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***Thornburgh v. Abbott*: Slamming the Prison Gates on Constitutional Rights**

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."*

I. INTRODUCTION

In January and August of 1975, two prison inmates died of asthma attacks at the United States Penitentiary in Terre Haute, Indiana.¹ The prison infirmary had only one respirator, which was nonfunctional at the time of the first death and still inoperative at the time of the second death.² An article in *Labyrinth*, a magazine published by the Committee for Prisoner Humanity and Justice,³ detailing the deaths, concluded that the prisoners were *murdered by neglect*.⁴ Prison officials at Marion Federal Penitentiary refused to deliver that particular publication of *Labyrinth* to subscribing inmates, and returned the magazine to its publisher.⁵ The Marion officials who rejected that issue of *Labyrinth* admitted having no reason to do so.⁶ The legal issue arising from this scenario is easily identified: Is the content-based rejection of the magazine by prison officials an uncon-

* Pell v. Procunier, 417 U.S. 817, 822 (1974).

1. *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1885 (1989) (Stevens, J., concurring and dissenting). William Lowe died in January 1975, and Joseph Jones, Jr., died in August, 1975. *Id.* (Stevens, J., concurring and dissenting).

2. At the time of William Lowe's death, it was known that the respirator was broken. Joseph Jones' death was hastened not only by the broken respirator, but by the administration of a tranquilizer, a treatment that is contraindicated by an asthma attack. *Id.* (Stevens, J., concurring and dissenting).

3. *Id.* (Stevens, J., concurring and dissenting).

4. *Id.* (Stevens, J., concurring and dissenting). "'Jones, who was convicted of bank robbery and sentenced to 10 years in prison, was in fact, sentenced to death and was murdered by neglect.'" *Id.* (Stevens, J., concurring and dissenting) (quoting *Medical Murder*, *supra* note 1, at 5) (emphasis in original).

5. The circumstances of Jones' death eventually came before the Supreme Court in an action by Jones' mother against prison officials. *Carlson v. Green*, 446 U.S. 14 (1980); *Thornburgh*, 109 S. Ct. at 1885-86 (Stevens, J., concurring and dissenting). The concurrence in *Thornburgh* observed that the *Labyrinth* article on inadequate federal prison medical treatment was newsworthy and of great public importance. *Id.* (Stevens, J., concurring and dissenting); see also Swygert, *In Defense of Judicial Activism*, 16 VAL. U.L. REV. 439, 455-56 (1982) (discussing the factual history and eventual resolution of *Carlson*).

6. *Thornburgh*, 109 S. Ct. at 1886 (Stevens, J., concurring and dissenting).

stitutional violation of the first amendment free speech rights⁷ of both the subscribing prisoners and the magazine's publisher?

In *Thornburgh v. Abbott*,⁸ the Supreme Court recently held that the above actions on the part of the prison officials did not violate the first amendment rights of either publisher or prisoner.⁹ In reaching this conclusion, the Court was forced to decide what standard of review to apply to prison regulations limiting the access of publishers to inmates who willingly seek said publishers' point of view through subscription.¹⁰ The Court, in deciding upon a standard of review, was limited to a choice between two standards created by two previous Supreme Court decisions.¹¹

*Procunier v. Martinez*¹² established a two-part standard of review requiring the regulation in question to (1) "further an important or substantial governmental interest unrelated to the suppression of expression," and (2) "be no greater than necessary or essential to the protection of the particular governmental interest involved."¹³ *Turner v. Safley*,¹⁴ on the other hand, simply required that the regulation or practice in question be "reasonably related to legitimate penological interests."¹⁵ In *Thornburgh*, the Court rejected the *Martinez* standard and expressly adopted the more lenient *Safley* reasonableness standard in approaching free speech questions in the prison context.¹⁶

This Note discusses the *Thornburgh* decision in light of first amendment prison context cases. As in *Thornburgh*, the emphasis will be on the conflict between the *Safley* and *Martinez* decisions. The differing standards of review, the decisions, and their subsequent

7. U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech . . .")

8. 109 S. Ct. 1874 (1989).

9. *Id.* at 1884-85. The Supreme Court held that the regulations allowing such action on the part of the Marion prison officials were facially valid. *Id.* The question of whether the regulations were constitutionally valid as applied was remanded, but the Court's discussion leads to the conclusion that the regulations will be found valid as applied as well. See *infra* notes 215-16 and accompanying text.

10. *Thornburgh*, 109 S. Ct. at 1878-79.

11. A specific line of Supreme Court cases exists involving free speech rights in prison settings. The evolution of these cases started with *Procunier v. Martinez*, 416 U.S. 396 (1974), and progressed to *Turner v. Safley*, 482 U.S. 78 (1987). These two cases adopted differing standards of review, creating a situation ripe for resolution by the *Thornburgh* Court.

12. 416 U.S. 396 (1974).

13. *Id.* at 413; see *infra* notes 47-52 and accompanying text.

14. 482 U.S. 78 (1987).

15. *Id.* at 89; see also *infra* notes 92, 94-101 and accompanying text.

16. *Thornburgh*, 109 S. Ct. at 1881. The Court further held that the standard of review established in *Martinez* should be limited to regulations concerning outgoing correspondence. *Id.*; see also *infra* note 168 and accompanying text.

impact upon *Thornburgh* will be analyzed in light of the prison regulations or actions at issue in each case.

This Note begins in section II with a brief history of first amendment free speech cases in the context of prisoners' rights, and provides a background of the state of the law in this area prior to the *Thornburgh* decision. Section III discusses the facts of *Thornburgh*, and section IV analyzes in detail the majority and dissenting opinions. Section V examines the probable impact of this case on the constitutional analysis of future prisoners' rights cases. Finally, section VI presents a brief summary of the author's conclusions.

II. HISTORICAL BACKGROUND

Prior to *Procunier v. Martinez*, federal courts adopted a broad hands-off attitude toward prison administration problems.¹⁷ This hands-off attitude allowed the courts to evade or deny review of cases involving prisoners' rights issues.¹⁸ Essentially, this policy functioned as a jurisdictional bar to prisoners' constitutional complaints brought to the federal courts, as the courts effectively declared that prisoners had no constitutional rights.¹⁹ Reasons for these avoidance tactics va-

17. *Martinez*, 416 U.S. at 404. The Court stated that this attitude has been fostered by the difficulties inherent in prison administration, which the Court found "too apparent to warrant explication." *Id.* The Court believed that the problems of prisons are too complex to be resolved by judicial decree, as the courts are ill-equipped to deal with the urgent problems of prison administration and reform. *Id.* at 404-05. "Historically, courts refused to hear prisoners' complaints or to interfere with the administration of prisons." Note, *The New Standard of Review for Prisoners' Rights: A "Turner" for the Worse?*, 33 VILL. L. REV. 393, 399 (1988); see also Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 212-13 (1980) (emphasizing rationales underlying denial of jurisdiction over prisoners' complaints and erosion of this position in the lower courts).

