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THE REHNQUIST COURT AND THE
"TURNERIZATION" OF PRISONERS' RIGHTS

James E. Robertson*

I. INTRODUCTION

In *Kimberlin v. United States Department of Justice*, the highly respected Court of Appeals for the District of Columbia Circuit swept aside constitutional objections to the Federal Bureau of Prisons' "No Frills" regulations banning electric or electronic musical instruments. Upon applying the multi-factor test articulated by the Supreme Court in *Turner v. Safley*, the *Kimberlin* court found the regulations "reasonably related to the asserted goal—conserving correctional funds." The court reached this conclusion without needing any facts. "Common sense," posited the three-judge panel, "tells us . . . that a prisoner's possession and use of an electric guitar costs correctional institutions money for electricity, upkeep, storage and supervision." The plaintiff's First Amendment rights virtually dissolved into a tautology, and meanness became a constitutionally acceptable, symbolic condition of confinement.

The *Kimberlin* ruling can be read as an exemplar of three dominant features of prisoners' rights adjudication during the tenure of the Rehnquist Court: (1) the seemingly ubiquitous application of the deferential, rational-basis test enunciated in *Turner v. Safley* ("the Turner test"); (2) the trivialization of "legitimate" penal objectives, which are nonetheless allowed to trump prisoners' rights, including those "fundamental" to ordered liberty; and (3) a willingness to forego empirically based "facts" in favor of prison officials' asserted "truths." The interlocking nature of these practices has synergized the Turner test, resulting in the "Turnerization" of prisoners' rights.

This Article documents and critiques the Rehnquist Court's primary correctional legacy: the Turnerization of prisoners' rights. Part II of the Article provides historical context by presenting the

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* Distinguished Professor of Corrections & Correctional Law, Minnesota State University; editor-in-chief, The Criminal Law Bulletin; contributing editor, Criminal Justice Review. This Article is dedicated to my law tutor at Oxford University, Professor Roger Hood, upon his retirement.

1 318 F.3d. 228 (D.C. Cir. 2003).
3 *Kimberlin*, 318 F.3d at 233.
4 *Id.* (citing *Amatel v. Reno*, 156 F.3d 192, 198 (D.C. Cir. 1998)).
genealogy of the Turner test, concluding with a description of its four parts. Part III maps the expansion of the Turner test beyond its First Amendment base into a variety of constitutional issues. Part IV critiques the underpinnings of the Turner test, finding that Turnerization has given legitimacy to a thin, underenforced federal Constitution for prisoners. Part V concludes the Article by establishing that Turnerization represents a normative strain in the bureaucratic state, with the Turner test advancing the management of prisoners as a permanent underclass and thereby inflicting great damage to the grundnorm—or basic norm—of prisoners’ rights.

II. THE ORIGINS OF TURNERIZATION

The Framers did not envisage a nation where more than two million detainees and inmates reside in warehouse-like institutions.\(^5\) At its birth, the new republic had yet to be populated by a fortress-like prison. Jails had long operated in the Old and New Worlds, mostly in a manner whereby filth, disease, and despair plagued the ranks of their wards.\(^6\) By the eighteenth century, the management of jails epitomized arbitrary government\(^{-}\)—the very evil that inspired the Bill of Rights.\(^8\) Hamilton, in The Federalist No.

\(^5\) See Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics Bulletin: Prisoners in 2004 at 1 (2005), available at http://www.ojp.usdoj.gov/bjs//pub/pdf/p04.pdf (delineating the size of the prison population). The Author has described the “warehouse prison” as follows:

During the 1980s three forces transformed the prison: 1) a dramatic rise in the incarceration rate; 2) disillusionment with rehabilitation; and 3) a penal strategy that manages the underclass. Their marriage produced the “human warehouse with a junglelike underground.” Seemingly powerless to combat the rampant violence and pervasive idleness that often accompanies incarceration, the warehouse prison-type operates without the pretense that it does anything other than store and recycle offenders.


\(^7\) See, e.g., Matthew W. Meskell, The History of Prisons in the United States from 1877 to 1977, 51 Stan. L. Rev. 839, 848 (1999) (“Colonial jails, like their English predecessors, were run mostly for profit. Jailers extorted often exorbitant sums from those in their care for food, clothing, and luxury goods like alcohol and tobacco.”) (footnote omitted).

\(^8\) See, e.g., Alfredo Garcia, The Fifth Amendment: A Comprehensive Historical Approach, 29 U. Tol. L. Rev. 209, 223 (1998) (“Power was the antithesis of liberty. Governmental power had to be checked, and curtailing the ability of the state to wield a coercive mechanism which meant the difference between life or death was critical. The spe-
84 quoting Blackstone, wrote that "confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten," constituted "a more dangerous engine of arbitrary government" than punishment. For good reason, gaolers owed their wards the duty at common law to provide a habitable environment. By the beginning of the twentieth century that duty acquired considerable breadth: In Westbrook v. State the Georgia Supreme Court announced that a prisoner "has all the rights of the ordinary citizen which are not expressly or by necessary implication taken from him by law."

A. The Hands-Off Doctrine

By the 1930s, the "hands-off" doctrine had taken hold in lower federal courts. It posited that federalism created a constitutional roadblock to adjudicating the merits of prisoner complaints brought from state prisons and jails. Lower federal courts also advanced a host of other reasons for the hands-off doctrine, including judges' lack of familiarity with prison life and that time-consuming, frivolous pro se filings would clog the courts. Some courts effected a hands-off policy by advancing the elusive distinct-

specific protections embedded in the Bill of Rights took root and expanded as the new nation grappled with the proper constraints upon the coercive power wielded by the government.


10 See, e.g., Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (acknowledging a constitutional basis for "the common law view that 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of liberty, care for himself'") (quoting Spicer v. Williamson, 132 S.E. 291, 293 (1926)); Ex parte Jenkins, 58 N.E. 560, 561 (Ind. App. 1900) (holding that the wife of a lynched prisoner could sue a sheriff for breach of "the duty he owes the prisoner himself to exercise reasonable and ordinary care to protect the prisoner's life and health").

11 66 S.E. 788 (Ga. 1909).

12 Id. at 585. This ruling hardly comports with infamous and much-repeated dictum in Ruffin v. Commonwealth that inmates are but "slaves of the State." 62 Va. (21 Gratt.) 790, 796 (Va. 1871). Contemporary casebooks have overstated its influence given that Corpus Juris in 1917 insisted that the case incorrectly stated the legal status of prisoners. Donald H. Wallace, Prisoners' Rights: Historical Views, in CORRECTIONAL CONTEXTS 248, 248–52 (James W. Marguert & Jonathan R. Sorensen eds., 1997).


14 See, e.g., United States ex rel. Lawrence v. Ragen, 325 F.2d 410, 412 (7th Cir. 1963); Eaton v. Bibb, 217 F.2d 446, 448 (7th Cir. 1954).

15 See, e.g., Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951); see also NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 18 (1973) ("Judges felt that correctional administration was a technical matter to be left to experts rather than to courts . . . ").

