Fisher v. Texas*. See *supra* note 22.

entire public, it seems perhaps more appropriate to understand demographically sensitive selection of students as a process of selecting community emissaries, to ensure that carriers of our intellectual heritage are seeded and dispersed widely among the public and not only in a discrete, concentrated segment of it. In assessing whether someone could serve as a community emissary, it's legitimate to ask whether they hail from the relevant community – whether defined in terms of geographic residence, nationality, age, gender, race, etcetera. In gauging that some people qualify as candidates in light of their residential zip code and others do not, we are not making any judgments about what they are like *as individuals*.

The mission argument is not an argument that demographic criteria be used to repair the flaws or missing elements of extant meritocratic criteria. We need not make any prediction about how students of a particular demographic background will perform or contribute to the classroom or the lab. The mission argument does not regard demographic criteria *as a proxy* for anything. Whether the demographic criteria hold of a person is not, as we are using it, an indicator for how they will think or talk or what experiences they are likely to draw on or how they will relate to other students and faculty. On the argument I am offering, demographic criteria represent a directly qualifying condition because having the relevant demographic criteria is what it would take to be an emissary from that community. So the fact that demographically sensitive admissions criteria do not treat individuals as individuals is irrelevant if we understand admissions officers not as refereeing an intellectual footrace, but rather as selecting community emissaries to experience a public good.

Notice also that the oft-cited requirement that any plausible affirmative action plan should have an end-date or a criterion for one does not apply to the mission argument. The absence of a clearly defined end-date for the affirmative action programs reviewed and

invalidated in *Students for FAIR Admissions* was another major factor in their demise.²⁴ This demand is, perhaps, intelligible if one thinks of affirmative action as a form of reparations or as a departure from otherwise optimal criteria to adjust to inclement conditions on the ground that the inclement conditions render usually apt criteria situationally unfair or misleading. It is intelligible, though not a given, to think that a reasonable remedial process will, at some point, come to an end. If the function of remedies is to acknowledge and repair damage and to restore all parties to some relationship of normalcy, it is understandable to wish for a remedy that will accomplish that restoration and, perhaps, to regard a remedy as defective to the extent that there is no foreseeable date when it will succeed.²⁵ Likewise, the end-date demand is intelligible when one thinks of affirmative action as an exceptional measure to compensate for some emergent deviation in the appropriate starting conditions; the idea that exceptions are somehow temporary or unusual lends fuel to the idea that there should be an end point. I hasten to add that ‘intelligible’ does not mean ‘correct.’ For many, given the depth and extent of the racial injustices perpetrated in our nation, it seems naïve to think that an adequate remedial process will be completed in our lifetimes or in this century.²⁶ In the context of university admissions, this controversy could be bypassed. For, if one thinks the mission is to share knowledge with the entire public, generation after generation, then the idea that there must be an expiration date to the use of demographically sensitive criteria seems perverse and inexplicable (even though what demographic criteria are relevant may change over time as society changes over time).

²⁴ *Students for FAIR Admissions* at 221-226. The emphasis on the need for a terminal date emerged in *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 342-3.

²⁵ See e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) (criticizing appeals to general social discrimination as arguments for racially conscious remedies because they would support “remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”).

²⁶ *Wygant*, id., can be read as conceding this point.

IV. Appropriate Criteria

I have been claiming that an appeal to the university's mission, understood in terms of the aim to give access to the public to the public's knowledge, both motivates the substantial use of demographic criteria in admissions and avoids many of the objections, hesitation points, and empirical disputes that are associated with more prominent arguments for affirmative action, ones that portray the point of affirmative action or the value of a university education in terms of its instrumental value. As I was just remarking, this argument understands affirmative action as having a permanent place in admissions because it does not regard the use of demographic criteria as an exception, a remedy, or as a proxy for something else.

A pressing question for this approach is: *To which* demographic groups should a university's admissions process be sensitive? There is room for discretion and variation in answering this question, so long as the answer represents a good faith effort to serve the public at large. Producing a definitive single answer does not seem central to the success of the approach. Just as different parks and libraries around the country have different policies about how they structure their services and outreach methods, one can imagine different universities reasonably taking different approaches to ensuring that they serve the entire public. Nevertheless, we might identify some relevant factors and considerations that might limit the range of reasonable answers and that might suggest leading, salient approaches.

