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Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners' Statutory Claims Under the Americans with Disabilities Act

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NOTES

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INTRODUCTION

When he was convicted in 1994 of drunken driving, escape, and resisting arrest, Ronald Yeskey was sentenced to serve 18 to 36 months in a Pennsylvania prison.[1] In addition, the judge recommended that Yeskey be sent to a motivational boot camp operated by the state.[2] Upon successful completion of the boot camp program, Yeskey's sentence would then be reduced to six months.[3] Although he eagerly wanted to participate, the prison refused him entrance into the boot camp program because of his history of hypertension, and also denied him admission into an alternative program for the disabled.[4] As a result, he was incarcerated for two years and two months longer than he might have been had he successfully completed the boot camp.[5] Yeskey filed suit in federal court, charging that prison authorities had violated his rights under the Americans with Disabilities Act (ADA)[6] by discriminating against him due to his physical condition.[7]

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1. *See* Jack Torry, *Does ADA Include Inmates? Court Hears Case of City Man Who Says Disability Caused Longer Term,* PITTSBURGH POST-GAZETTE, Apr. 29, 1998, at A5.

2. *See id.*

3. *See id.*

4. *See* Tina Schatz, *Inmates Win One in Court but Lose One in Legislature,* SUNDAY PATRIOT-NEWS (Harrisburg, PA), June 21, 1998, at A5.

5. *See* Torry, *supra* note 1.

6. 42 U.S.C. §§ 12101-12213 (1994). Congress passed the ADA with the purpose to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101 (b)(1)-(2). The Act defined a disability with respect to an individual, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2).

Title II of the Act, the focus of Ronald Yeskey's suit, gives rise to the bulk of prisoner ADA litigation. *See* Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison,* 15 YALE L. & POL'Y REV. 49, 76 (1996). Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities

On June 15, 1998, that suit reached the Supreme Court. In *Pennsylvania Department of Corrections v. Yeskey*[8] the Court resolved a long-running circuit split in holding that Title II of the ADA applies to inmates in state prisons.[9] The Court concluded that Ronald Yeskey's claim under the Act should not have been barred due to his status as a prisoner.[10]

The *Yeskey* decision promises to have far-reaching legal consequences. It has prompted many commentators to predict a flood of lawsuits from disabled prisoners.[11] The Court's ruling was lauded by

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of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Until Yeskey's case was decided by the Supreme Court, it had been unclear whether state prisons fell under the statutory definition of a public entity.

7. *See* Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 172 (3d Cir. 1997).[hereinafter *Yeskey I*] (summarizing the circuit split on this issue).

8. 118 S. Ct. 1952 (1998) [hereinafter *Yeskey II*].

9. Writing for a unanimous Court, Justice Scalia confirmed that such prisons fall "squarely" within the definition of a "public entity" for purposes of the ADA. *See Yeskey II, supra* note 8, 118 S. Ct. at 1953-54. In doing so, he rejected petitioner's claims that the phrase "benefits of the services, programs or activities of a public entity," 42 U.S.C. § 12132, created an ambiguity because state prisons do not provide prisoners with "benefits" of "programs, services or activities" as those terms are usually understood. *See Yeskey II, supra* note 8, 118 S. Ct. at 1955. The Court found instead that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners." *Yeskey II, supra* note 8, 118 S. Ct. at 1955.

The Court also disagreed with petitioner's claim that the description of a " 'qualified individual with a disability' " under Title II, which requires the individual to meet " 'the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity' " was ambiguous relative to state prisoners. *See Yeskey II, supra* note 8, 118 S. Ct. at 1955. The Court rejected the idea that the words " 'eligibility' " or " 'participation' " implied voluntariness on the part of an applicant under the Act, and thus would not include prisoners who are being held against their will. *See Yeskey II, supra* note 8, 118 S. Ct. at 1955. The Court held that the definitions of these words "do not connote voluntariness." *Yeskey II, supra* note 8, 118 S. Ct. at 1955.

10. Unfortunately for Yeskey himself, the inmate was unable to personally benefit from the fruits of the litigation he began. By the time his case was listed for submission in the Third Circuit, only a short time remained on his sentence. *See Yeskey I, supra* note 7, 118 F.3d at 169. Ultimately he was released in October of 1996 after serving 36 months in Greensburg prison in western Pennsylvania and is now a construction worker in the Pittsburgh region. *See* Torry, *supra* note 1.

11. *See, e.g.,* Laurie Asseo, *Justices Declare Federal Disabilities Act Protects Prison Inmates,* STAR-LEDGER (Newark, NJ), June 16, 1998, at 7 (" 'I expect a lot of creative litigation on the part of prisoners,' said Kent Scheidegger of the Criminal Justice Legal Foundation, which supported Pennsylvania officials' appeal. 'We're now opening another floodgate.' "); Barrie Tabin, *Unanimous Supreme Court Says ADA Applies to Prison Inmates,* NATION'S CITIES WKLY., June 22, 1998, at 1 ("As a result of the Court's ruling, such fundamental decisions as allocating jobs in prison industries, spaces in educational and vocational training programs, recreational opportunities, and other institutional privileges are likely to prompt costly and fact intensive lawsuits second-guessing the decisions of prison administrators."); Steven Walters, *Federal Disabilities Act Covers State Inmates,* MILWAUKEE J. SENTINEL, June 16, 1998, at 8 ("The high court's conclusion that the ADA

others as a victory for the disabled prison population, as it may provide a mechanism for inmates to improve correctional conditions regarding diverse issues, such as the physical protection of disabled inmates[12] or the reform of prison healthcare systems.[13] Yet for all of the fanfare it received, *Yeskey* failed to address an equally consequential issue that has the potential to blunt the force of the Supreme Court's ruling significantly: the level of judicial scrutiny that prisoners' ADA claims should receive.

Prior to 1987, *Procunier v. Martinez*[14] was the Supreme Court's most significant decision regarding the scrutiny afforded to alleged violations of prisoners' constitutional rights. In *Procunier,* the Court held that censorship of prisoner mail would only be justified if the regulation or practice in question furthered "an *important* or *substantial* governmental interest unrelated to the suppression of expression," and if "the limitation of First Amendment freedoms [were] no greater than [was] necessary or essential to the protection of the particular governmental interest involved."[15] This type of review is similar to the kind of "heightened scrutiny" that classifications based on gender receive — those that will not be upheld unless they are "substantially related to a sufficiently important governmental interest."[16]

Yet in a 1987 case, *Turner v. Safley,*[17] the Court made it more difficult for a prisoner to succeed with a claim that his or her *constitutional*

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covers state prisons disposes of a major impediment to those suits and is expected to encourage new cases.").

12. *See* Jordan Lite, *State Admits Disabled Prisoners Were Discriminated Against, Vows Changes,* ORANGE COUNTY REG., Aug. 12, 1998, at A4.

13. *See Split Down the Right,* NATION, July 20, 1998, at 3.

14. 416 U.S. 396 (1974).

15. *Procunier,* 416 U.S. at 413 (emphasis added).

16. Sandra J. Carnahan, *The Americans with Disabilities Act in State Correctional Institutions,* 27 CAP. U. L. REV. 291, 315 (1999) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985)). There are three traditional levels of judicial scrutiny that are undertaken by courts. The most searching is "strict scrutiny," which can be satisfied only if the classification in question is suitably tailored to serve a compelling state interest. *See* Carnahan, *supra.* This level of review is used to examine classifications based on "suspect status," such as race or religion. *See id.* The next level is "heightened scrutiny" of the kind used in *Procunier.* The least stringent level of review is the use of a "rational basis" test, under which classifications will be sustained if they are rationally related to a legitimate state interest. *See id.* For more discussion of how these levels of review affect the correctional environment, see *infra* notes 45-50 and accompanying text.

17. 482 U.S. 78 (1987). At issue in the case was a challenge to two regulations in effect at a Missouri correctional institution. The first, in most cases, only permitted correspondence between prisoners in different facilities if the "classification/treatment team" of each inmate allowed it. *See Turner,* 482 U.S. at 81-82. The second permitted an inmate to marry only with the permission of the superintendent of the prison, and provided that such approval should be given only when there were compelling reasons to do so. *See Turner,* 482 U.S. at 82.

rights were being infringed upon by a prison regulation. In that case, the Court limited the *Procunier* holding to the narrow context of correspondence between prisoners and the general public.[18] The *Turner* majority concluded that subjecting all judgments of prison officials to this type of heightened scrutiny would "seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[19] The Court went on to articulate four factors relevant in determining the "reasonableness" of the prison regulation at issue: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, (2) whether there are alternative means of exercising the right that remain open to prison inmates, (3) the impact that accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally, and (4) whether ready alternatives to the regulation exist.[20]

Since the *Turner* decision, it has generally been clear that a prison regulation that allegedly infringes upon an inmate's constitutional rights is valid if it is reasonably related to a legitimate penological interest.[21] The *Turner* Court specifically rejected the use of heightened scrutiny in examining the efficacy of the prison regulation, instead requiring that a disputed regulation satisfy only the lowest level of scrutiny that could be imposed by courts.[22]

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18. *See Turner,* 482 U.S. at 88-91.

19. *Turner*, 482 U.S. at 89. Instead, the Court highlighted that the difficult undertaking of running a prison was a job best left to the executive and legislative branches, not the judiciary. *See Turner,* 482 U.S. at 85. The ramifications of the *Turner* Court's deference to the legislature in this area will be discussed in Part II of this Note.

20. *See Turner*, 482 U.S. at 89-90. The "ready alternatives" part of the test is not a "least restrictive alternative" test: prison officials are not required to show why every possible method of accommodating an inmate's claim under the test would not be possible. *See Turner,* 482 U.S. at 90-91. Moreover, it has been held that a trial court is not required to weigh evenly or even consider explicitly each of the *Turner* factors — they are simply "relevant" to a court's determination. *See* Spies v. Voinovich, 173 F.3d 398, 403 (6th Cir. 1998). For more on why these factors and others render the test extremely deferential to prison administration decisions, see *infra* notes 81-86 and accompanying text.

21. *See Turner,* 482 U.S. at 89; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987) (reaffirming the *Turner* standard with respect to the alleged infringement of inmates' First Amendment rights to the free exercise of religion). Perhaps the most oft-used example of a legitimate penological interest is a prison security concern. For example, in the *Turner* case itself, restrictions on inmate correspondence were promulgated due to the correctional administration's belief that, by restricting these communications, prisons would combat the growing problem of prison gang membership. *See Turner,* 482 U.S. at 91. The Supreme Court found this prohibition "logically connected to these legitimate security concerns." *Turner,* 482 U.S. at 91.

22. *See supra* note 16; *see also* Amatel v. Reno, 156 F.3d 192, 198-99 (D.C. Cir. 1998) ("But the similarity between *Safley*'s phrasing and the language of rational basis review suggests to us that . . . *Safley*'s standard is, if not identical, something very similar.").

