GARRISON S. JOHNSON v. CALIFORNIA

SUPREME COURT OF THE UNITED STATES

125 S. Ct. 1141 (2005)

JUDGES: O'Connor, J., delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Ginsburg, J., filed a concurring opinion, in which Souter and Breyer, JJ., joined. Stevens, J., filed a dissenting opinion. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Rehnquist, C. J., took no part in the decision of the case.

Justice **O'Connor** delivered the opinion of the Court.

The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy.

I

A

CDC institutions house all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival. During that time, prison officials evaluate the inmates to determine their ultimate placement. Double-cell assignments in the reception centers are based on a number of factors, predominantly race. In fact, the CDC has admitted that the chances of an inmate being assigned a cellmate of another race are "'[p]retty close'" to zero percent. The CDC further subdivides prisoners within each racial group. Thus, Japanese-Americans are housed separately from Chinese-Americans, and Northern California Hispanics are separated from Southern California Hispanics.

The CDC's asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs. It cites numerous incidents of racial violence in CDC facilities and identifies five major prison gangs in the State: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. The CDC also notes that prison-gang culture is violent and murderous. An associate warden testified that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard. Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated. The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger to others.

With the exception of the double cells in reception areas, the rest of the state prison facilities--dining areas, yards, and cells--are fully integrated. After the initial 60-day period, prisoners are allowed to choose their own cellmates. The CDC usually grants inmate requests to be housed together, unless there are security reasons for denying them.

B

Garrison Johnson is an African-American inmate in the custody of the CDC. He has been incarcerated since 1987 and, during that time, has been housed at a number of California prison facilities. Upon his arrival at Folsom prison in 1987, and each time he was transferred to a new facility thereafter, Johnson was double-celled with another African-American inmate.

Johnson filed a complaint *pro se* in the United States District Court for the Central District of California on February 24, 1995, alleging that the CDC's reception-center housing policy violated his right to equal protection under the Fourteenth Amendment by assigning him cellmates on the basis of his race. He alleged that, from 1987 to 1991, former CDC Director James Rowland instituted and enforced an unconstitutional policy of housing inmates according to race. Johnson made the same allegations against former Director James Gomez for the period from 1991 until the filing of his complaint. The District Court dismissed his complaint for failure to state a claim. The Court of Appeals for the Ninth Circuit reversed and remanded, holding that Johnson had stated a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Johnson* v. *California*, 207 F.3d 650, 655 (9th Cir. 2000).

On remand, Johnson was appointed counsel and granted leave to amend his complaint. On July 5, 2000, he filed his Fourth Amended Complaint. Johnson claimed that the CDC's policy of racially segregating all inmates in reception-center cells violated his rights under the Equal Protection Clause.

Johnson has consistently challenged, and the CDC has consistently defended, the policy as a whole--as it relates to both new inmates and inmates transferred from other facilities. Johnson was first segregated in 1987 as a new inmate when he entered the CDC facility at Folsom. Since 1987, he has been segregated each time he has been transferred to a new facility. Thus, he has been subject to the CDC's policy both as a new inmate and as an inmate transferred from one facility to another.

After discovery, the parties moved for summary judgment. The District Court granted summary judgment to the defendants. The Court of Appeals for the Ninth Circuit affirmed. It held that the constitutionality of the CDC's policy should be reviewed under the deferential standard we articulated in *Turner* v. *Safley*, 482 U.S. 78 (1987) --not strict scrutiny. 321 F.3d at 798-799. Applying *Turner*, it held that Johnson had the burden of refuting the "common-sense connection" between the policy and prison violence. Though it believed this was a "close case," *id*. at 798, the Court of Appeals concluded that the policy survived *Turner*'s deferential standard, 321 F.3d at 807. We granted certiorari to decide which standard of review applies. 540 U.S. 1217 (2004).

II

A

We have held that "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." *Ibid.* We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, see *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003), race-based preferences in government contracts, see *Adarand*, *supra* at 226, and race-based districting intended to improve minority representation, see *Shaw* v. *Reno*, 509 U.S. 630, 650 (1993).

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989)

(plurality opinion). We therefore apply strict scrutiny to *all* racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."

The CDC claims that its policy should be exempt from our categorical rule because it is "neutral"--that is, it "neither benefits nor burdens one group or individual more than any other group or individual." Brief for Respondents 16. In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw*, *supra*, at 651. Indeed, we rejected the notion that separate can ever be equal--or "neutral"--50 years ago in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and we refuse to resurrect it today. See also *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991) (rejecting the argument that race-based peremptory challenges were permissible because they applied equally to white and black jurors and holding that "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

We have previously applied a heightened standard of review in evaluating racial segregation in prisons. In *Lee* v. *Washington*, 390 U.S. 333 (1968) *(per curiam),* we upheld a three-judge court's decision striking down Alabama's policy of segregation in its prisons. *Id*., at 333-334. Alabama had argued that desegregation would undermine prison security and discipline, *id*., at 334, but we rejected that contention. Three Justices concurred "to make explicit something that is left to be gathered only by implication from the Court's opinion"--"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." *Ibid.* (emphasis added). The concurring Justices emphasized that they were "unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility.*" *Shaw*, *supra* at 643. Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." *Shaw*, *supra* at 648; see also Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002) (in a study of prison desegregation, finding that "over [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated"). See also Brief for Former State Corrections Officials as *Amici Curiae* 19 (opinion of former corrections officials from six States that "racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence" and that "a blanket policy of racial segregation of inmates is contrary to sound prison management").

