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Constitutional Law - Equal Protection of Law: Strict Scrutiny Applies to All Racially Segregated Citizens, Free and Confined

Michelle Feist

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW: STRICT SCRUTINY APPLIES TO ALL RACIALLY SEGREGATED CITIZENS, FREE AND CONFINED
Johnson v. California, 543 U.S. 499 (2005)

I. FACTS

A male inmate arriving at the California Department of Corrections (CDC), either as a transferee from another state institution or as a new inmate, was housed in a reception center.[1] The inmate could remain in the reception center for up to sixty days depending upon how soon after his arrival he would be transferred to permanent housing.[2] During this time, prison officials evaluated the inmate's physical, mental, and emotional health.[3] The reception center evaluations were a method by which the CDC determined an inmate's ultimate placement.[4]

Inmate housing at the reception center was based upon a number of factors.[5] The factors included, but were not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history, custody designation, and race.[6] Race was a predominant factor in the inmate's placement at the reception center.[7] While at the reception center, the likelihood that an inmate would be assigned a cellmate of another race was "'[p]retty close' to zero percent."[8]

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1. Johnson v. California, 321 F.3d 791, 793 (9th Cir. 2003).

2. Reply Brief at 5, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636), 2004 U.S. S. Ct. Briefs LEXIS 579. Section 62010.8.3 of the *Departmental Operations Manual* states, "each institution shall establish an initial classification committee to review and initiate a suitable program for each inmate within 14 days after arrival at the institution." *Id.* The manual did not indicate that the inmate would be classified and placed within fourteen days, only that an initial review of the inmate would take place within that time. *Id.* The policy expressly permitted the inmates to be segregated in the reception centers for up to sixty days. *Id.*

3. *Johnson*, 321 F.3d at 794.

4. *Johnson*, 543 U.S. at 502.

5. *Johnson*, 321 F.3d at 794.

6. *Id.*

7. *Johnson*, 543 U.S. at 502; *see also* Brief for Petitioner at 3-4, *Johnson*, 543 U.S. 499 (No. 03-636) (indicating that during an inmate's initial assignment at the reception center, the prison officials use a form which includes only the inmate's name/prison number, security/custody level, and ethnicity/race).

8. *Johnson*, 543 U.S. at 502.

The CDC's rationale for segregating prisoners in double-celled reception areas was to prevent racial violence caused by gangs.[9] Five major prison gangs were found in the CDC system: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders.[10] The associate warden and prison officials at the CDC believed that prisoners would engage in racial violence if segregation had not been enacted.[11]

Aside from the double-celled reception areas, the rest of the State's prison facilities were fully integrated.[12] After the initial sixty-day period, the inmates were allowed to select their cellmates.[13] The CDC usually granted an inmate's request for a selected cellmate unless there was a security concern.[14]

Garrison Johnson, an African-American inmate, had been in the custody of the CDC since 1987.[15] During his incarceration, Johnson was housed at a number of California prison facilities.[16] In each of the prison facilities, Johnson was double-celled in the reception center with another African-American inmate.[17] Johnson filed his original complaint pro se on February 24, 1995, in the district court.[18] Johnson alleged that the CDC's reception center housing policy violated his constitutional right to equal protection under the Fourteenth Amendment by assigning his cellmates based on race.[19] Johnson alleged that former CDC Directors James Rowland, from 1987 to 1991, and James Gomez, from 1991 until the time Johnson filed his complaint, enforced the racial segregation policy in reception areas of the CDC.[20]

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9. *Id.*

10. *Id.*

11. *Id.* at 502-03; *Johnson*, 321 F.3d at 794. The double cells were unlike common areas in the prison because they provided areas of privacy for the inmates. *Id.* Prison officials could not see into the double cells without physically approaching them. *Id.* Inmates could cover the windows of the double cells so that vision into the cells was completely obstructed. *Id.*

12. *See Johnson*, 543 U.S. at 503 (indicating that the yard, cells, and dining areas were fully integrated).

13. *Id.*

14. *Id.*

15. *Id.*; *see also* Joint App. at 264a, *Johnson*, 543 U.S. 499 (No. 03-636) (indicating that Johnson was sentenced to the County of Los Angeles prison for twenty-five years to life for one count of murder, and a consecutive eleven years for four counts of residential robbery and one count of assault with a deadly weapon).

16. *See Johnson*, 321 F.3d at 793 (indicating that Johnson had been housed at reception centers in four correctional facilities in California: Chino, Folsom, Calipatria, and Lancaster).

17. *Id.*; Joint App. at 48a, *Johnson*, 543 U.S. 499 (No. 03-636).

18. *Johnson*, 321 F.3d at 795.

19. *Id.*

20. *Johnson*, 543 U.S. at 503.

The district court dismissed Johnson's complaint for failing to state a claim.[21] Johnson appealed to the United States Court of Appeals for the Ninth Circuit, which reversed and remanded, finding that Johnson had stated a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[22] On remand, Johnson was granted leave to amend his complaint once counsel was appointed to him.[23] The district court granted summary judgment on Johnson's fourth amended complaint in favor of the prison directors on grounds that they were qualifiedly immune because their conduct was not unconstitutional.[24]

The Court of Appeals for the Ninth Circuit applied *Turner v. Safley*'s[25] deferential standard of review to the CDC's policy rather than applying strict scrutiny.[26] To prevail, Johnson had to prove that that the prison officials had acted beyond their "broad discretion."[27] The Ninth Circuit held that the CDC's policy survived *Turner*'s deferential standard.[28] Johnson appealed the Ninth Circuit's decision, requesting a rehearing en banc.[29] The Ninth Circuit denied the rehearing.[30]

The United States Supreme Court granted certiorari.[31] The issue before the Court was whether the standard of review for racially segregating inmates should be *Turner*'s deferential standard or strict scrutiny.[32] The Court held that racial classifications in prisons shall be evaluated under strict scrutiny.[33]

II. LEGAL BACKGROUND

The Fourteenth Amendment of the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

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21. *Id.* at 503-04.
22. *Id.* at 504.
23. Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000).
24. *Johnson*, 543 U.S. at 504.
25. 482 U.S. 78 (1987).
26. Johnson v. California, 321 F.3d 791, 798 (9th Cir. 2003).
27. *Id.* at 799; *see* Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (stating that prison officials should be given "broad discretion" in disciplining inmates because of the volatile nature of prisons).
28. *Johnson*, 321 F.3d at 807.
29. Johnson v. California, 336 F.3d 1117, 1117 (9th Cir. 2003).
30. *Id.*
31. Johnson v. California, 540 U.S. 1217, 1217 (2004).
32. Johnson v. California, 543 U.S. 499, 505 (2005).
33. *Id.* at 515.

> due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[34]

The Equal Protection Clause of the Fourteenth Amendment prevents a state from applying a facially neutral law for the purpose of racially discriminating against individuals.[35] Even if a state applies the law equally to different races, the Court may find invidious discrimination.[36] When laws contain racial classifications, states must meet a heavy burden of justification, which the Fourteenth Amendment requires.[37] Consequently, the Court has consistently "repudiated '[d]istinctions between citizens solely because of their ancestry.'"[38]

However, the Court's repugnance of states racially discriminating against their citizens has historically involved free citizens, and not incarcerated citizens.[39] Thus, two competing lines of precedent are relevant in determining what standard of review applies to racial discrimination against an inmate.[40] In the first line of cases, the Supreme Court held that strict scrutiny is the appropriate standard of review when the government racially discriminates against its citizens.[41] However, in the second line of cases, the Supreme Court applied a deferential standard of review when determining whether prison regulations violate an inmate's constitutional rights.[42]

A. DEVELOPMENT OF CONSTITUTIONAL PROTECTION AGAINST RACIAL DISCRIMINATION

The United States Supreme Court originally took the position that the Fourteenth Amendment's Equal Protection Clause was intended only to enforce the legal equality of races.[43] However, the Court also found that the Fourteenth Amendment was not intended to abolish social distinctions

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34. U.S. CONST. amend. XIV, § 1.

35. Johnson v. Governor of Florida, 405 F.3d 1214, 1218 (11th Cir. 2005) (citing Washington v. Davis, 426 U.S. 229, 239-40 (1976)).

36. Loving v. Virginia, 388 U.S. 1, 8 (1967).

37. *Id.* at 9.

38. *Id.* at 11 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

39. *See Hirabayashi*, 320 U.S. at 100 (stating that racial distinctions are odious to free people).

40. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to racial discrimination by any government entity); Turner v. Safley, 482 U.S. 78, 89 (1987) (finding that courts should defer to the judgment of prison administrators in determining what regulations are necessary to prevent security problems).

41. *See Adarand*, 515 U.S. at 227 (stating that the government must have compelling reasons for treating its citizens differently because of their race).

42. *See Turner*, 482 U.S. at 89 (stating that a penal regulation is valid so long as it is reasonably related to penological interests).

43. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

based upon color or to enforce commingling of the races.[44] In *Plessy v. Ferguson*,[45] the Supreme Court faced the challenge of applying the Fourteenth Amendment's Equal Protection Clause to a seemingly white individual.[46] Plessy, who was one-eighth African-American blood and seven-eighths Caucasian blood, had violated Louisiana law by sitting in a railway car that was designated for whites.[47] The Court stated racial separation neither denied Plessy due process of the law nor denied him equal protection of the laws within the meaning of the Fourteenth Amendment.[48] In addition, the Court noted that the United States Constitution could not put races that were considered to be socially unequal on an equal footing.[49] Social equality "must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[50]

But fifty-eight years later, in *Brown v. Board of Education*,[51] the Supreme Court rejected the notion that separate could ever be equal in public schools.[52] The Court determined that the clocks of time could not be turned back to 1868, when the Fourteenth Amendment was adopted, nor even to *Plessy*.[53] Instead, the Court stated that the "separate but equal" doctrine must be applied to public education in light of education's present place in American life.[54] The Court held that the "separate but equal" doctrine was unconstitutional when applied to educational facilities.[55] The

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44. *Id.*
45. 163 U.S. 537 (1896).
46. *Plessy*, 163 U.S. at 541.
47. *Id.*
48. *Id.* at 548.
49. *Id.* at 552.
50. *Id.* at 551.
51. 347 U.S. 483 (1954).
52. *Brown*, 347 U.S. at 495.
53. *Id.* at 492. The Court stated that the "separate but equal" doctrine had to be evaluated in light of present circumstances, because at the time of the Fourteenth Amendment's adoption in 1868, there were inherent differences in the education levels of African American children and white children. *Id.* at 490. In 1868, white children were educated in private schools. *Id.* African American children were not educated; thus, most were illiterate. *Id.* However, the Court noted that some African Americans at the time of *Brown* had been educated, excelling in the sciences and in business. *Id.* The advancement of educational opportunities for African Americans between the time of the Fourteenth Amendment's adoption and the time of *Brown* led the Court to conclude that racial segregation in schools had to be evaluated in light of present conditions. *Id.* at 492.
54. *Id.* at 492-93.
55. *Id.* at 495. The Court found public education to be one of the most important functions of the government because it awakens children to cultural values, offers professional training, and helps them adjust to their environment. *Id.* at 493. The Court stated that segregating children by race creates an inferiority complex in African-American children that affects their ability to learn by limiting their mental and educational development. *Id.* at 494. Due to the significant and irreversible impacts that segregation had on African-American children, the Court stated that

Brown reasoning was extended to schools in the District of Columbia that same year.[56]

The Supreme Court later adopted strict scrutiny as the standard of review for governmental implementations of racial classifications outside of public schools.[57] Since racial segregation in public schools was unconstitutional, the Court said, "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[58] In *Adarand Constructors, Inc. v. Pena*,[59] the Department of Transportation (DOT) awarded a prime contract to a general contractor, which requested bids from subcontractors for the guardrail portion of the contract.[60] Adarand, a construction company specializing in guardrail work, submitted the lowest bid.[61] Instead of hiring Adarand, the general contractor hired a construction company that was "socially and economically disadvantaged."[62] The Small Business Act allowed general contractors to receive additional compensation for hiring subcontractors certified as socially and economically disadvantaged small businesses.[63] But the Court was not persuaded that "benign" racial classifications, which were intended to benefit the minority race, could be distinguished from racial classifications based on illegitimate motives.[64]

The *Adarand* Court stated that all government actions based on race should be evaluated under detailed judicial inquiry to ensure that one's

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"separate educational facilities are inherently unequal," and therefore violate the Fourteenth Amendment. *Id.* at 495.

56. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that racial segregation in public schools was an arbitrary deprivation of African-American students' liberties).

57. *Id.*; *see* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (stating that racial gerrymandering of political districts cannot be judicially regulated under the Equal Protection Clause, but instead must be left to the states and Congress); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (invalidating a state university's undergraduate admissions program under a strict scrutiny analysis, because the applicant was guaranteed a higher chance of acceptance merely on the basis of the applicant's race); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding a state law school's admissions policy under strict scrutiny because the applicant's race was but one of many factors considered in the admissions process); Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (invalidating a city's plan that apportioned public contracting duties on the basis of race, because the plan did not meet strict scrutiny).

58. *Bolling*, 347 U.S. at 500; *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (indicating that claims of racial discrimination by any government entity are evaluated under strict scrutiny).

59. 515 U.S. 200 (1995).

60. *Adarand*, 515 U.S. at 205.

61. *Id.*

62. *See id.* (citing section 8(a) of the Small Business Act, 15 U.S.C. § 637(d)(2)-(3) (1958), which provides in part that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities").

63. *Id.*

64. *Id.* at 226.

equal protection rights have not been infringed.[65] Summarizing its own precedent, the Court set forth three propositions regarding racial classifications: (1) any preference based on race or ethnicity should be evaluated under the most searching examination; (2) the standard of review of a racial classification is not based upon the race of the individual burdened or benefited; and (3) the Equal Protection analysis is the same for a Fourteenth Amendment claim as it is for a Fifth Amendment claim.[66] Taking these three propositions together, the Supreme Court in *Adarand* held that all racial classifications imposed by state, local, or federal governments must be examined under strict scrutiny.[67] The Court stated, "[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[68]

Apart from *Adarand*, the Supreme Court has stated that disadvantageously treating races in the political process "inevitably raises dangers of impermissible motivation."[69] In *Washington v. Seattle School District Number 1*,[70] the Court applied strict scrutiny to a state initiative that banned mandatory busing designed to eliminate racial segregation.[71] The Court stated that governmental laws or policies designed to protect minorities or ameliorate past racial segregation are constitutionally suspect.[72] But the Court also acknowledged that not every attempt to address racial issues creates an impermissible racial classification.[73]

In sum, the Court has taken a strong stance against the government racially discriminating against its citizens.[74] The Court has applied a strict scrutiny standard of review to any governmental racial classification, regardless of whether it benefits or burdens a minority class, to determine

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65. *Id*. at 227; *see also* Shaw v. Reno, 509 U.S. 630, 657 (1993) (stating that the Equal Protection Clause demands strict scrutiny for racial classifications, like racial gerrymandering of political districts for voting purposes, because racial classifications prevent society from reaching a time when race no longer matters).

66. *Adarand*, 515 U.S at 223-24 (citations omitted).

67. *Id*. at 227.

68. *Id*. at 226 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

69. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 n.30 (1982).

70. 458 U.S. 457 (1982).

71. *Washington*, 458 U.S. at 485. The City of Seattle voted for the Seattle Plan, which was designed to balance the minority ratios in racially unbalanced public schools by extensive busing and mandatory reassignments of students. *Id*. at 461. In response to the Seattle Plan, a statewide initiative was passed providing that no school board could require any student to attend a school other than the one that is nearest to the student's residence. *Id*. at 462.

72. *Id*. at 486-87.

73. *Id*. at 485.

74. Loving v. Virginia, 388 U.S. 1, 11 (1967).

whether it infringes on an individual's Fourteenth Amendment rights.[75] But in those cases, the Court was evaluating the legal standard for Fourteenth Amendment protections of a free citizen, not an inmate.[76] Therefore, in order to understand whether an inmate's Fourteenth Amendment protection against racial discrimination differs from that of a free citizen, it is necessary to examine legal precedent that defines the standard of review for determining whether an inmate's constitutional rights have been violated.[77]

B. CONSTITUTIONAL RIGHTS OF PRISONERS

The Supreme Court has identified the unique situation presented by prisoners in determining whether they retain the same constitutional protections as free citizens.[78] As the Court stated in *Pell v. Procunier*,[79] "[B]y confining criminal offenders in a facility where they are isolated from the rest of society . . . they and others will be deterred from committing additional criminal offenses."[80] The Court further stated, "The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen, and that the 'internal problems of state prisons involve issues . . . peculiarly within state authority and expertise.'"[81] Therefore, the Court has consistently given deference to prison administrators in determining what regulations may be imposed on inmates to prevent violence within prison walls.[82] In making the determination that deference should be given to prison administrators, the Supreme Court has evaluated the constitutional rights of inmates under the First, Eighth, and Fourteenth Amendments.[83]

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75. *See* Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (stating that racial classifications must be strictly scrutinized regardless of what race is benefited or burdened); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (stating that all racial groups should be treated consistently).

76. *See Adarand,* 515 U.S. at 205-06 (concerning a statute that offered financial incentives for contractors to hire economically and socially disadvantaged subcontractors).

77. *See* Lee v. Washington, 390 U.S. 333, 333 (1968) (examining whether racially discriminating against inmates violates the Equal Protection Clause of the Fourteenth Amendment).

78. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) (stating that incarceration necessarily involves the loss of many rights and privileges of those detained).

79. 417 U.S. 817 (1974).

80. *Pell*, 417 U.S. at 822.

81. *Id.* at 825-26 (quoting Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)).

82. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (stating that affairs of prison administration are best left to prison staff, not the courts).

83. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (stating that an inmate's Eighth Amendment rights are violated only when an officer exhibits deliberate indifference to the inmate); *Turner*, 482 U.S. at 89 (finding that a prison regulation that infringes on an inmate's constitutional rights is valid so long as it is reasonably related to legitimate penological interests);

1. *Cruel and Unusual Punishment Under the Eighth Amendment*

Courts have a duty to alter the conditions of prisoner confinement where cruel and unusual punishment exists.[84] The Supreme Court has stated that the criteria necessary to establish cruel and unusual punishment vary depending on the circumstances.[85] For example, when there is a prison disturbance, such as a riot, correction officers are forced to balance the need to restore order and discipline against the risk of causing injury to inmates because of the force used.[86] Under such a circumstance, "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[87]

The standard of review for determining whether an inmate's Eighth Amendment rights have been violated is "deliberate indifference."[88] Under Supreme Court precedent, an Eighth Amendment violation occurs when prison officials exhibit deliberate indifference to the inmate's health or safety.[89] For an inmate to succeed in a deliberate indifference claim under the Eighth Amendment, the inmate must show that the prison official acted or failed to act despite knowledge of a substantial risk of serious harm to the inmate.[90] *De minimis* force against an inmate is excluded from the Eighth Amendment's cruel and unusual punishment prohibition, unless the force is "repugnant to the conscience of mankind."[91]

While the Eighth Amendment prohibits the government from displaying deliberate indifference to inmates, it does not mandate that prisons be comfortable environments.[92] The Eighth Amendment imposes a duty on prison officials to provide humane conditions of confinement, such as adequate food, clothing, shelter, and medical care, and to use reasonable means

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Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, J., concurring) (stating that in particularized circumstances prison administrators may racially segregate inmates).

