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"Not Susceptible to the Logic of *Turner*": *Johnson v. California* and the Future of Gender Equal Protection Claims From Prisons

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ABSTRACT

The U.S. Supreme Court's *Johnson v. California* decision creates a new legal context for gender equal protection claims in the prison context. *Johnson*'s language and justifications create a space in prison jurisprudence where the deferential norms of *Turner v. Safley* are inapposite, and where deference rationales have no place. This Comment argues that this change is significant, and that it fundamentally alters several deference-specific doctrines that have emerged in gender equal protection claims by prison inmates. Specifically, this Comment argues that *Johnson* requires the removal of all prison deference rationales from protected-class equal protection claims, and that its careful set-aside includes gender claims. The requirement that plaintiffs show intentional discrimination for facially neutral policies will likely remain unchanged, given its presence outside the prison context and longstanding presence in equal protection law. Nevertheless, *Johnson*'s ultimate impact is a change in the standard of review for gender claims, the end of the *Klinger v. Department of Corrections* similar-situation standard, and the abandonment of the parity standard in favor of an equality standard.

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INTRODUCTION

The protection of groups from discrimination based on inherent characteristics is a hallmark of the American legal system. The U.S. Supreme Court's equal protection jurisprudence is a cornerstone of this doctrine because it forbids differential treatment of a group without sufficient justification. The heart of equal protection analysis is a balancing of means and ends: deciding whether the government's claimed need justifies its discrimination. The standard used to balance means and ends varies according to the type of discrimination at issue.[1] Although some of the earliest and most prominent equal protection decisions address racial discrimination,[2] the doctrine has also played a central role in combating gender discrimination.[3]

When plaintiffs are incarcerated, however, equal protection analysis takes on particular nuances and complications. Differential treatment of prisoners with respect to constitutional rights has a long history in the United States. Early courts questioned whether prisoners had *any* constitutional rights.[4] Much of the modern prison rights jurisprudence follows a less harsh, but still limiting, doctrine. Prison rights claims are subject to prison deference—a concept rooted in the belief that courts should defer to prison administrators' needs and opinions because of prison administration's complex nature and the judiciary's lack of expertise.[5] The Supreme Court cemented prison deference's role in constitutional claims with *Turner v. Safley*,[6] which set out a uniform and very deferential standard for evaluating all constitutional claims by inmates.[7]

1. The three primary standards are strict scrutiny, intermediate scrutiny, and rational basis. Strict scrutiny applies in cases of racial discrimination and requires that the government show compelling interests that are furthered by narrowly tailored means. Intermediate scrutiny is the standard applied in gender discrimination cases, for which the government must show that its discriminatory means substantially further an important interest. Finally, rational basis review is the default standard of review and applies in any cases that do not merit heightened scrutiny (such as strict or intermediate scrutiny). It requires only that a legitimate government interest be rationally related to the relevant discriminatory means. *See infra* Part I.A.
2. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).
3. *See, e.g.*, United States v. Virginia (*VMI*), 518 U.S. 515 (1996); Reed v. Reed, 404 U.S. 71 (1971).
4. *See, e.g.*, Adam M. Breault, *"Onan's Transgression": The Continuing Legal Battle Over Prisoners' Procreation Rights*, 66 ALB. L. REV. 289, 291 (2002).
5. *See* Bell v. Wolfish, 441 U.S. 520 (1979); Procunier v. Martinez, 416 U.S. 396, 404–05 (1974); Pell v. Procunier, 417 U.S. 817, 826–27 (1974).
6. 482 U.S. 78 (1987).
7. Turner v. Safley, 482 U.S. 78 (1987).

The confluence of prison deference with equal protection law has created a particularly interesting series of developments in the adjudication of prison inmates' equal protection claims; traditional standards and doctrines are sometimes warped, and new limitations are sometimes added. In the gender context, courts have used prison deference to add new procedural hurdles and to modify existing doctrines, creating significant obstacles to gaining a hearing on the merits, let alone relief. This Comment addresses four key doctrinal barriers facing prison inmates with gender discrimination claims and the relationship between those barriers and prison deference rationales: (1) the appropriate standard of review for prison inmates' gender discrimination claims; (2) the acceptance of parity of treatment in lieu of identical treatment for male and female inmates; (3) the substitution of the traditional, largely symbolic similarly situated requirement with enumerated factors that are almost impossible to meet; and (4) the application of the intentional-discrimination doctrine to incarcerated person's claims.

This Comment first addresses the standard of review under which courts adjudicate the claims of prison inmates. Courts are divided over whether the prison-specific *Turner* standard supersedes the traditional constitutional standard of intermediate scrutiny that would normally apply to gender discrimination claims. While some courts steadfastly adhere to the traditional model, others have replaced intermediate scrutiny with *Turner*'s deferential standard.

Even plaintiffs in jurisdictions maintaining the traditional standard are not immune to deferential undercutting, however. As prison deference infused gender equal protection law, new doctrinal barriers emerged and traditional standards shifted, creating two of the obstacles to relief that this Comment discusses: the parity standard and a unique form of the similar-situation analysis. This Comment addresses the parity standard second. While gender equal protection cases traditionally require identical treatment for the plaintiff and her male analog, prisons need only show parity of treatment, placing another obstacle in the path of plaintiffs seeking better resources or conditions.

Prison deference has even changed traditional equal protection concepts to favor prison administrators. The third obstacle discussed in this Comment, the similar-situation requirement, is a long-standing component of equal protection doctrine. The requirement has had little practical significance after the modern tiered system of analysis emerged. After the Eighth Circuit's decision in *Klinger v. Department of Corrections*,[8] however, the similar-situation requirement became a

8. 31 F.3d 727 (8th Cir. 1994).

multifactor barrier preventing almost any inmate from succeeding on a gender discrimination claim—before her case was even heard on the merits.

Finally, this comment addresses a fourth obstacle with similar features: the intentional-discrimination requirement. The intentional discrimination doctrine applies when a law does not explicitly discriminate. Plaintiffs challenging these facially neutral laws must show the defendants intended to discriminate, an additional hurdle for gender plaintiffs to scale. These four primary areas of gender equal protection law in the prison context forestall claims, prevent relief, and deny prison plaintiffs a fair hearing on the merits.

But the state of the law is radically changed in the wake of *Johnson v. California*,[9] a racial discrimination case that has fundamentally altered the role of deference in prison equal protection claims. In *Johnson*, a California inmate challenged the racial segregation of prisoners in the state's reception centers.[10] Although the lower courts assumed that *Turner* was the appropriate standard for analysis,[11] the Supreme Court rejected *Turner* and instead required application of the traditional strict scrutiny standard. The Court also used sweeping language separating *Johnson* from the "logic" of *Turner*.[12] This was a radical and unexpected change from the Court's previous decisions.

Since the *Johnson* decision, scholars have discussed the case's potential impact on gender equal protection cases.[13] Some commentators have noted that intermediate scrutiny might now be the required standard for such claims.[14] Others suggest that the decision's impact may be minimal because *Turner*'s scope is so broad and the Court shows little interest in prisoners' gender claims.[15] This Comment, however, posits that *Johnson*'s impact is significant and broad, barring the use of prison deference in evaluating any equal protection claim based on race or gender.

By creating a complete separation between prison deference doctrine and equal protection doctrine in the racial discrimination context, *Johnson* renders prison deference wholly inappropriate in the gender context as well. The ultimate consequence is a significant change in the utility of the prison deference–driven doctrines

9. 543 U.S. 499 (2005).
10. *Id.* at 502.
11. *See infra* Part II.E.
12. *Johnson*, 543 U.S. at 510.
13. *See, e.g.*, Lara Hoffman, *Separate but Unequal—When Overcrowded: Sex Discrimination in Jail Early Release Policies*, 15 WM. & MARY J. WOMEN & L. 591 (2009); Elizabeth Budnitz, Note, *Not a Part of Her Sentence: Applying the Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 BROOK. L. REV. 1291, 1294 (2006); Trevor N. McFadden, Note, *When to Turn to* Turner*? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 177 (2006).
14. *See, e.g.*, Hoffman, *supra* note 13, at 591; Budnitz, *supra* note 13, at 1294.
15. *See, e.g.*, McFadden, *supra* note 13, at 177–78.

that have emerged in gender equal protection law. Specifically, intermediate scrutiny will be the required standard for such claims, forestalling use of *Turner* in any jurisdiction. The parity requirement will similarly be rendered inapposite, replaced by the traditional requirement of equality. The warped similar-situation requirement, as developed by the *Klinger* court's decision, will be inappropriate and thus no longer viable as a doctrinal tool. Unfortunately, courts likely will still have discretion to apply the intentional-discrimination requirement through facial neutrality determinations.

Part I of this Comment explores the factual and procedural background of equal protection doctrine in the prison context and the *Turner* decision's impact. Part II discusses the particular prison deference doctrines that have emerged in gender equal protection claims and discusses how *Johnson* differs from this context. Part III argues that *Johnson* applies to gender equal protection claims, and that *Johnson*'s rejection of *Turner*'s ideology eliminates the use of prison deference in deciding those claims.

Part IV discusses the implications of this argument by addressing its impact on the four key barriers facing incarcerated plaintiffs with gender equal protection claims: (1) the standard of review the court decides to impose (*Turner* or intermediate scrutiny), (2) the heightened form of the similar-situation requirement as enunciated by the Eighth Circuit in *Klinger*, (3) the parity-of-treatment standard in lieu of equality of treatment, and (4) the greater likelihood that their claims will be seen as facially neutral, thus requiring a showing of intentional discrimination. This Part argues for an overhaul of nearly all these doctrines, claiming that they are largely defunct and inappropriate in the wake of *Johnson*, despite their entrenched history. Part V addresses other areas of concern, including a different potential reading of *Johnson* and current fiscal implications. Part VI finally addresses current prison conditions and the way in which equal protection claims remain vital to incarcerated persons' rights.

I. EQUAL PROTECTION, PRISONS, AND *TURNER*

The judiciary's attitude toward inmates' constitutional claims has fluctuated with time, but has always acknowledged some degree of deference to prison officials. This Part discusses the development of gender equal protection generally and the evolution of deference in claims by prison inmates. It then describes the Court's *Turner* decision in detail. Following this description it explores the four barriers to gender equal protection claims by prison inmates at the heart of this argument: the standard of review, the similar-situation requirement, the parity requirement, and the intentional-discrimination requirement.

A. Equal Protection Doctrine: Means and Ends

Equal protection jurisprudence has its origin in the text of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[16] The Equal Protection Clause is the basis for claims of improper discrimination based on a variety of distinctions, including race, gender, ability, sexual orientation, and national origin.

All equal protection analyses require a comparison of the goals served by the discriminatory behavior to the methods used to achieve those goals. The higher the standard applied, the closer the fit must be between the ends and the means. The most demanding standard of scrutiny under the Equal Protection Clause is strict scrutiny, applicable in racial discrimination cases.[17] The least demanding level of scrutiny is rational basis, applied to the vast majority of equal protection claims—those not based on protected groups.[18] The standard for gender discrimination, intermediate scrutiny, falls between these two.[19]

Although equal protection claims based on race emerged as early as the 1950s,[20] gender discrimination claims were not seriously recognized until the 1970s.[21] The Court rejected the application of strict scrutiny for gender discrimination, at first applying rational basis review in *Reed v. Reed*.[22] In subsequent landmark cases like *Craig v. Boren*,[23] however, the Court instituted intermediate scrutiny as the standard for evaluating gender claims.[24] The Court has hinted that the standard may be even more exacting than it appears on its face—in *United States v. Virginia* (*VMI*),[25]

16. U.S. CONST. amend. XIV, § 1.
17. Strict scrutiny requires that the government show a compelling interest that is furthered by narrowly tailored means. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
18. Rational basis review requires only that a legitimate government interest be rationally related to the methods used. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).
19. Intermediate scrutiny requires that the government show an important state interest that is substantially furthered by the discriminatory methods in place. *VMI*, 518 U.S. 515, 524 (1996).
20. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
21. *See* Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190 (1976), Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); *VMI*, 518 U.S. 515.
22. 404 U.S. 71. The Court held that an Idaho probate law favoring male relatives was unconstitutional. It applied the rational relationship test and found that the policy in question did not further its interest in a way that was "consistent with the command of the Equal Protection Clause." *Id.* at 76.
23. 429 U.S. 190.
24. In *Craig*, the Court found that a law allowing the sale of 3.2 percent beer to women under the age of 18 but not to men in the same age range violated the Equal Protection Clause. *Id.* at 208–09.
25. 518 U.S. 515.

Justice Ginsburg wrote that the state must provide an "exceedingly persuasive justification" for gender discrimination.[26]

B. Prison Deference, Constitutional Claims, and the Development of Gender Equal Protection Jurisprudence in the Prison Context

Through the 1800s, prisoners in the United States were not considered to have any constitutional rights.[27] In *Ruffin v. Commonwealth*,[28] the Supreme Court of Virginia[29] emphasized that a prisoner retains only those rights explicitly granted by statute. While incarcerated, a prisoner was considered to be "the slave of the State."[30] Prisoners were considered to have "forfeited their liberty" and "all their personal rights."[31]

The 1900s brought a new attitude toward prisoners' rights, although the change had little practical impact. Rather than claiming that prisoners had no rights to assert, the courts refused to hear such claims because they did not consider the recognition and enforcement of those rights the judiciary's responsibility.[32] These courts justified prison deference by pointing to judges' lack of prison administration experience and to the problem of frustrating the purposes of incarceration.[33] This method, which eventually became known as the hands-off approach, survived through the mid-1900s and began to erode with the rise of the Warren Court.[34]

Prisoners benefited from the increased interest in individual rights and liberties during the 1960s and 1970s. The courts were more willing to accord constitutional rights to criminal defendants and the convicted, resulting in cases acknowledging that prisoners did maintain some constitutional rights and could enlist the courts in their enforcement.[35] This increase in judicial review and in the acknowledgment of rights retained by incarcerated persons ushered in an "era of prisoner's

26. *United States v. Virginia*, often referred to as *VMI*, forced the gender integration of the Virginia Military Institute, a publicly funded military academy. *Id.* at 558.
27. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871).
28. 62 Va. (21 Gratt.) 790.
29. The court was then called the Supreme Court of Appeals of Virginia.
30. *Ruffin*, 62 Va. at 796.
31. *Id.*
32. LYNN S. BRANHAM & MICHAEL S. HAMDEN, CASES AND MATERIALS ON THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 463 (8th ed. 2009).
33. *Id.* at 464.
34. *See* James E. Robertson, *The Rehnquist Court and the "*Turner*ization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 99–101 (2006).
35. BRANHAM & HAMDEN, *supra* note 32, at 464–65.

rights."[36] Throughout the reform movement, however, the Supreme Court's decisions continued to emphasize deference to prison officials.[37]

The explosion of cases acknowledging prisoners' constitutional rights soon waned, however, and a new era of deferential standards emerged. Courts returned to the traditional justifications of the hands-off period, eroding the developments of the previous decades. The Supreme Court's 1979 decision in *Bell v. Wolfish*[38] is often considered the "first clear sign" that the tide had turned back against prisoner plaintiffs.[39] The decision rejected claims challenging the constitutionality of conditions at a short-term detention facility because the conditions were "reasonably related to a legitimate government objective."[40] Subsequent decisions also revisited the deferential standards and justifications of the hands-off period, retrenching the role of prison deference.[41] The resurgence of prison deference led to a new standard for determining the rights of prisoners, articulated in the Supreme Court's 1987 *Turner v. Safley*[42] decision. This solidification of prison deference would weigh heavily on the claims of future equal protection plaintiffs.

C. Deference Reinforced: The *Turner* Decision

Modern prisoner's rights jurisprudence is rooted in *Turner v. Safley*.[43] In *Turner*, the Supreme Court ruled on prison regulations that prevented high-security inmates from having certain printed materials or photographs and limited the rights of prisoners to marry.[44] The real impact of *Turner*, however, has been in the standard of review it announced and the justification for that standard.