18. Note, *O'Lone v. Estate of Shabazz: The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U.L. REV. 453, 458 (1988) [hereinafter *Religious Free Exercise*]. Specifically, the "hands-off" doctrine provided that "'courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.'" Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963) (quoting *Banning v. Looney*, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954)); see also *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (convict is the "slave of the state"). Further, a hands-off approach frees prison personnel to exercise virtually unlimited discretion over the day-to-day conditions of imprisonment, "short of engaging in the most egregiously abusive practices." Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 820 (1987).

19. Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 212, 220-21 (1977).

ried and included the difficulty of prison administration,²⁰ the judiciary's inability to deal with prison administrative problems,²¹ prison officials' expertise in the area of prison administration,²² federalism,²³ separation of powers,²⁴ and the notion that prison officials should be afforded deference in their decisions.²⁵

As a result of the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect prisoners' constitutional rights, the federal courts have adopted varied and inconsistent approaches to the problem.²⁶ In regard to censorship of prisoner mail, some courts have maintained a strict hands-off approach.²⁷ For example, the Second Circuit has required only that the censorship of prisoner mail be supported by a "rational prison system."²⁸ On the other extreme, some courts have required a com-

20. See *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); *Bumgarner v. Bloodworth*, 768 F.2d 297, 300-01 (8th Cir. 1985).

21. See *Procurier v. Martinez*, 416 U.S. 396, 405 (1974); *Main Road v. Aytch*, 522 F.2d 1080, 1085 (3d Cir. 1975); see also *Swygert*, *supra* note 5, at 454 (judiciary lacks both expertise and experience in prison administration).

22. See *Pell v. Procurier*, 417 U.S. 817, 827 (1974); *Abdul Wali v. Coughlin*, 754 F.2d 1013, 1018 (2d Cir. 1985); Special Project, *Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia*, 8 GA. L. REV. 919, 921 (1974) ("[P]rison officials are experts and it is better to defer to their judgment than risk frustration of penological objectives by ill-advised judicial meddling.").

23. See *Martinez*, 416 U.S. at 405; *Main Road*, 522 F.2d at 1085; *Hall v. Maryland*, 433 F. Supp. 756, 778-79 (D. Md. 1977), *aff'd in part, rev'd in part on other grounds sub nom. Carter v. Mandel*, 573 F.2d 172 (4th Cir. 1978); see also Note, *supra* note 17, at 399 n.29 (noting that "a hands-off position promotes federalism by precluding federal intervention on behalf of state prisoners") (citing Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795, 797).

24. See *Martinez*, 416 U.S. at 405; *Goff v. Nix*, 803 F.2d 358, 362 (8th Cir. 1986), *cert. denied*, 484 U.S. 835 (1987); *Meadows v. Hopkins*, 713 F.2d 206, 209-10 (6th Cir. 1983); *Feiler v. Sampson*, 570 F.2d 364, 371 (1st Cir. 1978); *Wooden v. Norris*, 637 F. Supp. 543, 555 (M.D. Tenn. 1986); *Goldfarb & Singer, Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970) (discussion and criticism of the notion that judicial intervention would violate the separation of powers doctrine); *Millemann, Protected Inmate Liberties: A Case for Judicial Responsibility*, 53 OR. L. REV. 29, 36 (1973).

25. See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (*per curiam*). Another less common justification for the adoption of the hands-off doctrine is that prison officials cannot be forced to appear in court because they possess sovereign immunity. See, e.g., *Williams v. Craven*, 273 F. Supp. 649 (C.D. Cal. 1967); *Black v. Stanley*, 270 F. Supp. 993 (D. Kan. 1967), *cert. denied*, 390 U.S. 926 (1968); *Delaney v. Shobe*, 235 F. Supp. 662 (D. Ore. 1964). See generally Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270, 1294-97 (1969).

26. *Martinez*, 416 U.S. at 406.

27. See, e.g., *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964); see also *Krupnick v. Crouse*, 366 F.2d 851 (10th Cir. 1966); *Leo v. Tahash*, 352 F.2d 970 (8th Cir. 1965) (hands-off approach appropriate except in cases in which mail censorship rules are applied to discriminate against a particular racial or religious group); *Pope v. Daggett*, 350 F.2d 296 (10th Cir. 1965).

28. *Sostre v. McGinnis*, 442 F.2d 178, 199 (2d Cir. 1971) (censorship of personal correspondence does not lack support "in any rational and constitutionally acceptable concept of a prison system"), *cert. denied*, 405 U.S. 978 (1972).

elling state interest to justify censorship of prisoner mail.²⁹ Other similarly demanding standards have been phrased in terms of "clear and present danger."³⁰ And, finally, between the two extremes, courts have applied more moderate "reasonableness" standards.³¹

A. *Martinez and Its Progeny*

Into this morass of confusion came *Procunier v. Martinez*. Clearly, the issue of which standard of review to apply to prison mail censorship regulations was ripe for decision. Resolution was necessary because, as matters stood, neither the prisoners' first amendment interests nor the regulations of prison officials were certain of being protected or enforced.³² The resulting uncertainty about the correct constitutional standard led to repetitive, piecemeal litigation that only perpetuated the involvement of the federal courts in the affairs of prison administration.³³

1. The Issue Presented by *Martinez*

Thus, when *Martinez* came before the Supreme Court challenging, among other things,³⁴ censorship of prisoner mail, the Court decided that the task before it was to formulate a standard of review for prisoner mail censorship that was responsive to both first amendment

29. See, e.g., *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968) (decided on both equal protection and first amendment grounds); *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972); *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).

30. See, e.g., *Wilkinson v. Skinner*, 462 F.2d 670, 672-73 (2d Cir. 1972).

31. Most notable of the "reasonable" standards is the view that a "prison regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably and necessarily to the advancement of some justifiable purpose of the imprisonment." *Carothers v. Follette*, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970) (citations omitted); see also *LeMon v. Zelker*, 358 F. Supp. 554 (S.D.N.Y. 1972); *Gates v. Collier*, 349 F. Supp. 881, 896 (N.D. Miss. 1972), *aff'd*, 489 F.2d 298 (5th Cir. 1973).

32. "On the one hand, the First Amendment interests implicated by censorship of inmate correspondence are given only haphazard and inconsistent protection. On the other, the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them . . ." *Procunier v. Martinez*, 416 U.S. 396, 407 (1973); see *supra* notes 26-28 and accompanying text; see also Note, *supra* note 17, at 404.

33. *Martinez*, 416 U.S. at 407. In addition, without a uniform standard of review, prisoners' first amendment interests received, at best, only inconsistent and haphazard protection. *Id.*; see also Note, *supra* note 17, at 404 n.49.