84. Spain v. Procunier, 600 F.2d 189, 194 (9th Cir. 1979).

85. Hudson v. McMillian, 503 U.S. 1, 5-6 (1992).

86. *Id*. at 6.

87. *Id*. (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

88. *Farmer*, 511 U.S. at 834.

89. *Id*. at 843.

90. *Id*. at 842. If the prison officials applied force, the Court must determine "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson*, 503 U.S. at 7 (citing Whitley v. Albers, 475 U.S. 312, 320-21 (1986)); *see also* Hope v. Pelzer, 536 U.S. 730, 745-46 (2002) (holding that qualified immunity was not a valid defense for prison guards who used a restraining bar on an inmate as corporal punishment, due to the Department of Justice's repeated condemning of Alabama's use of the restraining bar).

91. *Hudson*, 503 U.S. at 9-10 (quoting *Whitley*, 475 U.S. at 327).

92. *Farmer*, 511 U.S. at 832.

to guarantee inmates' safety.[93] If prison officials take reasonable measures to respond to a risk, they may be free from liability even if the risk was not averted.[94] In applying the deliberate indifference standard, the Court takes two considerations into account: (1) the alleged deprivation by the official must be objectively "sufficiently serious"; and (2) "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment."[95]

2. *Free Speech Protection Under the First Amendment*

As in the Eighth Amendment context, the Supreme Court has taken a deferential approach when determining whether an inmate's free speech rights have been violated.[96] The Court has applied the *Turner* standard to inmates' First Amendment challenges.[97] Under *Turner*, the Court stated that government regulation of an inmate's speech is valid when it is reasonably related to penological interests.[98]

The Court has stated that an inmate loses those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[99] An inmate's First Amendment associational right to join groups in prison is subject to the reasonable considerations of prison management.[100] The Supreme Court in *Jones v. North Carolina Prisoners' Labor Union, Inc.*[101] evaluated a claim by a prisoner labor union that confiscating union packets violated the First Amendment rights of prisoners.[102] The Court stated that the Constitution

93. *Id.*

94. Jensen v. Clarke, 94 F.3d 1191, 1197 (8th Cir. 1996).

95. *Farmer*, 511 U.S. at 834 (quoting Wilson v. Seiter, 501 U.S. 294, 297-98 (1991)); *see* Robinson v. Prunty, 249 F.3d 862, 866-67 (9th Cir. 2001) (stating that the prohibition of cruel and unusual punishment includes protecting inmates from the risk of violence from other inmates and that prison officials are not immune from liability for an Eighth Amendment violation if no reasonable prison official would have believed that the conduct was lawful); *see also* Conroy v. Dingle, No. 01-1626, 2002 U.S. Dist. LEXIS 20160, at *10-11 (D. Minn. Oct. 11, 2002) (indicating that the presence of gangs and violence in itself does not mean that an Eighth Amendment violation occurred).

96. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348-50 (1987) (stating that courts should defer to the judgment of prison administrators when determining whether prison regulations affecting inmates' religious rights serve valid penological objectives).

97. *Id.* at 350.

98. *Id.* at 353; *see also* Stefanow v. McFadden, 103 F.3d 1466, 1475 (9th Cir. 1996) (finding that the confiscation of a religious book that an inmate used in practicing his religion was reasonably related to the penological objective of preventing inmate violence, because the book was not necessary for the practice of the inmate's religion).

99. Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

100. *Id.* at 132.

101. 433 U.S. 119 (1977).

102. *Jones*, 433 U.S. at 121.

does not require prison management to treat all prison groups the same when differentiation is necessary to ensure safety and prevent violence.[103] Therefore, prison officials may permit some inmate organizational groups, while denying other groups that would interfere with the penological objectives of the institution.[104] Prison officials are granted this discretion because prisons are filled with "individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society," so the rules within prison walls are substantially different than those imposed on society.[105]

Just as it allowed the limitation of organizational groups in prisons, the Supreme Court has also held that officials have the discretion to limit an inmate's attendance of religious services.[106] In *O'Lone v. Estate of Shabazz*,[107] the Court determined that the Free Exercise Clause of the First Amendment does not require sacrificing legitimate penological objectives for inmates to attend religious services, if permitting inmate attendance would result in high-risk situations of violence.[108] The Court indicated that two general principles guide the constitutional right to attend religious services: (1) inmates do not forfeit all constitutional rights simply because of conviction and incarceration in prison; and (2) lawful incarceration necessarily and justifiably results in the withdrawal of many privileges and rights of the inmates.[109] Consequently, the Court gave deference to prison officials to evaluate penal objectives because it is the officials who are "charged with and trained in the running of the particular institution under examination."[110] In addition, the Court affirmed that the proper standard of review for prison regulations that infringe on an inmate's constitutional rights is the "reasonableness" test.[111] *Turner*'s reasonableness standard

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103. *Id.* at 136.

104. *Id.* at 132.

105. *Id.* at 137 (Burger, J., concurring).

106. O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987).

107. 482 U.S. 342 (1987).

108. *O'Lone*, 482 U.S. at 352-53. The inmates in *O'Lone* belonged to the Islamic faith. *Id.* at 344-45. The inmates were assigned work areas, and a prison regulation forbade inmates from leaving their workstation during the day to return to the main building. *Id.* at 346-47. The Islamic weekly service was scheduled in the late afternoon on Fridays. *Id.* at 345. In order to attend the religious services, the inmates would have had to leave work to return to the main building. *Id.* at 346.

109. *Id.* at 348.

110. *Id.* at 349 (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

111. *Id.* The Court paid deference to prison officials regarding an inmate's constitutional rights because running a prison is a "formidable" task, which requires administrators to evaluate difficult and sensitive issues to maintain safety. *Id.* at 353; *see also* Overton v. Bazzetta, 539 U.S. 126, 135-36 (2003) (applying the *Turner* standard to uphold the right of penal officials to reasonably place visitation restrictions on inmates with substance abuse violations).

applies unless the activity for which the inmate is seeking protection is "presumptively dangerous," which requires more rigorous scrutiny.[112]

Similar to the Court's holdings that prison officials may limit an inmate's First Amendment rights to attend religious services and to form organizational meetings, an inmate's right to speak to the press may also be limited.[113] In *Pell v. Procunier*, the Supreme Court determined that inmates do not have a First Amendment right of access to the press to conduct interviews.[114] Acknowledging that the First Amendment guarantees provided to a prisoner are not the same as those provided to a free citizen, prison officials may place restrictions on prisoners, providing that such restrictions are reasonable in time, place, and manner.[115] The Court noted that the central goal of all prison institutions is the safety of the prisoners, and as a legitimate penological objective, safety may be primary to free speech rights.[116]

Unlike other free speech regulations, censorship of mail in prisons involves unique constitutional concerns.[117] In *Procunier v. Martinez*,[118] an inmate challenged the prison's policy of censoring prison mail as a violation of his First Amendment right to free speech.[119] The Supreme Court reasoned that censorship of prison mail is unique because it implicates not only the prisoner's rights to free speech and protection against unjustified governmental interference, but also the rights of those who are not prisoners.[120] The governmental interests at stake in running a prison include preserving order and discipline, maintaining institutional security against escape or unauthorized entry, and rehabilitating prisoners.[121] Due to the unique effect that censorship of mail has on individual rights, the Court stated that the censorship must further one or more substantial governmental interests in security, order, or rehabilitation, and the censorship must be no greater than is necessary.[122]

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112. *O'Lone*, 482 U.S. at 349 n.2. Prior to *Turner*, the Supreme Court applied a reasonableness standard to the issue of prison officials accommodating inmates' religious beliefs. Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972). The Court held in *Cruz* that the penal institution need not provide a place of worship for every religion, but prison officials need only provide reasonable opportunities for all inmates to exercise religious freedom under the First and Fourteenth Amendments. *Id.*

113. Pell v. Procunier, 417 U.S. 817, 828 (1974).

114. *Id.* at 827-28 n.6.

115. *Id.* at 822, 826.

116. *Id.* at 822-23.

117. Procunier v. Martinez, 416 U.S. 396, 409 (1974).

118. 416 U.S. 396 (1974).

119. *Procunier*, 416 U.S. at 398.

120. *Id.* at 409.

121. *Id.* at 412.

122. *Id.* at 413-14.

In sum, the Supreme Court has applied a deferential standard of review when determining whether an inmate's First Amendment rights were violated.[123] The Court has allowed prison officials to impose First Amendment regulations that are reasonable in time, manner, and place.[124] But historically, the Court has not applied such a deferential standard when assessing whether an inmate's Fourteenth Amendment right to equal protection was violated.[125]

3. *Equal Protection Under the Fourteenth Amendment*

The Supreme Court has a long-standing policy against racial discrimination in the administration of justice.[126] In *Rose v. Mitchell*,[127] the Court evaluated the effects of racial discrimination in grand juries.[128] The Court stated that when racial discrimination is present in grand juries, the indictee's right to equal protection is comprised.[129] As a result, the Court will correct the wrong by quashing the indictment.[130] Finding discrimination in judicial matters so abhorrent, the Court stated, "[E]qual protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand . . . its safeguards extend to all—the least deserving as well as the most virtuous."[131]

The Court's aversion for racial discrimination continued in the prison context as well.[132] In *Lee v. Washington*,[133] the Supreme Court considered whether a state statute that mandated racial segregation in prisons and jail cells violated the Fourteenth Amendment.[134] The *Lee* majority found that the statute mandating racial segregation was unconstitutional.[135] However, in a concurring opinion, Justice Black stated that racially segregating

123. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 132 (1977) (stating that an inmate's First Amendment associational rights mist give way to reasonable penal objectives).

