

**LOCKING THEM UP AND THROWING AWAY THEIR
CONSTITUTIONAL RIGHTS: THE COURT'S DECISION
IN *BEARD V. BANKS* DEPRIVED PRISONERS OF
FIRST AMENDMENT PROTECTIONS**

[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.¹

INTRODUCTION

As the old saying goes, “lock them up and throw away the key.” When analyzing prison regulations, the U.S. Supreme Court has largely deferred to prison officials’ judgment, holding that prison regulations are permissible if they are “reasonably related to legitimate penological interests.”² In *Beard v. Banks*, the Court gave great deference to prison officials when it upheld a prison restriction prohibiting access to newspapers, magazines, and personal photographs.³ The Court reasoned that the penological interest of inmate rehabilitation justified the restrictive regulation.⁴

Imprisonment does not, however, entirely strip prisoners of their constitutional rights.⁵ This Note examines the reasoning behind the Court’s decision to defer to prison officials in *Beard* and how the case may affect prisoners’ rights. While it might sometimes be wise for the Court to defer to prison officials to a degree, complete deference is improper—it cannot simply throw away the key. The regulation at issue in *Beard* was not reasonably related to a legitimate penological interest. Thus, it inappropriately deprived prisoners of their First Amendment rights.⁶

Part II briefly surveys previous cases in which the Court tackled issues concerning prisoners’ First Amendment rights.⁷ As Part II illus-

1. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

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

3. 126 S. Ct. 2572 (2006).

4. *Id.* at 2579–80.

5. *See Bell*, 441 U.S. at 545.

6. The First Amendment to the U.S. Constitution states the following: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.” U.S. CONST. amend. I.

7. *See infra* notes 13–117.

trates, the Court has become increasingly deferential to the judgment of prison officials.⁸ Part III provides the factual and procedural history of *Beard v. Banks*, as well as its plurality, concurring, and dissenting opinions.⁹ Part IV analyzes the Court’s failure to properly apply legal precedent.¹⁰ Additionally, it advocates the use of a more appropriate analytical framework for examining prison regulations that impinge upon constitutional rights.¹¹ Finally, Part V explores *Beard*’s potential impact upon prisons and prisoners,¹² arguing that it will serve as a justification for future abuses against prisoners by prison officials.

II. BACKGROUND

A host of U.S. Supreme Court cases have examined prison regulations concerning the constitutional rights of prisoners.¹³ With the exception of racial classifications, over the past three decades, when determining the constitutionality of prison regulations impinging upon prisoners’ constitutional rights, the Court has given increasing deference to the views of prison officials.¹⁴

8. *Compare* *Procunier v. Martinez*, 416 U.S. 396 (1974) (holding that a prison regulation censoring inmate mail was too broad and was unnecessary to further an important government interest), *with* *Turner v. Safley*, 482 U.S. 78 (1987) (holding that a prison’s correspondence regulation was reasonably related to a legitimate penological interest, but that a marriage restriction was not), *and* *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (upholding a regulation restricting prisoners from receiving dangerous publications). However, the Court did not extend this level of deference when analyzing a prison regulation creating racial classifications. *Johnson v. California*, 543 U.S. 499 (2005).

9. *See infra* notes 118–220 and accompanying text.

10. *See infra* notes 221–313 and accompanying text.

11. *See infra* notes 295–313 and accompanying text.

12. *See infra* notes 314–333 and accompanying text.

13. *See generally* *Johnson*, 543 U.S. 499 (determining that strict scrutiny analysis was necessary for prison rules based on racial classifications); *see also* *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003) (finding visitation restrictions valid); *Shaw v. Murphy*, 532 U.S. 223, 225 (2001) (concluding that prisoners did not have a First Amendment right to give other prisoners legal advice); *Thornburgh*, 490 U.S. at 404–05 (upholding a rule that restricted prisoner access to publications that could cause inmate violence); *Turner*, 482 U.S. at 91 (holding that a regulation restricting marriage was invalid, but upholding a rule that prohibited correspondence between inmates of different institutions); *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (upholding a rule prohibiting contact visitation); *Bell v. Wolfish*, 441 U.S. 520, 551 (1979) (“[R]estriction on receipt of hardback books does not infringe the First Amendment rights of . . . inmates”); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 121 (1977) (finding that prison regulations hampering the operation of a prisoner labor union were reasonable); *Pell v. Procunier*, 417 U.S. 817, 819, 828 (1974) (upholding a prison regulation that restricted media interviews with prisoners); *Martinez*, 416 U.S. at 398 (finding a restriction of inmate correspondence to be invalid).

14. *See supra* note 8.

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A. *When Determining the Validity of Prison Regulations that Impinge upon Constitutional Rights, the Court Largely Defers to Prison Officials*

Prisoners do not enjoy the full rights of free citizens. Yet “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”¹⁵ Thus, the Court has attempted, and at times struggled, to establish the manner in which prison regulations restricting constitutional rights should be analyzed.

1. *Procunier v. Martinez*

In 1974, in *Procunier v. Martinez*, the Court considered the appropriate standard of review for prison regulations restricting prisoners’ exercise of free speech.¹⁶ This was the Court’s “first significant decision regarding First Amendment rights in the prison context.”¹⁷ In *Martinez*, the prison regulation at issue allowed inmate mail to be censored.¹⁸ Specifically, inmates could not “unduly complain” or “magnify grievances” in their letters.¹⁹ Additionally, inmate writing was defined as “contraband” if it expressed “inflammatory political, racial, religious or other views or beliefs.”²⁰ Finally, prisoners could not send or receive letters that referred to criminal activity or were “lewd, obscene, or defamatory” or “otherwise inappropriate.”²¹ Prison employees examined all mail, incoming and outgoing, for infringement of these rules.²² In its opinion, the Court affirmed the district court ruling, which held that these regulations violated the First Amendment, because the regulations “authorized censorship of protected expression without adequate justification.”²³ While recognizing that courts should often give deference to the judgment of prison officials, the Court also asserted that, “[w]hen a prison regulation or practice of-

15. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

16. 416 U.S. at 406.

17. *Thornburgh*, 490 U.S. at 408. While this was the first major case in this area, in *Martinez* the Court acknowledged that federal courts traditionally used a hands-off approach when faced with prison problems. *Martinez*, 416 U.S. at 404.

18. 416 U.S. at 399.

19. *Id.*

20. *Id.*

21. *Id.* at 399–400.

22. *Id.* at 400. If a violation was discovered, the prison employee could do one of the following: return the letter to the inmate; report the violation, which could result in the temporary loss of the prisoner’s mail privileges; or put the letter in the prisoner’s file, so it could be referenced when considering the prisoner’s housing, employment, or parole eligibility. *Id.*

23. *Id.* at 400–15.

fends a fundamental constitutional guarantee,” courts must fulfill “their duty to protect constitutional rights.”²⁴

As a preliminary matter, the *Martinez* Court indicated that the regulation also implicated the First Amendment rights of free citizens who correspond with prisoners through letters.²⁵ Consequently, the Court refused “any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners.”²⁶

The Court then conducted a two-part analysis to determine the constitutionality of the censorship. First, the regulation “must further an important or substantial governmental interest unrelated to the suppression of expression.”²⁷ The Court found that the prison officials failed to demonstrate that the restrictions were necessary to further a governmental interest.²⁸ Also, when enforcing these regulations, there was a risk that the prison employees would “apply their own personal prejudices and opinions as standards for prisoner mail censorship.”²⁹ Second, First Amendment rights cannot be limited more “than is necessary or essential to the protection of the particular governmental interest involved.”³⁰ The Court found that the regulations were too broad, because they encompassed writings that were not essential to the interest in prison safety and security.³¹ In sum, the Court found that the First Amendment interest in uncensored communication “is protected from arbitrary government invasion.”³²

2. *Bell v. Wolfish*

Five years after *Martinez*, the Court decided *Bell v. Wolfish*.³³ In *Bell*, the Metropolitan Correctional Center, which primarily housed pretrial detainees,³⁴ prohibited inmates from receiving hardcover books unless they were mailed directly from a publisher or book-

24. *Martinez*, 416 U.S. at 405–06.

25. *Id.* at 409. For example, “[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him.” *Id.*

26. *Id.*

27. *Id.* at 413. In this context, substantial governmental interests include security, order, and rehabilitation. *Id.*

28. *Id.* at 415.

29. *Id.*

30. *Martinez*, 416 U.S. at 413.

31. *Id.* at 416.

32. *Id.* at 418.

33. 441 U.S. 520 (1979).

34. *Id.* at 523.

store.³⁵ The warden justified the rule by stating that hardcover books created a “serious” security concern and each book would have to be thoroughly inspected for hidden contraband.³⁶

The *Bell* Court found that this regulation was constitutional.³⁷ As a preliminary matter, the Court outlined four principles regarding prisoner rights. First, inmates do not surrender all of their constitutional rights as a result of their status as prisoners.³⁸ Second, even though prisoners retain constitutional rights, these rights may be subject to limitations that correspond with the “legitimate goals and policies” of prisons.³⁹ Third, the “legitimate goals and policies” that might justify limiting prisoners’ rights include prison safety and order.⁴⁰ Fourth, courts should give wide deference to prison officials unless it is apparent that the regulations are an exaggerated response to the prison’s need for internal safety and order.⁴¹

Further, the *Bell* Court reasoned that the regulation did not violate the First Amendment, because it was a “rational response” to “an obvious security problem.”⁴² The Court emphasized three additional factors that also influenced its decision.⁴³ First, the regulation was neutral, because it applied to all books regardless of content.⁴⁴ Second, the prisoners had “alternative means” to acquire books and reading materials.⁴⁵ Third, because the inmates were mainly pretrial detainees, they were only subject to the rule for a maximum of sixty

35. *Id.* at 550.