One relevant factor concerns how any particular university fits into the larger institutional structure and division of labor with respect to the production and preservation of knowledge. For example, the United States has very few national public universities.²⁷ State universities are the

²⁷ I am treating the various federally run military academies (e.g., West Point, the Air Force Academy, the Naval Academy) as universities, although their mandatory vocational focus may place pressure on that honorific.

predominant public institutions that are dedicated to cultivating, preserving, and distributing knowledge through intellectual training. Given their funding sources and their oversight by state legislatures, many of them reasonably understand themselves as primarily charged to serve the residents of that state.²⁸ In state systems with many branches, their primary mission may be to serve residents of an even smaller region. For such universities, the relevant demographic groups may be understandably calibrated to the demographic representation in the jurisdictional area being served. For other universities, whether private or public, that have a national or international charge, a regional focus may be less appropriate.

Other relevant considerations may be dictated by other features of the university's mission. For instance, because the university's teaching mission is, in part, to give students the skills and the contextualized information to formulate their considered opinions and worldviews, it seems inappropriate for the university to use religious affiliation, political affiliation, or any other identity category that is based upon a person's beliefs about the world as relevant demographic categories for admission. From the university's perspective, any person's membership in these categories is a process still in the making, to which a university education is supposed to contribute. From the university's perspective, identifying a student as belonging to one of these categories would be premature and potentially counterproductive to supporting an open-minded consideration of the relevant topics.²⁹

So far, I have suggested some limiting considerations based on the particular university's sphere of responsibility and its mission. From here, one can imagine at least three positive

²⁸ The University of Nebraska, for example, describes itself as "the primary intellectual and cultural resource for the state." See <https://www.unl.edu/about/role-mission/>

²⁹ A more subtle distinction between one's religious background or community of upbringing and one's own current affiliation could be made, although, in practice, it may prove difficult to treat the former as relevant without rendering it salient in ways that cut against the effort to encourage open-mindedness.

approaches. First, one might deploy a spatial demographic approach that imagines serving the public at large by ensuring that minimally qualified representatives from every segment of the relevant jurisdictional area are admitted, with appropriate allowances for differences in density; for convenience, but at the loss of accuracy, we might call this the *zip code approach*.³⁰ Second, a randomizing approach that uses outreach to solicit a wide range of applications and then randomized selection among minimally qualified applicants.³¹ Third, an approach that reflects

³⁰ Zip codes are ill-suited for this purpose. Zip codes are postal designations, rendered for the convenience of the postal service and determined partly by factors such as the density of buildings and businesses and mail volume as well as an area's topography. See United States Postal Service, "Postal Zip Code Boundaries," <https://about.usps.com/who/government-relations/assets/postal-101-zip-codes.pdf> There is not a uniform population size served by each zip code and indeed, some zip codes belong solely to government entities such as the IRS. Zip codes are subject to change for reasons distinct from change in population size, such as infrastructure changes, variations in staffing patterns, and variations in mail volume. This means that proportionate representation by zip code cannot be used as a method of ensuring proportionate population representation relative to a geographic area. Also, since there are over 41,000 zip codes, universities would have to decide which zip codes should be grouped together and which should be treated separately; that decision will itself require a distinct theory of how the lines should be drawn and why. Finally, given that shifts in zip codes do not track shifts in population closely, a reliance on zip codes as a method of ensuring that the public was served would stymie efforts over time to assess the university's success since the same zip code at one time may not serve the same area or population size as at a later time. Using congressional district or intrastitital political district lines (or their equivalent for Guam, Puerto Rico, American Samoa, the Virgin Islands, the Mariana Islands and Washington DC) would solve some of these problems, since there are fewer of them, but they raise other problems, including that the drawing of political district lines is famously highly contested and, in some areas, regularly subject to charges of discrimination. It is unlikely to serve the interests of universities to compound the stakes of such fraught and contested boundary lines.