124. Pell v. Procunier, 417 U.S. 817, 826 (1974).

125. *See* Lee v. Washington, 390 U.S. 333, 333-34 (1968) (upholding a district court decree to delegate inmate holding cells).

126. Rose v. Mitchell, 443 U.S. 545, 559 (1979).

127. 443 U.S. 545 (1979).

128. *Rose*, 443 U.S. at 565.

129. *Id.* at 555.

130. *Id.* at 556.

131. *Id.* at 557 (quoting Hill v. Texas, 316 U.S. 400, 406 (1942)).

132. Lee v. Washington, 390 U.S. 333, 333-34 (1968).

133. 390 U.S. 333 (1968).

134. *Lee*, 390 U.S. at 333.

135. *Id.* at 334. The district court provided a schedule for the desegregation of Alabama's jails and prisons. *Id.* at 333. The Supreme Court held that the district court's desegregation schedule was permissible, thereby affirming the district court's order. *Id.* at 334.

inmates is not always a violation of inmates' constitutional rights.[136] According to Justice Black, racial tensions may be considered in particularized circumstances to properly maintain order and discipline, so long as the prison authorities are acting in good faith.[137]

Similarly, in *White v. Morris*,[138] a federal district court faced the issue of racial segregation in prisons in light of a Consent Decree made between prison officials and inmates.[139] The district court adhered to the Supreme Court's ruling in *Lee* that generally racial segregation in prisons is unconstitutional.[140] However, the Court found that conditions within the prison had worsened to such an extent that temporary cell assignments on the basis of race were constitutional under *Turner*'s reasonableness test.[141]

4. *Turner v. Safley*

The Supreme Court in *Turner v. Safley* established a standard for evaluating the constitutional rights of inmates.[142] In *Turner*, inmates brought a class action to challenge the constitutionality of a regulation relating to inmate marriages.[143] The challenged regulation allowed an inmate to marry when two conditions were met: (1) the prison superintendent had approved the marriage; and (2) the inmate had compelling reasons for the

136. *Id.* (Black, J., concurring).

137. *Id.*

138. 832 F. Supp. 1129 (S.D. Ohio 1993).

139. *White*, 832 F. Supp. at 1132. The prison riot that erupted was described as one of the worst in the history of the United States. *Id.* at 1130. Nine prisoners and one prison official were murdered, and many other prisoners were injured as a result of the riot. *Id.* The prisoners themselves indicated that one of the reasons for the intense riot was integrated celling. *Id.* To end the riot, the inmates negotiated with the prison officials to conditions in a Consent Decree. *Id.* Security information and cell assignment records were destroyed, so the warden made cell assignments on the basis of race to alleviate the racial tension and to preserve security within the prison. *Id.* at 1131. The inmates brought a lawsuit on grounds that cell assignments on the basis of race violated the Consent Decree. *Id.* The Consent Decree provided that cell assignments on the basis of race could only be made on a written finding by the approval of the warden that an inmate "harbors such racial hostility or animosity that he cannot be placed in an integrated cell without a risk of violence." *Id.*

140. *Id.* at 1132.

141. *Id.* at 1137.

142. Turner v. Safley, 482 U.S. 78, 89 (1987); *see* Shaw v. Murphy, 532 U.S. 223, 230 (2001) (applying *Turner*'s four-part test to the issue of whether inmates had a First Amendment right to provide legal assistance to other inmates); Lewis v. Casey, 518 U.S. 343, 361-62 (1996) (applying *Turner*'s deferential standard to determine whether the prisoners' access to law libraries was inadequate); Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (indicating that the constitutionality of regulations affecting the sending of a publication to an inmate must be evaluated under *Turner*); Walker v. Gomez, 370 F.3d 969, 977 (9th Cir. 2004) (applying *Turner* to the issue of racial segregation of prison jobs upon prison lockdowns); Fraise v. Terhune, 283 F.3d 506, 521 (3d Cir. 2002) (applying *Turner* to the issue of whether segregating and separating inmates belonging to religious associational groups was constitutional).

143. *Turner,* 482 U.S. at 81.

marriage.[144] To determine the standard of review for the regulation, the Court evaluated four prior decisions involving inmate rights.[145] The Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[146]

The Court combined factors from *Pell v. Procunier*, *Bell v. Wolfish*,[147] *Block v. Rutherford*,[148] and *Jones v. North Carolina Prisoners' Labor Union, Inc.* to establish *Turner*'s four-part test.[149] The first factor of the test requires that there be a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[150] The correlation between the prison regulation and the goal cannot be so remote that the correlation is rendered arbitrary or irrational.[151] In addition, the government's purpose must be legitimate and neutral.[152] The second factor of the *Turner* test is whether inmates can exercise their asserted rights through alternative means.[153] The third factor is the impact that the inmate's asserted constitutional right would have on guards, other inmates, and the allocation of resources.[154] In other words, courts must examine what ramifications would result in the prison if prison officials were forced to recognize the asserted right of the inmate.[155] The *Turner* Court acknowledged that when the asserted right would have a "ripple effect" on other inmates and prison staff, then great deference ought to be given to prison officials.[156] The fourth factor of the *Turner* test is whether there is an absence of immediate alternatives.[157] The Court stressed that

144. *Id.* at 82.

145. *Id.* at 86-87 (evaluating the constitutionality of prisoner rights based on Block v. Rutherford, 468 U.S. 576, 577 (1984); Bell v. Wolfish, 441 U.S. 520, 523 (1979); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 119 (1977); and Pell v. Procunier, 417 U.S. 817, 817 (1974)). The Court did not apply heightened scrutiny in any of these cases. *Id.* at 87. In each of these cases, the Court held that the prison regulation must be reasonably related to legitimate penological objectives. *Id.*

146. *Id.* at 89.

147. 441 U.S. 520 (1979).

148. 468 U.S. 576 (1984).

149. *Turner*, 482 U.S. at 89.

150. *Id.* (quoting *Block*, 468 U.S. at 586).

151. *Id.* at 89-90.

152. *Id.* at 90.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

where there is an absence of appropriate alternatives, the prison regulation is reasonable.[158]

The *Turner* Court applied the four factors to determine whether correctional officials could ban the marriage of an inmate when supervisory approval had not been granted.[159] The Court stated that an inmate's right to marry is not absolute, but rather is subject to restrictions that are consistent with legitimate penological objectives.[160] On the other hand, the Court noted the significance of marriage as an expression of religious faith, emotional support, and public commitment for the inmate.[161] The Court determined that these personal and religious effects of marriage did not impinge on the legitimate goals of the penal institution.[162]

Applying the four-part test to the marriage regulation, the Court found the regulation facially invalid.[163] First, there were no legitimate penological concerns regarding the regulation's restriction on inmate marriage that would require the approval of a supervisor.[164] Instead, the restriction represented an exaggerated response by prison officials.[165] Second, there were ready alternatives that would impose a "*de minimis* burden on the pursuit of security objectives."[166] Third, the corrections officers' assertion that inmate marriages might lead to "love triangles" was unfounded because these feelings were likely to form with or without marriage.[167] The right to marry would not create a "ripple effect" because an inmate's choice to marry is private.[168] Fourth, the regulation was not reasonably related to the legitimate goal of rehabilitating the inmate.[169] Consequently, by applying the four-part test, the Court affirmatively established that a reasonableness standard of review is to be used when evaluating regulations restricting the constitutional rights of inmates.[170]

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158. *Id.*
159. *Id.* at 97-98.
160. *Id.* at 95.
161. *Id.* at 95-96.
162. *Id.* at 96.
163. *Id.* at 99-100.
164. *Id.* at 97. The Court noted that the regulation was not reasonably related to the prison administration's concerns that inmate marriages would result in "love triangles" and would hinder the inmates' rehabilitation. *Id.*
165. *Id.* at 97-98. The Court stated that the prison could implement reasonable restrictions on the inmate marriages that pose security concerns. *Id.*
166. *Id.* at 98 (italics added).
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 89.

C. SUMMARY OF LEGAL BACKGROUND

The Supreme Court has historically taken a strong stance against the government's use of racial discrimination.[171] The Court has consistently upheld a strict scrutiny standard because of the pernicious effect that racial discrimination has on its citizens.[172] Furthermore, the Court stated in *Adarand* that racial discrimination by any government agency induces the strict scrutiny standard of review.[173] However, the Court took this ardent approach to the racial discrimination of free citizens, with no mention as to whether it also applied to inmates.[174]

When the Supreme Court has been faced with determining which standard of review to apply to alleged constitutional violations of inmates' rights, the Court has generally deferred to the judgment of prison administrators.[175] In light of the dangerous and complex nature of prisons, the Court has maintained that prison officials are best equipped to determine how to run the institutions.[176] Therefore, the Court has granted deference to prison administrators, applying either *Turner*'s reasonableness standard or a more deferential standard to Eighth Amendment claims when considering the constitutional rights of inmates.[177] But the *Turner* Court did not state whether the reasonableness standard of review applies to all constitutional challenges by an inmate or to only those challenges where an inmate's rights are inconsistent with penal objectives.[178] Therefore, the Court had to resolve this issue in *Johnson v. California*[179] by determining whether *Turner*'s reasonableness standard or *Adarand*'s strict scrutiny standard applied to Fourteenth Amendment claims of racial discrimination against inmates.

III. ANALYSIS

In *Johnson v. California*, Justice O'Connor wrote the opinion of the Court, in which Justice Kennedy, Justice Souter, Justice Ginsburg, and

171. Hirabayashi v. United States, 320 U.S. 81, 111 (1943) (Murphy, J., concurring).

172. Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

173. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

174. *See Hirabayashi*, 320 U.S. at 100 (stating that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality").

