Criminal Law and Procedure

Johnson v. California: When Does "All" Mean "All?"

*By Tom Gede**

In February 2005 the U.S. Supreme Court, in a 5-3 decision, refused to craft a prison exception to its now firmly-anchored command that "'[a]ll racial classifications [imposed by government] . . . must be analyzed . . . under strict scrutiny.'" *Johnson v. California*.[1, 2] Will this decision point to similar outcomes in other civil rights cases involving race on the grounds that "all" racial classifications will be subject to strict scrutiny? Quite probably that is the case, but only for divergent reasons. All in all, there were only two votes in *Johnson* embracing the notion that the higher standard properly applies "to any and *all* racial classifications" [3] without exception.

Indeed, while the five-member majority in *Johnson v. California* requires strict scrutiny for the prison rights at issue, a majority of justices appear not to embrace wholeheartedly the above command for *all* cases involving racial classifications. The two-member dissent of Justices Thomas and Scalia argue strict scrutiny should not automatically apply in prison administration cases involving racial classifications. The three-member concurrence of Justices Ginsburg, Souter and Breyer opines that, while appropriate here, strict scrutiny ought not be applied "to any and all racial classifications,[4]" citing Justice Ginsburg's reservations in her concurrence in the 2003 law school admissions case of *Grutter v. Bollinger*.[5] Justice Stevens dissented on the ground the record did not justify the prison's segregation practices, no matter which standard is applied. At minimum, then, it seems at least four justices, and possibly five, do not fully subscribe to the command to subject "all" racial classifications to strict scrutiny. That leaves only Justices O'Connor, the author of *Johnson*, and Justice Kennedy arguably as the strongest defenders of the standard for all cases involving racial classifications.

The dissent in *Johnson* has its own italicized "all" to remark upon, in noting that the Court previously had adhered to a standard of deference to prison administrators under *Turner v. Safley*[6] in all cases involving constitutional claims by prisoners.[7] Indeed, Justice Thomas starts his dissent by witnessing the Court's conflicting categorical statements. "On the one hand, . . . 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, 270 (2003) (emphasis added) (quoting Adarand Constructors, Inc. v. PeZa, 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* [. . .] applies to all circumstances in which the needs of prison administration implicate constitutional rights.'"[8]

As Justice Thomas observes, the majority resolves this conflict in favor of strict scrutiny. Disagreeing, he says the Constitution has always demanded less within the prison walls. "Even when faced with constitutional rights no less 'fundamental' than the right to be free from state-sponsored racial discrimination," he writes, "we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons."[9] Justice Thomas uses the dissenting opinion to provide an exacting analysis of the court's prison standards jurisprudence, highly recommended for the student of prison rights. Clearly, however, it did not carry the day.

I. CDC's double-celling practice

At issue in *Johnson* was California's practice of segregating on the basis of race new and transferring male prisoners at "reception centers" in double cells for up to 60 days each time they enter a new correctional facility. The California Department of Corrections (CDC) houses all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival.[10] During that time, prison officials evaluate the inmates to determine their ultimate placement. The temporary double-cell assignments in the reception centers are based on a number of factors, including race, according to the CDC.[11] However, invariably, inmates of the same racial and ethnic background are housed together during this evaluation period. Racial classifications are not an issue in other aspects of the state prison system, as all other facilities, including dining areas, yards and cells are fully integrated.

The emphatic concern of CDC officials has been the prevention of violence related to prison and street gang affiliations, most often organized along racial and ethnic lines.[12] Indeed, as Justice Thomas notes, the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, the Nazi Low Riders, and La Nuestra Familia are organized along racial lines.[13] As Justice Thomas further notes, these gangs perpetuate hate and violence, and interracial murders and assaults among inmates perpetrated by these gangs are common.[14]