Turner, however, made no mention of the *statutory* rights of prisoners, nor did it discuss whether cases implicating those rights would also be subject to the deferential standard of review it outlined for cases involving constitutional rights violations. This question has not been resolved uniformly by the circuit courts. The Ninth Circuit, in a case involving a statutory claim under the Rehabilitation Act, applied the same standard of review defined in *Turner* for the review of constitutional rights in a prison setting.[23] The Court believed that it was "highly doubtful" that Congress intended a more stringent application of the prisoners' statutory rights created by the Rehabilitation Act than the Court would afford to their constitutional rights.[24] The Fourth Circuit has agreed, noting that due to the leeway that prison officials are accorded where their actions threaten inmates' constitutional rights, "it follows *a fortiori* that prison officials enjoy similar flexibility with respect to inmates' statutory rights."[25]

In contrast, some circuit courts have shied away from using the *Turner* standard in all cases implicating inmates' statutory rights.[26] For example, the Eighth Circuit has held that some reviews of prison policies may require more heightened judicial review than *Turner* allows.[27] The court reasoned that other prisoners' rights cases, even some involving inmates' constitutional rights, did not preclude the use of heightened scrutiny when warranted by the circumstances.[28] The Eleventh Circuit, in a case involving a prisoner's Rehabilitation Act

23. *See* Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994). *Gates* was apparently the first case to use *Turner*'s standard in the statutory rights context. *See In Prison Context, the ADA Must Be Interpreted Using the* Turner *Test,* 6 CORRECTIONAL L. REP. 57 (1994) ("Prior to *Gates, Turner* was not used to interpret statutory rights.").

24. *See Gates,* 39 F.3d at 1447; *see also* Kaufman v. Carter, 952 F. Supp. 520, 532 (W.D. Mich. 1996) (agreeing with the *Gates* reasoning).

25. Torcasio v. Murray, 57 F.3d 1340, 1355 (4th Cir. 1995).

26. One circuit court has identified the question of whether principles of deference to the decisions of prison officials in the context of constitutional law apply to statutory rights, but has not decided it. In the case leading to the Supreme Court's *Yeskey* decision, the Third Circuit "flagged" the question, but did not determine whether *Turner* applies to statutory rights generally or to ADA claims in particular. *See Yeskey I, supra* note 7, 118 F.3d 168, 174-75 (3d Cir. 1997) (taking note of the "controversial and difficult question whether principles of deference to the decisions of prison officials in the context of constitutional law apply to statutory rights" and noting that it was "not sure of the answer").

27. *See* Pargo v. Elliott, 49 F.3d 1355, 1357 (8th Cir. 1995).

28. *See Pargo,* 49 F.3d at 1357. The Eighth Circuit seemed to argue that if some infringements of prisoners' constitutional rights should receive heightened scrutiny, even post-*Turner,* then a violation of an inmate's statutory rights might also not always be limited to a deferential standard of judicial review. This argument is addressed more fully in Part I. Ultimately, the *Pargo* Court remanded the case to the trial court for more detailed factual findings in order to determine the correct standard to be used. *See Pargo,* 49 F.3d at 1357.

claim, maintained that refusing to superimpose *Turner*'s standard onto the statute made "better sense" than applying it.[29]

The level of scrutiny appropriate for prisoners' statutory rights is particularly complicated with regard to the ADA[30] in light of *Yeskey*. On the one hand, if inmates are subject to the use of *Turner*'s "legitimate penological interest" test with regard to their constitutional rights, perhaps their statutory rights should be no different. The Supreme Court has often recognized the difficulties inherent in running a prison and has clearly specified that courts are ill suited to become arbiters of what constitutes the best solution to prison problems.[31] Furthermore, in *Turner* the Court clearly stated that infringements on prisoners' constitutional rights should be subject to loose judicial scrutiny that gives great deference to the decisions of prison administrators.[32]

Yet other factors point toward the conclusion that the rights of prisoners under the ADA should be protected to a greater degree than that provided by the *Turner* test. First, the Supreme Court has often held that prisoners do not lose protection from violations of their rights simply because they are incarcerated.[33] More specifically,

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29. *See* Onishea v. Hopper, 126 F.3d 1323, 1336 (11th Cir. 1997) [hereinafter *Onishea I*]. The *Onishea* Court argued instead that the inmate's claim should have been adjudicated under the language of the Rehabilitation Act itself, *see Onishea I, supra*, 126 F.3d at 1336, the merits of which are discussed in Section IV.A with respect to the ADA. Moreover, in another context the Eleventh Circuit has continually refused to subject prisoners' statutory claims to the *Turner* test. *See* Lawson v. Singletary, 85 F.3d 502, 508-11 (11th Cir. 1996) (holding that prisoners are covered by the Religious Freedom Restoration Act to the extent intended by Congress). In further litigation in the *Onishea* matter, the Court went on to explicitly state that *Turner* "does not, by its terms, apply to statutory rights." Onishea v. Hopper, 171 F.3d 1289, 1300 (11th Cir. 1999) [hereinafter *Onishea II*] (adding, however, that consideration of the ideas behind the *Turner* factors in its Rehabilitation Act determinations was not forbidden).

30. Only one circuit court has discussed the *Turner* standard as it applies to review of statutory rights claims under the ADA in particular. The Fourth Circuit, though it had expressed agreement earlier with the idea that *Turner* should be applicable in statutory rights claims of prisoners, *see supra* note 25 and accompanying text, has not agreed with regard to the ADA. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 178 F.3d 212, 220-22 (4th Cir. 1999) [hereinafter *Amos II*] (arguing instead for deference to Department of Justice regulations and the "reasonable accommodation" language of the Act). Yet both *Gates* and *Onishea* also involved a prisoner's claim under the Rehabilitation Act, a piece of legislation that is very similar to the ADA in its protections for the disabled. *See* 42 U.S.C. § 12133 (1995). The specific reasoning used in these cases will be discussed later in the Note.

31. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

32. *See Turner*, 482 U.S. at 89.

33. *See, e.g., Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Bell v. Wolfish, 441 U.S. 520, 545 (1979); *Procunier*, 416 U.S. at 405 ("[A] policy of judicial restraint cannot encompass any

the *Yeskey* decision made clear that prisoners have the right to bring a claim under the ADA.[34] Furthermore, the ADA's mandate is a powerful one — to protect the disabled from discrimination based on their physical or mental limitations and provide them with an equal playing field in our society.[35] These contrasting views leave the question: When a principle of deference towards the decisions of prison administration collides with rights provided to inmates by a statute such as the ADA, how should courts strike a balance in adjudicating prisoners' claims?

This Note will argue that when a prison regulation infringes upon an inmate's statutory rights under the ADA, courts should not use the deferential *Turner* standard of review. Such a standard would effectively render the ADA toothless in the correctional environment. Instead, courts should incorporate the claims of the inmates and prison administration into their "reasonable modification" determinations under Title II of the ADA.[36] Part I of this Note shows that the *Turner* test has not been applied to all cases involving the alleged infringement of prisoners' constitutional rights. Accordingly, it argues that these cases demonstrate that when compelling reasons exist to deviate from *Turner*, courts have and should continue to do so. Part II suggests that the characteristics of statutory rights in general, and those granted by the ADA in particular, provide a number of persuasive reasons to deviate from *Turner*. Part III contends that the use of the *Turner* test in practice has effectively rendered the statutory protections of ADA inapplicable in the prison context. Lastly, Part IV argues that instead of applying *Turner* to inmates' claims under the ADA, courts should consider the prison context as a part of their ADA determinations. It also claims that doing so need not cause tre-

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failure to take cognizance of valid constitutional claims whether arising in a federal or state institution.").

34. *See Yeskey II, supra* note 8, 118 S. Ct. 1952, 1954 (1998) (holding that the ADA's language "unmistakably includes State prisons and prisoners within its coverage").

35. *See* 29 C.F.R. app. § 1630.1(a) (1997); *see also* 42 U.S.C. § 12101(b)(1), (3) (stating that it is the intent of the Act "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to ensure that the Federal Government plays a central role in enforcing [those] standards").

36. Title II of the ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The Act defines a "qualified individual with a disability" as "an individual with a disability who, with or without *reasonable modification* to rules, policies or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added). This Note focuses on Title II of the ADA because it plays the most prominent role in prisoner litigation under the Act, while Titles I, III, IV, and V have only limited application for prison inmates. For an excellent summary of the potential scope of the ADA regarding prisoner claims, see Robbins, *supra* note 6, at 76-81.

mendous financial or administrative burdens for correctional facilities. This Note concludes that administering the ADA in this way would provide disabled prisoners with a more evenhanded adjudication of their discrimination claims, while also respecting the legitimate concerns of prison administration.

I. THE *TURNER* STANDARD'S APPLICABILITY TO CASES INVOLVING PRISONERS' RIGHTS

Although the Supreme Court has said that *Turner* should apply to "all circumstances in which the needs of prison administration implicate constitutional rights,"[37] some courts and commentators have claimed that *Turner* was never meant to apply in *all* cases involving the alleged infringement of prisoners' rights, nor to all constitutional rights cases. This Part examines case law after *Turner* and demonstrates that a number of courts reviewing prison policies or practices do not require a *Turner*-like standard of judicial deference. This reality weakens the argument, proffered by two circuit courts, that the *Turner* standard should be used in cases involving statutory rights simply because it is used in the constitutional rights setting.[38] This Part will show that this does not always occur — in at least four types of cases, courts have refused to apply *Turner* to prison disputes regarding alleged constitutional rights violations.[39] Consequently, courts should look more closely at *why* they would use the *Turner* standard in future litigation, rather than simply assuming that it should automatically apply in all prison cases.

First, a number of courts have held that when the challenged rule does not implicate concerns involving prison security or institutional order, a more strict standard than *Turner* should apply. For example, in *Pitts v. Thornburgh*,[40] the District of Columbia Circuit held that the

37. *See* Washington v. Harper, 494 U.S. 210, 224 (1990).

38. *See supra* notes 23-25 and accompanying text.

39. There is at least one other instance, regarding the review of prisoners' Fourth Amendment claims, where, while some courts have not questioned the use of the *Turner* "reasonableness" standard in general, they have declined to apply the four factors laid out by the *Turner* court to define that standard. *See* Foote v. Spiegel, 995 F. Supp. 1347, 1349 (D. Utah 1998) (employing the *Turner* standard of review, but using factors enumerated in *Bell v. Wolfish*, 441 U.S. 520 (1979), to address inmate Fourth Amendment claims); *see also* Hayes v. Marriott, 70 F.3d 1144, 1146-47 (10th Cir. 1995) (applying *Bell* and *Turner* factors jointly); Jordan v. Gardner, 986 F.2d 1521, 1535 (9th Cir. 1993) (Reinhardt, J., concurring) (finding that *Turner* "distills the principles originally established in *Bell*"); Michenfelder v. Sumner, 860 F.2d 328, 331 n.1 (9th Cir. 1988) (remarking that the second *Turner* factor is "much more meaningful in the First Amendment context than the Fourth, where the right is to be free from a particular wrong").

40. 866 F.2d 1450 (D.C. Cir. 1989).