The test enunciated in *Turner* is highly deferential to prison administrators' opinions. It finds any prison regulation constitutional as long as it is "reasonably re-

36. Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights*, 144 F.R.D. 127, 153 n.153 (1993).
37. *See* Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1512 (2004).
38. 441 U.S. 520 (1979).
39. Weidman, *supra* note 37, at 1514 (stating that *Bell* is "often considered to be 'the first clear sign' of the end of the reform movement" (citing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 47 (1998))).
40. Bell v. Wolfish, 441 U.S. 520, 538–39 (1979).
41. BRANHAM & HAMDEN, *supra* note 32, at 469–70.
42. Turner v. Safley, 482 U.S. 78 (1987).
43. *See* Weidman, *supra* note 37, at 1515.
44. The Court upheld the regulation limiting access to personal items and photographs but struck down the regulation on marriage. *Id.* at 99–100.

lated to [a] legitimate penological interest[]."[45] The *Turner* Court provided four factors to consider when determining whether the standard has been met: (1) a valid rational connection between the regulation and the legitimate interest, (2) the existence of alternative means for inmates to exercise the allegedly infringed right, (3) the effect on other inmates, guards, and prison resources of accommodating that right, and (4) the absence of ready alternatives.[46]

These factors demonstrate the extensive deference *Turner* accorded prison officials. First, the rational connection required by the first factor is easily met; the government need only show a "logical connection," and the factor protects only against policies that are "arbitrary or irrational."[47] The second factor encourages deference in any situation in which there is some additional way for an inmate to assert the right in question.[48] Under the third factor, a right is less likely to be acknowledged if its assertion would create a "ripple effect" for guards or other inmates, an eventuality the Court acknowledged as very likely.[49] The fourth factor does little to mitigate its highly deferential counterparts; only a viable alternative shown not to infringe on legitimate penological interests will be considered evidence that the policy has no "reasonable relationship."[50] The Court emphasized that the fourth factor is not a "least restrictive alternative" test. Prison administrators need not show that every possible alternative is infeasible, and an inmate must show that the right could be protected "at de minimis cost to valid penological interests."[51] The *Turner* test has since been readily and regularly applied to prisoners' rights cases, although the Court has occasionally rejected the standard for particular fundamental rights.[52]

The rationales for the standard are a key aspect of the *Turner* decision. The Court reemphasized the justifications for prison deference, including the difficulties of prison administration and the courts' limited capacity to remedy prison regulation issues.[53] The Court took the opportunity to "formulate a standard of review

45. *Id.* at 89.
46. *Id.* at 89–90.
47. *Id.* at 90.
48. *Id.*
49. *Id.*
50. *Id.* at 90–91.
51. *Id.*
52. McFadden, *supra* note 13, at 145–62 (discussing in depth the Court's rejection of *Turner* in the Eighth Amendment context and detailing the complexities of the Court's Fifth Amendment and Fourteenth Amendment jurisprudence in the prisoners' rights context).
53. *Turner*, 482 U.S. at 84–85 ("Running a prison 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.").

for prisoners' constitutional claims that [was to be] responsive both to the 'policy of judicial restraint . . . and the need to protect constitutional rights.'"[54] The Court relied on earlier deferential cases and their rationales to develop this single standard.[55] The Court intended that *Turner* would "appl[y] to all circumstances in which the needs of prison administration implicate constitutional rights,"[56] cementing the rejuvenation of prison deference.[57]

II. GENDER EQUAL PROTECTION CLAIMS AND PRISON DEFERENCE: DEVIATIONS FROM TRADITION

A. Standard of Review: Use of the *Turner* Standard to Decide Gender Equal Protection Claims in the Prison Context

As prison deference has combined with equal protection analysis, equal protection's traditional hallmarks have shifted in favor of prison administrators. The type of review applied to inmates challenging prison regulations is markedly different from traditional equal protection analysis. This Comment argues that most of these idiosyncrasies are the result of courts' commitment to prison deference and to limited judicial review, interests that shaped the *Turner* decision and that are called into question in the wake of *Johnson*. This Part provides a brief history and explanation of the four doctrinal abnormalities that most affect prison inmate plaintiffs in gender discrimination claims: the standard of review applied, the parity doctrine, the similar-situation requirement, and the intentional discrimination requirement.

A primary way in which *Turner* affects gender claims in the prison context is through the standard of review used to balance the government's justifications against the discriminatory methods. While the traditional intermediate scrutiny standard applies outside prisons, how *Turner* should affect this analysis in the prison context is unsettled. Without a Supreme Court decision on the issue, individual circuit and district courts have divided on the appropriate standard of review; there

54. *Id.* at 85 (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)).
55. *Id.* at 85–89.
56. Washington v. Harper, 494 U.S. 210, 224 (1990).
57. The *Turner* standard's development and use is discussed at length in Part I.C.

is no single national standard for adjudicating these claims.[58] This Part provides a brief explanation of how various jurisdictions across the country have chosen to handle the issue.

At one end of the spectrum, some courts resolve gender equal protection claims in the prison context by relying exclusively on the intermediate scrutiny standard with no reference to *Turner*.[59] Several of these courts acknowledged the option of applying *Turner* in lieu of the traditional standard but explicitly refused to do so.[60] Even in these courts, plaintiffs may struggle with other deferential doctrines. For example, the Eighth Circuit technically applies intermediate scrutiny.[61] Nevertheless, the Eighth Circuit has developed other methods of deferring gender claims before reaching the merits, such as the infamous *Klinger v. Department of Corrections*[62] decision discussed at length in Part II.B.

At the opposite end of the spectrum, the Fifth Circuit ultimately adopted a strictly *Turner*-reliant approach.[63] Still other jurisdictions have no clear precedential

58. *See* 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 5:11, at 671 (4th ed. 2009); Donna L. Laddy, *Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Educational and Vocational Programming at Women's Prisons*, 5 TEMP. POL. & CIV. RTS. L. REV. 1, 16 (1995); Jennifer Arnett Lee, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 268 (2000).

59. *See, e.g.*, Jackson v. Thornburgh, 907 F.2d 194, 196, 200 (D.C. Cir. 1990) (stating that the appropriate standard of scrutiny for a facial gender discrimination claim is "showing that the distinction is substantially related to important government objectives," although finding no violation because the policy was facially neutral and the plaintiffs failed to show intentional discrimination (internal quotation marks omitted)); West v. Va. Dep't of Corr., 847 F. Supp. 402, 405 (W.D. Va. 1994) ("On the other hand, sex-based classifications, even in the context of unequal prison conditions, are given 'intermediate' scrutiny."); McCoy v. Nev. Dep't of Prisons, 776 F. Supp. 521, 523 (D. Nev. 1991) (declining to apply rational basis review in favor of intermediate scrutiny to claims of inferior programming, resources, and privileges).

60. *See* Pitts v. Thornburgh, 866 F.2d 1450, 1453 (D.C. Cir. 1989) (applying intermediate scrutiny because "after careful reflection, we believe that neither [*Turner*'s] concerns, nor *Turner* itself, suggests the appropriateness of a reasonableness standard in this particular case"); Amenson v. Litscher, No. 00-C-419-C, 2000 WL 34229778, at *3 (W.D. Wis. Sept. 5, 2000); DeBlasio v. Johnson, 128 F. Supp. 2d 315, 327–28 (E.D. Va. 2000); Ashann-Ra v. Virginia, 112 F. Supp. 2d 559, 571 (W.D. Va. 2000) ("The court rejects the defendants' argument for rational basis scrutiny of gender classifications in prison regulations and finds that such regulations must withstand intermediate scrutiny to survive an Equal Protection challenge."); Davie v. Wingard, 958 F. Supp. 1244, 1252 (S.D. Ohio 1997) (acknowledging that "[a] dispute exists as to the proper level of scrutiny to be applied when an inmate raises an equal protection claim in the context of gender discrimination," and electing to follow intermediate scrutiny over *Turner*).

61. *See* Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966, 974 (8th Cir. 2009) (applying intermediate scrutiny to a statute regulating decisionmaking process for female inmate housing: "When a statute employs a gender-based classification, we apply a heightened review standard.").

62. 31 F.3d 727 (8th Cir. 1994).

63. *See* Yates v. Stalder, 217 F.3d 332 (5th Cir. 2000).

decisions at the appellate level, as is the case in the Ninth[64] and Sixth[65] Circuits. The Fourth Circuit, too, has no clear appellate decision on the issue, but some district courts have adopted the intermediate scrutiny standard.[66] The D.C. Circuit handles these claims similarly.[67] Between circuits applying only the intermediate scrutiny standard, circuits applying only the *Turner* standard, and other circuits making no official determination, plaintiffs can face widely variable results depending on their location. Plaintiffs in jurisdictions where the *Turner* standard is the primary standard of review are particularly disadvantaged because the standard heavily favors prison administrators. Although numerous other factors determine the ultimate outcome of a claim, the applicable standard of review is a driving force in adjudication and the most common source of argument about *Johnson*'s future.[68]

B. Similar Situation

The idea that an equal protection plaintiff must be similarly situated to the individual or group that she claims receives better treatment, and in turn that the law may not treat similarly situated persons differently without good reason, has deep roots. The similarly situated language predates prison rights and gender equal pro-

64. The Ninth Circuit has decided prison gender discrimination cases on other grounds but not specifically on equal protection. One district court applied the *Turner* standard, but the Ninth Circuit reversed the district court under Title IX without deciding the proper standard for gender discrimination claims. Jeldness v. Pearce, 30 F.3d 1220, 1231 (9th Cir. 1994). In an unpublished decision, the circuit vacated an equal protection claim based on a failure to show intentional discrimination but cited the intermediate scrutiny standard set out in *VMI*. Goldyn v. Angelone, No. 97-17185, 1999 WL 728561, at *2 (9th Cir. Sept. 16, 1999). For an excellent discussion of the lack of clarity on the issue, see the court's discussion in *Greene v. Tilton*, No. 2:09-cv-0793, 2012 WL 691704, at *4–6 (E.D. Cal. Mar. 2, 2012).

65. The Sixth Circuit applied intermediate scrutiny in an unpublished decision, *Pariseau v. Wilkinson*, No. 96-3459, 1997 WL 144218 (6th Cir. Mar. 27, 1997), holding that the plaintiff's gender discrimination claim was "properly rejected because . . . the hair grooming policy was substantially related to the important objectives of security and identification, which were more vital in handling male prisoners." *Id.* at *1. The Sixth Circuit had previously refused to hear a claim on its merits in *Canterino v. Wilson*, 869 F.2d 948 (6th Cir. 1989), because it found the female inmate plaintiffs had not shown discriminatory intent. *Id.* at 954.

66. *See, e.g.*, Bukhari v. Hutto, 487 F. Supp. 1162, 1171 (E.D. Va. 1980); West v. Va. Dep't of Corr., 847 F. Supp. 402, 406 (W.D. Va. 1994).

67. The D.C. Circuit's position is somewhat difficult to divine, as its primary case on the issue, *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), found the plaintiffs not similarly situated and so dismissed the claim. *Id.* at 924–27. However, the court did reference traditional equal protection language (although not intermediate scrutiny specifically), and made no mention of *Turner* being the appropriate standard if they were similarly situated. *Id.* at 926.

68. *See* Hoffman, *supra* note 13, at 603; Budnitz, *supra* note 13, at 1323; McFadden, *supra* note 13, at 176–77.

tection jurisprudence. It has been traced back to ship captures in 1812 and to New Orleans land grants in 1836.[69] The concept first emerged in equal protection jurisprudence in an 1884 suit over a law targeting Chinese laundry owners in San Francisco,[70] a predecessor to *Yick Wo v. Hopkins*.[71] Although not always mentioned, the concept was generally used to combat "class legislation," requiring that laws were neutral and nondiscriminatory in their effect.[72] With time, this analysis began to focus on the fit between the purpose of the law in question and the discriminatory methods in place. This type of analysis was prominent in key equal protection cases like *City of Cleburne v. Cleburne Living Center*[73] and *Plyler v. Doe*.[74]

As the tiered form of equal protection analysis emerged, the similarly situated language adjusted again and was often used to "restate the core principles of Fourteenth Amendment inquiry."[75] The concept of similar situation and the development of the intermediate scrutiny standard are particularly intertwined. Before the intermediate scrutiny standard had officially emerged, courts used similar situation to measure whether a law discriminated improperly.[76] Even though the phrase itself is absent from several major equal protection decisions, including *VMI*[77] and *Romer v. Evans*,[78] its fundamental requirement that discrimination be justified by the purpose of the law still prevails.[79]

Although men and women are generally considered similarly situated in Supreme Court equal protection decisions,[80] the Court has found them dissimilarly situated in certain narrow situations. In *Michael M. v. Superior Court*,[81] for example, the Court relied on physical differences between men and women to find them

69. *See* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 598 (2011). Its breadth across doctrinal areas is also impressive, including references in tax law, social security, the Commerce Clause, antitrust, and capital punishment, among many others. *See id.* at 584–85.
70. Barbier v. Connolly, 113 U.S. 27 (1884).
71. 118 U.S. 356 (1886); *see* Shay, *supra* note 69, at 600.
72. *See* Shay, *supra* note 69, at 612.
73. 473 U.S. 432 (1985).
74. 457 U.S. 202 (1982); *see* Shay, *supra* note 69, at 612.
75. Shay, *supra* note 69, at 611.
76. *Id.* at 606–07 (pointing out that cases like *Hogan* used the comparison of a similarly situated person of the opposite gender to find a questioned law unfair).
77. 518 U.S. 515 (1996).
78. 517 U.S. 620 (1996); *see* Shay, *supra* note 69, at 586.
79. *See Romer*, 517 U.S. at 632.
80. *See, e.g.*, *VMI*, 518 U.S. 515; Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).
81. 450 U.S. 464 (1981).

dissimilarly situated with respect to their childbearing capability.[82] In a separate concurrence, however, Justice Stewart did emphasize that allowing discrimination based on "clear differences" between men and women was to be permitted only in "certain narrow circumstances."[83]

Despite its changing history, similar-situation analysis was an integral part of determining whether the goals of the law in question were appropriately related to the type of discrimination at issue.[84] An entirely different approach emerged in *Klinger v. Department of Corrections*, however. Instead of using the similar-situation requirement as a description of the doctrine or as a key part of analyzing the claim, the Eighth Circuit used similar situation as a threshold requirement that, if not met, forestalled any review of the merits.[85] Although *Klinger* was the first case to adopt this method, it has since spread to other doctrinal areas and courts.[86]

Klinger addressed the equal protection claim of female inmates in Nebraska who alleged that male inmates in another facility were receiving superior services and programs.[87] The court held that the plaintiffs were not similarly situated to the male inmates in question and thus had no claim.[88] The court based its holding on several differences between the two populations: the difference in size of the facilities,[89] the average length of stay of an inmate at each facility,[90] the security level of the facility,[91] and several so-called special characteristics of male and female inmates.