CDC relies on its own classification process for each new inmate, starting from a rough profile from county records, during which it completes an evaluation of the inmate's physical, mental and emotional health.[15] To determine the inmate's security needs, CDC evaluates the prisoner's criminal history, history in jail, previous prison or jail commitments, and whether he has enemies elsewhere in prison, including people who may have testified against him in the past or in his criminal case, or inmates with whom he may have had disputes during previous jail or prison placements.[16]

Because of a shortage of space, single-celling at reception centers is reserved for inmates who present special

security problems. CDC includes those convicted of very notorious crimes; those in need of protective custody because of their effeminate appearance, extreme youth or old age, or small stature; former law enforcement officers; known informants; and known gang leaders.[17]

In arguing that race is only one of many considerations prison officials take into account, CDC informed the Court that prison officials look at the relative ages of the potential cellmates, avoiding the placement of an older inmate with a much younger inmate; the relative size of the potential cellmates, avoiding the placement of a large inmate with an inmate of a much slighter build; and various "case factors" and "custody concerns," including, among other things, the inmate's need for psychiatric or specialized medical care, criminal and escape history, the need for protective or confidential placement, and prison gang or street gang affiliation. CDC officials work to discern gang affiliation from a number of visual cues, including race, tattoos, haircut, or displays of gang colors on items of clothing or items carried on the person.[18]

II. The Court's response

The case arose out of years of litigation by plaintiff inmate Johnson seeking damages for the double-celling practices as an infringement of his constitutional rights. The district court granted summary judgment to CDC officials on grounds that they were entitled to qualified immunity because their conduct was not clearly unconstitutional. The Court of Appeals for the Ninth Circuit affirmed,[19] holding the constitutionality of the CDC's policy should be reviewed under the deferential standard the Supreme Court articulated in *Turner v. Safley*,[20] not strict scrutiny. The Supreme Court granted review to decide which standard of review applies.[21]

On review in the Supreme Court, the five-member majority made short work of CDC's justification of double-celling by race and its argument for the *Turner* standard for its procedures. Without hesitation, the Court sprang to its standard articulated in *Adarand Constructors, Inc. v. PeZa*,[22] when it said: "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny."[23] To emphasize the standard's universality, the Court noted it has insisted on strict scrutiny "in every context," and then cited its holdings on "benign" racial classifications, such as race-conscious university admissions policies,[24] race-based preferences in government contracts,[25] and race-based districting intended to improve minority representation.[26] Concluding the CDC's policy is "immediately suspect" as an express racial classification, it now requires the CDC to demonstrate that the policy is narrowly tailored to serve a compelling state interest. The Court declined to decide whether the CDC policy violates equal protection, and remanded the case to the lower courts to apply strict scrutiny in the first instance.[27]

Just as quickly the Court dispatched the CDC's claim that its policy should be exempt from the strict scrutiny standard and its concomitant burden because it is "neutral," meaning that all prisoners are "equally" segregated. Citing *Shaw v. Reno*,[28] the Court reiterated that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally," and even relied on *Brown v. Board of Education*[29] for the Court's rejection of the notion that separate can ever be equal—or "neutral."[30]

The Court majority also rests on the 1968 decision in *Lee v. Washington*,[31] where it upheld a three-judge panel's order directing desegregation in Alabama's prisons. It is the case that in Lee, three Justices concurred to express the view 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."[32] But the three justices make clear that this right is limited and its recognition does not "dilute" the Court's commitment to the Fourteenth Amendment.[33]

The interesting play of conflicting categorical commands is found in the Court's—and the dissent's—treatment of *Turner v. Safley*, *supra*. In *Turner*, the Court adopted a reasonableness standard that asks whether a regulation that burdens prisoners' fundamental rights is "reasonably related" to "legitimate penological interests."[34] Turner, it should be noted, took into account the Court's previous regard for *Lee v. Washington*, when it recited the set of principles that necessarily frame an analysis of prisoners' constitutional claims.[35] Federal courts, it noted, must take cognizance of the valid constitutional claims of prison inmates.[36] Among those to which the *Turner* Court pointed were: prisoners retain the constitutional right to petition the government for the redress of grievances,[37]; they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment,[38] and they enjoy the protections of due process.[39]