Turner standard of scrutiny was inapplicable to the equal protection review of a District of Columbia policy which mandated that female inmates be housed in a remote facility in West Virginia while male inmates were placed in institutions far closer to the District.[41] *Pitts* applied a heightened level of scrutiny, arguing that *Turner* applies most directly to cases involving "the daily oversight of inmate behavior, with the attendant security concerns and necessary limitations upon 'prisoners rights.' "[42] The court suggested that in a case implicating only "general budgetary and policy choices," the *Turner* standard was not appropriate.[43] Other courts have also made this distinction with regard to cases not implicating concerns of prison order or security.[44]

Second, many courts have refused to apply the *Turner* standard to prisoners' claims emanating from discrimination based on a "suspect classification." The Supreme Court has ruled that when a state classifies by race, alienage, or national origin, these factors are seldom relevant to the achievement of any legitimate state interest and may often reflect prejudice and antipathy. As a result, laws containing these classifications are subjected to "strict scrutiny" and will be sustained only if they are suitably tailored to serve a compelling state interest.[45]

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41. *See Pitts,* 866 F.2d at 1453. Incarceration in institutions located in Alderson, West Virginia, resulted in a number of hardships for the woman prisoners: they received fewer visitors (especially family members) as well as less preparation for and support in their eventual return to the District than male prison inmates did. *See Pitts,* 866 F.2d at 1452.

42. *Pitts,* 866 F.2d at 1454.

43. *Pitts,* 866 F.2d at 1454. The court's decision was also motivated in part by the fact that the regulation implicated gender discrimination concerns, an area that the Supreme Court has held calls for heightened scrutiny. See *infra* note 46 and accompanying text.

44. *See* Schultz v. Lewis, No. 92-15782, 1993 WL 230191, at *1 (9th Cir. June 28, 1993) (holding that *Turner* should not apply because the case may address "purely administrative concerns rather than valid penological objectives"); Lyon v. Del Vande Krol, 940 F. Supp. 1433, 1438 (S.D. Iowa 1996) (applying the "usual strict scrutiny rule for fundamental rights" in place of *Turner* in case involving challenge to litigation and court administration process "[b]ecause this case raises none of the concerns ... about second-guessing prison officials judgments concerning prison administration and security").

In a dissenting opinion in *Griffin v. Wisconsin,* Justice Blackmun also suggested that *Turner* should not apply to probation regulations because those restrictions on inmates were not motivated by the " 'essential goals' of 'maintaining institutional security and preserving internal order and discipline' inside the walls of a prison." Griffin v. Wisconsin, 483 U.S. 868, 883 n.2 (1987) (Blackmun, J., dissenting) (quoting Bell v. Wolfish, 441 U.S. 520, 546 (1979)). The majority in the case did not reach the issue, *see* 483 U.S. at 874 n.2, but commentators have noted the dissent's skepticism in indicating that the *Turner* test would likely not apply. *See* Daniel E. Post, Comment, *The Constitutionality of Parole Departments Disclosing the HIV Status of Parolees,* 1992 WIS. L. REV. 1993, 2012 ("The dissent in *Griffin* intimates that a probationer's freedom imposes different goals on probation authorities that do necessitate the adoption of the deferential *Turner* test.").

45. *See* Graham v. Richardson, 403 U.S. 365, 371-76 (1971) (concerning application of state welfare laws discriminating against aliens); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (involving Florida statute providing for punishment of mixed race couples who were unmarried and lived in same household).

Other classifications, sometimes referred to as "quasi-suspect," also call for a heightened standard of review, though not as stringent as the aforementioned groups. These include classifying by gender, which must be substantially related to a sufficiently important governmental interest,[46] and illegitimacy, which must be substantially related to a legitimate state interest.[47] Courts have agreed that inmates' claims of discrimination rising as a result of their status as a member of a "suspect class" should receive this type of heightened review, specifically in cases involving gender discrimination[48] or racial discrimination.[49] Presumably other suspect classifications, such as discrimination based on alienage and national origin, would also receive more rigorous review in the prison context under this line of argument.[50]

Third, courts and commentators have recognized that some persons who are associated with the penal system, but have a greater expectation of liberty due to their unique circumstances, should also receive a heightened level of review for their constitutional rights claims. This argument has arisen regarding the claims of probationers and parolees,[51] the actions of duly admitted attorneys within prison con-

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46. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-26 (1981) (challenging denial of university admission to male desiring nursing education because of sex); Craig v. Boren, 429 U.S. 190 (1976) (challenging Oklahoma statutes providing for differing age restrictions for men and women seeking to purchase alcohol).

47. *See* Mills v. Habluetzel, 456 U.S. 91, 98-99 (1982) (challenging Texas statute providing for limitations on illegitimate children in seeking child support that were not present for legitimate children). Though the test for classifications based on illegitimacy is slightly different than that for classifications based on gender, the Supreme Court has ruled that illegitimacy also holds quasi-suspect status. Such classifications are subject to "more" than rational basis review — what the Court has termed "a realm of less than strictest scrutiny." Trimble v. Gordon, 430 U.S. 762, 767 (1977).

48. *See, e.g.,* Pargo v. Elliott, 49 F.3d 1355 (8th Cir. 1995) (unsure whether *Turner* should automatically apply to case questioning whether male and female inmates could by deemed similarly situated for purposes of equal protection analysis); Jeldness v. Pearce, 30 F.3d 1220, 1230 (9th Cir. 1994) (applying intermediate scrutiny to challenge by class of women prisoners and concluding that "penological necessity is not a *defense* to Title IX" (emphasis in original)); Pitts v. Thornburgh, 866 F.2d 1450, 1454 (D.C. Cir. 1989) (expressing skepticism toward *Turner* standard in the context of a gender discrimination claim); West v. Virginia Dep't of Corrections, 847 F. Supp. 402, 406 (W.D. Va. 1994) (applying "intermediate scrutiny" in case where distinction drawn between male and female inmates for purposes of admission into boot camp program); Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979); *see also* Robbins, *supra* note 6, at 112 n.231 (listing these results). *But see* Klinger v. Department of Corrections, 31 F.3d 727, 733 (8th Cir. 1994) (holding the *Turner* standard of deference appropriate in case brought by a class of women prisoners asserting equal protection violations).

49. *See* Robbins, *supra* note 6, at 66 & nn.80-81.

50. *See West,* 847 F. Supp. at 406 (operating under this assumption).

51. *See* Griffin v. Wisconsin, 483 U.S. 868, 883 n.2 (Blackmun, J., dissenting); Deborah Dalrymple-Blackburn, Comment, *AIDS, Prisoners, and the Americans With Disabilities Act,* 1995 UTAH L. REV. 839, 867; Post, *supra* note 44, at 2012.

fines,[52] and with respect to management of conditions in county or municipal jails designed primarily to house individuals charged with but not convicted of criminal offenses.[53]

Fourth, courts have indicated that the *Turner* standard should not apply to Eighth Amendment claims because rights under that Amendment apply only to inmates, and therefore courts would have no justification for lessening its protection in prison facilities. For example, the Ninth Circuit argued that "*Turner* has been applied only where the constitutional right is one enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment."[54] In contrast, the court held that Eighth Amendment rights do not conflict with incarceration but simply limit the hardships that can be inflicted upon the incarcerated as "punishment."[55] Perhaps for these reasons, the Supreme Court has never applied *Turner* to an Eighth Amendment case.[56]

These cases demonstrate that with regard to the constitutional rights of prisoners, despite the language used in *Turner* and its progeny, there is a fairly broad consensus that the *Turner* test should not apply in all constitutional rights cases. While some, but certainly not all, cases of infringements on prisoners' statutory rights under the ADA would meet one of these exceptions,[57] these cases are significant

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52. *See* Sturm v. Clark, 835 F.2d 1009, 1014 (3d Cir. 1987).

53. *See* Fennell v. Simmons, 951 F. Supp. 706, 713 (N.D. Ohio 1997).

54. Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993) (en banc).

55. *See Jordan*, 986 F.2d at 1530 ("Whatever rights one may lose at the prison gates . . . the full protections of the eighth amendment most certainly remain in force." (citing Spain v. Procunier, 600 F.2d 189, 193-94 (9th Cir. 1979))); *see also* Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983) (not applying *Turner* with regard to Eighth Amendment claim); Curry v. Hall, 839 F. Supp. 1437, 1440 (D. Or. 1993) ("With certain exceptions, notably the Eighth Amendment, the *Turner* framework applies in approaching all claims in which it is asserted that a particular prison practice or rule implicates constitutional rights.").

56. *See Jordan*, 986 F.2d at 1530 (implying that because the Supreme Court had never applied *Turner* in this way, the Court would agree with the Ninth Circuit's conclusion).

57. Even if each noted exception were accepted by the Supreme Court, a large number of prisoner ADA cases would still implicate *Turner*. For example, it can first be acknowledged that while some prisoner ADA claims have no bearing on matters of inmate behavior or institutional order and security, in many cases the prison regulations which lead to inmates' ADA claims are promulgated because of such concerns, and would therefore not be subject to this exemption.

Second, the Supreme Court has ruled that the disabled are not a "suspect class" and that claims of discrimination based on disability should not automatically receive strict scrutiny. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985). *City of Cleburne* would make it much more difficult to equate prisoners' ADA claims with the female prisoners' equal protection claims in a case like *Pitts*. Yet in some prisoner ADA litigation, judges have noted the similarity between discriminating against an inmate based on race, a "suspect class," and discriminating against an inmate because of his or her disability. *See* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 486 (7th Cir. 1997) ("If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks

in another way. They show that the *Turner* standard, even in the realm of prisoners' constitutional rights, should not be used in the review of *every* case. Instead, they indicate that if there are compelling reasons why a more rigorous analysis is necessitated in adjudicating these claims,[58] the use of the *Turner* test may be inappropriate. As noted earlier, the circuit courts that have indicated that a different standard of review might apply to inmates' claims involving statutory rights have used this exact rationale.[59]

II. THE NATURE OF STATUTORY RIGHTS AND THE MANDATE OF THE ADA

In *Gates v. Rowland,* the Ninth Circuit saw no reason to differentiate between the constitutional and statutory rights of prisoners, and held that if the *Turner* test applied in the constitutional rights setting, it should also apply to an inmate's statutory rights.[60] Yet a number of factors involving the nature of statutory rights in general and the ADA in particular persuasively argue for a different conclusion — that the impact of the ADA should not be significantly diluted in prisons by granting extreme deference to the decisions of prison administrators. This Part argues that courts must distinguish between consti-

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that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining hall . . ."); Torry, *supra* note 1, (reporting that in oral argument in the *Yeskey* case, Justice O'Connor was skeptical of the argument that the state can deny inmates certain rights and asked the defendant's attorney: "Do you think that this court would sanction a policy that black prisoners have to eat in separate dining rooms?").

Third, there is little doubt that almost all prison ADA claims are brought by inmates themselves, and not those groups of people associated with the prison environment but who nonetheless have a greater expectation of liberty. *See supra* notes 51-53 and accompanying text. And lastly, the provisions of the ADA are not rights that can only be claimed by prisoners, unlike Eighth Amendment claims. *See supra* notes 54-56 and accompanying text.