16 See, e.g., Stroud v. Swope, 187 F.2d 850, 852 (9th Cir. 1951).
tion between rights and privileges; the latter invariably formed the gravamen of the complaint, causing the plaintiff to lose.\textsuperscript{17}

Prisoners confined during the era of the hands-off doctrine experienced a host of inhumane acts, including racial segregation;\textsuperscript{18} poor medical care;\textsuperscript{19} inmate-on-inmate assault;\textsuperscript{20} staff brutality and indifference;\textsuperscript{21} and squalor.\textsuperscript{22} The sordid reality of prison life under the hands-off doctrine came to the fore in a 1967 presidential commission that found confinement "at best barren and futile, at worst unspeakably brutal and degrading."\textsuperscript{23}

Between 1967 and 1977 the federal judiciary underwent a historic transformation. It abandoned the hands-off doctrine and constitutionalized most aspects of incarceration, such as classification of inmates;\textsuperscript{24} discipline;\textsuperscript{25} medical care;\textsuperscript{26} access to the courts;\textsuperscript{27} religious freedom;\textsuperscript{28} exercise;\textsuperscript{29} prison rules;\textsuperscript{30} treatment of pretrial detainees;\textsuperscript{31} speech;\textsuperscript{32} search and seizure;\textsuperscript{33} food, shelter, clothing, and sanitation;\textsuperscript{34} and the totality of living conditions.\textsuperscript{35}

Several lower federal courts also assumed control of entire state

\textsuperscript{17} See, e.g., Douglas v. Sigler, 386 F.2d 684, 687 (8th Cir. 1967); Parks v. Ciccone, 281 F. Supp. 805, 809–10 (W.D. Mo. 1968).
\textsuperscript{18} See, e.g., John Irwin, Prisons in Turmoil 9 (1980) (observing that blacks and whites resided in separate sections of the “Big House” prison-type); Michael Welch, Corrections: A Critical Approach 369 box 13-2 (1996) (observing that until the 1960s, institutional racism could be found throughout the prison).
\textsuperscript{19} See, e.g., Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974) (finding an absence of “prompt and efficient” medical care in Mississippi prisons); Newman v. Alabama, 549 F. Supp. 278, 281 (M.D. Ala. 1972) (finding that the one hospital for Alabama’s inmates employed no full-time physicians).
\textsuperscript{20} See, e.g., Alan J. Davis, Sexual Assaults in the Philadelphia Prison System and Sheriff’s Vans, 6 TRANS-ACTION 8, 9 (1968). In Philadelphia’s jails “virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison.” Id. at 9.
\textsuperscript{21} See, e.g., Jackson v. Bishop, 404 F.2d 571, 579–80 (8th Cir. 1968) (banning the whipping of inmates).
\textsuperscript{23} President’s Comm’n on Law Enforcement and Admin. of Justice, The Challenge of Crime in A Free Society 159 (1967).
\textsuperscript{24} See, e.g., Kelly v. Brewer, 525 F.2d 394, 400 (8th Cir. 1975).
\textsuperscript{25} See, e.g., Knell v. Bensinger, 489 F.2d 1014, 1018 (7th Cir. 1973).
\textsuperscript{26} See, e.g., Fitzer v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972).
\textsuperscript{27} See, e.g., Corby v. Cowboy, 457 F.2d 251, 253 (2d Cir. 1972).
\textsuperscript{28} See, e.g., Walker v. Blackwell, 411 F.2d 23, 28–29 (5th Cir. 1969).
\textsuperscript{32} See, e.g., Sostre v. McGinnis, 442 F.2d 178, 202 (2d Cir. 1971).
\textsuperscript{33} See, e.g., Bonner v. Coughlin, 517 F.2d 1311, 1316 (7th Cir. 1975).
prison systems through all-encompassing structural injunctions.\footnote{36}

B. "The Cry of Wolfish"

By 1977, lower federal courts had written a broad charter of rights for prisoners in piecemeal fashion.\footnote{37} The Southern District of New York's ruling in United States ex rel. Wolfish v. Levi\footnote{28} demonstrated the expanse of this charter. While the court spoke of deference to "the primary authority and expertise of those charged with building and running the prisons,"\footnote{39} the decision accorded no weight to the judgments of prison officials when "made arbitrarily or in conflict with particular rights given by Constitution or statute."\footnote{40} For pretrial detainees, the charter of rights forbade "any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, [and any deprivation or restriction] must be justified by a compelling necessity."\footnote{41} This standard effectively dictated the least-restrictive form of confinement for pretrial detainees unless their keepers advanced a strong case to the contrary—one not merely based on financial or administrative considerations. The court held that the defendants failed to meet this considerable burden of proof on several counts, including plaintiff's complaint of double-bunking.\footnote{42}

The Supreme Court's 1979 ruling in Bell v. Wolfish\footnote{43} halted the expansion of prisoners' rights. Writing for the Court, then-Justice Rehnquist repudiated the premises embraced by the lower court. First, rather than deference ending where rights began, deference came into play in determining the scope of those rights.\footnote{44} Second, rather than detainees possessing all rights of free citizens absent a


\footnote{37} See supra notes 24–35 (citing cases).


\footnote{39} Id. at 124.

\footnote{40} Id.

\footnote{41} Id. (quoting Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975)).

\footnote{42} See id. at passim.

\footnote{43} 441 U.S. 520 (1979).

\footnote{44} Id. at 546–49.

That the Court can uphold these indiscriminate searches highlights the bankruptcy of its basic analysis. Under the test adopted today, the rights of detainees apparently extend only so far as detention officials decide that cost and security will permit. Such unthinking deference to administrative convenience cannot be justified where the interests at
compelling justification, the necessities of confinement precluded certain rights and severely limited others. Accordingly, the Court held that adverse conditions or restrictions pass constitutional muster under the Due Process Clause if they are "reasonably related to a legitimate governmental objective." Moreover, when applying the test of reasonableness, "courts should ordinarily defer to" prison staff's supposed expertise. The Court reversed the trial court on all the primary issues.

A long-time litigator on behalf of inmates would later characterize Wolfish as "the first emphatically general statement of the requirement of deference to the expertise of prison officials, regardless of whether they actually possess such expertise." And the Wolfish Court certainly took its own advice. The facts of the record mattered little, because a majority of the justices accepted at face value the defendant's security concerns and accorded them greater weight than the liberty interests of persons presumed innocent.

For the next fourteen years, "the cry of Wolfish"—the Court's call for deference to the actions of prison officials—did not fully resonate among the lower federal courts in large part because the remedy, not the right, became the real keystone of prisoners' rights. Comprehensive structural injunctions as well as equally expansive consent decrees refashioned prison conditions in a manner

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stake are those of presumptively innocent individuals, many of whose only proven offense is the inability to afford bail.

*Id.* at 579 (Marshall, J., dissenting).

45 *Id.* at 554.

Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

*Id.* at 539.

46 *Id.* at 543 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

47 *Id.* at 563.

48 Fred Cohen, *The Limits of Judicial Reform of Prisons: What Works, What Doesn't*, 40 CRIM. L. BULL. 421, 440–41 (2004) (quoting John Boston); see also *id.* at 441 n.101 ("If the poet laureate of New York were named a prison warden on January 1, he would be a corrections expert in the *Bell [v. Wolfish]* mode the following morning.").

50 See *id.* at 441.


ner once reserved for legislation. One amendment carried most of the doctrinal weight. In the Eighth Amendment prohibition of cruel and unusual punishment, lower federal courts found the proverbial "empty vessel." Two commentators were not fooled: Feeley and Rubin, in their seminal study of the period, wrote, "Unless there is additional content in the text [of the Eighth Amendment], those decisions must be recognized as policy making, however much the rule maker may try to characterize them as interpretation."

