THE COAL MINER'S DAUGHTER PREFERENCE: A REVIEW OF CASHIN'S *PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA*

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> Well, I was born a coal miner's daughter, in a cabin on a hill in Butcher Holler—Loretta Lynn.[1]

INTRODUCTION

A half century after Henry Caudill described the abject poverty of Eastern Kentucky as "night comes to the Cumberlands,"[2] the region still

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1. LORETTA LYNN, *Coal Miner's Daughter*, *on* COAL MINER'S DAUGHTER (Decca Records 1970). The song is autobiographical and describes Ms. Lynn's upbringing in Butcher Hollow, an unincorporated mining community in Johnson County, Kentucky. The song title became the title of Ms. Lynn's autobiography (1976) and a major motion picture (1980). Ms. Lynn received the Presidential Medal of Freedom as well as countless awards for her contributions to music.

2. *See* HARRY M. CAUDILL, NIGHT COMES TO THE CUMBERLANDS (1963).

awaits the dawn.[3] Lyndon Johnson, inspired in part by Caudill's work, launched the War on Poverty in Letcher County, Kentucky,[4] but that war was lost in Appalachia.[5] By any objective measure, the fifty–four Kentucky counties[6] served by the Appalachian Regional Commission lag behind the rest of the Commonwealth and the Nation.[7] Indeed, in terms of per capita income, poverty rate, percentage of adults with a high school diploma, percentage of adults with a college degree, and homes with broadband access, the non-Appalachian counties of Kentucky (population 3.2 million) closely track the national average,[8] but the Appalachian counties (population 1.1 million) resemble another country.[9]

Yet, despite the obvious economic, cultural, and educational disadvantages, America's selective schools give little regard for the people of this beautiful, yet troubled, region. Universities have never insisted that a certain number of seats be set aside for residents of Appalachia[10] or that residents of Appalachia should automatically receive bonus points in the admissions process.[11] Higher Education does not litigate over how many

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3. *See* JOHN CHEVES, BILL ESTEP & LINDA B. BLACKFORD, FIFTY YEARS OF NIGHT (2014) (Kindle Edition) (chronicling the current conditions of Appalachian Kentucky on the fiftieth anniversary of Caudill's work).

4. *Id.* at 74.

5. *See* Kevin D. Williamson, *Left Behind: An Elegy for Appalachia*, NAT'L REVIEW, Dec. 16, 2013 at 26.

6. Those counties are Adair, Bath, Bell, Boyd, Breathitt, Carter, Casey, Clark, Clay, Clinton, Cumberland, Edmonson, Elliott, Estill, Fleming, Floyd, Garrard, Green, Greenup, Harlan, Hart, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Menifee, Metcalfe, Monroe, Montgomery, Morgan, Nicholas, Owsley, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Russell, Wayne, Whitley, and Wolfe.

7. *See* CHEVES, ESTEP, & BLACKFORD, *supra* note 3, at 3320 (chart comparing Appalachian Counties, non-Appalachian Counties, and nation as a whole).

8. *Id*. For example, non-Appalachia Kentucky has a per capita income of $25,130 and the Nation has a per capita income of $28,051. The poverty rate is 16% for non-Appalachia Kentucky and 14% for the Nation. The percentage of adults without a high school diploma is identical (14%). Non-Appalachia Kentucky is slightly below the United States in terms of adult college graduates (28%-24%) and has an identical broadband rate (98%).

9. *Id*. To illustrate, Appalachia Kentucky has a per capita income of $ 18,158 and the Nation has a per capita income of $28,051. The poverty rate is 25% for Appalachia Kentucky and 14% for the Nation. The percentage of adults without a high school diploma is 26%; almost double the national norm of 14%. Appalachia Kentucky is far below the United States in terms of adult college graduates (28%–12%) and substantially trails broadband rate (98%–87%).

10. *Cf*. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978) (invalidating university plan to reserve a certain number of spaces in the entering class for racial minorities).

11. *Cf*. Gratz v. Bollinger, 539 U.S. 244, 270 (2003) ("We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant

poor whites constitutes a critical mass or how many poor whites must be in each classroom to ensure diversity across the institution.[12]

Sheryll Cashin, a professor of law at Georgetown University, wants to change this paradigm. In a provocative new book, *Place, Not Race: A New Vision of Opportunity In America*,[13] she "challenge[s] universities to reform both affirmative action and the entire admissions process."[14] In her view, preferences should emphasize

> …place, rather than race, as the focus of affirmative action for the pragmatic reason that it will foster more social cohesion and a better politics. . . . Those who suffer the deprivations of high-poverty neighborhoods and schools are deserving of special consideration. Those blessed to come of age in poverty-free havens are not.[15]

Fifty years ago, "race and gender were appropriate markers for the type of exclusion practiced by most predominately white universities. Today, place is a more appropriate indicator of who gets excluded from consideration by admissions officers at selective institutions."[16]

Cashin's rationale for this paradigm shift is basic "fairness."[17] Her primary focus is to "help those [minority children] *actually* disadvantaged by [de facto] segregation,"[18] but she recognizes "whites who *do* live in impoverished environs or attend high-poverty schools are no less deserving of special consideration—as is anyone who is actually disadvantaged by economic isolation."[19] Applicants from "low-opportunity places that rise, despite the undertow, deserve special consideration from selective schools. They have enormous fortitude and focus—skills they had to develop to succeed against ridiculous odds, skills that will help them persevere through college. And it should not matter what color they are or what nation they come from."[20]

Cashin recognizes that her desire to diminish the emphasis on race while increasing emphasis on poverty is "sacrilegious in the civil rights

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solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.").

