JOHNSON V. CALIFORNIA: A GRAYER SHADE OF *BROWN*

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INTRODUCTION

For decades, the famous school desegregation case of *Brown v. Board of Education*[1] and its progeny have supported the notion "that a State may not constitutionally require [racial] segregation of public facilities."[2] Indeed, with regard to state-mandated racial segregation, the doctrine of "separate but equal" has long been considered dead and buried.[3] In February 2005, however, the Supreme Court of the United States in *Johnson v. California*[4] curiously reopened the segregation question by replacing the post-*Brown* ban on racial segregation with the strict scrutiny standard of review afforded to all other racial classifications,[5] thereby muddying the once clear doctrinal waters.

Johnson dealt with an unwritten policy of the California Department of Corrections (CDC), by which new correctional facility prisoners were segregated in double cells according to race for up to sixty days.[6] During those sixty days, prison officials "evaluate[d] the inmates to determine their ultimate placement."[7] Although the

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam) (citing *Brown*, 347 U.S. at 495) In this case, the Court reversed the conviction of a black citizen for refusing to sit in the seats reserved for minorities in traffic court. *Id.*

3. Johnson v. California, 543 U.S. 499, 506 (2005) (The U.S. Supreme Court "rejected the notion that that separate can ever be equal—or neutral—50 years ago"); *see* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (upholding a Louisiana state law requiring separate but equal railway cars for blacks and whites), *overruled by* Brown v. Bd of Educ., 347 U.S. at 494–95 (1954) ("Any language in *Plessy v. Ferguson* contrary to this finding [that separate is not equal] is rejected.").

4. *Johnson*, 543 U.S. at 499.

5. *Id.* at 515.

6. *Id.* at 502.

7. *Id.*

double-cell assignments were based on a number of factors including race, the CDC conceded "that the chances of an inmate being assigned a cellmate of another race [were] '[p]retty close' to zero percent."[8]

The CDC asserted that such a policy was "necessary to prevent violence caused by racial gangs."[9] According to one witness, if race were not considered in making initial housing assignments, there would undoubtedly be "racial conflict in the cells and in the yard."[10] All other prison facilities other than the double cells in the reception area were fully integrated—including dining areas, yards, and cells.[11] After the sixty-day holding period, "prisoners [were] allowed to choose their own cellmates" and inmate requests to be housed together were usually granted, barring any "security reasons" for denial.[12]

Garrison S. Johnson was an African-American inmate in the California prison system who had been housed at several California prison facilities[13] since his incarceration and arrival at Folsom prison in 1987.[14] "[E]ach time he was transferred to a new facility . . . , Johnson was double-celled with another African-American inmate."[15]

Importantly, in deciding this case, the *Johnson* Court established strict scrutiny as the proper standard of review for a policy of temporary racial segregation in prisons, stating that "all racial classifications" are subject to strict scrutiny.[16] This decision contrasts, however, with a long line of precedents beginning with *Brown v.*

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8. *Id.* (quoting Appendix to Petition for Writ of Certiorari at 3a, *Johnson*, 543 U.S. 499 (No. 03-636)). "[A] corrections official . . . testified that an exception to this policy was once granted to a Hispanic inmate who had been 'raised with Crips'. . . ." *Id.* at 517 n.1 (Stevens, J., dissenting) (quoting Appendix to Petition for Writ of Certiorari, *supra*, at 184a). Notwithstanding this lone exception, Justice Stevens, dissenting, noted that "the CDC's suggestion that its policy is therefore flexible . . . strains credulity." *Id.* (citation omitted).

9. *Id.* at 502 (majority opinion). The Brief for the Respondents cited several incidents of racially-motivated violence in CDC facilities, identifying "five major prison gangs in the State: Mexican Mafia, Nuestra Familia, Black Guerrilla Family, Aryan Brotherhood, and Nazi Low Riders." *Id.* (citing Brief for Respondents at 2, *Johnson*, 543 U.S. 499 (No. 03-636)).

10. *Id.* at 503 (citing Appendix to Petition for Writ of Certiorari, *supra* note 8, at 215a).

11. *Id.*

12. *Id.*

13. Johnson had previously "been through the inmate reception centers at Chino, Folsom, and Calipatria, and [was] incarcerated at Lancaster" at the time of his appeal to the Ninth Circuit. Johnson v. California, 321 F.3d 791, 793 (9th Cir. 2003).

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

15. *Id.*

16. *Id.* at 505 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

Board of Education,[17] standing for the principle that racial segregation is inherently unequal and thus violative of the Fourteenth Amendment, therefore any racial segregation in public facilities is prohibited.[18] Moreover, *Johnson* does not limit its decision to the prison context, but rather broadly asserts that racial segregation is now to be treated like any other racial classification.[19]

This Note first attempts to present the apparent inconsistencies between the unique historical treatment of racial segregation in *Brown* and progeny and the strict scrutiny standard imposed by *Johnson*. It next examines *Johnson* more closely and presents four interrelated responses that can be used to reconcile these inconsistencies and account for the decision: (1) the court simply failed to consider the issue; (2) the holdings in *Brown* and progeny are more limited than a complete ban on racial segregation in *all* public facilities; (3) an evolution in the social context and meaning attached to racial segregation over fifty-one years has produced a shift in the application of anticlassification and antisubordination principles, allowing *Johnson* to change the standard of review; and (4) in balancing these principles, the imposition of strict scrutiny can be seen as a middle ground or compromise among three sets of precedents—per se prohibition in *Brown*, strict scrutiny in all other racial discrimination jurisprudence such as *Adarand Constructors, Inc. v. Pena*[20] and *Richmond v. J.A. Croson Company*,[21] and the

17. 347 U.S. 483 (1954).

18. *Id.* at 483. There have been numerous post-*Brown* decisions extending the ban on segregation past the realm of public education. *See, e.g.*, Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom seating); Turner v. Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959), *aff'g per curiam* 168 F. Supp. 149 (E.D. La. 1958) (athletic contests); Gayle v. Bowder, 352 U.S. 903 (1956) (state-mandated segregation on buses); Holmes v. Atlanta, 350 U.S. 879 (1955), *vacating per curiam* 223 F.2d 93 (5th Cir. 1955) (municipal golf courses); Mayor of Balt. v. Dawson, 350 U.S. 877 (1955), *aff'g per curiam* 220 F.2d 386 (4th Cir. 1955) (public beaches and bathhouses); Bohler v. Lane, 204 F. Supp. 168 (S.D. Fla. 1962) (separate drinking fountains, restrooms, and entrances at public recreational facilities); Shuttlesworth v. Gaylord, 202 F. Supp. 59 (N.D. Ala. 1961), *aff'd*, 310 F.2d 303 (5th Cir. 1962) (recreational facilities); Banks v. Hous. Auth., 260 P.2d 668 (Cal. Dist. Ct. App. 1953), *cert. denied*, 347 U.S. 974 (1954) (administrative regulation requiring segregation in public housing).

19. *Johnson*, 543 U.S. at 509.

20. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The Court in *Adarand* applied strict scrutiny to preferences toward minority businesses in government contracting. *Id.* at 226.

21. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) The Court in *Croson* held that a minority set-aside program was violative of the Equal Protection Clause because appellant city

deferential "reasonable-relationship" test with respect to other fundamental rights in the prison context in *Turner v. Safley*.[22] Rather than mutually exclusive or competing theories, these reconciliations should be seen as building blocks, each of which contributes to the others' validity.

I. THE *BROWN* DECISION: ITS CONTEXT AND ITS PROGENY

A. Preamble: The Civil War Amendments, Plessy*, and* Korematsu

The aftermath of the Civil War and the accompanying abolition of slavery led to the Thirteenth, Fourteenth and Fifteenth Amendments of the United States Constitution.[23] The Fourteenth Amendment establishes a constitutional definition of national citizenship and forbids the states to abridge the "incidents" of such citizenship.[24] It also forbids the states to deny equal protection to any person or to deprive any person of life, liberty, or property "without due process of law,"[25] and it grants Congress the power to enforce such protection through "appropriate legislation."[26]

The extent to which these amendments restricted the government from regulating or allocating by race, however, remained

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failed to show a compelling interest in apportioning public contract opportunities on the basis of race. *Id.* at 511.

22. Turner v. Safley, 482 U.S. 78 (1987). The Court in *Turner* held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

23. The Thirteenth Amendment prohibits all forms of involuntary servitude and allows Congress to enforce the prohibition through federal law. U.S. CONST. amend. XIII. The Fifteenth Amendment explicitly protects the right to vote from abridgement "on account of race, color, or previous condition of servitude," again allowing Congress to enforce such protection through "appropriate legislation." U.S. CONST. amend. XV. Although the Thirteenth and Fifteenth Amendments are discussed in some of the following cases, this note will focus on the Fourteenth Amendment, the subject of analysis in the *Johnson* and *Brown* cases. *See* Johnson v. California, 543 U.S. 499, 505–15 (2005); Brown v. Bd. of Educ., 347 U.S. 483, 489–96 (1954).

24. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

25. *Id.* ("[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

26. *Id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

unsettled at the time, and "remains unsettled even now."[27] Following the ratification of the three amendments, the Supreme Court marginalized their immediate impact.[28] In a series of cases known as the *Civil Rights Cases*, federal statutes forbidding racial discrimination by commercial enterprises "were held to be excessive, as acts of an unwarranted color-blind zeal."[29] In the eyes of the Court, "[t]he fourteenth amendment provided no basis for such legislation . . . because that amendment reached only the government's own denials of equal protection, not those of private, commercial parties."[30]

With respect to both government and private action, racial discrimination could not be forbidden per se; the question was not whether there was allocation on the basis of race, but rather "whether the particular regulation by race was constitutionally 'reasonable.'"[31] The Court's treatment of the Civil War Amendments reflected deference to legislative bodies to sort out benign from invidious uses of race, and supported the view that as long as "individuals [could] be equally protected, albeit racially regulated, then nothing in the command or ethos of the fourteenth amendment was deemed to deny the use of racial classification to the body of American politics."[32] This view continued to develop through the end of the nineteenth century and was cemented by the "separate but equal" decision of *Plessy v. Ferguson*.[33]

In *Plessy v. Ferguson*, the Supreme Court upheld a Louisiana statute requiring separate railway cars for blacks and whites.[34]

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27. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 775 (1979); *see also id.* at 776–77 ("The materials of enlightened constitutional interpretation permit us . . . to treat the Constitution as repudiating the propriety of regulating people by race or allocating among people by race, but they do not compel that conclusion. It is oddly a matter of what we might wish to make of it.").

28. *Id.* at 780–81 ("With the exception of a few notable cases striking down the most egregious race regulations, the Supreme Court adopted a wholly tolerant and deferential rendering of all three amendments, imputing to them only the most modest consequences." (footnotes omitted)).

29. *Id.* at 780 & nn.14–15.

30. *Id.* at 780.

31. *Id.* at 780–81.

32. *Id.* at 781.

33. 163 U.S. 537, 544 (1896).

34. *Id.* at 542 ("That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for a crime, is too clear for argument."); *id.* at 550–51 ("[W]e cannot say that a law which authorizes is unreasonable, or

Although the Fourteenth Amendment was "undoubtedly [designed] to enforce the absolute equality of the two races before the law," the Court held, "it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality. . . ."[35] Examples of such allegedly lawful distinctions included segregation of public schools[36] and prohibition of intermarriage between the races.[37] The Court further held, moreover, that any tendency of racial segregation to "stamp[] the colored race with a badge of inferiority . . . . [was] not by reason of anything found in the act, but solely because the colored race [chose] to put that construction upon it."[38]

Justice Harlan alone provided a vigorous dissent, rooted in a more expansive view of the Civil War Amendments and drawn from "the lessons of his own contemporary history."[39] The Civil War Amendments, in Justice Harlan's view, were about anticlassification, as they "removed the race line from our governmental systems."[40] To the antisubordination-based argument that the Louisiana statute was applied equally to both whites and blacks, Justice Harlan retorted: "Every one knows that the statute in question had its origins in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by . . . white persons."[41] "No one," he added, "would be so wanting in candor as to assert the contrary."[42]

Taking what he deemed to be a "reasonable construction" of the amendments, Justice Harlan advocated the anticlassification view that the Constitution is "color-blind, and neither knows nor tolerates classes among citizens."[43] Conceding that race pride may be expressed to the extent that "the rights of others . . . are not to be affected," Harlan "den[ied] that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those

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more obnoxious to the Fourteenth Amendment than the acts . . . requiring separate schools for colored children . . . .").

35. *Id.* at 544.

36. *Id.* at 544 (citing Roberts v. Boston, 59 Mass. (5 Cush.) 198, 206 (1849)).

37. *Id.* at 545 (citing State v. Gibson, 36 Ind. 389, 405 (1871)).

38. *Id.* at 551.

39. Van Alstyne, *supra* note 27, at 781.

40. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

41. *Id.* at 557.

42. *Id.*

43. *Id.* at 559.

citizens are involved," for such legislation is "inconsistent not only with that equality of rights which pertain to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States."[44]

For almost fifty-eight years, Justice Harlan's unrequited dissent languished on the dusty bookshelves of judicial history,[45] while the Court continued to hold the view expressed in *Plessy*, that the Fourteenth Amendment did not prevent legislative bodies from regulating by race. State legislative bodies, without much judicial resistance,[46] continued to enact a series of race-based laws.[47] The exclusion of others based on race would remain unchallenged and even unscrutinized until *Korematsu v. United States*.[48]

Three years after the attack on Pearl Harbor, and in the twilight of World War II, the Supreme Court affirmed the conviction of a Japanese American for violating a civilian exclusion order which excluded all persons of Japanese ancestry from a particular

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44. *Id.* at 554–55.

45. Of the twenty-seven cases citing *Plessy* between 1986 and 1954, no federal case mentions Justice Harlan's dissent. Only four state cases mention it. Perez v. Sharp, 198 P.2d 17, 31–32 (Cal. 1948) (granting a petition for mandamus to request the clerk issue a marriage license to a racially mixed couple); Tyler v. Harmon, 104 So. 200, 202–03 (La. 1925) (rejecting the plaintiff's plea that the Fourteenth Amendment made unconstitutional a New Orleans statute prohibiting members of different races from establishing residence in the same neighborhoods); Commonwealth v. George, 61 Pa. Super. 412, 420 (Super. Ct. 1915) (holding that the jury may appropriately determine whether accommodations for African Americans were reasonable); Smith v. State, 46 S.W. 566, 569 (Tenn. 1898) (holding that a Louisiana statute requiring segregation on a public conveyance did not violate the Interstate Commerce Clause); *see also* Chesapeake & O.R. Co. v. Kentucky, 179 U.S. 388, 395 (1900) (Harlan, J., dissenting without opinion) (dissenting from the majority's affirmation of a railway company's conviction for violation of a statute requiring separate cars for the races).

46. A few cases in the time leading up to *Brown*, however, began to erode the applicability of the separate but equal doctrine. *See* McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950) ("[Graduate school segregation] impair[s] and inhibit[s] [students'] ability to study, to engage in discussions and exchange views with other students, and in general to learn [their] profession[s]."); Sweatt v. Painter, 339 U.S. 629, 636 (1950) (ordering the University of Texas Law School to admit a black student on the ground that the nearby black law school was unequal); Sipuel v. Bd. of Regents, 332 U.S. 631, 633 (1948) (per curiam) (holding that it was unconstitutional for the only law school in the state of Oklahoma to deny the petitioner on the basis of his race without providing him a legal education in conformity with that provided to white Oklahoma residents).

47. *See, e.g.*, Berea Coll. v. Kentucky, 211 U.S. 45, 58 (1908) (upholding the trial conviction of a college for violation of a state act by willfully admitting both white and black pupils); McCabe v. Atchison, 186 F. 966, 969 (8th Cir. 1911) (upholding an Oklahoma act requiring racial segregation of railway cars); Hayes v. Crutcher, 108 F. Supp. 582, 584–85 (M.D. Tenn. 1952) (upholding the separate but equal doctrine with respect to public golf courses).

48. Korematsu v. United States, 323 U.S. 214 (1944).

designated military area.[49] The opinion began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[50] Although such legal restrictions are not unconstitutional per se, the majority continued, "courts must subject them to *the most rigid scrutiny*. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[51] Although not explicitly specifying "strict scrutiny" as the standard of review, the court then proceeded to apply a closely analogous level of scrutiny, assessing the compelling need for the order[52] and the narrowness of the military's remedy.[53]

The judicial approval, under *Korematsu*, of legal restrictions that "curtail the civil rights of a single racial group"[54] was short lived, however, as courts began to question the underlying premise of the separate but equal doctrine.[55] In the last of the Supreme Court segregation cases before *Brown*, the Supreme Court implicitly recognized the intangible disadvantages to racial segregation by holding that once black students were admitted to an all-white school, they could not be forced to sit in segregated areas of classrooms, libraries, and cafeterias, as such segregation hindered the students'

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49. *Id.* at 215–16; *see* Hirabayashi v. United States, 320 U.S. 81, 102 (1943) (affirming conviction of defendant for violating curfew imposed on persons of Japanese ancestry).

50. *Korematsu*, 323 U.S. at 216.

51. *Id.* (emphasis added).

52. *See id.* at 219–20 ("Compulsory exclusion of large groups of citizens from their homes, except under the circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."); *id.* at 219 ("[H]ardships are part of war, and war is an aggregation of hardships.").