82. *Id.* at 471 (holding that the differential treatment of the sexes in California's statutory rape law was constitutional because "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse").
83. *Id.* at 478 (Stewart, J., concurring).
84. Shay, *supra* note 69, at 616. Giovanna Shay offers the example of *Williams v. Vermont*, 472 U.S. 14 (1985), wherein a Vermont statute required an additional tax on registrations of cars bought out of state by owners who later became Vermont residents. *Id.* at 15; *see* Shay, supra note 69, at 616. The Supreme Court took into consideration the goal of the law in the context of the classification to determine whether the affected group was "similarly situated" for the purpose of road maintenance in Vermont. *Williams*, 472 U.S. at 23–24. The Court concluded that because both sets of drivers used cars, lived in Vermont, and had equivalent responsibility for the roads in the state, they were similarly situated with respect to the goal and should be burdened equally. *Id.* The Court did not use similar situation to decide whether the claim even ought to be heard by the Court—it used the concept to determine whether the classification at issue was fair.
85. Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994).
86. Shay, *supra* note 69, at 592.
87. *Klinger*, 31 F.3d at 729.
88. *Id.* at 731 ("Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim."). The *Klinger* court also made an alternate holding that even if the plaintiffs were similarly situated their claim failed because they had not shown intentional discrimination. *Id.* at 733–34.
89. The male facility held roughly six times as many inmates. *Id.* at 731.
90. Male inmates tended to have stayed in their facility two to three times longer. *Id.*
91. *Id.*

The special characteristics that the court found relevant were the fact that female inmates "are more likely to be single parents with primary responsibility for child rearing . . . [and] are more likely to be sexual or physical abuse victims," while "[m]ale inmates . . . are more likely to be violent and predatory than female inmates."[92] The court found that these factors rendered the plaintiffs not similarly situated and dismissed the claim.[93]

As many scholars and judges have pointed out, the *Klinger* factors are problematic. Because incarcerated women are less likely to have committed violent crimes and more likely to be serving shorter sentences, it is highly unlikely that any identical facility population exists.[94] The *Klinger* analysis thus virtually forestalls any prison equal protection claim based on gender.[95] Other common criticisms include arbitrariness[96] and contrariness with modern Fourteenth Amendment jurisprudence.[97] It seems particularly ironic to deprive certain inmates of valuable education and job training *because* they are more likely to be parents, to need stable employment to support their children, and to return to society in a short time.[98]

92. *Id.* at 731–32.

93. *Id.* at 729; *see* Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated,"* 51 N.Y.L. SCH. L. REV. 595, 613 (2006/07) (addressing the irony of finding women dissimilarly situated and thus ineligible to argue that the services offered were inferior based on factors that make them arguably in greater need of such services).

94. *See* Carroll-Ferrary, *supra* note 93, at 613 (citing statistical information about offending and prison populations by gender). A Bureau of Justice Statistics report for 2010 showed these trends remain. There were 1,499,573 men under the jurisdiction of state or federal correctional authorities at the end of 2010 and only 112,822 women. PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 236096, PRISONERS IN 2010, at 2 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf. Of the women in state prisons sentenced to more than one year, 36 percent committed a violent crime, 30 percent a property crime, and 26 percent a drug offense. *Id.* at 7. Of the men, however, 54 percent committed a violent crime, 18 percent a property crime, and 17 percent a drug offense. *Id.*

95. *See* Laddy, *supra* note 58, at 22; Carroll-Ferrary, *supra* note 93, at 614; Joanna E. Saul, Note, *This Game Is Rigged: The Unequal Protection of Our Mentally-Ill Incarcerated Women*, 5 MOD. AM. 42, 45 (2006) (quoting Keevan v. Smith, 100 F.3d 644, 652 (8th Cir. 1996) (Heaney, J., dissenting)).

96. Carroll-Ferrary, *supra* note 93, at 613–15.

97. *See Klinger*, 31 F.3d at 734 (McMillan, J., dissenting) ("The majority opinion artificially manipulates the Equal Protection Clause requirement of 'similarly situated' and misapplies the Fourteenth Amendment standards at the expense of female inmates incarcerated at NCW."); Angie Baker, *Leapfrogging Over Equal Protection Analysis: The Eighth Circuit Sanctions Separate and Unequal Prison Facilities for Males and Females in* Klinger v. Department of Corrections, 76 NEB. L. REV. 371, 385–86 (1997) (comparing *Klinger* to other cases in which the court has found men and women not similarly situated, like *Michael M.*); Carroll-Ferrary, *supra* note 93, at 609–12 (arguing that the *Klinger* factors are "constitutionally irrelevant" and inconsistent with the *Cleburne* and *VMI* holdings).

98. A full analysis of these critiques is outside the scope of this Comment, which addresses the *Klinger* standard only in light of *Johnson*. For more analysis of these issues, see Baker, *supra* note 97, and Carroll-Ferrary, *supra* note 93.

Aside from its questionable reasoning and analysis, the *Klinger* interpretation is a significant hurdle to any plaintiff in a jurisdiction that has embraced this stance.

Courts in several subsequent cases adopted *Klinger*'s logic. In *Pargo v. Elliott*,[99] an Iowa District Court distilled the *Klinger* decision into five factors it used to determine whether male and female inmates were similarly situated: population size, security level, types of crimes, lengths of sentences, and special characteristics.[100] In 1996, the factors reappeared in *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*[101] in the D.C. Circuit.[102] The Eighth Circuit made another similar holding in *Keevan v. Smith*,[103] finding that the two groups of inmates were not similarly situated (although not applying all the *Klinger* factors).[104] The Fifth Circuit in turn "appeared to embrace *Klinger*" in *Yates v. Stalder*,[105] but remanded to the trial court because the record did not indicate sufficient factual examination of the *Klinger* factors.[106] In any jurisdiction that has adopted this methodology, the similar-situation requirement remains a serious hurdle to any hearing on the merits of an inmate-plaintiff's gender equal protection claim.

C. The Parity Standard

Unlike the similar-situation requirement, the parity doctrine has no roots in traditional equal protection law whatsoever. Traditional equal protection cases, including those in the gender and race context, require equality of treatment.[107] When plaintiffs are incarcerated, however, prisons do not need to provide equal treatment. Instead, longstanding prison jurisprudence requires only parity of conditions and resources.[108] This limitation on plaintiff relief appears in the earliest prison gender equal protection cases, which largely involved female plaintiffs arguing that the resources provided to them were far inferior to those available for male inmates.[109] The courts were receptive to these claims in a number of cases but maintained the

99. 894 F. Supp. 1243 (S.D. Iowa), *aff'd*, 69 F.3d 280 (8th Cir. 1995).
100. *Id.* at 1259–61; *see* Carroll-Ferrary, *supra* note 93, at 605.
101. 93 F.3d 910 (D.C. Cir. 1996).
102. *Id.* at 924–25; *see* Carroll-Ferrary, *supra* note 93, at 606.
103. 100 F.3d 644 (8th Cir. 1996).
104. *Id.* at 649; *see* Saul, *supra* note 95, at 45.
105. 217 F.3d 332 (5th Cir. 2000).
106. *Id.* at 334–35; *see* Carroll-Ferrary, *supra* note 93, at 607.
107. *See, e.g.*, *VMI*, 518 U.S. 515 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Brown v. Bd. of Educ., 347 U.S. 483 (1954).
108. Dawson v. Kendrick, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981); Barefield v. Leach, No. 10282, 1974 U.S. Dist. LEXIS 11539, at *52 (D.N.M. Dec. 18, 1974).
109. *See, e.g.*, McMurry v. Phelps, 533 F. Supp. 742 (W.D. La. 1982); *Kendrick*, 527 F. Supp. 1252; *Barefield*, 1974 U.S. Dist. LEXIS 11539.

concept of parity: the idea that female inmates did not have the right to equality of treatment, but rather need only be provided resources or conditions that were "substantially equivalent," or "equivalent in substance if not in form."[110] The doctrine appears as early as 1974 in *Barefield v. Leach*[111] and has remained largely undisturbed.[112] The exact requirements of parity are not entirely clear, although early courts held that showing greater financial expenditures per female inmate or arguing that the female prison population was significantly smaller were not sufficient justifications.[113] It is very clear, however, that parity demands less than the equality of treatment usually required.

D. Facial Neutrality and Intentional Discrimination

Facial neutrality and its intentional-discrimination requirement, much like similar situation, have significant roots in traditional equal protection doctrine. The Supreme Court has long required an additional showing for plaintiffs challenging facially neutral laws (laws that do not explicitly discriminate between two groups).[114] In the case of a facially neutral law or policy, the plaintiff must show the presence of discriminatory intent against a certain group, not merely a disparate impact on that group.[115] In *Washington v. Davis*,[116] for example, a group of applicants to the District of Columbia police force brought suit arguing that a particular test administered by the department was racially discriminatory because it disproportionately excluded African American applicants from employment.[117] Because the test was administered to all applicants and did not racially discriminate on its face, the Court required

110. Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979); *see* Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1196 n.7 (1984) (explaining that although the parity standard was first discussed in the unpublished *Barefield v. Leach* decision, courts have widely adopted the standard set out in *Glover v. Johnson*).

111. No. 10282, 1974 U.S. Dist. LEXIS 11539.

112. Some courts have analyzed claims by women prisoners under Title IX and have required equality of treatment, marking a distinct departure from the parity doctrine. I do not discuss such cases in detail, however, because the decisions are not based on equal protection but rather on the Title IX federal statute. For more information, see, for example, Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994).

113. For a detailed overview of the early district court cases evaluating parity requirements (several of which were overruled on other grounds), see MUSHLIN, *supra* note 58, at 678–82.

114. Washington v. Davis, 426 U.S. 229, 240 (1976) ("The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."); Pers. Adm'r v. Feeney, 422 U.S. 256, 274 (1979).

115. *Feeney*, 422 U.S. at 272.

116. 426 U.S. 229.

117. *Id.* at 228–29.

a showing of intentional discrimination to trigger strict scrutiny analysis.[118] The Court ultimately found in favor of the department because the test was sufficiently related to training school performance and not motivated by discriminatory purposes.[119]

Courts frequently dismiss inmates' gender equal protection cases on this basis.[120] Because proving intentional discrimination is very difficult,[121] a determination that a policy is facially neutral is likely to terminate a claim before the court hears the merits. However, courts vary in their determinations of whether regulations that differ between men's and women's prisons are facially neutral.[122] Because this preliminary step in the intentional-discrimination analysis is the pivotal point in the determination of the claim, this Comment focuses on whether courts find regulations facially neutral in part because of prison deference. Because facial neutrality and the intentional-discrimination requirement it triggers are entirely independent of the prison context and have a long history, however, tying facial neutrality findings to prison deference interests is more challenging. In contrast with the standard of review, use of the parity standard, and the *Klinger* similar-situation analysis, facial neutrality and the intentional-discrimination requirement likely will remain an option for courts to adopt.

E. Muddying the Waters: The *Johnson* Decision

In 2005, the Supreme Court unexpectedly altered the prison rights landscape with its *Johnson v. California*[123] decision. The plaintiff in the case was Garrison Johnson, an African American prison inmate in the California Department of

118. *Id.* at 240.
119. *Id.* at 250.
120. *See, e.g.*, Keevan v. Smith, 100 F.3d 644, 646 (8th Cir. 1996); Canterino v. Wilson, 869 F.2d 948, 954 (6th Cir. 1989); Klinger v. Dep't of Corr., 31 F.3d 727 (8th Cir. 1994) (alternate holding).
121. *See, e.g.*, Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Board of Governors v. Aikens, 70 CALIF. L. REV. 1201, 1202–03 (1982) (discussing the challenges of proving intentional discrimination in the modern Title VII context); Browne C. Lewis, *Changing the Bathwater and Keeping the Baby: Exploring New Ways of Evaluating Intent in Environmental Discrimination Cases*, 50 ST. LOUIS U. L.J. 469, 498 (2006) (describing reasons why "it is almost impossible to attribute discriminatory intent to a group of people"); Miriam Kim, Note, *Discrimination in the* Wen Ho Lee *Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases*, 9 ASIAN L.J. 117, 139 (2002) (exploring problems of intent in equal protection selective prosecution cases).
122. *Compare* Jackson v. Thornburgh, 907 F.2d 194 (D.C. Cir. 1990), *with* Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989).
123. 543 U.S. 499 (2005).

Corrections and Rehabilitation (CDCR).[124] Johnson brought an equal protection claim challenging the CDCR's policy of segregating all inmates in the prison system's reception centers by race.[125] The CDCR defended the policy based on its need to reduce racial violence, as California prison gangs are largely divided along racial lines.[126]

The Central District of California dismissed the case for untimeliness and failure to state a claim.[127] The opinion cited *Turner* as the governing law on the racial discrimination issue.[128] The Ninth Circuit reversed, stating that sufficient facts had been alleged, and remanded for a determination on the issue.[129] On remand, the district court again granted summary judgment for the CDCR on qualified immunity grounds.[130] Johnson again appealed, but the Ninth Circuit found in favor of the CDCR because it concluded that the policy rationally related to a legitimate penological interest under the *Turner* factors.[131] The court emphasized that the decision was driven largely by prison deference, stating that prisons are "inherently different and we must defer our judgment to that of the prison administrators until presented evidence demonstrating the unreasonableness of the administrators' policy."[132] The Ninth Circuit then denied Johnson's petition for a rehearing en banc, with four judges dissenting vigorously.[133] The dissenting opinion claimed that the application of *Turner* "create[d] a dangerous and unwarranted exception to the general rule for prison officials," and was the first to argue that strict scrutiny should be applied.[134] The Supreme Court granted certiorari to determine whether *Turner* was the appropriate standard.

Although the defendants invited the Court to apply the *Turner* standard, the Court refused. Justice O'Connor's opinion held that strict scrutiny must be applied and remanded for a determination on the issue.[135] The opinion emphasized that the right not to be discriminated against based on one's race was "not inconsistent with legitimate penological objectives," rendering it outside of *Turner*'s in-

124. *Id*. at 503.
125. *Id.*
126. *Id.* at 520 (Stevens, J., dissenting).
127. Johnson v. California (*Johnson I*), No. 95-1192, 1997 WL 34671267, at *6, *8 (C.D. Cal. Aug. 12, 1997), *aff'd in part, rev'd in part*, Johnson v. California (*Johnson II*), 207 F.3d 650 (9th Cir. 2000).
128. *Id.* at *6–7.
129. *Johnson II*, 207 F.3d at 655.
130. Johnson v. California (*Johnson III*), 321 F.3d 791, 807 (9th Cir. 2003), *rev'd*, 543 U.S. 499.
131. *Id.* at 799, 806.
132. *Id.* at 807.
133. Johnson v. California (*Johnson IV*), 336 F.3d 1117, 1117 (9th Cir. 2003) (per curiam).
134. *Id.* at 1119.
135. *Johnson*, 543 U.S. at 515.

fluence.[136] The opinion explicitly noted that such rights are "not susceptible to the logic of *Turner*," and so the deferential standard was inappropriate.[137] The Court's decision was unexpected—the lower courts had consistently assumed that *Turner* was the appropriate standard.[138] This radical departure from the Court's previously deferential jurisprudence carved out an exception to *Turner*'s dominance over prisoners' rights claims and caused scholarly speculation about the future of gender equal protection claims by prison inmates.[139]

III. TAKING *JOHNSON* AT ITS WORD: FUNDAMENTAL CHANGES FOR GENDER CLAIMS

A. The *Johnson* Holding Should Be Applied to Gender Discrimination Claims by Incarcerated Persons

Although *Johnson* addressed a racial discrimination claim, the Court's language and approach indicate that the holding applies equally to gender discrimination claims. This Comment argues that *Johnson* governs such claims and so eliminates the legitimacy of prison deference rationales in deciding gender discrimination cases. After reviewing the Court's language, this Part first explores the similarities between race and gender and argues that those similarities suggest that *Johnson* should apply to gender claims. Second, it analyzes the policy interests the Court emphasized in *Johnson* and draws parallels to the policy rationales behind the Court's gender discrimination jurisprudence. Finally, this Part argues that gender discrimination claims are fundamentally distinct from the type of claims the Court describes as being subject to *Turner*. The fact that the nature of gender discrimination claims in the prison context makes them less likely to implicate the security and administration concerns emphasized in *Johnson* reinforces this point.

The *Johnson* Court explained its refusal to apply *Turner* to racial discrimination in several ways. First, the Court relied on its own history and stated that it "[had] never applied *Turner* to racial classifications."[140] This, the Court explained, is because *Turner* is appropriate only for "rights that are 'inconsistent with proper incarceration,'"[141] and the "right not to be discriminated against based on one's race . . . is not a right that need necessarily be compromised for the sake of proper prison

136. *Id.* at 505 (quoting *Johnson IV*, 336 F.3d at 1117).
137. *Id.* at 510–14.
138. *See supra* notes 130–136.
139. *See supra* note 13.
140. *Johnson*, 543 U.S. at 510.
141. *Id.* (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)).

administration."[142] The crucial question following this assertion, then, is how the racial nondiscrimination right is distinct from those rights that are inconsistent with proper incarceration.