58. The Ninth Circuit's decision in *Gates* seemed not to recognize *any* reason, short of a Congressional mandate to the contrary, why review of prisoner claims made pursuant to statutory rights should differ from the standard applicable to constitutional rights. *See* Gates v. Rowland, 39 F.3d 1439, 1447 (1994) ("It is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights. Thus, we deem the applicable standard . . . to be equivalent to the review . . . in *Turner v. Safley.*"). In contrast, this Note provides many reasons why statutory rights in general and the ADA in particular provide a compelling rationale to abandon *Turner* in ADA cases and defer to the "reasonable modification" language of the Act's Title II in addressing claims. *See infra* Parts II & III.

59. *See, e.g., Onishea I, supra* note 29, 126 F.3d 1323 (11th Cir. 1997) (acknowledging that a more rigorous standard might be appropriate in a statutory rights case arising under the Rehabilitation Act); Pargo v. Elliott, 49 F.3d 1355 (8th Cir. 1995) (noting that the exceptions to *Turner* in the constitutional rights context argues for a potentially stronger standard in other cases).

60. *See Gates,* 39 F.3d at 1447.

tutional rights and such statutory rights as those provided in the ADA in order to (1) conform to the intent of the *Turner* decision regarding the enhanced fact finding ability of the legislature and the centralized nature of its determinations, (2) acknowledge the flexibility of statutory decision making as opposed to the creation of constitutional rights, and (3) rely on the specificity of statutes such as the ADA to address some problems of interpretation.

First, the rationales behind the *Turner* decision support a distinction between constitutional rights and rights provided by a legislative enactment such as the ADA. One important reason for the *Turner* policy of judicial deference was that courts are not well equipped to make decisions relating to the urgent problems of prison administration and reform.[61] The Court specifically noted that:

> 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.* Prison administration is, moreover, a task that *has been committed to the responsibility of those branches,* and separation of powers concerns counsel a policy of judicial restraint.[62]

In passing the ADA, which creates a new set of statutory rights, the legislature has made exactly the type of reasoned determination that the *Turner* Court argued it was uniquely qualified to make.[63] Through the ADA, Congress determined that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."[64] Moreover, the Supreme Court has unambiguously

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61. *See* Turner v. Safley, 482 U.S. 78, 84 (1987).

62. *Turner,* 482 U.S. at 84-85 (emphasis added) (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)). The Supreme Court has also generally agreed that with regard to laws affecting the disabled in particular, deference to Congress's investigative power is important. *See City of Cleburne,* 473 U.S. at 442-43 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."). Unlike courts, Congress has the ability to hold hearings regarding particular legislation, receive large amounts of witness testimony on the potential effects of a particular Act and spend long periods of time crafting that legislation — luxuries that are not generally available to the judicial branch.

63. *See also Onishea I, supra* note 29, 126 F.3d at 1336 (recognizing that "although *Turner* serves to restrain the judiciary from interfering in prison matters, a job best left to the legislative and administrative branches, rights under the Rehabilitation Act emanate from those branches" (citations omitted)). Moreover, while *Turner* can be said to serve federalism concerns by keeping federal authority out of state prisons, unless it is clear that Congress intended such an intrusion, *see* Torcasio v. Murray, 57 F.3d 1340, 1345 (4th Cir. 1995), this does not justify application of the *Turner* standard in the ADA context as *Yeskey* has already determined that the ADA does apply to state prisons.

64. *See* 42 U.S.C. § 12132 (1994).

stated that the effect of the statutory language of Congress was to include prisoners within the umbrella of the ADA's protection.[65]

While it is unclear whether the ADA's drafters intended for the Act to apply specifically to prisoners,[66] the *Turner* Court's rationale for deference to the legislature is still persuasive in this case. In *Yeskey*, the Supreme Court stated that even if Congress had not considered prisoners when writing the ADA, that did not mean that the statute should have any less effect with regard to inmates.[67] Instead, the Court held that this did not demonstrate congressional ambiguity with respect to prisoners, but rather was an example of the "breadth" of the ADA.[68] The Fourth Circuit has recently agreed that deference should be given to Congress's findings of discrimination as stated in the ADA, even in the context of prisoners' claims, stating that "[i]t would be obtuse for us to believe that the discrimination Congress found to be so pervasive in the free world automatically stops at the prison gates."[69] In line with this reasoning, the *Turner* Court's rationale for deferring to the legislative branch regarding prison matters should not be read to cover only those situations where Congress produces a bill

65. *See Yeskey II, supra* note 8, 118 S. Ct. 1952, 1954 (1998) (holding that "state prisons fall squarely within the statutory definition of 'public entity' ").

66. It is not clear what Congress's intent was with regard to the level of scrutiny that prisoners' ADA claims should receive. Some have argued that Congress, in writing the ADA, specifically intended that the courts should consider disabled persons a suspect class and apply strict scrutiny to their claims. *See* Robbins, *supra* note 6, at 93; *see also* James B. Miller, *The Disabled, the ADA and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393 (1994). The Supreme Court itself noted in *Yeskey* that the ADA's reference in its statement of findings and purpose to discrimination " 'in such critical areas as . . institutionalization,' § 12101(a)(3), can be thought to include penal institutions." *Yeskey II, supra* note 8, 118 S. Ct. at 1955 (1998). Yet the Court ultimately assumed without deciding that the legislature did not specifically consider prisoners when constructing the Act. *See Yeskey II, supra* note 8, 118 S. Ct. at 1955.

Additionally, there is some evidence that at least one architect of the ADA agrees with the *Yeskey* decision that prisoners should be able to bring ADA claims, and that in general, their claims should receive the same protection as the claims of citizens who are not incarcerated. *See Harkin, an Architect of Act, Says He's Not Upset,* DES MOINES REG., June 16, 1998, at 3 [hereafter *Harkin*] (reporting that Senator Tom Harkin of Iowa, one of the architects of the Americans with Disabilities Act, said he was not troubled by the [Supreme Court's *Yeskey*] ruling and that " '[p]eople with disabilities who commit crimes should serve their time just as people without disabilities.' "). Yet the text of the Act itself offers no such indication, and the legislative history of the ADA is absent of any significant reference to prisoners or the correctional environment.

67. *See Yeskey II, supra* note 8, 118 S. Ct. at 1955-56.

68. *See Yeskey II, supra* note 8, 118 S. Ct. at 1956.

69. *Amos II, supra* note 30, 178 F.3d at 219 (4th Cir. 1999) (noting that while its "deference to Congress must not be blind . . . a great deal of deference must still be given to Congress, especially in the face of a fully developed evidentiary record of discrimination"). The court also recognized that Congress did gather evidence in the past on arbitrary discrimination against the disabled in prisons. *See Amos II, supra* note 30, 178 F.3d at 219 n.5.

intended specifically to apply to correctional facilities. Congress's superior factfinding ability is no less relevant and still far superior to that of the courts when it is used to devise statutes with broad mandates.

Moreover, the centralized nature of Congress's decision making regarding the ADA would also quell the *Turner* Court's fear that numerous courts around the country would provide differing and confusing mandates for prisons to follow. The *Turner* majority expressed this view by worrying that such rulings would "distort the decision-making process" and subject every administrative judgment to the "possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand."[70] Unlike a case implicating a constitutional right, a statutory rights case does not require the court itself to establish a set of guidelines that could have the effect of restricting a prison warden's flexibility. In passing a statute such as the ADA, Congress has provided a centralized set of standards that courts and prison administrators can turn to when disputes arise.[71] The application of a statute like the ADA to state prison facilities addresses the *Turner* majority's worry that numerous and potentially conflicting requirements should not be placed on correctional facilities.[72]

Therefore, in situations involving the infringement of a prisoner's statutory rights, some of the most important reasons for adopting the *Turner* test are not applicable. Unlike courts, Congress is at least as able as prison administrators to articulate workable solutions to prison problems — a reality that should force a more detailed examination as to whether *Turner* should generally apply in a statutory context.[73]

Second, the nature of constitutional rights as compared to that of statutory rights supports a preference for granting the latter greater application in the prison context. This premise might initially seem counterintuitive, as Americans are conditioned to view constitutional

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70. Turner v. Safley, 482 U.S. 78, 89 (1987).

71. The idea of creating a comprehensive set of standards for this purpose was a motivating factor for Congress in passing the Act. *See* Carnahan, *supra* note 16, at 297.

72. Moreover, deference to the legislature in some statutory rights cases has the added benefit of allowing courts to avoid the appearance of judicial lawmaking. *See* Raines v. Florida, 987 F. Supp. 1416, 1420 (N.D. Fla. 1997).

73. The *Turner* Court did not indicate that Congress was *more* able than prison administrators to articulate workable solutions to prison problems — in fact it indicated that both were able to do so. *See Turner*, 482 U.S. at 84-85 (noting that the problems of prisons are "peculiarly within the province of the legislative and executive branches" as well as that "[w]here a state penal system is involved . . . [there is] additional reason to afford deference to the appropriate prison authorities"). This argument merely identifies why Congress's involvement makes statutes different from constitutional cases with respect to *Turner*'s application in prisons. The other arguments regarding the statute itself articulated in this Part, the arguments relating to the ADA's application in prisons in Part III, and the flexibility of the statute's "reasonable modification" language, noted in Part IV, all demonstrate more particularly why *Turner* should not be used in the ADA context.

rights as the most "special" rights with which they are endowed, due to the respect that we afford to the Constitution's guarantee of liberties. Yet statutory rights have the advantage of providing guidance for prison administrators while also allowing for flexibility if a bill's provisions become unworkable in the correctional environment. If a statute's guidelines are found to be unworkable in prisons, the legislative body can amend them to remedy those deficiencies and still retain the option to make further changes *in the future.* In contrast, once courts make constitutional rights determinations, those rulings cannot be overturned by the legislature.[74] Moreover, these constitutional grants of liberty are also difficult to overrule within the courtroom, as courts prefer a stable body of law to one that constantly changes depending on the identity of judges on the bench.[75] As a result of the greater flexibility they provide to the legislature to address weaknesses in the correctional environment, statutory rights should be granted greater application than are constitutional rights for inmates.

Third, legislation such as the ADA provides courts and prison administrators with far greater detail than do grants of constitutional rights. While rules of constitutional law are unique in that they depend entirely upon judicial decisions to determine their scope,[76] legislative determinations often have the ability to provide greater specificity in their text and are augmented by agency interpretations. Thus, the legislature is able to provide prison administrators with substantial guidance in attempting to ensure that their prison's regulations will meet legal standards regarding disabled prisoners.[77] As with many other statutes, the ADA's provisions are supplemented by guidelines provided by governmental agencies, including the Department of Justice.[78] In particular, it has been stated that "the text of the ADA was

74. *See, e.g.,* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress exceeded its authority under the Enforcement Clause of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act). It has been recognized that *Boerne* explained that "[o]nce the Court clearly pronounced the appropriate level of scrutiny for equal protection analysis, Congress lost the power to raise the standard." Carnahan, *supra* note 16, at 316.