53. *See id.* at 218 ("We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour [disloyal Japanese Americans] could not readily be isolated and separately dealt with . . . .").

54. *Id.* at 216.

55. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 634 (1950) ("[P]etitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State."); Sipuel v. Bd. of Regents, 332 U.S. 631, 633 (1948) (declaring unconstitutional Oklahoma's refusal to provide legal education for blacks while maintaining a white law school); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938) (issuing a mandamus in favor of the petitioner, an African-American law student who was denied entry into Missouri State University Law School because of his race); Buchanan v. Warley, 245 U.S. 60, 82 (1917) (declaring unconstitutional a Kentucky law mandating racial segregation in housing). *But see* Fisher v. Hurst, 333 U.S. 147, 150–51 (1948) (denying the plaintiff leave to file for a writ of mandamus when the state responded to *Sipuel* by establishing a law school for blacks).

"ability to study, to engage in discussions and exchange views with other students, and, in general, to learn [their] profession."[56]

B. The Brown *Decision*

In the 1952 Term, the Supreme Court granted review in five cases that challenged the *Plessy* doctrine of "separate but equal" with respect to public secondary education.[57] The *Brown* Court unanimously held that "in the field of education the doctrine of 'separate but equal' has no place."[58] The Court's main difficulty in reaching this conclusion was rooted in the clear precedent of *Plessy* that segregation (and, more broadly, distinctions based on color) did not violate the Fourteenth Amendment, and that any alleged stigma or "badge of inferiority" due to segregation existed in the psychological "construction" that "colored people" placed on it.[59]

The Court, however, minimized the propriety of either historical or doctrinal interpretation, choosing instead to examine the realm of public education in light of present day national ethos, noting that "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[60] Citing *Sweatt v. Painter*[61] and *McLaurin v. Oklahoma State Regents*[62] for the proposition that some benefits of education may be intangible, the *Brown* Court held that segregation of public schools, though physical facilities and other "tangible benefits" may be equal, "deprive[s] the children of the minority group of equal educational opportunities" in violation of the Fourteenth Amendment.[63] For support, the Court

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56. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950).

57. For a discussion of the consolidation of the five cases, see RICHARD KLUGER, SIMPLE JUSTICE 540–42 (1975).

58. 347 U.S. 483, 495 (1954).

59. 163 U.S. 537, 551 (1896).

60. *Brown*, 347 U.S. at 492–93; *see also* ROBERT C. POST, CONSTITUTIONAL DOMAINS 43 (1995) ("The decision did not turn on what the ratifiers of the Fourteenth Amendment thought, or on what the Court had previously held in Plessy v. Ferguson. Instead, the ideal of racial equality had become so pressing to the Court that there was no alternative but to interpret the Equal Protection Clause in light of its imperatives. But because this interpretation rested upon an open avowal of a national ideal, *Brown* represented a courageous gamble." (footnotes omitted)).

61. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

62. McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950).

63. *Brown*, 347 U.S. at 493, 495.

relied on "modern authority" in the form of extensive social science evidence.[64] Ignoring the strict scrutiny standard applied to racial classifications in *Hirabayashi v. United States*[65] and *Korematsu*,[66] the *Brown* Court held racial segregation in public schools to be a per se violation of the Fourteenth Amendment.

C. Progeny: The Subsequent Expansion of Brown

As the Supreme Court wrestled with the implementation of school desegregation in various states,[67] it also handed down a series of per curiam summary decisions that extended *Brown* past the realm of public education and into other areas of public life.[68] "In each instance, the fulcrum of judicial leverage was an *existing governmental* race line, which the particular judicial order sought to remove."[69] Despite the controversial nature of the *Brown* decision, the per curiam decisions provided no written opinions for their judgments, but simply cited *Brown* as support, thus implicating the same rationale. This piecemeal expansion of *Brown* to other areas of public facilities eventually led the Supreme Court to declare that "it is no longer open to question that a State may not constitutionally require segregation of public facilities."[70]

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64. *Id.* at 494 n.11.

65. Hirabayashi v. United States, 320 U.S. 81 (1943).

66. *See supra* text accompanying notes 49–53.

67. *See generally* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (addressing the issue of the federal court's power to issue desegregation remedies); Rogers v. Paul, 382 U.S. 198 (1965) (allowing transfers of the petitioners to schools with more extensive curricula while the public schools desegregated at the rate of one grade a year); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (holding that the defendant may not close public schools and open white private schools in lieu of desegregation); Goss v. Bd. of Educ., 373 U.S. 683 (1963) (prohibiting voluntary transfer provisions on the ground that they promoted discrimination); Cooper v. Aaron, 358 U.S. 1 (1958) (ordering desegregation of the Little Rock, Arkansas school system). *But see* Milliken v. Bradley, 418 U.S. 717 (1974) (limiting the power of federal courts in imposing remedies).

68. For a list of examples of these summary decisions, see *supra* note 18.

69. Van Alstyne, *supra* note 27, at 784. Despite this characterization of *Brown*'s progeny, several scholars nevertheless opine that race-consciousness in affirmative action should be viewed differently. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 274 n.8 (1995) (Ginsburg, J., dissenting) ("'To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.'" (quoting Stephen Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433–34 (1988))).

70. Johnson v. Virginia, 373 U.S. 61, 62 (1963) (reversing the appellant's conviction for refusing to sit in the seats reserved for minorities in traffic court).

D. Lee v. Washington*: Racial Segregation in the Prison Context*

The issue of racial segregation in the prison context was not squarely addressed until 1968, when the Supreme Court affirmed, in a per curiam opinion, a three-judge panel decision from the Middle District of Alabama, which held that an Alabama statute requiring racial segregation in prisons and jails violated the Fourteenth Amendment.[71] In the district court, the defendants had argued that the practice was "a matter of routine prison security and discipline and . . . therefore not within the scope of permissible inquiry by the courts."[72] The district court rejected this argument, responding that "[s]ince *Brown v. Board of Education* . . . and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated."[73] The district court recognized that

> there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period . . . [h]owever . . . recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.[74]

The district court then warned that "there should be no misunderstanding on the part of any of the officials involved concerning the duty imposed upon them . . . to cease the practice of arbitrarily segregating the races in . . . penal facilities."[75]

On appeal, the Supreme Court issued a one paragraph per curiam affirmance of the district court's three-judge panel decision. The paragraph made no mention of *Brown* or any corresponding standard of review, but instead neglected the issue by merely noting that it found "unexceptionable"[76] a district court opinion that failed to

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71. Lee v. Washington, 390 U.S. 333, 333–34 (1968) (per curiam).

72. Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966).

73. *Id.* at 331 (citing *Johnson*, 373 U.S. at 62).

74. *Id.* at 331–32. As an example of such an isolated instance, the district court mentioned "the 'tank' used in the City of Birmingham . . . where intoxicated persons are placed upon their initial incarceration and kept until they become sober. According to the evidence in this case, the population of the 'tank' on Saturday nights in the Birmingham jail reaches fifty or more." *Id.* at 332 n.6.

75. *Id.* at 333.

76. *Lee*, 390 U.S. at 333–34.

explicitly mention any standard of review.[77] A three-Justice concurrence clarified 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," but insisted that their "explicit pronouncement [did not evince] any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination."[78] Ultimately, aside from a weak and ambiguous three-Justice concurrence, the Court summarily affirmed a district court opinion[79] that had cited both *Brown* and *Johnson v. Virginia*, even in the prison context.[80]

II. *JOHNSON V. CALIFORNIA*

Thirty-seven years later, the Court again took up the issue of racial segregation in prisons with the case of *Johnson v. California*.[81] Johnson, an African-American prisoner in the California correctional system, filed a pro se complaint alleging that the CDC's policy violated his right to equal protection under the Fourteenth Amendment by assigning him cellmates on the basis of his race.[82] The Ninth Circuit reversed and remanded the district court's initial dismissal, holding that "Johnson had stated a claim for racial discrimination in violation of the Equal Protection Clause . . . ."[83] On remand, the district court granted summary judgment to the defendants on the ground that the CDC officials' conduct, not clearly unconstitutional, was entitled to qualified immunity.[84] The Ninth Circuit affirmed, holding that the deferential *Turner v. Safley*[85] standard applied as opposed to strict scrutiny.[86] Because Johnson did not satisfy the burden of refuting the "common-sense connection"

77. *See* Johnson v. California, 543 U.S. 499, 539 (2005) (Thomas, J., dissenting) ("The majority claims that *Lee* applied a heightened standard of review. But *Lee* did not address the applicable standard of review.") (internal quotation marks omitted). *See generally* Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966).

78. *Lee*, 390 U.S. at 334 (Black, J., concurring).

79. *Id.* at 333–34.