Yet the Court never affirmatively stated why racial discrimination is outside *Turner*'s purview. The Court emphasized that preventing racial discrimination "bolsters the legitimacy of the entire criminal justice system [because] such discrimination is 'especially pernicious in the administration of justice[,]' [a]nd public respect for our system of justice is undermined" when racial discrimination is permitted.[143] The Court relied on its decision in *Lee v. Washington*[144] as well, arguing that it was reaffirming this earlier holding.[145] The Court also contrasted racial discrimination against a list of instances in which it had applied *Turner* to prisoners' rights claims, noting its application in First Amendment cases and some due process claims.[146]

The Court discussed racial discrimination specifically, but its rationale supports the argument that claims based on gender discrimination are also beyond *Turner*'s reach. First, the Court defined the right in question as "the right not to be discriminated against based on one's race," and categorically stated that this right is consistent with proper incarceration. There are several significant similarities between race and gender, which imply that gender discrimination should be viewed similarly in the prison context. Both race and gender are immutable characteristics that have historically been used to disadvantage certain groups, and the Court has made a point of decrying discrimination in both contexts.[147] These similarities imply that the right not to be discriminated against based on one's race is analogous to the right not to be discriminated against based on one's gender.

Second, the policy rationales the *Johnson* Court emphasized are applicable to gender discrimination. The Court expressed concern that racial discrimination undermines the justice system because it damages public respect for and faith in the system. The Court pointed out that "searching" judicial review is especially important in the prison context, where "government power is at its apex."[148] Additionally, the Court stated that racial discrimination harms "the integrity of the

142. *Id.*
143. *Id.* at 510–11 (citation omitted) (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).
144. 390 U.S. 333, 333 (1968) (affirming a three-judge panel decision finding that "certain Alabama statutes violate the Fourteenth Amendment to the extent that they require segregation of the races in prisons and jails").
145. *Johnson*, 543 U.S. at 512 (citing *Lee*, 390 U.S. 333).
146. *Id.* at 510.
147. See Part I.A, *supra*, for a detailed discussion of equal protection jurisprudence.
148. *Johnson*, 543 U.S. at 511.

criminal justice system," and that heightened scrutiny is necessary to prevent "invidious discrimination."[149] The Court specifically acknowledged that this rationale drives its Eighth Amendment jurisprudence, showing that racial discrimination is not the only context in which this interest overrides *Turner*'s influence.[150]

The gender discrimination jurisprudence similarly decries baseless discrimination, and the intermediate scrutiny standard is designed to prevent use of sex-based classifications to "perpetuate the legal, social, and economic inferiority of women."[151] The Court has long acknowledged that gender discrimination often promotes "archaic and stereotypic notions" to the detriment of all.[152] The Court has interpreted the intermediate scrutiny standard in ways that demonstrate a real challenge to discriminatory practices; the standard has evolved to require, at least in some instances, an "exceedingly persuasive justification" and places the burden for said "demanding" justification on the state.[153] Just as racial discrimination erodes the integrity of the criminal justice system, allowing rampant gender discrimination in prisons reinforces stereotypes and may perpetuate their effect. Third, the *Johnson* Court listed a number of contexts in which *Turner* does apply: marriage regulations, correspondence, access to courts, receipt of mail, the right of association, attendance at religious services, and involuntary medication.[154] The Court pointed out that these rights are inconsistent with proper prison administration and so can be regulated with *Turner*'s lenient standard.[155] The Court clearly distinguished racial discrimination as outside these boundaries. This further supports the application of *Johnson* to gender claims; the right not to be discriminated against based on gender, like the right not to be discriminated against based on race, is attached to a person's inherent nature and physical appearance or biology.[156] The rights the Court emphasized as subject to *Turner* implicate substantive rights to certain activities or items: where prisoners may go, what they may possess, with whom they

149. *Id.* at 511–12.
150. *Id.* at 511.
151. *VMI*, 518 U.S. 515, 534 (1996).
152. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (striking down a state-run nursing school's female-only enrollment policy).
153. *VMI*, 518 U.S. at 533.
154. *Id.* at 509–10.
155. *Id.* at 510.
156. This Comment approaches gender as a binary reality, when in fact there is significant scholarship questioning this distinction and its impact on prisons. For more information on transgender issues in prisons, see, for example, Julia C. Oparah, *Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239 (2012), Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000), and Angela Okamura, Note, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L.J. 109 (2011).

may associate. These privileges do not implicate innate biological characteristics that are a historical source of discrimination, as do race and gender. Similarly, there is nothing about treating prisoners differently based on gender that immediately suggests any similarities to the rights the Court listed. Certainly a right based on gender is more similar to a racial discrimination right than it is to the right to receive mail, to participate in activities, or to enter into a marriage.

Additionally, gender claims often challenge the educational or vocational programming available at prisons,[157] prison conditions or facilities,[158] or even location.[159] These issues are more analogous to legislative policy concerns than to decisions about security and safety made by prison administrators on a daily basis.[160] Thus, gender discrimination in prisons is rarely a result of the "day-to-day judgments of prison officials"[161] that the *Turner* Court contemplated. For many gender equal protection claims, then, the policies in question are further from "the historical purview of *Turner*" than the policy challenged in *Johnson*.[162]

One could argue that this interpretation is misguided because *Johnson* only explicitly rejects *Turner* for racial discrimination and the Court has historically been less concerned with gender discrimination than racial discrimination.[163] Trevor McFadden points out that the Court seems wary of the practical consequences of making equal protection litigation easier, particularly in the gender context.[164] Even the language of *Johnson* offers some support for this critique. The Court noted that "[r]ace discrimination is 'especially pernicious in the administration of justice,'"[165] implicating the troubling relationship that has long existed between racism and incar-

157. *See, e.g.*, Klinger v. Dep't of Corr., 31 F.3d 727 (8th Cir. 1994).
158. *See, e.g.*, Suter v. Crawford, No. 06-4032-CV-C, 2008 WL 4866613 (W.D. Mo. Nov. 10, 2008) (addressing a complaint by female inmates who objected to the planned cell capacity in a new facility).
159. *See* Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989) (challenging the housing of female inmates outside the District of Columbia).
160. *See id.* at 1453–54.
161. Turner v. Safley, 482 U.S. 78, 89 (1987).
162. Hoffman, *supra* note 13, at 605–06.
163. The Court refused to apply strict scrutiny to gender discrimination and instead developed the intermediate scrutiny standard, acknowledging that "inherent differences" between men and women may justify a sex-based classification. *VMI*, 518 U.S. 515, 533–34 (1996). The Court has also never granted certiorari on a gender equal protection case in the prison context, which could imply that the Court is less concerned about gender discrimination in prisons than race discrimination.
164. *See* McFadden, *supra* note 13, at 177–78 (noting that while the doctrinal case for applying the *Johnson* rationale is strong, "the Court has been more persuaded by pragmatic concerns than doctrinal purity in the prison-rights context," and "[t]he *Johnson* majority emphasized the oddity of California's classification system").
165. Johnson v. California, 543 U.S. 499, 511 (2005) (quoting Rose v. Mitchell, 433 U.S. 545, 555 (1979)).

ceration in the United States.[166] The Court further stated that "[g]ranting the CDC an exemption . . . would undermine [the] 'unceasing efforts to eradicate racial prejudice from our criminal justice system.'"[167] The opinion also draws parallels to the Court's jurisprudence on legislative redistricting—an area devoted to preventing racial discrimination but silent on gender.[168] Thus, it might be argued that *Johnson* forecloses any extensions beyond race.

Legitimate as they may be, the issues raised by this argument do not invalidate *Johnson*'s applicability to gender claims. First, although the Court's language discusses only racial discrimination, it does not foreclose the possibility of other rights falling outside *Turner*'s influence. The Court explicitly highlighted its Eighth Amendment jurisprudence as addressing such a right.[169] It is true that gender claims do not enjoy as much treatment in the Court's prison jurisprudence as racial discrimination, which the Justices claimed they had addressed previously in *Lee v. Washington*.[170] This reliance on *Lee* is perhaps less persuasive, as the opinion itself is less definitive on the Court's position than the *Johnson* majority seems to imply.[171] The Court has issued extensive opinions on gender discrimination generally,[172] which shore up its critique of using gender stereotypes to perpetuate unfair treatment. Additionally, although the Court did rely on its legislative redistricting cases, it also discussed its decisions on peremptory strikes, an area in which gender discrimination is expressly forbidden.[173]

It is true that race and incarceration have a particularly troubling connection in the nation's history, and the wrongs perpetrated on the basis of race have long warranted heightened scrutiny beyond the intermediate scrutiny standard. However, gender discrimination has also held a prominent place in the carceral experiences of

166. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

167. *Johnson*, 543 U.S. at 512 (quoting McCleskey v. Kemp, 481 U.S. 279, 309 (1987)). For more on the dynamics of race and gender in the prison population, see, for example, Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012), and Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

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

169. *Id.* at 511.

170. 390 U.S. 333 (1968).

171. Sharon Dolovich argues that this depiction of *Lee v. Washington* may not be as definitive as the Court assumes and that in fact *Lee* was open to a variety of interpretations that would have lent support to a deferential outcome. Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 84 n.379 (2011).

172. *See supra* note 21 and accompanying text.

173. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

female inmates. Early female prison facilities were often far inferior and offered significantly diminished opportunities compared to those available to male inmates.[174] Modern prisons show some improvement, but some inmates still receive treatment or resources inferior to those of their differently gendered counterparts.[175] Thus, the Court's emphasis on the troubling role of discrimination in the prison context is relevant to gender claims. Furthermore, any differences between race and gender discrimination are already accounted for in the less demanding nature of intermediate scrutiny as compared to strict scrutiny.

Another possible critique of this Comment's argument may be that requiring equality of programming or conditions across sex-segregated prisons could require significant financial outlays, which would affect the whole system's budget and thus reduce funds available for prison security. Prison security is certainly part of the day-to-day prison administration contemplated in *Turner*, weighing in favor of prison deference. This argument is closely tied to financial concerns about a flood of litigation but more directly implicates prison security rather than judicial costs. Particularly when state resources are desperately scarce, the safety protocols of prisons could theoretically be affected significantly by forced outlays in another area.

Although it is possible that equality requirements could force prisons to spend money they would otherwise reserve for different purposes, this does not render any constitutional right whose protection would require financial expenditure inconsistent with proper prison administration. First, gender equal protection claims implicate core constitutional rights that the Court has considered sufficiently important to protect with heightened scrutiny. Previous gender discrimination cases have been suspicious of the argument that administrative convenience or cost savings were sufficient justifications for gender discrimination.[176] There is thus little precedential justification for subverting one's right not to be discriminated against

174. *See, e.g.*, McMurry v. Phelps, 533 F. Supp. 742, 757 (W.D. La. 1982) (addressing a gender discrimination claim based on state prison policy allowing only male inmates to be trustees, to participate in work release programs, and to work on the prison farm).

175. For a more complete discussion of gender discrimination in modern prisons, see *infra* Part IV.

176. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court applied strict scrutiny to a government regulation providing support benefits to all male servicemen's female spouses regardless of financial status but requiring evidence that a servicewoman's male spouse was in fact financially dependent before providing benefits to him. *Id.* at 688. The Court held that the policy was invidiously discriminatory and not justified by its being "cheaper and easier." *Id.* at 688–89. The decision is a plurality decision, however, because the four-justice majority was joined by a three-justice concurrence which agreed with the judgment but felt that strict scrutiny was not the appropriate standard. *Id.* at 691–92 (Powell, J., concurring); *see also* Reed v. Reed, 404 U.S. 71, 76 (1973) (holding unconstitutional an Idaho probate statute that automatically selected male relatives over female relatives despite its administrative convenience).

on the basis of one's gender for the purposes of saving the state money. Justice Marshall further endorsed this view in his *Block v. Rutherford*[177] dissent, stating that "a desire to run a jail as cheaply as possible is not a legitimate reason for abridging the constitutional rights of its occupants."[178]

Furthermore, making the right identified in *Johnson* explicitly independent of *Turner* requires additional state expenditures throughout the system, and the Court must have been aware that such an outcome was likely. Although the Court did not decide whether the California policy met the requirements of strict scrutiny, its language strongly implied that the policy had serious flaws.[179] The Court was aware that all the reception centers would likely have to be desegregated, and that additional and more personnel-heavy security measures would likely be required. In her concurrence, Justice Ginsburg pointed out that the policy was likely "administratively convenient," but she did not consider this relevant.[180] The Court thus had the option of attaching the right in question to *Turner* through financial outlays, but it did not.

The Court's failure to give credence to this argument is further relevant in that gender claims are far less likely than racial discrimination claims to generate forced spending. Security policies genuinely based on differential safety needs at a men's or women's facility, such as some grooming restrictions,[181] can be justified by showing an important government interest that the policies substantially further—any legitimate security concern that is remedied effectively would certainly fall into this category.[182] The real concern is likely that requiring equivalent programming

177. 468 U.S. 576 (1984).

178. *Id.* at 604 (Marshall, J., dissenting).

179. For example, the Court emphasized that most state prison systems and the Federal Bureau of Prisons successfully operate without racial segregation. Johnson v. California, 543 U.S. 499, 508 (2005).

180. *Id.* at 516 (Ginsburg, J., concurring) ("Experience in other States and in federal prisons . . . strongly suggests that CDC's race-based assignment of new inmates and transferees, administratively convenient as it may be, is not necessary to the safe management of a penal institution.").

181. In some cases, male plaintiffs have challenged prison policies requiring short hair for men but not women, even requiring the shaving of male inmate's heads upon arrival in the prison. *See, e.g.*, Pariseau v. Wilkinson, 110 F.3d 64 (6th Cir. 1997) (unpublished table decision). Prison administrators have often justified these concerns based on a higher security level at the men's facility. *Id.* ("Pariseau's gender discrimination claim was properly rejected because the defendant demonstrated that the hair grooming policy was substantially related to the important objectives of security and identification, which were more vital in handling male prisoners."); Abordo v. Hawaii, 938 F. Supp. 656, 659 (D. Haw. 1996) (holding in favor of prison administrators because of concerns that male inmates historically concealed weapons in long hairstyles, while female inmates did not).

182. Although a highly undesirable justification, the argument remains that any security- or search-related leniency given to women and not to men can always be revoked from the women unless it is constitutionally required (in which case, it is likely required for male inmates as well regardless of their female counterparts). For example, cross-gender search policies might differ, but most are consti-

and vocational training will force prison systems to devote financial resources to expensive courses or equipment for additional inmates. There is no fundamental right to programming, however, so any state could choose to eliminate a program before providing it to all inmates.[183] Certainly this is not an ideal outcome, but it precludes the possibility that the costs of equal treatment would forcibly bankrupt the system or cripple its vital functions. Inmates of both genders have the right to equivalent treatment, and it is unfair to deprive one rather than the other based on cost-saving concerns.

Practical concerns about the volume of litigation follow similar lines but are addressed more fully in Part V.C.[184]

B. An End to Prison Deference in Protected-Class Equal Protection Claims

This Part argues that *Johnson* forbids any use of prison deference in determining the outcome of prison inmates' race and gender equal protection claims. This is not to say that prison deference is eliminated from *all* constitutional claims by incarcerated people—the fundamental holding of *Turner* has not been rejected by the Court in any general sense.[185] Rather, this Part argues that through its language in *Johnson*, the Court has placed equal protection claims based on membership in a protected group outside not only the purview of *Turner* but also outside its root justification: deference to prison officials. This Part first establishes that the *Turner* standard itself is clearly barred from any gender equal protection analysis after *Johnson* because the *Johnson* Court thoroughly rejected it.[186] The Part then posits that because *Turner*'s role in prison deference doctrine is as a consolidation and representation of deferential principals, a rejection of the *logic* of *Turner* is a rejection of prison deference generally. On this basis, this Part goes on to argue that all prison deference doctrines and rationales are barred from gender equal protection analysis after *Johnson*.

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tutional. *See* Flyn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free From Rape*, 13 WM. & MARY J. WOMEN & L. 841, 851 (2007).