75. The Supreme Court stated in *Boerne* that when Congress acts "against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis.*" *Boerne*, 521 U.S. at 536; *see also* Carnahan, *supra* note 16, at 316.

76. *See Raines,* 987 F. Supp. at 1420.

77. The relative inability of courts to provide more than minimal instruction to correctional facilities seemed to be exactly the concern of the Court in *Turner* when it worried that courts "would become the primary arbiters of what constitutes the best solution to every [prison] administrative problem." Turner v. Safley, 482 U.S. 78, 89 (1987).

78. *See, e.g.,* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities, 59 Fed. Reg. 31,676 (1994)

laden with detail" and that the standards for compliance are detailed "in literally hundreds of pages of specifications."[79] The existence of ADA-related agency regulations, combined with the detail of the legislation itself, provide exactly the type of specificity that the *Turner* Court generally supposed the legislative branches would supply. This provides further justification for the proposition that instead of relying on the *Turner* standard, a "judicially created test for judicially construed rights," courts would better serve the policy of deference underlying *Turner* by looking to these regulations and the text of the statute when possible if ambiguity exists.[80]

The nature of statutory rights in general, and of the ADA in particular, reveals some important reasons why courts should not simply defer to the decisions of prison administrators when inmates bring claims under the Act. These reasons demonstrate that arguments for the use of the *Turner* test in the constitutional rights setting, a realm of cases where the standard is not even incorporated in all instances, are even less persuasive when applied to grants of statutory rights to inmates.

III. THE *TURNER* STANDARD'S EFFECT ON THE ADA'S APPLICATION IN PRISONS

From its inception, the *Turner* standard has been viewed by courts and commentators as being highly deferential to prison administration decisions, with the potential to severely limit the legal rights of prisoners.[81] In his dissenting opinion in *Turner*, Justice Stevens warned that

(establishing accessibility standards for new construction and alteration of facilities covered by Title II of the ADA); Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 35,408 (1991). In the ADA itself, Congress directed the Justice Department to issue implementing regulations and render technical assistance explaining the responsibilities of covered individuals and institutions. *See* 42 U.S.C. §§ 12186(b), 12206(c) (1994).

79. Robbins, *supra* note 6, at 81, 91.

80. *See* Emily Alexander, Note, *The Americans With Disabilities Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L. REV. 2233, 2276 (1998); *see also Amos II*, *supra* note 30, 178 F.3d at 221. The existence of the Act itself and the agency provisions provide significant assistance for courts that is often not available in cases involving a constitutional rights dispute. Of course, reliance on the text of such a statute as the ADA and agency provisions will have its limits, as there will always be ambiguities that a court must resolve. *See infra* Section IV.A.

81. *See Turner*, 482 U.S. at 100 (Stevens, J., dissenting) (arguing that if the standard "can be satisfied by nothing more than a 'logical connection' between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless"). Courts examining the "legitimate penological interest" standard in recent years have continued to note that it is a "highly deferential standard." Torcasio v. Murray, 57 F.3d 1340, 1356 (4th Cir. 1995). This should not be surprising. Since one of the fundamental concerns of prison administration is to maintain the security and order of its prisons, almost any regula-

"[a]pplication of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern."[82] In particular, if this standard is applied to the review of potential ADA violations by prisons, "only the truly horrifying scenario of inmate abuse will have a prospect for relief" under the Act.[83] The *Turner* standard is so difficult to overcome for prisoners bringing ADA claims because it: (1) allows security concerns to gain an overwhelming importance not intended by the ADA, and (2) shifts the burden of justifying the restriction from the institution to the inmate, who must show that it is an overreaction.[84]

Additionally, courts have maintained that if the standard of review of the disabled prisoners' statutory claims is equivalent to the standard for constitutional claims, then it is obvious that the statute's protections make little difference in the prison context.[85] Prior to the *Yeskey* decision, one court had even argued that the results of applying the *Turner* standard to the ADA and Rehabilitation Act in the prison context would mean that such claims would rarely succeed, and that this result was evidence that the statutes were not intended to apply to prisons at all.[86] Of course, the *Yeskey* decision has since made it clear that these statutes do apply to state prisons. If the use of the *Turner* test would frustrate this ruling by making the ADA's application to prisons "unworkable," that result is evidence that such a standard should not be used.

Section III.A examines the practical effect of the use of the *Turner* standard in cases involving claims by disabled prisoners. It will do so by analyzing cases decided under the authority of the Ninth Circuit, which is one of only two circuits to have decided that the *Turner* stan-

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tion intended to make the daily routine of prison life run more smoothly might be justified by some type of security rationale.

82. *Turner*, 482 U.S. at 100-01.

83. Robbins, *supra* note 6, at 110; *see also* William C. Collins, *Use of* Turner *Test Deferring to Institutions' Security Concerns May Sharply Limit Inmates' ADA Protection*, 6 CORRECTIONAL L. REP. 65, 65(1995) (arguing that the Ninth Circuit's decision in *Gates v. Rowland*, applying the *Turner* test to prisoners' claims under the Rehabilitation Act, "may gut portions of the Americans With Disabilities Act . . . as it applies to inmates"). It has also been argued that the requirements of the ADA are inconsistent with the general principle that deference is due to prison officials. *See* Carnahan, *supra* note 16, at 315.

84. *See* Collins, *supra* note 83, at 74. Furthermore, in placing an increased burden on the inmate to combat the claims of prison administrators, courts would be requiring justification from a party whose ability to provide information regarding prison safety conditions or institutional alternatives is drastically inferior.

85. *See* Callaway v. Smith County, 991 F. Supp. 801, 806 (E.D. Tex. 1998).

86. *See* Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 126 F.3d 589, 607 (4th Cir. 1997) [hereinafter *Amos I*].

dard should apply to review of disabled prisoners' statutory claims.[87] Ultimately, it will argue that this approach precluded prisoners from prevailing in their claims under the Rehabilitation Act,[88] even when the justifications produced by prison administration were based on very weak evidence. Next, Section III.B will claim that the use of the *Turner* test effectively eliminates any consideration of the prisoner's disability or personal physical discomfort, focusing instead solely on the legitimacy of the prison rule involved. Only when a rule is deemed not to have a "legitimate penological interest" might any consideration then be given to the inmate's disability. This procedural result has the effect of eliminating any consideration of the ADA's provisions in a large number of inmate ADA cases — a result that is inconsistent with the Supreme Court's mandate in *Yeskey* that the Act should apply inside prison walls.

A. *The Damaging Results of the Ninth Circuit's* Gates *Decision*

After the Ninth Circuit ruled that prisoners' claims under the ADA and the Rehabilitation Act would be reviewed using the *Turner* standard, the circuit has consistently upheld the denial of those claims.[89] The use of the deferential "legitimate penological interest" test has allowed weak rationales to prevail over prisoners' statutory rights, and provides a disturbing preview of the outcome of a potential Supreme Court decision that would validate the *Turner* standard for use in this context. One such rationale often employed in these cases argues that it is not the reality of the disability, but how that disability is perceived that should take precedence in *Turner*-based determinations of claims by the disabled.[90] This consequence is particularly unfortunate in light of the fact that Congress passed the ADA in part to change stereotypical assumptions made about the disabled that had no basis in fact.[91] These cases also allow two other dangerous arguments to prevail under the *Turner* test: that prisoners are ignorant and abnormal,[92] and that solutions should be implemented that punish the disabled inmate instead of protecting his rights.[93]

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87. *See* Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994).

88. The remedies, procedures, and rights under Title II of the ADA are the same as under the Rehabilitation Act. *See* 42 U.S.C. § 12133 (1994).

89. *See infra* notes 94-105 and accompanying text.

90. *See infra* notes 94-101 and accompanying text.

91. *See* 42 U.S.C. § 12101(a)(7) ("[I]ndividuals with disabilities . . . have been faced with restrictions and limitations . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in . . . society.").

92. *See infra* notes 97-99 and accompanying text.

93. *See infra* notes 105-108 and accompanying text.

In *Gates,* for example, the defendants were excluded from serving food at their correctional facility because they were HIV-positive,[94] despite the fact that the risks of a "prisoner acquiring HIV through food service are slight," amounting only to "theoretic possibilities."[95] The court agreed with the argument that if HIV-positive prisoners were placed in these jobs, other prisoners would fear that they would bleed or spit into the food — and that such fears would lead to violence.[96] The prison's argument that many inmates "are not necessarily motivated by rational thought" and frequently have irrational phobias "that education will not modify" succeeded in satisfying the *Turner* test.[97]

Similarly, in *Bullock v. Gomez,*[98] a prisoner with HIV was denied an overnight visit with his wife. The prison administration claimed this was because "theoretical[ly]" such visits could cause fear in other prisoners that they "might be exposed to the disease by the subsequent family visitors," and that these concerns, even if they had no validity, could result in violence because inmates have "different ways of dealing with their concerns than *regular people.*"[99] The prison made this argument although the warden admitted that this was "not a significant security issue"[100] and that no prisoners had ever previously objected to such visitors.[101] The court, though refusing to grant sum-

94. The court held that the Rehabilitation Act's protection of disabled individuals included those infected with the HIV virus. *See* Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994). The Supreme Court later agreed that HIV infection is a disability under the ADA, even when the infection has not progressed to the "so-called symptomatic phase." *See* Bragdon v. Abbott, 118 S. Ct. 2196, 2200, 2204 (1998).

95. *See* Gates v. Rowland, 39 F.3d. 1439, 1447 (9th Cir. 1994).

96. *See id.* The court also recognized that its decision was motivated by the "perception problems" in the methods of transmission of the virus and that the defendants were not attempting to justify the policy on medical considerations of the likelihood of transmitting the virus through food service. *See id.* Thus, the plaintiff was denied a job open to other inmates not because of a risk associated with his disability, but because of other inmates' ill-formed perceptions of his disability.

97. *Id.* at 1448. It seems clear that the defendant's argument was based on the premise that prisoners are not amenable to such education based on their general nature. *See* Julie Brienza, *Appellate Panel Ruling Boots Prisoners with HIV out of the Kitchen,* TRIAL, Feb. 1995, at 93 (quoting Michael Santoki, Supervising Deputy Attorney General of California, after the *Gates* decision as saying that the appeals panel found that "you can't educate people's fears away when they're stuck in prison. These are not socially well-adjusted people.").

98. 929 F. Supp. 1299 (C.D. Cal. 1996).

99. *Id.* at 1306-07 (emphasis added).

100. *Id* at 1307.

101. *See id.* at 1306-07 (warden testifying that he was unaware of any instance where prisoners were unwilling to use a family visiting trailer after a prisoner known to have HIV used it, or where a prisoner had objected to assignment to a cell formerly occupied by an HIV-positive inmate).

mary judgment to the defendant, held that these theoretical claims need not to be shown to have caused past violence to be successful under *Turner*.

