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## Supreme Court Watch

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# SUPREME COURT WATCH



By Reginald C. Oh

In its 2004–05 Term, the U.S. Supreme Court decided a constitutional challenge to the State of California’s practice of temporarily racially segregating its prisoners. On November 2, 2004, the Court heard oral arguments in *Johnson v. California*, No. 03–636, a lawsuit brought by an African-American prison inmate in the California Department of Corrections. The petitioner contends that the state’s long-standing policy of racially segregating prisoners for sixty days violates the Equal Protection Clause. On February 23, 2005, the Court issued its opinion in *Johnson v. California*, 125 S. Ct. 1141 (2005), and held that the policy of racially segregating prisoners must be subject to strict scrutiny.

The petitioner, Garrison Johnson, is an African-American prisoner currently serving his prison term for murder, robbery, and assault with a deadly weapon. He entered the California Institute for Men in Chino, California, on June 22, 1987. Upon a prisoner’s arrival at a corrections facility, it is the policy of the CDC to initially house the prisoner in a reception center for sixty days, where he undergoes various physical, mental, and emotional evaluations. All inmates, including both new inmates and inmates transferring from another CDC prison facility, are initially housed in the reception center.

Johnson’s equal protection claim focused on the CDC’s policy of taking race into account when determining double-cell placements at the reception center. Each inmate is assigned a cellmate, and the CDC takes into consideration various factors in assigning an inmate’s cellmate. One of those factors is the race of the prisoners, and the state concedes that race is a dominant factor in double-cell placement decisions. The CDC categorizes inmates into four general racial categories—black, white, Asian, and other—and all prisoners are assigned a cellmate of his own race.

The petitioner in this case had been through several inmate reception centers in the CDC system, and at each facility, he was initially assigned an African-American cellmate. He brought suit in the U.S. District Court for the

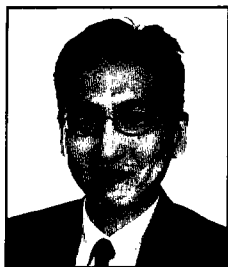
Central District of California, challenging the racial assignment policy as a violation of his equal protection. The district court granted summary judgment in favor of the CDC administrators, concluding that they were entitled to qualified immunity because their actions clearly did not violate a constitutional right. The Ninth Circuit Court of Appeals affirmed the district court ruling, *Johnson v. California*, 321 F.3d 791 (9th Cir. 2003). Petitioner then appealed the Ninth Circuit ruling to the U.S. Supreme Court.

A central issue in this case is the question regarding the appropriate standard of review. Under equal protection law, typically, laws that classify on the basis of race are subject to strict judicial scrutiny. Laws that employ racial classifications are treated as presumptively unconstitutional, and such laws will survive strict scrutiny only if the state can put forth a compelling state interest in discriminating on the basis of race and if the racial classification is necessary to serve that compelling state interest. Historically, under strict scrutiny review, the Court has struck down laws that discriminated on the basis of race, holding that in each case, the government has failed to meet its heavy burden of justifying racial discrimination.

In *Johnson*, however, the Ninth Circuit, in upholding the constitutionality of California’s policy of racially segregating prison inmates, did not use the strict scrutiny standard of review. Instead, it relied on the *Turner* test developed by the Supreme Court to analyze constitutional claims in the prison context. See *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, the Court adopted a deferential standard of review for analyzing constitutional challenges brought by prisoners. To determine if a prison regulation violates an inmate’s constitutional rights, the Court ruled that a regulation will be valid if it is reasonably related to serving legitimate penological interests. *Id.* at 89.

Under the *Turner* test, four factors are analyzed to determine the constitutionality of a prison regulation. “First, there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” *Id.* Second, there must be “alternative means of exercising the right that remains open to prison inmates.” *Id.* at 90. Third, a court must assess “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.” *Id.* Finally, a court must determine if the prison had alternatives for achieving the same end. “The absence of ready alternatives is evidence of the reasonableness of a prison regulation.” *Id.*

In applying the four-part *Turner* test to the facts in *Johnson*, the Ninth Circuit concluded that the temporary racial segregation of inmates in reception centers did not violate equal protection. First, the court held that there is a valid, rational connection between the regulation and the government’s legitimate interest, concluding that racial segregation of inmates is rationally related to furthering the state’s inter-



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est in protecting the safety of inmates and staff. Both sides agreed that inmate violence along racial lines was a serious and legitimate concern, and that court reasoned that temporary racial segregation of inmates was related to reducing racial violence and maintaining a safe prison environment.

Second, the court held that inmates had alternative means of exercising their constitutional rights. The policy only required segregation of inmates for sixty days during their stay in the reception center. After the sixty day period is up, inmates are then assigned cellmates in a racially neutral manner. Thus, the court concluded that overall, inmates could exercise their right to be free from race conscious decision-making while an inmate in the California prison system.