Brushing aside CDC's argument that the *Turner* standard is rigorous and searching enough to root out any invidious discrimination against prisoners,[40] the *Johnson* majority simply stated it has never applied the Turner standard to racial classifications.[41] *Turner* itself did not involve such a classification, the Court observed, "and it cast no doubt on *Lee*."[42] The Court stated it applies *Turner* only to rights that are "inconsistent with proper incarceration."[43] Compliance with the Fourteenth Amendment's ban on racial discrimination is, according to the *Johnson* majority, "consistent with proper prison administration," adding further that "[r]ace discrimination is 'especially pernicious in the administration of justice.'"[44] In short, the Court in *Johnson* equates CDC's double-celling, which invariably occurs along racial lines, with the invidious racial discrimination barred by *Lee v. Washington*. As Justice O'Connor pens:

> 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.[45]

Justice O'Connor writes further that the "necessities of prison security and discipline,"[46] are a "compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities, *see, e.g.*, *Grutter v. Bollinger*, 539 U. S. 306." It is in *Grutter*, of course, that Justice O'Connor wrote that the use of race in the law school admissions policies at the University of Michigan were in fact subject to strict scrutiny, but nonetheless met the heightened test of being narrowly tailored to meet compelling governmental interests. Consistent with her words in this *Johnson* case - and the remand for further analysis - her language in *Grutter* reflects her embracing of the categorical involved:

> Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[47]

III. The dissenting opinion

The dissent in *Johnson* tackles the conflict of categorical commands in part by noting "just how limited the policy at issue is."[48] Putting the matter in context, Justice Thomas, joined by Justice Scalia, notes that "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."[49] California's prisons, housing some 160,000 prisoners, have been a breeding ground for some of the most violent prison gangs in America—"all of them organized along racial lines."[50] While the majority is concerned with "sparing inmates the indignity and stigma of racial discrimination," he writes, "California is concerned with their safety and saving their lives."[51]

While the majority accepts the notion advanced by certain amici and the U.S. Solicitor General that racial integration of prisoners actually leads to less violence,[52] the dissent accepts the CDC's contention that housing inmates in tightly-confined double cells without regard to race threatens not only prison discipline, but also the physical safety of inmates and staff.[53] The dissent takes issue with the amount of actual segregation that occurs, citing figures such as "10.3% of all wardens at maximum security facilities in the United States report that their inmates are assigned to racially segregated cells—apparently on a permanent basis."[54] Apparently, such policies are the result of discretionary decisions by wardens rather than of official state directives.[55]

Ultimately, Justice Thomas takes the dissent to the question of *Turner* and *Adarand* and *Grutter*. He writes that none of the categorical statements in the latter two cases 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."[56] *Adarand*, he notes, only addressed the contention that racial classifications favoring rather than disfavoring blacks are exempt from strict scrutiny.[57] For most of the Nation's history, Justice Thomas writes, "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."[58] In writing for the majority in *Overton v. Bazzetta*,[59] a visitation rights case, Justice Kennedy noted:

> The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.[60]

Clearly, the Court has moved in the direction of finding that incarceration does not divest prisoners of all constitutional protections.[61] However, as for *Lee v. Washington, supra*,[62] Justice Thomas confirms that *Lee* did not address an applicable standard of review—no less a "heightened" one.[63] There, in a *per curiam*, one-paragraph opinion the Court affirmed an order to Alabama to desegregate its prisons under *Brown v. Board of Education*, supra. At issue there, of course, was the complete and permanent racial segregation in all the state's penal facilities. Where the District Court, affirmed by the *per curiam* opinion, allowed for segregation by race for limited periods where needed for prison security and discipline, the Court expressed no standard for evaluating such actions.[64]