The CDC's policy is unwritten. Although California claimed at oral argument that two other States follow a similar policy, see Tr. of Oral Arg. 30-31, this assertion was unsubstantiated, and we are unable to confirm or deny its accuracy. Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. Federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit racial segregation. 28 CFR § 551.90 (2004)

("[BOP] staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs"). The United States contends that racial integration actually "leads to less violence in BOP's institutions and better prepares inmates for re-entry into society." Brief for United States as *Amicus Curiae* 25. Indeed, the United States argues, based on its experience with the BOP, that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence." *Id.*, at 24. As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible.

Because the CDC's policy is an express racial classification, it is "immediately suspect." *Shaw*, 509 U.S., at 642. We therefore hold that the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest.

B

The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and instead to apply the deferential standard of review articulated in *Turner* v. *Safley*, 482 U.S. 78 (1987), because its segregation policy applies only in the prison context. We decline the invitation. In *Turner*, we considered a claim by Missouri prisoners that regulations restricting inmate marriages and inmate-to-inmate correspondence were unconstitutional. *Id*. at 81. We rejected the prisoners' argument that the regulations should be subject to strict scrutiny, asking instead whether the regulation that burdened the prisoners' fundamental rights was "reasonably related" to "legitimate penological interests." *Id*. at 89.

We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification, and it cast no doubt on *Lee.* We think this unsurprising, as we have applied *Turner*'s reasonable-relationship test *only* to rights that are "inconsistent with proper incarceration." *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003); see also *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"). This is because certain privileges and rights must necessarily be limited in the prison context. See *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("'[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" Thus, for example, we have relied on *Turner* in addressing First Amendment challenges to prison regulations, including restrictions on freedom of association, *Overton*, *supra;* limits on inmate correspondence, *Shaw* v. *Murphy*, 532 U.S. 223 (2001); restrictions on inmates' access to courts, *Lewis* v. *Casey*, 518 U.S. 343 (1996); restrictions on receipt of subscription publications, *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); and work rules limiting prisoners' attendance at religious services, *Shabazz*, *supra*. We have also applied *Turner* to some due process claims, such as involuntary medication of mentally ill prisoners, *Washington* v. *Harper*, 494 U.S. 210 (1990); and restrictions on the right to marry, *Turner*, *supra*.

The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner.* It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance 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. Race discrimination is "especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979). And public respect for our

system of justice is undermined when the system discriminates based on race. Cf. *Batson* v. *Kentucky*, 476 U.S. 79, 99 (1986). 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. For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the "deliberate indifference" standard, rather than *Turner*'s "reasonably related" standard. This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment. See *Spain* v. *Procunier*, 600 F.2d 189, 193-194 (9th Cir. 1979) (Kennedy, J.) ("[T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes. . . . Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary" (internal quotation marks omitted)).

In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination. Granting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our "unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey* v. *Kemp*, 481 U.S. 279, 309 (1987).

The CDC argues that "[d]eference to the particular expertise of prison officials in the difficult task of managing daily prison operations" requires a more relaxed standard of review for its segregation policy. But we have refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion. For example, we have held that, despite the broad discretion given to prosecutors when they use their peremptory challenges, using those challenges to strike jurors on the basis of their race is impermissible. See *Batson*, *supra* at 89-96. Similarly, in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race. Compare generally *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (partisan gerrymandering), with *Shaw* v. *Reno,* 509 U.S. 630 (1993) (racial gerrymandering).

We did not relax the standard of review for racial classifications in prison in *Lee*, and we refuse to do so today. Rather, we explicitly reaffirm what we implicitly held in *Lee:* The "necessities of prison security and discipline," 390 U.S. at 334, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities. See *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (citing *Lee* for the principle that "protecting prisoners from violence might justify narrowly tailored racial discrimination"); *J. A. Croson Co.*, 488 U.S. at 521 (Scalia, J., concurring) (citing *Lee* for the proposition that "only a social emergency rising to the level of imminent danger to life or limb--for example, a prison race riot, requiring temporary segregation of inmates--can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens'" (quoting *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); see also *Pell*, 417 U.S. at 823 ("[C]entral to all other corrections goals is the institutional consideration of internal security within the correctional facilities themselves").