36. *Id.* at 549. The warden explained that “prison officials would have to remove the covers of hardback books and to leaf through every page of all books and magazines to ensure that drugs, money, weapons, or other contraband were not secreted in the material.” *Id.* On the other hand, the warden noted that “there is relatively little risk that material received directly from a publisher or book club would contain contraband, and therefore, the security problems are significantly reduced without a drastic strain on resources.” *Id.*

37. *Id.* at 549–50. The appellate court found the regulation to be unconstitutional, stating that “it is obvious that many books sought by inmates are available neither in the library nor directly from a publisher. And it is inconceivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles.” *Wolfish v. Levi*, 573 F.2d 118, 130 (2d Cir. 1978), *rev’d sub nom.* *Bell v. Wolfish*, 441 U.S. 520 (1979).

38. *Bell*, 441 U.S. at 545.

39. *Id.* at 546.

40. *Id.*

41. *Id.* at 547–48.

42. *Id.* at 550.

43. *Id.* at 551.

44. *Bell*, 441 U.S. at 551.

45. *Id.* While the appellate court portrayed the inmate’s book selection as limited to mere “selected titles,” the Court noted that inmates could receive paperback books and magazines from any source, they could use the institution’s library which contained 3,000 hardcover books and 5,000 paperback books, or they could buy various newspapers and magazines. *Id.* at 552 n.33.

days.⁴⁶ In light of these considerations, the Court determined that the regulation was reasonable.⁴⁷

3. *Turner v. Safley*

Next, in 1987, in *Turner v. Safley*,⁴⁸ the Court established that a differential standard of scrutiny is appropriate when determining the constitutionality of prison regulations infringing upon prisoners' constitutional rights.⁴⁹ Two regulations were at issue in *Turner*.⁵⁰ First, the prison prohibited correspondence between inmates housed in different prisons.⁵¹ The second regulation permitted inmates to marry only when the prison superintendent had "compelling reasons" to grant permission to marry.⁵² The Court held that the correspondence regulation was constitutional, but the marriage restriction was not.⁵³

In making this determination, the Court first established the standard of review.⁵⁴ It reasoned that *Martinez* failed to establish a level of review, because the case focused on the prison regulation's consequential restriction on the rights of non-prisoners.⁵⁵ The Court noted that *Bell* had already used a reasonableness standard of review, but, to avoid confusion, it would now clarify that standard.⁵⁶ Thus, the Court determined that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁵⁷

46. *Id.* at 552.

47. *Id.*

48. 482 U.S. 78 (1987).

49. *Id.* at 81.

50. *Id.*

51. *Id.* However, the rule provided an exception for correspondence with immediate family members who were also incarcerated and for communication involving legal matters. *Id.*

52. *Id.* at 82. "Compelling reasons" typically included only pregnancy or birth of a child out of wedlock. *Id.*

53. *Id.* at 91.

54. *Turner*, 482 U.S. at 89.

55. *Id.* at 85 (citing *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974)).

56. The Court also noted three other post-*Martinez* cases that used a rational basis standard when reviewing prison regulations. *Id.* at 86-88. First, in *Pell v. Procunier*, the Court upheld a regulation that restricted the media from interviewing individual prisoners. 417 U.S. 817, 819, 835 (1974). Second, in *Jones v. North Carolina Prisoners' Union*, the Court rejected a challenge to a regulation restricting the activities of a prison labor union. 433 U.S. 119, 121 (1977). Finally, in *Block v. Rutherford*, the Court upheld a restriction that banned contact visits. 468 U.S. 576, 586-88 (1984).

57. *Turner*, 482 U.S. at 89. The Court explained that using a strict scrutiny analysis would hinder a prison official's "ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.*

Further, the *Turner* Court delineated four factors for determining the reasonableness of prison rules.⁵⁸ First, “there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it.”⁵⁹ This connection cannot be “so remote as to render the policy arbitrary or irrational.”⁶⁰ Additionally, when a regulation implicates First Amendment rights, it should be “operated in a neutral fashion, without regard to the content of the expression.”⁶¹ The second factor “is whether there are alternative means of exercising the right that remain open to prison inmates.”⁶² Third, courts should give significant deference to prison officials where accommodating the constitutional right would have a negative “ripple effect” on other inmates and prison employees.⁶³ Fourth, “easy alternatives” that could accommodate prisoners’ rights “may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to the prison concerns.”⁶⁴

In *Turner*, the Court found that the correspondence regulation was reasonably related to the legitimate penological interest in prison safety.⁶⁵ Otherwise, inmates could communicate escape plans, violent acts, or other criminal activities.⁶⁶ This regulation addressed the legitimate concern of inmate safety. Additionally, it only prohibited correspondence with other inmates, not with free citizens. Finally, there were no easy alternatives to the restriction that could address these safety concerns.⁶⁷ Thus, in applying the four-part test, the regulation was facially valid.⁶⁸

In contrast, the marriage regulation did not meet the reasonableness standard.⁶⁹ The fundamental right to marry is not inconsistent with the status of prisoners.⁷⁰ Moreover, the regulation was not rea-

58. *Id.* at 89–90.

59. *Id.* at 89 (internal quotation marks omitted).

60. *Id.* at 89–90.

61. *Id.* at 90.

62. *Id.*

63. *Turner*, 482 U.S. at 90.

64. *Id.*

65. *Id.* at 91.

66. *Id.*

67. *Id.* at 91–92. The only alternative, having prison employees inspect each piece of correspondence, would impose too large of a burden. *Id.*

68. *Id.* at 99.

69. *Turner*, 482 U.S. at 97.

70. *Id.* at 95–96. The Court emphasized four important attributes of marriage that retain relevance for inmates: marriage is an expression “of emotional support and public commitment”; marriage may have religious significance; most marriages will continue when the inmate is released or paroled; and marriage “often is a precondition to the receipt of government benefits.” *Id.*

sonably related to safety concerns.⁷¹ Prison officials were concerned that allowing marriage could create “love triangles” involving multiple prisoners, causing inmate rivalries and violence.⁷² However, this was not a legitimate justification, because love triangles could also develop within nonmarital relationships.⁷³ Additionally, prison officials argued that female prisoners should be rehabilitated by developing self-reliance skills rather than being dependent upon and marrying males, but this was not legitimate, because it was paternalistic and overly broad.⁷⁴ Thus, the marriage regulation failed the Court’s deferential, reasonableness test.⁷⁵

4. Thornburgh v. Abbott

The Court has since applied *Turner*’s four-part test when determining the constitutionality of prison regulations infringing upon constitutional rights.⁷⁶ *Thornburgh v. Abbott* involved a challenge to a prison regulation allowing prison officials to prevent inmates from obtaining any mailed publications deemed “detrimental to institutional security.”⁷⁷ The prison officials examined each individual issue of the publications to determine whether they would be harmful to security.⁷⁸ Officials were not permitted to deny a publication to a prisoner “solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant.”⁷⁹ Additionally, the warden was required to give notice to the prisoner and

71. *Id.* at 97.

72. *Id.* at 97–98.

73. *Id.* at 98.

74. *Id.* at 97–99. The prison officials argued “that female prisoners often were subject to abuse at home or were overly dependent on male figures, and that this dependence or abuse was connected to the crimes they had committed.” *Id.* at 97.

75. *Turner*, 482 U.S. at 99.

76. *See, e.g.*, *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

77. 490 U.S. at 403.

78. *Id.* at 405.

79. *Id.* (quoting 28 C.F.R. § 540.71(b) (1988)). A prison warden could, however, prevent an inmate from receiving a publication for the following reasons:

- (1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;
- (2) It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;
- (3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;
- (4) It is written in code;
- (5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;
- (6) It encourages or instructs in the commission of criminal activity;

the sender of the publication, indicating why the prison denied the prisoner access to the publication.⁸⁰

The Court determined that the *Turner* test should be applied.⁸¹ In doing so, the Court overruled *Martinez*,⁸² which used a higher standard of review regarding a regulation pertaining to outgoing correspondence with free citizens.⁸³ The Court found that the regulation at issue in *Thornburgh* met *Turner*'s four-part reasonableness standard.⁸⁴ First, the Court reasoned that the regulation was rationally related to a legitimate and neutral government objective.⁸⁵ For example, some publications, once circulated among the prisoners, could potentially induce disruptive behavior.⁸⁶ The rule was also neutral, because officials "draw distinctions between publications solely on the basis of their potential implications for prison security."⁸⁷ Thus, the rule rationally prohibited publications that the warden determined would create an "intolerable risk of disorder" within the prison.⁸⁸ Second, the regulation allowed sufficient alternative means for prisoners to exercise their First Amendment rights at issue, because they were allowed to receive a wide array of publications.⁸⁹ Third, allowing select publications into the prison could negatively affect the safety and se-

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

Id. at 405 n.5.

80. *Id.* at 406. The inmate was also permitted to appeal the warden's decision to reject the publication. *Id.*

81. *Id.* at 419.

82. *Id.* at 413–14.

83. *Procunier v. Martinez*, 416 U.S. 396, 415–17 (1974). The Court could have upheld *Martinez*, while still applying the rational basis test to regulations concerning incoming correspondence. *Thornburgh*, 490 U.S. at 413–14. However, the Court stated that it would rather overrule *Martinez* than apply different standards of review for incoming and outgoing mail. *Id.* The Court explained as follows:

[W]e recognize that it might have been possible to apply a reasonableness standard to all incoming materials without overruling *Martinez*: we instead could have made clear that *Martinez* does not uniformly require the application of a "least restrictive alternative" analysis. We choose not to go that route, however, for we prefer the express flexibility of the *Turner* reasonableness standard. We adopt the *Turner* standard in this case with confidence that, as petitioners here have asserted, "a reasonableness standard is not toothless."

Id.

84. *Thornburgh*, 490 U.S. at 419.

85. *Id.* at 414.

86. *Id.* at 412. For example, "prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly." *Id.*

87. *Id.* at 415.

88. *Id.* at 417.