183. *See, e.g.*, Hernandez v. Johnston, 833 F.2d 1316, 1319 (9th Cir. 1987) ("[N]either the due process clause nor Washington law creates a liberty interest in prison education or rehabilitation classes."); Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1985) ("[T]here is no constitutional right to rehabilitation."); Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981).

184. For a more complete discussion of the issues associated with increased costs, see *infra* Part IV.

185. *See, e.g.*, Beard v. Banks, 548 U.S. 521, 530–31 (2006) (plurality opinion) (denying a prisoner's claim regarding rights to newspapers, magazines, and photographs in a restrictive housing unit based on *Turner*'s standard of review).

186. See Part III.A, *supra*, for this Comment's argument that *Johnson* is equally applicable in cases of gender and racial discrimination.

First, it is clear from the decision that *Johnson*, at a bare minimum, carves out a space within prison equal protection jurisprudence where the *Turner* standard has no place. The Court refused to apply *Turner* to Johnson's claim and mandated strict scrutiny instead. The Court's rejection of the *Turner* standard is thorough.[187] But because *Turner* embodies much more than just a method of analyzing a claim, the Court's rejection, and the language it used, shows that prison deference can no longer be used to decide these cases.

Turner is more than a standard: It is a crystallization of prison deference's place in modern prison rights law. As such, it stands for an entire doctrinal concept—not a single balancing test or standard. The *Turner* decision is a distillation of prison deference into one standard that emerged from a patchwork of cases decided during the prisoners' rights era.[188] The *Turner* Court emphasized that the ultimate goal in creating the *Turner* standard was to announce a test that encompassed the prison deference policy interests articulated in previous cases, eliminating confusion about the proper test for such claims.[189] To this end, the Court intentionally consolidated this line of cases, mentioning some of their holdings as building blocks for its new standard.[190] The Court has subsequently made clear its intention that

187. Johnson v. California, 543 U.S. 499, 510 (2005) ("[W]e have applied *Turner*'s reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration.' . . . The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration." (citations omitted)).

188. *See* Lorijean Golichowski Oei, Note, *A New Standard of Review for Prisoners' Rights: A "*Turner*" for the Worse?*, 33 VILL. L. REV. 393, 418–19 (1988); Weidman, *supra* note 37, at 1515.

189. The *Turner* Court explicitly stated that its "task" in deciding the case was to resolve the open question of *Martinez* and "formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint . . . and [to] the need to protect constitutional rights." Turner v. Safley, 482 U.S. 78, 85 (1987) (latter alteration in original) (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)). The Court made it clear that *Turner* was meant to encompass the prior prison deference cases and develop a new and universal standard. The Court went further, emphasizing that "[i]f *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: 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. The Court then drew on the rationales of the *Jones*, *Pell*, *Rutherford*, and *Bell* cases to develop the four *Turner* factors. *Id.* at 89–91; *see also* Weidman, *supra* note 37, at 1515 ("The [*Turner*] Court . . . formalized the newly articulated standard of deference by defining a new standard for the evaluation of the constitutionality of prison regulations.").

190. The *Turner* Court cited *Martinez* for the concept that prisoners retain some constitutional rights but that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," and "the problems of prisons in America are complex and intractable, and, . . . not readily susceptible of resolution by decree." *Turner*, 482 U.S. at 84 (quoting *Martinez*, 416 U.S. at 404–05) (internal quotation marks omitted). The Court also cited *Pell v. Procunier*, 417 U.S. 817 (1974), for the principle that "judgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters.'" *Turner*, 482 U.S. at 86 (quoting *Pell*, 417 U.S. at 827). The Court also

the *Turner* standard be applied in all constitutional claims brought by inmates, although some exceptions have developed.[191] Thus, *Turner* is a monolith in prison rights jurisprudence and is inextricably tied to the rationales for a lenient standard: the values of judicial restraint and deference.

The *Johnson* Court, through its language and treatment of *Turner*, acknowledged the decision's doctrinal roots and thoroughly rejected them. The Court not only found the *Turner* standard inappropriate and inadequate to combat racial discrimination, but also determined that the *logic* of *Turner* did not apply. The Court refused to apply the *Turner* standard in lieu of strict scrutiny even though the "segregation policy applie[d] only in the prison context," as the defendant emphasized.[192] The Court explained that even though "certain privileges and rights must necessarily be limited in the prison context," *Turner*'s test was appropriate only for "rights that are 'inconsistent with proper incarceration.'"[193] The Court placed the right not to be discriminated against based on race outside *Turner*'s purview because the right was "not susceptible to the logic of *Turner*."[194]

The *Johnson* Court's additional reliance on policy rationales that implicate the root interests behind equal protection law demonstrates the Court's view of the issue as being beyond *Turner*'s deferential core. The Court rejected *Turner* in part because it found the standard too weak to sufficiently "ferret out" invidious discrimination.[195] The Justices were also concerned that using the *Turner* standard for racial discrimination claims would erode general respect for the justice system.[196] These policy concerns do not address the weaknesses of the *Turner* factors or a minor problem

pointed out that *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), used a rational basis test to measure the efficacy of prison policies forbidding a prison labor union. *Turner*, 482 U.S. at 86 (citing *Jones*, 433 U.S. at 136). The Court also referred to the deference and use of a rational basis–like standard in both *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Block v. Rutherford*, 468 U.S. 576 (1979). *Turner*, 482 U.S. at 87.

191. Washington v. Harper, 494 U.S. 210, 224 (1990) ("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."); Jennifer N. Wimsatt, Note, *Rendering* Turner *Toothless: The Supreme Court's Decision in* Beard v. Banks, 57 DUKE L.J. 1209, 1217 (2008) (describing *Turner* as "what was to be the sole standard for prisoners' rights cases").

192. Johnson v. California, 543 U.S. 499, 509 (2005).

193. *Id.* at 510 (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)).

194. *Id.* The Court has referred to *Turner*'s mandate as a principle to be respected and not merely a standard to be utilized. In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court castigated a district court for failing to adequately defer to prison administrators, stating that "*Turner*'s principle of deference" was especially applicable under the circumstances. *Id.* at 361.

195. *Johnson*, 543 U.S. at 513. The Court was concerned that if "government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers." *Id.* at 511.

196. *Id.* at 511.

with applying *Turner* in this case. Instead, they focus on the core issues inhibited by the *Turner* standard's inherent deference. The Court's emphasis on these justifications is additional evidence that the opinion rejects deference and its justifications in discrimination claims.

Furthermore, the Court went on to replace *Turner* not with a less deferential standard but with strict scrutiny—the traditional, deference-free, and very demanding equal protection standard.[197] The Court could have retained minimal prison deference by creating a new standard or adjusting the traditional standard to accommodate some deference. In other cases where the Court was reticent to apply *Turner*, for example, the standard in place has still deferred to prison officials or administrators in some way. When an inmate alleges an Eighth Amendment violation, the standard is less deferential if the inmate claims a failure to provide adequate medical care and more deferential if the claim addresses official conduct while trying to restore order in a potentially violent situation.[198] The Court's justification for a more lenient "good faith" standard in cases of restoring order is the necessary deference to prison officers and officials.[199] The *Johnson* Court had the option, then, to produce a new standard more strenuous than *Turner* but still deferential to prison administrators. The Court, however, chose otherwise. It mandated that lower courts use the strictest form of equal protection review, with no deferential considerations in the balancing. By rejecting yet another deferential option, the Court further demonstrated its intent to bar deference completely from prisoners' discrimination claims.

The Court's choices show that it intended *Johnson* to effect real change in prison equal protection cases. It would have been easy for the Court to apply *Turner* or a new deferential standard in *Johnson.* The Court knew the history of *Turner* and its predecessors and knew that it could easily have relied on *Turner* and remained con-

197. Strict scrutiny has been considered such a significant obstacle to government actors that it has been described as "strict in theory, fatal in fact." *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794 (2006). It has been shown, however, that government agencies can prevail under the standard, but it is much less common than failure. *Id.* at 807–08.

198. *See* Hudson v. McMillian, 503 U.S. 1, 5–6 (1992) ("For example, the appropriate inquiry when an inmate alleges that prison officials failed to attend to serious medical needs is whether the officials exhibited 'deliberate indifference.'" (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976))).

199. *Id.* at 6 (quoting Whitley v. Albers, 475 U.S. 312, 321–22 (1986)) ("[C]orrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that '[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'").

sistent doctrinally.[200] Indeed, the Central District and the Ninth Circuit assumed automatically that the *Turner* standard should apply.[201] Because of this widely held assumption and *Turner*'s dominance, the Court's decision to reject *Turner* was a groundbreaking change. That the Court chose to take a case that was widely presumed to be governed by *Turner* and declare that precedent entirely inapposite indicates that they intended to make a sweeping change in at least one small part of prison rights jurisprudence.

Thus, by considering both the role *Turner* plays as a monolith in prison deference jurisprudence and the Court's treatment of *Turner* in its *Johnson v. California* decision, it is evident that prison deference is no longer an appropriate consideration in prisoners' protected-class equal protection claims. Although *Turner* remains the dominant standard in prison rights cases generally, the Court has cleared a space for rights that are consistent with proper incarceration where *Turner* and its prison deference justifications have no place.

IV. GENDER EQUAL PROTECTION AFTER *JOHNSON*: WHAT IMPACT FOR THE FUTURE?

Johnson's rejection of *Turner* and prison deference in gender equal protection claims would change the process for analyzing these claims in many jurisdictions. This Part discusses the implications of this rejection on the actual litigation of gender equal protection claims by prison inmates. To do so, this Part analyzes the four doctrinal barriers addressed in Part III, considering the role that *Turner* and its deferential rationales play in each one. The most straightforward analyses are those of the standard of review applied and the use of the complex *Klinger v. Department of Corrections*[202] similarly situated standard; these doctrines involve *Turner* specifically, either through use of the standard or through heavy reliance on the case itself. Because *Johnson* so clearly rejects *Turner*—both standard and logic—any doctrine tied directly to *Turner* is seriously affected by the *Johnson* decision. As this analysis shows, however, *Turner* has no explicit place in either parity or facial neutrality. Nevertheless, for reasons explained below, the parity standard still has its roots in prison deference and so is deeply affected by the *Johnson* decision. This is not the

200. The Court claimed that the *Johnson* decision was almost predecided by its decision in *Lee v. Washington*. *Johnson*, 543 U.S. at 512. As noted above, Sharon Dolovich has suggested that this is perhaps not a sufficiently nuanced view of *Lee*. *See* Dolovich, *supra* note 171, at 84 n.379.

201. *See supra* Part II.E.

202. 31 F.3d 727 (8th Cir. 1994).

case with respect to facial neutrality, however, and so it likely survives unaffected after *Johnson*.

A. Ending the Confusion: *Johnson* Requires Use of the Intermediate Scrutiny Standard

The most obvious and often argued consequence of *Johnson* is the use of the intermediate scrutiny standard in judging gender discrimination in prisons.[203] This is a straightforward application of the *Johnson* holding in the gender context. If *Johnson* eliminates the deferential *Turner* standard because it is inapposite and insufficient to combat racial discrimination, and this same principle holds true for gender claims, then *Turner* cannot be the appropriate standard of review for prisoners' gender equal protection claims. Because *Johnson* relied on the traditional equal protection standard of strict scrutiny, the logical standard for gender claims would be the traditional intermediate scrutiny test.

Although this is the reading most frequently considered in scholarship after *Johnson*, it would only have an impact in those courts where, before *Johnson*, the *Turner* standard was adopted as the primary method of determining whether the state had demonstrated sufficient justification for differential treatment.[204] As discussed previously, circuit and district courts vary widely in their interpretation of the appropriate standard of review.[205] In those circuits or districts where intermediate scrutiny was already the enunciated standard, this change would have no effect. In the Eighth Circuit, for example, intermediate scrutiny has always been the enunciated standard, but plaintiffs face significant hurdles in the threshold *Klinger* similar-situation and intentional-discrimination requirements.[206] In this and other similar circuits, then, outcomes would remain the same because the real challenge is not the

203. *See* Hoffman, *supra* note 13, at 604–07 (arguing for the application of intermediate scrutiny in challenges to a jail's early release policies); Budnitz, *supra* note 13, at 1328–31 (arguing that *Johnson* supports using the undue burden test from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to analyze prison abortion policies).

204. *See* Yates v. Stalder, 217 F.3d 332, 335 (5th Cir. 2000) ("If legitimate penalogical [sic] goals can rationally be deemed to support the decision to treat male and female prisoners differently, then they are not similarly situated for Equal Protection purposes."); Star v. Gramley, 815 F. Supp. 276, 278 (C.D. Ill. 1993) ("In the context of equal protection claims, the reasonableness of prison rules and policies must be examined to determine whether distinctions made between groups in prison are reasonably related to legitimate penological interests.").

205. *See infra* Part II.A.

206. The Eighth Circuit maintains that where inmates are similarly situated, such as for purposes of challenging the processes by which prison programming decisions are made, heightened scrutiny is appropriate. *See* Roubideaux v. N.D. Dept. of Corr. & Rehab., 570 F.3d 966, 974 (8th Cir. 2009); *Klinger*, 31 F.3d at 733 n.4.

implementation of the *Turner* standard itself. Importing intermediate scrutiny in all jurisdictions would certainly help some plaintiffs, like those in the Fifth Circuit, but leaves intact, and at the disposal of deference-friendly courts, the other damaging doctrines that do not directly derive from *Turner*.

B. Moving on From *Klinger*: A Return to the Normal "Similarly Situated"

The concept that plaintiffs must be similarly situated to their equal protection counterparts is a longstanding part of equal protection law. Although it has long stood for the concept that "like must be treated alike," it has never assumed a significant role in the actual analysis of modern equal protection claims.[207] *Klinger*, however, repurposed this otherwise neutral doctrinal standby into a complex set of inapposite factors, creating a significant barrier for gender discrimination plaintiffs to overcome. This development is particularly out of place given the *Klinger* court's reliance on oddly counterintuitive factors for developing its analysis.[208] As others have emphasized, the differences between male and female inmate populations indicate that no two facilities will ever be fully similarly situated for the *Klinger* purposes.[209]

This interpretation, however, argues that the *Klinger* modifications to the similar-situation requirement are defunct after *Johnson* because they rely entirely on *Turner*'s language and rationales. If *Turner* has no place in post-*Johnson* equal protection analysis, then a doctrine that relies entirely on *Turner* and its prison deference reasoning for its existence must also be foregone. This Part further points out that the *Klinger* analysis is not attributable to any other source in traditional equal protection law, forestalling any argument that it draws its higher standard from anything other than prison deference. Thus, this Part ultimately argues that after *Johnson*, the *Klinger* similarly situated doctrine is defunct.

The Eighth Circuit relied heavily on *Turner*'s language and fundamental principles in its *Klinger* decision. The court stated that "the Supreme Court's *Turner* decision counsels against holding that the plaintiffs and [the male] inmates are similarly situated for purposes of prison programs and services," and went on to em-

207. Shay, *supra* note 69, at 598.

208. The court's use of factors, including the length of sentences (on average longer for male inmates), security levels (higher for male inmates), and special characteristics of female offenders (including the likelihood of female inmates being parents and primary caregivers) to deny female plaintiffs in *Klinger* services for which they clearly had superior need based on those same factors is noted in Part II.B, *supra*.