80. *Lee*, 263 F. Supp. at 331.

81. 543 U.S. 499 (2005). For an overview of the facts, see *supra* Introduction.

82. *Id.* at 503.

83. *Id.* at 503–04.

84. *Id.* at 504.

85. *See supra* note 22 and accompanying text.

86. Johnson v. California, 321 F.3d 791, 798–99 (9th Cir. 2003), *rev'd*, 543 U.S. 499 (2005).

between the policy and prison violence,[87] the policy survived the less rigorous *Turner* standard.[88]

The Ninth Circuit Court of Appeals then denied Johnson's petition for rehearing en banc.[89] A four-judge dissent disagreed, stating that "[t]he panel's decision ignore[d] the Supreme Court's repeated and unequivocal command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny."[90] After granting certiorari, the Supreme Court declared strict scrutiny to be the proper standard of review and remanded the matter to the lower court to determine whether the policy survives the standard.[91]

A. The Majority

The majority divided its analysis into two parts, the first considering general reasons for imposing strict scrutiny in this context, and the second explaining why the deferential standard commonly applied to inmates' fundamental rights did not apply in this context. The majority first began the more general part of its analysis by asserting that "'*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny,'"[92] and that even benign racial classifications are reviewed under strict scrutiny.[93]

Second, the Court noted that it had "previously applied a heightened standard of review in evaluating racial segregation in prisons" in *Lee v. Washington*.[94] As evidence of the heightened scrutiny in *Lee*, the Court pointed to the three-Justice concurrence that "'prison authorities have the right, acting in good faith and in *particularized circumstances*, to take into account racial tensions in

87. *Id.* at 801–02.

88. *Id.* at 807.

89. *Johnson*, 543 U.S. at 505.

90. Johnson v. California, 336 F.3d 1117, 1117 (9th Cir. 2003) (Ferguson, J., dissenting) (internal quotation marks omitted).

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

92. *Id.* at 505 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)) (emphasis in *Johnson*).

93. *Id.* (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *Adarand*, 515 U.S. at 226; Shaw v. Reno, 509 U.S. 630, 650 (1993)). Note that some Justices, notably Ginsburg, Souter, and Breyer, disagree on this point with respect to affirmative action. *See supra* note 69; *infra* notes 118–19 and accompanying text.

94. *Id.* at 506 (citing Lee v. Washington, 390 U.S. 333, 333–34 (1968) (per curiam)).

maintaining security, discipline, and good order in prisons and jails.'"[95]

Third, the Court rejected the idea that the government's interest in preventing racial violence obviated the need for strict scrutiny because "racial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility*.'"[96] By "perpetuating the notion that race matters" through the insistence that inmates be housed with inmates of the same race, the Court explained that prison authorities could possibly breed further racial hostility and thus "exacerbate the very patterns of [violence that the policy is] said to counteract."[97]

Fourth, the Court took judicial notice of the fact that "[v]irtually all other states and the Federal Government manage their prison systems without reliance on racial segregation."[98] Moreover, the Court noted the United States' contention that "racial integration actually 'leads to less violence in BOP's [Bureau of Prisons] institutions and better prepares inmates for re-entry into society.'"[99] Because the CDC's policy as a racial classification is "immediately suspect," the Court concluded, the lower court erred in failing to apply strict scrutiny.[100]

In the second part of the Court's analysis, focusing on the comparison of the strict scrutiny given to racial classifications with the deferential *Turner v. Safley*[101] standard commonly applied to inmates' fundamental rights, the Court first distinguished *Turner* by insisting

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95. *Id.* at 507 (citing *Lee*, 390 U.S. at 333–34); *see also Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) ("I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent [imminent] violence, will constitute a 'pressing public necessity.'"); *cf. Lee*, 390 U.S. at 334 (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination].").

96. *Johnson*, 543 U.S. at 507 (quoting *Shaw*, 509 U.S. at 643) (emphasis in *Johnson*).

97. *Id.* (quoting *Shaw*, 509 U.S. at 648).

98. *Id.* at 508–09 (citing 28 C.F.R. § 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.").

99. *Id.* at 509 (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 25, *Johnson*, 543 U.S. 499 (2005) (No. 03-636)).

100. *Id.*

101. 482 U.S. 78 (1987) (applying the "legitimate penological interest" standard to prison policies regulating personal correspondence and inmate marriage).

that it had "never applied *Turner* to racial classifications."[102] *Turner* did not limit *Lee*, but instead had been applied "*only* to rights that are 'inconsistent with proper incarceration.'"[103] The right not to be racially discriminated against, however, was not a right that need be compromised for the sake of proper prison administration, and thus was not "susceptible to the logic of *Turner*."[104] Similarly, claims of cruel and unusual punishment were not analyzed under *Turner*, but rather the "deliberate indifference" standard.[105]

Second, the *Johnson* Court held strict scrutiny to be the proper standard because to grant an exception to the application of strict scrutiny to all racial classifications would "undermine [the Court's] 'unceasing efforts to eradicate racial prejudice from our criminal justice system.'"[106] This principle, the Court noted, has driven the application of strict scrutiny to otherwise broadly deferential areas such as the use of race in peremptory jury strikes[107] and redistricting.[108]

Third, the Court interpreted the three-Justice concurrence in *Lee* to establish an exception to the color-blind principle articulated in Justice Harlan's *Plessy* dissent.[109] Determining whether that exception applies, concluded the *Johnson* Court, requires the application of strict scrutiny.[110]

Fourth, the *Johnson* Court addressed Justice Thomas's dissent, which argued that the judgment of whether race-based policies are necessary "'[is] better left in the first instance to the officials who run our Nation's prisons.'"[111] The *Turner* standard drawn to its logical conclusion, the majority replied, would prove to be too lenient,

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102. *Johnson*, 543 U.S. at 510.

103. *Id.* (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)).

104. *Id.*

105. *Id.* at 511.

106. *Id.* at 512 (quoting McCleskey v. Kemp, 481 U.S. 279, 309 (1987) (internal quotation marks omitted)); *see also* Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

107. *Johnson*, 543 U.S. at 512 (citing Batson v. Kentucky, 476 U.S. 79, 89–96 (1986)).

108. *Id.* (comparing the partisan gerrymandering in Vieth v. Jubelirer, 541 U.S. 267 (2004) with the racial gerrymandering in Shaw v. Reno, 509 U.S. 630 (1993)).

109. *Id.* at 512–13 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989)).

110. *See id.* at 515 ("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 . . . .").

111. *Id.* at 513 (quoting *id.* at 542 (Thomas, J., dissenting)); *see also infra*, Part II.B.1.

allowing prison officials to use race-based policies even when they do not advance the interest at stake, and when other race-neutral policies are available.[112] Such a standard would obviate any limitation on racial segregation in prisons at all.[113]

Fifth and finally, the majority rejected the CDC's argument that the application of strict scrutiny would be "'strict in theory but fatal in fact'" and thus prohibit the use of racial segregation under any circumstance.[114] Disagreeing with Justice Thomas' description of the policy as "limited," the majority contested that the policy in fact "applie[d] to *all* prisoners housed in double cells in reception centers, whether newly admitted or transferred from one facility to another."[115] Further, any nonracial factors taken into account were negligible, given that the CDC admitted that the chances of an inmate being housed with another of a different race were "'[p]retty close' to zero."[116] In contrast, prison administrators still "address[ed] the compelling interest in prison safety," as long as they "demonstrate[d] that any race-based policies are narrowly tailored to that end."[117]

A concurrence authored by Justice Ginsburg and joined by Justices Souter and Breyer agreed with the Court's result and opinion, subject to their pro-affirmative action reservation expressed in the *Gratz v. Bollinger*[118] dissent that "[a]ctions 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."[119] Disagreeing with the majority's assertion that strict scrutiny is necessary for *all* racial classifications, the concurring Justices agreed that, as the CDC's policy was neither necessary nor intended to "correct inequalities," strict scrutiny was the proper standard.[120]

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112. 543 U.S. at 513, 514 n.3.

113. *Id.* at 514.

114. *Id.* (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).

115. *Id.* at 515 n.3.

116. *See id.* at 514–15 n.3 ("Justice Thomas characterizes the CDC's policy as a 'limited' one, but the CDC's policy is in fact sweeping in its application." (internal citation omitted)).

117. *Id.* at 514.

118. 539 U.S. 244 (2003).

119. *Johnson*, 543 U.S. at 516 (Ginsburg, J., concurring) (quoting *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting)).

120. *Id.* at 516 (Ginsburg, J., concurring) (quoting Herbert Wechsler, *The Nationalization of Civil Liberties and Civil Rights*, Supp. to 12 TEX. Q. 10, 23 (1968)).