175. *See* Turner v. Safley 482 U.S. 78, 84-89 (1987) (examining the Court's role in deferring to prison administrators when determining whether the constitutional rights of inmates have been violated).

176. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-50 (1987).

177. Overton v. Bazzetta, 539 U.S. 126, 136-37 (2003).

178. *See Turner*, 482 U.S. at 89-90.

179. 543 U.S. 499 (2005).

Justice Breyer joined.[180] The majority held that strict scrutiny is the proper standard of review for an equal protection challenge to the policy of racially segregating prisoners in double-celled reception centers.[181] Justice Ginsburg filed a separate concurrence, in which Justice Souter and Justice Breyer joined.[182] Justice Stevens dissented.[183] Justice Thomas filed a separate dissent, in which Justice Scalia joined.[184] Chief Justice Rehnquist did not take part in the decision.[185]

A. THE MAJORITY OPINION

The Court was faced with the issue of determining what standard of review to apply to the CDC's policy.[186] The CDC's policy allowed California prisons to racially segregate all male inmates for the first sixty days upon their arrival.[187] The Court found that *Turner*'s deferential standard was inapplicable to racial classifications in prisons.[188]

1. *Turner Is Inapplicable to Racial Segregation*

The Court noted that it has never applied *Turner*'s deferential standard to issues of racial segregation.[189] Rather, the Court has applied "*Turner*'s reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration.'"[190] The Court observed that it has consistently applied the *Turner* reasonableness standard to inmates' First Amendment challenges.[191]

While the *Turner* standard is applicable in First Amendment contexts, the same is not true for the Fourteenth Amendment.[192] The Court noted a distinct difference between the preservation of an inmate's Fourteenth Amendment rights and First Amendment rights.[193] An inmate's First

180. *Johnson*, 543 U.S. at 501.
181. *Id.* at 515.
182. *Id.* at 516 (Ginsburg, J., concurring).
183. *Id.* at 517 (Stevens, J., dissenting).
184. *Id.* at 524 (Thomas, J., dissenting).
185. *Id.* at 501 (majority opinion).
186. *Id.* at 505.
187. *Id.* at 502.
188. *Id.* at 509.
189. *Id.* at 510.
190. *Id.* (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)). The Court noted that the *Turner* reasonableness standard does not disturb the ruling in *Lee*. *Id.* (citing Lee v. Washington, 390 U.S. 333, 334 (1968)).
191. *Id.* (citing to *Turner*'s application in Overton v. Bazzetta, 539 U.S. 126, 131-32 (2003); Shaw v. Murphy, 532 U.S. 223, 230 (2001); Lewis v. Casey, 518 U.S. 343, 361 (1996); Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989); Washington v. Harper, 494 U.S. 210, 225 (1990); and O'Lone v. Estate of Shabazz, 482 U.S. 342, 348-49 (1987)).
192. *Id.*
193. *Id.* at 510-11.

Amendment right to free speech can be compromised to further penal objectives, but the same cannot be said for an inmate's Fourteenth Amendment right to be free from racial discrimination.[194] "[C]ompliance with the *Fourteenth Amendment*'s ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system."[195] Historically, the Court has recognized the pernicious nature of racial discrimination, particularly in administering justice.[196] "When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers."[197] Since the government's power is at its apex in the prison context, a heightened standard of review of racial classifications is needed to prevent invidious discrimination.[198]

Apart from Fourteenth Amendment challenges, the Court has also not applied *Turner* to Eighth Amendment "cruel and unusual punishment" challenges.[199] Instead, the Court has applied a deliberate indifference standard to determine whether an inmate has been subjected to cruel and unusual punishment within the penal institution.[200] The Court found a similarity between Eighth Amendment and Fourteenth Amendment challenges, such that *Turner* should not be applied to either challenge.[201]

2. *The Application of Strict Scrutiny Would Not Handcuff Prison Administrators from Maintaining Security*

The CDC argued that deference to prison officials necessarily required the application of a deferential standard to its segregation policy.[202] But the Court has not deferred to officials' judgment on race in other areas, such as peremptory challenges or redistricting electoral districts.[203] The Court reasoned that it applied strict scrutiny to the racial segregation of inmates in

194. *Id.*

195. *Id.*

196. *Id.* at 511 (citing Batson v. Kentucky, 476 U.S. 79, 99 (1986); Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 738 (2002); Hudson v. McMillian, 503 U.S. 1, 8 (1992); Spain v. Procunier, 600 F.2d 189, 193-94 (9th Cir. 1979)).

201. *Id.* The Court observed that both Eighth and Fourteenth Amendment violations affect the integrity of the criminal justice system. *Id.*

202. *Id.* at 512. The CDC argued that deference to prison officials was necessary in judicial matters because of the difficult task of operating prisons. *Id.*

203. *Id.* (citing Shaw v. Reno, 509 U.S. 630, 658 (1993); Batson v. Kentucky, 476 U.S. 79, 89-96 (1986)).

Lee instead of applying a relaxed judicial standard.[204] The Court found it necessary to adhere to *Lee* as precedent, and therefore it reaffirmed *Lee*'s ruling.[205] "The 'necessities of prison security and discipline,' are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities."[206]

The Court maintained that strict scrutiny would not handcuff officials from preventing racial violence in prisons.[207] Strict scrutiny does not prevent prison officials from addressing issues of prison security.[208] Instead, strict scrutiny requires that the policies be narrowly tailored to serve a compelling government interest.[209]

3. *Disputing Justice Thomas's Opinion*

The Court disagreed with Justice Thomas's opinion that race-based policies should be evaluated under a deferential standard, subject to the judgment of prison officials.[210] The Court noted that the *Turner* standard is too lenient to prevent invidious instances of racial discrimination.[211] Furthermore, the Court postulated that the *Turner* standard would allow prison officials to discriminate on the basis of race when race neutral alternatives were available.[212] Justice Thomas's application of the *Turner* standard would allow prison officials to segregate visiting areas on the basis that social unrest could be caused by racial mixing.[213] "Under *Turner*, '[t]he prisoner would have to prove that there would *not* be a riot.'"[214] The Court stated that under Justice Thomas's approach, there would be no limit as to when prison officials may discriminate on the basis of race.[215] Therefore, the Court rejected the *Turner* standard because even "rank discrimination" could be permitted.[216]

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204. *Id.* (citing Lee v. Washington, 390 U.S. 333, 334 (1968)).
205. *Id.*
206. *Id.* (quoting Lee v. Washington, 390 U.S. 333, 334 (1968) (citation omitted)).
207. *Id.* at 514.
208. *Id.*
209. *Id.*
210. *Id.* at 513.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* (quoting Johnson v. California, 336 F.3d 1117, 1120 (9th Cir. 2003) (Ferguson, J., dissenting)).
215. *Id.* at 514.
216. *Id.*

4. *Application of Strict Scrutiny to the CDC Policy*

Ultimately, the Court held that strict scrutiny is the proper standard of review for racial classifications in prisons.[217] The Court reversed the Ninth Circuit's application of *Turner*, and remanded the case for a determination of the constitutionality of the CDC's policy under strict scrutiny.[218] The Court noted that the application of strict scrutiny does not mean that a racial policy is automatically unconstitutional.[219] Rather, the Court stated that because of the dangerous nature of prisons, racial classifications may be constitutional in some contexts.[220] Therefore, in *Johnson*, the Court established the strict scrutiny standard of review for racially classifying inmates in prisons, but it did not make a judgment as to whether the CDC policy violated the Equal Protection Clause of the Fourteenth Amendment.[221] On remand, the CDC will have to prove that its policy of racially segregating inmates is narrowly tailored to meet a significant government interest in order to succeed.[222]

B. JUSTICE GINSBURG'S CONCURRENCE, JOINED BY JUSTICE SOUTER AND JUSTICE BREYER

Justice Ginsburg agreed with the Court's decision to apply strict scrutiny to the CDC regulation.[223] However, she argued that strict scrutiny should not apply to "every official race classification."[224] Justice Ginsburg suggested that racial classifications benefiting a suppressed class should not be held to the strict scrutiny standard.[225]

C. JUSTICE STEVENS'S DISSENT

Justice Stevens disagreed with the Court's refusal to determine whether the CDC's policy violated the Equal Protection Clause of the Fourteenth Amendment.[226] He argued that the CDC's policy of segregating inmates within the first sixty days of arriving at a California penal institution violated the Equal Protection Clause, because the CDC did not provide enough evidence to justify the segregation policy even under a minimal level of

217. *Id.* at 515.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 516 (Ginsburg, J., concurring).
224. *Id.*
225. *Id.*
226. *Id.* at 517 (Stevens, J., dissenting).

scrutiny.[227] He stated that the CDC made no showing that housing inmates of different races together created an unacceptable risk.[228] Justice Stevens argued that the CDC's policy was too broad because it applied to all newly admitted inmates, regardless of the inmates' proclivity to racial violence.[229] In addition, Justice Stevens did not give much weight to the testimony of two CDC employees who testified to the necessary nature of the segregative policy.[230] However, he cited, with approval, the opinions of six former state correctional officials that a blanket policy of even temporary racial segregation runs counter to sound prison management.[231]

Furthermore, Justice Stevens argued that there was only a tenuous relationship between gang violence and the CDC's segregation policy.[232] He stated that the CDC failed to show specific instances of interracial violence among cellmates.[233] Justice Stevens observed that the CDC failed to show that inmates from the general population recruit newly arrived inmates into gangs during the first sixty days.[234] In addition, the CDC failed to prove that racial violence in the common areas was a result of newly admitted inmates.[235] Justice Stevens proffered race neutral alternatives to the CDC policy, such as individually assessing each inmate's risk of violence at the time of assigning him a cell.[236] An inmate's risk of violence could be determined by examining his file, which includes records from county jails or other penal institutions that detail the inmate's racial violence history and gang affiliation.[237]