12. *Cf.* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2416–17 (2013) (discussing a university's concern about the number of minorities in particular undergraduate classes).

13. SHERYLL CASHIN, PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014).

14. *Id*. at ix.

15. *Id*. at xv.

16. *Id*. at xvi.

17. *Id*. at ix.

18. *Id*. at xv.

19. *Id*. at 79.

20. *Id*. at 56.

community."[21] Acknowledging "[r]ace still matters in American society, particularly in the criminal justice system[,]"[22] she insists that "race is under-inclusive"[23] and that higher education's race-based affirmative action efforts are about "what skin color the rich kids have."[24] "Race-based affirmative action buys some diversity for a relative few, but not serious inclusion."[25] "[R]ace does not, by definition, capture those who suffer the structural disadvantages of segregated schools and neighborhoods. Race is also over-inclusive in that it can capture people with dark skin who are exceedingly advantaged."[26] "[D]iversity by phenotype puts no pressure on institutions to dismantle underlying systems of exclusion that propagate inequality."[27]

This review of Cashin's new vision of equal opportunity has three parts. Part I details her argument and her supporting evidence in some depth.[28] Part II examines the two constitutional questions resulting from a public institution's choice to adopt Cashin's emphasis on place rather than race. Specifically, would college or university administrators violate the Constitution by substituting place for race? If an emphasis on place allows an institution to achieve the educational benefits of diversity, must the institution substitute place for race? Part III explores the public policy consequences of her new paradigm.

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21. *Id*. As Cashin explains:

> The rub for proponents of affirmative action is that as long as they hold on to race as the sine qua non of diversity, they stymie possibilities for transformative change. The civil rights community, for example, expends energy on a policy that primarily benefits the most advantaged children of color, while contributing to a divisive politics that makes it difficult to create quality K-12 education for all children. I argue that the next generation of diversity strategies should encourage rather than discourage cross-racial alliances and social mobility. I contend that meaningful diversity can be achieved if institutions rethink exclusionary practices, cultivate strivers from overlooked places, and give special consideration to highly qualified applicants of all races that have had to overcome structural disadvantages like segregation.

Id. at xix.

22. *Id*. at xv.

23. *Id.*

24. *Id.* at xv–xvi (quoting Walter Benn Michaels, *Most Black Students at Harvard Are from High-Income Families*, 52 J. BLACKS HIGHER EDUC. 13 (2006)).

25. *Id*. at xx.

26. *Id.* at xvi.

27. *Id.*

28. Cashin's book is deeply personal. There is extensive discussion of her personal upbringing and her experiences as a mother of two sons in Washington D.C. The book ends with a letter to her sons about the challenges that they will face as men of color in twenty-first century America.

I. OVERVIEW OF CASHIN'S ARGUMENT FOR HER NEW VISION

In Chapter 1, "White Resentment, Declining Use of Race, and Gridlock,"[29] Cashin argues, "law and politics work against the use of race."[30] Detailing "the constraints of law," she argues four Justices (Roberts, Scalia, Thomas, and Alito) have embraced a colorblind Constitution[31] while one Justice (Kennedy) rejects a colorblind Constitution but has never upheld a racial preference.[32] Examining "the constraints of politics," she notes that racial preferences are unpopular among voters and that politicians can achieve more support by opposing rather than supporting racial preferences.[33] Discussing the "Perception Gap: White Resentment in the Age of Obama," Cashin recounts how minorities and whites have different views of discrimination in contemporary America,[34] but notes "[d]ata about racial disparities mask the experiences of working-class whites."[35] Concluding the chapter with "Reforming Affirmative Action to Begin Racial Conciliation," Cashin advocates ending racial preferences and implementing preferences based on poverty and overcoming structural barriers.[36] "If whites are to engage with diversity rather than resent it, the rules of competition must be perceived as fair to them and everyone else."[37]

In Chapter 2, "Place Matters,"[38] Cashin demonstrates "place, although highly racialized, now better captures who is disadvantaged than skin

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29. *Id.* at 1–18.

30. *Id.* at 2.

31. *Id.* at 3–4.