34. The class action in *Martinez* challenged not only censorship of prisoner mail, but also a ban against the use of legal paraprofessionals and law students to conduct attorney-client interviews with inmates. *Martinez*, 416 U.S. at 398.

concerns and the concerns of correctional officers.³⁵ In formulating that standard, the *Martinez* Court decided that more than just the prisoners' first amendment rights were at issue. Also implicated were the rights of those outside the prisons who were corresponding with the prisoners.³⁶ Any standard of review would have an impact on the rights of third parties and, thus, needed to be considered with third party rights in mind.³⁷

Using this reasoning, the *Martinez* Court refused to justify censorship of inmate correspondence solely on the basis of the legal status of prisoners.³⁸ Rather, the Court turned to cases resolving incidental restrictions on first amendment rights imposed in the furtherance of legitimate governmental activities.³⁹ From *Tinker v. Des Moines School District*,⁴⁰ *Healy v. James*,⁴¹ and *United States v. O'Brien*,⁴²

35. *Martinez*, 416 U.S. at 407. Rather than answering the framed question, however, the *Martinez* court emphasized that censorship of personal correspondence restricted not only the inmates' rights to free speech, but also worked an incidental restriction of the first amendment rights of those outside the prison who were corresponding with the inmates. *Id.* at 408-09; see also Note, *supra* note 17, at 404.

36. Censorship of direct personal correspondence between inmates and those with a particularized interest in communicating with the inmates implicates more than just the rights of prisoners. Both parties to the correspondence have an interest in communicating; therefore, censorship affects the rights of both. *Martinez*, 416 U.S. at 408. Interestingly, however, the Supreme Court raised the issue of non-inmate correspondent's rights *sua sponte*, without assertion of the rights by the prisoners. See generally Comment, *Backwash Benefits for Second Class Citizens: Prisoner's First Amendment and Procedural Due Process Rights*, 46 U. COLO. L. REV. 377, 384-85, 390-95 (1975).

37. *Martinez*, 416 U.S. at 408. In developing its analysis, the Court "emphasized the first amendment interests of persons corresponding with prisoners and did not distinguish between authors and recipients of inmate correspondence." Note, *Constitutionality of Regulations Restricting Prisoner Correspondence With the Media*, 56 FORDHAM L. REV. 1151, 1155 (1988) (citing *Martinez*, 416 at 408-09). Further, the rights of outsiders created a narrower basis of decision, enabling the Court to decline consideration of the extent to which an individual's free speech survives incarceration. Robbins viewed the case as a

[p]yrrhic victory, for *Martinez* expressly declined to rule that prisoners had any communication rights, and instead based its holding on the outsiders' first amendment rights. . . . As a result, the somewhat hands-off doctrine and its companion, the withdrawal of privileges doctrine, remained a serious barrier to the expansion of prisoners' rights

Robbins, *supra* note 17, at 214 (footnote omitted).

38. "[C]ensorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners." *Martinez*, 416 U.S. at 409.

39. The *Martinez* Court expressly declined to use cases involving questions of "prisoners' rights" in order to develop a standard more accommodating of free citizens' rights. *Id.*

40. 393 U.S. 503 (1969). "First Amendment guarantees must be applied in light of the special characteristics of the . . . environment." *Martinez*, 416 U.S. at 410 (citing *Tinker*, 393 U.S. at 506). *Tinker* involved the conflict between the free speech rights of high school students and the need of the states and school officials to proscribe and control conduct in the schools. *Tinker*, 393 U.S. at 507. The *Martinez* court noted that *Tinker's* analysis focused on the "legitimate requirements of orderly school adminis-

the *Martinez* Court distilled a rule allowing incidental restrictions on first amendment liberties "by governmental action in furtherance of legitimate and substantial state interest [sic] other than suppression of expression."⁴³

Applying this rule to the prison context, the Court found an identifiable governmental interest in the preservation of a prison's internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and prisoner rehabilitation.⁴⁴ The Court justified the imposition of certain restraints on inmate correspondence by the legitimate governmental interest in the order and security of penal institutions.⁴⁵ In light of this determination of the legitimate governmental interests at stake in a penal institution, the *Martinez* Court announced a two-part standard for determining whether a particular regulation or practice pertaining to inmate correspondence constituted an impermissible restraint of first amendment liberties.⁴⁶

tration in order to ensure that the students were afforded maximum freedom of speech consistent with those requirements." *Martinez*, 416 U.S. at 410.

41. 408 U.S. 169 (1972). In *Healy*, the question of the constitutionality of a state college's refusal to grant official recognition to a politically active student organization came before the Court. The college's fear of future disruption due to the purportedly dangerous nature of the organization's political philosophy could not justify such an infringement on the students' right of free association. *Id.* at 189-90. The right could be limited, however, if necessary to prevent campus disruption. *Id.* at 189 n.20.

42. 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968). The *O'Brien* case dealt with incidental restrictions on free speech caused by the exercise of the governmental power to conscript men for military service. *O'Brien* burned his Selective Service registration certificate to dramatize his opposition to the draft. He was convicted of violating a law prohibiting the destruction of registration certificates. In deciding the case, the Court utilized a four-factor test, which included the furtherance of an important or substantial government interest and the relation of the regulation to the suppression of free expression. *Id.* at 377.

43. *Martinez*, 416 U.S. at 412.

44. *Id.* In discussing these governmental interests, the Court expressly avoided the issues raised when a prison temporarily denies an inmate personal correspondence as a disciplinary sanction. *Id.* at 412 n.12.

45. *Id.* at 412-13. Justifiable censorship can be found in situations such as the refusal to send or deliver letters concerning escape plans or other criminal activity, in addition to the refusal to transmit messages in code. *Id.* at 413.

46. *Id.* This two-part test provides a heightened level of scrutiny that is consistent with the three cases relied upon to formulate the test. See *Healy v. James*, 408 U.S. 169 (1972); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968). Because the test formulated by the *Martinez* Court was based upon the incidental free speech rights of outsiders, the Court sidestepped the question of what standard of review to apply when prison regulations restrict the freedom of speech. Note, *supra* note 17, at 404-05.

2. The *Martinez* Test

Part one of the two-part test requires that “the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.”⁴⁷ Therefore, there must be a showing by prison officials that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation.⁴⁸ The second part of the test requires that the resulting first amendment limitations be “no greater than is necessary or essential to the protection of the particular governmental interest involved.”⁴⁹ Under this second element of the test, a restriction on inmate correspondence that furthers an important governmental interest in penal administration will fail if its sweep is too broad.⁵⁰ Prison administrators are given some latitude in determining probable consequences;⁵¹ they are not required to prove with certainty that adverse consequences would result from failure to censor a particular letter.⁵²

Using this standard, the Court invalidated the regulations at issue in *Martinez*.⁵³ Those regulations allowed the censorship of “statements that ‘unduly complain,’ or ‘magnify grievances’ [or] expression of ‘inflammatory political, racial, religious or other views’ . . .”⁵⁴ The

47. *Martinez*, 416 U.S. at 413. The Court formulated this first prong of analysis by reference to *Healy*, *Tinker*, and *O'Brien*. See *supra* note 46; see also *supra* notes 40-42 and accompanying text.

48. *Martinez*, 416 U.S. at 413. “Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions . . .” *Id.* Rather, the Court placed the burden on prison officials to demonstrate that the censorship regulation furthered at least one of the substantial governmental interests of security, order, or rehabilitation. *Id.*

49. *Id.* This prong of the *Martinez* test is what caused the *Turner* court to formulate its own test in an effort to avoid interpretation as a least restrictive alternative test. See *infra* note 137 and accompanying text.