³¹ Michael Sandel argues for randomized university admissions, though his argument takes a different path than the argument offered here. Michael J. Sandel, *THE TYRANNY OF MERIT* 184-188 (2019). Sandel objects to the social resentment, the social divisions, and the culture of winners and losers that are created by the gratuitous overuse of meritocratic criteria. Consequently, he proposes choosing at random among 'qualified' university applicants and, perhaps, giving an extra 'ticket' to 'diversity' candidates. Sandel's concern is to dismantle a culture of competition and the deleterious social dynamics that it produces. For him, whatever benefits are gained by competitive meritocracy do not compare to the corrosion of community generated by competition and hierarchy. Eliminating the competition is the answer to that problem. My argument is compatible with either endorsing or rejecting Sandel's position. It focuses on the idea that we each have a claim to access to the public intellectual commons. With respect to

sensitivity to the major demographic classifications associated with historical, legal, and contemporary determinants of social status, economic well-being, health and longevity, community composition, and other life-determining outcomes, e.g., race and ethnicity, gender, and class background. These are just exemplar categories and others might be considered, including gender orientation, sexual orientation, and immigration status (e.g., whether the applicant or their parents are immigrants).³²

All of these approaches may better serve the public's access to its intellectual heritage than does the current dominance of competitive meritocracy. Further, these approaches need not be mutually exclusive. Different portions of the student body could be selected using different approaches. Nonetheless, there are powerful reasons not to rely predominantly on the first or second approach and, instead, to make generous, direct use of socio-economic demographic

access to that which we each have an entitlement, it is illegitimate to place criteria for access that probe more deeply into an individual's specific qualities but not because of the poor dynamics that such probing and such sorting produce. Rather, it's because our access to a common good is an entitlement. Whether we have access to that to which we are entitled should not depend upon our particular accomplishments or our projected future individual achievements. Where we cannot all have direct access to a common good, we have reason to ensure that limited access is allocated in a way that ensures the good is fully appreciated and that facilitates its indirect appreciation and distribution.

³² What about age? In light of the expanding nature of the intellectual commons, in terms of both knowledge and the relevant skills to access the commons, there is a strong argument for ensuring that each generation has continuing access to the university. At the same time, there is an argument for ensuring greater access to members of younger generations to ensure they gain the skills and exposure to the intellectual commons early on to use and enjoy throughout their entire lives. The latter consideration might justify privileged (if not exclusive) access to degree programs for younger applicants or to applicants without degrees; the former consideration may underscore the imperative for universities to offer other avenues of access to the university for nondegree students, including continuing education programs. More instrumental conceptions of the university lean toward strong emphases on degree programs as gateways to professions (and therefore also as sources of revenue, whether as tuition in anticipation of future compensation or through alumni donations); less instrumental conceptions of the university might instead understand the significance of degrees as pathways for concentration, focus, and the development of disciplinary knowledge and techniques, but not as the presumptive method of offering access to the intellectual commons.

categories. The zip code approach has the disadvantage of relying and drawing upon residential patterns that are themselves the product of discriminatory redlining and other discriminatory social forces. The randomization approach (and to some extent the zip code approach) leave it to chance that the university will substantively serve a range of socioeconomic groups. In part, this is the nature of randomization and in part, this is because of the limited efficacy of outreach efforts. But this criticism presupposes that substantial, proportionate access based on socioeconomic groups is important. Why?

The examples advanced at the outset underscore the intuitive importance of such demographic representation. To reiterate, it seems obvious that something would be wrong with even a randomly generated student body in which there were no Jewish students who had access to a university's courses on the Holocaust, no Black students in its courses on slavery, no women to take its courses on women's studies etcetera. These are stark examples, but they do not turn for me on the specialized nature of the topic, although the specialized nature underscores the relevance of those topics to the demographic group and the ways in which the knowledge would resonate for them. The point holds also of abstract mathematics or music theory. Where there are social categories that hold demographic significance, there is a problem if representatives from some demographic groups lack meaningful access to our shared intellectual history.

Why? Three reasons, one purely philosophical and the other two more dependent on political and sociological claims, albeit ones that seem relatively uncontroversial. The first, purely philosophical reason is that ensuring demographic representation in a student body is a public way of manifesting public ownership of our intellectual heritage. It is a public and roughly visible way of refuting the idea that this knowledge is reserved for a special class of people, even though only a fraction of the public may gain direct access to any particular outlet

of that knowledge. Given prior practices of discriminatory exclusion based on these socioeconomic categories (whose historical occurrence and inappropriateness is uncontested), it is especially important to underscore the rejection of such practices.

