Johnson v. California: Setting a Constitutional Trap for Prison Officials

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In *Johnson v. California*, the United States Supreme Court considered the appropriate standard of review for an equal-protection challenge to a California Department of Corrections (CDC) policy that assigned inmates to temporary double cells primarily according to race. The Court held that strict scrutiny governed judicial review of racial classifications in prisons and expressly rejected the deferential *Turner v. Safley* standard. Although the Court properly applied precedent in requiring strict scrutiny, its narrow holding effectively discouraged prison officials from appropriately addressing racial violence and endangered prisoners in three major ways. First, the Court failed to sufficiently address the real risk of racial violence at the root of the CDC policy and consequently cast doubt on the policy's legitimacy. Second, the Court expressly withheld deference to prison officials and instead required an inflexible rather than deferential approach to strict scrutiny, suggesting that justifying such policies will be difficult. Third, the Court's decision to remand rather than evaluate the constitutionality of the policy left prison officials with little guidance and further exacerbated the risk that existing safety measures implicating race will be abandoned. The result of the Court's limited holding is that prison officials may be forced to choose between violating the Fourteenth or the Eighth Amendment.

Instead of restricting its holding by ordering the application of strict scrutiny upon remand, the Court should have followed its approach in *Grutter v. Bollinger* and instantly applied a deferential ver-
sion of strict scrutiny to the CDC policy. Or, at the very least, the Court should have expressed that a measure of deference ought to be afforded to prison officials when applying strict scrutiny to racial classifications in prisons. Either approach would have strengthened prisoners’ Fourteenth Amendment rights without simultaneously weakening prison security.

I. THE CASE

In 1995, when entering the California prison system, new and newly transferred male inmates were initially housed in reception centers for up to sixty days. While undergoing evaluations to determine their ultimate placements, the CDC temporarily assigned the prisoners to single cells, dormitories, or double cells at the reception centers. Prisoners who did not present special security concerns warranting a single cell but who could not be safely housed in a dormitory were housed in double cells. The CDC employed an unwritten policy of using race as the dominant consideration when assigning inmates to their temporary quarters. Prison administrators generally divided inmates into four racial categories—black, white, Asian, and other—and then further subdivided the inmates within each racial group. Under the policy, an inmate had close to zero chance of being assigned a cellmate of a different race.

According to the CDC, racially segregating double cells was necessary because its prisons were dominated by violent gangs. Such gangs, including the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, the Nazi Low Riders, and La Nuestra Familia, or-

11. See infra Part IV.C.; see also Grutter, 539 U.S. at 328 (reviewing Michigan Law School’s admissions policy under strict scrutiny but deferring to school administrators’ assessment that diversity is a compelling interest).
12. See infra Part IV.C.
13. See infra Part IV.C.
15. Id. at 1158 (Thomas & Scalia, JJ., dissenting).
16. Id.
17. Johnson v. California, 321 F.3d 791, 794 (9th Cir. 2003). Factors for double-cell assignments included “gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history, custody designation, and race.” Id.
18. Id. For example, Hispanics from Northern California were separated from Hispanics from Southern California. Id. Japanese and Chinese inmates were generally not housed together; Laotians, Vietnamese, Cambodians, and Filipinos were also usually separated. Id.
19. Johnson, 125 S. Ct. at 1144.
20. Id. at 1158 (Thomas & Scalia, JJ., dissenting).
organized themselves along racial lines. The CDC claimed that housing inmates without regard to race would have created a threat to prison discipline and inmate safety. The CDC further justified its policy based on the private nature of the cells. Because guards could not see into the cells without going up to them and inmates could easily cover cell windows, the CDC contended, double cells presented a greater risk of racial violence than public areas. The rest of the CDC’s facilities were fully integrated.

In June 1987, Garrison Johnson entered the custody of the CDC and began serving a sentence for murder, robbery, and assault with a deadly weapon. Johnson, an African American, was subsequently transferred to several different CDC facilities. Upon his arrival and with each successive transfer, Johnson was assigned to a double cell with another African-American inmate.

In February 1995, Johnson filed a pro se complaint in the United States District Court for the Central District of California. Johnson contended that by assigning him cellmates on the basis of race, the CDC violated his Fourteenth Amendment right to equal protection. In January 1998, the district court dismissed Johnson’s complaint for failure to state a claim. The United States Court of Appeals for the Ninth Circuit reversed the district court’s decision and remanded the case in March 2000, holding that Johnson’s complaint sufficiently stated a claim for racial discrimination in violation of the Equal Protection Clause. Johnson was then appointed counsel and granted leave to amend his complaint. In July 2000, Johnson filed his fourth

21. Id.
22. Id.
23. Id. at 1158-59.
24. Id.
25. Id. at 1145 (majority opinion).
26. Id. at 1157 (Thomas & Scalia, JJ., dissenting).
27. Id. at 1158.
28. Id. at 1145 (majority opinion).
29. Id.
30. Id.
32. Id.
33. Johnson, 125 S. Ct. at 1145. Like his initial complaint, Johnson’s fourth amended complaint alleged that the CDC’s policy of racially segregating inmates violated his constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. Id. Johnson sought monetary damages from former CDC Directors James Rowland and James Gomez for their roles in establishing and enforcing the policy. Id. In addition, he sought injunctive relief against former CDC Director Stephen Cambra. Id. Rowland was CDC Director from 1987 to 1991; Gomez from 1991 through the filing of Johnson’s second amended complaint. Id. By 2000, Stephen Cambra had stepped into the role. Id.
amended complaint in district court. The district court ultimately granted the prison officials’ motion for summary judgment on qualified-immunity grounds. Johnson again appealed to the Ninth Circuit.

In February 2003, the Ninth Circuit affirmed the district court’s ruling and held that the CDC’s reception-center policy did not violate the Equal Protection Clause. Applying the deferential Turner standard of review, the Ninth Circuit held that the CDC’s policy was reasonably related to the prison officials’ goal of preventing racial violence. The court further held that Johnson failed to carry the “heavy burden” of proving that prison officials acted unconstitutionally.

The Ninth Circuit subsequently denied Johnson’s petition for rehearing en banc in July 2003. In his dissent, Judge Fergusen argued that the panel’s decision ignored the Supreme Court’s oft-repeated and unmistakable rule that courts must review all racial classifications using strict scrutiny. He further maintained that the Turner standard does not apply when the constitutional right asserted is consistent with legitimate penal goals. The Supreme Court granted

34. Id. Discovery ensued and both parties moved for summary judgment. Johnson, 321 F.3d at 795. Both parties’ motions for summary judgment on the equal-protection claim were denied. Id.

35. Johnson, 125 S. Ct. at 1145-46. Although the district court first denied the administrators’ motion for summary judgment on qualified-immunity grounds, Rowland and Gomez successfully moved for reconsideration after the United States Supreme Court decided Saucier v. Katz, 533 U.S. 194 (2001). Johnson, 321 F.3d at 795. In Saucier, the Court considered the proper approach for determining whether a government official is entitled to qualified immunity. Saucier, 533 U.S. at 201. The Saucier Court held that courts must consider whether, viewed in a light most favorable to the victim, a constitutional right would have been violated based on the facts asserted. Id. If so, courts must next address whether the constitutional right was clearly established based on the specific facts of the case. Id. Based on the Saucier decision, the district court in Johnson granted the administrators’ motion for summary judgment because their acts did not clearly violate the Constitution. Johnson, 321 F.3d at 795.