Since a transferred inmate's file contains information regarding his gang affiliation and history, Justice Stevens found it relevant that a high percentage of inmates living in the reception centers were transferees from another state institution.[238] According to Justice Stevens, the transferees were unlike newly admitted inmates because the transferees' records could easily be obtained and reviewed by prison staff without subjecting the transferee to segregation.[239] He observed that the CDC rarely reviewed the

227. *Id.* at 517-18.
228. *Id.*
229. *Id.* at 518.
230. *Id.* at 518-19.
231. *Id.* at 519.
232. *Id.* at 520.
233. *Id.*
234. *Id.*
235. *Id.* at 520-21.
236. *Id.* at 521.
237. *Id.*
238. *Id.* Justice Stevens observed that eighty-five percent of the inmates housed in reception centers were transferred from another correctional facility. *Id.*
239. *Id.* at 522-23.

transferees' records in assigning inmates to reception cells.[240] Justice Stevens suggested that the CDC policy was unconstitutional regardless of the standard of review because the CDC did not make a good-faith effort to transfer an inmate's file in a timely fashion.[241] Finally, Justice Stevens argued that race is an unreliable predictor of violence because assigning individuals of different races who are members of rival gangs might lead to violence, as would assigning individuals of like races and rival gangs.[242]

D. JUSTICE THOMAS'S DISSENT, JOINED BY JUSTICE SCALIA

Justice Thomas, joined by Justice Scalia, argued that two issues were presented in the case: (1) whether "*all* racial classifications reviewable under the *Equal Protection Clause* must be strictly scrutinized"; and (2) whether *Turner's* deferential standard "applies to *all* circumstances in which the needs of prison administration implicate constitutional rights."[243] Justice Thomas disagreed with the Court's application of strict scrutiny to racially discriminatory policies in prisons.[244] He noted the dangerous nature of California prisons as a "breeding ground for some of the most violent prison gangs in America."[245] Furthermore, he argued that the CDC's policy was established out of a concern for the protection and safety of inmates' lives.[246]

Justice Thomas argued that an examination of the legal issue in *Johnson* required more than simply an evaluation of precedent.[247] In addition to examining legal precedent, he reasoned that the factual background of the CDC policy should be evaluated in light of prison life within the CDC facilities.[248] Justice Thomas looked to the level of violence in prisons, the effects of gangs, the nature of the CDC restriction, and the safety of prison administrators and other inmates in determining which standard of review should apply.

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240. *Id*. at 522. The CDC's explanation for not reviewing the transferees' records prior to assigning inmates to reception cells was that these records frequently did not accompany the inmate. *Id.*

241. *Id*.

242. *Id.* at 523.

243. *Id*. at 524 (Thomas, J., dissenting) (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (emphasis added); Washington v. Harper, 494 U.S. 210, 224 (1990) (emphasis added)).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 525.

248. *Id.*

1. *Overview of the Reception Centers*

Justice Thomas noted that prison officials at the reception centers generally had little background information on a newly arrived inmate.[249] He suggested that the sixty-day reception period was necessary to evaluate an inmate's physical, emotional, and mental health, as well as to review an inmate's criminal history, jail record, and enemy listings to determine the inmate's ultimate housing.[250] Justice Thomas argued that this individual inmate evaluation had "nothing to do with race."[251]

In support of this assertion, Justice Thomas observed that not every inmate was racially segregated during the sixty-day interview process.[252] Three housing options were available for an inmate upon arriving at a CDC facility, depending on the security threat of the inmate.[253] The highest risk inmates, those who either were an immediate security threat or needed protective custody, were housed in single cells.[254] Minimal risk inmates were placed in dormitories on a random basis, and the dorm assignments were not based on race.[255] Justice Thomas argued that assignment to either a single cell or the dormitory had nothing to do with race.[256] However, race was taken into account in the room assignments of double cells because racial violence in double cells was higher than in public areas.[257]

2. *Housing Assignments*

Furthermore, Justice Thomas argued that race was but one of many factors that were considered in the placement of the inmates in reception centers.[258] He reasoned that inmates were separated from inmates of other geographical or national origins to prevent gang violence.[259] In addition, inmates were separated by age, mental health, medical needs, criminal history, and gang affiliation.[260] To fully illustrate his argument, Justice Thomas cited Johnson as an example: Johnson was a member of the Crips,

249. *Id.*
250. *Id.* at 525-26.
251. *Id.* at 526.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 526-27. Justice Thomas argued that racial violence in double cells was so high because prison officials could not see into the cells without going into them, and inmates could cover the windows to prevent staff from looking into the cells. *Id.* at 527.
258. *Id.*
259. *Id.*
260. *Id.*

a black street gang, when he was originally admitted to the CDC in 1987, so he was not housed with members of a different race.[261]

Justice Thomas argued that the CDC did not absolutely bar interracially celling inmates in the reception centers.[262] For example, a Hispanic inmate who was a member of the Crips asked to be assigned a black cellmate, and the CDC granted the inmate's request.[263] But Justice Thomas noted that Johnson never requested a cellmate of a different race.[264]

3. *Justice Thomas's Application of Turner*

Turning to the issue of the proper standard of review, Justice Thomas argued that even prior to *Turner*, the Court had historically given great deference to prison administrators in matters governing inmate rights.[265] But the ruling in "*Turner* made clear that a deferential standard of review would apply across-the-board to inmates' constitutional challenges to prison policies."[266] Following *Turner*'s ruling, the Court has applied the deferential standard to a variety of constitutional cases, regardless of which standard of review would have applied.[267] Further, he quoted the *Turner* Court: "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[268]

According to Justice Thomas, the Court did not consider the reality of prison life in determining the standard of review.[269] Justice Thomas stated that controlling prison gangs is a central concern for California wardens and guards.[270] He noted that prison gangs are difficult to control because the gangs are highly sophisticated and regimented organizations.[271] Gang

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261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 528.
265. *Id.* at 529.
266. *Id.* at 530.
267. *See id.* at 530-31 (citing Washington v. Harper, 494 U.S. 210, 224 (1990)) (applying *Turner*'s reasonableness test to the issue of forcing medication on an inmate with a serious mental illness because trained medical specialists, and not judges, are in the best position to determine whether an inmate should be forcibly medicated).
268. *Id.* at 531 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).
269. *Id.* at 532.
270. *Id.*
271. *Id.* (citing DIV. OF LAW ENFORCEMENT, CAL. DEP'T OF JUSTICE, ORGANIZED CRIME IN CALIFORNIA ANNUAL REPORT TO THE CALIFORNIA LEGISLATURE 15 (2003), *available at* http://caag.state.ca.us/publications/org_crime.pdf; Johnathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years* (1962-1987), 37 AM. U. L. REV. 41, 55-56 (1987)).

activity is especially problematic in California prisons because the State has the largest gang-related activity by inmates, with five major gangs in the CDC.[272]

In light of these facts, Justice Thomas determined that the CDC's policy met the *Turner* standard.[273] First, he argued that the CDC policy was reasonably related to protecting inmates from violence, which is a legitimate penological interest.[274] Notably, Johnson himself admitted that he feared racial violence simply because of the color of his skin.[275] Justice Thomas reasoned that the CDC policy protected inmates from racial violence by other inmates during the crucial time when prison officials were gathering information on an inmate's background.[276] Even Johnson admitted that it would be constitutional for race to be one of the factors in considering cell assignments.[277] Here, Justice Thomas argued that race was but one factor out of many taken into account under the CDC policy.[278]

Second, Justice Thomas noted that every other area of the prison was integrated, so double-celled inmates were segregated only during the brief period of time spent in the reception area.[279] Third, he argued that Johnson failed to prove that alternative housing would not have an adverse effect on inmates and prison staff.[280] Justice Thomas postulated that limited prison staff, closed cells, and the prevalence of violence in cells could make it difficult for prison administration to respond effectively to gang violence.[281] He noted that racial violence would create the "ripple effect" that *Turner* tried to prevent with its standard of deference to prison officials.[282]

Fourth, Justice Thomas stated that Johnson did not prove that easy, ready alternatives existed to the CDC's policy.[283] Justice Thomas conceded that inmates who were transferred from one facility to another had records detailing their classification.[284] However, he argued that integrating these transferees was not necessarily an alternative, because an inmate who had been well-behaved in a prison where few gang members were present might

272. *Id.* at 533.
273. *Id.* at 534.
274. *Id.*
275. *Id.* at 535.
276. *Id.*
277. *Id.*
278. *Id.* at 535-36.
279. *Id.* at 536.
280. *Id.*
281. *Id.*
282. *Id.* at 537.
283. *Id.*
284. *Id.* at 538.

be a different threat when transferred to a facility containing more gang members.[285]

According to Justice Thomas, the Court in *Lee* did not address the level of judicial scrutiny for racial segregation in prisons.[286] The discrepancy he found in applying *Lee* to racial segregation in prisons was that the *Lee* Court affirmed the desegregation of Alabama prisons and jails, but still permitted racially segregated cells "for the necessities of prison security and discipline."[287] Justice Thomas reasoned that even if *Lee* had established a standard of review, it would have also provided an exception for prison security and discipline.[288] He quoted the *Lee* Court for the proposition that "prison authorities have the right, acting in *good faith* and in *particularized circumstances*, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."[289] Justice Thomas argued that CDC's segregation policy would "fall squarely within *Lee*'s exception."[290]

Moreover, Justice Thomas disagreed with the Court's conclusion that general racial classification cases pertain to prisons.[291] He noted that *Turner* does not apply strictly to prisoner rights that are "inconsistent with proper incarceration" because such an application merely begs the question.[292] In order to determine whether prisoners' rights are inconsistent with proper incarceration, Justice Thomas argued that it must be known how a proper prison is run.[293] But he noted that it would be inherently problematic for courts to decide what a proper prison looks like because *Turner* precisely left such judgments to prison administration.[294] Therefore, Justice Thomas argued that the Court's ruling eviscerated *Turner* because the Court, and not prison administration, has determined how best to run the Nation's prisons.[295]

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285. *Id.*

286. *Id.* at 539. Justice Thomas noted that the opinion in *Lee* was a one-paragraph *per curiam* opinion, which affirmed the district court's decision to desegregate the Alabama jail and prison cells. *Id.* He argued that the opinion found "unexceptionable" that total segregation was unconstitutional, but segregation was constitutional when necessary to enforce prison security and discipline. *Id.* Therefore, Justice Thomas argued that *Lee* did not say what standard of review applies to racially segregating inmates. *Id.* at 540.