209. *See supra* Part II.B.

phasize several of the key prison deference ideas espoused in *Turner*.[210] The court relied on quotations from *Turner* describing the need and rationale behind deference, namely that "courts are ill equipped to deal with the increasingly urgent problems of prison administration," and "[b]ecause courts have little expertise in the 'inordinately difficult' task of running prisons, courts should accord a high degree of deference to prison authorities."[211] After reiterating the key justifications behind the *Turner* decision, the court elected not to engage in a "program comparison" between the two Nebraska prisons because it "places dozens of substantive administrative prison decisions under close judicial scrutiny and subjects them to after-the-fact second-guessing by a federal court."[212]

Thus, by its own language and reasoning, the *Klinger* court justified its decision through *Turner* and its rationales. This reliance on *Turner* can also be found in the subsequent cases that adopted *Klinger*'s methodology. In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*,[213] the D.C. Circuit cited *Turner* and refused to engage in program comparisons because "[s]uch an approach completely eviscerates the deference that federal courts are obliged to give prison administrators."[214] The court then began its conclusion by stating that "[b]ecause courts have little experience in the 'inordinately difficult' task of running a prison, they should give deference to prison officials where possible," again citing directly to *Turner*.[215] The court then stated its resolution of the issues at hand "[w]ith these principles in mind."[216]

The Iowa District Court that decided *Pargo v. Elliott*[217] cited *Klinger* and *Turner* in forming its conclusion that the plaintiffs were not similarly situated to their male counterparts. The court was "reluctant to substitute its judgment for that of prison administrators in reviewing day-to-day program and management decisions because it may 'seriously hamper[] [their] ability to . . . adopt innovative solutions to the intractable problems of prison administration,'" citing a *Klinger* passage that in turn cites *Turner*.[218] The court explicitly found that the measures in question involved

210. *Klinger*, 31 F.3d at 732.
211. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987)).
212. *Id.* at 732–33.
213. 93 F.3d 910 (D.C. Cir. 1996).
214. *Id.* at 926–27 (citing *Turner*, 482 U.S. at 84–85, 89).
215. *Id.* at 931–32 (quoting *Turner*, 482 U.S. at 85).
216. *Id.* at 932.
217. 894 F. Supp. 1243 (S.D. Iowa), *aff'd*, 69 F.3d 280 (8th Cir. 1995).
218. *Id.* at 1291 (alterations in original) (citing *Klinger*, 31 F.3d at 732).

the "day-to-day" operations of the prison and expressly "defer[red] to Warden Long's day-to-day management of [the women's prison]."[219]

Finally, the Fifth Circuit similarly acknowledged *Turner*'s influence when remanding *Yates v. Stalder*[220] to the lower court for further analysis of the similar-situation issue. First, the court stated it was "fully cognizant of the high degree of deference courts must afford to prison authorities in the inordinately difficult task of running prisons," citing *Turner*.[221] The court also implied that the appropriate standard of review for the equal protection claim was that of *Turner* even though the court did not reach that stage of the analysis.[222]

Not only is the *Klinger* analysis defunct because of its reliance on *Turner*, but it also stands contrary to the broader post-*Johnson* prohibition on prison deference posited in this Comment. *Turner* is a consolidation of prison deference jurisprudence into one modern standard.[223] Thus, since *Klinger* so clearly relies on *Turner* to justify its complex and difficult similar-situation analysis, the doctrine is fundamentally based on prison deference. After *Johnson*, such deference is inappropriate in analyzing gender equal protection claims. *Johnson* specifically rejects the *Turner* standard and the underlying justifications, creating an even stronger rationale for rejecting the *Klinger* analysis for its close connection to *Turner*.

It is also impossible that *Klinger* draws its higher similar-situation standard from any other source than prison deference and *Turner*. The *Klinger* analysis is almost entirely unique within equal protection law. Courts traditionally use the similarly situated language simply to emphasize the traditional importance of equality among equals, but they never use it to create complex systems to divide plaintiffs from their counterparts.[224] *Klinger* also originated the concept of applying strict scrutiny as a threshold issue in the first place, making it an outlier in another respect.[225] Other landmark equal protection Supreme Court cases have not utilized this method. For example, in *City of Cleburne v. Cleburne Living Center*,[226] the Court compared a home for the mentally disabled to other facilities included in a local ordinance but did not require that they be similar in size or population—the Court

219. *Id.*
220. 217 F.3d 332 (5th Cir. 2000).
221. *Id.* at 335 (citing *Turner*, 482 U.S. at 85).
222. *Id.* ("If legitimate penological goals can rationally be deemed to support the decision to treat male and female prisoners differently, then they are not similarly situated for Equal Protection purposes.").
223. *See supra* Part III.B.
224. *See* Shay, *supra* note 69, at 612.
225. *Id.* at 592.
226. 473 U.S. 432 (1985).

did not even discuss this aspect of the situation.[227] Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[228] no similarly situated analysis was performed even though the schools involved had widely varying student populations with diverse age ranges and racial backgrounds.[229]

Most importantly, the application of factors like those used in *Klinger* as a threshold issue is unprecedented in gender and racial discrimination cases specifically. Although numerous cases have dealt with discrimination in facilities or programs between large institutions (schools, generally), none have utilized threshold requirements as a method of determining whether plaintiffs are similarly situated. In the Court's primary gender equal protection cases, whether the plaintiffs are similarly situated is not an issue.[230] In *VMI*,[231] two years after *Klinger*, the Court held that the state's failure to provide women with equal access to public military education violated the Equal Protection Clause.[232] Scholars have pointed out that the Court did not even discuss whether the plaintiffs were similarly situated, even though the claim was based on the resources available to male and female students at two entirely different institutions.[233] The D.C. Circuit addressed *VMI* in *Women Prisoners* and argued that the holdings were entirely consistent, in part because the institutions the *VMI* Court compared had been of similar size but had vastly different educational offerings.[234]

The D.C. Circuit made an interesting choice to use the size of *all* of Mary Baldwin College as the basis of this point, however. The actual military program developed for women *within* Mary Baldwin College, VWIL, had only twenty-five students enrolled.[235] Joanna Saul emphasizes that the Court still found the two groups of students similarly situated.[236] Jennifer Arnett Lee also points out that

227. *Id.* at 448; *see also* Saul, *supra* note 95, at 44 n.59 (citing *Cleburne*, 473 U.S. at 448).
228. 551 U.S. 701 (2007).
229. *See* Saul, *supra* note 95, at 44.
230. Carroll-Ferrary, *supra* note 93, at 596–97. Carroll-Ferrary notes that the Court in *Bradwell v. Illinois*, 83 U.S. 130 (1872), did find men and married women not similarly situated with respect to joining the bar based on women's duties in the home but that later in *Reed v. Reed*, 404 U.S. 71 (1971), the court held men and women similarly situated for the purposes of the legislation in question. *Id.* at 596 n.5. Similarly, the Court in *VMI*, 518 U.S. 515 (1996), did not analyze whether the parties were similarly situated nor did they in *Craig v. Boren*, 429 U.S. 190 (1976).
231. 518 U.S. 515.
232. *Id.* at 534.
233. Carroll-Ferrary, *supra* note 93, at 612.
234. Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 926 (D.C. Cir. 1996). The court stated that Mary Baldwin had an enrollment of 1,327 students while VMI had 1,124. *Id.*
235. Saul, *supra* note 95, at 46.
236. *Id.*

the Court considered the similarities of the facilities in *VMI* "during the central analytical stage" rather than as a threshold issue.[237] She also highlights the weakness of using institutions to measure similar-situation claims when the unfairness of the institutional differences is in issue.[238] There are thus several reasons to question the D.C. Circuit's conclusion.

It is true that a small number of equal protection claims receive a stricter interpretation of similar situation. Class-of-one equal protection claims, for example, have a higher standard. This is true, for instance, in the zoning context. Courts have required that a plaintiff prove "that they were treated differently than someone who is *prima facie* identical in all relevant respects."[239] This appears to be confined to zoning class-of-one cases, however, as the Seventh Circuit emphasized in such a case that courts "have imposed on plaintiffs a 'high burden' in establishing someone who is similarly situated in these types of cases."[240] Some courts have still applied a lesser standard, requiring only that plaintiffs be "situated similarly in all relevant aspects."[241] *Klinger* can thus find no justifications within equal protection law to support using a higher standard of similar situation than traditional gender equal protection law would require.[242]

237. Lee, *supra* note 58, at 285.

238. *Id.* ("If the very institution that is challenged as discriminatory is deemed outside of equal protection analysis *because* it is different, blatant discrimination between groups can take place unchecked.").

239. Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002) (plaintiff developers argued that a zoning board violated the Equal Protection Clause by refusing to approve subdivision plans).

240. Maulding Dev., LLC v. City of Springfield, 453 F.3d 967, 970 (7th Cir. 2006) (quoting McDonald v. Vill. of Winnetka, 371 F.3d 992, 1003 (7th Cir. 2004)).

241. Cordi-Allen v. Conlon, 494 F.3d 245, 250–51 (1st Cir. 2007) (emphasis omitted) (quoting Buchanan v. Maine, 469 F.3d 158, 178 (1st Cir. 2006)).

242. The only other potential justification I could find for a stronger similar-situation standard was located in *Racine Charter One, Inc. v. Racine Unified School District*, 424 F.3d 677 (7th Cir. 2005), which used a more aggressive standard to determine that a charter school was not similarly situated to other local schools because it had a separate administration. *Id.* at 682. The court declined to decide the issue based on the similar situation of the students affected by the school district's refusal to extend busing for students to the charter school. *Id.* The court acknowledged that the students attending the charter school were "clearly" similarly situated to students attending the traditional public schools in the area. *Id.* at 681. The court found that the charter school was the equivalent of an independent school district, however, not just an independent school. *Id.* at 682. As such, the local school district was not statutorily required to bus charter school students because the charter school was a "unique statutory creation." *Id.*

Racine does little, if anything, to support the use of *Klinger*'s standard in gender equal protection cases. Not only is *Racine* not an equal protection claim based on a protected class, it makes a distinction that does not apply to prisons. *Racine* focuses on the legal differences between two schools under a statutory framework. The court concluded that "the two entities simply enjoy no legal relationship." *Id.* This is certainly not the case for any two state prisons. Even if they are operated by private companies, the state directs all prisons under a general department of corrections, not by

Finally, one could possibly argue that *Klinger*'s methodology is justified because its factors include special characteristics that are similar to distinctions that the Supreme Court has sometimes found between men and women to justify finding them dissimilarly situated.[243] This would be a vast expansion of the Court's prior jurisprudence, however, and the analogy is very weak. Rather than demonstrating why the *Klinger* plaintiffs were dissimilarly situated, these cases illustrate how distant *Klinger*'s analysis is from the Supreme Court's usual method of determining similar situation.

Twice in military-related cases, the Court has determined that men and women could be treated differently because they were not similarly situated. In *Rostker v. Goldberg*[244] and *Schlesinger v. Ballard*,[245] the Court upheld statutes specifying different treatment for female servicemembers in the context of the draft and promotions, respectively.[246] In both cases, however, the Court based this determination on the fact that federal statutes explicitly prevented female servicemembers from serving in the same capacities as male servicemembers.[247] The Court performed no analysis on the type of branch in which they served or the number of women in the military; it based its decision on statutory limitations that *made* men and women serving in the armed forces dissimilarly situated. This is distinct from any application to prisons, which have no military deference and no federal laws differentiating treatment of men and women.

The Court also addressed the similar-situation requirement in *Michael M. v. Superior Court*,[248] holding that men and women were not similarly situated with respect to statutory rape laws because only women could bear children.[249] The analysis relied solely on this distinct physical difference between men and women. This decision lends no support to the *Klinger* standard because no distinct physical difference justifies providing male and female inmates with different educational

different districts broken up as school districts might be—prisons are individual facilities within a larger framework of administration.

243. *See supra* Part II.B.

244. 453 U.S. 57 (1981).

245. 419 U.S. 498 (1975).

246. *See Rostker*, 453 U.S. at 76–77 (finding no invidious discrimination from a male-only military draft because the draft was intended to recruit combat troops and women were statutorily prevented from serving in combat, thus making men and women not similarly situated); *Schlesinger*, 419 U.S. at 508 (holding that male and female naval line officers were not similarly situated with respect to promotion because female officers could not serve in as many capacities as male officers and so allowing women a longer period of service before mandatory discharge did not violate the Due Process Clause).

247. *Rostker*, 453 U.S. at 76; *Schlesinger*, 419 U.S. at 508.

248. 450 U.S. 464 (1981).

249. *Id.* at 471.

programs or resources. Although the *Klinger* court mentioned special circumstances that included female inmates' increased likelihood of having and caring for children, this distinction was not based on the actual physical *ability* of women to have children. Rather, it commented on the empirical fact that female prisoners were more likely to be both parents and primary caregivers. Without a connection to women's physical ability to bear children, the *Michael M.* rationale provides no justification for the *Klinger* factors.

Klinger's interpretation of similar situation is thus a doctrinal outlier in every way. Its only justification stems from its emphasis on prison deference and its clear reliance on *Turner*. If *Johnson* is to be read according to its language and logic, both *Turner* and its underlying prison deference principles are inappropriate in gender equal protection analysis. With its sole justification no longer viable, *Klinger*'s similar-situation analysis is likewise no longer viable.

It is important to note that plaintiffs will still have to be similarly situated in the traditional way. Even without *Klinger*, some claims will still fail on this basis, as is appropriate in certain situations. For example, in *Suter v. Crawford*[250] a District Court pointed out that only maximum-security inmates among the male population received better housing (that is, two people or fewer to a cell) than the minimum-security female inmates suing.[251] Minimum-security male inmates, however, had widely varied housing that rarely had only two people to a cell. The court denied an injunction based on its determination that there was no evidence tying the differences in housing to gender, making it unlikely that the female plaintiffs would prevail on a gender discrimination claim.[252] In situations like *Crawford*, where there is no evidence of any gender-based differential treatment, the plaintiffs will likely face rational basis review.

C. Replacing Parity With Equality

Unlike the *Klinger* conception of similar situation, the parity requirement emerged over ten years before *Turner*. It is thus more difficult to associate with prison deference rationales, as it lacks a link to the predominant prison deference case in modern jurisprudence. This Part posits, however, that courts' language justifying parity and its relationship to other equal protection doctrines establishes a clear connection to prison deference rationales. Because of this connection, after *Johnson*, the parity doctrine is inapposite.

250. No. 06-4032-CV-C, 2008 WL 4866613 (W.D. Mo. Nov. 10, 2008).
251. *See id.* at *4 (holding that the women were unlikely to be found similarly situated).
252. *Id.*

In the earliest gender-based prison equal protection claims, the courts acknowledged that "identity" of treatment was not required—instead, they imposed a lower burden on prison administrators to show only "parity," a standard requiring substantial similarity but not equality.[253] Despite its pre-*Turner* emergence, the parity standard carries obvious signs of prison deference logic. First, early courts made clear that parity was the appropriate standard for *prison* cases in particular. In quoting *Barefield v. Leach*,[254] the court in *Bukhari v. Hutto*[255] stated that "[w]hat the Equal Protection Clause requires in a prison setting is parity of treatment, as contrasted with identity of treatment, between male and female inmates."[256] At its outset, the parity doctrine was expressly to be used in the prison setting, for claims between inmates.

The *Barefield* court went on to tie this explanation to the imprisonment itself, holding that "[t]he state can justify a lack of parity in treatment or opportunities when its actions have a fair and substantial relationship to the purpose of the inmate's incarceration."[257] This language makes clear that the prison environment justified application of the parity standard. Moreover, this justification anticipates *Turner*'s "reasonably related to a legitimate penological interest"[258] language, demonstrating the parallel reasoning underlying the parity standard.

Thus, even though the cases introducing the parity standard do not explicitly connect it to prison *deference*, they indicate clearly that the particular nature of the prison context and interests in incarceration allow for a reduced standard. This reliance on incarceration as a justification for less searching review is the hallmark of prison deference. The parity standard as a substitute for equality also appears to be isolated in gender equal protection claims by prisoners. Its confinement to prison claims combined with its prison-specific language further support its connection to prison deference rationales.