In *Fowler v. Gomez*,[102] the plaintiff was on crutches[103] and was not allowed to be fed outside the infirmary unless he carried his own food tray. Prison officials had thrown away plaintiff's food when he had not followed this regulation, forcing him to forage food from the trash can to feed himself.[104] In finding for the prison administration, the court held with little comment that the regulation satisfied *Turner* because its purpose was to "permit medical observation and provide for plaintiff's needs without detracting from custody operations in other areas."[105]

Additionally, in *Martinez v. California Department of Corrections*,[106] a prison regulation that restricted a quadriplegic to the hospital unit of the prison, thereby denying him access to the general yard, classroom education, and vocational training programs, was found to pass the *Turner* test.[107] The court accepted the justification that the plaintiff would be unable to defend himself from attacks by other inmates in these venues and therefore should be confined to the hospital.[108] In contrast, the dissent argued that the regulation should not pass the *Turner* test because the security concerns presented by the plaintiff's presence would be the result of potential misconduct by other inmates.[109]

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102. No. C 94-2679 FMS, 1995 WL 779128, at *1 (N.D. Cal. Nov. 22, 1995).

103. The court assumed without deciding that the plaintiff had a disability for the purposes of this argument, although it noted that it was not convinced that the temporary use of crutches qualifies a person as disabled under the ADA. *See Fowler*, 1995 WL 779128, at *3 n.1.

104. *See id.* at *1.

105. *Id.* at *1-2.

106. 112 F.3d 516, 1997 WL 207946, at *1 (9th Cir. Apr. 25, 1997) (unpublished opinion).

107. *See id.* at *1.

108. *See id.* at *1.

109. *See id.* at *2 (Wiggins, J., dissenting) ("I do not think it is rational to prevent misconduct by punishing the potential victim rather than those who misbehave."). The dissent also believed that the prison provided no justification for its other security claim, that Martinez's medical condition requires him to be closely monitored by hospital staff in the infirmary. *See id.* at *2 (Wiggins, J., dissenting) (finding that "nothing about Martinez's daily condition" requires this). Prison officials might claim that in light of the Supreme Court's affirmation, in *Farmer v. Brennan*, of the principle that prisons have a duty to protect prisoners from violence at the hands of other prisoners, 511 U.S. 825, 833 (1994), these restrictions are necessary to accomplish that goal. Yet the same goal might often be accomplished just as effectively by affirmatively providing protection for the prisoner, instead of restricting his opportunities within the prison. If such protection constituted a legitimately serious burden for the prison, it would be free to make such a showing under the ADA's regulations by arguing that the suggested modification to the prison routine was "unreasonable." *See* 42 U.S.C. § 12131(2) (1994); *see also infra* Section IV.A.

These cases show that when courts have used the *Turner* test to review inmates' ADA claims, the standard has been met by arguments that rely on stereotypes of a prisoner's disability, claims that prisoners are ignorant and irrational, and focus on the security needs of the prison without making a serious effort to accommodate the prisoner's needs. The unfortunate outcomes of these cases should give courts pause before implementing a standard that promotes results that stigmatize and restrict the rights of inmates due to their disabilities.

B. *A Misguided Focus on the Standard, Not the Disabled Inmate*

Another practical result of the use of *Turner* in the review of prisoner ADA claims is that the use of the standard often eliminates any consideration of the prisoner's disability, the basis for his claim under the ADA, from being used as a factor in the judicial determination of that claim. In the cases examined in the Ninth Circuit, if a regulation was deemed to meet the *Turner* standard, then the plaintiff's ADA claim was terminated.[110] Although the prisoner's claim is brought under a statute protecting the disabled from discrimination, the court's focus remains solely on the prison's justification of its regulation until the case is dismissed. In these cases, no examination of the plaintiff's disability is attempted, nor are the provisions of the ADA itself discussed or implicated. Thus, only if a plaintiff were successful in showing that a prison regulation was unrelated to a "legitimate penological interest" would his or her ADA-related claim be examined in any detail. And because that outcome would occur so infrequently,

110. There seems to be some confusion as to what would occur if a prison regulation *did not* meet the *Turner* test. The Eleventh Circuit has assumed that if the *Turner* test was not satisfied by a prison then the provisions of the Rehabilitation Act would be applied, and a prisoner must also meet the standards of that Act to succeed in his claim. *See* Inmates of the Allegheny County Jail v. Wecht, No. 95-3402, 1996 WL 474106, at *11 (3d Cir. Aug. 22, 1996) *vacated en banc* Sept. 20, 1996; *See Onishea I*, *supra* note 29, 126 F.3d at 1335 (assuming that *Turner* would be used in conjunction with a test determining whether the plaintiff could prove he or she was "otherwise qualified" under the Act). Alternatively, another court believed that *Gates* stood for the proposition that *Turner* mandated the use of a standard of "deliberate indifference to a serious medical need," which it noted was the same standard that would be applied if the ADA and the Rehabilitation Act were not applied to prisons. *See* Callaway v. Smith County, 991 F. Supp. 801, 806 n.4 (E.D. Tex. 1998) (citing Farmer v. Brennan, 511 U.S. 825 (1994)). The *Callaway* court did not define whether such a standard would be used in place of the four factors described in *Turner*, or applied after a plaintiff met those factors. Yet it has been argued that given the generally objective presentation of the ADA's requirements, the use of "deliberate indifference" test would not be appropriate. This is because the element of intent to be indifferent to the medical need, which is crucial for that test, is likely not a required element for prevailing claims under the ADA. *See* Robbins, *supra* note 6, at 91. Additionally, "deliberate indifference" is often an important element in Eighth Amendment claims, which may not be subject to the *Turner* test at all. *See supra* notes 54-56 and accompanying text.

the practical outcome of invoking *Turner* in these scenarios would be that the ADA would have strikingly little effect in prisons.

These results frustrate the intent of the ADA, as individuals are discriminated against because of their disability and yet are often not allowed to have that disability or the prospect of reasonable modification under the ADA emerge as a factor in the judicial process. This outcome seems particularly unfortunate in light of the history of prisons, such as those in the Ninth Circuit, which have admitted to serious violations of the rights of disabled prisoners.[111] In the face of such violations[112] and the protection afforded by the ADA in general, a standard of review that does not allow disabled prisoners the ability to have the ADA's provisions considered by the court is a misguided one.

IV. CONSIDERING THE PRISON CONTEXT AS PART OF THE ADA'S CALCULUS

This Note has argued that, for a number of reasons, it would be inappropriate to use the *Turner* standard in adjudicating prisoners' claims under the ADA. As an alternative to that standard, Section IV.A suggests that courts should analyze the justifications surrounding a challenged prison regulation as part of its "reasonable modification" deliberations under Title II of the Act.[113] In this way, the statute could

111. *See, e.g.*, Reynolds Holding, *State Prisons Settle Disability Bias Lawsuit*, S.F. CHRON., Aug. 12, 1998, at A20 (reporting that the state of California admitted violating the ADA and the U.S. Constitution's ban on cruel and unusual punishment by allowing a broad range of abuses in its prisons, including the knifing and rape over a two-week period of a San Diego prisoner with an IQ of fifty-six who complained to guards that he was in danger, and the taunting and punishing of disabled prisoners by guards throughout the state's thirty-two prison system); Jordan Lite, *State Admits Disabled Prisoners Were Discriminated Against, Vows Changes*, ORANGE COUNTY REG., Aug. 12, 1998 at A4 (reporting that state prison abuses also included having disabled prisoners given longer prison terms after not being assisted during hearings to establish their guilt or innocence); *see also* Maura Dolan, *Judge Orders End to Brutality at High-Tech Prison*, L.A. TIMES, Jan. 12, 1995, at A1 (reporting that a federal district judge determined that the state of California permitted guards at Pelican Bay Prison to exercise " 'grossly excessive' force" and that the facility denied adequate medical and mental-health care to inmates, leading to deaths).

112. It is of course true that a similar argument might be made regarding the abuses that could arise in the use of the *Turner* test in cases involving infringement of prisoners' constitutional rights. It is not the intent of this Section to claim that those unfortunate consequences are not significant for prisoners as well. Yet aside from the previously noted reasons why the protection of inmates' statutory rights might differ from that afforded to their constitutional rights, there is another reason why the results of prisoner ADA claims, governed by *Turner*, might seem more egregious than those in the constitutional rights context. The reason is that there is something abhorrent about the notion that a prisoner's disability, which in many cases is already a severe physical and emotional burden, should be a significant justification as to why the inmate must be further penalized in the prison environment.

113. *See* 42 U.S.C. § 12131(2) (1994) (stating under the Act that a "qualified individual with a disability" is one "who, with or without reasonable modification to rules, policies, or

provide a mechanism for courts to protect prisoners' rights while also considering the needs of the correctional administration. Section IV.B maintains that greater judicial scrutiny need not cause either tremendous organizational disruption or large financial burdens for prisons. Instead, this Section provides evidence that prisons have adapted to handle the needs of disabled prisoners and counters the notion that a different standard of review will result in a large amount of damaging prisoner litigation.

A. *A Better Alternative to the* Turner *Standard*

In light of the difficulties that accompany the *Turner* standard, some courts have suggested that the ADA claims of prisoners should be treated no differently than those of non-prisoners, without addressing the reality of the claimant's incarceration.[114] Yet this approach would ignore the reality, often underscored by the Supreme Court, that prisons have special security needs and that due to the nature of prison life, inmates simply do not have the same freedoms as non-inmates do.[115]

A more appropriate solution would be for courts to incorporate the unique circumstances of prison life into their determinations under the Act. In particular, in deciding whether a reasonable modification exists in a particular dispute, a deliberation required by the ADA,[116] the court would be able to take into account concerns regarding security and order often raised by correctional administration.[117]

Unlike the deferential *Turner* standard, which only requires the prison to make the minimal and often theoretical showing that a re-

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practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

114. *See* Raines v. Florida, 987 F Supp. 1416, 1420 (N.D. Fla. 1997) (claiming that the ADA should not be interpreted with any "added judicial gloss").

115. *See* Turner v. Safley, 482 U.S. 78, 89 (1987); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

116. *See supra* note 113 and accompanying text.

117. *See, e.g., Amos I*, *supra* note 86, 126 F.3d at 600 (noting that in determining what type of scrutiny applies to violations of prisoners' statutory rights, courts will be outlining the meaning of key ADA terms such as reasonable accommodation and undue burden); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 483 (7th Cir. 1997) (arguing that when a prisoner makes a claim, "a prison might be able to show that there was no reasonable accommodation that would have enabled the plaintiff to participate in the programs and activities in question or that making the necessary accommodation would place an undue burden on the prison system"); Niece v. Fitzner, 941 F. Supp. 1497, 1510 (E.D. Mich. 1996) (arguing that the application of the ADA and the Rehabilitation Act would not bring about "horrors" and that a modification which would seriously jeopardize the security of other inmates or prison officials would not be reasonable).

striction serves a legitimate penological interest,[118] this type of review would be more rigorous in protecting the statutory rights of inmates under the Act. This is because the ADA's key provisions do not focus solely on the justifications offered by the prison managers, but instead first seek to ensure equal treatment among disabled and non-disabled inmates.[119] This "reasonable modification" approach therefore forces courts to look beyond the necessity of the restriction to the prison, which is *Turner*'s focus, and also seriously consider the depth of the inmate's physical or mental concerns.