37. Id. at 807.
38. Id.
39. Id.
40. Johnson v. California, 336 F.3d 1117 (9th Cir. 2003).
41. Circuit Judges Pregerson, Nelson, and Reinhardt joined in dissent. Id. at 1117 (Fergusen, Pregerson, Nelson & Reinhardt, JJ., dissenting from denial of rehearing en banc).
42. Id.
43. Id. at 1122 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).
certiorari to determine whether strict scrutiny or the *Turner* standard of review applies to racial classifications in prisons.44

II. LEGAL BACKGROUND

Racial classifications in the prison context implicate three distinct standards of review under the United States Supreme Court's Fourteenth and Eighth Amendment jurisprudence.45 First, to evaluate whether government-imposed race-based measures violate the Equal Protection Clause of the Fourteenth Amendment, the Court subjects such classifications, whether they burden or benefit racial groups, to strict scrutiny.46 Second, the Court has crafted a specific rational-basis test for prisoners' constitutional claims that are incompatible with proper incarceration.47 Finally, the Court has articulated a third standard for prisoners' claims under the Eighth Amendment focusing on whether prison officials acted with "deliberate indifference."48


The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."49 Soon after the Fourteenth Amendment was adopted in 1868, the Supreme Court narrowly interpreted the Equal Protection Clause as only protecting African Americans from discriminatory state laws.50 Although the application of the Equal Protection Clause has since broadened, the Court has long held that the core purpose of the Fourteenth Amendment is to eradicate all government-imposed discrimination based on race.51

In accordance with the Fourteenth Amendment's purpose of eliminating racial discrimination, the Supreme Court only permits racial classifications to stand if the government can prove that such discrimination is necessary to accomplish a compelling governmental

45. See infra Parts II.A-C.
46. See infra Part II.A.
47. See infra Part II.B.
48. See infra Part II.C.
50. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (stating that the purpose of the Equal Protection Clause was to protect newly emancipated blacks from laws that discriminated against them as a class); Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879) (same).
Known as strict scrutiny, this test was first applied to a classification based on national origin in *Korematsu v. United States,*53 in which the Court decided that Congress and the Executive did not exceed their war powers by excluding all persons of Japanese ancestry from the West Coast war area. Writing for the Court, Justice Black noted that legal restrictions which infringe upon a single racial group’s civil rights are “immediately suspect.”54 He further explained that while not all classifications burdening a single racial group are unconstitutional, courts must subject such restrictions to “the most rigid scrutiny.”55 Indeed, although the Court upheld the use of war powers in *Korematsu,*56 the case laid the groundwork for the application of strict scrutiny to all classifications burdening racial or ethnic groups.57

Following *Korematsu,* however, the Court did not consistently apply strict scrutiny in every case in which governmental action implicated race. For example, in *Brown v. Board of Education,* the Court based its holding that segregated schools violate the Equal Protection Clause on the social and psychological harms caused by segregation in education, not on a strict-scrutiny analysis.58 In the 1960s, the Court returned to the strict judicial review of *Korematsu* by expanding the scope of strict-scrutiny analysis as applied to racial measures. In *Lov ing v. Virginia,* for instance, the Court extended strict scrutiny to a Virginia law banning interracial marriage despite the state’s protest that the law equally burdened whites and minorities.59 The Court rejected the argument that a law containing a racial classification could not violate the Fourteenth Amendment because it had “equal applica-

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52. *Id.* at 432-33.
53. 323 U.S. 214 (1944). The origin of strict scrutiny has also been traced to footnote four of *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938). See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287-88 (1978) (citing footnote four of *Carolene Products* to support the petitioner’s argument that strict scrutiny should be applied to classifications that burden “discrete and insular minorities”).
54. *Korematsu,* 323 U.S. at 216.
55. *Id.* Justice Black also acknowledged that while public necessity may occasionally present a valid reason to infringe upon a single racial group’s civil rights, racial antagonism is never a permissible justification for doing so. *Id.*
56. *Id.* at 219.
57. See Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995) (noting that *Korematsu* demonstrates that even strict scrutiny can fail to root out an illegitimate racial classification).
58. 347 U.S. 483, 494-95 (1954). Chief Justice Warren, writing for a unanimous Court, overruled *Plessy v. Ferguson,* 163 U.S. 537 (1896) and rejected the notion that segregated public schools could ever be separate but equal. *Id.*
59. 388 U.S. 1, 8, 11 (1967).
tion." Citing Korematsu, the Loving Court analyzed the miscegenation statute under strict scrutiny and held that the law violated the Equal Protection Clause.

One year after Loving, the Court in Lee v. Washington appeared to apply heightened scrutiny to desegregation in the prison context. Lee involved a state challenge to an Alabama federal district court decree that a desegregation schedule be established for the state's prisons and jails. The Court's brief per curiam opinion rejected the state's protest that the district court's order did not allow for the requirements of prison security and discipline and held only that the order should not be interpreted in that manner. Justices Black, Harlan, and Stewart concurred to make explicit 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." Although the majority opinion in Lee did not openly state the standard of review that it applied to Alabama's complaint, lower courts went on to subject prison-segregation policies to a heightened standard of review.

From the late 1970s to the 1990s, the Court broadened its application of strict scrutiny in equal-protection cases by extending the standard to affirmative-action measures. Initially, however, the Court struggled with the proper standard of review for remedial racial classifications, failing to produce a majority opinion in three cases and leaving the issue unresolved. In City of Richmond v. J.A. Croson Co., the

60. Id. at 8.
61. Id. at 11-12.
63. Lee, 390 U.S. at 333.
64. Id. at 333-34.
65. Id. (Black, Harlan & Stewart, JJ., concurring).
66. See, e.g., Sockwell v. Phelps, 20 F.3d 187, 191-92 (5th Cir. 1994) (citing Lee for the proposition that a vague fear of racial violence is not a sufficient justification for wholesale racial segregation and holding that a Texas prison-system policy of racially segregating double cells violated the Equal Protection Clause); see also Black v. Lane, 824 F.2d 561 (7th Cir. 1987) (invoking strict scrutiny to reverse summary judgment on a prisoner's racial discrimination claim); United States v. Wyandotte County, 480 F.2d 969 (10th Cir. 1973) (holding that vague fears of racial violence are not enough to justify racially segregated jail facilities).
67. See Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 219-21 (1995) (recounting the Court's struggle to produce a majority opinion in three cases that addressed whether to apply strict scrutiny to remedial race-based measures). First, in Regents of the University of California v. Bakke, the Court addressed the proper level of scrutiny to review a state medical school's affirmative-action admissions policy. 438 U.S. 265, 287-91 (1978) (plurality opinion). Although Bakke did not result in a majority opinion, Justices Powell and White took the position that racial classifications merit strict scrutiny. Id. at 291. Four Justices, however, concluded that remedial race-based measures should be subjected to intermedi-
Court resolved the question of the proper standard of review for remedial race-based measures imposed by state and local governments. At issue was a remedial plan adopted by the Richmond City Council requiring that minority business owners be awarded a percentage of public construction contracts. Writing for the majority, Justice O'Connor declared that without employing the most searching judicial review, there is no way to properly distinguish remedial racial measures from classifications that are founded in ideas of racial inferiority or that stem from racial politics. Justice O'Connor further explained that the purpose of strict scrutiny is to "smoke out" improper racial classifications and ensure that the government’s goal is sufficiently important to merit use of such a drastic tool. The Croson Court held that strict scrutiny is required for both remedial and discriminatory racial classifications.

While Croson clarified the proper standard of review for state and local governments, the Court did not explicitly extend its holding to similar actions taken by the federal government under the Fifth Amendment until its decision in Adarand Constructors, Inc. v. Peña.
In *Adarand*, the Court addressed a federal affirmative-action program providing general contractors with financial incentives to hire subcontractors controlled by people from socially and economically disadvantaged backgrounds.\(^7\) The *Adarand* Court unequivocally declared that all racial classifications imposed by any governmental entity—federal, state, or local—must be reviewed under strict scrutiny.\(^7\) Hence, the Court explained, for race-based measures to survive strict scrutiny and pass constitutional muster, such classifications must be narrowly tailored to further compelling governmental interests.\(^7\)

In future decisions, the Court embraced *Adarand*'s strict-scrutiny rule but further explored the types of governmental interests considered compelling and the types of policies considered narrowly tailored. In *Gratz v. Bollinger*,\(^7\) the Court applied strict scrutiny to the University of Michigan's admissions policy of automatically granting a set number of points to bolster the admissions scores of underrepresented minority applicants. The *Gratz* Court held that because the admissions policy failed to show individual consideration and instead simply used race as the determinative factor, it was not narrowly tailored to serve the asserted compelling interest in educational diversity and thus was unconstitutional.\(^8\)

In the companion case to *Gratz, Grutter v. Bollinger*,\(^8\) the Court upheld the Michigan Law School's admissions policy. The policy at issue in *Grutter* required admissions officials to consider "soft variables" in addition to the applicant's grade point average and law school admission test (LSAT) score.\(^8\) The policy also enabled admissions officials to accord "substantial weight" to applicants who would contribute to the school's diversity, including, but not restricted to, its

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*Metro Broadcasting* dealt with the constitutionality of two Federal Communications Commission (FCC) minority-preference policies. *Metro Broad.*, 497 U.S. at 552. The *Metro Broadcasting* Court held that unlike remedial measures imposed by state and local governments, those imposed by the federal government need only satisfy intermediate scrutiny to be found constitutional. *Id.* at 564-65.