89. *Id.* at 418.

curity of other inmates and prison employees.⁹⁰ Finally, on its face, the regulation was “not an exaggerated response” to the safety concern.⁹¹ Thus, the Court found that the prison regulation was valid.⁹²

5. *Overton v. Bazzetta*

In 2003, the Court again applied *Turner*'s reasonableness standard to analyze a prison regulation.⁹³ *Overton v. Bazzetta* involved a challenge to a prison's visitation policies.⁹⁴ Due to limited resources, the prison had trouble adequately supervising the prisoners' visitation sessions, and, consequently, officials encountered difficulty controlling drug smuggling into the prison.⁹⁵ In response, the prison forbade inmates with multiple substance abuse infractions from having visitors other than clergy members and attorneys, and it required these inmates to wait two years before reapplying for full visitation privileges.⁹⁶

The Court held that the regulation was valid, because it met *Turner*'s four-part test.⁹⁷ First, the restriction was rationally related to the legitimate goal of “detering the use of drugs and alcohol within the prisons,” particularly for those inmates “who have few other privileges to lose.”⁹⁸ However, the Court noted that, had this been “a *de facto* permanent ban on all visitation for certain inmates, [it] might reach a different conclusion in a challenge to a particular application of the regulation.”⁹⁹ Second, the prisoners had alternative means of communicating with prohibited visitors.¹⁰⁰ For example, the inmates

90. *Thornburgh*, 490 U.S. at 418. In other words, the regulation prevents the “ripple effect.” *Id.*; accord *Turner*, 482 U.S. at 90.

91. *Thornburgh*, 490 U.S. at 418 (internal quotation marks omitted). The prison officials also noted that simply tearing out the objectionable portions of a publication before giving it to an inmate could potentially cause even more discontent. *Id.* The Court responded that “when prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact select was not an ‘exaggerated response’ under *Turner*.” *Id.* at 419.

92. *Id.* at 419.

93. *Overton v. Bazzetta*, 539 U.S. 126 (2003).

94. *Id.* at 128.

95. *Id.* at 129.

96. *Id.* at 130. Additionally, the prison officials sought to reduce the number of visitors by limiting visitation for all prisoners to immediate family, ten individuals designated by the prisoner, and clergy members and attorneys. *Id.* at 129. They also prohibited former inmates, other than immediate family members, and minors, other than a prisoner's child, stepchild, grandchild, or sibling, from visiting. *Id.* at 129–30.

97. *Id.* at 131.

98. *Id.* at 134.

99. *Overton*, 539 U.S. at 134.

100. *Id.* at 135.

could write letters and make telephone calls.¹⁰¹ The Court observed that “[a]lternatives to visitation need not be ideal, however; they need only be available.”¹⁰² Third, allowing inmates with substance abuse violations to have full visitation privileges would impact other inmates and prison employees, because it would reduce prison officials’ ability to “protect all who are inside a prison’s walls.”¹⁰³ Fourth, reducing the severity of the visitation restriction for substance abuse violators would not be a ready alternative, because it would undermine the regulation’s goals.¹⁰⁴ Thus, the Court upheld the regulation.¹⁰⁵

B. The Court Made a Narrow Exception to the Typical Turner Analysis for Regulations Involving Racial Classifications

Although the Court seemed to consistently apply the *Turner* test when reviewing the validity of prison regulations, it refused to extend its application to prison policies involving racial classifications.¹⁰⁶ In *Johnson v. California*, an unwritten prison policy provided for the racial segregation of prisoners.¹⁰⁷ All new and transferred inmates within the California Department of Corrections were housed with an inmate of the same race while awaiting permanent placement.¹⁰⁸ Prison officials stressed that this housing practice was “necessary to prevent violence caused by gangs.”¹⁰⁹ In evaluating this policy, the Ninth Circuit applied the *Turner* test and concluded that the practice was valid.¹¹⁰ The U.S. Supreme Court reversed, holding that the policy must be reviewed under strict scrutiny.¹¹¹

The Court reasoned that strict scrutiny must be applied to racial classifications,¹¹² even where the policy affected all races equally.¹¹³ In fact, the Court noted that this type of policy could exacerbate racial bias and violence.¹¹⁴ Allowing anything but a strict scrutiny analysis

101. *Id.*

102. *Id.* “Were it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulations were unreasonable.” *Id.*

103. *Id.*

104. *Id.* at 136.

105. *Overton*, 539 U.S. at 131.

106. *Johnson v. California*, 543 U.S. 499 (2005).

107. *Id.* at 502.

108. *Id.* This preliminary housing could last up to sixty days. *Id.*

109. *Id.* Prison officials named five major gangs within the California Department of Corrections: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. *Id.*

110. *Johnson v. California*, 321 F.3d 791,799, 807 (9th Cir. 2003), *rev’d*, 543 U.S. 499 (2005).

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

112. *Id.* at 505.

113. *Id.* at 506; *see Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

114. *Johnson*, 543 U.S. at 507.

“would undermine our ‘unceasing efforts to eradicate racial prejudice from our criminal justice system.’”¹¹⁵ Thus, the *Turner* standard was “too lenient” and “would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal.”¹¹⁶ Therefore, the Court rejected the *Turner* standard in the narrow context of racially based regulations.¹¹⁷ In short, with the exception of racial classifications, the Court has increasingly deferred to prison officials when determining the constitutionality of prison regulations.

III. SUBJECT OPINION: *BEARD V. BANKS*

In *Beard v. Banks*, the Court examined yet another prison regulation.¹¹⁸ A divided Court used the *Turner* factors to uphold a prison regulation prohibiting inmate access to newspapers, magazines, and personal photographs.¹¹⁹ Justices Roberts, Kennedy, and Souter joined Justice Breyer’s plurality opinion.¹²⁰ Justice Scalia joined Justice Thomas’s concurring opinion.¹²¹ Justices Stevens and Ginsburg both dissented.¹²²

A. *Factual History*

Pennsylvania’s Department of Corrections operates special units for the state’s most difficult prisoners.¹²³ Pennsylvania’s Long Term Segregation Unit (LTSU) is the most restrictive unit and contains the “most incorrigible, recalcitrant inmates.”¹²⁴ Approximately forty pris-

115. *Id.* at 512 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987)).

116. *Id.* at 513.

117. *Id.*

118. 126 S. Ct. 2572 (2006).

119. *Id.* at 2576.

120. *Id.* at 2575.

121. *Id.* at 2582.

122. *Id.* at 2585, 2591. Eight Justices participated in the consideration of this case; Justice Alito did not take part. *Id.* at 2575.

123. *Id.* at 2576.

124. *Beard*, 126 S. Ct. at 2576. Prisoners in the LTSU included those who exhibited violent and assaultive behavior toward other prisoners and prison employees, participated in prison gangs, acted as sexual predators, or attempted escape from prison. Specifically, all prisoners in the LTSU had to meet at least one of the following conditions: failure to complete the Special Management Unit program; exhibiting “assaultive behavior with the intent to cause death or serious bodily injury”; injuring other prisoners or prison staff; “engaging in facility disturbances(s)”; belonging to a prison gang; partaking in criminal activity; possessing weapons or “implements of escape”; having “a history of ‘serious’ escape attempts”; “exerting negative influence in facility activities”; or being a “sexual predator.” *Id.*

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oners live within one of the LTSU's two levels.¹²⁵ These prisoners are generally locked in their cells for twenty-three hours each day.¹²⁶ Each LTSU prisoner spends at least ninety days in level 2, the most restrictive level.¹²⁷ Then, "depending on an inmate's behavior," he can potentially "graduate" to level 1, which is less restrictive.¹²⁸ But, in reality, most do not make the transition.¹²⁹ Within level 2, prisoners "have no access to the commissary, they may have only one visitor per month (an immediate family member), and they are not allowed phone calls except in emergencies."¹³⁰

At issue in *Beard* was a restriction prohibiting LTSU level 2 inmates "access to newspapers, magazines, or personal photographs."¹³¹ Level 2 prisoners are the only inmates in Pennsylvania subject to this restriction.¹³² However, level 2 inmates are allowed to have "legal and personal correspondence, religious and legal materials, two library books, and writing paper."¹³³ If a level 2 inmate graduates to level 1, he is then permitted to have one newspaper and five magazines.¹³⁴

B. Procedural History

Ronald Banks, on behalf of himself and other inmates housed in LTSU's level 2, filed an action against Jeffrey Beard, the Secretary of Pennsylvania's Department of Corrections ("Secretary"), in federal court.¹³⁵ Banks alleged that the prison regulation prohibiting level 2 inmates from having access to newspapers, magazines, and personal photographs violated the First Amendment, because the rule had "no reasonable relation to any legitimate penological objective."¹³⁶ The district court granted the Secretary's motion for summary judgment.¹³⁷ The Third Circuit Court of Appeals reversed the district court, holding that the restriction "cannot be supported as a matter of

125. *Id.*

126. *Id.* at 2576.

127. *Id.*

128. *Id.* at 2575.

129. *Id.*

130. *Beard*, 126 S. Ct. at 2576.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* However, the photograph restriction applies to both levels 2 and 1 of the LTSU. *Id.* at 2576–77.

135. *Id.* at 2577.

136. *Beard*, 126 S. Ct. at 2577.