B. The Dissents

1. *The Thomas Dissent*. Emphasizing the *Turner* standard of review in opposition to the majority's *Adarand*/*Gratz* emphasis, a dissenting Justice Thomas noted that "[t]he Constitution has always demanded less within the prison walls" even with respect to rights "no less 'fundamental' than the right to be free from state-sponsored racial discrimination . . . ."[121]

Describing the policy as "limited,"[122] Justice Thomas noted that "[f]or most of this Nation's history . . . defendants forfeited their constitutional rights [upon conviction and incarceration] and possessed instead only those rights that the State chose to extend them."[123] If the *Turner* standard is the Court's "accommodation of the Constitution's demands to those of prison administration," Justice Thomas argued, then it should be applied with "uniformity," regardless of the constitutional claim.[124]

Justice Thomas next pointed out the safety concern that "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."[125] Such a standard would unnecessarily force courts to be "the primary arbiters of what constitutes the best solution to every [prison] administrative problem . . . ."[126] Given the very real dangers of racial gang violence in prisons,[127] the CDC's policy would survive the four factors of the *Turner* test: it is "reasonably related to a legitimate penological interest; alternative means of exercising the restricted right remain

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121. *Id.* at 524 (Thomas, J., dissenting). Justice Scalia joined Thomas's dissent. *Id.*

122. *Id.* at 525.

123. *Id.* at 528 (citation omitted). Justice Thomas then qualified this assertion by noting that the Court has recently "decided that incarceration does not divest prisoners of all constitutional protections" such as due process and free exercise of religion, *see id.* at 528–29, and so the initial question for a constitutional claim is whether the prisoner even possesses the disputed right at all, or whether it is a right that has been "divested" of him as a "condition of his conviction and confinement," *id.* at 529 n.3.

124. *See id.* at 531 ("[W]e should apply [*Turner*] uniformly to prisoners' challenges to their conditions of confinement.").

125. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

126. *Id.* at 531–32 (quoting *Turner*, 482 U.S. at 89).

127. *See id.* at 532 ("[T]here is no more intractable problem inside America's prisons than racial violence, which is driven by race-based prison gangs.") (internal quotation marks omitted).

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."[128]

After describing the broad applicability of the *Turner* test, Justice Thomas then characterized the majority's decision to use strict scrutiny as based on both precedents and "its general skepticism of racial classifications."[129] The majority, he insisted, was "wrong on both scores."[130]

First, Justice Thomas rejected the majority's degree of reliance on *Lee* as precedent.[131] The *Lee* affirmance said nothing about the applicable standard of review, as there was no need—the "wholesale segregation of [Alabama's] prisons"[132] would have been unconstitutional under either strict scrutiny *or* a more deferential standard of review.[133]

Second, Justice Thomas rejected the majority's main rationale that the *Turner* standard applies only to rights that are "'inconsistent with proper incarceration.'"[134] He contended that such circular logic requires the court to have "some implicit notion of [how] a proper prison ought . . . to be administered" in order to know "whether any particular right is inconsistent with proper prison administration," which "eviscerates" *Turner*'s prohibition on such second-guessing in the first place.[135] In the many cases in which the Court has used *Turner* regarding speech or associational rights, expanded access to courts, freedom from bodily restraint, or free exercise rights, the Court has "steadfastly refused to undertake the threshold standard-

128. *Id.* at 534.

129. *Id.* at 538.

130. *Id.*

131. *See id.* at 539 ("The majority claims that *Lee* applied 'a heightened standard of review.' But *Lee* did not address the applicable standard of review."(citation omitted)).

132. *Id.* at 540.

133. *See id.* Even if *Lee* had announced a heightened standard of review for race-based prison policies, Thomas contended that the CDC policy would have satisfied such an exception: Johnson did not contest the "good faith" nature behind the CDC's policy, and the policy, in its limited scope, applied only to new inmates and transfers held in double cells in a handful of prisons for no more than two months. Moreover, Thomas maintained that *Adarand*'s application of strict scrutiny for all racial classification was inapposite, as that case, which dealt with classifications favoring blacks, did not overrule *Turner* and progeny with respect to the unique context of prisons. *Id.* at 540–41.

134. *Id.* at 541 (quoting *id.* at 510 (majority opinion) (citations omitted)).

135. *Id.* at 541–42 (Thomas, J., dissenting).

of-review inquiry that *Turner* settled, and that the majority today resurrects."[136]

As for the majority's contention that the Court has maintained a strict burden on state actors to justify race-based policies, even in "'areas where those officials traditionally exercise substantial discretion,'"[137] Justice Thomas pointed to the *Grutter*[138] case, in which the Court deferred to the law school's "'educational judgment that . . . diversity is essential to its educational mission. . . .'"[139] Deference, Justice Thomas pointed out, would seem all the more appropriate in the penal context than the educational one, for "whatever the Court knows of administering educational institutions, it knows much less about administering penal ones."[140]

Finally, Justice Thomas rejected the "parade of horribles" presented by the majority that would result from applying the allegedly "toothless" *Turner* standard.[141] The CDC's policy applied only to double cells, as opposed to dining halls, yards, etc., because they were particularly difficult to monitor.[142] If the CDC's policy were broader, there might be a more racially neutral means "at its disposal capable of accommodating prisoners' rights without sacrificing their safety," thus affecting one of the *Turner* factors.[143]

2. *The Stevens Dissent*. Justice Stevens's dissent expressed the opinion that the CDC's policy should be held unconstitutional under either level of scrutiny, rather than remanding to the lower court for application of the strict scrutiny standard.[144] The policy, Justice Stevens wrote, "is based on a conclusive presumption that housing

136. *Id.* at 542.

137. *Id.* at 543 (quoting *id.* at 512 (majority opinion)).

138. *See* Grutter v. Bollinger, 539 U.S. 306, 341–44 (2003) (upholding law school admissions policy using race as a "plus" factor as a narrowly tailored and thus constitutional remedy to the compelling interest of increasing diversity).

139. *Johnson*, 543 U.S. at 543 (Thomas, J., dissenting) (quoting *Grutter*, 539 U.S. at 328).

140. *Id.* at 543.

141. *Id.* at 547.

142. *Id.*

143. *Id.*

144. *Id.* at 517–23 (Stevens, J., dissenting). In the final part of his dissent, Justice Thomas disagrees with Stevens's characterization of the evidence presented. *Id.* at 548 (Thomas, J., dissenting). According to Justice Thomas, as Johnson's arguments and the lower court rulings concerned the application of *Turner* and the assumed precedence of *Lee*, the CDC had no obligation to present evidence of narrow tailoring and should therefore have such opportunity upon remand. *Id.* at 549–50.

inmates of different races together creates an unacceptable risk of racial violence" and assumes, without any individualized assessment, that "an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence."[145] Other prisons, both state and federal, have been able to maintain safety and security without "resorting to the expedient of segregation."[146] Justice Stevens thus agreed with the majority's remand to the lower court to resolve the issue of qualified immunity, but dissented from the Court's "refusal to decide, on the basis of the record before us, that the CDC's policy is unconstitutional."[147]

III. ANALYSIS

Section A of this analysis points out the inconsistencies between the *Johnson* Court decision and judicial precedent regarding racial segregation as articulated by *Brown* and its progeny. The Court examined whether racial segregation in prison should be reviewed under strict scrutiny or the deferential "reasonable-relationship" test, without even considering the outright ban on racial segregation created in the realm of public education by *Brown* and subsequently expanded in piecemeal fashion to apply to all public facilities.[148] Because the *Johnson* majority equated segregation with *all* racial classifications, it ignored the unique treatment of racial segregation by courts since 1954. Section B of this analysis provides four interrelated frameworks that attempt to reconcile the inconsistencies. These reconciliations are not mutually exclusive alternative interpretations, but rather a series of interrelated possibilities, some of which support each other or expand on each other, and are intended to provoke discussion. They should thus be read as a group of possibilities, rather than a series of competing interpretations.

A. The Inconsistencies

First, the *Johnson* majority began by asserting that "'*all* racial classifications [imposed by government] . . . must be analyzed by a

145. *Id.* at 517 (Stevens, J., dissenting).

146. *Id.* at 520.

147. *Id.* at 523.

148. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61, 62 (1963) (reversing the conviction of appellant for refusing to sit in the seats reserved for minorities in traffic court, stating that "it is no longer open to question that a State may not constitutionally require segregation of public facilities").

reviewing court under strict scrutiny.'"[149] Indeed, prior to *Johnson*, case law did hold that all racial classifications must be analyzed under strict scrutiny, and this remains accepted precedent.[150] This argument does not clarify, however, why racial segregation, which has followed its own unique track separate from other racial classifications since *Brown*, should suddenly be accorded the same treatment as all other racial classifications. The application of strict scrutiny to all racial classifications has merit when deciding, as the *Johnson* opinion did, between strict scrutiny and a lesser standard of review. It does not explain, however, why the argument is not framed as a choice between strict scrutiny and a complete ban.