32. *Id.* at 4. As Cashin explains, any reliance on Justice Kennedy to support a racial preferences is precarious:

> Kennedy dissented in *Grutter*. He has never voted to uphold an affirmative action program. Whether the issue is affirmative action, school integration, employment discrimination or some other context touching upon race, he has sounded a consistent theme. For him consideration of the race of individuals is not only unconstitutional but inherently demeaning. In *Rice v. Cayetano*, a case involving voting rights of non-native Hawaiians for election of public trustees of a fund to assist native Hawaiians, he stated: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.

Id.

33. *Id.* at 6–9.

34. *Id.* at 9–15.

35. *Id.* at 10.

36. *Id.* at 15–18. As Cashin notes, "[t]he relevant debate is not whether we should have had affirmative action in the first place. That question is moot. Given the inevitable demise of race-based affirmative action, the relevant question is, what is its logical replacement?" *Id.* at 16.

37. *Id.* at 18.

38. *Id.* at 19–40.

color."[39] "In the geographic sorting that goes on in metropolitan areas, everybody aspires to live in a neighborhood that helps them to get ahead. The children of parents who can't afford to escape to quality are stuck in segregated, high-poverty schools."[40] This lack of racial and socio-economic class integration has long-term consequences.[41] "A child surrounded by poverty is not exposed to other kids with big dreams and a realistic understanding of how working hard in school now will translate into concrete success years later."[42] Residents of "high-opportunity neighborhoods rise easily on the benefits of exceptional schools and social networks . . . . Anyone who has spent time in high-opportunity quarters knows intuitively what this means—the habits you observe, the people and ideas you are exposed to, the books you are motivated to read."[43] Therefore, "place locks in advantages and disadvantages that are reinforced over time. Geographic separation of the classes puts affluent, high-opportunity communities in direct competition with lower-opportunity places for finite public and private resources."[44]

In Chapter 3, "Optical Diversity v. Real Inclusion," Cashin turns to the admission policies of highly selective universities.[45] "People of all colors are disadvantaged by current, exclusionary practices in higher education because of where they live or where they went to school, or because they

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39. *Id.* at 21.
40. *Id.*
41. With respect to racial integration:

> [r]esearch shows that children of all races and incomes who attend integrated schools improve their critical thinking skills, are less apt to accept stereotypes as truth, lead more integrated lives as adults, and are more civically engaged. Racial minorities in integrated schools also achieve at higher levels, with no detriment to the learning of white students.

Id. (quoting Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, E PLURIBUS. . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 6–11 (2012).

Concerning socio-economic integration:

> This differential experience of place greatly affects opportunity. Only about 30 percent of black and Latino families reside in neighborhoods where less than half of the people are poor. Put differently, less than one–third of black and Latino children get to live in middle-class neighborhoods where middle-class norms predominate. Meanwhile, more than 60 percent of white and Asian families live in environs where most of their neighbors are not poor. As urban sociologist John Logan put it, "It is especially true for African Americans and Hispanics that their neighborhoods are often served by the worst-performing schools, suffer the highest crime rates, and have the least valuable housing stock in the metropolis.

Id. at 23 (footnotes omitted).

42. *Id.* at 31.
43. *Id.* at 24.
44. *Id.* at 27.
45. *Id.* at 41–62.

are poor."[46] Those policies are flawed in three respects.

First, there is a geographic bias.[47] "The debate over affirmative action is about who gets into selective schools, and those segregated into lower-opportunity environs are almost invisible in this argument. Economic elites of all colors enjoy built-in advantages in the withering competition for spaces at choice schools . . ."[48] Yet, there are numerous low-income students of all races who could be competitive for those slots.[49] Unfortunately, highly selective institutions often ignore these low-income students because students take the ACT rather than the SAT[50] or because the students live in the Midwest, South, or Mountain West.[51]

Second, instead of pursuing the poor and disadvantaged students of all races, the highly selective institutions pursue upper middle class and upper class minorities.[52] "Professors, administrators, and many students want to look across a room and see a human rainbow. The son of an African World Bank executive or the daughter of a black president counts the same in terms of optics and is easier to admit than the son or daughter of a black policeman."[53] Indeed, one "unintended consequence[]"" of highly selective institutions' emphasis on race is a preference for the children of highly educated African immigrants rather than a poor African-American.[54] "[W]hen an elite school uses race-based affirmative action to create optical blackness but little socioeconomic diversity, it masks the struggles of those

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46. *Id.* at 62.
47. *Id.* at 46–49.
48. *Id.* at 42.
49. As Cashin observes:

> In fact, the pool of disadvantaged strivers is much larger than many would imagine. Economists Caroline Hoxby and Christopher Avery have garnered headlines for their research about low-income high achievers. They estimate that the number of low-income high school seniors who break the 90th percentile on the SAT or ACT and have a GPA of A- or better ranges from 25,000 to 35,000 each year. Nearly 6 percent of this cohort is black. Nearly 8 percent is Latino. In other words, each year between 3,300 and 4,600 high-achieving, low -income black and brown youth graduate each year. This number does not include middle- and upper-class black and Latino achievers. About 200 poor Native American youth also meet this standard every year. Over 17,000 poor white achievers and 3,800 poor Asian achievers fill out the cohort.