C. Answering the "Cry of Wolfish"

One court that did not hear "the cry of Wolfish" was the district court in Turner v. Safley, which employed heightened scrutiny in finding unconstitutional prison regulations largely forbidding correspondence between inmates and barring inmate marriages. The district court had deemed these activities to be fundamental rights—that is, "the very essence of a scheme of ordered lib-

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Id. at 15.


See Turner, 482 U.S. at 82–83.

Id. at 83 (noting that the district court "held the marriage regulation to be an
erty"—and thus barred limitations on their exercise unless they constituted the least-restrictive method to achieving penal goals. The court of appeals affirmed using the same demanding test.

Writing for the Supreme Court in *Turner*, Justice O'Connor rejected application of the strict scrutiny test because she deemed it incompatible with the Rehnquist Court's policy that judges should not "become the primary arbiters of what constitutes the best solution to every administrative problem." In place of heightened scrutiny, the *Turner* Court advanced a reasonableness standard consisting of the following prongs:

- Whether there is a "valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it."  
- "[W]hether there are alternative means of exercising the right [that is, the general constitutional right, such as freedom of expression, rather than a particular aspect—such as corresponding through the mail,] that remain open to prison inmates."  
- "[T]he impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."  
- "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."  

Four members of the Court—Justices Stevens, Marshall, Brennan, and Blackmun—dissented. Speaking for the dissenters, Justice Stevens characterized the test as "open-ended" and thus inviting prison staff's speculative concerns to carry the day, every day. He

unconstitutional infringement upon the fundamental right to marry because it was far more restrictive than was either reasonable or essential for the protection of the State's interests in security and rehabilitation" (citing *Safley*, 586 F. Supp. at 594)).

63 Id. at 89.
64 Id. (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).
65 Id. at 90.
66 Id. ("When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." (citing *Jones v. N.C. Prisoners' Union*, 433 U.S. 119, 132–33 (1977))).
67 Id. at 91.
68 Id. at 101 n.1 (Stevens, J., dissenting).
feared that wardens could invariably "produce[...][some] plausible security concern" to justify an exercise of power, including "the use of bullwhips" to enforce prison rules.69

III. THE IMPACT OF TURNERIZATION

Chief Justice Rehnquist and the other members of the Turner majority envisaged a test governing all rights implicated by prison regulations. Justice O'Connor, writing for the Turner Court, posited that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."70 On the heels of the Turner ruling, the Court applied the Turner test to prison regulations addressing two other aspects of the First Amendment: religious practices in O'Lone v. Estate of Shabazz71 and receipt of books in Thornburgh v. Abbott.72 In 2004, the Turner test would completely encircle the First Amendment when the Court upheld limitations on freedom of association in Overton v. Bazzetta.73

Meanwhile in Washington v. Harper,74 the Chief Justice voted with the majority in applying the Turner test outside its original First Amendment boundaries. The respondent had objected to a policy allowing the involuntary use of psychotropic medication.75 Even though the Court found that the policy implicated a due process liberty interest, it nonetheless applied the Turner test in finding that it reasonably advanced prison security.76 Regarding its scope, the Court stated: "We made quite clear that the standard of review we adopted in Turner applies to all circumstances in which the needs of prison administration implicate constitutional rights."77

A. Boundary-Defining Criteria

During the long interval between Harper and the Court's 2005 decision in Johnson v. California,78 the Court expressed inconsistent views regarding the reach of the Turner test. On the one hand in

69 Id. at 101.
70 Id. at 89 (majority opinion).
75 Id. at 214–15.
76 Id. at 225–26.
77 Id. at 224 (emphasis added) (citing Turner v. Safley, 482 U.S. 78, 85 (1987)).
Shaw v. Murphy, the Court spoke of the Turner test as the "unitary, deferential standard for reviewing prisoners' rights claims." On the other hand, the Court did not apply the Turner test to prison cases addressing the Fifth Amendment right against self-incrimination and the Eighth Amendment right against cruel and unusual punishment.

Meanwhile, federal courts of appeals advanced three boundary-defining approaches. One posited that the several prongs of the Turner test applied to rights that involve "multi-faceted balancing." In articulating this criterion, the Eighth Circuit Court of Appeals used the Turner test to adjudicate a claim that cross-gender searches violated male inmates' right to privacy. Cross-gender searches, according to the federal panel, necessitated the balancing of prisoners' rights to privacy, equal employment rights of female officers, and the institution's interest in internal security.

A second boundary-defining approach limited the Turner test to situations involving day-to-day penal management. The Court of Appeals for the District of Columbia articulated this criterion by ruling that the Turner test did not apply to a lawsuit bought by female federal prisoners who complained of unequal treatment because their male counterparts were housed closer to Washington, D.C. The court observed that the proximity of the female prison rested on policy decisions rather than day-to-day management.

A third test, initially employed by the Ninth Circuit in Jordan v. Gardner, posited that the Turner test "has been applied only where

80 Id. at 229.
81 McKune v. Lile, 536 U.S. 24, 48 (2002) (holding that an inmate's refusal to make incriminating admissions in order to qualify for a sex abuse treatment program did not result in adverse consequences sufficiently severe to constitute self-incrimination under the Fifth Amendment).
83 See Timm v. Gunter, 917 F.2d 1093, 1099 n.8 (8th Cir. 1990) (citing Michenfelder v. Sumner, 860 F.2d 328, 331 n.1 (9th Cir. 1988)).
84 See id. at 1099–1101.
85 See id. at 1100.
86 Pitts v. Thornburgh, 866 F.2d 1450, 1451–52 (D.C. Cir. 1989). Plaintiffs claimed that "their being incarcerated far from the District" results "in the hardship of fewer visitors (especially family members) and less preparation for and support in their eventual return to the District than that afforded males imprisoned at the D.C. facilities." Id. at 1452.
87 Id. at 1454.
88 986 F.2d 1521 (9th Cir. 1993).
the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment." The court held that the Turner test did not determine what constitutes cruel and unusual punishment because the Eighth Amendment prohibition of such punishment does "not conflict with incarceration," but instead "limit[s] the hardships which may be inflicted upon the incarcerated as 'punishment.'"

In Johnson v. California, the Supreme Court delimited the Turner test to situations in which asserted rights are "inconsistent with proper incarceration." However, Justice O'Connor's majority opinion failed to identify criteria for making this determination except to posit that cruel and unusual punishment as well as racial segregation fell outside the new standard because they were incompatible with "public respect for our system of justice." Justices Thomas and Scalia, the lone dissenters, would likely have agreed with a circuit judge's assessment in Gerber v. Hickman that "[t]he repetition of . . . [the Johnson Court's] vague principle in numerous ways, however, does not explain why . . . [a right] is fundamentally inconsistent with incarceration." The editors of the Harvard Law Review agreed: "[T]he Court has done little to assure that they will be resolved in a predictable fashion. The key question that Johnson passes over, and which underlies the doctrinal confusion it will create, is why prisoners lose full constitutional protection at all."

B. Charting the Constitutional Divide

1. Settled Territory

Prior to Johnson v. California, the Supreme Court had applied the Turner test to challenges brought under the First Amendment in Turner v. Safley, O'Lone v. Estate of Shabazz, Thornburgh v. Abbott, Shaw v. Murphy, and Overton v. Bazzetta, as well as prison-

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89 Id. at 1530 (citing Washington v. Harper, 494 U.S. 210, 224 (1990)).
90 Id. (citing Spain v. Procunier, 600 F.2d 189, 193–94 (9th Cir. 1979)).
92 Id. at 511 (citing Batson v. Kentucky, 476 U.S. 79, 99 (1986)).
96 482 U.S. 342, 348 (1987) (holding that institutional regulations restricting the exercise of religion are reasonably related to institutional goals).
97 490 U.S. 401, 419 (1989) (holding that institutional regulations restricting publications are reasonably related to institutional goals).
ers’ right to privacy in *Washington v. Harper*. Lower federal courts extended the reach of *Turner* to the prohibition of cruel and unusual punishment; the ban on unreasonable searches; denial of equal protection of the law because of race, gender, and religious affiliation; as well as matters of statutory interpretation.