Justice Thomas would subject race-based policies in prisons to *Turner*'s deferential standard of review because, in his view, judgments about whether race-based policies are necessary "are better left in the first instance to the officials who run our Nation's prisons." But *Turner* is too lenient a standard to ferret out invidious uses of race. *Turner* requires only that the policy be "reasonably

related" to "legitimate penological interests." 482 U.S. at 89. *Turner* would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal. See, *e.g.*, 321 F.3d, at 803 (case below) (reasoning that, under *Turner*, the Court of Appeals did "not have to agree that the policy actually advances the CDC's legitimate interest, but only [that] 'defendants might reasonably have thought that the policy would advance its interests'"). See also *Turner*, *supra* at 90 (warning that *Turner* is not a "least restrictive alternative test" (internal quotation marks omitted)).

For example, in Justice Thomas' world, prison officials could segregate visiting areas on the ground that racial mixing would cause unrest in the racially charged prison atmosphere. Under *Turner*, "[t]he prisoner would have to prove that there would *not* be a riot. [But] [i]t is certainly 'plausible' that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could potentially lead to conflict." 336 F.3d at 1120 (case below) (Ferguson, J., dissenting from denial of rehearing en banc). Indeed, under Justice Thomas' view, there is no obvious limit to permissible segregation in prisons. It is not readily apparent why, if segregation in reception centers is justified, segregation in the dining halls, yards, and general housing areas is not also permissible. Any of these areas could be the potential site of racial violence. If Justice Thomas' approach were to carry the day, even the blanket segregation policy struck down in *Lee* might stand a chance of survival if prison officials simply asserted that it was necessary to prison management. We therefore reject the *Turner* standard for racial classifications in prisons because it would make rank discrimination too easy to defend.

The CDC protests that strict scrutiny will handcuff prison administrators and render them unable to address legitimate problems of race-based violence in prisons. Not so. Strict scrutiny is not "strict in theory, but fatal in fact." *Grutter*, 539 U.S. at 326-27 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"). Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety. Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end. See *id.* at 327 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied").

The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Adarand*, *supra* at 229-230. At this juncture, no such determination has been made. On remand, the CDC will have the burden of demonstrating that its policy is narrowly tailored with regard to new inmates as well as transferees. Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account.

III

We do not decide whether the CDC's policy violates the Equal Protection Clause. We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

The **Chief Justice** took no part in the decision of this case.

Justice **Ginsburg,** with whom Justice **Souter** and Justice **Breyer** join, concurring.

I join the Court's opinion, subject to the reservation expressed in *Grutter* v. *Bollinger*, 539 U.S. 306, 344-346 (2003) (Ginsburg, J., concurring).

The Court today resoundingly reaffirms the principle that state-imposed racial segregation is highly suspect and cannot be justified on the ground that "'all persons suffer [the separation] in equal degree.'" While I join that declaration without reservation, I write separately to express again my conviction that the same standard of review ought not control judicial inspection of every official race classification. As I stated most recently in *Gratz* v. *Bollinger*, 539 U.S. 244, 301 (2003) (dissenting opinion): "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."

There is no pretense here, however, that the California Department of Corrections (CDC) installed its segregation policy to "correct inequalities." Experience in other States and in federal prisons strongly suggests that CDC's race-based assignment of new inmates and transferees, administratively convenient as it may be, is not necessary to the safe management of a penal institution.

Disagreeing with the Court that "strict scrutiny" properly applies to any and all racial classifications, but agreeing that the stereotypical classification at hand warrants rigorous scrutiny, I join the Court's opinion.

Justice **Stevens,** dissenting.

In my judgment a state policy of segregating prisoners by race during the first 60 days of their incarceration, as well as the first 60 days after their transfer from one facility to another, violates the Equal Protection Clause of the Fourteenth Amendment. The California Department of Corrections (CDC) has had an ample opportunity to justify its policy during the course of this litigation, but has utterly failed to do so whether judged under strict scrutiny or the more deferential standard set out in *Turner* v. *Safley,* 482 U.S. 78 (1987). The CDC had no incentive in the proceedings below to withhold evidence supporting its policy; nor has the CDC made any offer of proof to suggest that a remand for further factual development would serve any purpose other than to postpone the inevitable. I therefore agree with the submission of the United States as *amicus curiae* that the Court should hold the policy unconstitutional on the current record.

The CDC's segregation policy is based on a conclusive presumption that housing inmates of different races together creates an unacceptable risk of racial violence. Under the policy's logic, an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence. The CDC, however, has offered scant empirical evidence or expert opinion to justify this use of race under even a minimal level of constitutional scrutiny. The presumption underlying the policy is undoubtedly overbroad. The CDC has made no effort to prove what fraction of new or transferred inmates are members of race-based gangs, nor has it shown more generally that interracial violence is disproportionately greater than intraracial violence in its prisons. Proclivity toward racial violence unquestionably varies from inmate to inmate, yet the CDC applies its blunderbuss policy to *all* new and transferred inmates housed in double cells regardless of their criminal histories or records of previous incarceration. Under the CDC's policy, for example, two car thieves of different races--neither of whom has any history of gang involvement, or of violence, for that matter--would be barred from being housed together during their first two months of prison. This result derives

from the CDC's inflexible judgment that such integrated living conditions are simply too dangerous. This Court has never countenanced such racial prophylaxis.