Id. at 45–46 (citing Caroline M. Hoxby and Christopher Avery, THE MISSING 'ONE-OFFS': THE HIDDEN SUPPLY OF HIGH-ACHIEVING, LOW-INCOME STUDENTS (2012)).

50. *Id.* at 46.
51. *Id.* at 47.
52. *Id.* at 49–56.
53. *Id.* at 50.
54. *Id. See also id.* at 51 ("About 30,000 blacks immigrate from the Caribbean annually, and this region contributes the largest share of black immigrants at selective colleges (43 percent), followed by Africa (29 percent) and Latin America (7 percent)." (footnote omitted)).

who are limited by the places they have been relegated to."[55]

Third, financial aid policies increasingly focus not on need, but on merit—a practice that disadvantages the poor.[56] "Research shows a direct trade-off between awarding merit scholarships and enrolling lower-income students."[57] Indeed, "working-class whites are as alien as the children of the ghetto on selective college campuses and anti-intellectualism and denigration of 'liberal elites' has become a common cultural sensibility among blue-collar whites or those who would lead them."[58]

In Chapter 4, "Place Not Race, and Other Radical Reforms" Cashin turns prescriptive—what is necessary to achieve a significant number of students from disadvantaged areas.[59] Drawing upon the experience of Amherst College, which is enormously successful at enrolling and graduating students from disadvantaged areas, Cashin identifies six factors: (1) a commitment from all levels of the organization; (2) money; (3) bringing recruited students to the campus at the expense of the institution; (4) partnering with an opportunity program for low income student; (5) a no-loan policy for financial assistance; and (6) lowering academic standards by twenty SAT points.[60] Amherst also insists that low-income applicants have "[s]traight A's…."[61]

Of course, institutional support (factors 1 and 4) and financial commitment (factors 2,3, and 5) are choices that have no real impact on academic reputation, but lowering test scores (factor 6) potentially has ramifications for academic reputation. Yet, as Cashin notes, "[i]n college admissions, high school grade point average is a better predictor than standardized test scores, not only of freshman grades in college but also of four-year college outcomes."[62] She insists, "all institutions and all of American society should resist the idea that differences in test scores above

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55. *Id*. at 55.
56. *Id.* at 56–61.
57. *Id*. at 58. As Cashin explains:

> One study found that as the share of institutionally funded National Merit Scholars increases in a school's freshman class, the share of Pell Grant recipients in its student body declines. Another found that the introduction of a merit aid program led to a reduction in both black students and low-income students, particularly at top-tier schools. Hill and Winston examined trends at fourteen very elite schools between 2001 and 2009 and found that most of the growth in financial aid given out by these colleges was allocated to the wealthiest of eligible students.

Id. (footnotes omitted).
58. *Id*. at 61.
59. *Id*. at 63–87.
60. *Id*. at 65–67.
61. Id. at 69.
62. *Id*. at 73.

a certain threshold suggest something meaningful."[63]

To be sure, many "[p]roponents of race-based affirmative action argue that without it, the numbers of blacks and Latinos at selective schools will plummet."[64] Cashin concedes the point, but notes "[t]he picture is better when the lens is widened" to include less selective schools.[65] Moreover, when "a middle-class black applicant is disadvantaged along some dimension other than place," she advocates, "a holistic approach to admissions would enable consideration of such actual disadvantage."[66]

In Chapter 5, "Reconciliation,"[67] Cashin argues, "based upon insights from social psychology, for much more care and intention in building alliances that transcend boundaries of racial identity."[68] She focuses on "two parables" from "red" States.[69] The first is the Texas Top Ten Percent Plan, a bipartisan measure guaranteeing admission to the top students at each high school, regardless of the quality of the school or the strength of the individuals test score.[70] This legislation, which passed after the U.S. Court of Appeals for the Fifth Circuit prohibited the consideration of race in college and university admissions,[71] "increased minority enrollments and that of rural white students at the flagship public universities in the state."[72] "The Ten Percent Plan ameliorates the effects of separate and unequal K-12 education by admitting high achievers from all places from which they apply. The law ended the dominance of a small number of wealthy high schools in UT admissions."[73] The second parable is Mississippi's rejection of anti-immigrant legislation.[74] A multi-racial coalition of African-

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63. Id. at 74. Cashin elaborates:

> Hopefully, we will soon reach a tipping point where institutions and the people who love them throw off the oppressions of rankings and throw a hammer to the whole admissions process and start breaking things—as did Bard College when it offered applicants the option of submitting four 2,500-word essays and no grades or test scores.

Id. at 76.

64. Id. at 77.

65. *Id*. "A recent study of the impact of affirmative action bans in four states (California, Washington, Texas, and Florida) found that total enrollment of unrepresented minorities did not change at four-year universities. The decline occurred at selective schools, with black and Latino enrollment falling 4.3 percent overall at those schools." *Id*. (footnote omitted)

66. *Id*. at 79.