137. *Id.*

law by the record in this case.”¹³⁸ The U.S. Supreme Court granted certiorari.¹³⁹

C. Justice Breyer’s Plurality Opinion

The Court reversed the Third Circuit’s decision and held that the Secretary provided sufficient support for the prison regulation.¹⁴⁰ It acknowledged that “imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment.”¹⁴¹ However, it also stated that “the Constitution sometimes permits greater restriction of such rights in prison than it would allow elsewhere.”¹⁴² As a result, the Court found that it must give “substantial deference to the professional judgment of prison administrators”¹⁴³ and should uphold restrictive regulations that are “reasonably related to legitimate penological interests.”¹⁴⁴

In support of his motion for summary judgment, the Secretary offered three “penological rationales” for the prison policy:

- (1) to “motivat[e]” better “behavior” on the part of these “particularly difficult prisoners,” by providing them with an incentive to move to level 1, or out of the LTSU altogether, and to “discourage backsliding” on the part of level 1 inmates;
- (2) to minimize the amount of property controlled by the prisoners, on the theory that the “less property these high maintenance, high supervision, obdurate troublemakers have, the easier it is for . . . correctional officer[s] to detect concealed contraband [and] to provide security”; and
- (3) to diminish the amount of material (in particular newspapers and magazines) that prisoners might use as weapons of attack in the form of “‘spears’” or “‘blow guns,’” or that they could employ “as tools to catapult feces at the guards without the necessity of soiling one’s own hands,” or use “as tinder for cell fires.”¹⁴⁵

The Court found that the first rationale, improving inmate behavior, alone justified the prison restriction and satisfied the *Turner* test.¹⁴⁶ The Court summarized *Turner*’s factors as follows: (1) whether there is a “‘valid, rational connection’ between the prison regulation and

138. *Id.* (quoting *Banks v. Beard*, 399 F.3d 134, 148 (3d Cir. 2005)). Specifically, the Third Circuit found that the regulation failed *Turner*’s four-part test. *Banks*, 399 F.3d at 148.

139. *Beard*, 126 S. Ct. at 2577.

140. *Id.* at 2582.

141. *Id.* at 2577.

142. *Id.* at 2577–78.

143. *Id.* at 2578 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

144. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 87 (1987)).

145. *Beard*, 126 S. Ct. at 2579.

146. *Id.*

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) what type of impact the “accommodation of the asserted constitutional right” will have “on guards and other inmates, and on the allocation of prison resources generally”; and (4) whether there are “‘ready alternatives’ for furthering the governmental interest.”¹⁴⁷

As for *Turner*’s first factor, the Court found that the restriction was logically connected to the legitimate penological objective of improving inmate behavior, because the restriction provided an incentive for the inmates to improve their behavior in order to regain their privileges.¹⁴⁸ Regarding the second factor, the Court acknowledged that there were no other means for level 2 inmates to access newspapers, magazines, or photographs.¹⁴⁹ Although the prisoners would be able to regain this right after graduating to level 1, the Court admitted that, in “approximately 2½ years after the LTSU opened, about 25 percent of those confined to level 2 did graduate to level 1 or out of the LTSU altogether.”¹⁵⁰ However, the Court justified this circumstance by explaining that the lack of alternative means is “‘some evidence that the regulations [a]re unreasonable,’ but is not ‘conclusive’ of the reasonableness of the Policy.”¹⁵¹

Furthermore, the Court found that the impact of accommodating the right, as addressed in *Turner*’s third factor, would be “negative,” because, if the rule results in improved behavior, the absence of the rule would cause “worse behavior.”¹⁵² Finally, concerning the fourth factor, there was no “ready alternative” to accommodate the right without jeopardizing the penological interest of providing an incentive for improved behavior.¹⁵³

In light of these factors, the Court found that the restriction was reasonable.¹⁵⁴ In support of its decision, the Court noted that, in *Overton*, it had held that withholding privileges “is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.”¹⁵⁵ Here, as in *Overton*, the prison offi-

147. *Id.* at 2578 (quoting *Turner*, 482 U.S. at 89–90).

148. *Id.* at 2579.

149. *Id.*

150. *Id.*

151. *Beard*, 126 S. Ct. at 2580 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003)).

152. *Id.*

153. *Id.*

154. *Id.* at 2580.

155. *Id.* (quoting *Overton*, 539 U.S. at 134).

cials used their professional judgment to determine that the restriction would help to induce better inmate behavior.¹⁵⁶

Banks argued that the regulation was “unreasonable as a matter of law,” because it did not provide a significant incentive for level 2 inmates to improve behavior.¹⁵⁷ Banks supported his assertion with various lower court decisions finding that “increased contact with the world generally favors rehabilitation.”¹⁵⁸ The Court rejected his argument, distinguishing the cases upon which he relied, because they did not deal with particularly difficult prisoners, such as those in level 2.¹⁵⁹

Finally, the Court stated that the Ninth Circuit gave “too little deference to the judgment of prison officials.”¹⁶⁰ However, the Court added a caveat: “we do not suggest that the deference owed to prison authorities makes it impossible for prisoners or others attacking a prison policy like the present one ever to succeed or to survive summary judgment.”¹⁶¹ In other words, the relationship between a prison regulation and a penological objective cannot merely be a “formalistic logical connection.”¹⁶² The Court noted that, if the regulation had been a “*de facto* permanent ban,” it may have reached a “different conclusion.”¹⁶³

D. Justice Thomas's Concurrence

In his concurrence, Justice Thomas asserted that the regulation should not have been analyzed under the *Turner* factors.¹⁶⁴ Rather, he concluded that the rule was constitutional under the approach that he outlined in his *Overton* concurrence.¹⁶⁵ Justice Thomas criticized

156. *Id.* at 2581.

157. *Beard*, 126 S. Ct. at 2581. Banks argued that the regulation would not be an incentive, “given the history of incorrigibility of the inmates concerned.” *Id.*

158. *Id.* For example, Banks pointed to *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir. 1985); *Bieregu v. Reno*, 59 F.3d 1445 (3d Cir. 1995); and *Knecht v. Collins*, 903 F. Supp. 1193 (S.D. Ohio 1995).

159. *Beard*, 126 S. Ct. at 2581.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 2582.

164. *Id.* (Thomas, J., concurring).

165. *Beard*, 126 S. Ct. at 2582 (Thomas, J., concurring). Justice Scalia also joined Justice Thomas's concurrence in *Overton*. See *Overton*, 539 U.S. at 138 (Thomas, J., concurring). Justice Thomas stated that, contrary to the presumptions in *Turner*, the Constitution does not contain an “implicit definition of incarceration.” *Beard*, 126 S. Ct. 2582 (Thomas, J., concurring) (quoting *Overton*, 539 U.S. at 139). Rather, “[s]tates are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment.*” *Id.* at 2582–83 (emphasis in original) (quoting *Overton*, 539 U.S. at 139). Thus, because states have the power to determine the conditions of imprisonment, states may also decide that a punishment can include the

the shortcomings of the *Turner* test.¹⁶⁶ He stressed that, even if a regulation is related to a legitimate penological interest, the *Turner* test is inappropriate when “applied to prison regulations that seek to modify inmate behavior through privilege deprivation.”¹⁶⁷ By definition, prison regulations that remove privileges in an attempt to induce better prisoner behavior must fail *Turner*’s second factor, which looks to whether the prisoner has other means to exercise the restricted right.¹⁶⁸ Encouraging good behavior by depriving inmates of a right would be ineffective if prisoners had alternative means to exercise that right.¹⁶⁹

Justice Thomas further argued that the third and fourth *Turner* factors do not comport with “privilege deprivation policies.”¹⁷⁰ The third factor, which looks to how the restriction impacts other inmates and guards, is irrelevant in analyzing a regulation that encourages good behavior.¹⁷¹ Additionally, the fourth factor, whether there are “ready alternatives” to accommodate the restricted right, is not a suitable consideration in determining the regulation’s validity, “because the unavailability of ‘ready alternatives’ is typically . . . one of the underlying rationales for the adoption of inmate privilege deprivation policies.”¹⁷² Thus, Justice Thomas concurred with the plurality’s judgment but stressed that the regulation should not have been analyzed under the *Turner* test.¹⁷³

E. Justice Stevens’s Dissent

In his dissent, Justice Stevens argued that the prison officials failed to establish that the regulation was reasonably related to any penological interest.¹⁷⁴ Thus, he believed that the Ninth Circuit correctly rejected the prison officials’ request for summary judgment.¹⁷⁵ Justice Stevens explained that prisoners retain their First Amendment rights, and a regulation that invades these rights is invalid unless “reasonably

deprivation of a constitutional right, so long as the prison officials “are not acting ultra vires with respect to the discretion given them.” *Id.* at 2583 (quoting *Overton*, 539 U.S. at 140). Thus, Justice Thomas argued that the State of Pennsylvania can determine whether or not to allow prisoners to have newspapers, magazines, and personal photographs. *Id.*

166. *Beard*, 126 S. Ct. at 2584–85 (Thomas, J., concurring).

167. *Id.* at 2584.

168. *Id.* at 2584–85 (Thomas, J., concurring); see *Turner*, 482 U.S. at 90.

169. *Beard*, 126 S. Ct. at 2585 (Thomas, J., concurring).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 2586 (Stevens, J., dissenting).

175. *Beard*, 126 S. Ct. at 2586 (Stevens, J., dissenting).

related to legitimate penological interests.”¹⁷⁶ A regulation cannot be upheld if the regulation’s relation to the penological goal is “so remote as to render the policy arbitrary or irrational.”¹⁷⁷ In this case, the parties agreed that the regulation, which prohibited access to secular, nonlegal newspapers and magazines and personal photographs, impinged upon the inmates’ First Amendment rights.¹⁷⁸ Justice Stevens argued that the penological interests asserted by the Secretary did not justify infringing upon the prisoners’ rights.¹⁷⁹

First, Justice Stevens asserted that the Secretary’s security rationale could not justify the regulation.¹⁸⁰ The inmates are allowed to have a number of items in their cells, including religious newspapers, legal periodicals, a library book, Bibles, a prison handbook, ten sheets of writing paper, envelopes, and carbon paper.¹⁸¹ Considering all of these materials allowed in the cells, permitting inmates to also have a secular, nonlegal newspaper or magazine would not result in “any measurable effect on the likelihood that inmates will start fires, hide contraband, or engage in other dangerous actions.”¹⁸² In fact, in his deposition, a prison official was unable to point to any distinctly dangerous behaviors that could result from allowing access to magazines, newspapers, and photographs, because disruptive behaviors could already be accomplished with the materials currently allowed in the cells.¹⁸³ For example, the official admitted that the inmates would be able to start fires and throw feces and urine with the items already permitted in the cells.¹⁸⁴ Moreover, in his deposition, the official never suggested that photographs might be used to fuel fires and throw excrement.¹⁸⁵ With these facts, Justice Stevens concluded that, at a minimum, reasonable minds could differ regarding the alleged connection between the regulation and the prison’s security interests; thus, summary judgment was improper.¹⁸⁶

176. *Id.* at 2585 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

177. *Id.* (quoting *Turner*, 482 U.S. at 89).