Additionally, by allowing for a balancing of the claims of prisoners and prison administration, the ADA addresses the requirement of the *Turner* and *Procunier* Courts that the difficulties of correctional administration and security be considered when reviewing inmate litigation cases. In fact, the ADA not only allows for the consideration of the concerns of the public entity, required by cases such as *Turner* and *Procunier,* it *mandates* judicial consideration of interests particular to the prison system.[120] Therefore, the ADA would require that correctional facilities show that a particular modification sought by a disabled inmate is unreasonable in the context of prison life and therefore not required under the Act. Moreover, in providing a centralized set of regulations augmented by agency interpretations and other jurisprudence surrounding the Act, Congress has given courts the tools to make reasoned decisions regarding application of the ADA in prison facilities.[121] As a result, by addressing inmates' claims under the ADA, courts would be focusing on the nature of an inmate's disability while balancing those claims with the needs of correctional administration, as the Act requires.

At least one commentator has suggested that judges will have little difficulty in incorporating the ADA into the prison context because they can simply use guidelines written by the Department of Justice regarding the Act in addressing conflicts that arise in court.[122] While

118. *See supra* Section III.A.

119. In requiring a determination of whether a proposed "modification" is "reasonable," 42 U.S.C. § 12131(2), the ADA looks closely at the *nature of the disability* at issue and whether the prisoner's claim for relief can be accommodated by means that do not subject the prison to unworkable hardship.

120. *See Amos II, supra* note 30, 178 F.3d at 220; *Onishea I, supra* note 29, 126 F.3d at 1336. Moreover, it has been noted that the goals of prisons and those of statutes like the Rehabilitation Act need not be very different — a viewpoint that considers such legislation a benefit to the mission of prisons, not a hindrance. *See* Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988) ("[T]he Act's goals of independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete.").

121. *See supra* Parts II & III.

122. *See* Alexander, *supra* note 80, at 2280.

these guidelines will no doubt be determinative in some situations,[123] there will be others in which courts will have to make determinations regarding what constitutes a "reasonable modification" that cannot be so obviously addressed by such regulations.[124] In some situations then, courts will be the sole arbiters articulating solutions to prison problems — a concern of the *Turner* court.[125] Yet in clearly establishing that prisoners should have the right to bring ADA claims, the Supreme Court itself has indicated that to some degree courts will have to act as mediator in these disputes.[126] In these situations, due to the nature of statutory rights and the results of the use of the *Turner* test for disabled inmates, a court's role as mediator should be greater than that required by *Turner*.[127]

It might be argued that the use of this judicial approach would be different than the use of *Turner*, because courts would be equally deferential to prison administration regardless of the type of review that is used.[128] Some courts have identified this concern without clearly answering it — while arguing that using the "reasonable modification" test would not bring about "horrors" for prisons, they do not indicate whether such a standard would likely be more prisoner-protective than *Turner*.[129] While it is no doubt true that some judicial decisions using the ADA's text would not differ from outcomes that incorporated *Turner*'s standard, many others might differ significantly, due to the increased emphasis placed on the nature of the disability under the ADA.[130] Unlike those cases using the *Turner* standard, with this ap-

123. *See supra* notes 76-80 and accompanying text.

124. *See* Dalrymple-Blackburn, *supra* note 51, at 867 (noting that the ADA "invites judicial interpretation by requiring public entities to implement 'reasonable' modifications with little statutory guidance as to what constitutes an 'unreasonable' modification").

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

126. *See Yeskey II, supra* note 8, 118 S. Ct. 1952, 1955 (1998); *see also Amos II, supra* note 30, 178 F.3d at 222 ("Certainly there will be conflicts between the views of the DOJ and prison authorities with respect to what is a 'reasonable accommodation,' but it is and always has been the job of the courts to reconcile such conflicting interpretations by considering all the unique surrounding facts and circumstances and attempting to balance the interests at stake in making the ultimate statutory interpretation.").

127. *See supra* Parts II-III.

128. *See* Inmates of the Allegheny County Jail v. Wecht, No. 95-3402, 1996 WL 474106, at *11 n.15 (3d Cir. Aug. 22, 1996) *vacated en banc* Sept 20, 1996 (maintaining that although a court can best express a degree of deference to prison officials through the framework of the Act, that approach would very likely make little difference in practice from the use of the *Turner* test).

129. *See* Niece v. Fitzner, 941 F. Supp. 1497, 1510 (E.D. Mich. 1996); *see also* Love v. Westville Correctional Ctr., 103 F.3d 558, 561 (7th Cir. 1996).

130. *See supra* Section III.B; *see also Amos II, supra* note 30, 178 F.3d at 228 (Williams, J., dissenting) (arguing that by using the text of the Act instead of *Turner* to judge inmates' ADA claims, courts would likely be using a procedure akin to intermediate scrutiny, which

proach courts would immediately investigate the nature of the inmate's disability and the alleged infringement on his or her rights. Instead of dismissing a large number of claims based solely on the legitimacy of the prison's explanation,[131] courts would be taking an approach to review which incorporates the ADA's concerns along with the prison's — an approach that could only give prisoners a somewhat greater chance at a successful outcome.[132]

Moreover, even if a prisoner does not succeed in a claim where the court uses the text of the ADA itself in its review, he or she has already won a symbolic battle. While concrete relief may not arise from the lawsuit, the inmate has forced the judicial and correctional systems to confront his or her statutory claim head on, and at least consider the seriousness of the claimed disability. In contrast, the *Turner* test often allows courts to reject an inmate's ADA claim without ever considering the nature of the disability.[133]

B. *Why a Higher Level of Scrutiny Will Not Substantially Burden Prison Administration*

If this type of approach to inmates' ADA claims is adopted, there is evidence to suggest that prisons will be equipped to handle the requirements placed upon them by inmate litigation. Correctional institutions would be able to survive a change to the review of ADA claims in a manner that is slightly more inmate-friendly than the use of *Turner* due to (1) the requirements of the Act itself, (2) the efforts of prisons to adapt to the ADA, and (3) the creative techniques that such facilities are increasingly using to support disabled inmates.

Some critics have claimed that prison populations contain a much greater percentage of persons with an ADA-covered disability[134] than

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would require "searching judicial scrutiny of state law" (quoting City of Boerne v. Flores, 521 U.S. 507 (1997))).

131. *See supra* notes 81-86 and accompanying text.

132. *See* Harris v. Thigpen, 941 F.2d 1495, 1527 (11th Cir. 1991) (suggesting that the effect of incorporating the Rehabilitation Act into decisions regarding prisons would be to provide a "balance" between inmate and administration concerns that would sometimes result in "reasonable accommodations" being made for prisoners). Moreover, when making the argument that use of the ADA text would not prove an unreasonable burden for prisons, some courts use only examples of situations where modifications "seriously" jeopardize prison interests in describing the types of changes that those facilities would not be required to make. *See Onishea I*, *supra* note 29, 126 F.3d at 1336; *Niece*, 941 F. Supp. at 1510. This might indicate the courts' belief that situations where the modification is not insubstantial, but does not carry such dangerous prison concerns, might offer the opportunity for a plaintiff to be successful in court.

133. *See supra* Section III.B.

134. The ADA defines a "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A) (1994).

the population at large, implying that this large block of disabled prisoners would flood the courts with ADA-related litigation after the *Yeskey* decision.[135] Yet comprehensive studies delineating the extent of the disabled prison population have not been done,[136] and what constitutes a "disability" under the ADA is constantly being defined by courts — at times in ways that significantly narrow the class.[137] With regard to physical disabilities, there is at least some evidence that disabled prisoners are in fact not extraordinarily numerous.[138] Moreover, at least one observer has noted that there has not been a barrage of prisoner lawsuits since the ADA's passage.[139] On the other hand, inmates might be seen as more likely than non-inmates to claim a mental disability, which is covered by the ADA with some exceptions,[140]

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135. *See* Walters, *supra* note 11, at 8.

136. *See, e.g.*, Carnahan, *supra* note 16, at 292 ("The proportion of disabled inmates to the general population has not been specifically determined . . ."); Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS PUB. L. REV. 175, 176 (1994) ("There are few overall statistics as to the number of inmates with disabilities in our country's prisons.").

137. *See, e.g.*, Linda Greenhouse, *High Court Limits Who Is Protected by Disability Law*, N.Y. TIMES, June 23, 1999, at A1. For example, in a number of cases decided in June of 1999, the Supreme Court held that employees with remediable handicaps cannot claim discrimination under the Act. *See id.* The Court believed that it was unlikely that Congress intended for these individuals to be covered under the ADA, because the Act notes that 43 million Americans suffer from a disability, and if those with remediable handicaps had been considered "disabled" by Congress, that figure would have ballooned to nearly 160 million people. *See id.*

138. *See, e.g.*, Gardner, *supra* note 136, at 176-77 (reporting on a study that indicated that an average of 0.46% of inmates in the federal prison system had "ambulation problems," and that 0.46% of inmates used wheelchairs or had mobility problems); Maura K. Ammenheuser, *Prisons Accessible to Disabled*, HERALD (Rock Hill, SC), June 19, 1998, at B1 ("It's fairly rare to have a handicapped inmate, local jailers said. For example, the York County [SC] Detention Center has handled about four in the last year, Short said."); Richard Locker & Joan I. Duffy, *Most Area Prisons Accessible to Handicapped, Officials Say*, COMMERCIAL APPEAL (Memphis, TN), June 17, 1998, at B1 (reporting that "very few" of Arkansas's 10,692 inmates behind bars are handicapped, and that of Mississippi's 16,000 prisoners, the amount of disabled " 'would be a small percentage.' "); David G. Savage, *Disabilities Act Applies to Inmates, High Court Says*, L.A. TIMES, June 16, 1998, at A12 (reporting that of California's 157,000 inmates only about 1000, or 0.64% of the total prison population, were disabled).

139. *See* Asseo, *supra* note 11 (quoting Marjorie Rifkin of the American Civil Liberties Union's National Prison Project as saying that " '[t]here has not in fact been a flood of lawsuits' by inmates"). It is difficult to gauge the effect that the introduction of a more favorable standard of review of those claims would have on the filing of prisoner litigation.

140. The ADA definition for disability includes mental impairments. *See* 42 U.S.C. § 12102(2)(A) (1994). As with physical disabilities, the text of the Act provides no listing of the mental disabilities covered by the legislation. *See id.* The Department of Justice has concluded that the definition includes but is not limited to "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 C.F.R. § 35.104 (1994). No mention is made of personality traits and cultural disadvantages. *See id.*

due either to the nature of their incarceration or a perception that someone convicted of criminal acts is more likely to have some form of mental instability.