Second, the majority relied on *Lee v. Washington* for the proposition that the Court has previously applied a heightened standard of review in evaluating racial segregation in prisons.[151] As the Thomas dissent pointed out, however, the *Lee* decision was a one-paragraph affirmance that made no mention of the applicable standard of review.[152] Similarly, the district court opinion lacked any adoption of a particular standard of review—in fact, it cites *Brown* for the proposition that "[s]ince Brown v. Board of Education and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated."[153]

The idea that both *Lee* courts applied a heightened standard of review is not completely unwarranted. The district court did recognize that "in some isolated instances prison security and discipline necessitates segregation of the races for a limited period."[154]

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149. *Johnson*, 543 U.S. at 505 (majority opinion) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

150. *See Adarand*, 515 U.S. at 227 ("[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny . . . ."); Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (holding strict scrutiny as proper standard of review for a 30 percent set-aside to minority-owned businesses in government contracting because "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

151. *Johnson*, 543 U.S. at 506–07 (citing Lee v. Washington, 390 U.S. 333, 333–34 (1968) (per curiam)).

152. *Lee*, 390 U.S. at 333–34; *see supra* notes 131–33 and accompanying text.

153. Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966) (citation omitted); *see id.* ("'[It] is no longer open to question that a State may not constitutionally require segregation of public facilities.'" (quoting *Johnson*, 373 U.S. at 62)).

154. *Id.*; *see also id.* at 331 n.6 (using the "drunk tank" used in the City of Birmingham as an example of such an "isolated instance").

Additionally, the three-Justice Supreme Court concurrence made explicit that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."[155] Although these comments may imply a carved-out exception to the outright ban on racial segregation in public facilities, it is not clear that such comments, absent any mention of a standard of review, translate into the application of strict scrutiny.

Third, the *Johnson* majority noted the principle that "racial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility*.'"[156] The proposition that racial classifications threaten to stigmatize is undoubtedly true; indeed, the *Brown* court recognized the stigma attached to racial segregation of public schools.[157] Recognition of segregation's stigmatic effect does little, however, to support the adoption of strict scrutiny over prohibition, and may even counsel against it.

Fourth, the *Johnson* court observed that "virtually all other States and the Federal Government manage their prison systems without reliance on segregation."[158] Regardless of the merits of this contention, it puts the proverbial cart before the horse. As Justice Thomas's dissent pointed out, the availability of race-neutral means to control racially motivated gang violence is relevant only to the *application* of the standard of review, a duty relegated to the lower court upon remand.[159] Discussion of the narrowly tailored nature of the CDC's policy seems circularly out of place in an opinion that purports to decide the standard of review and then remand for application of that standard.

Fifth, the *Johnson* majority emphasized that the CDC's policy, as an express racial classification, is "immediately suspect"[160] and that

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155. *Lee*, 390 U.S. at 334 (Black, J., concurring).

156. *Johnson*, 543 U.S. at 507 (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993)) (emphasis in *Johnson*).

157. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [schoolchildren] of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

158. *Johnson*, 543 U.S. at 508. *But see id.* at 544–45 (Thomas, J., dissenting) (noting that Oklahoma and Texas have adopted similar policies).

159. *Id.* at 544 (Thomas, J., dissenting); *see also id.* at 542.

160. *Id.* at 509 (majority opinion) (internal quotation marks omitted).

the deferential *Turner* test is thus inappropriate for review of racial classifications.[161] Regardless of its merits, this assertion ignores that the threshold discussion under *Brown* should not be whether strict or lesser scrutiny applies, but rather whether racial segregation in prisons should even be tolerated at all. Indeed, according to *Brown*,[162] *Johnson v. Virginia*,[163] and the district court in *Lee*,[164] racial segregation should *not* be tolerated.

Finally, the *Johnson v. California* majority concluded that granting the state an exemption from the rule that strict scrutiny applies to all racial classifications would "undermine [the Court's] 'unceasing efforts to eradicate racial prejudice from [the] criminal justice system.'"[165] This fails again to recognize that *Brown* and its progeny have created not an exemption for racial segregation, but a complete prohibition. Even taking into account the exception in the *Lee* Supreme Court concurrence, a "particularized circumstance" which "take[s] into account racial tensions" for a "limited time" does not necessarily equate to strict scrutiny, but indeed may suggest something even more rigorous.[166] By applying strict scrutiny to racial segregation in prisons instead of declaring it unconstitutional, the Court may be doing exactly what it purports to avoid—undermining the judiciary's "unceasing efforts" to eradicate racial prejudice from public facilities.

B. The Reconciliations

The previous analysis points out the arguable inconsistencies between the *Johnson* Court's analytical framework and the history of jurisprudence of racial segregation since *Brown*. The following points,

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161. *Id.*

162. *See Brown*, 347 U.S. at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."); *see also Johnson*, 543 U.S. at 506–07 ("Indeed, we rejected the notion that separate can ever be equal—or 'neutral'—50 years ago in Brown v. Board of Education, and we refuse to resurrect it today." (citation omitted))

163. *See* Johnson v. Virginia, 373 U.S. 61, 62 (1963) ("[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities.").

164. *See* Washington v. Lee, 263 F. Supp. 327, 331 (1966) ("[I]t is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated.").

165. *Johnson*, 543 U.S. at 512.

166. *See* Lee v. Washington, 390 U.S. 333, 334 (1968) ("[P]rison 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.").

however, attempt to account for these inconsistencies. Although none of these reconciliations is alone sufficient, together they interrelate to build upon one another. For example, the limited doctrinal view of *Brown* may allow the Court to implicitly modify *Brown*'s reach according to modern principles; alternatively, the ambivalent evolution of *Brown* under the competing principles of anticlassification and antisubordination may have been the driving force behind the Court's choice of a "middle-ground" compromise between three precedents. One should not perceive the following possibilities, therefore, as mutually exclusive or competing interpretations, but rather as building blocks, some of which are admittedly more intellectually solid than others.

1. *The Court Did Not Consider the Issue*. The first possibility is that the Court simply neglected to consider the possibility that *Brown* and its progeny strictly prohibited all racial segregation. Johnson did not assert in his complaint that the CDC's policy was prohibited under *Brown* and its progeny, but rather assumed that both *Lee* and *Turner* applied, alleging only that the CDC's policy was not "'related to a legitimate penological interest.'"[167] Similarly, the Ninth Circuit failed to discuss the applicable standard of review but resolved the tension between *Turner* and *Lee* in *Turner*'s favor.[168] All of the amicus briefs submitted to the Court in support of the respondent, with the exception of that submitted by the ACLU,[169] either failed to cite *Brown* entirely[170] or characterized *Brown* and its progeny as advocating a strict scrutiny standard.[171] It is thus possible that the *Johnson* Court simply addressed the issues presented before it without considering whether the prohibition on racial segregation

167. *Johnson*, 543 U.S. at 548 (Thomas, J., dissenting) (quoting Johnson v. California, 207 F.3d 650, 655 (9th Cir. 2000) (per curiam)).

168. *Id.*; *see* Johnson v. California, 321 F.3d 791, 798–99 (9th Cir. 2003).

169. Brief of Amici Curiae American Civil Liberties Union and its Three California Affiliates in Support of Petitioner at 13, *Johnson*, 543 U.S. 499 (No. 03-636) ("Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States.") (internal citations and quotations omitted).

170. *See generally* Brief for the United States as Amicus Curiae Supporting Petitioner, *Johnson*, 543 U.S. 499 (No. 03-636); Brief of Former State Corrections Officials as Amici Curiae in Support of Petitioner, *Johnson*, 543 U.S. 499 (No. 03-636).

171. *E.g.*, Brief for Petitioner at 44, *Johnson*, 543 U.S. 499 (No. 03-636) ("[T]he present case is squarely governed by a specific decision of this Court which has not been overruled. *Lee* was decided under the rule of strict scrutiny applied in *Brown* and its progeny.").

expressed in *Brown* and its progeny was relevant to the case. The highly unlikely probability, however, that the *Johnson* Court wholly forgot about one of the most famous and controversial cases in American legal history, not to mention a year after its fiftieth anniversary, necessitates more explanation as to *why* the Court did not discuss a complete prohibition on racial classifications altogether.