The Court’s decision in *Johnson* gave no indication that the constitutional territory it had previously staked out for the *Turner* test, as delineated above, would be lost to a different test. Indeed, the Court explicitly spoke of only two rights—the prohibition of cruel and unusual punishment and racial discrimination—that lay beyond the reach of the *Turner* test. Subsequently, lower federal courts have been true to this reading of *Johnson*. For example, the district court in *Roe v. Crawford* rejected the plaintiffs assertion that a woman’s right to terminate her pregnancy in prison is comparable to the right to be free of racial segregation and therefore is “not a right that need necessarily be compromised for the sake of proper prison administration.” The court asserted that *Johnson* intended “many rights,” including reproductive freedom, to fall under the *Turner* test.

2. Contested Territory

Commencing shortly after the Court’s ruling in *Turner v. Safley*, lower federal courts have extended the *Turner* test into areas not yet staked out by the Supreme Court. Although *Johnson v. California* categorically barred the lower federal courts from applying *Turner* test to the Eighth Amendment and to race-based equal protection challenges, it failed to address definitively the importation

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98 532 U.S. 223, 231 (2001) (holding that inmates lack a First Amendment right to assist other inmates in legal matters).
99 539 U.S. 126, 127 (2003) (barring visitation with children when the inmate’s parental rights have been terminated).
100 494 U.S. 210, 236 (1991) (allowing the involuntary use of psychotropic medication).
104 Klinger v. Dep’t of Corr., 31 F.3d 727, 732 (8th Cir. 1994) (aplying *Turner* to an equal protection claim).
106 Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994).
109 Id. at 948 (citing *Johnson*, 543 U.S. at 510).
110 Id. (emphasis added) (citing *Johnson*, 543 U.S. at 510).
of the *Turner* test by lower federal courts into the subject areas examined below.

a. Equal Protection

Albeit still limited, post-*Johnson* caselaw supports application of the *Turner* test to equal protection challenges not based on race. As the court in *Tolbert v. McGrath*\(^\text{111}\) concluded:

For distinctions drawn among prisoners other than those based on race, strict scrutiny is inappropriate to test the infringement of prisoners’ constitutional rights. Where a prison regulation (other than a race-based one) impinges on inmates’ constitutional rights, the regulation or practice is valid if it is reasonably related to legitimate penological interests.\(^\text{112}\)

Moreover, lower federal and state courts have ruled that disparate treatment of persons of color that can be attributed to some factor other than race or ethnicity should be adjudicated by the *Turner* test.\(^\text{113}\) For instance, in *Meggett v. Pennsylvania Department of Corrections*,\(^\text{114}\) a state court applied the *Turner* test to a prison regulation that treated Afro haircuts differently than other haircuts.\(^\text{115}\) The court reasoned that Afro haircuts were race-neutral because they could be worn by white people.\(^\text{116}\) The court ultimately ruled in favor of the defendant.\(^\text{117}\)

In turn, *Johnson* does not contravene earlier case law that applied the *Turner* test to claims of religious discrimination.\(^\text{118}\) For instance, *Salaam v. Collins*\(^\text{119}\) addressed whether staff had discriminated against Muslim inmates in denying them ritually slaughtered meat.\(^\text{120}\) By contrast, prison officials had honored Jewish inmates’ desire for kosher meals.\(^\text{121}\) The court in *Salaam* applied the highly

\(\text{\textit{Note:}}\)

112 Id. at *6 (citations omitted).
113 See, e.g., McClain v. Rogers 155 F. App’x 918, 921 (7th Cir. 2005) (characterizing a white supremacist’s claim as religion-based given his affiliation with a white supremacist religion); Meggett v. Pa. Dep’t of Corr., 892 A.2d 872 (Pa. Commw. Ct. 2006) (rejecting claim that restrictions on Afro haircuts was racially based). Because the disparate treatment affecting a black inmate in *McGrath* arose due to his attendance at Muslim religious services, the court used the *Turner* test and, not surprisingly, ruled against the plaintiff. *McGrath*, 2005 WL 3310065, at *6.
114 Meggett, 892 A.2d 872.
115 Id. at 883–84.
116 Id. at 888.
117 Id.
120 Id. at 854–55.
121 Id. at 860.
deferential *Turner* test in ruling that financial considerations justified the unequal treatment of Muslim inmates: Their dietary demands, unlike those of the Jewish inmates, would impose more than *de minimis* costs.\textsuperscript{122}

By placing discrimination based on race alone outside the reach of the *Turner* test, *Johnson* invites lower federal courts to reconsider their earlier case law on sex discrimination in prison. Shortly after the ruling in *Turner*, however, the D.C. Circuit in *Pitts v. Thornburgh*\textsuperscript{123} rejected defendant prison officials’ contention that the *Turner* test governed alleged sexual discrimination in the housing of inmates,\textsuperscript{124} advancing three reasons for not doing so. First, *Turner* addressed “the day-to-day operations of prisons that restrict the exercise of prisoners’ individual rights,” whereas the facts of the instant case concerned where to locate a women’s prison, which the court characterized as a nonjudiciable policy decision.\textsuperscript{125} Second, unlike the facts of *Turner*, the instant case alleged gender discrimination, “a classification that traditionally summons heightened scrutiny.”\textsuperscript{126} Finally, the right to equal protection is different from other individual rights in that it implicates the ill-will of government and thus an improper governmental motive.\textsuperscript{127}

Citing the *Pitts* case, the Eighth Circuit in *Pargo v. Elliott*\textsuperscript{128} observed that *Turner* does not foreclose all heightened judicial review.\textsuperscript{129} Female inmates imprisoned in Iowa complained of programs inferior to their male counterparts.\textsuperscript{130} Employing the *Turner* test, the district court ruled against them.\textsuperscript{131} The circuit court vacated and remanded the trial court judgment;\textsuperscript{132} moreover, the court implied that *Turner*’s deferential standard should not be applied because the women’s suit did not address a matter of internal prison security.\textsuperscript{133}