50. *Martinez*, 416 U.S. at 413-14.

51. The Court recognized that it is essential to the proper discharge of an administrator's duty that the administrator be given “some latitude” to anticipate probable consequences in allowing certain speech in a prison context. *Id.* at 414.

52. *Id.* “But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more legitimate governmental interests. . . .” *Id.* Further, safeguards such as notification of censorship to intended recipients of censored mail, along with an opportunity to object, see *Ramos v. Lamm*, 639 F.2d 559, 581 (10th Cir. 1980) (citing *Martinez*, 416 U.S. at 418-19), *cert. denied*, 450 U.S. 1041 (1981); *Taylor v. Sterrett*, 532 F.2d 462, 466 (5th Cir. 1976) (discussing *Martinez*), must be in place to temper the discretion exercised by prison officials over censorship of prisoner mail. See *Martinez*, 416 U.S. at 417-18; *Pittman v. Hutto*, 448 F. Supp. 61, 62 (E.D. Va. 1978), *aff'd*, 594 F.2d 407 (4th Cir. 1979)).

53. *Martinez*, 416 U.S. at 415.

54. *Id.* Inmate correspondence was monitored under regulations promulgated by the Director of the California Department of Corrections. *Id.* at 398. Director's Rule 2401 provided that “[t]he sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges.” *Id.* at 399 n.1. Director's Rule 1201 provided: “INMATE BEHAVIOR: Always conduct yourself in an orderly manner. Do

Court stated that these regulations were practically an invitation to individual prison officials to use their personal prejudices as the standard for prisoner mail censorship.⁵⁵ Because the regulations were so easily manipulated by personal bias, the Court found them to be too broadly drafted to reach only material that might encourage violence.⁵⁶ Further, the regulations were not limited to incoming mail,⁵⁷ leaving open the possibility of censorship of outgoing mail to prevent complaints about prison life.⁵⁸ In sum, the regulations at issue were far broader than any legitimate interest of penal administration could justify.⁵⁹

Although the *Martinez* Court decided the constitutionality of the prison regulations regarding outgoing mail, it did not articulate a broad standard of review for general restrictions on prisoners' first amendment rights.⁶⁰ *Martinez* expressly reserved the question of the proper standard of review to apply in prisoners' rights cases and relied instead on an analysis that recognized the "problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities."⁶¹ Thus, the holding turned on the fact that the challenged regulation caused an incidental restric-

not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence." The phrases "unduly complain" and "magnify grievances" were undisputedly applied to personal correspondence. *Id.* at 399 n.2.

55. *Id.* at 415. The Court gave examples of how the regulations can suppress unwelcome criticism. These examples included the rejection of letters that criticized prison policy, rules, or officials, in addition to those "letters belittling staff or our judicial system or anything connected with Department of Corrections." *Id.*

56. *Id.* at 416.

57. After the district court held that the original regulations were unconstitutional, substantial revisions were made, including a distinction between incoming and outgoing mail. Under the new regulations, outgoing mail could be disapproved for mailing for reasons such as the threat of physical harm, criminal activity, escape plans, or soliciting money from persons other than family members. *See Martinez*, 416 U.S. at 416 n.15 (listing various grounds for disapproval of outgoing letters).

58. *See supra* note 55.

59. *Martinez*, 416 U.S. at 416.

60. *See id.* at 408 (stating that an inquiry into the extent to which prisoners may claim first amendment rights is unnecessary); *see also* Calhoun, *supra* note 19, at 225; *Religious Free Exercise*, *supra* note 18, at 461-62.

61. *Martinez*, 416 U.S. at 409.

[W]e reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners. . . . We therefore turn for guidance, not to cases involving questions of "prisoners' rights," but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities.

Id.

tion on the rights of those who were not prisoners.⁶²

3. The *Martinez* Progeny

In four cases following *Martinez*, the Court addressed those questions of prisoners' rights expressly reserved in *Martinez*.⁶³ The first of these cases, *Pell v. Procunier*,⁶⁴ involved a constitutional challenge to prison regulations prohibiting face-to-face media interviews with specific inmates. The Court upheld these regulations because the inmates had other means of communicating with the outside world.⁶⁵ The Court also noted that prison security is the most important objective of the correctional system,⁶⁶ and that judgments regarding prison security "are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."⁶⁷ Thus, the language of *Pell* advocates deference to prison officials.⁶⁸

*Jones v. North Carolina Prisoners' Union*⁶⁹ involved prison regulations that prohibited meetings of a prisoners' labor union, inmate solicitation of other inmates to join the union, and bulk mailings from outside sources for distribution to other inmates. The Court held

62. See *supra* note 61; see also *Turner v. Safley*, 482 U.S. 78, 86 (1987).

63. See *supra* notes 60-62 and accompanying text. The question reserved by *Martinez* is the proper standard of review to apply in cases involving prisoners' rights. *Martinez*, 416 U.S. at 409. This question was addressed in four cases following *Martinez*. See *Turner*, 482 U.S. at 89.

64. 417 U.S. 817 (1974).

65. *Id.* at 820-21. Specifically, several professional journalists requested interviews with inmates Bly, Guile, and Spain. *Id.* at 820. Pursuant to section 415.071 of the California Department of Corrections Manual, which prohibits such interviews, the requests were denied. *Id.* Consequently, the inmates asserted that the rule violated their first amendment right of free speech, while the media plaintiffs contended that their first and fourteenth amendment rights were violated because their ability to gather news was impaired, infringing upon their rights of freedom of the press. *Id.* at 820-21. The district court dismissed the media's claim, concluding that the rule effectively protected whatever rights the press had to interview inmates because the media could still enter the prison and conduct interviews with inmates encountered at random. *Id.*

These alternate means of communicating with the outside world included visitation rights and mail communication. *Id.* at 827. In *Turner*, the Court explained that the alternate means of communication available to the prisoners in *Pell* were relevant in determining the scope of the burden on the prisoners' first amendment rights. *Turner*, 482 U.S. at 88.

66. *Pell*, 417 U.S. at 823.

67. *Id.* at 827.

68. "[W]hen the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation." *Id.*

69. 433 U.S. 119 (1977).

that the regulations were "rationally related to the reasonable . . . objectives of prison administration."⁷⁰ The Court found the prison officials' concerns about potential problems caused by the activities of the union to be reasonable,⁷¹ and noted that the regulations were no broader than necessary to meet the comprehended threat.⁷²

In *Bell v. Wolfish*,⁷³ the first amendment challenge was to a regulation precluding prisoners' receipt of hard-covered books unless mailed directly from a publisher, book club, or bookstore.⁷⁴ The Court upheld the rule as a rational response to an obvious security problem as testified to by prison officials.⁷⁵ Other factors also influ-

70. *Id.* at 129 (citing *Pell*, 417 U.S. at 822). The Court also determined that the first amendment rights of the prison inmates were "barely implicated" by the prohibition on bulk mailings. *Id.* at 130. It has been contended that in *Jones*, the Court took a restrictive view of prisoners' retained rights, its analysis appearing to minimally balance interests by applying a standard of review emphasizing deference to prison officials and the incompatibility of the exercise of certain rights with incarceration. Note, *supra* note 17, at 409-10.