178. *Id.* at 2585–86. *See also* *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) (“[T]here is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners.”). Photographs are also protected by the First Amendment. *Kaplan v. California*, 413 U.S. 115, 119 (1973).

179. *Beard*, 126 S. Ct. at 2586 (Stevens, J., dissenting).

180. *Id.*

181. *Id.* In their cells, prisoners also have a jumpsuit, a blanket, bed sheets, a pillow, toilet paper, socks, undershorts, and undershirts. *Id.*

182. *Id.*

183. *Id.* at 2587.

184. *Id.*

185. *Beard*, 126 S. Ct. at 2587 (Stevens, J., dissenting).

186. *Id.*

Second, in Justice Stevens's view, the Secretary's rehabilitation rationale was also an insufficient justification for the regulation.¹⁸⁷ The Secretary argued that the regulation encouraged rehabilitation, because the inmates in level 2 had an incentive to display good behavior as a means to be upgraded to level 1 and regain access to newspapers, magazines, and photographs.¹⁸⁸ Justice Stevens pointed out that this "deprivation theory of rehabilitation" is without limitation, because, "if sufficient, it would provide a 'rational basis' for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior."¹⁸⁹ Additionally, Justice Stevens asserted that, with the deprivation theory of rehabilitation, "the more important the constitutional right at stake . . . the stronger the justification for depriving prisoners of that right."¹⁹⁰

Justice Stevens agreed with Justice Thomas's assertion that this theory of rehabilitation does not fit within the *Turner* test, because it is impossible to have a "ready alternative" to a deprived right without compromising the penological interest of inducing better behavior through the deprivation of that right.¹⁹¹ Additionally, Justice Stevens explained that, under the plurality's reasoning, the marriage regulation that the Court invalidated in *Turner* would have to be upheld, because it would give prisoners an incentive to behave well so that they could be released early from prison and exercise their right to get married.¹⁹² However, Justice Stevens found this type of reasoning objectionable, because, if "a reasonable factfinder could conclude that challenged deprivations have a tenuous logical connection to rehabilitation, or are exaggerated responses to a prison's legitimate interest in rehabilitation, prison officials are not entitled to judgment as a matter of law."¹⁹³

Furthermore, Justice Stevens doubted the usefulness of the prison regulation. He reasoned that the regulation did not seem necessary for prisoner rehabilitation or prison safety, because most state and federal prisons did not utilize similar bans.¹⁹⁴ Additionally, level 2 inmates had many other incentives, other than the prospect of regaining access to newspapers, magazines, and photographs, to exhibit

187. *Id.* at 2587–90.

188. *Id.* at 2587.

189. *Id.* at 2588.

190. *Id.*

191. *Beard*, 126 S. Ct. at 2588 (Stevens, J., dissenting).

192. *Id.*

193. *Id.* at 2588–89.

194. *Id.* at 2589.

good behavior and be moved out of level 2.¹⁹⁵ For example, if inmates were moved to level 1, they could have two visitors each month, make a phone call each month, use the commissary, and take part in educational and counseling programs.¹⁹⁶ Moreover, prisoners did not regain access to personal photographs unless they rejoined the general prison population.¹⁹⁷ There were many reasons, other than gaining access to photographs, why prisoners would have an incentive to improve their behavior and be moved to the general prison population.¹⁹⁸ For example, in the general prison population, the prisoner would no longer be in solitary confinement and would have access to radio and television.¹⁹⁹ As a result, Justice Stevens concluded that a reasonable trier of fact could find that prisoners had strong incentives, without the regulation at issue, to exhibit good behavior as a means to be moved from level 2.²⁰⁰

Further, inmates can potentially remain in level 2 indefinitely.²⁰¹ In fact, in the two years of its operation prior to *Beard*, 75% of level 2 inmates remained there.²⁰² Thus, the deprivation of the inmates' First Amendment rights could be indefinite.²⁰³ Because most inmates remained in level 2 on a long-term basis, Justice Stevens argued that a reasonable fact-finder could conclude that the regulation was an "exaggerated response to [the prison's] legitimate interest in rehabilitation."²⁰⁴

Finally, Justice Stevens commented that the "most troubling" aspect of the regulation was that it "comes perilously close to a state-sponsored effort at mind control."²⁰⁵ The regulation "prevents prisoners from 'receiv[ing] suitable access to social, political, esthetic, moral, and other ideas,' which are central to the development and preservation of individual identity."²⁰⁶ Also, without personal photographs,

195. *Id.*

196. *Id.* Level 2 inmates are in solitary confinement, get one visitor each month, do not get phone calls other than in emergencies, cannot use the commissary, and may not take part in education programs. *Id.*

197. *Beard*, 126 S. Ct. at 2589 (Stevens, J., dissenting).

198. *Id.*

199. *Id.*

200. *Id.* at 2590. Additionally, the prison officials did not offer any other evidence, such as a psychological behavior modification theory that could demonstrate the regulation's effectiveness. *Id.*

201. *Id.*

202. *Id.* The Third Circuit described level 2 as an area for long-term segregation. *Id.* (quoting *Banks v. Beard* 399 F.3d 134, 141 (3d Cir. 2005)).

203. *Beard*, 126 S. Ct. at 2590 (Stevens, J., dissenting).

204. *Id.* at 2590–91.

205. *Id.* at 2591.

206. *Id.* (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

some inmates may be unable to remember their loved ones.²⁰⁷ This regulation effectively cut off prisoners from society.²⁰⁸ For all of these reasons, Justice Stevens believed that the issue of whether the regulation was reasonably related to a legitimate penological interest should be resolved through a full trial, not through an award of summary judgment.²⁰⁹

F. Justice Ginsburg's Dissent

Justice Ginsburg wrote a separate dissent in which she emphasized that the plurality incorrectly viewed summary judgment.²¹⁰ Summary judgment was not appropriate, because a rational trier of fact could have found that the regulation was not “reasonably related to legitimate penological interests.”²¹¹ Deference should be given to prison officials only after the facts are viewed in the light most favorable to the prisoners who are challenging the regulation.²¹²

Justice Ginsburg noted that the Secretary's support for summary judgment was scarce: “the kind that could be made to justify virtually any prison regulation that does not involve physical abuse.”²¹³ A reasonable trier of fact could find that the regulation's connection to the penological purpose is “so remote as to render the policy arbitrary or irrational.”²¹⁴ For example, the inmates were not allowed to have *The Christian Science Monitor* but were allowed to have *The Jewish Daily Forward*.²¹⁵ This distinction was based solely on a prison official's decision that *The Christian Science Monitor* did not qualify as a “religious publication” but *The Jewish Daily Forward* did.²¹⁶ Justice Ginsburg added, “Prisoners are allowed to read Harlequin romance novels, but not to learn about the war in Iraq or Hurricane Katrina.”²¹⁷ Thus, Justice Ginsburg concluded that the justification for

207. *Id.*

208. *Id.*

209. *Beard*, 126 S. Ct. at 2591 (Stevens, J., dissenting).

210. *Id.* at 2592 (Ginsburg, J., dissenting).

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

212. *Id.* at 2592–93. Before granting summary judgment, a court must consider the following: [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [movant] on the evidence presented. The mere existence of a scintilla of evidence in support of the [movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [movant].

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

213. *Beard*, 126 S. Ct. at 2592 (Ginsburg, J., dissenting).

214. *Id.* at 2593 (quoting *Turner*, 482 U.S. at 89–90).

215. *Id.*

216. *Id.*

217. *Id.*

the regulation was “too tenuous to be plausible.”²¹⁸ Justice Ginsburg would have reversed the award of summary judgment.²¹⁹ She asserted that, by granting summary judgment in this circumstance, “the plurality effectively tells prison officials they will succeed in cases of this order, and swiftly, while barely trying.”²²⁰

IV. ANALYSIS

The regulation in *Beard* improperly deprived prisoners of their First Amendment rights. In analyzing the regulation, the Court incorrectly applied *Turner*'s four-factor test.²²¹ The decision in *Beard* is also distinguishable from other cases in which the Court upheld prison regulations impinging upon First Amendment rights.²²² Alternatively, the Court should have adopted a standard that did not further extend the deference given to prison officials.²²³

A. *The Beard Court Failed to Properly Apply Turner's First Factor*

In *Turner*, the Court set out a four-part test for determining the reasonableness of prison regulations.²²⁴ When applying the first factor to *Beard*'s facts, the Court incorrectly found that the prison regulation was rationally related to the legitimate penological interest of improving inmate behavior. In *Turner*, the Court asserted that “a regulation *cannot be sustained* where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.”²²⁵ If the connection is arbitrary or irrational, “then the regulation fails, irrespective of whether the other [*Turner*] factors tilt in its favor.”²²⁶ The regulation prohibiting level 2 prisoners from having access to secular, nonlegal newspapers and magazines and personal photographs was both arbitrary and irrational.²²⁷ At most, there was a mere tenuous relationship between the regulation and the legitimate interest of improved inmate behavior.²²⁸

218. *Id.*

219. *Beard*, 126 S. Ct. at 2593 (Ginsburg, J., dissenting).

220. *Id.*

221. *See infra* notes 224–265.

222. *See infra* notes 266–294.

223. *See infra* notes 295–313.

224. *Turner v. Safley*, 482 U.S. 78, 89–90 (1987).