Ultimately, it was *Turner* that set forth the Court's recognition that there must be an accommodation between constitutional rights of prisoners and the needs of prison administration. In *Turner*, there was a two-step analysis reflecting (1) that prisoners retain certain constitutional rights, including the right to be "protected against invidious racial discrimination;"[65] and (2) prison administrators rather than courts should "'make the difficult judgments concerning institutional operations,'"[66] Thus, the reasoning goes, the *Turner* Court necessarily recognized that the deferential standard—upholding prison regulations if they reasonably relate to legitimate penological interests—would apply to the infringement of constitutional rights. Justice Thomas writes:

> 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."[67]

In urging *Turner* to be applied uniformly to a prisoner's challenge to his condition of confinement, Justice Thomas recited those cases to date where the Court refused to adopt a different standard of review for such claims.[68] Even fully recognizing that inmates retain rights not inconsistent with proper incarceration, it has been *Turner* that has provided

the standard by which to judge prison administration actions infringing upon those rights. As Justice Thomas puts it:

> [T]his Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country. [. . .] *Turner* made clear that a deferential standard of review would apply across-the-board to inmates' constitutional challenges to prison policies.

Finally, the dissent adopts the view that, under the *Turner* standard, the CDC's practice of double-celling by race for the 60-day evaluation period passes constitutional muster. Following the four-part test of *Turner*, as urged upon the Court by the CDC, Justice Thomas concludes (1) the CDC's policy is reasonably related to a legitimate penological interest (reducing violence to inmates and staff arising from racially-aligned gang-related activity); (2) alternative means of exercising the restricted right remain open to inmates; (3) racially integrating double cells might negatively impact prison inmates, staff, and administrators; and (4) there are no obvious, easy alternatives to the CDC's policy.[69] Forcing an integration of new and transferring inmates based solely on non-race factors would purposefully overlook the clear race-related aspects of ethnically- and racially-aligned gang activity. As Justice Thomas writes, the CDC's policy "does not appear to arise from laziness or neglect; California is a leader in institutional intelligence-gathering."[70] It would seem it is precisely in such conditions that courts should defer to the judgment of prison administrators under a rational relationship test. But, again, the argument did not persuade a majority of the Court.

IV. Conclusion

Johnson v. California puts in sharp focus a conflict in the categorical commands of the Court—all cases involving racial classifications are subject to strict scrutiny—and all cases involving challenges of prison regulations are subject to the *Turner* deferential standard of review. Here, the Court majority resolved the conflict in favor of the former formulation. Seen beyond the context of a prison case, *Johnson* demonstrates the more agonizing struggle of the Court when racial classifications are at issue. From questions on law school admission preferences to questions about institutions solely for persons of Hawaiian ancestry, the categorical commands are subject to expressed reservations, concurring opinions and vigorous dissents. Justices O'Connor and Kennedy appear to have been the most consistent in uniformly applying the higher standards, even if it results in upholding a law, regulation or practice under the higher standard.

It is not clear whether the dissent in *Johnson* believes that the CDC practice will survive strict scrutiny. The Court majority repeats the adage that strict scrutiny is not "strict in theory, but fatal in fact."[71] "Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety," the majority says.[72] While the University of Michigan Law School may have met the higher standard, it is difficult to know whether prison officials in California or elsewhere facing the possibility of racially-motivated gang-related violence can persuade federal courts of their compelling interests.

Justice Thomas, in his dissent, reflects on how the inmate plaintiff Johnson acknowledges the presence of racially-motivated gang violence in prison and fears that racial violence could be directed at himself.[73] In his final comment, Justice Thomas muses that "[p]erhaps on remand the CDC's policy will survive strict scrutiny, but in the event that it does not, Johnson may well have won a Pyrrhic victory."[74]

* Tom Gede is Executive Director, Conference of Western Attorneys General (CWAG) and teaches Federal Indian Law as an adjunct professor at University of the Pacific - McGeorge School of Law. Views expressed are his own and do not represent CWAG.