Second, where the nodes of direct access to a shared public good are scarce and many members of the public depend on indirect methods of access and indirect benefits from others' access, it makes sense to attend to how the channels of indirect access function. People speak to and associate significantly more with members of their own socioeconomic demographic group than to out-group members. This phenomenon is most pronounced with respect to race -- whether because of the geographical proximity partly associated with the legacy of racial segregation, because of shared social status and demographically grounded experiences, or because of other similarities. Given this phenomenon, crafting a demographically representative student body is a way to ensure that the knowledge bestowed upon student emissaries and its beneficial effects percolates more broadly, to each sector of the public. Here, I draw on the sociological evidence of homophily. As sociologist J. Miller McPherson observed:

“Similarity breeds connection. This principle-the homophily principle-structures network ties of every type, including marriage, friendship, work, advice, support, information transfer, exchange, comembership, and other types of relationship. The result is that people's personal networks are homogeneous with regard to many sociodemographic, behavioral, and intrapersonal characteristics. Homophily limits people's social worlds in a way that has powerful implications for the information they receive, the attitudes they form, and the interactions they experience. Homophily in race and ethnicity creates the strongest divides in our personal environments, with age, religion, education, occupation, and gender following in roughly that order.”³³

To point to these connections is not to defend them or privilege them normatively. We may aim or wish for a greater level of heterophily, -- i.e., regular conversations across and not only within all sorts of aisles, -- but an institution dedicated to distributing a communicable public good to the public at large must attend to the actual channels of communication in the population.

Third, demographic representation among those directly privy to knowledge serves democratic purposes, in that it works to preclude some demographic portions of the population from having access to an entirely different vocabulary, information set, and cultural reference points concerning our shared environment and public condition than other demographic portions of the population. Common vocabulary, information, and reference points (even if not judgments) serve the aim of enabling democratic understanding, discourse, and accountability. Whereas, fragmented vocabulary and disparate reference points can work to generate or reinforce inequality and division, by allowing the powerful to conduct business in terms that are opaque and hinder oversight.

Thus, the strategy of my argument is not to claim that affirmative action as it has been traditionally practiced may be defended without asserting that race, class, gender, and other socioeconomic demographic categories still matter to contemporary social life and to understanding our history. The strategy is rather to claim that affirmative action may be

³³ Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 416 (2001) (“The pervasive fact of homophily means that cultural, behavioral, genetic, or material information that flows through networks will tend to be localized.”). See also Damon Centola & Michael Macy, *Complex Contagion and the Weakness of Long Ties*, 113 Am. J. Soc. 702, 707-8, 730 (2007) (noting where use of information requires behavioral change, it is most effectively distributed through ‘tightly knit residential networks’ rather than acquaintance or employment networks, in part because of the credibility and legitimacy reinforcement provided by close knit community contacts).

defended without assessing the qualities, traits or merited treatment *of individuals* by reference to these demographic categories. It is the latter that has been the claimed basis of opposition to affirmative action by conservatives. The idea that our intellectual heritage is a public good that should be made available to the public is one that has been shared by many prominent conservatives.

So far, the argument has been that universities are justified in using affirmative action in light of their role as public trustees of the public, intellectual commons and in light of the public's interest in having access to this public good. Do those reasons alone also entail that affirmative action is mandatory? Probably.

I have contended that insofar as universities are pursuing their aim of transmitting our intellectual heritage, competitive, meritocratic criteria are inapt; further, demographically sensitive criteria of admission are well-suited to distributing this public good widely. But I have not made the argument that each university must pursue this aim. Trustees, it might be observed, may decide not to distribute the entire trust but to act so as to grow its corpus to permit larger distributions to beneficiaries in the future. Where the corpus is monetary, this may involve investment, rather than distribution. The monetary analogy can be misleading, since of course, information is a nonrivalrous resource, while money is not and because information can be shared, but not exactly invested. Nonetheless, where slots at universities are limited, using those slots for students who may be expected to contribute to research broadly speaking and thus, to the expansion of our treasury of knowledge might be considered the analog of reinvesting, rather than spending its capital. So, it might be argued that universities may pursue the aim of epistemic reinvestment, rather than epistemic distribution (so to speak).