To establish a link between integrated cells and violence, the CDC relies on the views of two state corrections officials. They attested to their belief that double-celling members of different races would lead to violence and that this violence would spill out into the prison yards. One of these officials, an associate warden, testified as follows:

> "[W]ith the Asian population, the control sergeants have to be more careful than they do with Blacks, Whites, and Hispanics because, for example, you cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it. The same with Laotians, Vietnamese, Cambodians, Filipinos. You have to be very careful about housing other Asians with other Asians. It's very culturally heavy." App. 189a.

Such musings inspire little confidence. Indeed, this comment supports the suspicion that the policy is based on racial stereotypes and outmoded fears about the dangers of racial integration. This Court should give no credence to such cynical, reflexive conclusions about race. See, *e.g., Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

The very real risk that prejudice (whether conscious or not) partly underlies the CDC's policy counsels in favor of relaxing the usual deference we pay to corrections officials in these matters. We should instead insist on hard evidence, especially given that California's policy is an outlier when compared to nationwide practice.

In support of its policy, the CDC offers poignant evidence that its prisons are infested with violent race-based gangs. The most striking of this evidence involves a series of riots that took place between 1998 and 2001 at Pelican Bay State Prison. That prison houses some of the State's most violent criminal offenders, including "validated" gang members who have been transferred from other prisons. The riots involved both interracial and intraracial violence. In the most serious incident, involving 250-300 inmates, "Southern Hispanic" gang members, joined by some white inmates, attacked a number of black inmates.

Our judicial role, however, requires that we scratch below the surface of this evidence, lest the sheer gravity of a threat be allowed to authorize any policy justified in its name. Upon inspection, the CDC's *post hoc*, generalized evidence of gang violence is only tenuously related to its segregation policy. Significantly, the CDC has not cited a single specific incident of interracial violence between cellmates--much less a *pattern* of such violence--that prompted the adoption of its unique policy years ago. Nor is there any indication that antagonism between cellmates played any role in the more recent riots the CDC mentions. And despite the CDC's focus on prison gangs and its suggestion that such gangs will recruit new inmates into committing racial violence during their 60-day stays in the reception centers, the CDC has cited no evidence of such recruitment, nor has it identified any instances in which new inmates committed racial violence against other new inmates in the common areas, such as the yard or the cafeteria. Perhaps the CDC's evidence might provide a basis for arguing that at Pelican Bay and other facilities that have experienced similar riots, some race-conscious measures are justified if properly tailored. But even if the incidents cited by the CDC, which occurred in the general prison population, were relevant to the conditions in the reception centers, they provide no support for the CDC's decision to apply its segregation policy to *all* of its reception centers, without regard for each center's security level or history of racial

violence. Nor do the incidents provide any support for a policy applicable only to cellmates, while the common areas of the prison in which the disturbances occurred remain fully integrated.

Given the inherent indignity of segregation and its shameful historical connotations, one might assume that the CDC came to its policy only as a last resort. Distressingly, this is not so: There is no evidence that the CDC has ever experimented with, or even carefully considered, race-neutral methods of achieving its goals. That the policy is unwritten reflects, I think, the evident lack of deliberation that preceded its creation.

Specifically, the CDC has failed to explain why it could not, as an alternative to automatic segregation, rely on an individualized assessment of each inmate's risk of violence when assigning him to a cell in a reception center. The Federal Bureau of Prisons and other state systems do so without any apparent difficulty. For inmates who are being transferred from one facility to another--who represent approximately 85% of those subject to the segregation policy--the CDC can simply examine their prison records to determine if they have any known gang affiliations or if they have ever engaged in or threatened racial violence. For example, the CDC has had an opportunity to observe the petitioner for almost 20 years; surely the CDC could have determined his placement without subjecting him to a period of segregation. For new inmates, assignments can be based on their presentence reports, which contain information about offense conduct, criminal record, and personal history--including any available information about gang affiliations. In fact, state law requires the county probation officer to transmit a presentence report to the CDC along with an inmate's commitment papers.

Despite the rich information available in these records, the CDC considers these records only rarely in assigning inmates to cells in the reception centers. The CDC's primary explanation for this is administrative inefficiency--the records, it says, simply do not arrive in time. The CDC's counsel conceded at oral argument that presentence reports "have a fair amount of information," but she stated that, "in California, the presentence report does not always accompany the inmate and frequently does not. It follows some period of time later from the county." Tr. of Oral Arg. 33. Despite the state-law requirement to the contrary, counsel informed the Court that the counties are not preparing the presentence reports "in a timely fashion." *Ibid.* Similarly, with regard to transferees, counsel stated that their prison records do not arrive at the reception centers in time to make cell assignments. *Id.*, at 28. Even if such inefficiencies might explain a temporary expedient in some cases, they surely do not justify a system-wide policy. When the State's interest in administrative convenience is pitted against the Fourteenth Amendment's ban on racial segregation, the latter must prevail. When there has been no "serious, good faith consideration of workable race-neutral alternatives that will achieve the [desired goal]," *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003), and when "obvious, easy alternatives" are available, *Turner,* 482 U.S. at 90, the conclusion that CDC's policy is unconstitutional is inescapable regardless of the standard of review that the Court chooses to apply.