67. *Id*. at 89–108.

68. *Id*. at 98.

69. *Id*. at 89.

70. *Id*. at 89–92.

71. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

72. CASHIN, *supra* note 13, at 90 (citing Nicholas WEBSTER, ANALYSIS OF THE TEXAS TEN PERCENT PLAN (2007)).

73. *Id*.

74. *Id*. at 92–95.

Americans, immigrants, and unions successfully lobbied against the legislation. Cashin ends the chapter with a brief discussion of how "[w]ith effort, strange bedfellows can unite against unfair structural barriers even if those systems distribute burdens unevenly."[75] As she observes, "[w]hite rural, white struggling suburban, black inner city, black middle class, Latino barrio, Latino middle class, Native reservation, urban Indian, poor Asian —all of these people are hurt by geographic concentrations of wealth and resources to different degrees and in different ways."[76]

Overall, Cashin's book is provocative and well researched, but it does have some flaws. Although the book is relatively short (132 pages of text including the introduction), it is often repetitive and, at times, tedious. The introduction, Chapters 2–3, a shorter version of Chapter 4, and the conclusion would make an excellent law review article, which might be more influential than a stand-alone book. One gets the impression that Chapter 5 and the Epilogue "Letter to My Sons"[77] were "make weight" mechanisms for the publisher as these pages add little or nothing to the overall argument. Nevertheless, Cashin's vision of new opportunity raises significant constitutional questions and important public policy implications. The next Parts of this Review explore the constitutional questions and the public policy implications.

II. CONSTITUTIONAL QUESTIONS RAISED BY CASHIN'S VISION

For institutions of higher education that choose to pursue affirmative action in admissions, Cashin's vision raises two significant constitutional questions.[78] First and most obviously, would college and university administrators violate the Constitution by substituting place for race?

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75. *Id.* at 104.

76. *Id.*

77. *Id.* at 113–20.

78. Although private institutions are not subject to the restrictions of the Constitution, *see In re Civil Rights Cases*, 109 U.S. 3 (1883), private institutions that receive federal funds must adhere to constitutional standards. To explain, all private institutions that receive federal funds are subject to Title VI, 42 U.S.C. § 2000d, which prohibits racial discrimination. The Supreme Court explicitly held that "that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by a [private] institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 275 n.23 (2003). *See also Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (suggesting that because there is no equal protection violation, there is no Title VI violation). Moreover, the non-discrimination obligation of Title VI applies to "all of the operations" of "a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance." 20 U.S.C. § 2000d-4a. An institution subject to Title VI may not discriminate because of race or gender in financial aid programs "directly or through contractual or other arrangementsFalse" 34 C.F.R. §100.3(b).

Second and more profoundly, if an emphasis on place allows an institution to achieve the educational benefits of diversity, must the institution substitute place for race?

A. Substituting Place for Race Is Constitutional

In Cashin's vision, students would receive a preference in the admissions process because of place, not race. What matters is whether the student is from an area of high poverty where there are structural barriers to equality and social mobility.

The constitutional analysis of Cashin's paradigm begins with the propositions that the Equal Protection Clause[79] is "essentially a direction that all persons similarly situated . . . be treated alike,"[80] and that the Constitution protects "*persons*, not *groups*."[81] Indeed, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[82] If a statute or regulation treats everyone equally, there is no equal protection violation. [83]

Yet, the Equal Protection Clause does not prohibit all governmental classifications.[84] "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."[85] The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[86] This general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize "suspect" or "quasi-suspect" classifications.[87]

In giving a preference to those who live in poverty and encounter structural barriers to educational and socio-economic success, Cashin's vision does not tread upon fundamental rights or utilize a classification—such as race or sex—warranting heightened scrutiny. Classifications based

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79. U.S. CONST. amend. XIV, § 1

80. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

81. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (emphasis in original). *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986).

82. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

83. Romer v. Evans, 517 U.S. 620, 623 (1996).

84. Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

85. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72 (1979).

86. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

87. *Cleburne*, 473 U.S. at 440−41; Graham v. Richardson, 403 U.S. 365 (1971); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

on an individual's wealth or the characteristics of the surrounding community are subject to rational basis review.[88] Because Cashin's place preference is rationally related to the legitimate state interest in helping those who are disadvantaged, it is constitutional.

To be sure, Cashin's emphasis on place will disproportionately help persons of color, but it will also assist a substantial number of poor whites. "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification."[89] Absent an explicit racial classification, Cashin's paradigm is constitutionally benign.

B. If an Emphasis on Place Achieves the Educational Benefits of Diversity, then the Constitution Prohibits the Use of Race

If an emphasis on place is constitutionally benign, then an emphasis on race is constitutionally radioactive. "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[90] Indeed, because racial distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"[91] and are "contrary to our traditions and hence constitutionally suspect,"[92] "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[93] Consequently, the Constitution imposes special rules for any racial classification.[94]

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88. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24−25 (1973).