Earlier, the Eighth Circuit in *Klinger v. Department of Correc-

\textsuperscript{122} *Id.* at 861.
\textsuperscript{123} 866 F.2d 1450 (D.C. Cir. 1989).
\textsuperscript{124} *Id.* at 1453–55.
\textsuperscript{125} *Id.* at 1453.
\textsuperscript{126} *Id.* at 1554.
\textsuperscript{127} *Id.* at 1555.
\textsuperscript{128} 49 F.3d 1355 (8th Cir. 1995).
\textsuperscript{129} *Id.* at 1357.
\textsuperscript{130} *Id.* at 1355–56.
\textsuperscript{132} *Id.* at 1357.
\textsuperscript{133} *Id.* at 1357. The case was dismissed by the district court on remand. *Pargo v. Elliott*, 894 F. Supp. 1243 (S.D. Iowa), *aff’d*, 69 F.3d 280 (8th Cir. 1995).
tions\textsuperscript{134} had addressed an alleged denial of equal protection arising from dissimilar programs available to female and male inmates confined in Nebraska.\textsuperscript{135} Unlike the aforementioned \textit{Pargo} women, these female inmates blamed the inequality on prison staff's allocation of resources.\textsuperscript{136} Consequently, the \textit{Klinger} court characterized the Nebraska women's claim as one addressing the "day-to-day administrative decisions of prison officials" and thus concluded that \textit{Turner}'s deferential test governed.\textsuperscript{137} The court then sided with the defendant.\textsuperscript{138}

b. Statutory Rights

\textit{Johnson} leaves undisturbed those lower federal court rulings that applied the \textit{Turner} test to inmate lawsuits over restrictions on statutory rights. In \textit{Gates v. Rowland},\textsuperscript{139} the court addressed a statutory claim by HIV-positive inmates. Prison staff had barred them from food service jobs, purportedly in violation of federal law forbidding disability discrimination.\textsuperscript{140} The court concluded that the rights created by the statute could be limited by prison authorities if reasonably related to penal objectives.\textsuperscript{141} Application of the \textit{Turner} test in this manner rested on statutory intent, so found the court:

"There is no indication that Congress intended the Act to apply to prison facilities irrespective of . . . effective prison administration. . . . Thus, we deem the applicable standard for the review of the Act's statutory rights in the prison setting to be equivalent to the review of constitutional rights in a prison setting as outlined by the Supreme Court in \textit{Turner} . . . ."\textsuperscript{142}

The Ninth Circuit then deferred to defendants' explanation for excluding the HIV-positive inmates from serving food to the mainline population. The defendants asserted that they had catered to inmates' "think[ing] the worst—that . . . [HIV-positive food servers] will bleed into the food, spit into the food, or even worse."\textsuperscript{143}

This, the defendants argued, could lead to "violent actions" against

\textsuperscript{134} 31 F.3d 727 (8th Cir. 1994).
\textsuperscript{135} \textit{Id.} at 729.
\textsuperscript{136} \textit{Id.} at 731.
\textsuperscript{137} \textit{Id.} at 732.
\textsuperscript{138} \textit{Id.} at 734.
\textsuperscript{139} 39 F.3d 1439 (9th Cir. 1994).
\textsuperscript{140} \textit{Id.} at 1445.
\textsuperscript{141} \textit{Id.} at 1447.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
HIV-positive food servers.\textsuperscript{144}

The Fourth and Seventh Circuits appear disposed to following the Ninth Circuit's lead on this issue. In \textit{Torcasio v. Murray},\textsuperscript{145} the Fourth Circuit addressed an action brought under the Americans with Disabilities Act (ADA). The plaintiff-inmate asserted that staff had failed to make necessary accommodations under the ADA by refusing to modify his cell, the prison lobby, and recreation areas.\textsuperscript{146} On appeal, the circuit court granted the defendants qualified immunity because they could have reasonably believed that \textit{Turner} permitted them to place penal objectives ahead of the inmate's statutory right to reasonable accommodations.\textsuperscript{147} Quoting the Ninth Circuit's decision in \textit{Gates}, the Fourth Circuit panel reasoned, "It is highly doubtful that Congress intended a more stringent application of prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights."\textsuperscript{148}

In the Seventh Circuit decision of \textit{Love v. Westville Correctional Center},\textsuperscript{149} a quadriplegic inmate brought suit under the ADA. He asserted that his disability prevented his use of numerous programs available to other inmates, as well as the recreational, dining, and visiting facilities.\textsuperscript{150} Rather than asserting that the \textit{Turner} test overrode statutory rights per se, the court stated, "It is entirely possible" that the Act's "reasonableness requirement must be judged in light of the overall institutional requirements."\textsuperscript{151} This could dictate that "no reasonable accommodations were possible."\textsuperscript{152} Because the defendant did not explain why it failed to accommodate the plaintiff, the court affirmed the jury award of damages.\textsuperscript{153}

The district court for the Eastern District of Wisconsin stands alone in expressly rejecting \textit{Turner}'s applicability to federal statutes. In \textit{Lewis v. Sullivan},\textsuperscript{154} the court addressed the constitutionality of a key provision of the Prison Litigation Reform Act (PLRA) barring \textit{in forma pauperis} suits. The defendants argued in part that the \textit{Turner} test applied to federal statutes, which would require the

\textsuperscript{144} \textit{Id.} at 1447–48.
\textsuperscript{145} 57 F.3d 1340 (4th Cir. 1995).
\textsuperscript{146} \textit{Id.} at 1342.
\textsuperscript{147} \textit{Id.} at 1355.
\textsuperscript{148} \textit{Id.} (quoting \textit{Gates}, 39 F.3d at 1447).
\textsuperscript{149} 103 F.3d 558 (7th Cir. 1996).
\textsuperscript{150} \textit{Id.} at 559–60.
\textsuperscript{151} \textit{Id.} at 561.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} 135 F. Supp. 2d 954 (W.D. Wis. 2001), \textit{rev'd on other grounds}, 279 F.3d 526 (7th Cir. 2002).
trial court to uphold the challenged provision of the PLRA as long as it promoted a reasonable penal objective—regardless of whether it otherwise violated the plaintiff’s constitutional rights.\textsuperscript{155} District Judge Crabb disagreed, finding that the justification for deferring to prison regulations, per \textit{Turner}, did not apply to federal statutes.\textsuperscript{156} She explained that prison regulations, unlike statutes, “are enacted and implemented by persons in the business of running prisons,” who would be impeded in “the efficient operation of prisons” if constrained by constitutional rights.\textsuperscript{157}

c. Privacy, Including Searches

In his dissenting opinion in \textit{Jordan v. Gardner},\textsuperscript{158} Chief Judge Wallace of the Ninth Circuit asserted that \textit{Turner} subsumed \textit{Bell v. Wolfish} in Fourth Amendment cases.\textsuperscript{159} When the \textit{Wolfish} Court invoked a reasonableness test, it characterized its inner workings as balancing “the scope of the particular intrusion; the manner in which it was conducted; the justification for initiating it; and the place in which it is conducted.”\textsuperscript{160} But Chief Judge Wallace’s dissent posited that “\textit{Turner} does not authorize such balancing.”\textsuperscript{161} Unlike \textit{Wolfish}, he explained, “What \textit{Turner} does not require or permit is for a judge to look at the injury to inmates, on the one hand, and the benefit to prison administration, on the other, and say this one or that one is more important . . . .”\textsuperscript{162} He could have added that \textit{Turner} dictates penal interests are presumed much weightier, placing a considerable burden on plaintiff-inmates to overcome this presumption. Hence, factual situations that balance in favor of the plaintiff-inmates under the \textit{Wolfish} test could be reversed under the more deferential \textit{Turner} test.

The pre-\textit{Johnson} caselaw on this issue lacked consensus.\textsuperscript{163} The Second Circuit presumably would use the \textit{Wolfish} test for pretrial detainees given its conclusion that \textit{Turner} exclusively addresses...
prisons rather than jails. The Third Circuit applied the *Turner* test to inmates’ right of privacy in medical information and to non-therapeutic abortions. Inmates possess “at best” a minimal right to privacy, wrote the Fifth Circuit in upholding cross-gender searches using *Turner’s* reasonableness standard. The Eighth Circuit applied the *Turner* test in permitting surveillance of men’s showers by female officers. Its brethren on the Ninth Circuit stated that they would use those parts of the *Turner* test they deemed applicable to the Fourth Amendment. In a later ruling, the Tenth Circuit embraced *Wolfish’s* balancing test in evaluating strip searches but indicated that *Turner’s* concern with penal aims would be pertinent in deciding the appropriateness of the search’s location. Lastly, an Eleventh Circuit panel indicated that it would rely exclusively on all four prongs of the *Turner* test in determining limitations on the right to bodily privacy.