225. *Id.* (emphasis added).

226. *Shaw v. Murphy*, 532 U.S. 223, 229–230 (2001) (citing *Turner*, 482 U.S. at 89–90).

227. *See infra* notes 229–247 and accompanying text.

228. *See id.*

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Prison officials failed to provide any evidence demonstrating that this specific regulation encourages improved inmate behavior,²²⁹ nor was the connection self-evident.²³⁰ In fact, common sense would hold that this regulation would have little or no positive impact on inmate behavior. LTSU's inmates are the "worst of the worst" and the "most incorrigible, recalcitrant inmates."²³¹ Therefore, most LTSU inmates are those who have consistently ignored previous incentives to modify their behavior.²³²

The respondent posed the following question: "If the prospects of having radios and televisions, weekly social visits, out of cell encounters with fellow prisoners, and the other inducements previously catalogued were insufficient to catalyze change, how could [prison] officials have reasonably entertained a view that withholding a newspaper or a few photographs might succeed?"²³³ There are many incentives for level 2 prisoners to improve their behavior,²³⁴ and, for most inmates, many of the potential privileges that can be earned through better behavior would likely have greater value to the prisoners than access to newspapers, magazines, and photographs.²³⁵ As a result, depriving prisoners of their First Amendment right to these particular materials was arbitrary. Consequently, the Court should not have sustained the regulation, because it was not reasonably related to the interest of improving inmate behavior.

Furthermore, the regulation prohibiting access to newspapers, magazines, and personal photographs is analogous to the marriage regulation in *Turner*. There, the Court held that the regulation preventing inmates from marrying was not reasonably related to safety concerns.²³⁶ The regulation was an "exaggerated response" to the threat of "love triangles" and an attempt to promote self-reliance among female inmates.²³⁷ In addition to using common sense, the Court looked to the record to search for evidence that the regulation

229. 399 F.3d 134, 141 (3d Cir. 2005), *rev'd*, *Beard v. Banks*, 126 S. Ct. 2572 (2006). About 25% of inmates graduated out of level 2. *Beard*, 126 S. Ct. at 2579 (plurality opinion). However, there is no indication that this percentage would change in any way if the regulation restricting access to newspapers, magazines, and photographs was eliminated.

230. *See* Brief for the Respondent at 22, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739).

231. *Beard*, 126 S. Ct. at 2576.

232. Brief for the Respondent, *supra* note 230, at 22.

233. *Id.* (emphasis omitted).

234. *Beard*, 126 S. Ct. at 2589–90 (Stevens, J., dissenting).

235. Additionally, over a two-and-a-half year period, only ten prisoners were transferred out of LTSU, which is evidence that the prison's policy did little good at promoting good behavior. *See* Brief for the Respondent, *supra* note 230, at 9.

236. *Turner v. Safley*, 482 U.S. 78, 97 (1987).

237. *Id.* at 97–99.

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was connected to the prison's asserted interests.²³⁸ The record failed to provide sufficient evidence of a connection, so the regulation was overruled.²³⁹

Similarly, the regulation prohibiting access to secular, nonlegal newspapers and magazines and personal photographs cannot be justified on its face or by the record. Because of the nature of level 2 inmates and the many existing incentives to improve behavior, this regulation, on its face, will do little or nothing to facilitate rehabilitation.²⁴⁰ Also, like the marriage restriction, the record did not show any evidence that prohibiting access to newspapers, magazines, and photographs promotes improved behavior.²⁴¹

Finally, as noted in Justice Stevens's dissent, the marriage restriction would have to be upheld under the plurality's reasoning in *Beard*.²⁴² If prohibiting access to newspapers, magazines, and photographs supposedly provided a legitimate incentive for graduation from level 2, then the marriage regulation should have also been upheld, because it provided an incentive for inmates to improve behavior to be released early from prison so they can marry.²⁴³ However, the Court rejected such tenuous reasoning in *Turner*; thus, *Beard* was incorrect in following such reasoning. Like the marriage regulation, the regulation in *Beard* was not reasonably related to a legitimate penological interest.

There are no other justifications for the regulation that are reasonably related to a legitimate penological interest. Prison officials attempted to assert two further justifications to which the *Beard* Court did not respond.²⁴⁴ The officials argued that the regulation reduced the amount of prisoner property, which would provide two benefits: (1) it would allow correction officers to more easily find hidden con-

238. *Id.* Justice O'Connor, writing for the majority, explained as follows:

We conclude that on this record, the Missouri prison regulation, as written, is not reasonably related to these penological interests. . . . [P]etitioners have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements. . . .

Nor, on this record, is the marriage restriction reasonably related to the articulated rehabilitation goal. . . . The rehabilitation concern appears from the record to have been centered almost exclusively on female inmates marrying other inmates or felons

Id. at 97–99; see also Brief for Lumumba Kenyatta Incumaa as Amicus Curiae Supporting Respondent at 9, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739).

239. *Turner*, 482 U.S. at 97–99.

240. See Brief for the Respondent, *supra* note 230, at 22.

241. *Banks v. Beard*, 399 F.3d 134, 141 (3d Cir. 2005), *rev'd*, 126 S. Ct. 2572 (2006).

242. *Beard*, 126 S. Ct. at 2588 (Stevens, J., dissenting).

243. *Id.*

244. *Id.* at 2579 (plurality opinion).

traband; and (2) it would make it more difficult for prisoners to use the newspapers and magazines as weapons.²⁴⁵ As Justice Stevens argued, these justifications are clearly unreasonable, because prisoners are allowed to have a number of items in their cells, including religious newspapers and legal periodicals.²⁴⁶ Allowing a prisoner to have an additional newspaper or magazine would not have a measurable negative effect on safety.²⁴⁷

B. The Regulation in Beard Cannot Be Properly Analyzed under Turner's Second, Third, or Fourth Factors

Because the connection between the regulation and rehabilitation is, at best, tenuous, *Turner's* other three factors become critical if the regulation is to be upheld.²⁴⁸ However, regulations that attempt to induce better prisoner behavior by restricting constitutional rights cannot satisfy the other three *Turner* factors. As for *Turner's* second factor, a regulation that attempts to induce good behavior by restricting a constitutional right does not, by definition, provide alternative means to exercise that right.²⁴⁹ In fact, the very goal of the regulation is to *deprive* the prisoners of the constitutional right.²⁵⁰ The regulation in *Beard* would be undermined if the prisoners had another way to exercise their right to newspapers, magazines, and personal photographs.²⁵¹ Nevertheless, while alternative means to exercise the right do not need to be "ideal," they at least need to "be available."²⁵² The regulation in *Beard* is problematic, because there are no alternative means to acquire the political, cultural, scientific, and societal information found in secular, nonlegal newspapers and magazines.²⁵³ Other than limited legal and religious correspondence, this regulation effectively cuts prisoners off from the outside world.²⁵⁴ Nor is there any alternative to possessing a personal photograph, because a prisoner's loved ones may be unable to write letters or may be ineligible to visit the inmate in prison.²⁵⁵

245. *Id.*

246. *Id.* at 2586–87 (Stevens, J., dissenting).

247. *Id.* at 2586.

248. See Brief for the Prison Legal News et al. as Amici Curiae in Support of Respondent at 27, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739).

249. *Beard*, 126 S. Ct. at 2584–85 (Thomas, J., concurring).

250. See Brief for the Becket Fund for Religious Liberty as Amicus Curiae in Support of the Respondent at 13, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739).

251. *Id.* at 15.

252. *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003).

253. See Brief for the Respondent, *supra* note 230, at 24.

254. See Brief for the Prison Legal News et al., *supra* note 248, at 27.

255. See Brief for the Respondent, *supra* note 230, at 25–26.

Furthermore, in response to *Turner's* third factor, allowing prisoners to exercise their right to newspapers, magazines, and personal photographs will not have a negative "ripple effect" on other prisoners or prison resources.²⁵⁶ Contrary to the Court's assertion, there is no evidence that the regulation's absence will result in "worse" behavior by level 2 inmates.²⁵⁷ Also, allowing the inmates to have limited access to newspapers and magazines would not be a significant hardship on prison resources, because the regulation only involved about forty level 2 inmates who were already permitted to have religious and legal periodicals.²⁵⁸

Finally, the regulation is incompatible with *Turner's* fourth factor, which looks to whether there are easy alternatives to the regulation.²⁵⁹ The Court found that using an alternative to accommodate the right would undermine the incentive of improving behavior.²⁶⁰ This is precisely why Justice Thomas believed that the fourth factor is not a useful tool in determining whether to uphold this type of regulation.²⁶¹ On the other hand, the penological goal was to make level 2 miserable, so as to provide an incentive for level 2 inmates to behave better as a means of graduating to a different unit.²⁶² However, by graduating out of level 2, inmates would regain many privileges, including more phone calls and visitors, contact with other inmates, use of educational programs, and access to television and radio.²⁶³ Thus, the penological objective of providing strong incentives for improved inmate behavior exists without depriving prisoners of their First Amendment right to newspapers, magazines, and photographs.²⁶⁴ Thus, the regulation was an "exaggerated response" to the interest in inmate rehabilitation.²⁶⁵ The Court incorrectly found that the regulation met *Turner's* four-part test. In fact, the regulation does not satisfy any of the four parts. Therefore, the regulation, which prohibits access to newspapers, magazines, and personal photographs, violated inmates' First Amendment rights.

256. *See id.* at 26–27.

257. *Compare* *Beard v. Banks*, 126 S. Ct. at 2580 (plurality opinion), *with* *Banks v. Beard*, 399 F.3d 134, 141 (3d Cir. 2005).

258. *See* Brief for the Respondent, *supra* note 230, at 27. In fact, it may have a small positive effect on prison resources, because prison officials would no longer need to determine whether a publication is religious, legal, or secular. *See id.*

259. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

260. *Beard*, 126 S. Ct. at 2580 (plurality opinion).