89. *Feeney*, 442 U.S. at 272.

90. Rice v. Cayetano, 528 U.S. 495, 517 (2000).

91. Shaw v. Reno, 509 U.S. 630, 643 (1993) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

92. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

93. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *See also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.") and Loving v. Virginia, 388 U.S. 1, 11 (1967) ("the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'").

94. Recognizing that "racial characteristics so seldom provide a relevant basis for disparate treatment,'" City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989), racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests." Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citations omitted). See also *Croson*, 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ., announcing the judgment of the Court). "'Absent searching judicial inquiry into the justification for such race-based measures,' we have no way to determine what 'classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or

First, the presumptions of constitutionality and burden of proof are flipped. Instead of presuming that governmental action is constitutional[95] and requiring the challenger to demonstrate otherwise,[96] "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'"[97] In the context of racial preferences in higher education, "[s]trict scrutiny requires the university to demonstrate with clarity that it's 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.'"[98] "It remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'"[99] Furthermore, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.' Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice."[100]

Second, government's use of race is limited to extraordinary circumstances—remedying the present day effects of identified past intentional discrimination by a particular governmental unit or obtaining the educational benefits of a diverse student body in higher education.[101] Just as significantly, the Court has rejected, as a matter of constitutional law, a number of other justifications offered by state and local governments for race-conscious measures: remedying societal discrimination;

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simple racial politics.'" *Grutter*, 539 U.S. at 326.

Moreover, the desire of the government to *help* racial minorities does not change the analysis. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) ("[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable . . . . While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change."). Indeed, the Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." Johnson v. California, 543 U.S. 499, 505 (2005).

95. Lyng v. Automobile Workers, 485 U.S. 360, 370 (1988).

96. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 314−15 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

97. *Johnson*, 543 U.S. at 505 (quoting *Adarand*, 515 U.S. at 227).

98. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2418 (2013) (quoting *Bakke*, 438 U.S. at 305).

99. *Id*. at 2420 (quoting *Grutter*, 539 U.S. at 337).

100. *Id.* at 2421 (quoting *Croson Co.*, 488 U.S. at 500).

101. *See, e.g.*, *Grutter*, 539 U.S. at 328−30; *Croson Co.*, 488 U.S. at 504−05.

maintaining racial balance; and providing faculty role models for students.[102] The Court also disapproved the rationale of increasing the number of physicians practicing in under-served areas where the institution did not prove that race-conscious admissions would "promote better health-care delivery to deprived citizens."[103]

Third, consideration of race must be a last resort.[104] In the context of higher education, the college or university must prove there are "no workable race-neutral alternatives [that] would produce the educational benefits of diversity."[105] If there is a workable race neutral alternative, "then the university may not consider race."[106]

Cashin's new vision is particularly relevant to the requirement that race be used only as a last resort.[107] Because minorities will disproportionately benefit from any emphasis on place, Cashin's paradigm may well result in many institutions achieving the critical mass of minorities necessary to

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102. *See Grutter*, 539 U.S. at 323−24; Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality opinion); *Bakke*, 438 U.S. at 307−10.

103. *Bakke*, 438 U.S. at 310−11. *See also Grutter*, 539 U.S. at 324.

104. Courts must inquire "into whether a university could achieve sufficient diversity without using racial classifications." Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420 (2013). As Heriot explained:

> "The bottom line, however, is that if capturing the educational benefits of diversity is the goal, the academic judgments that must be made in fashioning an actual policy are numerous and never-ending. Those judgments cannot be simple-minded sentimental ones and they definitely cannot be political in nature. Reason and principle must prevail.
>
> If *Fisher* does nothing else, it should force colleges and universities to confront the research on mismatch in a detached and scientific manner. That means using ideologically diverse teams of qualified, independent investigators— persons whose job and prestige are not dependent on maintaining the status quo. It means adequately funding and supporting the investigation with access to data. It means following standard scientific procedures by making the data available to qualified researchers who wish to critique the work."

Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts To Invoke Reason and Principle*, 2012-13 CATO S. CT. REV 1585, 2003−10 (2013) (footnotes omitted).

105. *Fisher*, 133 S.Ct. at 2420.

106. *Id.*

107. As Cashin observes:

> When an affirmative action plan is challenged in court, the court must be satisfied that there are "no workable race-neutral alternatives" to achieve the educational benefits of diversity. In theory, a race-based affirmative action plan can survive strict scrutiny. But the Court imposed an exacting standard for narrow tailoring that will be difficult to meet. With each passing year, as demographic change and experimentation enhance possibilities for achieving diversity without using race, the challenge of surviving lawsuits filed by disgruntled applicants will grow more onerous.