The sparse post-*Johnson* caselaw favors the application of the *Turner* test when prison regulations limit the most fundamental of privacy rights—a female inmate’s desire to terminate her pregnancy. At issue in *Roe v. Crawford* was a Missouri prison regulation that provided transportation for an off-site abortion only to safeguard the mother’s health. In finding that the *Turner* test governed the regulation’s constitutionality, the court held that the right to an abortion is “inconsistent with proper incarceration.”

d. Pretrial Detention

A line of lower federal court cases indicates that *Turner* does not subsume *Wolfish* for alleged inflictions of pretrial punish-

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164 See Shain v. Ellison, 273 F.3d 56, 66 n.3 (2d Cir. 2001); Benjamin v. Fraser, 264 F.3d 175, 187 n.10 (2d Cir. 2001).
168 Timm v. Gunter, 917 F.2d 1093, 1101 (10th Cir. 1990).
169 See Michenfelder v. Sumner, 860 F.2d 328, 331 (9th Cir. 1988). The court found *Turner’s* second prong to be “much more meaningful in the First Amendment context than the Fourth or Eighth, where the right is to be free from a particular wrong.” *Id.* at 331 n.1.
170 Farmer v. Perrill, 288 F.3d 1254, 1260 (10th Cir. 2002).
171 Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993).
172 439 F. Supp. 2d 942 (W.D. Mo. 2006).
173 *Id.* at 946.
174 *Id.* at 947.
They have stressed that Wolfish's delineation of the goals of pretrial detention differ from Turner's focus on "penological objectives." As the Second Circuit explained:

Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc...) of persons convicted of crimes. Although some of the concerns of pretrial detention, especially protection against further criminal conduct, overlap with the concerns of penology, there are important differences. Penological interests are therefore arguably not an appropriate guide for the pretrial detention of accused persons.

On the other hand, some circuits utilize the Turner test to address claims by pretrial detainees. The Ninth Circuit has embraced the Turner test when pretrial detainees assert violations of the First Amendment. The Fourth Circuit has employed the four prongs of the Turner test when disabilities imposed on detainees allegedly arise from security concerns, including those born of the facts-specific circumstances found in Wolfish. Lastly, the Sixth Circuit in Martucci v. Johnson applied both tests: It first held that, under the Wolfish test, a detainee's segregation did not inflict punishment and then used the Turner test in rejecting his First Amendment claims arising from jailers withholding his mail.

IV. The Underpinnings of Turnerization

The broad reach of Turnerization is matched by what Lawrence Sager would have called its "thinness"—that is, its capacity to underenforce the Constitution. The underpinnings of Turnerization, which are examined below, have circumscribed the potentially broad sweep of prisoners' rights. For inmates, the consequences of underenforcement are profound. As in the previ-

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175 See, e.g., Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004); Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (en banc).
176 Benjamin, 264 F.3d at 187 n.10 (Kleinfeld, J., dissenting) (citing Mauro v. Arpaio, 188 F.3d 1054, 1059 n.2, 1067 (9th Cir. 1999) (alteration in original)).
177 Mauro v. Arpaio, 188 F.3d 1054, 1059 (9th Cir. 1999).
179 See id. (applying the Turner test to the "publishers-only rule," which requires that all inmate publications come directly from the publisher and which the Wolfish Court upheld as a reasonable security measure).
180 944 F.2d 291 (6th Cir. 1991).
181 Id. at 293–94.
182 Id. at 296.
184 But cf. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) ("A prisoner retains
ously discussed *Kimberlin v. United States Department of Justice,*\(^{185}\) in which the D.C. Circuit Court of Appeals discarded "facts" in upholding a mean-spirited policy forbidding electric and electronic musical instruments,\(^{186}\) underenforcement has created a moral shortfall by compromising constitutional norms in exchange for penal objectives of trifling worth.\(^{187}\)

A. Judicial Minimalism

“All the Justices on the contemporary Rehnquist Court, other than the originalists [i.e., Justices Scalia and Thomas] . . . engage in judicial minimalism,” contends Ronald Kahn.\(^{188}\) Judicial minimalism possesses two dimensions: narrowness and shallowness. A decision is narrow when it decides the case at hand and nothing more.\(^{189}\) A decision achieves shallowness when it provides a definitive judgment free of abstractions.\(^{190}\)

The Rehnquist Court’s application of the *Turner* test bears a close resemblance to judicial minimalism, a form of judicial decisionmaking that “settles the case before it, but leaves many things undecided.”\(^{191}\) Take, for instance, the Supreme Court’s ruling in *Overton v. Bazzetta.*\(^{192}\) A burgeoning prison population led the Michigan Department of Corrections to limit the number of minors eligible to visit prisoners unless the minor is visiting an imprisoned parent and other kin.\(^{193}\) Some of the rules in question barred children of inmates whose parental rights had been terminated and required juvenile visitors to be accompanied by a parent or legal guardian.\(^{194}\) The Supreme Court ruled that the regulations satisfied each of the four parts of the *Turner* test.\(^{195}\)

Economy of analysis characterized Justice Kennedy’s majority

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\(^{185}\) 318 F.3d 228 (D.C. Cir. 2003).

\(^{186}\) *Id.* at 233.


\(^{190}\) *Id.* at 13.

\(^{191}\) *Id.*

\(^{192}\) 539 U.S. 126 (2003).

\(^{193}\) *Id.* at 129.

\(^{194}\) *Id.* at 129–30.

\(^{195}\) *Id.* at 133–36.
opinion. His “bottom line” read as follows: “[T]o reduce the number of child visitors, a line must be drawn,” and the one drawn by prison officials would do.\textsuperscript{196} The Court achieved “narrowness” by upholding the constitutionality of the visitation restrictions without deciding whether inmates possessed a right to contact visits.\textsuperscript{197} Justice Kennedy’s majority opinion also obtained “shallowness” by skirting any discussion of how one determines whether an asserted right is “inconsistent with proper incarceration.”\textsuperscript{198}

The minimalism of the \textit{Turner} test accommodates and implicitly legitimates the “countermajoritarian difficulty.”\textsuperscript{199} This is the notion that the powers of the Supreme Court, especially its authority to find legislation unconstitutional, improperly conflict with majority rule.\textsuperscript{200} Alexander Bickel famously coined the phrase “countermajoritarian difficulty”\textsuperscript{201} before the demise of the hands-off doctrine and thus never discussed its relationship to prisoners’ rights. However, for H.N. Hirsh and other commentators, “countermajoritarian” is exactly what “[American] constitutionalism is meant to be.”\textsuperscript{202} The Framers surely feared what Justice Brandeis called the “tyrannies of governing majorities.”\textsuperscript{203}

If one acknowledges the “countermajoritarian difficulty,” a caveat arises under \textit{United States v. Carolene Products}.\textsuperscript{204} Its much-discussed footnote four provides for “more searching” or “more exacting” judicial scrutiny of government actions directed against “discrete and insular minorities.”\textsuperscript{205} Erwin Chemerinsky contends