Justice **Thomas,** with whom Justice **Scalia** joins, dissenting.

The questions presented in this case require us to resolve two conflicting lines of precedent. On the one hand, as the Court stresses, this Court has said that "'*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.'" *Gratz* v. *Bollinger,* 539 U.S. 244 (2003) (emphasis added) (quoting *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 224 (1995)). On the other, this Court has no less categorically said that "the [relaxed] standard of review we adopted in *Turner [v. Safley,* 482 U.S. 78 (1987),] applies to *all* circumstances in which the needs

of prison administration implicate constitutional rights." *Washington* v. *Harper,* 494 U.S. 210, 224 (1990) (emphasis added).

Emphasizing the former line of cases, the majority resolves the conflict in favor of strict scrutiny. I disagree. The Constitution has always demanded less within the prison walls. Time and again, even when faced with constitutional rights no less "fundamental" than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons. There is good reason for such deference in this case. California oversees roughly 160,000 inmates, in prisons that have been a breeding ground for some of the most violent prison gangs in America--all of them organized along racial lines. In that atmosphere, California racially segregates a portion of its inmates, in a part of its prisons, for brief periods of up to 60 days, until the State can arrange permanent housing. The majority is concerned with sparing inmates the indignity and stigma of racial discrimination. California is concerned with their safety and saving their lives. I respectfully dissent.

I

To understand this case, one must understand just how limited the policy at issue is. That requires more factual background than the Court's opinion provides. Petitioner Garrison Johnson is a black inmate in the California Department of Corrections (CDC), currently serving his sentence for murder, robbery, and assault with a deadly weapon. Johnson began serving his sentence in June 1987 at the California Institution for Men in Chino, California. Since that time he has been transferred to a number of other facilities within the CDC.

When an inmate like Johnson is admitted into the California prison system or transferred between the CDC's institutions, he is housed initially for a brief period--usually no more than 60 days--in one of California's prison reception centers for men. In 2003, the centers processed more than 40,000 newly admitted inmates, almost 72,000 inmates returned from parole, over 14,000 inmates admitted for other reasons, and some portion of the 254,000 inmates who were transferred from one prison to another.

At the reception center, prison officials have limited information about an inmate, "particularly if he has never been housed in any CDC facility." App. 303a. The inmate therefore is classified so that prison officials can place the inmate in appropriate permanent housing. During this process, the CDC evaluates the inmate's "physical, mental and emotional health." *Ibid.* The CDC also reviews the inmate's criminal history and record in jail to assess his security needs and classification level. Finally, the CDC investigates whether the inmate has any enemies in prison. This process determines the inmate's ultimate housing placement and has nothing to do with race.

While the process is underway, the CDC houses the inmate in a one-person cell, a two-person cell, or a dormitory. The few single cells available at reception centers are reserved for inmates who present special security problems, including those convicted of especially heinous crimes or those in need of protective custody. At the other end of the spectrum, lower risk inmates are assigned to dormitories. Placement in either a single cell or a dormitory has nothing to do with race, except that prison officials attempt to maintain a racial balance within each dormitory. Inmates placed in single cells or dormitories lead fully integrated lives: The CDC does not distinguish based on race at any of its facilities when it comes to jobs, meals, yard and recreation time, or vocational and educational assignments.

Yet some prisoners, like Johnson, neither require confinement in a single cell nor may be safely housed in a dormitory. The CDC houses these prisoners in double cells during the 60-day period. In pairing cellmates, race is indisputably the predominant factor. California's reason is simple: Its

prisons are dominated by violent gangs. Brief for Respondents 1-5. And as the largest gangs' names indicate--the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, the Nazi Low Riders, and La Nuestra Familia--they are organized along racial lines. See Part II-B, *infra.*

According to the State, housing inmates in double cells without regard to race threatens not only prison discipline, but also the physical safety of inmates and staff. That is because double cells are especially dangerous. The risk of racial violence in public areas of prisons is high, and the tightly confined, private conditions of cells hazard even more violence. Prison staff cannot see into the cells without going up to them, and inmates can cover the windows to prevent the staff from seeing inside the cells. The risk of violence caused by this privacy is grave, for inmates are confined to their cells for much of the day.

Nevertheless, while race is the predominant factor in pairing cellmates, it is hardly the only one. After dividing this subset of inmates based on race, the CDC further divides them based on geographic or national origin. As an example, Hispanics from Northern and Southern California are not housed together in reception centers, because they often belong to rival gangs--La Nuestra Familia and the Mexican Mafia, respectively. Likewise, Chinese and Japanese inmates are not housed together, nor are Cambodians, Filipinos, Laotians, or Vietnamese. In addition to geographic and national origin, prison officials consider a host of other factors, including inmates' age, mental health, medical needs, criminal history, and gang affiliation. For instance, when Johnson was admitted in 1987, he was a member of the Crips, a black street gang. He was therefore ineligible to be housed with nonblack inmates.