261. *See id.* at 2585 (Thomas, J., concurring).

262. *See* Brief for the Prison Legal News et al., *supra* note 248, at 29–30.

263. *Beard*, 126 S. Ct. at 2589 (Stevens, J., dissenting).

264. *See* Brief for the Prison Legal News et al., *supra* note 248, at 29.

265. *See id.*

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C. *The Beard Decision Is Distinguishable from Pertinent Legal Precedent*

In addition to misapplying the *Turner* test, the *Beard* Court incorrectly applied relevant legal precedent in its analysis. *Beard*'s facts are distinguishable from those in past cases in which the Court upheld prison regulations impinging upon First Amendment rights.²⁶⁶

First, the regulation prohibiting access to newspapers, magazines, and photographs is distinguishable from *Bell v. Wolfish*,²⁶⁷ in which the Court upheld a regulation restricting prisoners from having hardcover books that were not sent directly from a publisher or bookstore.²⁶⁸ Although *Bell* was decided before the pivotal *Turner* case,²⁶⁹ the Court still used a rational basis standard in its analysis.²⁷⁰ The *Bell* Court revealed that the regulation's content-neutral character influenced its decision.²⁷¹ On the other hand, the regulation in *Beard* was not content-neutral, because it only prohibited *secular, nonlegal* newspapers and magazines.²⁷² Therefore, the rule did not encompass newspapers and magazines that prison officials determined to be religious or legal.²⁷³ For example, officials allowed level 2 inmates access to *The Jewish Daily Forward* but denied access to *The Christian Science Monitor*.²⁷⁴ This was determined solely on the publications' contents.²⁷⁵ Thus, whether an inmate would be allowed to have a

266. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Bell v. Wolfish*, 441 U.S. 520 (1979).

267. 441 U.S. 520.

268. *Id.* at 550.

269. The Court decided *Turner* in 1987 and *Bell* in 1979.

270. In *Bell*, the Court stated that the regulation was a "rational response . . . to an obvious security problem." 441 U.S. at 550.

271. *Id.* at 551.

272. *Beard v. Banks*, 126 S. Ct. 2572, 2576 (2006) (plurality opinion).

273. *Id.* at 2593 (Ginsburg, J., dissenting).

274. *Id.* *The Jewish Daily Forward* is a weekly newspaper covering Jewish affairs. The Jewish Daily Forward, Our History, <http://www.forward.com/about/history/> (last visited Feb. 22, 2008). *The Christian Science Monitor* is published by The First Church of Christ, Scientist. It features U.S. and international news, and it also includes one daily religious article. The Christian Science Monitor, About the Monitor, http://www.csmonitor.com/aboutus/about_the_monitor.html (last visited Feb. 22, 2008).

275. This was irrational. For example, prisoners could read about the 2006 Israel-Lebanon conflict in *The Jewish Daily Forward*. See, e.g., Vita Bekker, *Two Deaths Bring Crisis Home to U.S.*, THE JEWISH DAILY FORWARD, Aug. 11, 2006, available at <http://www.forward.com/articles/two-deaths-bring-crisis-home-to-us>; Ori Nir, *Israeli Military Policy Under Fire After Qana Attack*, THE JEWISH DAILY FORWARD, Aug. 4, 2006, available at <http://www.forward.com/articles/israeli-military-policy-under-fire-after-qana-atta>. However, inmates could not read about the war in Iraq in *The Christian Science Monitor* or any other "secular" newspaper. See *Beard*, 126 S. Ct. at 2593 (Ginsburg, J., dissenting).

newspaper or magazine was determined exclusively on whether the publication's content was sufficiently "religious" or "legal."²⁷⁶

The *Bell* Court's decision was also influenced by the fact that, even if prisoners had somewhat limited access to hardcover books, they still had other sources from which to acquire various reading materials, including paperback books.²⁷⁷ In *Beard*, however, the level 2 inmates could have religious and legal periodicals and one library book, but were prohibited from accessing the vast amount of information found in secular, nonlegal newspapers and magazines.²⁷⁸ Finally, under the regulation in *Bell*, the prisoners were subject to the book restriction for a maximum of sixty days.²⁷⁹ In contrast, prisoners could potentially be held in level 2 indefinitely—remaining subject to the regulation.²⁸⁰

Next, the Court used *Turner*'s four-part test to uphold the regulation in *Thornburgh v. Abbott*, allowing prison officials to deny prisoners access to individual publications that would be harmful to prison security.²⁸¹ The regulation in *Beard* is distinguishable, because it prohibited all secular, nonlegal newspapers and magazines,²⁸² regardless of any potential influence they may have on inmates' behavior. Additionally, unlike the regulation in *Beard*, the regulation in *Thornburgh* still provided ample alternatives for prisoners to practice their First Amendment rights by receiving publications that did not specifically pose a threat to security.²⁸³ Thus, the *Thornburgh* regulation addressed particular, articulated security concerns connected with individual periodicals.²⁸⁴ In contrast, the *Beard* regulation broadly prohibits all secular, nonlegal newspapers and magazines with the mere hope that it might provide some incentive for better behavior.²⁸⁵

Finally, the Court also used the *Turner* test to uphold a regulation in *Overton v. Bazzetta* that prohibited inmates with substance abuse infractions from having visitation privileges for two years.²⁸⁶ Again, this

276. Subsequently, in *Turner*, the Court confirmed that "it [is] important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Turner v. Safley*, 482 U.S. 78, 90 (1987). The *Beard* Court failed to value this point.

277. *Bell v. Wolfish*, 441 U.S. 520, 551 (1979).

278. *Beard*, 126 S. Ct. at 2586 (Stevens, J., dissenting).

279. 441 U.S. at 552.

280. *Beard*, 126 S. Ct. at 2590 (Stevens, J., dissenting).

281. 490 U.S. 401, 403–05 (1989).

282. 126 S. Ct. at 2576 (plurality opinion).

283. 490 U.S. at 418.

284. *Id.* at 415–17.

285. 126 S. Ct. at 2579 (plurality opinion).

286. 539 U.S. 126, 130–31 (2003).

regulation is distinguishable from that in *Beard*. The regulation focused on the problem of drug smuggling and targeted specific inmates with substance abuse infractions.²⁸⁷ On the other hand, the regulation at issue in *Beard* broadly applied to all level 2 inmates, regardless of whether they had any previous problems associated with newspapers, magazines, or photographs.²⁸⁸ Additionally, the visitation restriction could be lifted after two years,²⁸⁹ whereas prisoners in level 2 could potentially be subject to the ban on newspapers, magazines, and photographs indefinitely.²⁹⁰ Thus, the regulation in *Beard* may act as a “*de facto* permanent ban”—the type of restriction that the *Overton* Court indicated may be unconstitutional.²⁹¹ Furthermore, prisoners subject to the visitation restriction had alternative means of communicating with friends and family, such as through letters and phone calls.²⁹² The level 2 prisoners, however, did not have any realistic means of obtaining news or current events.²⁹³

Although the Court upheld the prison regulations in *Bell*, *Thornburgh*, and *Overton*, the regulations at issue were less restrictive of constitutional rights than the regulation in *Beard*. In those cases, the Court warned that a more restrictive regulation may be unconstitutional.²⁹⁴ Accordingly, the Court should not have upheld the regulation impinging upon prisoners’ First Amendment right to newspapers, magazines, and personal photographs.

D. The Court Should Have Adopted a Standard that Did Not Further Extend the Deference Given to Prison Officials

Although the Court traditionally has given a great amount of deference to prison officials when examining prison regulations,²⁹⁵ complete deference is inappropriate. The Court gave nearly complete

287. *Id.* at 129–30.

288. 126 S. Ct. at 2576 (plurality opinion).

289. *Overton*, 539 U.S. at 130.

290. *Beard*, 126 S. Ct. at 2590 (Stevens, J., dissenting).

291. *Overton*, 539 U.S. at 134.

292. *Id.* at 135.

293. See Brief for the Respondent, *supra* note 230, at 24–25. “The time when letters served as a primary means of communicating political and other public developments expired long ago.” *Id.* at 24. Additionally, “it is absurd to contend that letters, chaplains, attorneys or family visits can function as suitable surrogates for periodicals.” *Id.* at 25.

294. See, e.g., *Overton*, 539 U.S. at 134–35 (“And if faced with evidence that [the] regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion Alternatives to visitation need not be ideal, however; they need only be available.”).

295. See *supra* note 8 and accompanying text.

deference to the prison officials in *Beard* and upheld the regulation despite its unreasonableness.²⁹⁶

Courts must make sure that the constitutional rights of prisoners are properly protected. Justice Brennan, dissenting in *O'Lone v. Shabazz*, warned that, “[i]f a directive that officials act ‘reasonably’ were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary. Yet the Court deems this single standard adequate to restrain *any* type of conduct in which prison officials might engage.”²⁹⁷ Justice Brennan suggested that a better and more balanced approach to analyzing cases concerning the constitutional rights of prisoners was offered by the Second Circuit in *Abdul Wali v. Coughlin*.²⁹⁸

In *Abdul Wali*, the court determined that the level of deference accorded to prison officials should depend upon “the nature of the right being asserted, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation . . . on the exercise of that right.”²⁹⁹ The court suggested that, when a right is “inherently inconsistent” with the nature of imprisonment, courts should give nearly absolute deference to the prison officials’ judgment.³⁰⁰ Additionally, if exercising a right would be “presumptively dangerous,” the court should give “extremely broad, though not categorical” deference to views of prison officials.³⁰¹ Similar deference should be given if there are many alternative means for the prisoners to exercise a restricted right.³⁰² However, if “the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right, professional judgment must occasionally yield to constitutional mandate.”³⁰³ Thus, in this circumstance, prison officials would have to meet a higher level of scrutiny in order for the regulation to be upheld.³⁰⁴

Under this framework, the prison officials in *Beard* would have needed to meet a higher level of scrutiny, because allowing prisoners

296. See *supra* notes 224–247 and accompanying text.

297. 482 U.S. 342, 356 (1987) (Brennan, J., dissenting) (emphasis in original).