Cashin, *supra* note 13, at 5.

obtain the educational benefits of diversity. If so, then the institution *must* cease using race and start using the race neutral alternative of place.[108] In other words, an emphasis on place may well lead to an end of the emphasis on race.[109]

III. PUBLIC POLICY IMPLICATIONS

In addition to the constitutional questions discussed above, Cashin's vision has significant public policy implications. First, if implemented, it would signal an end to institution's pursuit of "optical diversity." Second and perhaps most importantly for the political acceptance of Cashin's proposal, it will benefit poor whites.

A. End to Optical Diversity

As Cashin explains in detail in Chapter 3, institutions are focused on "optical diversity."[110] As long as the class picture contains a significant number of people of color, the college or university can trumpet the triumph of its diversity policy. It does not matter that these students of color come from upper class families or attended elite private schools. It does not matter that their parents are highly educated recent immigrants from Africa, the Caribbean, or South America. The only thing that matters is that their skin tone creates an image of a diverse class. Conversely, a student who grew up in poverty, the student who attended the failing public school, or the child of the high school drop-out who never knew her father, may not change the optics.

This pursuit of optical diversity contradicts the Supreme Court. There is no compelling "interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated

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108. Although college and university administrators may well be alarmed at the end of racial preferences, such a development need not lead to a dramatic decline in minority representation. Indeed, after California banned racial preferences through a state constitutional amendment, the University of California had an increase in both the number of minority applicants and number of minorities actually attending. Richard Sander & Stuart Taylor, Jr., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 2504 (2012) (Kindle Edition).

109. Conversely, there will be some institutions where there are no workable race neutral preferences. This likely will be the case if the minority population is relatively low, if the high schools where minorities attend generally are integrated, and if whites are a significant portion of the poor and/or the first generation applicants. Those universities will be allowed to pursue racial preferences, albeit subject to the significant limitations imposed by the court.

110. Cashin, *supra* note 13, at 41−62.

aggregation of students."[111] Rather, the diversity that qualifies as a compelling governmental interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[112] "A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'"[113] "That would amount to outright racial balancing, which is patently unconstitutional."[114] "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[115]

In Cashin's vision, the focus shifts from a superficial optical diversity to real inclusion. A student of color who has the advantages of class, schooling, or educated parents will not receive a preference. Instead, the preferences will go to students of all races who face and overcome obstacles. As she explains:

> Place disadvantages poor whites differently than it does low-income students of color, who are more likely to grow up in high-poverty neighborhoods. It would be counterproductive to engage in an "Oppression Olympics," comparing the obstacles of growing up poor, rural, and white to the challenges of overcoming concentrated poverty. The truth is that low-income students of all colors— even high-achieving ones, even valedictorians— are being overlooked by selective campuses. . . .[116]

Instead of a campus that "looks like America," Cashin seeks a campus that embodies the American dream of upward mobility through hard work and achievement.

If Cashin's plan is adopted, optical diversity will disappear and the emphasis will be on socio-economic diversity and rewarding those who have overcome structural obstacles. Ironically, this approach, which will encompass applicants from a variety of backgrounds and experiences, is far closer to the Supreme Court's definition of diversity than the present analysis.

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111. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (Powell, J., announcing the judgment of the court).

112. *Id*.

113. Fisher v. Univ. of Tex., 131 S. Ct. 2411, 2419 (2013) (opinion of Powell, J., announcing the judgment of the Court) (quoting *Bakke*, 438 U.S. at 307).

114. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

115. Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007).

116. Cashin, *supra* note 13, at 49.

B. Substantial Benefit to Poor Whites

In contemporary America, "not all white and Asian children are privileged, and not all black and Latino children are poor."[117] Income inequality is growing; [118] the white underclass[119] is increasingly dysfunctional and self-destructive.[120] "Racial disparities in the poverty rate have narrowed significantly since 1970, and economic insecurity now threatens to engulf more than three–quarters of white adults by the time they turn sixty."[121]

Yet, the primary beneficiaries of admissions preferences are middle class minorities.[122] "Race can make institutions complacent and unwilling to

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117. *Id*. at xix.

118. As Sander and Taylor note:

> Since 1979 the share of consumer income in the United States going to the top 5 percent of the income distribution has doubled, and the share going to the top 0.1 percent has more than tripled. Measures of social mobility show that persons who start life in the bottom fifth of the income distribution are less likely now than they were a generation ago to move to the top half.

Sander & Taylor, *supra* note 108, at 4448–4514.

119. As Cashin explains:

> Data about racial disparities mask the experiences of working-class whites. Median wealth of whites is twenty times that of blacks and eighteen times that of Latinos, a gap that doubled as a result of the collapse of the housing market. But working-class whites fall far below any median of white wealth. For many, the very idea of "wealth" being associated with their circumstances is laughable. The most recently reported median annual income for whites over age twenty-five without a college degree is $ 28,644, compared to $ 23,582 for blacks and $ 22,734 for Latinos who also only completed high school. This reflects a greater than 20 percent income disparity, but the white person trying to live on such wages is much closer in in circumstances to working-class blacks and Latinos than they are to whites higher up the income scale. When civil rights advocates discuss racial inequality or when progressive academics speak of "white privilege," what they are really comparing is the experiences of ordinary people of color to that of affluent whites. Working-class whites are rarely disaggregated in these debates. They don't feel privileged, and they are not privileged in the globalized economy.