Third, the court assessed the impact of plaintiff's requested accommodation, and held that "failing to consider race in making initial housing assignments would lead to increased racial violence both in the cells and in the common areas." Finally, the court concluded that the plaintiff failed to show that there were any reasonable alternatives to deal with the problem of racial violence between inmates. In holding that the CDC's policy does not violate equal protection, the court asserted that the *Turner* test requires that the state be given great deference in how it regulates its prisons and its inmates. The court interpreted *Turner* as having "lowered the prison administrators' burden to justify race-based policies." 321 F. 3d at 798.

On appeal, the U.S. Supreme Court reversed the Ninth Circuit decision, holding that the *Turner* test is inapplicable in determining the constitutionality of racial segregation in prisons. *Johnson*, 125 S. Ct. at 1148-49. Instead, the Court reiterated the principle that all racial classifications must be subject to strict judicial scrutiny, even racial classifications used in the prison context. *Id.* at 1148. The Court, however, determined the appropriate standard of review, but it did not decide the ultimate question regarding the constitutionality of California's policy of racial segregation, leaving that decision for the lower courts.

Justice O'Connor wrote the opinion for the majority, while Justice Thomas wrote a dissent in which Justice Scalia joined. Justice Thomas would have applied the *Turner* test and would have upheld California's policy of racial segregation. Justice Stevens wrote a separate dissent, arguing that the majority did not go far enough and that it should have ruled that the policy is unconstitutional instead of remanding the case to the lower courts.

In holding that the proper standard of review is strict scrutiny, the Court reasoned that applying the deferential *Turner* test to an equal protection challenge to the government's practice of racial segregation is inconsistent with the Court's recent equal protection rulings in which it has emphatically declared that there are very few contexts in which de jure racial discrimination and segregation can ever be justified. *Id.* at 1146. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), for example, the Court upheld race-conscious affirmative action programs, but in doing so, it reaffirmed that even "benign" racial classifications must be subject to strict scrutiny, and it strongly hinted that it would permit the use of affirmative action programs for only twenty-five more years.

Furthermore, the Court reasoned that upholding government sponsored racial segregation in the prison context would conflict with the view that governmental reliance on racial classifications makes it harder to achieve a color-blind society in which race truly becomes a morally irrelevant factor in governmental and private decision-making. *See id.* at 1147. The Court reasoned that the State of California's reliance on racial segregation as a tool for prison management may end up reinforcing racial divisions, racial stereotypes, and inter-racial conflicts, and thus contribute to the very racial violence that it is purportedly seeking to prevent through its policy. *Id.*

However, while the Court made it clear what standard of review must apply to determine the constitutionality of racial segregation in prisons, in *Johnson*, the Court declined to apply strict scrutiny to the facts of the case, and instead, remanded the case for either the district court or the court of appeals to determine whether California's policy meets the strict scrutiny test.

Thus, even after the Court's decision in *Johnson*, a critical question remains unanswered: does racial segregation in prisons violate the Equal Protection Clause? There is a strong possibility that the lower court may uphold the practice of racial segregation even under strict scrutiny analysis. Clearly, the state has a compelling interest in preserving safety and in preventing racial violence in prisons. The critical question on remand, therefore, will be whether the temporary racial segregation of all inmates entering the reception center is narrowly tailored or necessary to further the state's compelling interest. If the court accepts the contention that racial segregation may sometimes be necessary to reduce racial violence in prisons, the court would be hard pressed to deny the state an effective tool in preventing death and injury to inmates and prison staff. Given the strong interests at stake, and the potential loss of life that could result if the state is required to discontinue its racial segregation policy, the court may very well be able to conclude that there are no other effective means to prevent racial violence besides racial segregation.

The case that might ultimately provide the best rationale for a decision declaring that racial segregation in prisons meets the strict scrutiny test is the infamous *Korematsu v. United States*, 323 U.S. 214 (1944), decision. In that case, while purporting to apply a rigorous form of judicial scrutiny, the Court upheld the evacuation and internment of Japanese and Japanese Americans during World War II, even though the government put forth no real credible evidence that persons of Japanese ancestry posed a threat to national security. The Court deferred to the judgment of the federal government and military officials, and given the high stakes involved, permitted the deprivation of civil liberties on the basis of one's race or national origin.

Thus, in *Johnson*, *Korematsu* would also justify giving some deference to the government, even under strict scrutiny, given the state's compelling goal of preserving prison security and of preventing unnecessary deaths and injury. Just as in *Korematsu*, when wartime provided exigent circumstances justifying a government policy of racial segregation, the always danger-

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ous prison context similarly provides an ongoing emergency situation in which the threat of eruption of racial violence may require deference to the state in how it decides to regulate its prison systems.

While the *Korematsu* decision has justly been criticized for justifying racial paranoia and invidious racial subordination, it still remains good constitutional law, and even though the court may not cite to the case in justifying its decision, the underlying principle of *Korematsu* may very well be the implicit doctrinal basis for giving prison administrators some discretion and authority to engage in racial segregation in the prison context. Thus, even though the Court held that strict judicial scrutiny is necessary to determine the constitutionality of racial segregation in prisons, there is a possibility that strict scrutiny ultimately may not be fatal in fact.

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