Jones invoked the restrictive reading of prisoner rights set forth in *Price v. Johnston*, 334 U.S. 266 (1948). *Price* stated that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 285.

71. *Jones*, 433 U.S. at 133. By early 1975, the prisoners' union had approximately 2,000 inmate members throughout forty different prison units in North Carolina. *Id.* at 122. Prison officials testified that the union would create many security and administration problems. *Id.* at 126-27.

72. *Id.* at 133. The decision in *Jones* may represent a retreat from *Martinez* and *Pell*. *Id.* at 141 (Marshall, J., dissenting) (stating that the majority's reasonableness approach abandons traditional first amendment analysis); see also Note, *Jones v. North Carolina Prisoners' Labor Union, Inc.: The "Hands-Off Doctrine" Revisited*, 14 WAKE FOREST L. REV. 647, 661 (1978) (asserting that *Jones* represents a significant departure from prior cases). But cf. Robbins, *supra* note 17, at 215 (*Jones* appears to be more of an extension of than a departure from earlier rulings) (citing Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 U.M.K.C. L. REV. 1, 2 (1978)).

73. 441 U.S. 520 (1979). Although pretrial detainees brought this case, the Court suggested that its ruling was applicable to inmates as well. *Id.* at 546 n.28. For a general discussion of *Bell*, see Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 182-85 (1986); see also Robbins, *supra* note 17.

/ 74. *Bell*, 441 U.S. at 530.

75. *Id.* at 550. Because there was no evidence of an exaggeration of the security risk that prison officials testified to, the Court stated "the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here." *Id.* at 551 (citations omitted). Prison officials cited security concerns that contraband could be concealed in book bindings and an administrative interest in avoiding the additional staff time that would be required to inspect the books. *Id.* at 549. Officials testified that a proper search of a hardback book would require the removal of both covers and a page-by-page leafing of every book to ensure that no drugs, money, weapons, or other contraband were hidden in the item. *Id.* Accordingly, inspections would take considerable staff time. *Id.*

enced the Court's decision, including the neutrality of the regulation, alternate means for the inmates to obtain reading material, and the jail's large library.⁷⁶

*Block v. Rutherford*⁷⁷ involved a ban on contact visits.⁷⁸ The Court upheld this restriction on the ground that "responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility"⁷⁹ and the regulation was reasonably related to these security concerns.⁸⁰

The Court decided these four "prisoners' rights" cases strictly on a reasonableness basis,⁸¹ rather than on a standard of heightened scrutiny. The Court focused its inquiry on whether the prison regulation burdening fundamental rights was reasonably related to legitimate penological objectives,⁸² or whether it represented an exaggerated response to those concerns.⁸³ Moreover, in each case, the Court advocated granting judicial deference to the security decisions of prison officials. It is in reliance on these standards, as applied in *Pell*, *Bell*, *Jones*, and *Block*, that the Court decided *Turner v. Safley*.⁸⁴

76. *Id.* at 552; see also *Pell v. Procunier*, 417 U.S. 817, 826-28 (1974) (referring to alternate channels of communication and the neutral operation of the regulation).

77. 468 U.S. 576 (1984).

78. In *Block*, pretrial detainees challenged the prison's policy of denying all contact visits and its practice of conducting random searches of cells in the detainee's absence. *Id.* at 578. Contact visits, while not expressly defined in *Block*, are those which allow actual physical contact between an inmate or detainee and the visitor. *Id.*

79. *Block*, 468 U.S. at 589. "Although this case does not involve first amendment rights, it is illustrative of the Supreme Court's continuing reaffirmation of deference to prison officials even in the face of a total ban on detainees' interests in contact visits." Note, *supra* note 17, at 413 n.93.

80. *Block*, 468 U.S. at 586. "[T]here is a valid, rational connection between a ban on contact visits and internal security of a detention facility Contact visits . . . open the institution to the introduction of drugs, weapons, and other contraband . . . [that can be passed] to an inmate unnoticed by even the most vigilant observers." *Id.*

81. See *Block v. Rutherford*, 468 U.S. 576, 588 (1984) (upholding prison's ban on contact visits under reasonableness standard); *Bell v. Wolfish*, 441 U.S. 520, 550 (1979) (analyzing restriction of prisoners' first amendment rights under reasonableness standard); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977) (applying reasonableness analysis to challenged limitations on prisoners' first amendment rights); *Pell v. Procunier*, 417 U.S. 817, 826-27 (1974) (prison regulations prohibiting media interviews with prison inmates evaluated with reference to reasonableness analysis).

82. *Block*, 468 U.S. at 586; *Bell*, 441 U.S. at 550; *Jones*, 433 U.S. at 129; *Pell*, 417 U.S. at 826-27.

83. *Block*, 468 U.S. at 588; *Bell*, 441 U.S. at 551; *Jones*, 433 U.S. at 133; *Pell*, 417 U.S. at 831-32.

84. 482 U.S. 78 (1987). "If *Pell*, *Jones*, and *Bell* have not already resolved the question . . . we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

B. Turner v. Safley

1. The Issue Presented by *Turner*

Turner involved a class action suit brought by prison inmates to determine the constitutionality of regulations regarding inmate correspondence.⁸⁵ The challenged regulations permitted correspondence between inmates regarding legal matters and correspondence between inmates and immediate family members who were inmates in other correctional institutions.⁸⁶ Other correspondence between inmates, however, was permitted only if the classification/treatment team of each inmate found it to be in the best interests of the involved parties.⁸⁷ The rule, as practiced, prohibited inmates from writing to nonfamily inmates.⁸⁸ Thus, this case dealt strictly with "prisoners' rights" and did not implicate the rights of free citizens.⁸⁹ In other words, this case squarely presented the issue that *Martinez* expressly avoided:⁹⁰ the formulation of a standard of review for prisoners' constitutional claims that was "responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" ⁹¹

2. The *Turner* Test

Given this situation, the Court in *Turner* held that the standard of

85. *Id.* at 81-82. The action actually involved two challenges: correspondence restrictions and marriage restrictions. *Id.* However, this article focuses only on the rulings in the case that pertain to correspondence restrictions.

86. *Id.*

87. *Id.* (quoting Brief for Appellant at 34, *Turner v. Safley*, 482 U.S. 78 (1987) (No. 87-1344)). Testimony at trial indicated that the determination permitting inmates to correspond was "based upon team members' familiarity with the psychological reports, conduct violations, and progress reports . . . in the inmates' files, rather than on individual review of each piece of mail." *Id.* at 82.

88. *Turner*, 482 U.S. at 82 (quoting *Safley v. Turner*, 586 F. Supp. 589, 591 (W.D. Mo. 1984)).