287. *Id.* at 539.

288. *Id.* at 540.

289. *Id.* (quoting Lee v. Washington, 390 U.S. 333, 334 (1968) (emphasis added)).

290. *Id.*

291. *Id.* at 541.

292. *Id.*

293. *Id.* at 541-42.

294. *Id.* at 542.

295. *Id.*

Furthermore, Justice Thomas attempted to discredit the Court's evidence of increased violence in racially segregated cells.[296] He argued that the sole source of the Court's evidence was one Texas prison study.[297] However, Justice Thomas noted that both Texas and California segregated inmates during the initial transfers of inmates.[298] Therefore, he reasoned that "the study says nothing about the violence likely to result from integrating cells when inmates are thrown together for brief periods during admittance or transfer."[299] According to Justice Thomas, the study showed only that once prison officials have obtained information on an inmate's history and criminal background, integrated housing is preferred.[300] But Justice Thomas argued that California followed this method because the State, upon conducting a background search, allowed inmates to select roommates.[301] Finally, he observed that even states with less severe instances of racial violence found that California's policies were necessary to control the problems of racial violence in prisons.[302]

Noting additional discrepancies with the Court's reasoning, Justice Thomas disputed the Court's interpretation of the standard of review for Eighth Amendment issues.[303] He argued that the Court's reliance on the Eighth Amendment standard of review as an exception to *Turner* was misplaced.[304] According to Justice Thomas, the Court's "deliberate indifference" standard of review for Eighth Amendment cases permits even greater deference to prison administrators than would the application of the *Turner* standard.[305] Therefore, Justice Thomas argued that the majority's reasoning was weakened because the Eighth Amendment exception did not impose a heightened standard to *Turner*.[306]

Turning to the facts at hand, Justice Thomas postulated that it was possible, and even likely, that the CDC policy would meet strict scrutiny.[307]

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296. *Id.* at 542-43.
297. *Id.* at 543 n.11.
298. *Id.* at 543.
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* at 545 (citing Brief of the State of Utah et al. as Amici Curiae Supporting Respondent, *Johnson*, 543 U.S. 499 (No. 03-636)) (indicating that eight states support a *Turner* reasonableness standard regarding inmates' constitutional rights, even when the asserted claim involves a Fourteenth Amendment equal protection challenge, such as racially segregating prison cells).
303. *Id.* at 546.
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 547.

The State of California has a compelling interest to maintain security in its prisons.[308] Justice Thomas stated that it would be a "Pyrrhic victory" if the CDC policy did not survive strict scrutiny.[309]

Overall, Justice Thomas adhered to the reasoning of *Turner* in his opinion.[310] He recognized the Court's long-held stance that prisoners do not retain the same level of constitutional rights that free citizens do.[311] Justice Thomas argued that the racially discriminatory effect of the CDC policy resulted in saving the lives of inmates, wardens, and guards, which outweighed any inmate indignation and stigmatization.[312] Therefore, Justice Thomas adhered to California's position that racially segregating inmates in reception cells was necessary.[313] Justice Thomas ultimately followed the Court's reasoning in *Turner*, concluding that deference should be given to prison administrators because they, not the Court, are best equipped to determine how to preserve safety and discipline in prisons.[314]

IV. IMPACT

It is uncertain whether the Supreme Court's decision in *Johnson* will have an impact outside of its limited facts.[315] Supporters of civil rights have commended the ruling.[316] But others have noted that in the civil rights battle between the State and Johnson, the Court was perceived as shutting out the State and favoring the inmate defendant.[317] Aside from commentators and supporters acknowledging the *Johnson* ruling, federal courts have recognized it as well.[318]

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308. *Id.* at 547-48.

309. *Id.* at 550. Justice Thomas noted that in the seventeen years that Johnson has been in the California prison system, for sixteen of those years, Johnson chose to live with a black cellmate. *Id.*

310. *Id.* at 534.

311. *Id.* at 524.

312. *Id.*

313. *Id.*

314. *Id.* at 542.

315. Erwin Chemerinsky, *A Civil Rights Victory for Prisoners*, TRIAL, May 2005, at 76.

316. *Id.*

317. Paul M. Rashkind, *Prosecution Nearly Shut Out in Third Quarter*, CRIM. JUST., Summer 2005, at 56.

318. *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 19 (1st Cir. 2005) (following *Johnson*'s ruling that strict scrutiny is the proper standard of review when the government racially discriminates against its citizens).

A. ACKNOWLEDGEMENT FROM LOWER COURTS

Federal courts have not only cited to *Johnson*, but the First Circuit has followed its ruling.[319] In *Comfort v. Lynn School Committee*,[320] the First Circuit evaluated a Massachusetts plan to racially diversify its public schools.[321] The plan allowed students to attend the public schools that were in their neighborhood, but if the students wished to transfer schools, automatic admittance was not granted.[322] Race was a primary factor in determining whether a student could transfer schools.[323] In adhering to *Johnson*'s ruling that racial classifications must be evaluated under a strict scrutiny standard of review, the Court found the plan constitutional.[324]

Likewise, the Eighth and Ninth Circuits cited to *Johnson* in cases involving First Amendment and Fourteenth Amendment challenges.[325] The dissent in *Republican Party of Minnesota v. White*[326] referred to *Johnson* to illustrate that the underinclusiveness of a policy would not negate its interest as compelling, but would cast doubt on its genuineness.[327] In *Western Paving Co. v. Washington State Department of Transportation*,[328] the Ninth Circuit cited to *Johnson* to indicate that the state has the burden of proving that its race-based policies are justified.[329]

In addition, federal district courts across the country have cited to *Johnson* in cases involving the constitutional rights of inmates.[330] The

319. *Id.*

320. 418 F.3d 1 (1st Cir. 2005).

321. *Comfort*, 418 F.3d at 5.

322. *Id.* at 6.

323. *Id.*

324. *Id.* at 21.

325. *See* Republican Party of Minn. v. White, 416 F.3d 738, 776 (8th Cir. 2005) (Gibson, J., dissenting) (agreeing with Justice Stevens' dissent in *Johnson* that the failure of the acting party to address the compelling interest, such as the CDC failing to demand pre-sentence reports and prison records of transferred inmates in a timely fashion, casts doubt on whether the acting party is sincere); Means v. Navajo Nation, No. 01-17489, 2005 WL 3370585, at *5 (9th Cir. Dec. 13, 2005) (citing to *Johnson* to distinguish the preferential hiring of Indians at the Bureau of Indian Affairs from racial discrimination); Doe v. Kamehameha Sch., 416 F.3d 1025, 1042 (9th Cir. 2005) (citing to *Johnson* to affirm that racially discriminatory programs, even those which benefit a burdened race, may actually perpetuate racism); W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 990 (9th Cir. 2005) (citing to *Johnson* for the proposition that all racial classifications require strict scrutiny and it is up to the government to show that its policies are justified).

326. 416 F.3d 738 (8th Cir. 2005).

327. *Republican Party of Minn.*, 416 F.3d at 776.

328. 407 F.3d 983 (9th Cir. 2005).

329. *W. States Paving Co.*, 407 F.3d at 990.

330. *See* Farmer v. Dormire, No. 03-4180-CV-C-NKL, 2005 WL 2372146, at *2 (W.D. Mo. Sept. 27, 2005) (citing to *Johnson* for the proposition that an inmate retains only those First Amendment rights that are not inconsistent with legitimate penological objectives); Elmaghraby v. Ashcroft, No. 04-CV-1409-JG-SMG, 2005 WL 2375202, at *28 (E.D.N.Y. Sept. 27, 2005) (citing

court in *Parker v. Kramer*[331] adhered to *Johnson*'s ruling and applied strict scrutiny to a warden's practice of ethnically separating inmates during riots.[332] The courts in *Worthen v. Hull*[333] and *Scott v. Quigley*[334] did not apply *Turner*'s reasonably related standard of review to Eighth Amendment rights because of the Supreme Court's opinion in *Johnson*.[335] In *Elmaghraby v. Ashcroft*,[336] the court cited to *Johnson* in evaluating whether racial discrimination occurred against inmates who were charged with the involvement in the September 11, 2001, attacks on the United States.[337]

B. NORTH DAKOTA

Unlike other courts that have already recognized *Johnson*'s ruling, the impact of the ruling in North Dakota courts and prisons is uncertain.[338] North Dakota has recognized three major considerations in weighing the constitutional rights of the inmate: (1) the inmate does not forfeit all constitutional rights by reason of incarceration; (2) the constitutional rights that the inmate retains while incarcerated are restricted; and (3) it is essential in penal institutions that institutional security and the preservation of order and discipline are maintained.[339]

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to *Johnson* for the proposition that all racial classifications by a government require evaluation under strict scrutiny); Parker v. Kramer, No. CVF-025117AWIDLBP, 2005 WL 2089802, at *5 (E.D. Cal. Aug. 29, 2005) (indicating that the government must meet the burden of strict scrutiny in a racial discrimination claim by an inmate); Worthen v. Hull, No. CIV-04-976-W, 2005 WL 1950250, at *4 (W.D. Okla. July 29, 2005) (citing to *Johnson* to indicate that the *Turner* reasonableness standard does not apply to all constitutional claims by a prisoner); Plata v. Schwarzenegger, No. C01-1351TEH, 2005 U.S Dist. LEXIS 8878, at *16 (N.D. Cal. May 10, 2005) (citing to *Johnson* for the proposition that the *Turner* reasonableness standard does not apply to Eighth Amendment claims by a prisoner); Parker v. Kramer, No. CVF025117AWIDLBP, 2005 WL 1343853, at *7 (E.D. Cal. Apr. 28, 2005) (stating that the government must meet the strict scrutiny burden such that its policy is narrowly tailored to meet a compelling government interest).