Footnotes

[1] 543 U.S. ___, 125 S. Ct. 1141, 160 L. Ed.2d 949 (2005), slip opn. at 4-5 (quoting Adarand Constructors, Inc. v. PeZa, 515 U.S. 200, 227 (1995) (emphasis added)). Chief Justice Rehnquist took no part in the decision. While the 5-member majority decided that the strict scrutiny standard applied, it remanded the case without determining whether the challenged CDC practice was unconstitutional as a violation of the Equal Protection Clause. In dissenting, Justice Stevens would have had the Court find the CDC's practice unconstitutional outright. (Thomas, J. and Scalia, J., dissenting, on the basis that the strict scrutiny standard should not apply to the CDC's practice).

[2] This *Johnson v. California*, No. 03–636, should not be confused with *Johnson v. California*, No. 04–6964, decided June 13, 2005, concerning purposeful discrimination in jury selection. The latter may be found at 125 S. Ct. 2410, 73 USLW 4460.

[3] *Johnson*, *supra*, slip opn. at 3 (Ginsburg, J., concurring)(italics added).

[4] *See* n.3.

[5] 539 U.S. 306, 344–346 (Ginsburg, J., concurring).

[6] 482 U.S. 78 (1987).

[7] Johnson v. California, 543 U.S. ___ (2005) (Thomas, J., dissenting) (slip opn. at 1; also at 7-8) ("[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.' Washington v. Harper, 494 U.S. 210, 224 (1990) (emphasis added).'").

[8] *Ibid*.

[9] *Ibid*.

[10] Respondents' Brief at 6. According to the CDC, the double-celling practice takes place at seven of California's thirty-two prisons. They are used for first-time inmates as well as to inmates transferring within the state correctional system. In 2003, the seven reception centers for male inmates processed more than 40,000 newly admitted inmates

and almost 72,000 inmates who were returned from parole, in addition to a portion of the 254,000 already admitted male inmates who were moved from one facility to another.

[11] Respondents' Brief at 6.

[12] *Johnson*, slip opn. at 2, at 9-10 (Thomas, J., dissenting).

[13] *Johnson*, at 10-11(Thomas, J., dissenting).

[14] *Ibid*.

[15] *Id*. at 7.

[16] *Ibid*.

[17] *Id*. at 7-8.

[18] *Id*. at 8.

[19] 321 F. 3d 791 (2003).

[20] 482 U.S. 78 (1987).

[21] 540 U.S. 1217 (2004).

[22] 515 U.S. 200, 227 (1995). *See also* Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989).

[23] *Johnson*, slip opn., at 4-5.

[24] *Id*. (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

[25] *Id*. (citing *Adarand, supra*, *at* 226).

[26] *Id*. (citing Shaw v. Reno, 509 U.S. 630, 650 (1993)).

[27] *Id*., slip opn., at 15.

[28] 509 U.S. 630, 650 (1993).

[29] 347 U.S. 483 (1954).

[30] *Johnson*, slip opn. at 6.

[31] 390 U.S. 333 (1968) (per curiam).

[32] *Johnson*, slip opn. at 6, (quoting *Lee v. Washington, supra*, at 334 (emphasis added)).

[33] *Ibid*., citing *Lee, supra*, (Black J., Harlan J., and Stewart J., concurring).

[34] 482 U.S. 78, 89.

[35] *Id*. at 84; Respondents' Brief at 20. The Brief characterizes a four-part test under *Turner*: "whether the [challenged] practice has a valid, rational connection to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the practice."

[36] *Id*. at 84. (citing Procunier v. Martinez, 416 U.S. 396, 413-414 (1974)).

[37] *Ibid*. (citing Johnson v. Avery, 393 U.S. 483 (1969)).

[38] *Ibid*. (citing *Lee v. Washington, supra)*.

[39] *Ibid*., (citing Wolff v. McDonnell, 418 U.S. 539 (1974) and Haines v. Kerner, 404 U.S. 519 (1972)).

[40] Respondents Brief, at 16.

[41] *Johnson*, slip opn. at 9.

[42] *Ibid*.