89. *Cf.* *Block v. Rutherford*, 468 U.S. 576 (1984) (challenged regulations banned contact visits between inmates and free citizens); *Bell v. Wolfish*, 441 U.S. 520 (1979) (challenged regulation prevented receipt of hardback books mailed to prisoners from free citizens other than book clubs, publishers, or bookstores); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (challenged regulations prohibited bulk mailings from outside sources, *i.e.*, free citizens to prison inmates); *Pell v. Procunier*, 417 U.S. 817 (1984) (challenged regulations prohibited face-to-face interviews between prison inmates and free citizens who were members of the media); *Procunier v. Martinez*, 416 U.S. 396 (1974) (challenged regulations concerned correspondence between prisoners and free citizens).

90. See *supra* notes 60-61 and accompanying text; see also *Martinez*, 416 U.S. at 408-09.

91. *Turner*, 482 U.S. at 85 (quoting *Martinez*, 416 U.S. at 406).

review for prison regulations infringing on prisoners' constitutional rights was that "the regulation is valid if it is reasonably related to legitimate penological interests."⁹² The Court stated that the reasonableness standard was more appropriate than a strict scrutiny analysis because of the inherent flexibility in a reasonableness standard, a flexibility that the Court viewed as necessary in dealing with prison administration.⁹³

The *Turner* reasonableness standard is determined by four factors. Under the first factor, a "'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it" must exist.⁹⁴ The connection between the regulation and the interest must not be so remote as to render the regulation arbitrary or irrational.⁹⁵ The second factor concerns whether there are alternative means of exercising the right being infringed upon.⁹⁶ When alternate means do exist, the courts should be particularly deferential to the corrections officials in evaluating the validity of the regulation.⁹⁷

The third *Turner* factor involves whether an accommodation of the asserted constitutional right will have an impact upon other inmates and guards, or on the allocation of prison resources generally.⁹⁸ In evaluating this factor, courts should give particular deference to the decisions of the corrections officials if accommodation of the asserted right will have a significant effect on staff or fellow inmates.⁹⁹ The

92. *Id.* at 89. Security, institutional discipline, and rehabilitation generally are considered legitimate penological objectives. See *Pell*, 417 U.S. at 822-23.

93. *Turner*, 482 U.S. at 89. The *Turner* Court claimed that such a standard is necessary in order to have " 'the prison administration, and not the courts, . . . make the difficult judgments concerning institutional operations.' " *Id.* (quoting *Jones*, 433 U.S. at 128). Moreover, the Court stated that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.*

94. *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

95. *Id.* at 89-90.

96. *Id.* at 90. Simply because alternative avenues of restriction are more desirable than the restricted ones does not make the restriction unconstitutional. See *Jones*, 433 U.S. at 130 n.6. Nor is the loss of a cost advantage in the restricted means of exercising a right a sufficient ground for invalidating a regulation. See *id.* at 130-31.

97. *Turner*, 482 U.S. at 90 (quoting *Jones*, 433 U.S. at 131; *Pell v. Procunier*, 417 U.S. 817, 827 (1974)). The Court derived this second factor from the rationale it used in *Pell*, in which it upheld regulations banning media interviews with specific inmates because other means were available for the inmates to communicate with society. *Pell*, 417 U.S. at 824-25; see also *Jones*, 433 U.S. at 131 (noting that although regulation restricted some forms of communication, the prisoners' union had other means to communicate). See generally *supra* notes 64-72 and accompanying text (discussing *Pell* and *Jones*).

98. *Turner*, 482 U.S. at 90. "In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Id.*

99. *Id.*; cf. *Jones*, 433 U.S. at 132-33. "Prison life, and relations between the in-

final *Turner* factor is an evaluation of alternatives. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation."¹⁰⁰ Conversely, the existence of available easy alternatives may be evidence that a regulation is not reasonable.¹⁰¹ While this is not considered a least restrictive alternative test, if an inmate can identify an alternative that is more accommodating to prisoners' rights and exacts only a de minimis cost to valid penological interests, that alternative will be taken as evidence that the regulation does not satisfy the reasonable relationship standard.¹⁰²

In applying the *Turner* test to the regulation prohibiting inmate-to-inmate correspondence, the Court upheld the regulation as reasonably related to legitimate security interests.¹⁰³ The *Turner* Court found that the prohibition of inmate-to-inmate correspondence was logically related to officials' fears of inmate communication of escape plans and future violent acts.¹⁰⁴ The Court held that the alternative proposed by the inmates, simply monitoring inmate correspondence, imposed more than a de minimis burden on the pursuit of legitimate corrections goals, and, consequently, the regulation reflected legitimate penological concerns.¹⁰⁵ The Court also held that the regulation was content neutral in its application.¹⁰⁶

mates themselves and between the inmates and prison officials or staff, contain the ever present potential for violent confrontation and conflagration." *Id.* at 132 (citing *Wolff v. McDonnell*, 418 U.S. 539, 561-62 (1974)).

100. *Turner*, 482 U.S. at 90 (citing *Block v. Rutherford*, 468 U.S. 576, 587 (1984)).

101. *Id.* The *Turner* Court stated that the existence of alternatives may indicate that the regulation in question is an exaggerated response to prison concerns. *Id.*; see also *Pell*, 417 U.S. at 827 (courts should defer to the judgments of prison officials concerning security matters unless substantial evidence indicates that officials exaggerated those concerns).

102. *Turner*, 482 U.S. at 91. This factor places the burden of showing another alternative squarely on the prisoner, and, as such, is another indication of the level of deference to prison officials. The Court did not specify whether an inmate making a showing of a ready alternative could invalidate a regulation if the other three *Turner* factors support the regulation's reasonableness.

103. *Id.* at 91-93.

104. *Id.* at 91. Witnesses stated that the Missouri Division of Corrections had a growing prison gang problem, and that restricting gang communications by limiting correspondence between gang members was an important element in combatting the problem. *Id.* Further, because the facility provided protective custody for certain inmates, prison officials feared the use of correspondence could compromise protective custody. *Id.*

105. *Id.* at 93. Prison officials felt it would be impossible to read all inter-inmate mail, leaving open the possibility that some dangerous messages would slip through. *Id.* Even if all the mail could be read, prison officials feared the inmates' use of jargon or codes to disguise their real messages. *Id.*

106. *Id.* Although the Court did not elaborate on this statement, presumably con-

When *Thornburgh* came before the Court, the *Martinez* and *Turner* standards of review were the two standards used by the courts in determining prisoners' correspondence rights.¹⁰⁷ *Turner's* creation of a standard of review for regulations limiting only prisoners' constitutional rights did not overrule *Martinez* because the *Martinez* Court expressly avoided that issue.¹⁰⁸ The *Martinez* standard applied to regulations affecting the rights of free citizens as well as prisoners.¹⁰⁹ Therefore, after *Turner*, the appropriate standard of review apparently is determined by whose rights were affected by the regulations, free citizens or prisoners.¹¹⁰

III. FACTS

While no specific facts were given by the Supreme Court, save that *Thornburgh v. Abbott* was brought by prisoners from Marion Federal Penitentiary,¹¹¹ the basis for *Thornburgh* is found in certain Federal Bureau of Prisons (FBP) regulations. These FBP regulations permit federal prisoners to receive publications¹¹² from the "outside."¹¹³

tent-neutrality was found because the challenged regulation, as practiced, prohibited all correspondence between nonfamily inmates, regardless of the content of the correspondence. *Id.* at 82.