Moreover, while prison officials consider race in assigning inmates to double cells, the record shows that inmates are not necessarily housed with other inmates of the same race during that 60-day period. When a Hispanic inmate affiliated with the Crips asked to be housed at the reception center with a black inmate, for example, prison administrators granted his request. Such requests are routinely granted after the 60-day period, when prison officials complete the classification process and transfer an inmate from the reception center to a permanent placement at that prison or another one.

II

Traditionally, federal courts rarely involved themselves in the administration of state prisons, "adopt[ing] a broad hands-off attitude toward problems of prison administration." *Procunier* v. *Martinez,* 416 U.S. 396, 404 (1974). For most of this Nation's history, only law-abiding citizens could claim the cover of the Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend them. In recent decades, however, this Court has decided that incarceration does not divest prisoners of all constitutional protections.

At the same time, this Court quickly recognized that the extension of the Constitution's demands behind prison walls had to accommodate the needs of prison administration. This Court reached that accommodation in *Turner* v. *Safley,* 482 U.S. 78 (1987), which "adopted a unitary, deferential standard for reviewing prisoners' constitutional claims," *Shaw*, *supra* at 229 That standard should govern Johnson's claims, as it has governed a host of other claims challenging conditions of confinement, even when restricting the rights at issue would otherwise have occasioned strict scrutiny. Under the *Turner* standard, the CDC's policy passes constitutional muster, because it is reasonably related to legitimate penological interests.

A

Well before *Turner*, this Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country. See, *e.g., Jones* v. *North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977) (courts must give "appropriate deference to the decisions of prison administrators"); *Procunier, supra* at 405 ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform"). *Turner* made clear that a deferential standard of review would apply across-the-board to inmates' constitutional challenges to prison policies.

At issue in *Turner* was the constitutionality of a pair of Missouri prison regulations limiting inmate-to-inmate correspondence and inmate marriages. The Court's analysis proceeded in two steps. First, the Court recognized that prisoners are not entirely without constitutional rights. As proof, it listed certain constitutional rights retained by prisoners, including the right to be "protected against invidious racial discrimination . . ., *Lee* v. *Washington,* 390 U.S. 333 (1968)." *Turner*, 482 U.S. at 84. Second, the Court concluded that for prison administrators rather than courts to "'make the difficult judgments concerning institutional operations,'" *id.* at 89, courts should uphold prison regulations that impinge on those constitutional rights if they reasonably relate to legitimate penological interests. Nowhere did the Court suggest that *Lee*'s right to be free from racial discrimination was immune from *Turner*'s deferential standard of review. To the contrary, "[w]e made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Harper,* 494 U.S. at 224.

Consistent with that understanding, this Court has applied *Turner*'s standard to a host of constitutional claims by prisoners, regardless of the standard of review that would apply outside prison walls. And this Court has adhered to *Turner* despite being urged to adopt different standards of review based on the constitutional provision at issue. Our steadfast adherence makes sense: If *Turner* is our accommodation of the Constitution's demands to those of prison administration, we should apply it uniformly to prisoners' challenges to their conditions of confinement.

After all, Johnson's claims, even more than other claims to which we have applied *Turner*'s test, implicate *Turner*'s rationale. In fact, in a passage that bears repeating, the *Turner* Court explained precisely why deference to the judgments of California's prison officials is necessary:

> "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. The rule would also distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration." 482 U.S. at 89.

The majority's failure to heed that advice is inexplicable, especially since *Turner* itself recognized the "growing problem with prison gangs." *Id.* at 91. In fact, there is no more "intractable problem" inside America's prisons than racial violence, which is driven by race-based prison gangs.

B

The majority decides this case without addressing the problems that racial violence poses for wardens, guards, and inmates throughout the federal and state prison systems. But that is the core of California's justification for its policy: It maintains that, if it does not racially separate new cellmates thrown together in close confines during their initial admission or transfer, violence will erupt.

The dangers California seeks to prevent are real. Controlling prison gangs is the central challenge facing correctional officers and administrators. The worst gangs are highly regimented and sophisticated organizations that commit crimes ranging from drug trafficking to theft and murder. In fact, street gangs are often just an extension of prison gangs, their "foot soldiers" on the outside. And with gang membership on the rise, the percentage of prisoners affiliated with prison gangs more than doubled in the 1990's.

The problem of prison gangs is not unique to California, but California has a history like no other. There are at least five major gangs in this country--the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, La Nuestra Familia, and the Texas Syndicate--all of which originated in California's prisons. Unsurprisingly, then, California has the largest number of gang-related inmates of any correctional system in the country, including the Federal Government.

As their very names suggest, prison gangs like the Aryan Brotherhood and the Black Guerrilla Family organize themselves along racial lines, and these gangs perpetuate hate and violence. Interracial murders and assaults among inmates perpetrated by these gangs are common. And, again, that brutality is particularly severe in California's prisons.