Moreover, even prior to *Yeskey*, it had also long been argued that if prisoners were allowed to bring ADA claims, prisons would face substantial and potentially crippling financial and administrative difficulties.[141] The Third Circuit believed that such a ruling might "place nearly every aspect of prison management into the court's hands for scrutiny" and make it not unfathomable that "courts will be used to reconstruct cells and prison space, to alter scheduling of inmate movements and assignments and to interfere with security procedures."[142] Judge Posner, writing for the Seventh Circuit, argued that such a ruling might require costly modifications of prison facilities, which could curtail educational, recreational, and rehabilitative programs and leave all prisoners worse off.[143] These potential ramifications have been described as having "serious implications"[144] and the potential to cause "chaos" for prisons.[145] Furthermore, since the Supreme Court decided *Yeskey*, some prisons have wondered if they can survive the implementation of ADA-required alterations.[146] These fears would presumably be exacerbated after a decision holding that those prisoner ADA claims would be subject to a more rigorous process of judicial review than that provided by *Turner*.

Yet there are many reasons why a reliance on the text of the Act need not create instability for prisons, even if such a standard would increase the total number of claims and the amount that are successful. First, the text of the ADA provides a number of hurdles for a claimant in order to achieve victory in a suit. Not only must the inmate prove that he or she has an ADA-covered disability, but the

141. Regardless of its truth, this is an argument that should be made to the legislature and not to the courts. If Congress allowed for the ADA to apply to prisons as *Yeskey* held, courts should not use these policy determinations to blunt the force of the statute. Congress has the ability to reformulate the law if these potentially dangerous consequences do arise. A court noted recently that Congress has to some degree already addressed the issue of frivolous prisoner litigation by enacting the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). *See Amos II, supra* note 30, 178 F.3d at 216 n.4.

142. *Yeskey I, supra* note 7, 118 F.3d 168, 174 (3d Cir. 1997).

143. *See* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 486 (7th Cir. 1997).

144. *Amos I, supra* note 86, 126 F.3d at 600 (quoting Torcasio v. Murray, 57 F.3d 1340, 1346 (4th Cir. 1995)).

145. *Amos I, supra* note 86, 126 F.3d at 591.

146. *See, e.g.*, Thomas R. O'Donnell & Kirsten Scharnberg, *Antiquated Lockups Burst with Inmates*, DES MOINES REG., Feb. 15, 1998 at 1 (claiming that partly because many Iowa prisons are not meeting ADA standards, along with other problems, the future of many of those institutions is in jeopardy); Jim Smiley, *Crumbling Jail to Force One County's Hand*, OMAHA WORLD-HERALD, Nov. 29, 1997, at 63 (reporting on a Nebraska prison that, due to its age, was not compliant with the ADA and most likely could not afford the $500 a day fee that other counties would charge to house its disabled prisoners).

modification that she proposes to the prison regulation must be "reasonable."[147] A strict statute of limitations applies to these claims as well, as an inmate must file a complaint within 180 days from the date of the alleged discrimination, or his or her suit will be barred.[148] Additionally, the Act does not require that all programs and services be made available to disabled persons, meaning that while prisoners must have access to programs, that access need not be located at the particular prison itself.[149]

Second, there is some evidence that prison compliance with the ADA need not be economically onerous if dealt with at an early stage.[150] Moreover, many prisons have reported that the *Yeskey* decision did not have a debilitating impact for them because they had anticipated that the ADA applied in the prison context,[151] and because a great deal of new prison construction in the past few years has been

147. *See supra* note 113.

148. *See* 28 C.F.R. § 35.170(b) (1998). *But see* Doe v. County of Milwaukee, 871 F. Supp. 1072, 1078 (E.D. Wis. 1995) (ruling that the time bar for filings was based on state law).

149. *See* Robbins, *supra* note 6, at 83 & n.176 (noting that while the ADA does not require modification at every location to permit access if access is available at alternative locations, it does demand that participants not be required to attend the special "disability-accessible" location). Lastly, even if a claimant were successful, it does not seem that the ADA allows for the success of punitive damage claims, which could open up far larger monetary liability for prisons. *See* Harrleson v. Elmore County, 859 F. Supp. 1465 (M.D. Ala. 1994); Robbins, *supra* note 6, at 104.

150. *See* Alan Appel, *Requirements and Rewards of the Americans with Disabilities Act*, CORRECTIONS TODAY, Apr. 1995, at 84, 85 (finding that in two new facilities built in compliance with the ADA, the additional cost of compliance was 3.6% and 0.83% of the total amount spent on construction); Darlene Van Sickle, *Avoiding Lawsuits: A Summary of ADA Provisions and Remedies*, CORRECTIONS TODAY, Apr. 1995, at 104, 106 ("Fears that complying with the ADA will break the bank are greatly exaggerated — at least at the prelitigation stage.").

151. *See, e.g.*, Jennifer Chorpening, *Impact of Ruling Modest*, DAYTON DAILY NEWS, June 17, 1998, at B4 (" 'Basically for us [the *Yeskey* decision] will not have much impact, since we've been dealing with the ADA as if it did apply anyway,' said John O'Malley, administrative assistant to the warden at Dayton Correctional. 'It never was clear that it didn't apply.' "); *Harkin*, *supra* note 66, at 3 (reporting that the director of the Iowa Department of Corrections said "many corrections officials nationally had been expecting Monday's [*Yeskey*] decision and were planning for it."); Locker & Duffy, *supra* note 138 ("Officials at Arkansas's Department of Correction also concluded that the disabilities act could apply to prisoners, and prepared handicapped accessible facilities."); Savage, *supra* note 138 ("The [*Yeskey*] decision comes as no surprise to California officials, who were ordered two years ago to comply with the federal law. 'We already are complying with the ADA and have made great strides,' said Kati Corsaut, a spokeswoman for the California Department of Corrections in Sacramento."); Walters, *supra* note 11 ("Dave Whitcomb, chief lawyer for Wisconsin's Department of Corrections, said the agency had been advised that the Americans with Disabilities Act applied to the state's prisons, so the ruling would not cause any major change. 'We assumed that law applied to us,' Whitcomb said, so the agency had formally been making special arrangements for disabled inmates on a case-by-case basis since 1991.").

ADA-compliant.[152] If a greater number of prisons are designed to address the needs of the disabled, the likelihood of a flood of litigation seems somewhat reduced.

Third, state governments, individual prison facilities, and the courts are increasingly implementing creative solutions that make caring for the needs of disabled prisoners less costly and less disruptive to prison administration, also reducing the possibility for ADA-related claims. For example, some states provide their courts with significant discretion regarding where to house disabled prisoners — allowing them to place inmates in newer facilities that meet their needs while older buildings are made ADA-compliant.[153] States have also begun to group prisoners with the same disability into one prison facility in an effort to provide assistance to them more easily as required by the ADA.[154] Other options which have been tested are "compassionate parole" structures providing for early release of disabled prisoners[155] and the transferring of disabled prisoners to appropriate medical facilities.[156] Additionally, the judicial system attempts to keep the disabled out of prison as much as possible, often by sympathetically citing the defendant's disability as a reason why no jail time should be imposed for an offense which would otherwise compel incarceration.[157]

As this Section demonstrates, there are a number of reasons not to expect that a more favorable standard of judicial review would result

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152. *See, e.g.*, Chorpening, *supra* note 151 ("Andrea Dean, spokeswoman for the Ohio Department of Rehabilitation and Correction, said all of Ohio's new prisons meet the act's guidelines . . ."); Christopher Elser, *Aging Behind Bars: Lengthy Jail Terms Have Left PA with Costly Problem of Caring for Elderly Inmates*, ALLENTOWN MORNING CALL, Aug. 9, 1998, at A1; Locker & Duffy, *supra* note 138 (quoting the director of corrections for Shelby County in East Memphis as saying, "'Any new construction is ADA-complaint' "); *Harkin, supra* note 66, at 3 (reporting that the director of the Iowa Department of Corrections said, " 'We have been designing every new facility (in Iowa) with the appropriate openings, handicapped parking and other improvements. In those facilities, we're pretty close to being up to speed' . . . ").

153. *See Harkin, supra* note 66.

154. *See* Elser, *supra* note 152. It has been noted, however, that this practice has the potential to raise Equal Protection claims if the caliber of the opportunities available in these institutions vary identifiably as opposed to other corrections facilities. *See* Robbins, *supra* note 6, at 108.

155. *See* Robbins, *supra* note 6, at 106. Yet the author recognizes that parole reform in this context often must face a host of obstacles, such as opposition from communities who pressure legislatures and prison officials to restrict parole opportunities. *See id.* at 106 n.320 (citing Lisa O'Neill, *Rapist Fails Mental Test, Won't Be Freed*, L.A. TIMES, Dec. 2, 1994, at 1).

156. *See* Robbins, *supra* note 6, at 107. The author further states that while the ADA would bar such transfer if it achieved little more than convenient segregation of prisoners requiring extensive treatment, such strategies could be beneficial because they would leave societal concerns for security undisturbed and not result in a prisoner's transfer into the community. *See id.* at 108.

157. *See id.* at 105-06.

in onerous economic and administrative burdens for prisons. These legislative realities and administrative strategies will help correctional officials guard against procedural chaos and more easily avoid the potential for a significant increase in prisoner claims, even if a more rigorous standard of review is implemented in ADA-related cases.[158]

CONCLUSION

There is ample evidence that the *Turner* standard should not be applied in all cases involving the review of prisoner litigation; it should not be used where there are persuasive reasons supporting the implementation of another mechanism to review such claims. The judicial history of the *Turner* standard itself, the flexibility of statutory rights generally, and the specificity that accompanies statutes such as the ADA, all lead to a conclusion that the *Turner* standard is not appropriate for the review of inmates' statutory suits under the ADA. Moreover, the results of using the *Turner* standard would preclude inmates from relief in all but the most horrible cases and divert attention from the claimants' disabilities. These consequences demonstrate that, courts should instead use the "reasonable modification" provision of the ADA in reviewing such claims. This result would, as mandated by the Supreme Court, provide disabled prisoners with an even-handed adjudication of their discrimination claims, while also respecting the legitimate security concerns of prison administration. It would ensure that Ronald Yeskey's victory truly had meaning for those Americans with disabilities who live in the state prison system.

158. The aftermath in Pennsylvania of the *Yeskey* decision itself serves as an instructive example of how some of the mitigating factors mentioned here can help protect the state from unmanageable consequences of decisions favorable to prisoners' ADA claims. In Pennsylvania, the state has made sure that the most recent prisons it has built comply with the ADA, *see* Elser, *supra* note 152, which should help mitigate the cost of future compliance with claims like Ronald Yeskey's. Pennsylvania had seven handicapped-accessible facilities in mid-1998, and new construction of such facilities was deemed not to be necessary. *See* Schatz, *supra* note 4. Additionally, the state has been trying novel ways to manage disabled prisoners' needs, by beginning to group prisoners with the same disability at specified institutions. *See* Elser, *supra* note 152. Additionally, another mitigating factor, which materialized in Pennsylvania after the *Yeskey* decision, is the ability of the state's citizens to seek some redress in the state legislature. Governor Tom Ridge signed a bill into law making it more difficult for prisoners to file lawsuits by, among other things, providing the courts with an expanded ability to dismiss those suits that a judge considers frivolous. *See* Schatz, *supra* note 4. As long as such legislation does not hinder prisoners from bringing valid ADA claims, it is another means that can be used by the state to ensure that prisoner litigation does not spiral out of control.