107. Cases adhering to the *Martinez* standard include: *Abbott v. Meese*, 824 F.2d 1166 (D.C. Cir. 1987); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1030 (2d Cir. 1985); *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976); *Aikens v. Jenkins*, 534 F.2d 751, 755 (7th Cir. 1976); *Jackson v. Ward*, 458 F. Supp. 546, 558 (W.D.N.Y. 1978); *Cofone v. Manson*, 409 F. Supp. 1033, 1039 (D. Conn. 1976); *McCleary v. Kelly*, 376 F. Supp. 1186, 1189 (M.D. Pa. 1974).

Cases following *Turner* include: *Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989); *Mumin v. Phelps*, 857 F.2d 1055, 1056 (5th Cir. 1988); *Card v. Dugger*, 709 F. Supp. 1098, 1103 (M.D. Fla. 1988); *Benjamin v. Coughlin*, 708 F. Supp. 570, 572 (S.D.N.Y. 1989); *Blankenship v. Gunter*, 707 F. Supp. 1137, 1138 (D. Neb. 1988); *Vallina v. Meese*, 704 F. Supp. 769, 772 (E.D. Mich. 1989).

108. See *supra* notes 60-62 and accompanying text.

109. *Martinez*, 416 U.S. 396, 408 (noting that "[m]ail censorship implicates more than the right of prisoners"). In formulating its standard of review, the *Martinez* Court looked "not to cases involving questions of 'prisoners' rights,' but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities." *Id.* at 409.

110. The *Martinez* standard was especially formulated to protect the rights of free citizens affected by prison regulations. *Id.* at 408-09. However, it would appear that the *Martinez* standard also was applied to prison regulations affecting prisoners as well as free citizens. *Turner*, on the other hand, was concerned with a prison regulation that affected only prisoners and, thus, created a standard that should be applied only when prisoners' rights are at stake. *Turner*, 482 U.S. at 81-82.

111. See *Thornburgh v. Abbott*, 109 S. Ct. 1874 (1989). The majority in *Thornburgh* does not explain anything about the facts of the case beyond the challenged regulations. In his dissent, however, Justice Stevens does mention that the challenge was brought by prisoners from Marion Federal Penitentiary, and that one of the publications in question was *Labyrinth*. *Id.* at 1885-86 (Stevens, J., concurring and dissenting); see also *supra* notes 1-5 and accompanying text.

112. A "publication" is defined as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus such other materials addressed

The FBP regulations, however, also authorize prison officials to reject incoming publications in particular circumstances.¹¹⁴ A publication may be rejected only if it is found to be "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."¹¹⁵ A publication may not be rejected "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant."¹¹⁶ Each issue of a publication must be reviewed separately, and the warden is prohibited from creating a list of excluded publications.¹¹⁷

The regulations also provide procedural safeguards for the recipient and the sender of the publication. The warden is the only person who may reject a publication, but the warden may designate staff to screen and approve incoming publications.¹¹⁸ If something is withheld, the inmate must be informed promptly, in writing, of the reasons for the rejection,¹¹⁹ and a copy of the rejection letter must be

to a specific inmate as advertising brochures, flyers, and catalogues." 28 C.F.R. § 540.70(a) (1988).

113. *Thornburgh*, 109 S. Ct. at 1876.

114. *Id.* (incoming publications can be rejected if they are found to be detrimental to institutional security.) See *infra* notes 115-22 and accompanying text.

115. *Thornburgh*, 109 S. Ct. at 1876 n.1.

Publications which may be rejected by a warden include but are not limited to publications which meet one of the following criteria:

- (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;
- (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.

28 C.F.R. § 540.71(b) (1988).

116. *Thornburgh*, 109 S. Ct. at 1877 (citing 28 C.F.R. § 540.71(b) (1988)).

117. *Id.* (citing 28 C.F.R. § 540.71(c) (1988)). Further guidance on the subject of sexually explicit material has been supplied by Program Statement No. 5266.5, which allows a warden to reject sexually explicit materials dealing with homosexuality, bestiality, sadomasochism, and sex with children. See *id.* at n.6.

118. 28 C.F.R. § 540.70(b) (1988).

119. *Thornburgh*, 109 S. Ct. at 1877-78.

Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this ma-

sent to the publisher or sender of the rejected publication.¹²⁰ In addition to these safeguards, the publisher or sender may seek an independent review of the rejection decision,¹²¹ while the inmate can pursue an internal appeals process.¹²²

Also challenged in this action was the all-or-nothing rule.¹²³ Under this rule, a prison must reject the entire publication even if just one page or article is found unacceptable under the FBP regulations;¹²⁴ it cannot simply censor the offensive page or article.

Based on the above, a class of inmates and publishers claimed that enforcement of the FBP regulations violated their first amendment rights¹²⁵ to send and receive publications under the standard of review espoused by the Court in *Procunier v. Martinez*.¹²⁶ They mounted a facial challenge to the regulations that allowed mail censorship and an as-applied challenge to the regulations' exclusion of forty-six specific publications.¹²⁷ In deciding *Thornburgh*, the district court did not utilize the *Martinez* standard, and upheld the regula-

terial for purposes of filing an appeal under the Administrative Remedy Procedure unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

28 C.F.R. § 540.71(d) (1988).

120. *Thornburgh*, 109 S. Ct. at 1878.

The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 15 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Procedure, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

28 C.F.R. § 540.71(e) (1988).

121. 28 C.F.R. § 540.71(e) (1988).

122. *Thornburgh*, 109 S. Ct. at 1878 (citing 28 C.F.R. §§ 542.10-16 (1988)). Under the Administrative Remedy Procedure, prisoners who have been unable to resolve their difficulties informally may file formal written complaints. 28 C.F.R. § 542.13(b) (1988). Inmates who believe they would be adversely affected if their claims became known at the prison have the option of filing their complaints with the Regional Director of the Bureau. *Id.* § 542.13(c). The Warden or Regional Director must respond within 15 or 30 days, respectively. *Id.* § 542.14. An adverse decision by the Warden is appealable to the Regional Director; an adverse decision by the Regional Director is appealable to the General Counsel of the Bureau. *Id.* § 542.15.

123. The majority gives the all-or-nothing rule very little attention, preferring instead to defer to the district court on this issue. *Thornburgh*, 109 S. Ct. at 1884.

124. *Id.* at 1891 (Stevens, J., concurring and dissenting); see also 28 C.F.R. § 540.71(e) (1988); *supra* note 120.

125. See *supra* note 7.

126. *Thornburgh*, 109 S. Ct. at 1876. The prisoners filed this lawsuit in May 1973. It was certified as a class action in 1974, and joined by publishers in 1978. *Id.* at 1876 n.2; see *supra* notes 34-59 and accompanying text for a discussion of *Martinez*.