This argument, even if fully persuasive on its merits, does not clearly establish that affirmative action is discretionary. It may show that (some) universities may, in the name of epistemic reinvestment, adjust their admissions criteria to privilege those skills associated with the production of knowledge rather than only those skills associated with its transmission and apprehension. The argument shows that different qualifying criteria may apply, depending on the university's aim. But it does not show any incompatibility with using those different criteria in conjunction with demographically sensitive criteria, i.e. choosing among the superset of those who have the potential for epistemic production with an eye to producing a demographically representative student body. That incompatibility only potentially arises when the further argument is made that either that superset does not contain a demographically representative subset (a suspect claim) or when the different argument is made, namely that the university, as a trustee, may elect to select only the "best" applicants, whether in terms of production or apprehension criteria that are demographically insensitive.

That is, the potential incompatibility between the affirmative action and a university specializing in the production of knowledge only arises when the argument is made that the university may *exclusively* employ *competitive* meritocratic criteria, in which case if demographic criteria are not directly part of the meritocratic schema (as say, the diversity argument contends), then demographic representation is left to chance (at best) or is unlikely where background conditions of injustice with demographic impacts directly or indirectly affect the composition of the applicant pool. In that case, even were perfectly fair and accurate competitive meritocratic criteria available to us, I do not think universities – to the extent they are trustees for the public of the knowledge they house and produce - may exclusively rely on competitive meritocratic criteria that do not incorporate demographic sensitivity.

Why? For one thing, a trustee may not exclusively invest and build corpus; they must eventually make distributions to the beneficiaries and since the beneficiaries are not a fixed set, but a continuously temporally replenishing one, it seems that the trustee must engage in at least some continuous distribution. At least some substantial part of the university's admissions process should be guided by an aim to make the intellectual commons accessible and to distribute the public's knowledge to the public.

But it may be objected that while universities *as a whole* must make distributions by admitting and teaching a demographically representative population, must each particular university do this? After all, the intellectual commons is, unlike landed public trusts, not accessible from only one place. So, it might be thought, some universities may share access widely to the commons; while others may serve a more restricted group; all that matters is that the former group of universities is large enough and serves a large enough group of demographically representative people. So, to return to the question of elite research universities, may *they* focus exclusively on producing cutting edge research and utilizing the 'best' students to do so (again contentiously assuming this is a coherent and demographically independent category), while leaving a focus on the distribution of knowledge to others?

I do not think so. In part, I resist the suggestion that all parts of the intellectual commons are functionally accessible from entirely different vantage points. Rather, each university has an exclusive or at least a privileged form of access to particular corners of the intellectual commons. Each research university identifies some distinct components of the intellectual commons that lie at the frontier of our knowledge. To the extent that they have their fingers on unique components of the intellectual commons, their responsibilities to share widely with the public and to empower active understanding by a cross-section of the public seem all the more

imperative, because other parties are not epistemically situated to serve as a backup or alternative.

This issue of whether affirmative action is mandatory brings us back to the assumption at the beginning of the paper that the university's mission is to distribute knowledge, broadly understood, to the entire public because universities play something like the role of a trustee or a fiduciary with respect to the intellectual commons. But why take this view? Is it a reasonable view for a university to take of itself? Is it a mandatory self-conception or could a university instead regard itself as a vocational school whose mission is to train the most qualified people for socially useful careers?

Regarding the university, as a social institution, as the trustee or custodian of our intellectual heritage (or at least, of the more advanced components of our intellectual heritage) seems appropriate for the following reasons, both interpretative and normative. Universities amass and store knowledge, both directly through libraries but also by hiring and continuing to train people with knowledge and abilities to access that knowledge. Their accumulation of knowledge is not purely task-based nor outcome-based, as it would be if the institution's purpose was just to train students in particular skills, but it ranges widely. Moreover, universities do not merely house a great deal of knowledge, they are also the primary social centers where people can engage in focused and concentrated activity, in concert with others who are similarly dedicated, to acquire the skills to access, understand, and interpret this knowledge, to relate knowledge from one field of inquiry to another, and to do so under the protection and encouragement of academic freedom, freedom of speech, and freedom of thought.³⁴ To varying