C

It is against this backdrop of pervasive racial violence that California racially segregates inmates in the reception centers' double cells, for brief periods of up to 60 days, until such time as the State can assign permanent housing. Viewed in that context and in light of the four factors enunciated in *Turner*, California's policy is constitutional: The CDC's policy is reasonably related to a legitimate penological interest; alternative means of exercising the restricted right remain open to inmates; racially integrating double cells might negatively impact prison inmates, staff, and administrators; and there are no obvious, easy alternatives to the CDC's policy.

1

First, the policy is reasonably related to a legitimate penological interest. *Turner*, 482 U.S. at 89. The protection of inmates and staff is undeniably a legitimate penological interest. California's policy bears a valid, rational connection to this interest. The racial component to prison violence is impossible for prison administrators to ignore. In combating that violence, an inmate's arrival or transfer into a new prison setting is a critical time for inmate and staff alike. The policy protects an inmate from other prisoners, and they from him, while prison officials gather more information, including his gang affiliation, about his compatibility with other inmates. This connection between racial violence and the policy makes it far from "arbitrary or irrational." *Turner*, *supra* at 89-90.

2

Second, alternative means of exercising the restricted right remain open to inmates like Johnson. The CDC submits, and Johnson does not contest, that all other facets of prison life are fully integrated: work, vocational, and educational assignments; dining halls; and exercise yards and recreational facilities. And after a brief detention period at the reception center, inmates may

select their own cellmates regardless of race in the absence of overriding security concerns. Simply put, Johnson has spent, and will continue to spend, the vast bulk of his sentence free from any limitation on the race of his cellmate.

3

Third, Johnson fails to establish that the accommodation he seeks--*i.e.*, assigning inmates to double cells without regard to race--would not significantly impact prison personnel, other inmates, and the allocation of prison resources. Prison staff cannot see into the double cells without going up to them, and inmates can cover the windows so that staff cannot see inside the cells at all. Because of the limited number of staff to oversee the many cells, it "would be very difficult to assist inmates if the staff were needed in several places at one time." *Ibid.* Coordinated gang attacks against nongang cellmates could leave prison officials unable to respond effectively. In any event, diverting prison resources to monitor cells disrupts services elsewhere.

Then, too, fights in the cells are likely to spill over to the exercise yards and common areas. As *Turner* made clear: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." 482 U.S. at 90. California prison officials are united in the view that racially integrating double cells in the reception centers would lead to serious violence. This is precisely the sort of testimony that the Court found persuasive in *Turner* itself.

4

Finally, Johnson has not shown that there are "obvious, easy alternatives" to the CDC's policy. Johnson contends that, for newly admitted inmates, prison officials need only look to the information available in the presentence report that must accompany a convict to prison. But prison officials already do this to the extent that they can. Indeed, gang affiliation, not race, is the first factor in determining initial housing assignments. Race becomes the predominant factor only because gang affiliation is often not known, especially with regard to newly admitted inmates. As the Court of Appeals pointed out: "There is little chance that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate." 321 F.3d 791, 806 (9th Cir. 2003). Even if the CDC had the manpower and resources to prescreen the more than 40,000 new inmates it receives yearly, leafing through presentence reports would not tell prison officials what they need to know.

Johnson presents a closer case with regard to the segregation of prisoners whom the CDC transfers between facilities. As I understand it, California has less need to segregate prisoners about whom it already knows a great deal (since they have undergone the initial classification process and been housed for some period of time). However, this does not inevitably mean that racially integrating transferred inmates, while obvious and easy, is a true alternative. For instance, an inmate may have affiliated with a gang since the CDC's last official assessment, or his past lack of racial violence may have been due to the absence of close confinement with members of other races. The CDC's policy does not appear to arise from laziness or neglect; California is a leader in institutional intelligence-gathering. In short, applying the policy to transfers is not "arbitrary or irrational," requiring that we set aside the considered contrary judgment of prison administrators.

III

The majority claims that strict scrutiny is the applicable standard of review based on this Court's precedents and its general skepticism of racial classifications. It is wrong on both scores.

A

Only once before, in *Lee* v. *Washington,* 390 U.S. 333 (1968) *(per curiam)*, has this Court considered the constitutionality of racial classifications in prisons. The majority claims that *Lee* applied "a heightened standard of review." But *Lee* did not address the applicable standard of review. And even if it bore on the standard of review, *Lee* would support the State here.

In *Lee*, a three-judge District Court ordered Alabama to desegregate its prisons under *Brown* v. *Board of Education,* 347 U.S. 483 (1954). This Court, in a *per curiam*, one-paragraph opinion, affirmed the District Court's order. *Lee* said nothing about the applicable standard of review, for there was no need. Surely Alabama's wholesale segregation of its prisons was unconstitutional even under the more deferential standard of review that applies within prisons. This Court's brief, *per curiam* opinion in *Lee* simply cannot bear the weight or interpretation the majority places on it.