75. 515 U.S. at 227. Recognizing that its decision in *Metro Broadcasting* undermined established principles in the Court's equal-protection jurisprudence, the *Adarand* Court overruled the case five years later. *Id.* at 226-27.

76. *Id.* at 204.

77. *Id.* at 227.

78. *Id.*

79. 539 U.S. 244 (2003).

80. *Id.* at 271-72, 275.


82. *Id.* at 315. Such "soft variables" included the quality of an applicant's recommendations, the undergraduate institutions attended, an applicant's personal essay, and an applicant's chosen coursework. *Id.*
racial and ethnic diversity.\textsuperscript{83} The plaintiff, a white Michigan resident who was first wait-listed and then rejected from the law school, alleged that the school's admission policy was racially discriminatory in violation of the Fourteenth Amendment.\textsuperscript{84}

Writing for the majority, Justice O'Connor reviewed the justifications for imposing strict scrutiny and noted at the outset that context is important when reviewing governmental racial classifications.\textsuperscript{85} Next, Justice O'Connor announced that the law school had a compelling interest in student-body diversity.\textsuperscript{86} In reaching its decision, the Court deferred to the law school's expertise and to its position that diversity is a critical aspect of its educational mission.\textsuperscript{87} Citing the Court's tradition of according a measure of deference to universities on academic issues, Justice O'Connor emphasized that the strict-scrutiny test was not diluted by deferring to the university officials' expertise in the complicated realm of education.\textsuperscript{88} The Court then upheld the constitutionality of the policy, finding it narrowly tailored to further a compelling interest in diversity because it provided for a highly individualized consideration of each application and did not unduly burden members of other racial groups.\textsuperscript{89}

Thus, post-Adarand, the Court has accepted the rule that strict scrutiny is the proper standard of review for all government-imposed racial classifications.\textsuperscript{90} However, the Court has yet to expressly extend Grutter's deferential strict scrutiny to other areas outside of the education context where deference is traditionally granted.\textsuperscript{91}

\textsuperscript{83} Id. at 316. Although there was no requirement that a certain percentage of minority students be admitted, the director of admissions kept careful track of the racial and ethnic composition of the class to ensure that a "critical mass" of minority students was admitted to ensure student-body diversity. Id. at 318.

\textsuperscript{84} Id. at 316-17.

\textsuperscript{85} Id. at 322-27.

\textsuperscript{86} Id. at 328.

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} Id. at 334, 337, 341. Not all of the Justices in Grutter agreed with the majority's decision to include a deferential component to strict scrutiny. In a dissent joined in parts by Justice Scalia, Justice Thomas declared the majority's deference to university administrators "unprecedented" and "antithetical to strict scrutiny." Grutter, 539 U.S. at 362 (Thomas & Scalia, JJ., dissenting).

\textsuperscript{90} See supra notes 79-89 and accompanying text.

\textsuperscript{91} See supra notes 87-88 and accompanying text.
B. Evolution of the Turner Standard for Prisoners’ Constitutional Claims Regarding Rights Incompatible with Proper Incarceration

As the Court grappled with whether to extend strict scrutiny to remedial classifications, it established a separate line of precedent that dealt with prisoners’ constitutional challenges. Traditionally, federal courts did not interfere with the internal affairs of prisons.\textsuperscript{92} Courts generally accepted that a prisoner was a “slave of the State,” stripped of all personal rights except those that the law chose to extend.\textsuperscript{93} The modern Court, however, has recognized that prisoners do not surrender all constitutional protections upon incarceration.\textsuperscript{94} Among the prisoners’ rights retained are the right to be free from racial discrimination under the Equal Protection Clause\textsuperscript{95} and the right to be free from cruel and unusual punishment as prohibited by the Eighth Amendment.\textsuperscript{96} The modern Court has also acknowledged that certain constitutional rights must be withdrawn or limited because of lawful incarceration, as well as legitimate penological goals such as deterrence, rehabilitation, and prison security.\textsuperscript{97}

Beginning in the 1970s with \textit{Procunier v. Martinez},\textsuperscript{98} the Court began to develop its modern framework for analyzing prisoners’ constitutional claims.\textsuperscript{99} In \textit{Martinez}, the Court was confronted with prison regulations that censored inmate correspondence.\textsuperscript{100} The Court decided to review the regulations using strict scrutiny because the correspondence restrictions also infringed on the First and Fourteenth Amendment rights of nonprisoners.\textsuperscript{101} The \textit{Martinez} Court did not reach the question of the proper standard of review for inmates’ First Amendment claims.\textsuperscript{102}

In four prisoners’ rights cases that followed \textit{Martinez}, the Court tackled issues implicating prisoners’ First and Fourteenth Amend-

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\textsuperscript{92} Shaw v. Murphy, 532 U.S. 223, 228 (2001).
\textsuperscript{94} O’Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).
\textsuperscript{95} Turner v. Safley, 482 U.S. 78, 84 (1987).
\textsuperscript{96} See Hope v. Pelzer, 536 U.S. 730, 737-38 (2002) (holding that an unruly prisoner’s Eighth Amendment rights were violated when he was handcuffed to a hitching post after already being subdued). Prisoners also retain such protections as the right to petition the government for redress of grievances and the right to due process. \textit{Turner}, 482 U.S. at 84.
\textsuperscript{97} Shabazz, 482 U.S. at 348.
\textsuperscript{98} 416 U.S. 396 (1974).
\textsuperscript{99} Turner, 482 U.S. at 84.
\textsuperscript{100} Martinez, 416 U.S. at 406.
\textsuperscript{101} Id. at 408-09, 413.
\textsuperscript{102} See id. at 408 (avoiding the prisoners’ First Amendment claims because the case could be decided on narrower grounds).
All four of the prisoners' rights cases—Block, Bell, Jones, and Pell—declined to impose a heightened standard of review on the challenged regulations, and instead focused on whether the regulations were reasonably related to proper goals of imprisonment or whether the regulations were simply an exaggerated response on the part of the prison administration.\textsuperscript{104}

In the 1980s, in \textit{Turner v. Safley}, the Court developed a standard of review for prisoners' constitutional claims that struck a balance between protecting inmates' rights and judicial restraint.\textsuperscript{105} \textit{Turner} involved a prisoner class action challenging two prison regulations limiting correspondence and marriage.\textsuperscript{106} Writing for the majority, Justice O'Connor established that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."\textsuperscript{107} Justice O'Connor then suggested four factors to consider to determine the reasonableness of a regulation: (1) whether there is a "valid, rational connection" between the regulation and a legitimate governmental interest; (2) whether there are alternative means of exercising the right open to prisoners; (3) the impact of accommodating the right on guards, other inmates, and prison resources; (4) and the absence of ready alternatives.\textsuperscript{108} The Court's major justification for requiring a deferential reasonable-relationship test as opposed to strict scrutiny was to avoid unduly burdening prison officials.\textsuperscript{109} Specifically, Justice O'Connor speculated, strict scrutiny would diminish prison officials' ability to adopt creative solutions to problems and would unnecessa-

\begin{itemize}
    \item \textsuperscript{104} \textit{Turner}, 482 U.S. at 87.
    \item \textsuperscript{105} \textit{Id.} at 85. The Court has justified its policy of exercising judicial restraint for prisoners' rights cases on the grounds that prison administrators, and not the courts, are best positioned to deal with problems of prison administration and that prison administration is the responsibility of the legislative and executive branches, rather than the judiciary. \textit{Id.} at 84-85.
    \item \textsuperscript{106} \textit{Id.} at 81-82.
    \item \textsuperscript{107} \textit{Id.} at 89 (emphasis added). Under \textit{Turner}, the prisoner bears the burden of disproving the validity of the prison regulation. Shaw v. Murphy, 532 U.S. 223, 232 (2001).
    \item \textsuperscript{108} \textit{Turner}, 482 U.S. at 89-90.
    \item \textsuperscript{109} \textit{Id.} at 89.
\end{itemize}
rily hamper administrative decision-making based on the possibility that a court somewhere could discover a less restrictive alternative.\textsuperscript{110}