2. Brown *Is Doctrinally More Limited than a Complete Ban on Racial Segregation in All Public Facilities*. Another possibility is that *Brown* and its progeny are more limited than a complete ban, and have evolved into a standard similar to strict scrutiny; the Court in *Johnson* simply recognized this evolution, while harmonizing segregation with all racial classifications, by imposing a strict scrutiny standard. The *Brown* decision itself was limited only to the realm of public education.[172] The expansion of *Brown* to other public facilities was accomplished in piecemeal fashion by a series of summary decisions in its wake.[173] Although several cases cited *Brown* for the proposition that racial segregation was prohibited in all public facilities, the issue of racial segregation *in prisons* was not squarely addressed by the Supreme Court until the *Lee* decision, in which the three-Justice concurrence noted an exception to the prohibition in "particularized circumstances."[174] In his appellate brief, Johnson asserted that "[s]trict scrutiny is required . . . by Lee v. Washington, part of the post-Brown v. Board of Education line of cases that the Court and commentators have overwhelmingly understood as requiring strict scrutiny (despite the absence of those words)."[175] It may be, therefore, that although the evolution of *Brown* and its subsequent line of affirmances expanded its reach to include racial segregation in all public facilities, the only Supreme Court case to

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172. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("[I]n the field of public education, the doctrine of 'separate but equal' has no place.").

173. *See supra* note 18 (outlining this piecemeal progression).

174. *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam) (Black, Harlan, & Stewart, JJ., concurring).

175. Brief for Appellant at 6, *Johnson*, 543 U.S. 499 (No. 03-636). For support the brief cites as examples *Miller v. Johnson*, 515 U.S. 900, 911 (1995), which cited post-*Brown* per curiam decisions for the proposition that "the State may not, absent extraordinary justification, segregate citizens on the basis of race"; CHRISTOPHER E. SMITH, COURTS AND THE POOR 85 (1991), in which Smith says that "[t]he Supreme Court applied strict scrutiny to discriminatory racial classifications after Brown v. Board of Education"; and Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 125 (1990), in which Simon asserts that the application of strict scrutiny "finally culminat[ed] in *Brown v. Board of Education*."

squarely address *Brown*'s application in the prison context modified its standard to allow for racial segregation in some extraordinary circumstances. The *Johnson* Court's imposition of strict scrutiny may therefore formalize "particularized circumstances"[176] as a compelling interest, and "good faith"[177] as a narrowly tailored remedy.

3. *The Evolution of* Brown *under Anticlassification and Antisubordination Principles*. A third, intellectually comprehensive (and perhaps the most convincing) possibility materializes when one examines the evolution of post-*Brown* jurisprudence from a more contextual approach. An insightful examination into this evolution may be found in the work of Reva Siegel.[178] In light of the values raised by Professor Siegel's thesis, the *Johnson* Court's imposition of strict scrutiny on the CDC's policy may illustrate a shift in the social meaning and stigmatic effects surrounding racial segregation, as well as the significance of that shift in terms of application over the fifty-one years since *Brown* was decided.

Although courts and scholars often invoke *Brown* for the principle that states are prohibited from classifying on the basis of race, the *Brown* opinion, in order to overrule *Plessy*, relied instead on evidence of the stigmatic and subordinative effect that segregation has on minority schoolchildren, thus concluding that "in the field of public education, the doctrine of 'separate but equal' has no place."[179] As furious controversy and debate ensued over the Court's reliance on this social science evidence, southerners resisted attempts to enforce *Brown* in other areas by insisting that such harms were not present in other contexts, or that integration may cause greater psychological or social harms than racial segregation.[180] Amid heated political and scholarly debate over "neutral principles" and the meaning behind the *Brown* decision,[181] scholars began to support a

176. *Lee*, 309 U.S. at 334 (per curiam) (Black, Harlan & Stewart, JJ., concurring).

177. *Id.*

178. *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004) (exploring the Court's varying degrees of application of the anticlassification principle since *Brown* in order to vindicate and sometimes mask shifting social concerns).

179. Brown v. Bd. of Educ., 347 U.S. 483, 495 & n.11 (1954).

180. Siegel, *supra* note 178, at 1486–87.

181. *Compare, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) (advocating adherence to neutral principles in constitutional adjudication and decrying the lack of such in the *Brown* decision's reasoning), *with* Louis H.

"cooler" view that invalidated segregation on the more neutral basis that racial segregation violated the Equal Protection Clause solely because "race is an inherently arbitrary classification."[182]

This politically safer approach, the anticlassification doctrine, encountered difficulty when the Court faced de facto segregation in the northern school districts, where there were no facially segregative school policies but schools were segregated nonetheless. Once again, America wrestled with defining the principle upon which to protect the equal rights of all citizens.[183]

The debate over whether the Equal Protection Clause prohibited racial classification per se (anticlassification doctrine) or status harm to a particular disadvantaged group (antisubordination doctrine) in the northern de facto segregation context then found a third arena as the country began to explore the contours of affirmative action.[184] Whereas the race-conscious assignments of the earlier desegregation movement had been seen as benign and "licit forms of racial classification,"[185] judges now began to focus on affirmative action measures and questioned the constitutional limits of the presumption against racial classification with regard to race-conscious efforts to ameliorate segregation.[186] Ironically, whereas harm to minority schoolchildren had been a driving factor in the *Brown* decision to end desegregation of schools, judgments about the potential harm to white applicants in professional school affirmative action cases were now contributing to "courts' newfound willingness to [interpret and apply anticlassification principles] as a constraint on voluntary governmental efforts to rectify racial imbalance in educational

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Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 26–27 (1959) (positing principled bases behind the *Brown* decision).

182. Siegel, *supra* note 178, at 1498; *see* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 845–47 (5th Cir. 1966) (upholding federal desegregation standards in light of *Brown* and the Civil Rights Act of 1964); Owen H. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 591 (1965) ("[T]he Court might have relied on the more 'neutral' or 'general' principle that race is an inherently arbitrary classification.").

183. Siegel, *supra* note 178, at 1500 ("[Q]uestions of anticlassification and questions of group status harm were not bifurcated frames of analysis, as they would later come to be. Anticlassification discourse acquired this new significance only as it was asked to solve a variety of new questions in the conflicts over implementing *Brown* in the North.").

184. *Id.* ("In the debates over de facto segregation in the 1960s, one can see anticlassification discourse acting both to advance and to limit antisubordination aims, with the two forms of reasoning finally assuming familiar form as agonistic principles in the affirmative action debates of the early 1970s.").

185. *Id.* at 1514.

186. *Id.* at 1527.

institutions."[187] In *Regents of the University of California v. Bakke*,[188] in which a white would-be applicant successfully challenged the University of California at Davis medical school admissions policy, Justice Powell attacked the antisubordinative idea of "stigma," stating that it "reflects a subjective judgment that is standardless," and argued that a deprivation to the "dominant majority" is equally invidious.[189] Although discounting the use of stigma, the Court "compromised" by recognizing diversity as a compelling state interest that would allow states to take race-conscious measures.[190]

As the previous discussion indicates, the characterization of *Brown*'s legacy continues to shift over time and in the face of new contexts. The strict anticlassification doctrine espoused by Powell in *Bakke* was not the ground for the *Brown* decision, but rather "the residuum of conflicts over enforcing *Brown*."[191] As the Court faced numerous racial classifications in varying social contexts over time—de jure segregation, de facto segregation, affirmative action—it employed differing degrees of anticlassification and antisubordination principles in light of the validity of the principle to the issue and the social conflict surrounding it:

> It was as the nation argued over *Brown*'s justification and implementation that the Court began to rely on anticlassification discourse, first to express, and then to limit, antisubordination values. . . . [C]ourts have applied this presumption of unconstitutionality selectively, and in a manner that has shifted over time, to vindicate multiple and sometimes conflicting social concerns. As we have seen, at some points in our history, claims about the wrongs of racial classification have served to express and to mask constitutional concerns about practices that enforce second-class citizenship for members of relatively powerless social groups—and at some points in our history, claims about the wrongs of racial classification have served to diffuse and to limit expression of such concerns.[192]

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187. *Id.* at 1529–30.

188. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)

189. *Id.* at 295 n.34 (opinion of Powell, J.).

190. *Id.* at 314–15 ("As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.").

191. Siegel, *supra* note 178, at 1533.

192. *Id.*

The above history and discussion highlights the evolutionary perspective of *Brown*'s main principle. Although scholars continue to struggle for a consistent, principled treatment of racial classifications, it would be difficult to argue today that a per se ban on a sole racial classification still exists. If post-*Brown* jurisprudence has revived antisubordination values, or put differently, has reintroduced antisubordination limitations onto what is no longer a pure anticlassification doctrine, then equal protection is about more than just racial classification. It must constitute some blend of anticlassification and antisubordination values, such that any racial classification is viewed not alone, but in light of its social meaning and effects in today's society. Whether stigma is taken into account or not, when a neutral racial classification such as the CDC's policy is examined in light of today's social environment as opposed to that of the *Brown* world of 1954, the social meaning is necessarily different.