Yet even if *Lee* had announced a heightened standard of review for prison policies that pertain to race, *Lee* also carved out an exception to the standard that California's policy would certainly satisfy. As the *Lee* concurrence explained without objection, the Court's exception for "the necessities of prison security and discipline" meant 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." *Lee*, *supra* at 334 (opinion of Black, Harlan, and Stewart, JJ., concurring) (emphasis added).

California's policy--which is a far cry from the wholesale segregation at issue in *Lee*--would fall squarely within *Lee*'s exception. Johnson has never argued that California's policy is motivated by anything other than a desire to protect inmates and staff. And the "particularized" nature of the policy is evident: It applies only to new inmates and transfers, only in a handful of prisons, only to double cells, and only then for a period of no more than two months. In the name of following a test that *Lee* did not create, the majority opts for a more demanding standard of review than *Lee*'s language even arguably supports.

The majority heavily relies on this Court's statement that "'all racial classifications [imposed] by government] . . . must be analyzed by a reviewing court under strict scrutiny.'" (quoting *Adarand Constructors, Inc.*, 515 U.S. at 227). *Adarand* has nothing to do with this case. *Adarand*'s statement that "all racial classifications" are subject to strict scrutiny addressed the contention that classifications favoring rather than disfavoring blacks are exempt. *Id.* at 226-27; accord, *Grutter* v. *Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part). None of these statements overruled, *sub silentio, Turner* and its progeny, especially since the Court has repeatedly held that constitutional demands are diminished in the unique context of prisons.

B

The majority offers various other reasons for applying strict scrutiny. None is persuasive. The majority's main reason is that "*Turner*'s reasonable-relationship test [applies] *only* to rights that are 'inconsistent with proper incarceration.'" According to the majority, the question is thus whether a right "need necessarily be compromised for the sake of proper prison administration." This inconsistency-with-proper-prison-administration test begs the question at the heart of this case. For a court to know whether any particular right is inconsistent with proper prison administration, it must have some implicit notion of what a proper prison ought to look like and how it ought to be administered. But the very issue in this case is whether such second-guessing is permissible.

The majority's test eviscerates *Turner.* Inquiring whether a given right is consistent with "proper prison administration" calls for precisely the sort of judgments that *Turner* said courts were ill

equipped to make. The Court has steadfastly refused to undertake the threshold standard-of-review inquiry that *Turner* settled, and that the majority today resurrects. And with good reason: As *Turner* pointed out, these judgments are better left in the first instance to the officials who run our Nation's prisons, not to the judges who run its courts.

In place of the Court's usual deference, the majority gives conclusive force to its own guesswork about "proper" prison administration. It hypothesizes that California's policy might incite, rather than diminish, racial hostility. The majority's speculations are implausible. New arrivals have a strong interest in promptly convincing other inmates of their willingness to use violent force. In any event, the majority's guesswork falls far short of the compelling showing needed to overcome the deference we owe to prison administrators.

The majority contends that the Court "[has] put the burden on state actors to demonstrate that their race-based policies are justified" and "[has] refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion." Yet two Terms ago, in upholding the University of Michigan Law School's affirmative-action program, this Court deferred to the judgment by the law school's faculty and administrators on their need for diversity in the student body. See *Grutter, supra* at 328. Deference would seem all the more warranted in the prison context, for whatever the Court knows of administering educational institutions, it knows much less about administering penal ones. The potential consequences of second-guessing the judgments of prison administrators are also much more severe. More important, as I have explained, the Court has recognized that the typically exacting review it applies to restrictions on fundamental rights must be relaxed in the unique context of prisons. The majority cannot fall back on the Constitution's usual demands, because those demands have always been lessened inside the prison walls.

Finally, the majority presents a parade of horribles designed to show that applying the *Turner* standard would grant prison officials unbounded discretion to segregate inmates throughout prisons. But we have never treated *Turner* as a blank check to prison officials. Quite to the contrary, this Court has long had "confidence that . . . a reasonableness standard is not toothless." *Abbott*, 490 U.S. at 414. California prison officials segregate only double cells, because only those cells are particularly difficult to monitor--unlike "dining halls, yards, and general housing areas." Were California's policy not so narrow, the State might well have race-neutral means at its disposal capable of accommodating prisoners' rights without sacrificing their safety. The majority does not say why *Turner*'s standard ably polices all other constitutional infirmities, just not racial discrimination. In any event, it is not the refusal to apply--for the first time ever--a strict standard of review in the prison context that is "fundamentally at odds" with our constitutional jurisprudence. Instead, it is the majority's refusal--for the first time ever--to defer to the expert judgment of prison officials.

IV

Even under strict scrutiny analysis, "it is possible, even likely, that prison officials could show that the current policy meets the test." 336 F.3d 1117, 1121 (9th Cir. 2003) (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc). As Johnson concedes, all States have a compelling interest in maintaining order and internal security within their prisons. Thus the question on remand will be whether the CDC's policy is narrowly tailored to serve California's compelling interest.