After \textit{Turner}, the Court applied its reasonable-relationship test to prisoners' constitutional claims under the First and Fourteenth Amendments. For example, in \textit{O'Lone v. Estate of Shabazz}, the Court applied the four \textit{Turner} factors to a claim that prison policies preventing inmates from attending religious services violated the Free Exercise Clause of the First Amendment.\textsuperscript{111} It concluded that the prison's policies were reasonably related to legitimate goals of incarceration and were therefore constitutional.\textsuperscript{112} In \textit{Washington v. Harper}, the Court extended its application of the \textit{Turner} standard beyond prisoner cases involving the First Amendment to inmate due-process challenges under the Fourteenth Amendment.\textsuperscript{113} In \textit{Harper}, the Court held that a prison regulation authorizing the state to override a mentally-ill prisoner's refusal of medication satisfied the \textit{Turner} test and thus did not violate the Due Process Clause.\textsuperscript{114} The Court stressed in \textit{Harper} that the \textit{Turner} standard should apply in every situation where prison needs implicate prisoners' constitutional rights.\textsuperscript{115}

Thirteen years after \textit{Harper}, however, the Court in \textit{Overton v. Bazetta}\textsuperscript{16} appeared to modify its broad declaration that \textit{Turner} applies to all constitutional claims in the prison context. In \textit{Overton}, the Court reviewed a Michigan prison regulation restricting the number of visitors that prisoners could receive.\textsuperscript{117} Writing for the majority, Justice Kennedy noted that inmates do not retain rights inconsistent with proper incarceration.\textsuperscript{118} The Court reasoned that because freedom of

\textsuperscript{110} \textit{Id.} The \textit{Turner} Court held that the correspondence regulation was facially valid but that the marriage regulation was unconstitutional. \textit{Id.} at 99-100. Justice Stevens, who dissented in part, noted that the reasonableness standard articulated by the majority was open-ended and would too easily allow courts to uphold regulations restricting prisoners' First Amendment rights simply by citing potential security risks. \textit{Id.} at 101 n.1 (Stevens, Brennan, Marshall & Blackmun, JJ., concurring in part and dissenting in part).


\textsuperscript{112} \textit{Id.} at 350. In his dissent, Justice Brennan argued that a reasonableness standard for all constitutional challenges in the prison setting is an inadequate measure because such a standard is too deferential and cannot distinguish among levels of deprivation. \textit{Id.} at 356 (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting). Two years later, in \textit{Thornburgh v. Abbott}, the Court again addressed a First Amendment claim in the prison context. 490 U.S. 401 (1989). In \textit{Thornburgh}, the Court held that a prison regulation enabling prison administrators to reject incoming publications under certain circumstances was facially valid under \textit{Turner}. \textit{Id.} at 404.


\textsuperscript{114} \textit{Id.} at 227.

\textsuperscript{115} \textit{Id.} at 224.

\textsuperscript{116} 559 U.S. 126 (2003).

\textsuperscript{117} \textit{Id.} at 129.

\textsuperscript{118} \textit{Id.} at 131.
association is a right that is necessarily at odds with lawful incarceration, the *Turner* standard governs.\footnote{119} Therefore, based on the Court’s clarification in *Overton*, the *Turner* test applies when prisoners assert claims regarding constitutional rights that are incompatible with imprisonment, such as free speech and due process.\footnote{120}

C. The Deliberate-Indifference Standard of Review for Eighth Amendment Violations in Prisons

In addition to strict scrutiny and the *Turner* standard, race-based government action in the prison context may also be subject to the Court’s deliberate-indifference test for prisoners’ Eighth Amendment claims.\footnote{121} Although the Court acknowledges that the Constitution does not require comfortable prisons,\footnote{122} the Court also recognizes that prison officials must provide humane conditions of confinement, which includes taking reasonable measures to guarantee inmate safety.\footnote{123}

In *Estelle v. Gamble*, the Court first used the term “deliberate indifference” to evaluate a prisoner’s Eighth Amendment claim that he received inadequate medical treatment for a back injury sustained while engaged in prison work.\footnote{124} The *Estelle* Court held that ordinary negligence on the part of prison officials does not violate the Eighth Amendment; rather, only deliberate indifference constitutes cruel and unusual punishment.\footnote{125}

Following *Estelle*, the Court further defined the boundaries of the deliberate-indifference standard for Eighth Amendment claims. In *Farmer v. Brennan*, the Court conclusively defined the level of culpability necessary to establish deliberate indifference.\footnote{126} Farmer, a transsexual, was raped and beaten in his cell by another inmate.\footnote{127} He subsequently sued prison officials, alleging deliberate indifference in failing to protect against the risk of physical harm in violation of the Eighth Amendment.\footnote{128} Farmer claimed that the prison officials

\begin{itemize}
  \item \footnote{119} Id. at 131-32.
  \item \footnote{120} See supra notes 116-119 and accompanying text.
  \item \footnote{121} See Farmer v. Brennan, 511 U.S. 825, 837 (1994) (clarifying that the deliberate-indifference standard is a subjective test for prisoners’ Eighth Amendment claims against the infliction of cruel and unusual punishment).
  \item \footnote{124} 429 U.S. 97, 104 (1976).
  \item \footnote{125} Id. at 106.
  \item \footnote{126} 511 U.S. 825, 836-37 (1994).
  \item \footnote{127} Id. at 829-30.
  \item \footnote{128} Id. at 830-31.
\end{itemize}
knew that the penitentiary environment was dangerous per se and that, as a transsexual, he would be especially vulnerable to sexual attack. Writing for the majority, Justice Souter declared that deliberate indifference amounts to subjective recklessness. Specifically, a prison official violates the Eighth Amendment if she knows of an excessive risk to an inmate’s health or safety and disregards that risk. Justice Souter further clarified that the official must not only be aware of facts from which an inference could be drawn that serious harm is substantially possible but also actually draw such an inference before she is found liable under the deliberate-indifference standard.

After Farmer, at least two lower courts invoked the deliberate-indifference standard to hold that the failure of prison officials to take adequate measures to protect prisoners from violence violated the Eighth Amendment. In Robinson v. Prunty, for example, the Ninth Circuit upheld the district court’s order denying prison officials’ qualified immunity from a prisoner’s claim that the officials violated the Eighth Amendment by failing to consider the risk of racial violence when releasing a prisoner into a racially integrated exercise yard. Robinson alleged that he was attacked twice by Mexican-American inmates while the guards watched. The Robinson court held that because the law regarding deliberate indifference was clearly established at the time of the attacks, qualified immunity was properly denied.

Similarly, in Jensen v. Clarke, the Eighth Circuit addressed a class action by inmates challenging a Nebraska prison-system policy of randomly assigning prisoners to double cells. Specifically, the class contended that by failing to account for the violent propensities of potential cellmates, prison officials were deliberately indifferent to the inmates’ safety. Based on the prison officials’ knowledge of reported violent incidents, the Jensen court affirmed the district court’s ruling that the prison officials violated the Eighth Amendment.

129. Id. at 831.
130. Id. at 839-40.
131. Id. at 837.
132. Id. The Farmer Court ultimately remanded the case to the district court for further proceedings under the proper standard for deliberate indifference. Id. at 849. The Court has often remanded cases for actual application of the standard of review when the appropriate standard is in question. E.g., Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557-58 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031-32 (1992).
133. 249 F.3d 862, 867 (9th Cir. 2001).
134. Id. at 864-65.
135. Id. at 866-67.
136. 94 F.3d 1191, 1193-94 (8th Cir. 1996).
137. Id. at 1195.
138. Id. at 1199.
III. THE COURT'S REASONING

In *Johnson v. California*, the United States Supreme Court reversed the Ninth Circuit's decision to uphold the CDC's race-based policy under the deferential *Turner* standard of review and remanded the case for further proceedings under a strict-scrutiny standard. Writing for the majority, Justice O'Connor began by expressing the Court's continued commitment to strict scrutiny for review of all government-imposed racial classifications. The Court emphasized that strict scrutiny is important when the justification for the race-based measures is racial violence in prisons. The Court noted that such measures could potentially create greater hostility among inmates, or worse, actually increase racial violence.