[43] *Ibid*. (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003); Pell v. Procunier, 417 U.S. 817, 822 (1974)).

[44] Johnson, slip opn. at 10 (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

[45] *Ibid*.

[46] *Ibid*. (quoting *Lee v. Washington, supra*, at 334).

[47] *Grutter v. Bollinger*, *supra*, at 326-27 (quoting Adarand Constructors, Inc. v. PeZa, *supra*, 515 U.S. at 229-230).

[48] *Johnson*, slip opn. at 2 (Thomas, J., dissenting).

[49] *Ibid*.

[50] *Id*. at 1-2.

[51] *Id*. at 2.

[52] *Johnson*, slip opn. at 8. (majority opinion).

[53] *Johnson*, slip opn. at 4 (Thomas, J., dissenting).

[54] *Id*. at 23.

[55] *Ibid*.; there was some dispute as to whether other states or the federal government permitted similar temporary racial segregation in prisons, but the dispute was not dispositive of the question of the legal standard before the Court. Justice Thomas points to the argument of several States with less severe problems which nonetheless maintained that policies like California's are necessary to deal with race-related prison violence, citing the Brief of the States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as *Amici Curiae*.

[56] *Ibid*. (citing *Harper, supra*, 494 U. S., at 224; Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); *Turner, supra*, 482 U.S., at 85; Webster v. Fall, 266 U.S. 507, 511 (1925)).

[57] *Id*. at 19 (citing *Adarand*, 515 U.S. at 226-227; accord, Grutter v. Bollinger, 539 U.S. 306, 353 (2003))(Thomas, J., concurring in part and dissenting in part).

[58] *Id*. at 5 (citing Shaw v. Murphy, 532 U.S. 223, 228 (2001); Ruffin v.

Commonwealth, 62 Va. 790, 796 (1871)).

[59] 539 U.S. 126 (2003).

[60] *Id*. at 131-132 (citing Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977); Shaw v. Murphy, *supra*, 532 U.S. at 229).

[61] *Ibid*. (citing Wolff v. McDonnell, *supra*, 418 U.S. at 555–556 (the right to due process) and Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam)(the right to free exercise of religion)).

[62] 390 U.S. 333 (1968) (per curiam).

[63] *Johnson*, slip opn. at 16-17; and at 27 (Thomas, J., dissenting) ("The Court of Appeals, like Johnson, did not equate Lee's test with strict scrutiny, and . . . [e]ven Johnson did not make the leap equating Lee with strict scrutiny when he requested that the Court of Appeals rehear his case. [. . .] That leap was first made by the judges who dissented from the Court of Appeals' denial of rehearing *en banc*. 336 F. 3d, at 1118 (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing *en banc*).").

[64] *Ibid*.

[65] *Turner*, *supra*, 482 U.S. at 84 (citing Lee v. Washington, *supra*, 390 U.S. 333).

[66] *Id*. at 89, quoting *Jones, supra*, 433 U.S. at 128.

[67] *Johnson*, slip opn. at 7-8. (Thomas, J., dissenting).

[68] *Id*., at 8 (citing *Harper*, *supra*, 494 U.S. at 224) (Turner's standard of review "appl[ies] in all cases in which a prisoner asserts that a prison regulation violates the Constitution, *not just those in which the prisoner invokes the First Amendment*" (emphasis added)); O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) ("We take this opportunity to reaffirm our refusal, *even where claims are made under the First Amendment*, to substitute our judgment on . . . difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison." (internal quotation marks and citation omitted; emphasis added)).

[69] *Id.* at 12-16.

[70] *Id*. at 16.

[71] *Johnson*, slip opn. at 14 (majority opinion)(quoting *Adarand*, *supra*, 515 U.S., at 237 (internal quotation marks omitted)) *See also Grutter*, 539 U.S., at 326–327 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.").

[72] *Ibid*.

[73] *Johnson*, slip opn. at 28 (Thomas, J., dissenting).

[74] *Ibid*.