Cashin, *supra* note 13, at 10 (footnotes omitted).

120. *See* CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA 1960-2010 (2012).

121. Cashin, *supra* note 13, at 11 (footnotes omitted).

122. While racial preferences increase the number of minorities on campus, they do little to increase the number of poor minorities on campus. As Sander & Taylor explain:

> In an authoritative series of national surveys of high school students, more than half of blacks entering elite colleges in 1972 came from families that were in the bottom half of the socioeconomic distribution. By 1982 less than a quarter of blacks entering elite colleges came from the bottom half, and by 1992 the proportion was down to 8 percent. Two–thirds of the 1992 cohort of blacks at elite colleges came from the top quartile of the American socioeconomic distribution—that is, the upper-middle class and

rethink exclusionary practices that are not relevant to mission."[123] "Rather than being 'visibly open to talented and qualified individuals of every race and ethnicity,' selective colleges can much more accurately be described as bastions of privilege, with no more than a tenth of their enrollments coming from the less fortunate half of American society."[124]

Cashin's paradigm opens the selective institutions to those of all races who have risen above abject poverty and humble circumstances. The focus is on the poor who have achieved, not the minority who can change the cosmetic appearance of the classroom. Because minorities are disproportionately poor and confined to failing schools, minorities will certainly benefit; but the poor white will no longer be out of sight. Rather, poor whites will receive substantial benefit.

CONCLUSION

Long before a daughter of Kentucky sang of "a cabin on a hill in Butcher Holler,"[125] a son of Kentucky described our Nation as "conceived in liberty and dedicated to the proposition that all . . . are created equal."[126] Because we are human, America—through our individual and collective acts and omissions—has fallen short of these self-evident truths.[127] Racial minorities—particularly African-Americans—have disproportionately borne the consequences of those sins.

Given our trespasses, there is a strong moral argument in favor of racial preferences,[128] but such a paradigm is constitutionally impossible.[129] By

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> the upper class. There is little reason to think that things have gotten better since then.

Sander & Taylor, *supra* note 108, at 4442−47.

123. Cashin, *supra* note 13, at 78.

124. PETER SCHMIDT, COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION 3 (2007).

125. Lynn, *supra* note 1.

126. Abraham Lincoln, GETTYSBURG ADDRESS (1863), *available at* http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm. Although Lincoln generally is associated with Illinois, he was born in a cabin in Sinking Spring, Kentucky, an unincorporated area of Hardin (now Larue) County. Lincoln spent the first seven years of his life in Kentucky.

127. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

128. *See* RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, & THE LAW (2013) (making a moral argument in favor of racial preferences based on societal discrimination). *But cf.* Russell K. Nieli, WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE (2012) (making a social science argument against racial preferences). For contrasting reviews of both works in these pages, see William E. Thro, *The Future of Racial Preferences: A Review of Russell K. Nieli's Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide & Randall Kennedy's for Discrimination: Race, Affirmative Action, and the Law*, 40 J.C. & U.L. 359 (2014), and Michael K. Olivas, *The Burden of Persuasion: Affirmative Action, Legacies, and Reconstructing History: A Review of Russell K.*

recognizing "[p]eople of all colors are disadvantaged by current, exclusionary practices in higher education because of where they live or where they went to school, or because they are poor,"[130] Cashin shifts the paradigm from race[131] to place. More importantly, Cashin's vision is constitutionally plausible, and, in some instances, constitutionally mandated. "Given the strong public opposition to use of race in college admissions and the risk of legal challenges under the tightened *Fisher* standard, it would make sense to tailor affirmative action to those who are actually disadvantaged by structural barriers, rather than continue with a race-based affirmative action that [benefits] high-income, advantaged blacks . . . ."[132] In other words, establish preferences for a coal miner's daughter.

Nieli's Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide & Randall Kennedy's for Discrimination: Race, Affirmative Action, & The Law, 40 J.C. & U.L. 381 (2014).

129. Remedying societal discrimination is not and never has been a compelling governmental interest. Grutter v. Bollinger, 539 U.S. 306, 323−24 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306−10 (1978). As the Court explained:

> "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

Bakke, 438 U.S. at 310. Similarly, the Court has rejected the notion of increasing the representation of minorities is a compelling governmental interest. *Grutter*, 539 U.S. at 323−24; *Bakke*, 438 U.S. at 306−10. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307.

130. Cashin, *supra* note 13, at 61.

131. "Race can make institutions complacent and unwilling to rethink exclusionary practices that are not relevant to mission." *Id.* at 78.

132. *Id*.