Next, the Court rejected the deferential *Turner* standard for use in reviewing racial classifications in prisons. The Court noted that applying *Turner* would be inconsistent with the heightened standard of review the Court used in *Lee v. Washington* and inappropriate because *Turner* has only applied to rights inconsistent with the goals of the penal system. Unlike certain First Amendment challenges, the Court reasoned that it need not compromise the right to be free from racial discrimination for the sake of proper prison administration. To the contrary, the Court argued, racial discrimination damages the legitimacy and integrity of the criminal justice system.

The Court ended its analysis by explaining that the *Turner* standard would make invidious discrimination easier to defend and therefore that strict scrutiny must apply. Although it refused to defer to state officials on matters of race, the Court assured the CDC that prison officials would remain able to serve the compelling interest of prison security as long as they could demonstrate that a race-based measure was narrowly tailored to that interest.
ever, declined to determine whether the CDC's policy was narrowly tailored to protect prisoners from racial violence, holding only that strict scrutiny governs review. Instead, the Court remanded the case to give the Court of Appeals for the Ninth Circuit the first opportunity to apply the correct standard, justifying its decision by citing cases that reversed and remanded for the lower court to apply the correct legal standard for the first time.

In her concurrence, Justice Ginsburg agreed with the majority's decision to require strict scrutiny. She wrote separately, however, to express her view that the same standard of review should not necessarily apply to every government-imposed racial classification. Justice Ginsburg reasoned that the Court should not rank discriminatory actions against groups who have historically been denied full citizenship rights alongside remedial measures taken to stamp out discrimination and its aftereffects. Nevertheless, she concluded that the CDC's stereotypical classification demanded the heaviest scrutiny.

Justice Stevens dissented on the grounds that the CDC's race-based double-cell policy violated the Equal Protection Clause under any standard of review and should be invalidated outright. Specifically, Justice Stevens contended that the CDC failed to present adequate evidence to justify the policy, which he viewed as overbroad and based on racial stereotypes. According to Justice Stevens, the CDC did not have any reason to withhold evidence justifying its policy. In fact, he noted, the CDC never suggested that remanding the case would be useful for any purpose other than to postpone an avoidable result. Justice Stevens further added that the CDC failed to consider race-neutral alternatives for protecting inmate security.

Pointing to the CDC's failure to obtain timely pre-sentence reports and prison records while inmates undergo the reception process, Justice Stevens explained that without the inmate-specific information that can be gleaned from such records, prison officials easily run the risk of housing inmates together who are from the same race but from

150. Id. at 1152.
152. Id. at 1152 (Ginsburg, J., concurring).
153. Id.
154. Id. at 1152-53.
155. Id. at 1153.
156. Id. (Stevens, J., dissenting).
157. Id. at 1153-54.
158. Id. at 1153.
159. Id.
160. Id. at 1155-56.
Thus, while acknowledging that remanding the case would have been appropriate to determine the qualified-immunity issue, Justice Stevens disagreed with the Court's refusal to hold that the policy violated the Equal Protection Clause.\textsuperscript{161}

In a dissent joined by Justice Scalia, Justice Thomas maintained that the Court erred in two major respects.\textsuperscript{162} First, he argued that the Court was mistaken to require strict scrutiny instead of the deferential \textit{Turner} approach.\textsuperscript{163} By requiring strict scrutiny, he reasoned, the majority failed to account for the hardship imposed on prison officials by subjecting their day-to-day judgments to a court's inexpert and inflexible review.\textsuperscript{164} Second, Justice Thomas argued that the Court erred in failing to uphold the constitutionality of the CDC's double-cell assignment policy, asserting that when \textit{Turner}'s four factors are applied to the record, the CDC's policy is clearly constitutional.\textsuperscript{165} Finally, he also maintained that the CDC's policy could survive strict scrutiny.\textsuperscript{166} Nevertheless, if the CDC's policy is struck down on remand, Justice Thomas concluded, Johnson's victory will come at a heavy price.\textsuperscript{167}

\section*{IV. Analysis}

In \textit{Johnson v. California}, the United States Supreme Court properly rejected the \textit{Turner} standard for racial classifications in the prison context and insisted on subjecting such classifications to strict scrutiny, thereby resolving a conflict between its equal-protection jurisprudence and prisoners' rights cases.\textsuperscript{168} The Court's limited holding, however, discouraged prison officials from implementing legitimate safety measures to prevent racial violence in three respects: first, by insufficiently addressing the dangers motivating the CDC policy;\textsuperscript{169}
second, by rejecting a deferential component to strict scrutiny in the prison setting; and third, by remanding the case rather than deciding outright whether the CDC policy was constitutional. In so doing, the Court potentially subjected prison officials to greater liability under the Eighth Amendment and exposed prisoners to greater risk of racial violence.

Rather than require strict scrutiny—and withhold deference—the Court should have applied strict scrutiny with a measure of deference to evaluate the constitutionality of the CDC policy like it did in Grutter v. Bollinger. At the very least, the Court should have acknowledged that difficult policy judgments made by prison administrators, like education officials, warrant a degree of deference. Either approach would have better protected prisoners’ safety and equal-protection rights without forcing prison administrators to worry about violating the Fourteenth and Eighth Amendments.

A. The Court’s Decision to Require Strict Scrutiny Was Consistent with Precedent, Whereas the Turner Standard Would Have Been an Inappropriate Departure

1. The Court Properly Required Strict Scrutiny for Judicial Review of Racial Classifications in Prisons.—By imposing strict scrutiny rather than the Turner reasonable-relationship test, the Johnson Court remained true to the purpose of the Fourteenth Amendment, namely, to prohibit state discrimination based on race, and to its own long-standing commitment to the eradication of racial discrimination. Like the exclusion order in Korematsu, the Johnson Court properly deemed the CDC policy suspicious and therefore in need of strict judicial re-

171. See infra Part IV.B.2.
172. See infra Part IV.B.3.
173. See infra Part IV.B.4.
174. See infra Part IV.C.
175. See infra Part IV.C.
176. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (providing that the Equal Protection Clause of the Fourteenth Amendment was crafted for the purpose of protecting blacks from discriminatory state laws); see also Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879) (stating that the purpose of the Fourteenth Amendment was to prohibit discriminatory state laws); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (same).
177. See Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting that restrictions burdening a single racial group’s legal rights should be subject to strict scrutiny); see also United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (mentioning that a more searching judicial form of review may be necessary for laws that “prejudice against discrete and insular minorities”).
Indeed, the CDC never argued that the practice of assigning inmates to double cells based on race was remedial in nature. Rather, the CDC justified its practice by citing the risk of racial violence perpetrated by gang members. Thus, just as the Korematsu exclusion order warranted the strictest review because the order burdened a group's civil rights, so too was it necessary to strictly scrutinize the CDC policy to ensure that the practice was not "motivated by an invidious purpose."

Likewise, the Court in Johnson appropriately rejected the CDC's argument that the reception-center housing policy was exempt from strict scrutiny because the policy was neutral and did not burden one racial group more than another. As the Court clarified in Loving v. Virginia, racial classifications that burden and benefit racial groups equally are still subject to strict scrutiny, and thus the CDC policy should be reviewed under strict scrutiny even if it was "neutral." Furthermore, as the Johnson Court pointed out, the crux of the CDC's argument was essentially the notion of "separate but equal," which was repudiated in Brown v. Board of Education. Even if the CDC policy could somehow be characterized as remedial, the Johnson Court's decision to impose strict scrutiny would still be consistent with precedent. As the Court explained in City of Richmond v. J.A. Croson, strict scrutiny is essential to properly distinguish benign from discriminatory classifications. Based on the categorical rule articulated in Adarand Constructors, Inc. v. Peña that all government-imposed racial classifications, whether beneficial or burdensome, are subject to strict scrutiny, the Court correctly sub-

178. See Johnson v. California, 125 S. Ct. 1141, 1146 (2005) (stating that strict scrutiny is necessary because racial classifications raise concerns of illegitimate motivation).
179. See id. at 1153 (Ginsburg, J., concurring) (noting the absence of any pretense that the purpose of the CDC's policy was to fix inequalities).
180. Id. at 1144 (majority opinion).
181. Korematsu, 323 U.S. at 216.
182. Johnson, 125 S. Ct. at 1146.
183. Id. at 1146-47.
184. 388 U.S. 1, 8, 11 (1967).
185. Johnson, 125 S. Ct. at 1147.
186. Id.; see also Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (establishing the "separate but equal" doctrine).
190. 515 U.S. at 227.
jected the CDC policy to strict scrutiny. In light of the Court's struggles with the proper standard of review for affirmative-action measures, any standard besides strict scrutiny would have been a surprising result. Moreover, in the prison setting where the government has enormous power and there is great potential for abuse, the most rigorous standard of review should govern.