If *Johnson* renders prison deference inappropriate in gender equal protection claims and requires a return to traditional equal protection analysis, then certainly a doctrine that exists only in the prison context and limits gender equal protection relief on the basis of that context is highly suspect. Without incarceration as a ra-

253. *See* Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979); *supra* Part II.C.
254. No. 10282, 1974 U.S. Dist. LEXIS 11539 (D.N.M. Dec. 18, 1974).
255. 487 F. Supp. 1162 (E.D. Va. 1980).
256. *Id.* at 1172 (quoting *Barefield*, 1974 U.S. Dist. LEXIS 11539, at *52).
257. *Barefield*, 1974 U.S. Dist. LEXIS 11539, at *52. For a similar correlation between prison justifications and parity, see *Bukhari*, 487 F. Supp. at 1172 ("A determination of parity will involve a review of the totality of prison conditions and rehabilitative opportunities at male prisons and at VCCW. *Differences* unrelated to such valid concerns as prison security must be remedied." (emphasis added)).
258. Turner v. Safley, 482 U.S. 78, 89 (1987).

tionale, the parity standard has no reasonable utility in equal protection analysis. Because it cannot draw any legitimacy from traditional equal protection standards and instead relies exclusively on the prison environment for its justification, the parity standard cannot survive *Johnson*. Even though the path to finding *Klinger* inappropriate is easier, the implications for the parity doctrine are evident.

D. One Holdout: The Intentional Discrimination Requirement

The intentional-discrimination requirement, like the traditional similar-situation concept, is a longstanding part of equal protection jurisprudence.[259] If a plaintiff challenges a law or policy that explicitly discriminates against a certain group, such as the CDCR's explicit policy of housing inmates according to their race,[260] it is facially discriminatory and the courts will apply the appropriate balancing test without addressing any threshold issues. If, however, the policy challenged does not discriminate on its face but nonetheless disproportionately affects a certain group, it is considered facially neutral. To challenge facially neutral policies, the plaintiff must show that the defendant intentionally discriminated against a certain group.[261]

This doctrine applies in the prison context in the case of a facially neutral prison policy. Because proving intentional discrimination is so difficult, prison inmate plaintiffs challenging facially neutral policies often have their claims dismissed before any hearing on the merits.[262] Plaintiffs must thus hope that their claims will be found facially discriminatory, avoiding the intentional discrimination issue altogether. Although determining whether statutes are facially discriminatory may seem straightforward, the courts are inconsistent and unclear in determining this issue in prison gender discrimination cases.[263]

Because a finding that a policy is facially neutral is so devastating to an inmate plaintiff's discrimination claim, it is not useful to analyze how courts decide whether discrimination is intentional. With this in mind, this Part instead analyzes how the *Johnson* decision might affect the application of this requirement by focusing on when courts find statutes facially neutral or facially discriminatory. *Johnson* focuses on prison deference, however, and so could only affect courts' applications of facial

259. *See* Washington v. Davis, 426 U.S. 229, 240–41 (1976).
260. Johnson v. California, 543 U.S. 499, 502 (2005).
261. *See Davis*, 426 U.S. at 240.
262. This was, for example, the alternate holding in *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994).
263. *See supra* Part II.D.

neutrality doctrine if judges were somehow using prison deference rationales as a justification for finding policies facially neutral. Connections to prison deference in making this determination, however, are more difficult to identify than in the other doctrines discussed previously. Facial neutrality and intentional discrimination long predate *Turner* and exist throughout nonprison equal protection jurisprudence, and so cannot be tied to prison deference through either of these methods.[264] Courts are also not explicitly referencing prison deference rationales when they determine facial neutrality, adding to the difficulty of determining whether the decisions can be associated with such rationales. Still, there are patterns within the courts' findings that suggest some degree of deference playing a role in determining whether a law or policy is facially neutral.

Because the facial neutrality doctrine existed long before the prisoners' rights cases, it lacks the direct and explicit connection to prison deference that appears in other areas. Unfortunately, the explanations offered for facial-neutrality findings in prison gender cases are equally unhelpful; courts are not using deference rationales or precedents in their discussions. This is the case in the D.C. Circuit's 1990 holding in *Jackson v. Thornburgh*.[265] The female *Jackson* plaintiffs challenged a good-time-credits policy that reduced the minimum sentence of inmates in D.C. prisons. Because female offenders were all housed in federal facilities, only male prisoners received the benefit and female prisoners could only have good time taken off their maximum sentence.[266] The *Jackson* court found that the policy was facially neutral because it did not discriminate against the women based on their gender but rather based on their location; they strongly emphasized that some women (those serving a year or less) would actually benefit.[267] The court cited heavily to gender discrimination cases unrelated to prisons, thus leaving no clear connection to prison deference in its reasoning.[268]

The *Klinger* court used the lack of intentional discrimination as an alternate holding in its denial of the female plaintiffs' claims for better programming, and this finding in turn made its way into the *Klinger* progeny.[269] Like the *Jackson* opin-

264. *See supra* Part II.D.
265. 907 F.2d 194, 197–98 (D.C. Cir. 1990).
266. *Id.* at 196.
267. *Id.* at 197.
268. *See id.* (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); Pers. Adm'r v. Feeney, 442 U.S. 256, 274 (1979)).
269. *Klinger*, 31 F.3d at 733; *see* Keevan v. Smith, 100 F.3d 644, 650–51 (8th Cir. 1996) (noting that differences in programming were a function of facility size, not the gender of inmates); Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 924–25 (D.C. Cir. 1996); Pargo v. Elliott, 894 F. Supp. 1243, 1259–61 (S.D. Iowa 1995).

ion, the *Klinger* decision cites nonprison equal protection precedent for its analysis, leaving no clear connection to *Turner* and the deference rationales espoused in that case's similar-situation analysis.[270] The *Pargo* court came to the same conclusion, citing only to *Personnel Administrator v. Feeney*,[271] not to *Turner*.[272] No actual prison rationales are referenced in these discussions and one could suggest alternative explanations, such as the particular types of cases presented or differences in interpretation between the circuits.

Without these two primary connections to prison deference, then, this Comment can rely only on circumstantial evidence of a relationship. This circumstantial evidence could support an inference that courts found policies facially neutral more often after the *Klinger* decision, suggesting that prison deference does play a role in these determinations. The D.C. Circuit, for example, ruled only a year before *Jackson* that a very similar policy was facially discriminatory. In *Pitts v. Thornburgh*,[273] the D.C. Circuit found the policy of housing long-term female offenders in federal facilities facially discriminatory because "long-term, D.C. women offenders, because they are women, are imprisoned considerably farther from the District than are similarly situated male offenders and consequently suffer a substantial burden."[274] Only a few months before *Klinger*, the Western District of Virginia found the state's policy of giving only male juvenile offenders access to a boot camp rehabilitation program facially discriminatory.[275] It is also notable that the *Klinger* and *Women Prisoners* district courts found the policies in question facially discriminatory but were overturned at the appellate level, suggesting that there was at least reasoned disagreement over the facial-neutrality determinations in those cases.[276]

270. *Klinger*, 31 F.3d at 731–33.

271. 442 U.S. 256 (1979).

272. Pargo v. Elliott, 894 F. Supp. 1243, 1263 (S.D. Iowa) ("Plaintiffs have not cited to any facially gender based state law or 'general budgetary and policy choices' in support of their claims. Nor have the Plaintiffs challenged the decision to segregate women and men inmates, or any budget allocation for ICIW. Additionally, Plaintiffs failed to present evidence of policies that were motivated by discriminatory intent." (footnote omitted) (quoting Pitts v. Thornburgh, 866 F.2d 1450, 1454–55 (D.C. Cir. 1989))), *aff'd*, 69 F.3d 280 (8th Cir. 1995).

273. 866 F.2d 1450.

274. *Id.* at 1453.

275. West v. Va. Dep't of Corr., 847 F. Supp. 402, 408 (W.D. Va. 1994).

276. *See* Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 674–75 (D.D.C. 1994), *rev'd*, 93 F.3d 910 (D.C. Cir. 1996); Klinger v. Dep't of Corr., 824 F. Supp. 1374, 1388 (D. Neb. 1993) ("[T]he fact remains that female prisoners, as a result of their gender alone, can receive only the programs available at NCW. Therefore, if the programming at NCW is comparatively inferior to programs at NSP, the female recipients may receive poor programming because of their gender and not for some nongender-related reason."), *rev'd*, 31 F.3d 727 (8th Cir. 1994); Laddy, *supra* note 58, at 17 n.126.

It is possible to argue on this basis that an overall shift occurred in the courts' approach to prison gender claims and that the *Klinger* decision could have influenced this shift. Even though the *Klinger* court did not cite to any prison deference authority for its facial-neutrality determination, the case is heavily influenced by deference in other ways. The shift toward finding policies facially discriminatory could be the result of courts feeling empowered to use the prison deference rationales enunciated in *Turner* and reinforced in *Klinger* to reject gender discrimination plaintiffs' constitutional claims by any means possible. One could also point out that in a deference-heavy jurisdiction like the Eighth Circuit, which references *Turner* regularly in the gender context which and wholeheartedly endorses its deferential mandate, deference would also have affected close calls in courts' facial-neutrality determinations as well. Thus, these considerations may be influencing judicial decisions even if they are not explicitly cited.

Without clearer connections to *Turner* and prison deference rationales, however, the use of facial neutrality in prisoners' gender discrimination claims is unlikely to be affected after *Johnson*. There are no clear connections to prison deference, and what links can be found are tenuous. Facial neutrality and intentional discrimination are an established and powerful force in equal protection law generally, and any impact made by deferential concerns in the prison context is very hard to measure. Theoretically, deferential courts could retain the facial neutrality determination as an additional means to thwart plaintiffs' claims. Such a use of the doctrine, however, would defy *Johnson*'s elimination of deference from such claims and its requirement of traditional doctrinal standards. Thus, if courts were either intentionally or implicitly finding policies facially neutral more frequently because *Turner* and *Klinger* gave the equal protection atmosphere a clearly deferential tone, *Johnson* should end this trend.

V. ADDRESSING CONCERNS ARISING FROM *JOHNSON*

A. *Johnson* Is Limited to Its Facts

A primary critique of this argument is that *Johnson* is a one-time case, limited entirely to its facts and not intended for any readings beyond its exact holding. *Johnson* is, in many ways, a radical departure from the Court's previous prison jurisprudence. Although the Court claims it only followed its decision in *Lee v. Washington*,[277]

277. 390 U.S. 333 (1968).

the connection is not entirely clear and no other courts anticipated the outcome.[278] *Johnson* also relies heavily on the pernicious nature of racial discrimination and the particular circumstances of the case, further lending credence to concerns that *Johnson* is strictly limited to its facts.[279]

Although *Johnson* is certainly a unique case that diverges from many of its predecessors, it does not follow that the case is meaningless or narrowly confined merely because it is new. First, the Court created a space for certain rights that are totally outside *Turner*'s influence—those rights that are not inconsistent with proper prison administration.[280] It identified the *right* not to be discriminated against based on race as one such right rather than find that the prison *policy* required strict scrutiny. This is not entirely out of step with the Court's prior jurisprudence; other constitutional claims are decided under standards outside *Turner*.[281] The Court has refused to apply the *Turner* test to claims based on the Eighth Amendment and has been inconsistent with its application in procedural due process claims.[282] The goal here is not to argue that gender equal protection is comparable to these other doctrines, although the argument has been made,[283] but rather to highlight that the Court has been willing to dispense with *Turner* in other instances. Given the Court's past flexibility, *Johnson* is less likely to be a random aberration intended to be strictly limited to its facts. Instead, the Court was setting aside another particular area of law, including racial discrimination claims, in which *Turner* is inappropriate.

It is still true that the elimination of all deference from a prison-related case takes *Johnson* beyond the Court's prior forays outside the *Turner* umbrella.[284] The Court did choose to write its opinion in a manner that completely rejects its prior precedent, however, and the opinion is framed in language that implies a broad range of rights that carry the same burdens and concerns as racial discrimination. So if the case appears odd or out of the ordinary, it is in fact a large change in a relatively small area of prisoners' rights law. The Court's break with long-standing tradition may be unusual, but its mere oddity does not change the tone or the language the Court chose to embrace.

278. *See infra* Part II.E.
279. *See* Johnson v. California, 543 U.S. 499, 511–13 (2005).
280. *Id.* at 510.
281. *See* McFadden, *supra* note 13, at 136.
282. *See* Budnitz, *supra* note 13, at 1321; McFadden, *supra* note 13, at 136–37.
283. Budnitz, *supra* note 13, at 1321–22.
284. See *supra* Part III.B on the deference still accorded prison officials under some *Turner* alternatives, like the good-faith Eighth Amendment standard.

The reading here is further supported by lower courts' acknowledgments that *Johnson* has changed the landscape of equal protection in the prison context. The Ninth Circuit noted in a recent case that *Turner* may no longer be the applicable standard for analyzing detainees' disability claims after *Johnson*.[285] The court did not reach the issue, however, as the policy in question did not survive even the deferential *Turner* standard.[286] In the Eastern District of California, however, a district court compared the standards at issue and rejected the *Turner* standard on a gender equal protection issue in light of the *Johnson* decision.[287]

Similarly, an Illinois district court found male and female inmates similarly situated for the purposes of equal protection and did not apply *Turner* or the *Klinger* similar-situation factors in its analysis.[288] The district court explicitly refused to apply the *Turner* standard, citing *Johnson* for the proposition that "*Turner* does not foreclose all heightened judicial review."[289] The court went on to emphasize that "gender is a 'quasi-suspect' class and subject to heightened scrutiny."[290] The

285. Pierce v. Cnty. of Orange, 526 F.3d 1190, 1217 n.29 (9th Cir. 2008).

286. *Id.* On remand, the district court similarly failed to reach the *Johnson* issue because the difference in treatment of disabled detainees failed to meet the deferential *Turner* standard. Pierce v. Cnty. of Orange, 761 F. Supp. 2d 915, 946–47 n.5 (C.D. Cal. 2011) ("This Court also does not reach the question here for the same reason: the County has not satisfied the more lenient *Turner* test.").

287. Greene v. Tilton, No. 2:09-CV-0793, 2012 WL 691704, at *6–8 (E.D. Cal. Mar. 2, 2012). In *Greene*, a male inmate brought a gender equal protection claim based on a written policy allowing female inmates specific items of property that male inmates were not permitted. The defendant institution argued that there were "issues specific to female offenders" that justified the difference: "Female [inmates] . . . have demonstrated a lower level of violence, less escape risk and a need for the building of self-esteem." *Id.* at *2 (internal quotation marks omitted). The court discussed the various standards of review that could be used, and rejected *Turner* in light of the *Johnson* decision. *Id.* at *8. Summary judgment was denied for both parties, however, based on factual issues. *Id.* at *8–9.

A Northern District court chose the opposite approach two years before. *See* Gonzalez v. Mullen, No. C 09-00953, 2010 WL 1957376 (N.D. Cal. May 14, 2010) (denying an inmate's gender equal protection claim using *Turner*'s language).

288. Bullock v. Sheahan, 568 F. Supp. 2d 965, 973 (N.D. Ill. 2008). In *Bullock*, male jail detainees challenged a Cook County jail policy allowing women who had their cases discharged to elect not to return to their housing unit within the jail, but instead to have their belongings brought to them at the jail's reception center. This option allowed the female "returns" to avoid being strip searched. *Id.* at 970. Men waiting to be discharged were not offered this choice, and so were forced to undergo a strip search in order to return to their housing unit to gather their belongings. *Id.* The district court found the two groups of detainees similarly situated, despite "their disparity in numbers (roughly five to six times more male potential discharges); propensity for violence; and, on average, lengthier criminal histories," and the female inmates' having menstrual cycles, justifying use of the screen. *Id.* at 971–72. More notably, the district court did not apply the *Klinger* standards explicitly, and did not cite the *Klinger* decision throughout its entire opinion.

289. *Id.* at 973.

290. *Id.*

court found in favor of the plaintiffs, holding that the defendants had failed to meet the intermediate scrutiny standard in justifying their discriminatory policy.