³⁴ Christopher Kutz celebrates the special atmosphere of the university setting, or its 'hothouse culture,' and the goods it enables in more eloquent terms: "Students bumping into other students, falling into conversation, love, and conflict – these make and shape a broader public sphere. It is

degrees, this conception is often reflected in the mission statement of the university.³⁵ Witness the University of Michigan’s articulation of its mission: “The university’s mission is to serve the people of Michigan and the world through preeminence in creating, communicating, preserving and applying knowledge, art, and academic values, and in developing leaders and citizens who will challenge the present and enrich the future.”³⁶ Or that of my own University of California, “The distinctive mission of the University is to serve society as a center of higher learning, providing long-term societal benefits through transmitting advanced knowledge, discovering new knowledge, and functioning as an active working repository of organized knowledge.”³⁷ The

the familiar dance of improvisation, one that cannot be scripted by technocrats aiming to produce so many entrepreneurs or intellectual property claims. It arises out of the wonderful organic mess visible on any vibrant campus.” Kutz, *supra* note x, at 195.

³⁵ Here’s the mission statement of Colorado State University: “Inspired by its land-grant heritage, Colorado State University is committed to excellence, setting the standard for public research universities in teaching, research, service and extension for the benefit of the citizens of Colorado, the United States and the world.” <https://catalog.colostate.edu/general-catalog/welcome/mission-values/> That of the University of Texas, though, has a somewhat more instrumental feel: “The university contributes to the advancement of society through research, creative activity, scholarly inquiry and the development and dissemination of new knowledge, including the commercialization of University discoveries. The university preserves and promotes the arts, benefits the state’s economy, serves the citizens through public programs and provides other public service.” <https://www.utexas.edu/about/mission-and-values>. The University of Toronto’s statement of purpose places strong emphasis on the university’s special role to house and protect the exercise of intellectual rights to raise challenging and provocative questions. “[There is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.” <https://governingcouncil.utoronto.ca/secretariat/policies/institutional-purpose-statement-october-15-1992>

NYU is among those universities that motivate the qualified ‘often’. Its mission statement does not emphasize public benefit or public service. Although it does describe itself as a platform for ‘inventing new ways to meet humanity’s challenges,’ it describes its mission succinctly as “to be a top quality international center of scholarship, teaching and research,” and crowns that it is located in “great cities” that are “all magnets for talented, ambitious people.” <https://www.nyu.edu/about.html#:~:text=New%20York%20University's%20mission%20is,of%20scholarship%2C%20teaching%20and%20research>.

³⁶<https://culturejourney.umich.edu/values/#:~:text=The%20university's%20mission%20is%20to,present%20and%20enrich%20the%20future>.

vastness of the riches housed in a university coupled with its skilled personnel is what makes a university's understanding of its mission as to protect and share our intellectual heritage with the public both reasonable and nondiscretionary.³⁸

Why is it a nondiscretionary self-conception? First, the public contribution to both public and private universities, through governmental monetary and land grants, through favored tax status, and through individual donations, is vast. The high level of public investment in universities merits an expectation that universities will share the knowledge they accumulate with the public.³⁹ Second, I suspect there is a high level of path-dependence here; we have come to depend on universities as our source of access to the public intellectual common. Given the built universities we have and the many sources of public support for them, should universities decide to abandon or phase-out their mission and emphasize vocational training, it would be difficult for the public to pivot quickly to generate new institutions that do the curatorial, custodial, skill-building and access-facilitating work that universities do. Given the need for training to access and contextualize a great deal of the intellectual commons, universities represent both gateways to the intellectual commons and barriers to some parts of the intellectual commons. Much of the intellectual commons has been framed and encoded, often by the university educated, in ways that, typically, demand a university training to decrypt and fully to appreciate.⁴⁰ When a social institution controls the exclusive or even just a dominant means of

³⁷<https://www.ucop.edu/about/mission/index.html#:~:text=%22The%20distinctive%20mission%20of%20the,working%20repository%20of%20organized%20knowledge.>

³⁸ See also Kutz, who discusses the representativeness of the student body, but also aptly places a strong emphasis on the scale of the population served. “[I]t’s an important feature of many universities...that they aim to provide the direct benefits of education to a large number of people.” Ch. 4, p. 178.