Finally, the Court's decision to require strict scrutiny in Johnson was consistent with its decision in Lee v. Washington, in which the Court applied heightened scrutiny to a race-based measure in the prison setting. The Lee Court's placement of the burden of proof on prison officials to justify the racial-segregation policy, as well as the "particularized circumstances" exception emphasized by the concurrence, indicate that the policy was indeed subject to heightened scrutiny. Also, in subsequent cases, lower courts accepted the proposition that racial classifications in prisons warrant heightened scrutiny.

2. The Court Appropriately Rejected the Turner Standard for Equal-Protection Challenges.—After recognizing that strict scrutiny was the correct standard of review for racial classifications in prisons, the Johnson Court properly rejected the reasonable-relationship test of Turner v.

191. See Johnson, 125 S. Ct. at 1146 (reviewing Adarand, Grutter, and Croson and holding that strict scrutiny governed review of racial classifications in prisons).
194. Johnson, 125 S. Ct. at 1150.
195. See id. at 1147 (stating that the Court applied a heightened standard of review in Lee).
196. See Johnson v. California, 336 F.3d 1117, 1118 (9th Cir. 2003) (Fergusen, Pregerson, Nelson, & Reinhardt, JJ., dissenting from denial of rehearing en banc) (arguing that strict scrutiny was applied in Lee because the burden was placed on prison officials to justify their policies and further pointing out that later cases construed Lee as applying a heightened standard of review).
197. See, e.g., Sockwell v. Phelps, 20 F.3d 187, 191-92 (5th Cir. 1994) (relying on Lee for the notion that a greater justification than a vague concern about racial violence was necessary before upholding a racial-segregation policy); see also Black v. Lane, 824 F.2d 561, 562-63 (7th Cir. 1987) (using strict scrutiny to review a prisoner's racial-discrimination claim); United States v. Wyandotte County, 480 F.2d 969, 971 (10th Cir. 1973) (holding that a racial-segregation policy is not legitimately justified by unclear racial-violence concerns).
Safley. As Block, Bell, Jones, and Pell indicate, the Turner standard grew out of the Court's efforts to accommodate certain First Amendment and due-process challenges brought by prisoners, not equal-protection claims such as the one brought by Johnson. Turner itself did not address an equal-protection challenge, nor did it involve a racial classification. Despite the Court's proclamation in Washington v. Harper that Turner applies to all constitutional claims brought by prisoners, the Court appeared to backtrack in Overton v. Bazzetta, implying that the Turner standard of review only applies to rights incompatible with proper incarceration. Unlike the First Amendment challenge addressed in O'Lone v. Estate of Shabazz, Johnson's Fourteenth Amendment right to be free from racial discrimination is consistent with proper incarceration and should therefore remain unfettered behind prison walls. As the Johnson Court noted, for the very same reasons, the Turner standard has not been applied to prisoners' Eighth Amendment claims. Therefore, in rejecting the Turner standard and imposing strict scrutiny for racial classifications in prisons, the Court acted in accordance with established precedent and provided clear resolution to the conflict between the Court's equal-protection and Turner lines of precedent.

B. Johnson's Limited Holding May Trap Administrators Between Violations of the Fourteenth and Eighth Amendments

While the Court in Johnson properly required that prison-based racial classifications be reviewed using strict scrutiny rather than Turner.

198. Johnson, 125 S. Ct. at 1151.
199. See Block v. Rutherford, 468 U.S. 576 (1984) (challenging prohibition of contact visits); Bell v. Wolfish, 441 U.S. 520 (1979) (claiming restriction on inmates' ability to receive books unless shipped from bookstores, publishers, or book clubs was unconstitutional); Jones v. N.C. Prisoners' Union, 433 U.S. 119 (1977) (challenging prohibition of prisoners' labor union meetings); Pell v. Procunier, 417 U.S. 817 (1974) (claiming that forbidding certain media interviews was unconstitutional).
200. Johnson, 125 S. Ct. at 1145.
205. Johnson, 125 S. Ct. at 1149.
206. Id.
207. See supra Parts II.A-B.
ner's reasonable-relationship test,\textsuperscript{208} the Court's narrow holding effectively discouraged prison officials from preventing racial violence and endangered prisoners in three respects.\textsuperscript{209} First, the Court's characterization of the CDC policy failed to acknowledge the real dangers in the California prison system, thus sending a message to lower courts and CDC officials that the policy probably would not survive strict scrutiny.\textsuperscript{210} Second, the Court's express rejection of a deferential component to strict scrutiny for racial classifications in prisons further suggested that such policies would be difficult to defend under the Fourteenth Amendment.\textsuperscript{211} Third, the Court's choice to remand the case without applying strict scrutiny to the CDC policy left prison administrators with no guidance as to how to develop a policy that is both constitutional and effective.\textsuperscript{212} As a result, prison administrators may become liable under the Eighth Amendment for demonstrating deliberate indifference to prisoners' safety.\textsuperscript{213}

1. The Court Did Not Sufficiently Acknowledge the Real and Unique Dangers in the California Prison System That Motivated the Policy.—Although the Johnson Court purported to only determine the proper standard of review for racial classifications in prisons and not the constitutionality of the CDC policy,\textsuperscript{214} its dismissive description of the policy belied its statement of purpose.\textsuperscript{215} The majority briefly acknowledged the CDC's "asserted rationale" that the purpose of the policy was to prevent racial violence\textsuperscript{216} but mostly focused on the fact that the CDC policy was unwritten and that most of the other state and federal prison systems operate without a temporary racial-segregation policy in reception centers.\textsuperscript{217} In glossing over the CDC's justifications, however, the Court ignored the serious danger of racial violence rampant in the prison system in general and California's prisons in particular.\textsuperscript{218} Prisons are undoubtedly among the most racist

\textsuperscript{208} See supra Parts IV.A.
\textsuperscript{209} See infra Part IV.B.
\textsuperscript{210} See infra Part IV.B.1.
\textsuperscript{211} See infra Part IV.B.2.
\textsuperscript{212} See infra Part IV.B.3.
\textsuperscript{213} See infra Part IV.B.4.
\textsuperscript{214} Johnson, 125 S. Ct at 1144.
\textsuperscript{215} See id. at 1169 (Thomas & Scalia, JJ, dissenting) (noting that the majority's description of particular features of the CDC policy is irrelevant because it has no bearing on the question of the proper standard of review).
\textsuperscript{216} Id. at 1144-45 (majority opinion).
\textsuperscript{217} Id. at 1148.
\textsuperscript{218} See id. at 1162 (Thomas & Scalia, JJ, dissenting) (arguing that the majority does not consider the problems of racial violence that must be addressed by prison officials).
Contributing to the heightened racial tension is the fact that prisons are dominated by gangs organized along racial lines. Many of the predominant racial gangs—for example, the Black Guerilla Family, Aryan Brotherhood, and Mexican Mafia—originated in California correctional facilities. Gang members in the California prison system routinely murder and rape other prisoners who are not gang members and interfering guards. Such violence presents an enormous threat and challenge to prison administrators.

The Johnson majority, however, declined to address the magnitude of the racial-gang problem and instead only highlighted features of the policy that cast doubt on its motivation. In so doing, the majority sent a strong message to lower courts and CDC officials that the policy should be found unconstitutional. The Court's decision is thus likely to discourage prison officials from implementing safety measures necessary to address the very real danger of racial violence in the California prison system.