298. *Id.* at 358 (citing *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985)).

299. 754 F.2d at 1033.

300. *Id.* By “inherently inconsistent,” the court refers to rights that are nonexistent inside prison walls. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. Prison officials would have to show that the regulation was “necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved.” *Id.*

to have access to newspapers, magazines, and personal photographs was not presumptively dangerous, and the regulation specifically sought to deprive inmates of their First Amendment right to those materials.³⁰⁵ Because there was no evidence that the regulation had any influence on rehabilitation,³⁰⁶ the prison officials would likely have been unable to show that restricting access to newspapers, magazines, and personal photographs was necessary to improve inmate behavior.

Justice Brennan explained that “prison officials are in control of the evidence that is essential to establish the superiority of such deprivation over other alternatives,” and so it is “fair for these officials to be held to a stringent standard of review in such extreme cases.”³⁰⁷ By giving less deference to prison officials under the *Abdul Wali* approach, the *Beard* Court should have found that the deprivation of First Amendment rights was unconstitutional.

Furthermore, while the Court has used the *Turner* test to analyze other prison regulations encroaching upon inmates’ rights,³⁰⁸ it made a narrow exception in *Johnson v. California*, refusing to use it for prison rules involving racial classifications.³⁰⁹ However, if the Court used the *Abdul Wali* framework instead of the *Turner* test for all cases analyzing prison regulations impinging upon constitutional rights, the *Johnson* decision would not have been an exception to the analysis typical of these types of cases. In *Johnson*, the Court refused to use the *Turner* test to analyze the racially segregated housing practice.³¹⁰ If the *Abdul Wali* framework would have been used, the Court still should have concluded that the segregation rule was unconstitutional. Assigning two inmates of different races to live in a single prison cell was not presumptively dangerous.³¹¹ Additionally, segregating inmates based on race violated society’s interest in preventing government-imposed racial classifications.³¹² Thus, under the *Abdul Wali* framework, the segregation rule would still need to be analyzed under

305. See *Beard v. Banks*, 126 S. Ct. 2572, 2589 (2006) (Stevens, J., dissenting).

306. See *Banks v. Beard*, 399 F.3d 134, 141 (3d Cir. 2005), *rev’d*, 126 S. Ct. 2572 (2006); Brief for the Respondent, *supra* note 230, at 22.

307. *O’Lone v. Shabazz*, 482 U.S. 342, 359 (1987) (Brennan, J., dissenting).

308. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *O’Lone*, 482 U.S. 342.

309. 543 U.S. 499, 513 (2005).

310. *Id.*

311. Prison officials asserted that there was violence between racial gangs. *Id.* at 502–03. However, this does not mean that housing individuals of different races with one another was presumptively dangerous.

312. See *id.* at 505.

a higher level of scrutiny,³¹³ but this analysis would be consistent with other cases examining regulations that impinge upon inmates' constitutional rights.

The framework in *Abdul Wali* offers a better approach to analyzing cases concerning the constitutional rights of prisoners, because it allows for the level of deference given to the prison officials to differ based on factual circumstances. However, the Court has applied the *Turner* test, giving nearly complete deference to prison officials. Unlike the *Abdul Wali* framework, the *Turner* test is incompatible with some types of prison regulations, such as the regulations in *Beard* and *Johnson*.

V. IMPACT

The great deference afforded to prison officials in *Beard* may result in severe negative consequences not only for prisoners, but for society as a whole. For example, the extreme deference given to prison officials may allow for discrimination against prisoners based on their religion.³¹⁴ Additionally, prison officials will be able to point to *Beard* to justify nearly any prison regulation impinging upon constitutional rights.³¹⁵ Finally, the regulation may actually inhibit inmate rehabilitation.³¹⁶

First, prison employees could discreetly discriminate against inmates based upon religion. Prisoners retain religious freedoms, and prison officials may not discriminate against prisoners because of their religion.³¹⁷ Under the regulation at issue in *Beard*, a prison official determines whether a publication qualifies as "religious."³¹⁸ Prison officials might consciously or unconsciously favor or disfavor certain religions when making this determination. Alternatively, a prison official might attempt to punish a minority religious group by using harsher standards when deciding whether a requested newspaper or magazine is religious. Thus, by upholding the regulation, the Court inevitably gives prison officials room to engage in discriminatory and abusive behavior toward prisoners based upon religion.

313. See *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985). This would be consistent with the *Johnson* Court's conclusion, and with previous cases that have held that strict scrutiny must be used when analyzing racial classifications. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.")

314. See *infra* notes 317–318 and accompanying text.

315. See *infra* notes 319–325 and accompanying text.

316. See *infra* notes 326–333 and accompanying text.

317. See *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

318. *Beard v. Banks*, 126 S. Ct. 2572, 2593 (2006) (Ginsburg, J., dissenting).

Furthermore, prison officials will be able to use the precedent established in *Beard* “to justify virtually any prison regulation that does not involve physical abuse.”³¹⁹ In *Beard*, the Court concluded that, by taking away the right to newspapers, magazines, and personal photographs, inmates would have an incentive to improve their behavior so that they could regain those rights.³²⁰ Applying this reasoning, prison officials could deprive prisoners of nearly any constitutional right³²¹ and could justify this deprivation on the basis that they are providing inmates with an incentive to behave better.³²² There is no apparent limit to this justification.³²³ The more fundamental the constitutional right, the more leverage officials would gain over prisoners by restricting that right.³²⁴ In other words, “the more severe the restriction, the more likely it will deter.”³²⁵ Thus, the nearly complete deference that the Court gave prison officials poses a great threat to prisoners’ constitutional rights.

Finally, prohibiting inmate access to secular, nonlegal newspapers and magazines may hurt rehabilitation efforts.³²⁶ The Third Circuit noted several cases suggesting that cutting prisoners off from the outside world hinders rehabilitation.³²⁷ For example, a court found that rehabilitation is “furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates.”³²⁸ Another court noted that “deprivation of reading materials in segregation can cause ‘psychological deterioration’ which in turn can cause inmates either to be ‘very withdrawn and curl up in infancy, or [to] become acting out and aggressive people.’”³²⁹ The *Beard* Court disregarded these cases, distinguishing them, because they did not deal with “especially difficult prisoners” like those in level 2.³³⁰

319. *Id.* at 2592.

320. *Id.* at 2579 (plurality opinion).

321. This would exclude racial classifications. *See Johnson v. California*, 543 U.S. 499 (2005).

322. *See Beard*, 126 S. Ct. at 2588 (Stevens, J., dissenting) (“[The deprivation theory of rehabilitation] would provide a ‘rational basis’ for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.”); Brief for Religious Liberty, *supra* note 250, at 8.

323. *See* Brief for the ACLU et al. as Amicus Curiae Supporting Respondent at 9, *Beard v. Banks*, 126 S. Ct. 2572 (2006) (No. 04-1739).

324. *Id.* at 9.

325. *Id.* at 8.

326. *Id.* at 18.

327. *Banks v. Beard*, 399 F.3d 134, 142 n.9 (3d Cir. 2005), *rev’d*, 126 S. Ct. 2572 (2006).

328. *Id.* (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985)).

329. *Id.* (quoting *Spellman v. Hopper*, 95 F. Supp. 2d 1267, 1281 (M.D. Ala. 1999)).

330. 126 S. Ct. at 2581 (plurality opinion).

However, in reality, this minor distinguishing point does not mean that the prison regulation will not hamper rehabilitation.

A number of studies suggest that harsh prison restrictions, such as the regulation at issue in *Beard*, will harm, rather than aid, rehabilitation. In one study, researchers concluded that “harsher prison conditions do not reduce post-release criminal behavior, and may even increase it.”³³¹ Other researchers have found that isolated prisoners develop symptoms that include anxiety, confusion, hallucination, and violent or self-destructive outbursts.³³² These studies make sense: isolating prisoners from the world and current events will make post-release transition into the community more difficult and stressful, which may lead to recidivism. Because most prisoners will eventually return to the community,³³³ this should be a great concern to the courts and the American public.

VI. CONCLUSION

In *Beard v. Banks*, the Court gave great deference to prison officials when it upheld a regulation impinging upon level 2 inmates’ rights to newspapers, magazines, and personal photographs. The extent of the Court’s deference was improper, and the regulation incorrectly deprived inmates of their First Amendments rights. Specifically, the Court failed to properly apply the *Turner* test, as the regulation does not satisfy any of the test’s four parts. Additionally, the regulation in *Beard* is distinguishable from pertinent legal precedent. Not only do the precedential cases have distinguishable facts, but the regulations at issue were generally less restrictive of constitutional rights than the *Beard* regulation. Moreover, the Court failed to seize the opportunity to adopt Justice Brennan’s recommended test for analyzing deprivations of prisoners’ constitutional rights, which would be more practical and workable than the *Turner* test. Now, lower courts are bound to look to the faulty reasoning in *Beard* when analyzing challenges to prison regulations that infringe upon inmates’ constitutional rights.

In light of *Beard*, prisoners will be denied, without adequate justification, their First Amendment right to have access to newspapers, magazines, and personal photographs. This may hurt prisoners and their likelihood of rehabilitation, which will consequently have a nega-

331. M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1, 19 (2007).

332. See JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS* 58 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

333. In fact, 95% of inmates will return to the community. *Id.* at 11.

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tive impact on society as a whole. A former Minnesota warden acknowledged this impact:

There are offenders who need to be highly controlled at all times . . . [b]ut they still need contact with other people. They still need a reason to approach each day with a positive attitude—a phone call or visit from a loved one, a *magazine or newspaper*. They still need to feel like human beings.³³⁴

Unfortunately, the Court threw away the key.

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334. *Id.* at 57 (emphasis added).

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