³⁹ See, e.g., the sentiments of the Continental Congress as expressed in the Northwest Ordinance in 1787: [K]nowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”
<https://www.archives.gov/milestone-documents/northwest-ordinance>

access to a good owned by the public, that institution should be expected to behave as a trustee of that good.

V. Conclusion

I have argued that the mission of the university supplies a non-instrumental argument for the permissibility and, arguably, the mandatory nature of affirmative action in university admissions. One might ask why one should bother to make this argument given the Supreme Court's recent decision that has effectively taken race-sensitive admissions criteria off the table for the foreseeable future.

As I have noted, this line of argument can be sharply distinguished from the ones considered and rejected by the Court. Still, universities may be loath to gamble with another line of argument and to suffer another defeat over race-sensitive admissions criteria. Even so, it is noteworthy that many universities are actively implementing or considering other demographically sensitive measures in admissions, including the use of economic affirmative action.

While these arguments are more widely accepted as constitutionally kosher, one can foresee the emergence of political resistance to these measures should the same instrumental and remedial arguments be advanced for their deployment. Turning to an argument based in the mission of the university may avoid some of the traditional nodes of controversy associated with affirmative action. The mission argument offers a rationale for affirmative action that does not depend on empirical and contested (if correct) claims about which demographic groups are unfairly disadvantaged by contemporary meritocratic standards or whether other forms of

⁴⁰ The complexity of the skills and contextual knowledge that has become necessary to access parts of the intellectual commons explains why it is not sufficient for the university qua trustee to expand its non-degree granting public access programs, such as continuing education classes. Doing so, though, may be an additional obligation of the university as public trustee.

demographic diversity will enhance the academic conversation. By focusing on fulfilling the duties of a public trust in distributing access to a public good to a broad segment of the population, the mission argument sidesteps many of the issues that divide liberals and conservatives, including issues about how and the extent to which one's background and childhood circumstances determine one's prospects and opportunities, whether one's background and childhood circumstances lend one a unique perspective, and whether and when to redress social injustices indirectly and through decisions made about specific individuals.

A great deal of the tension over affirmative action may be traced, I suspect, to underlying differences about the sociological and normative relationship between social events, past and present, social structure, and individuality. These issues come to the fore when college admissions are framed as a competition and certain instincts (or fetishes) about the purity of the competition are triggered. When, instead, we conceptualize the university as the gatekeeper of access to a *universal entitlement* and we think about the university's responsibility in distributing that public good widely, to the entire community, we might sidestep these disputes and reflexes. Such sidestepping is not a matter of mere redescription, though. It would require that we redesign admissions criteria away from a predominantly competitive meritocratic model and more toward minimum credentials necessary to make use of a public good and discussions about how best individual institutions can play their part in engaging in a collective distribution project.

In any case, it should come as no surprise that I resist the thought that there needs to be a further strategic payoff to crafting this argument. If the mission argument is right, its recognition brings two intellectual benefits. First, the argument grounds a fuller understanding of the damage occasioned by the Court's recent decision, namely that it not only hampers the cause of

equal opportunity with respect to other social benefits and resources (including social, political, and economic power and mobility) but also that it directly frustrates the university's own mission of transmitting the public's intellectual inheritance to the public at large.

Second, this mission-based argument may recenter our own discourse about our primary mission away from the downstream, external benefits of a university education and back to the intrinsic value of knowledge and the service we provide in preserving, refining, expanding, and distributing it to the public. It is not news that the liberal arts remain under siege, that non-STEM departments suffer budget cuts and even forced closure, and that we are under constant pressure to document the 'use' and long-term financial payoffs of a university education. These pressures have been resisted valiantly. Nonetheless, in arguments about affirmative action, progressives have partly capitulated to the relentless pressure to make instrumental arguments about the value of students and the value of education.

Affirmative action is justified not merely because a greater diversity of students will improve the education we now offer, because it will lead to a better student body that will then make us more economically or technologically or epistemologically productive, or because it will work towards levelling the playing field for the economic competition in which one's secondary education is often deployed. The use of demographically sensitive criteria to ensure a demographically representative student body is justified whether it has additional beneficial side-effects or not. It's justified because it is an eternal component of the basic and intrinsically valuable mission of the university – to enrich the public's lives through knowledge and to honor and preserve the achievements of our predecessors by learning and passing on our intellectual heritage to the entire community.