2. The Court's Rejection of a Deferential Component to Strict Scrutiny Expresses to Prison Officials That Race-Based Policies Will Have Trouble Surviving Judicial Review.—In addition to disregarding the CDC's motivations for the temporary racial-segregation practice, the Johnson Court also distorted the proper application of strict scrutiny in the

219. ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA'S PRISONS 36 (2004). As Elsner notes, "Race permeates every aspect of prison life, and prison authorities take great care to keep ethnic groups apart to avoid bloodshed . . . . Whenever members of rival groups cross paths, there is a danger of violence." Id. at 37.


221. ELSNER, supra note 219, at 38-39. Not surprisingly, California ranks among the top three prison systems dominated by race-based gangs. Willens, supra note 220, at 56 n.69.

222. Willens, supra note 220, at 57-58; johnson, 125 S. Ct. at 1162 (Thomas & Scalia, JJ., dissenting).

223. See johnson, 125 S. Ct. at 1148 (describing the policy as unwritten and questioning the CDC's statement that two other states have similar policies). But see id. at 1155 (Stevens, J., dissenting) (addressing the substance of the CDC's justifications for the racial-segregation policy and nonetheless finding the evidence unconvincing).

224. See Erwin Chemerinsky, A Civil Rights Victory for Prisoners, TRIAL, May 2005, at 77 (arguing that even though the Johnson Court remanded the case for the application of strict scrutiny, Justice O'Connor's opinion suggests that routine racial segregation of prisoners is unconstitutional).

225. See johnson, 125 S. Ct. at 1162-63 (Thomas & Scalia, JJ., dissenting) (describing the dangers in the California prison system).

226. See supra Part IV.B.1.
prison context. Although strict scrutiny is the correct standard of review, the Court erroneously ignored the merits of the CDC's argument that prison administrators are owed a measure of deference in their expert judgments, and it improperly based its decision on non- penal contexts in which the case for deference is trumped by race, such as in the peremptory challenge or redistricting contexts. The Court's decision to not extend deference to prison officials was unnecessary because the Court properly rejected the Turner test on other grounds.

Moreover, the Johnson Court's refusal to defer to official expertise was perplexing because precedent allowed for such deference. In Adarand, the Court emphasized that the fundamental purpose of strict scrutiny is to account for "relevant differences." As the Court further explained in Grutter, context is important when applying strict scrutiny and deferring to experts does not dilute the standard. As noted by commentators, the Grutter Court's functional rather than mechanical approach to strict scrutiny, evidenced by its inclusion of deference, was consistent with the Court's statements in prior cases that strict scrutiny is necessary to determine motivations for race- based policies and is not necessarily fatal. Furthermore, if traditional deference to university officials warranted strict scrutiny with deference in Grutter, the Court's long-standing tradition of deferring to prison administrators as evidenced in the Turner line of cases certainly merits the same respect.

Precedent aside, the Johnson Court's rejection of a deferential approach to strict scrutiny for racial classifications in prisons also gives rise to practical difficulties. The Johnson Court held that such classifications would be subject to strict scrutiny, yet refused to account for prison officials' expert judgments. Prison officials, not courts, are

228. See supra Part IV.A.
229. Johnson, 125 S. Ct. at 1150.
230. See id. at 1151 (rejecting the Turner test because it could sanction a blanket segregation policy).
233. Grutter, 529 U.S. at 328.
234. See Luis Fuentes-Rohwer & Guy-Uriel E. Charles, In Defense of Deference, 21 Const. Comment. 133, 165-67 (2004) (defending the Court's decision in Grutter to defer to university officials in its application of strict scrutiny and arguing that such an approach was consistent with precedent).
235. See Johnson, 125 S. Ct. at 1168 (Thomas & Scalia, JJ., dissenting) (reasoning that if deference was warranted in Grutter, deference was certainly warranted in the prison context).
236. Id. at 1150 (majority opinion).
best situated to make difficult judgments related to prison administration.\textsuperscript{237} As the Court warned in \textit{Turner}, subjecting prison officials to an inflexible standard of review will seriously impede their ability to address safety problems and will put courts in the position of determining the best solution to problems of prison administration.\textsuperscript{238} The \textit{Johnson} Court has done exactly this by imposing an even stricter version of strict scrutiny than was required in \textit{Grutter}, \textit{Gratz}, or \textit{Adarand}.\textsuperscript{239}

3. \textbf{The Court’s Decision to Remand Without Evaluating the Constitutionality of the CDC Policy Leaves Prison Officials Without a Sense ofconstitutionally Permissible Racial-Violence Policies.}—After announcing that strict scrutiny was the proper standard of review, the Johnson Court improperly remanded the case to allow the lower court to apply the standard to the CDC policy for the first time.\textsuperscript{240} In declining the opportunity to determine whether the policy was a narrowly tailored means to address prison security,\textsuperscript{241} the Court missed a chance to elucidate the characteristics of a narrowly tailored policy to prevent racial violence, thus increasing the danger that prison officials will abandon safety measures already in place. The Court supported its decision to remand by citing two cases that it remanded to allow a lower court to apply the correct standard.\textsuperscript{242} The supporting cases suggest that remand is appropriate when the parties have not sufficiently briefed or argued under the particular standard that the Court deems controlling.\textsuperscript{243} Unlike the parties in those cases, however, the parties in Johnson clearly recognized that strict scrutiny was potentially applicable and briefed the issue accordingly.\textsuperscript{244}

Moreover, at least three Justices in \textit{Johnson} believed there was enough evidence to determine the constitutionality of the CDC policy

\textsuperscript{237} Id. at 1160 (Thomas & Scalia, JJ., dissenting).
\textsuperscript{238} Turner v. Safty, 482 U.S. 78, 89 (1987).


\textsuperscript{240} Johnson, 125 S. Ct. at 1152.

\textsuperscript{241} Id.


\textsuperscript{243} Gottshall, 512 U.S. at 558; Lucas, 505 U.S. at 1030-31.

\textsuperscript{244} See Brief for Respondents at 37-43, Johnson v. California, 125 S. Ct. 1141 (2005) (No. 03-636) (arguing that even under strict-scrutiny analysis, the CDC’s temporary-housing policy is constitutional); see also Brief for Petitioner at 15-24, Johnson v. California, 125 S. Ct. 1141 (2005) (No. 03-636) (contending that strict scrutiny applies to the CDC policy).
based on the record rather than remand the case.\textsuperscript{245} As Justice Stevens noted, the CDC had no reason to withhold evidence supporting the policy and never argued that additional factual development would have any use other than to delay the inevitable.\textsuperscript{246} Although advocating for the applicability of the \textit{Turner} test rather than strict scrutiny, Justices Thomas and Scalia believed that the CDC policy survived \textit{Turner} and was constitutional on the current record.\textsuperscript{247}

Although the majority conceded that prison security is a compelling interest,\textsuperscript{248} the \textit{Johnson} Court's refusal to evaluate whether the CDC's policy was narrowly tailored leaves prison officials in the dark.\textsuperscript{249} In choosing to remand the case, the Court provided prison officials with little guidance as to the characteristics of a policy that would survive strict scrutiny beyond its vague warning that policies must be demonstrably narrowly tailored.\textsuperscript{250} Thus, to strengthen prisoners' Fourteenth Amendment rights, the Court actually increased the risk that prison officials will abandon safety policies implicating race, thereby contradicting its assertion that prison security is a compelling governmental interest.\textsuperscript{251}

4. 	extbf{Johnson Creates Greater Liability for Prison Officials Under the Eighth Amendment}.—By disregarding the dangers motivating the CDC policy, rejecting a deferential approach to strict scrutiny, and remanding rather than deciding constitutionality outright,\textsuperscript{252} the Court created a disincentive to regulate racial violence that could subject prison officials to lawsuits under the Eighth Amendment.\textsuperscript{253} Specifically,

\textsuperscript{245} \textit{See Johnson}, 125 S. Ct. at 1153 (Stevens, J., dissenting) (noting that the CDC had no reason to withhold evidence justifying its policy); \textit{see also id.} at 1165, 1171 (Thomas & Scalia, JJ., dissenting) (arguing that the CDC policy is constitutional under the \textit{Turner} test).

\textsuperscript{246} \textit{Id.} at 1153 (Stevens, J., dissenting).