It was virtually unmistakable that the purpose, effect, and social meaning of de jure racial segregation in 1954 was to maintain the inferiority of the minority race, and the social science cited by *Brown* indicated the imposition of a stigma on minority schoolchildren. Although de facto segregation and racial discrimination in American public schools[193] continue to have a malicious grip on American society,[194] none of the segregation that persists today is of the de jure kind seen in *Plessy* and *Brown*. Federal, state, and local governments may no longer mandate racial segregation in schools or housing. Interracial marriages have risen dramatically over the last few decades, signaling a shift in the basic structure of U.S. society.[195]

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193. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE 782 (Vintage Books 2004) (1976) (noting that the number of African Americans living at or below the poverty level, having dropped 33 percent between 1960 to 2002, was still three times higher than that for white families and that the average income for black men had risen from 52 percent to only 68 percent of that for the average white man between 1950 and 2002); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1598 (2003) ("By 1991, the percentage of African-American students attending majority white schools in the South had decreased to 39.2% and over the course of the 1990s this number dropped: 36.6% in 1994; 34.7% in 1996; and 32.7% in 1998.").

194. KLUGER, *supra* note 193, at 752–53 (noting the considerable social self-segregation in the lives of private individuals and the widespread feeling that "whites, in their hearts and minds, still viewed [blacks] by and large as their moral and intellectual inferiors . . .").

195. *See generally* Michael J. Rosenfeld & Byung-Soo Kim, *The Independence of Young Adults and the Rise of Interracial and Same-Sex Unions*, 70 AM. SOCIOLOGICAL REV. 541 (2005) (suggesting that an increase in interracial and same-sex unions is partly due to the increased geographic mobility and urban nature of today's young adults, signaling a change in the fabric of U.S. society as they distance themselves from the communities of their origins).

Despite persistent socio-economic inequalities and continued racial hostilities, the social and legal environments surrounding race relations in the United States have substantially evolved since 1954.[196]

One might therefore say that a policy by which prison authorities segregate new prisoners by race for two months in an effort to protect them from a perceived risk of racially motivated violence, whether correct or incorrect, is considerably less likely to be suspected as an "invidious use" of race classification in 2005 than it would have been in 1954. It is no longer clear that a neutral policy of racial segregation, although perhaps less beneficial to all due to lack of diversity, will have a deleterious or stigmatic effect on the minority; indeed, many brilliant and well-qualified young minorities today choose to attend historically black colleges and universities.[197] Perhaps it is because of this changed understanding of the social circumstances surrounding racial segregation that modern courts have felt justified in creating exceptions to *Brown*'s flat prohibition on racial segregation.[198]

If racial segregation in 2005 is somehow perceived differently from racial segregation in 1954 in terms of antisubordination values such as social meaning, stigma, and effects, and if any of these values are ones that the Court is prepared to recognize, then the "inherent inequality" justification for *Brown*'s per se ban on racial segregation is no longer accurate. Just as the *Brown* Court felt compelled to "consider public education in the light of its full development and its present place in American life throughout the Nation,"[199] perhaps the *Johnson* Court, considering the present place of penological administration in today's society, implicitly or even manifestly

196. KLUGER, *supra* note 193, at 752 ("Fifty years after *Brown*, overt displays of bigotry were no longer socially, politically, or legally excusable. And a black presence well beyond tokenism had been established and was thriving almost everywhere in American society to an extent unimaginable half a century earlier—on every college campus, in corporate towers, on job sites at all skill levels, in public service up to and including the highest reaches of government, throughout the U.S. military, and, most visibly, in the arts, entertainment, and sports worlds, where stellar black performers abounded.").

197. *See* James A. Washburn, Note, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1151–52 (1994) (citing research indicating that African-American students tend to thrive better personally and achieve more academically at historically black colleges and universities).

198. *See* Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992) (noting that "*West Coast Hotel* [300 U.S. 379 (1937)] and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions").

199. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

recognized a change in the understanding of circumstances that allows for some racially segregationist policies to be justified. Perhaps there are some racial classifications in 2005 that do not automatically carry the same subordinative meaning, and thus do not rise to the level of unconstitutionality. If our modern understanding of racial segregation thus includes both an anticlassification and an antisubordination analysis—that is, both the existence of a racial classification and an examination of its social meaning and effects—then a question remains as to how to weigh those different concerns.

4. *The* Johnson *Decision Represents a Compromise between Three Conflicting Precedents*. Although racial segregation was effectively racial discrimination in the 1950s, and courts have often cited the principles of post-*Brown* jurisprudence in racial discrimination cases, it is not axiomatic that state-mandated segregation should be lumped into the strict scrutiny standard along with all other forms of racial discrimination. However, the Court's choice, whether purposeful or reflexive, to group racial segregation with all other racial discrimination and to impose strict scrutiny presents the final possibility, that the *Johnson* court's imposition of strict scrutiny for racial segregation in the prison context reflects a compromise between three conflicting lines of precedent: the outright ban on racial segregation as initially expressed by *Brown* and its progeny, the strict scrutiny applied to all racial classifications as seen in *Adarand* and *Croson*, and the deferential treatment accorded to prison administration by *Turner*. In light of the polar opposites of *Brown* and *Turner*, supplemented only by a muddily unhelpful three-Justice concurrence in *Lee*, perhaps the *Johnson* Court's treatment of the CDC's policy can be seen as a properly suspect middle ground.

CONCLUSION

Whether the *Johnson* Court deliberately chose to exclude a discussion of *Brown*'s initially per se prohibition in order to illustrate the evolution of the doctrine, or whether the evolution of the *Brown* doctrine was so ingrained that the Court's omission was simply reflexive, the newly explicit strict scrutiny standard for state-mandated racial segregation policies has significant implications for civil rights litigation. These significant implications are due in large part to the fact that the Supreme Court grouped racial segregation in

with *all* forms of racial classification, without limiting such a statement to the prison context.[200]

On the one hand, the implications may be minor from an ultimate judicial perspective—proof of a compelling interest is such a high bar that strict scrutiny is often said to be "strict in theory, fatal in fact."[201] After the *Bakke*, *Grutter*, and *Gratz* decisions, however, it is not entirely clear that a compelling governmental interest need be an imminent war-time emergency such as that in *Korematsu*; it may be as simple as the interest of public universities in achieving diversity.[202] It is therefore imaginable that penological institutions have a compelling interest in maintaining the safety and security of prisoners under their custody by shielding them from the effects of racially motivated violence.[203]

On the other hand, the difference between a per se prohibition and a strict scrutiny standard, although perhaps slight from a Supreme Court judicial perspective, becomes more significant for lower courts and litigators. Because the *Johnson* Court broadly asserted, without contextual limitation, that racial segregation is now to be treated like any other racial classification,[204] any government policy of racial segregation would now assumedly be subject to strict scrutiny as opposed to a per se prohibition. In the pre-*Johnson* world, in which racial segregation was flatly prohibited, the government would never have adopted a policy of racial segregation, because the law would deem it clearly invalid. The effects of *Johnson*'s strict scrutiny standard, however, free government bodies to adopt measures that would have previously been struck down from the start, in hopes that they can subsequently compile a record establishing a factual basis for a claim of compelling interest.

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200. Johnson v. California, 543 U.S. 499, 505 (2005) (quoting Adarand Constructors Inc. v. Pena, 515 U.S. 200, 227 (1995)).

201. *Id.* at 514 (*quoting Adarand*, 515 U.S. at 237).

202. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

203. Even if the lower court were to find such an interest to be compelling on remand, the CDC's policy would still have to be sufficiently narrow, and their blind racial assignment without any examination into history of gang affiliation or racial violence would have to be justified.

204. *See Johnson*, 543 U.S. at 509 ("Because the CDC's policy is an express racial classification, it is 'immediately suspect.'"). It may be worth noting that *Johnson*, if expanded beyond its factual context, evokes (although not perfectly) the single-sex education case of *United States v. Virginia*, 518 U.S. 515 (1996), in which the Court held that Virginia failed to provide an "exceedingly persuasive justification" under heightened scrutiny for its gender segregation policy in education. *Id.* at 524.

Conversely, it lures plaintiffs into a difficult and almost perverse position, in which parties who are genuinely concerned with civil rights find themselves arguing against the compelling nature of a government's interest in, for example, maintaining the safety of its prisoners or providing a first class education for all children.

The absence of any discussion in *Johnson v. California* about the alternative of a prohibition on state-mandated racial segregation marks a divergence from the conventional view of post-*Brown* jurisprudence. The imposition of strict scrutiny for the Department of Corrections policy may be the delayed illustration of a historical evolution in the Court's balance between anticlassification and antisubordination values, fueled by a shift in the modern societal meaning ascribed to neutral racial classifications. Regardless of the impetus behind the new standard of review for racial segregation in prisons, *Johnson v. California* muddies the legal waters for the proper analysis of racial segregation in other contexts, and leaves us with a much grayer shade of *Brown*.