By contrast, the Eighth Circuit appears to be refusing to acknowledge any change after *Johnson*. In *Roubideaux v. North Dakota Department of Corrections & Rehabilitation*,[291] decided in 2010, the Eighth Circuit applied intermediate scrutiny to a challenge addressing the statutory transfer of many female inmates from state corrections facilities to the custody of county jails. The circuit court clearly assumed that the *Klinger* analysis would still apply had the challenge focused on actual conditions or programs rather than on funding allocation at the policy-planning level.[292] The circuit court made no mention of *Johnson* and did not acknowledge the implications of the case in the gender discrimination context, even though the plaintiffs had made arguments for strict scrutiny on that basis.[293]

This refusal to acknowledge *Johnson* is unsurprising in a circuit that has promulgated highly deferential doctrines and decisions in the past. It is still, however, misguided. It is possible that the Eighth Circuit might adopt a different approach if actually faced with a programming issue rather than a resource allocation question at the policy level. This difference was the reason for the *Roubideaux* court's silence on *Klinger*—at the resource allocation and policymaking level, the Eighth Circuit finds men and women similarly situated. As courts continue to hear new gender equal protection claims, they should acknowledge the significant alterations in the doctrine that *Johnson* mandates.

B. Deference and the Courts After *Johnson*

It could be argued that any extended reading of *Johnson* based on a rejection of prison deference or *Turner* is nonsensical given the patterns emerging after *Johnson* in this area. Lower courts deciding gender discrimination cases are barely mentioning *Johnson*, let alone deciding cases differently on its reasoning.[294] The Supreme

291. 570 F.3d 966 (8th Cir. 2009).

292. *Klinger* emphasized this distinction, stating that claims based on allocation of funds to men's and women's prisons would present a different issue with respect to being similarly situated. Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994). *See Roubideaux*, 570 F.3d at 974–75.

293. *Roubideaux*, 570 F.3d at 974–75; Response Brief of State Defendants at 29–30, *Roubideaux*, 570 F.3d 966 (No. 07-3780), 2008 WL 1767222 (rebutting plaintiffs' arguments for heightened scrutiny under *Johnson*).

294. *See* Gonzalez v. Mullen, No. C 09-00953, 2010 WL 1957376, at *4 (N.D. Cal. May 14, 2010) ("Plaintiff has failed to show a discriminatory intent or purpose. He also fails to allege that the denial was not based on a legitimate penological interests [sic]. Accordingly, Plaintiff fails to state a cognizable claim under the Equal Protection Clause based on the alleged gender discrimination."); Suter v. Crawford, No. 06-4032-CV-C, 2008 WL 4866613, at *3–4 (W.D. Mo. Nov. 10, 2008) (holding

Court itself has also continued to respect prison deference. In *Beard v. Banks*,[295] decided the year after *Johnson*, the Court determined that a policy forbidding access to magazines, newspapers, and photographs to inmates confined in long-term segregation was justified by the prison administrator's need to encourage good behavior in high security–level inmates.[296] The Court rested its opinion almost entirely on the first *Turner* factor, stating that "the second, third, and fourth factors, being in a sense logically related to the [p]olicy itself, here add little . . . to the first factor's basic logical rationale."[297] *Banks* relied solidly on *Turner*, demonstrating the Court's continued commitment to prison deference.

But the continued use of prison deference does not render *Johnson* meaningless. *Johnson* in no way implied that prison deference should be eliminated from all constitutional claims by prisoners. Rather, *Johnson* states that a certain number of claims are "consistent with proper prison administration."[298] Racial discrimination is highlighted as one such case, but a range of other claims are not even mentioned. Most fundamental rights have long been subject to the *Turner* test, and *Johnson* gave no indication that the Court intended to change those precedents. This Comment does not suggest that *Johnson* is meant to herald an end to all prison deference. Rather, *Johnson* forces courts to consider whether a certain right is consistent with proper prison administration and thus does not necessitate deferential analysis. Continued deference does not change *Johnson*'s impact on equal protection claims invoking rights that are not "susceptible to the logic of *Turner*."[299]

Additionally, the Court's use of *Turner* in the *Banks* context is entirely appropriate. *Banks* addressed First Amendment claims based on what objects a prisoner is permitted to keep in his cell. These facts are directly related to day-to-day prison administration concerns including maintaining order and security. Both the fundamental right implicated and the facts involved speak directly to *Turner*'s facts and holding, further supporting the appropriateness of the use of the deferential standard in that case.

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that plaintiffs were unlikely to prevail because analyzing the claim using the *Klinger* factors made it unlikely that they were similarly situated to the male population, and so it was "not a decision that qualifies for condemnation or even consideration as a constitutional violation, on the present record, using *Klinger* as a guide"). *Bullock v. Sheahan* does cite *Johnson*, unlike the majority of other gender equal protection cases decided since 2005, but only for the proposition that *Turner* need not control the decision in all prison constitutional rights cases. *Bullock*, 568 F. Supp. 2d at 973.

295. 548 U.S. 521 (2006).

296. *Id.* at 531 (plurality opinion).

297. *Id.* at 532.

298. Johnson v. California, 543 U.S. 499, 510 (2005).

299. *Id.*

C. Possible Efficiency and Administrative Concerns

A common residual concern is that freeing gender discrimination claims from the stranglehold of prison deference could result in more claims reaching substantive review. This, in turn, could create a greater incentive to file cases and a subsequent rise in case volume. The argument follows that without deferential tools to eliminate cases early in the process, excessive judicial resources would have to be expended to hear legitimate claims. Additionally, increased judicial involvement may result in more pro-plaintiff determinations, causing significant prison spending as well.

It must be true that this interpretation of *Johnson* would result in some increase in cases heard on their merits, if only because some cases that would otherwise be dismissed in deferential jurisdictions would now require full briefing and consideration. It does not follow, however, that the volume of these cases would overwhelm the courts. First, there are already significant limits on inmates' ability to bring claims, especially under the Prison Litigation Reform Act (PLRA).[300] The Act requires exhaustion of administrative remedies, limits attorney's fees and recovery, and gives the court wide latitude to dismiss any case it finds "frivolous."[301] This legislation alone severely limits any inmate's ability to access federal court, let alone gain any significant attention.[302] Any economic costs of this reading would be limited to those claims able to survive the gauntlet of the PLRA, claims that would thus be both limited and worthy of attention.

Furthermore, even assuming an increase in gender equal protection claims by prisoners, this argument does not follow the spirit of the *Johnson* opinion. *Johnson* placed discrimination rights outside the financial and efficiency concerns of prison administrators when it found them "consistent with proper prison administration."[303] Cost management is clearly part of day-to-day prison management, and yet the *Johnson* Court placed these rights beyond administrators' reach. Additionally,

300. 42 U.S.C. § 1997e (2006).

301. *Id.*

302. *See* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 489 (2001) (providing an overview of the provisions of the PLRA designed to curb frivolous lawsuits, focusing on the exhaustion provision); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1276 (1998) ("[T]he PLRA deters and prevents individual prison litigation by imposing financial and other restrictions on prisoner-plaintiffs."); Amy Petré Hill, Note, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 240–43 (2002) (arguing that provisions of the PLRA prevent meritorious actions by women in need of healthcare in the California prison system).

303. *Johnson*, 543 U.S. at 511.

the Court has traditionally refused to justify gender discrimination with cost-saving or efficiency rationales.[304] Inmates can and do bring racial discrimination claims under the Equal Protection Clause. There is no reason to believe there would be more gender claims or that such claims would be significantly more or less legitimate. This, coupled with the fundamental nature of the right in question and the heavy limits already set on prison litigation, weighs against any determination that gender discrimination claims are too expensive or time consuming to be heard.

Other avenues for bringing claims also have resulted in positive outcomes for plaintiffs. Some education- and vocation-related complaints can be brought under Title IX, and women have had success in cases under that statute.[305] Although many legitimate claims might be ineligible for such relief, there is likely not an untapped flood of litigation that would emerge as a result of any of these regulations. There is also no constitutional right to programming,[306] so prisons would always have the option of revoking a privilege completely in lieu of providing equality. Although this would be unfortunate, it precludes an argument that the reading of *Johnson* suggested here would seriously financially compromise any one state or prison system.

This issue suggests another risk in broadening *Johnson*. It is possible that prisons may choose to shut down all programming instead of struggling to provide equivalency. While this might be a valid concern, prisons have continued to provide programming despite extensive equal protection litigation thus far. Spending on prison education and job training is thus presumably connected to a belief that it has real benefits, financial or rehabilitative, that trump litigation costs. Because these readings are unlikely to significantly increase claims or unleash a flood of judgments in favor of prison plaintiffs, it seems unlikely that prisons will overhaul their practices of the last several decades on this basis.

Attached to this issue is the residual question of how far this reading of *Johnson* might extend. Certainly the jump from race to gender is relatively short—the doctrines are similar and both address traditionally protected groups. But would this reading include other forms of equal protection? Would it replace the *Turner* standard with rational basis in even the most basic equal protection claims? The Ninth Circuit has certainly considered the concept.[307] This analysis would arguably extend

304. For a more complete discussion of the Court's language on administrative convenience and cost saving in gender discrimination claims, see *supra* notes 159–160 and accompanying text.

305. Some courts have also held that Title IX requires equality of treatment in the prison context in lieu of the lower parity standard. *See, e.g.*, Jeldness v. Pearce, 30 F.3d 1220, 1228 (9th Cir. 1994).

306. *See, e.g.*, Pargo v. Elliott, 894 F. Supp. 1243, 1259–61 (S.D. Iowa 1995).

307. Pierce v. Cnty. of Orange, 519 F.3d 985, 1010 n.29 (9th Cir. 2008) (questioning whether case law governing equal protection claims under the ADA has changed after *Johnson*, but not reaching a decision on the issue).

to other characteristics accorded strict scrutiny, like alienage, as they are theoretically rights just as "consistent with proper prison administration"[308] as race.[309]

It seems unlikely that *Johnson* extends to any classification that is not recognized as deserving heightened scrutiny, however. *Johnson*'s language emphasizes an interest in preventing invidious discrimination, which would only apply to groups granted heightened scrutiny because of traditional discrimination based on immutable characteristics (for example, gender or race). The *Johnson* Court described the right in issue as "the right not to be discriminated against based on one's race,"[310] which is a right analyzed at length within the Court's jurisprudence as one deserving careful attention and special focus, like the right to be free from gender discrimination. The Court has refused to apply any such recognition to other posited groups, however, including those defined by age,[311] ability,[312] or sexual orientation;[313] for claims involving these characteristics, the Court has adhered firmly to the rational basis standard. This implies that the Court recognizes no actual "right" to be free from this type of discrimination. Scholars have pointed out that the type of rational basis applied to these categories sometimes appears heightened, but they have nevertheless remained outside the sphere of protected status inhabited by gender and race claims.[314] Plaintiffs could argue that other characteristics are similarly "consistent with proper prison administration," but they will only have *Johnson* to argue from, which focuses heavily on the need for heightened scrutiny in a historically unique area. The only other claims justifiable under *Johnson*, then, are those also accorded strict scrutiny, of which there are very few. This is highly unlikely to yield a flood of litigation.

VI. WHY BOTHER? A COMMENT ON CURRENT PRISON CONDITIONS

Certainly it bears considering that prison conditions have vastly improved for women since gender equal protection claims first began to emerge. Female facilities are now often considered cleaner and safer than male prisons, and gender ste-

308. *Johnson*, 543 U.S. at 511.
309. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011) ("The Supreme Court has formally accorded heightened scrutiny to classifications based on five characteristics—race, national origin, alienage, sex, and nonmarital parentage.").
310. *Johnson*, 543 U.S. at 510.
311. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).
312. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
313. *See* Romer v. Evans, 517 U.S. 620 (1996).
314. *See, e.g.*, Yoshino, *supra* note 309, at 759 ("The claim that the canon has closed on heightened scrutiny classifications must be tempered by acknowledging the Court's use of a more aggressive form of rational basis review.").

reotyping has markedly decreased in the types of programs offered. An extensive study by Karen Lahm has found that women's prison programming has significantly improved since the 1970s, when it was marked by distinctly poorer educational opportunities and heavily stereotyped vocational opportunities.[315] Lahm's research also showed that programming in women's facilities was more varied than ever, although also still marked by an overrepresentation of service industry training and technical, sales, or administrative training, both of which constitute "traditional" vocational programs.[316]

Although it is encouraging that data from the late 1990s shows improvements in the types of programming available to women and equivalency in the availability of basic education, this does not render the need for gender equal protection claims moot. It also does not justify denying legitimate claims using deferential versions of normal equal protection requirements, as improved conditions (which do not necessarily indicate equality) are never guarantees of nondiscriminatory treatment in the future. As budgets collapse and prison overcrowding continues,[317] new incarceration techniques or plans may be introduced that perpetuate gender stereotyping.

Arguments that gender equal protection is irrelevant because women's prisons are improving also fail to account for other potential developments in this area. Male inmates also bring claims for better conditions under the Equal Protection Clause, and sometimes succeed in obtaining better treatment.[318] Similar claims might be

315. Karen F. Lahm, *Equal or Equitable: An Exploration of Educational and Vocational Program Availability for Male and Female Offenders*, 64 FED. PROBATION 39, 40 (2000) (detailing a 1973 study that showed women were offered fewer vocational programs including clerical skills, cosmetology, floral design, dental assistance, food service, and nursing assistance while men enjoyed a much broader range of programs that would provide better earning power after release). Lahm uses the same study to show that many female institutions in the 1970s lacked any general education programs, while now nearly all men's and women's facilities offer such classes. *Id.* at 41.

316. *Id.* at 42.

317. GOV'T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS, GAO-12-743, GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE (2012), *available at* http://gao.gov/assets/650/648123.pdf (finding that overcrowding in federal prisons reduces work opportunities, treatment programs, and staffing, all resulting in greater risk to inmates and correctional officers). At the time of publication, for example, California administrators were struggling to reduce the prison population to comply with a federal mandate. *See, e.g.*, Paige St. John, *California's Prisons Chief Stepping Down*, L.A. TIMES, Oct. 27, 2012, http://www.latimes.com/news/local/la-me-prisons-20121027,0,5965920.story (noting that California is shifting prison inmates to county jails and cutting prison spending); Marisa Lagos, *Prison Reforms' Results Mixed After Year*, S.F. CHRON., Sept. 30, 2012, http://www.sfgate.com/crime/article/Prison-reforms-results-mixed-after-year-3907655.php (noting that as counties play a larger role in corrections, some counties are releasing inmates early as they run out of space in county jails).

318. *See, e.g.*, Bullock v. Sheahan, 568 F. Supp. 2d 965, 973–74 (N.D. Ill. 2008) (finding that strip-searching of male inmates returning to jail to retrieve belongings violated equal protection when female inmates were not strip-searched).

made on behalf of male inmates with respect to parenting classes or rights, for example, which are often more plentiful at women's prisons.[319] Furthermore, as budgets shrink and new policies are instituted to relieve crowding or comply with court-mandated directives,[320] individuals of one gender might be unfairly disfavored.[321]

CONCLUSION

Although *Johnson v. California* may be a significant departure from traditional deference-oriented prisoners' rights cases, it is an intentional effort to set apart certain rights from deference's influence. The Court's language and justifications clearly indicate the scope of the change *Johnson* created, and gender discrimination fits neatly within that scope. As a result, the doctrines that have traditionally inhibited gender discrimination claims are significantly changed. *Johnson* gives advocates and plaintiffs additional tools to argue their claims. Given the dispersed nature of review in the circuits on these issues, some plaintiffs may find success using these arguments. *Johnson* is neither a dead letter nor a fluke; it is a targeted attack on prison deference in certain narrow situations, and should be treated as such.

319. *See* Elise Zealand, *Protecting the Ties That Bind From Behind Bars: A Call for Equal Opportunities for Incarcerated Fathers and Their Children to Maintain the Parent–Child Relationship*, 31 COLUM. J.L. & SOC. PROBS. 247, 257–58 (1998) (discussing the lack of parenting programs available for male inmates).

320. For example, a three-judge panel mandated population reductions in the California prisons to alleviate overcrowding. Coleman v. Schwarzenegger, No. CIV S-90-0520, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010), *aff'd sub nom.* Brown v. Plata, 131 S. Ct. 1910 (2011).

321. *See* Hoffman, *supra* note 13, at 597–603 (pointing out that early release policies across the country often treat men and women differently, to the disadvantage of one gender or the other depending on the jurisdiction).