\textsuperscript{247} \textit{Id.} at 1163-65 (Thomas & Scalia, JJ., dissenting) (arguing that based on \textit{Turner}'s four factors, the CDC policy was constitutional). Note, however, that Justices Thomas and Scalia agreed with the majority that if strict scrutiny was to govern review, the case should be remanded out of fairness to the CDC. \textit{Id.} at 1172.

\textsuperscript{248} \textit{Id.} at 1150 (majority opinion).

\textsuperscript{249} \textit{See id.} at 1152 (refusing to determine whether the CDC policy was valid under strict scrutiny).

\textsuperscript{250} \textit{See id.} at 1151 (dismissing the CDC's concerns that strict scrutiny will handcuff prison officials with the response that policies will only be invalidated if they are not narrowly tailored to address prison safety).

\textsuperscript{251} \textit{See id.} at 1150 (reaffirming that prison security and discipline are compelling governmental interests).

\textsuperscript{252} \textit{See supra} Parts IV.B.1, IV.B.2, and IV.B.3.

\textsuperscript{253} \textit{See Johnson}, 125 S. Ct. at 1170 (Thomas & Scalia, JJ., dissenting) (suggesting that the Court's holding could subject prison officials to suit under the Eighth Amendment deliberate-indifference standard for ignoring dangerous conditions).
under the deliberate-indifference standard of Farmer v. Brennan, Estelle v. Gamble, and the Court's Eighth Amendment jurisprudence, prison officials could be held liable for doing exactly what the Johnson majority urges: disregarding race when assigning inmates to cells despite a risk of racial violence. Justice Thomas raised this point in his dissent, arguing that the majority placed prison officials in an impossible position. Because CDC officials have openly admitted that random double-cell assignment would create a "substantial risk of serious harm," Justice Thomas predicted that if prison officials housed prisoners indiscriminately without consideration of race, such conduct clearly could be deemed deliberately indifferent.

Indeed, the Court in Johnson should have recognized that prisoners have already brought Eighth Amendment claims against prison officials for deliberate indifference to the risk of violence. In Robinson v. Prunty, the prisoner charged California prison officials with failure to consider the risk of violence when they sent him into an integrated exercise yard. Similarly, in Jensen v. Clarke, integrated housing in double cells sparked an Eighth Amendment challenge to the safety of such a policy. Should CDC prison officials modify or eliminate the existing temporary housing policy to prevent lawsuits under the Fourteenth Amendment, an increase in Eighth Amendment deliberate-indifference lawsuits against those same officials could ensue.

C. The Court Should Have Applied a Deferential Version of Strict Scrutiny to the CDC Policy or at Least Acknowledged a Measure of Deference to Prison Administrators When Describing the Strict-Scrutiny Test

The Johnson Court's rejection of a deferential component to strict scrutiny for prison-based racial classifications was inconsistent with its decision in Grutter. Instead of withholding deference and remand-

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256. See, e.g., Hope v. Pelzer, 536 U.S. 730 (2002) (applying the deliberate-indifference standard and holding that a prisoner's Eighth Amendment rights were violated); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (finding that a prison practice of double-celling inmates is not cruel and unusual).
257. Id. at 758-59; see also Hudson v. Palmer, 468 U.S. 517, 526-27 (1984) (stating that prison officials need to ensure the safety of inmates).
258. Johnson, 125 S. Ct. at 1170 (Thomas & Scalia, JJ., dissenting).
259. Id.
260. 249 F.3d 862, 865 (9th Cir. 2001).
261. 94 F.3d 1191, 1193-94 (8th Cir. 1996).
ing, the Court should have followed *Grutter* by applying strict scrutiny to the CDC policy while deferring to prison officials' expertise.\(^{263}\) If the Court had applied strict scrutiny to the CDC policy, prison officials would know better how to legitimately combat racial violence in their institutions, just like university administrators have a stronger sense of constitutionally permissible admissions policies after *Grutter* and *Gratz*.\(^{264}\) Whether the Court agreed with Justice Stevens that the CDC policy violated the Equal Protection Clause,\(^{265}\) or with Justices Thomas and Scalia that the policy was constitutional,\(^{266}\) either result would have provided more direction to prison officials seeking to effectively protect prisoners from racial violence without violating the Constitution.

Even if the *Johnson* Court was convinced that out of fairness to California, the case should be remanded,\(^{267}\) the Court should have made it clear that deference to prison officials, like deference to university officials, was warranted in the application of strict scrutiny to racial classifications in prisons.\(^{268}\) In fact, prior to the decision in *Johnson*, one scholar predicted that the Court could potentially invoke *Grutter*’s “contextual strict scrutiny” in *Johnson* and the result would be that the temporary segregation practice is upheld.\(^{269}\) As Justice Thomas noted in his dissent, if deference is warranted in the education context, deference is certainly deserved in the prison setting because the Court knows even less about administering prisons than it does educational institutions.\(^{270}\) Moreover, as Justice O’Connor stressed in *Grutter*, affording a degree of deference does not diminish the overall effectiveness of strict scrutiny.\(^{271}\) Incorporating deferential

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\(^{263}\) *See Johnson*, 125 S. Ct. at 1168 (Thomas & Scalia, JJ., dissenting) (noting that the majority’s refusal to acknowledge deference to prison administrators contradicts its approach in *Grutter*).

\(^{264}\) *See Grutter*, 539 U.S. at 334, 337 (noting the highly individualized consideration evident in the University of Michigan’s Law School admissions policy); *see also Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (finding that the University of Michigan’s undergraduate admissions policy was not narrowly tailored because it did not take into account individual considerations before automatically granting additional points).

\(^{265}\) *Johnson*, 125 S. Ct. at 1153 (Stevens, J., dissenting).

\(^{266}\) *Id.* at 1163 (Thomas & Scalia, JJ., dissenting).

\(^{267}\) *See id.* at 1152 (majority opinion) (supporting its decision to remand with case law).

\(^{268}\) *See Grutter*, 539 U.S. at 328 (explaining that strict scrutiny was not less strict when deferring to the expert judgments of university officials).


\(^{270}\) *Johnson*, 125 S. Ct. at 1168 (Thomas & Scalia, JJ., dissenting).

\(^{271}\) *Grutter*, 538 U.S. at 928. *But see id.* at 362 (Thomas & Scalia, JJ., dissenting) (arguing that the majority’s deference to the law school was unprecedented and antithetical to strict scrutiny); *id.* at 387 (Kennedy, J., dissenting) (contending that the majority distorted strict scrutiny, undermining the test as well as precedent).
language into the opinion would have better assured prison officials that their expertise will be factored into the analysis.272 Had the Johnson Court evaluated the CDC's policy with the same deferential application of strict scrutiny it used in Grutter, or at the very least noted that deference should be afforded to prison administrators when strict scrutiny is applied to racial classifications in prisons, prison security would not have been swept aside in the interest of protecting inmates from racial discrimination.273

V. Conclusion

In Johnson v. California, the United States Supreme Court expressly adopted strict scrutiny for racial classifications in prisons, rejected the Turner standard for such measures, and declined to decide whether the CDC's specific policy was constitutional.274 The Court's decision to impose strict scrutiny was consistent with precedent and the spirit of the Fourteenth Amendment.275 Nevertheless, the Court also downplayed the dangers motivating the CDC policy, rejected a deferential strict-scrutiny approach, and refused to decide the policy's constitutionality.276 In so doing, the Court inadvertently discouraged prison officials from taking legitimate measures to tackle problems of racial violence, thus exposing them to greater liability under the Eighth Amendment and putting prisoners at risk.277 The Court should have applied a more deferential version of strict scrutiny to the policy in a manner similar to Grutter or at least clarified that a measure of deference to prison administrators would be appropriate for prison-based racial classifications.278 Either approach would have better protected prisoners from racial discrimination without deterring prison officials from addressing racial violence.279

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272. Id. at 328 (majority opinion) (deferring to university officials' expert judgments in the complex educational realm).
273. See Johnson, 125 S. Ct. at 1157 (Thomas & Scalia, JJ., dissenting) (disagreeing with the Court's opinion on the grounds that the majority is concerned with protecting prisoners from racial discrimination while California is concerned with their safety).
274. Id. at 1148-49, 1152 (majority opinion).
275. See supra Part IV.A.
276. See supra Part IV.B.
277. See supra Part IV.B.
278. See supra Part IV.C.
279. See supra Part IV.C.