\textsuperscript{196} Id. at 133.
\textsuperscript{197} The Court denied that it was precluding a right to “intimate association” and proceeded to state that it “need not attempt to explore or define the asserted right of association.” \textit{Id.} at 131–32.
\textsuperscript{198} Id. at 131 (“The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.”).
\textsuperscript{199} ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1978).
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} H.N. HIRSCH, A THEORY OF LIBERTY 5 (1992); \textit{see also} Whitney v. California 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (arguing that judicial review existed to prevent “the occasional tyrannies of governing majorities”); Julian N. Eule, \textit{Judicial Review of Direct Democracy}, 99 YALE L.J. 1503, 1522 (1990) (“If the Constitution’s Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection.”).
\textsuperscript{203} Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring); \textit{see also} THE FEDERALIST NO. 10, at 129–30 (James Madison) (Benjamin F. Wright ed., 1961) (observing that “measures are too often decided, not according to the rules of Justice and the rights of the minor party, but by the superior force of an interested and over-bearing majority”).
\textsuperscript{204} 304 U.S. 144, 152 n.4 (1938).
\textsuperscript{205} \textit{See, e.g.}, LIEF H. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING 86 (1985)
that inmates ought to be regarded as one of those groups. Indeed, several other commentators describe inmates as “a despised minority without political power,” the untouchable class of American society, and “the least sympathetic group of ‘outsiders’ in our constitutional jurisprudence.” Moreover, inmates bring to prison other disadvantaging qualities: They are largely undereducated and impoverished, and they disproportionately experience mental illness.

Footnote four provides:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth Amendment.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities. Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Caroleine Products, 304 U.S. at 152 n.4 (citations omitted).

206 Erwin Chemerinsky, The Constitution in Authoritarian Institutions, 32 Suffolk U.L. Rev. 441, 459 (1999) ("Those in the military, in prisons, and in schools are classic discrete and insular minorities, who have little political power.").

207 Christopher E. Smith, Courts, Politics, and the Judicial Process 289 (1993) ("Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials.").


210 See James E. Robertson, Psychological Injury and the Prison Litigation Reform Act: A Not Exactly, Equal Protection Analysis, 37 Harv. J. on Legis. 105, 133 (2000) ("Fifty percent left school before the eleventh grade. Three of every four inmates cannot read above an eighth grade level and as many as half may be functionally illiterate.").

211 See Jeffrey Reiman, The Rich Get Richer and the Poor Get Prison 135 (5th ed. 1998). Some 50% of inmates free for a year or more before their arrest reported incomes under $10,000; 19% reported incomes less than $3000. Id.

212 See James R.P. Ogloff et al., Mental Health Services in Jails and Prisons: Legal,
B. Faux Balancing

Prisoners' rights came of age in a constitutional era dominated by "balancing." In its purest form, balancing as a mode of constitutional interpretation identifies threatened constitutional rights and assigns weight to those rights to determine if their importance exceeds that of the intruding governmental interests. The four-prong Turner test deceptively suggests balancing, particularly with regard to all but the first prong: If the court finds that the first-prong is satisfied—the presence of a valid, rational connection between the prison regulation and the legitimate and neutral governmental interest put forward to justify it, the court then considers the remaining prongs and balances the findings.

In practice, the Turner test operates as a multi-factor test. "Turner does not authorize a balancing test," wrote the chief judge of the Ninth Circuit. Unlike Bell v. Wolfish, he explained, "Turner does not require or permit . . . a judge to look at the injury to inmates, on the one hand, and the benefit to prison administration, on the other, and say this one or that one is more important . . . ."

Moreover, the several prongs have a distinct "tilt." "[W]hat is striking about the Court's application of the Turner test," writes one commentator, "is the way in which the Turner factors are crafted (or, critics might contend, contrived) to generally foreordain a finding against a prisoner's constitutional claim." The first prong's commitment to rationality, the sine qua non of the test, has a clear subtext: Reasonable means of achieving goals, including petty goals, trump rights. Indeed, penal goals acquire the status of

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_Clinical, and Policy Issues_, 18 LAW & PSYCHOL. REV. 109, 109 (1994) (finding that serious mental illness afflicts 6.5%-10% of prisoners, with moderate mental illness found amongst an additional 15%-40%).


214 See supra text accompanying notes 64-67.


216 Id.


218 See, e.g., Shaw v. Murphy, 532 U.S. 223, 229–30 (2001) ("If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor.") (quoting Turner v. Safley, 482 U.S. 78, 89–90 (1987)); Prison Legal News v. Cook, 238 F.3d 1145, 1151 (9th Cir. 2001) (describing the first prong as the "sine qua non"); Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990) (explaining that the "first of these factors constitutes a sine qua non").
categorical imperatives, occupying a higher constitutional plane than rights. Moreover, the first prong functions as the leveler of rights by drawing no distinction between “weak” (non-fundamental) and “strong” (fundamental) rights. Similarly, this prong ignores the vulnerability of inmates as powerless outcasts to government overreaching.\(^{219}\)

To make matters worse for plaintiffs, the remaining three prongs are conceptually aligned in favor of defendant prison officials. As one court observed, “the first [prong] ‘looms especially large’ because it ‘tends to encompass the remaining [prongs].’”\(^{220}\) Because of their overlapping features, the prongs operate like dominoes: Once the first and most weighty prong falls, the others do as well. A commentator elaborates:

For example, if a court finds under the first prong that there is a valid connection between a regulation and a legitimate governmental purpose, then it will naturally conclude under prong three that the exerted right would have an impact on prison staff. This makes perfect sense. If there is a legitimate reason for enacting the regulation, it must be to prevent some deleterious effect within the prison. And, once a court finds that the regulation is rationally related to a penological purpose and that it furthers prison security, the court will likely define the prisoner’s right broadly in order to find, under the second prong, that there are other means available for exercising the right. Similarly, under prong four, a court will be less inclined to find that the regulation represents an exaggerated response, or that the state has alternative means of dealing with the problem at hand.\(^{221}\)

C. Deference

As illustrated by the Court’s embrace of challenged restrictions on child visitation in Overton v. Bazzetta,\(^ {222}\) the Turner test also rested upon a third element: due deference to the judgments of prison staff. Indeed, the Court in Overton assumed the truthfulness of the prison officials’ concerns about visitation by minors despite

\(^{219}\) See supra note 207 and accompanying text (asserting that inmates ought to be regarded as a powerless class).


\(^{222}\) 539 U.S. 126 (2003); see also supra text accompanying notes 193–94 (describing the challenged visitation rules).
empirical evidence to the contrary.\textsuperscript{223} Whereas prison staff claimed that visiting children created disturbances, not one documented incident occurred.\textsuperscript{224} Moreover, one study found that "[t]he presence of children makes prisons easier, not harder, to manage, and that lawsuits have not been a problem."\textsuperscript{225} Similarly, the defendants' proposition that child visitors would become "too comfortable" with prison life and thus less likely to be deterred from criminal acts\textsuperscript{226} is refuted by studies showing that children separated from an incarcerated parent suffer considerable psychological harm and become likely candidates for criminality.\textsuperscript{227}

The Rehnquist Court's strong commitment to deference\textsuperscript{228} arose from its affinity to the majoritarian constitutional paradigm.\textsuperscript{229} Born from the \textit{Lochner} era, which spanned from 1897 to 1939 and saw the Supreme Court invalidate economic and social welfare legislation in the name of freedom to contract,\textsuperscript{230} this paradigm posits that actions taken by the majoritarian branches of government should prevail even when there exists "reasonable disagreement" over their constitutionality.\textsuperscript{231} In turn, by applying \textit{Turner}'s rational-basis test to prison rules and policies, the Court has sought to restrain itself, and especially the lower federal courts, from interfering with the executive branch's management of prisons. "Prison administration," stated the \textit{Turner} Court, "is . . . a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial

\textsuperscript{223} \textit{Overton}, 539 U.S. at 133.
\textsuperscript{226} \textit{Bazzetta}, 148 F. Supp. 2d at 824.
\textsuperscript{228} See Richard H. Fallon, Jr., \textit{The Supreme Court, 1996 Term—Foreword: Implementing the Constitution}, 111 Harv. L. Rev. 54, 79 (1997) ("[J]udicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp.").
\textsuperscript{229} Id. at 141–42.
\textsuperscript{230} In \textit{Lochner} v. \textit{New York}, the Supreme Court found "a general right . . . to contract." 198 U.S. 45, 58 (1905). \textit{Lochner}'s offspring read laissez faire values into the Constitution. \textit{See}, e.g., \textit{Adkins} v. \textit{Children's Hosp.}, 261 U.S. 525, 554 (1923) (ruling that minimum wage laws violated due process); \textit{Coppage} v. \textit{Kansas}, 236 U.S. 1, 25–26 (1915) (striking down legislation prohibiting "yellow dog" contracts).
\textsuperscript{231} Fallon, \textit{supra} note 228, at 75–77.
The Court has also expressly linked deference to the myth that prison staff possesses unique and extraordinary skills. "Running a prison," asserted Justice O'Connor in *Turner*, "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." In applying the *Turner* test to censorship of books bound for prison, the Court went so far as to characterize the supervision of inmates as subject to "Herculean obstacles."

This perspective is disconnected from the contaminated reality of incarceration. As evidenced by Zimbardo's famous mock prison experiment of 1971, the prison environment transforms prison officers for the worse. The abuses visited upon his volunteer student-inmates by student-guards led Zimbardo to conclude that at the very least a "mean spirited value system" may be inherent in the prison officer subculture.

The Rehnquist Court would have benefited from Owen's study of the evolving behavior of prison guards at San Quentin Prison. Whereas new officers begin their careers by "going by the book"—an approach that approximates a legalistic style that the Supreme Court presumes to be the norm—they soon discern gaps between official policy and look elsewhere to make sense of the complicated prison culture. To address the inadequacy of "going by the book," guards enter a second occupational style—becoming "badge heavy," "super cops" who rely on force and its threatened use. Many guards progress to a third stage, "the old-timer phase," which is based on a kind of "common sense" that has little to do with legality and likely justifies illegal uses of force.

Nor did the Rehnquist Court grasp the notion that prison guards' shared occupational experiences give rise to an officer sub-

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233 Id. at 84–85.
236 Id. at 210.
238 Id. at 87.
239 Id.
240 Id. at 88.
241 Id. at 90.
culture that further undermines legality. John Irwin, a former inmate turned criminologist, observed that guards as well as prison administrators perceive inmates as "worthless, untrustworthy, manipulative, and disreputable deviants."242 James Marguart identified an officer code legitimating illegal beatings as means of order maintenance.243 Kelsey Kauffman's interviews with correctional officers revealed widespread unlawful guard violence directed at inmates.244

V. Conclusion

No jailhouse lawyer would have long mourned the death of Chief Justice Rehnquist. His tenure as Chief Justice could be captured in one decision handed down shortly after his elevation: Turner v. Safley. Surely Turner remains the most influential of all prisoners' rights cases. Addressing freedom of correspondence, a preferred right given heightened scrutiny by the Turner trial court,245 the Court applied its most deferential test. The Supreme Court, as well as the lower federal courts, quickly extended the Turner test to a host of other prisoners' rights. That Turner has worked a sea change was confirmed when the Ninth Circuit, reputed to be the nation's most liberal circuit,246 applied this standard in ruling that the racial segregation of inmates at reception centers was constitutionally acceptable.247 And while the Supreme Court in Johnson v. California retreated from its earlier language describing the Turner test as the "unitary, deferential standard for reviewing prisoners' rights claims,"248 a wide swath of constitutional territory remains subject to it.249

243 See James W. Marquart, Prison Guards and the Use of Physical Coercion As a Mechanism of Prisoner Control, 24 CRIMINOLOGY 347, 347 (1986) (describing guard violence as "highly structured and deeply entrenched in the guard subculture").
244 See KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD 130 (1988) (finding that the majority of the interviewed guards reported seeing illegal force against inmates).
249 See supra Part III.B.
The federal judiciary's embrace of the Turner test reveals a "normative strain" in the bureaucratic state. On the one hand, through its broad reach and exceptional deference, Turnerization precludes effective judicial opposition to the dominant penal ideology—the new penology. In contrast to the rehabilitative ideal, which sought to reintegrate offenders into the broader community, the new penology regards prisoners as disposable social junk and is dedicated to managing them as a permanent subgroup.

On the other hand, Turnerization conflicts with the grundnorm of prisoners' constitutional rights—equal concern and respect. This grundnorm originates in the Equal Protection Clause of the Fourteenth Amendment. For George Fletcher, the Equal Protection Clause represents the "second American [C]onstitution." Born of the Civil War, this Constitution advances the republican ideals of "organic nationhood, equality of all persons, and

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250 Francis Allen coined the term "rehabilitative ideal":

The rehabilitative ideal is itself a complex of ideas. . . . It is assumed, first, that human behavior is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, . . . it is assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfaction and in the interest of social defense.


Beneath the sanitized exterior of the new penology lies a correctional system that manages the underclass—the social junk of advanced capitalism. . . . [T]his lumpenproletariate occupying the inner city [has long been targeted by the criminal justice system] by virtue of their criminality, deviance, race, and perhaps foremostly their class. In the past, however, the rehabilitative ideal deflected criticism of a class-oriented crime control policy. Presently, the bureaucratized prison and its constitutional edifice—the rational-basis test—perform the same defensive function once born by the rehabilitative ideal. Their success made possible a new type of prison, the warehouse prison.

252 Malcolm M. Feeley & Jonathan Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 CRIMINOLOGY 449, 455 (1992) ("The new penology is neither about punishing [justly] or rehabilitating individuals. It is about identifying and managing unruly groups. It is concerned with rationality not of individual behavior or even community organization, but of managerial process.").

popular democracy." Its inclusive nature precludes ostracizing inmates from the protections of the Constitution and its amendments. Regardless of their crimes, inmates remain part of an organic community that marries civil society to the Equal Protection Clause. The effects of this marriage emanate to all constitutional amendments; they individually acquire a subtext—equal concern and respect for the punished, including the imprisoned.

This subtext found new vitality in Johnson v. California, which recognized that equal concern and respect mandates heightened scrutiny when black and white prisoners are treated differently. However, equal concern and respect requires more than the equal treatment of the races behind bars: It dictates that all constitutional rights are consistent with incarceration, leaving no room for Turnerization.

254 Id.
255 See John Hart Ely, Democracy and Distrust 173 (1980) (noting that the plurality in Furman v. Georgia, 408 U.S. 238 (1972), "took this underlying theory [of an integrated reading of the Equal Protection Clause and the Eighth Amendment ban on cruel and unusual punishment] very seriously indeed").
256 See Johnson v. California, 543 U.S. 499, 500 (2005) (ruling that "strict scrutiny" applies to "all racial classifications," including those used in prisons).