331. No. CVF025117AWIDLBP, 2005 WL 1343853 (E.D. Cal. Apr. 28, 2005).

332. *Parker*, 2005 WL 1343853, at *7.

333. No. CIV-04-976-W, 2005 WL 1950250 (W.D. Okla. July 29, 2005).

334. No. 3:03-CV-768, 2005 WL 1377839 (M.D. Pa. June 7, 2005).

335. *Worthen*, 2005 WL 1950250, at *4; *Scott*, 2005 WL 1377839, at *2.

336. No. 04 CV-1409-JG-SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005).

337. *Elmaghraby*, 2005 WL 2375202, at *28.

338. *See* Brief for the State of Utah et al. as Amici Curiae Supporting Respondent at 21, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636) (indicating that the racial violence in no two prisons is the same, so there is no single rule to apply to all prisons nationwide).

339. Hampson v. Satran, 319 N.W.2d 796, 797-98 (N.D. 1982). The court stated that prison officials must have the discretion to take appropriate action in prisons to ensure the safety of inmates and corrections personnel and to prevent the escape or unauthorized entry of the inmates. *Id.* at 798; *see* Little v. Graff, 507 N.W.2d 55, 58-59 (N.D. 1993) (indicating that the warden of the State Penitentiary has the power to transfer inmates from one penal institution to another for reasons of safety, discipline, medical care, and welfare of other inmates); Jensen v. Powers, 472 N.W.2d 223, 225-26 (N.D. 1991) (stating that depriving a prisoner of privileges, such as the use of a television or a computer, is not a violation of an inmate's rights).

To determine whether racially segregating inmates infringes upon an inmate's constitutional rights, North Dakota may look to the *Inmate Handbook*.[340] In *Ennis v. Schuetzle*,[341] the North Dakota Supreme Court referred to the text of the state's *Inmate Handbook* to determine whether revoking an inmate's housing status was the loss of a right or privilege.[342] The Handbook provides that an inmate has no "implied right or expectation to be housed in any particular unit . . . ."[343] The *Ennis* court determined that revoking preferential housing does not infringe on the rights of an inmate because the inmate simply lost a privilege, not a right.[344] "Deprivation of a prisoner's privileges does not infringe on any recognized right of a prison inmate."[345] But the *Ennis* ruling does not indicate under what conditions housing assignments involve the loss of a right, so its effect on racially segregating inmates is unknown.[346]

In addition to North Dakota's *Inmate Handbook*, the North Dakota Century Code provides further guidance as to whether racially segregated housing assignments infringe upon a prisoner's constitutional right to equal protection.[347] The Century Code defines the rights of inmates, stating in part, "Subject to reasonable safety, security, discipline, and correctional facility administration requirements, the administrator of each correctional facility shall: . . . Ensure that inmates are not subjected to discrimination based on race, national origin, color, creed, sex, economic status, or political belief . . . ."[348] However, the North Dakota Century Code also details the warden's duty to maintain order in the penitentiary: "All necessary means shall be used, under the discretion of the warden, to maintain order in the penitentiary, enforce obedience, suppress insurrections, and prevent escapes."[349]

Although the Century Code defines an inmate's rights, North Dakota courts have applied *Turner*'s reasonableness standard to determine whether

340. *See* Ennis v. Schuetzle, 488 N.W.2d 867, 871 n.3 (N.D. 1992) (citing to the NORTH DAKOTA INMATE HANDBOOK to determine whether the loss of preferential housing is a violation of an inmate's rights).

341. 488 N.W.2d 867 (N.D. 1992).

342. *Ennis*, 488 N.W.2d at 871 n.3 (citing N.D. INMATE HANDBOOK 3 (1990) (stating that housing assignments are made at the administration's discretion and inmates are subject to being transferred at any time by administration)).

343. *Id.* (quoting N.D. INMATE HANDBOOK at 3).

344. *Id.* at 871.

345. *Id.* (quoting Jensen v. Powers, 472 N.W.2d 223, 225 (N.D. 1991)).

346. *Id.*

347. *See* N.D. CENT. CODE § 12-44.1-14 (2005) (defining the rights of inmates).

348. *Id.*

349. N.D. CENT. CODE § 12-47-23 (2005).

the rights were violated.[350] In *State* ex rel. *Schuetzle v. Vogel*,[351] the North Dakota Supreme Court applied the *Turner* standard to the issue of whether the act of forcibly medicating an inmate violated his constitutional rights.[352] The Court stated that the "proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is whether the regulation is 'reasonably related to legitimate penological interests.'"[353]

Looking at North Dakota law, there are unresolved questions as to how the state should apply *Johnson*'s strict scrutiny standard to the issue of racially segregating inmates.[354] In one respect, North Dakota has specifically laid out the rights of the warden to maintain order with "all necessary means," and the Attorney General affirmatively has indicated that there is no single rule governing the maintenance of order in correctional facilities.[355] On the other hand, the state has codified that inmates shall not be subjected to racial discrimination.[356] Unlike California, North Dakota has not adopted a policy of racially segregating its inmates.[357]

If any instances of racial segregation were to arise, the application of strict scrutiny, as opposed to the reasonably related standard, might have little effect.[358] In either instance, the court would likely evaluate the claim on a case-by-case basis, examining the circumstances that led to the segregation.[359] As stated in *Hampson v. Satran*,[360] North Dakota might

350. State *ex rel.* Schuetzle v. Vogel, 537 N.W.2d 358, 363 (N.D. 1995).

351. 537 N.W.2d 358 (N.D. 1995).

352. *State* ex rel. *Schuetzle*, 537 N.W.2d at 363.

353. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)); *see also* Burke v. N.D. Dep't of Corr. and Rehab., 2000 ND 85, ¶ 5, 609 N.W.2d 729, 731 (stating that if a prison regulation is reasonably related to legitimate penological objectives, then the court will not strike down the regulation).

354. *See* Brief for the State of Utah et al. as Amici Curiae Supporting Respondent at 21, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636) (stating that there is ongoing debate among prison officials nationwide as to the best method of reducing racial violence in prisons).

355. *See id.* (arguing that there is no single rule to apply to all prisons nationwide).

356. N.D. CENT. CODE § 12-44.1-14 (2005); *see* United Hosp. v. D'Annunzio, 514 N.W.2d 681, 684 (N.D. 1994) (stating that the court will construe statutory language in light of the legislature's intent when the text is ambiguous).

357. Reply Brief at 1, *Johnson*, 543 U.S. 499 (No. 03-636), 2004 U.S. S. Ct. Briefs LEXIS 579.

358. *See Johnson*, 543 U.S. at 547-48 (Thomas, J., dissenting) (arguing that the CDC's policy likely will pass the strict scrutiny standard because all states have a compelling interest in maintaining order and internal security within their prisons); Chemerinsky, *supra* note 315, at 76 (indicating that the *Johnson* ruling might only have an effect on factually similar cases).

359. *See, e.g.*, State v. Maxwell, 259 N.W.2d 621, 629-30 (N.D. 1977) (holding that a statute mandating that female prisoners be transported to another state was violative of the inmates' constitutional civil rights, but if there had been no adverse effects to the prisoners from the transfer, then no constitutional deprivation would have occurred).

360. 319 N.W.2d 796 (N.D. 1982).

look to the circumstances of the inmate's conduct and the inmate's impact on the safety of other inmates and corrections officials.[361] If the safety of other inmates and prison staff were a concern, perhaps the court would place greater emphasis on the use of inmate solitary confinement.[362] Since North Dakota has not applied a segregative policy to inmate housing, the *Johnson* ruling will likely have minimal impact in housing North Dakota inmates.[363]

V. CONCLUSION

In *Johnson v. California*, the United States Supreme Court ruled that racial discrimination in penal institutions falls under a strict scrutiny standard of review.[364] The Court found that *Turner*'s reasonableness standard was inapplicable because it would permit rank discrimination.[365] While the Court determined that racial segregation in prisons must be evaluated under a strict scrutiny standard, the Court did not decide whether the CDC's policy was constitutional.[366] Instead, the Court remanded the case for review by the lower court.[367] Because the Court did not decide whether the CDC's policy was constitutional under strict scrutiny, it is unknown what segregative policies, if any, meet strict scrutiny.[368] Nor is it known whether specialized circumstances, such as social unrest among prisoners, would justify racially segregating cells.

Michelle Feist[*]

361. Hampson v. Satran, 319 N.W.2d 796, 798 (N.D. 1982).

362. *See* Havener v. Glaser, 251 N.W.2d 753, 760 (N.D. 1977) (reasoning that there are circumstances when a warden must act quickly, based upon conclusions from his experience as a prison warden, to avert volatile situations among inmates).

363. *See id.* (stating that changes in housing conditions must have more than just a substantial adverse impact on the inmate to invoke the protections of Due Process).

364. *Johnson*, 543 U.S. at 515.

365. *Id.* at 514.

366. *Id.* at 515.

367. *Id.*

368. *Id.*

[*] J.D. candidate at the University of North Dakota School of Law.