127. *Thornburgh*, 109 S. Ct. at 1876.

tions without addressing the forty-six specific exclusions.¹²⁸ The court of appeals, however, applied the *Martinez* standard,¹²⁹ found the regulations lacking, and remanded the case for a specific determination of the propriety of the forty-six exclusions.¹³⁰

IV. ANALYSIS OF OPINION

As indicated in the lower court decisions, the outcome of *Thornburgh* was dependent upon the standard of review adopted by the Court.¹³¹ The *Martinez* standard, being less deferential to prison officials than later cases,¹³² would invalidate the regulations, as indicated by the court of appeals' decision.¹³³ On the other hand, the more deferential reasonableness standard adopted in the cases following *Martinez*, and, most particularly, in *Turner v. Safley*,¹³⁴ would uphold the regulations. Therefore, the Court's first task was to decide which standard of review to apply to the regulations in this case.

A. *The Selection of the Turner Standard of Review*

The *Thornburgh* Court began its opinion with a discussion of the *Martinez* standard, which requires that the regulation in question advance an important or substantial government interest unrelated to the suppression of expression, and that the limitation of first amendment freedoms be no greater than necessary to protect the particular governmental interest involved.¹³⁵ The Court stressed that this standard did not deprive corrections officials of the discretion necessary to protect the particular governmental interest at stake.¹³⁶ The Court then stated, however, that the reasonableness standard

128. *Id.*

129. *Abbott v. Meese*, 824 F.2d 1166, 1172 (D.C. Cir. 1987). "We find no holding that the tests for prison censorship of a publication on the basis of content, having an impact on the rights of the publisher, are different from those stated in *Martinez*." *Id.*

130. *Id.* at 1175-76. The *Abbott* court recognized that with the passage of time and changes in circumstances, the question of the rejection of any specific magazine might have become moot, and accounted for that in its order on remand. *Id.*

131. See *supra* notes 128-30 and accompanying text.

132. See *supra* notes 46-52, 81-84 and accompanying text.

133. See *supra* notes 129-30 and accompanying text.

134. 482 U.S. 78 (1987); see *supra* notes 92-93 and accompanying text.

135. *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1879 (1989). The Court, however, gave some indication that its reference to *Martinez* is merely historical. "*Martinez* was our first significant decision regarding First Amendment rights in the prison context." *Id.*

136. *Id.* "It is clear . . . that we did not deprive prison officials of the degree of discretion necessary to vindicate 'the particular governmental interest involved.'" *Id.*

adopted after *Martinez* was inspired by a concern that *Martinez* established a standard of strict or heightened scrutiny.¹³⁷ The Court viewed a standard of strict scrutiny as “not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons.”¹³⁸

Because the perceived *Martinez* standard was “too readily understood as failing to afford prison officials sufficient discretion”¹³⁹ in their task of protecting prison security, the Court rejected *Martinez* in favor of *Turner*.¹⁴⁰ In rejecting *Martinez*, the Court stressed that the focus of the review is not on the identities of the parties allegedly harmed, such as free citizens incidentally affected by prison regulations, but on the regulations themselves, and how they relate to legitimate penological interests.¹⁴¹ Thus, the Court adopted the *Turner* test and held that a regulation is valid if “reasonably related to legitimate penological interests.”¹⁴²

By adopting the reasonableness standard of *Turner* concerning incoming publications, the Court limited *Martinez* to regulations concerning outgoing prison correspondence.¹⁴³ The Court reasoned that because there are fewer security risks inherent in outgoing mail than in incoming correspondence or publications,¹⁴⁴ the stricter test of

137. *Id.* “*Martinez* might be too readily understood as establishing a standard of ‘strict’ or ‘heightened’ scrutiny, and . . . could be (and had been) read to require a strict ‘least restrictive alternative’ analysis, without sufficient sensitivity to the need for discretion in meeting legitimate prison needs.” *Id.* at 1879-80 (citations omitted); see also *supra* notes 51-52 and accompanying text.

138. *Thornburgh*, 109 S. Ct. at 1879. The Court chose not to focus on the fact that the regulations at issue in both *Martinez* and *Thornburgh* affected the rights of non-prisoners, preferring instead to emphasize the impact of the regulations on a reasonable relation to legitimate penological objectives. *Id.* at 1879 n.9.

139. *Id.* at 1881. Thus, the Court took a standard that had been formulated specifically to preserve discretion in the prison officials, and broadened that discretion even more. See *supra* notes 51-52 and accompanying text.

This approach is especially interesting when compared with the view that “prison mail regulations operate as prior restraints, and, therefore, bear ‘a heavy presumption against [their] constitutional validity.’” Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 105-11 (1971) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam)).

140. *Thornburgh*, 109 S. Ct. at 1881. The Court justified its position by stating: “We adopt the *Turner* standard in this case with confidence that, as petitioners here have asserted, ‘a reasonableness standard is not toothless.’” *Thornburgh*, 109 S. Ct. at 1882 (quoting *Petition for Certiorari* at 17 n.10).

141. *Id.* at 1879 n.9. This represents a complete turnabout from the *Martinez* focus on the identities of the parties affected by the prison regulations. See *supra* notes 36-37 and accompanying text.

142. *Thornburgh*, 109 S. Ct. at 1881 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

143. *Id.*

144. *Id.*

The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. Any attempt to justify a similar categorical distinction between incoming correspondence from prisoners (to which we applied a reasonableness standard in

Martinez is justified in order to avoid unnecessarily limiting prisoners' first amendment rights.¹⁴⁵

B. *The Application of the Turner Standard*

The *Turner* reasonableness standard provides that a regulation is valid if reasonably related to legitimate penological interests.¹⁴⁶ The test is applied with the aid of four factors: (1) the governmental objective underlying the regulations must be legitimate and neutral, and the regulations rationally related to that objective;¹⁴⁷ (2) the existence of alternative means for the prisoners to exercise their remaining rights must be considered;¹⁴⁸ (3) the court must take into account the impact that accommodation of the asserted right would have on guards and other prison inmates;¹⁴⁹ and (4) the existence of obvious, easy alternatives must be appraised.¹⁵⁰ The Court carefully applied these factors in *Thornburgh*.

The first factor, the legitimacy and neutrality of the governmental objective and the rational relationship of the regulation to that objective, is actually a combination of concerns. In applying this factor, the Court easily disposed of the requirement that the governmental objective be legitimate. The Court found that the objective of the regulation was undoubtedly legitimate¹⁵¹ as it was aimed at protecting prison security.¹⁵² The Court engaged in a more lengthy discussion of the neutrality requirement, noting that, at first glance, the regulations seem to be content-based restrictions because only the content of the publication would make it a security risk. The Court then went on to explain, however, that neutrality, as required by

Turner) and incoming correspondence from nonprisoners would likely prove futile, and we do not invite it.

Id.

145. *Id.* On the other hand, the Court viewed the *Turner* test as providing a greater flexibility that will enable prison officials to conduct their legitimate penological objectives with greater efficiency. *Id.* at 1881-82; see also note 93 and accompanying text.

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

147. *Id.* at 89-90; see also *supra* notes 94-95 and accompanying text.

148. *Turner*, 482 U.S. at 90; see also *supra* notes 96-97 and accompanying text.

149. *Turner*, 482 U.S. at 90; see also *supra* notes 98-99 and accompanying text.

150. *Turner*, 482 U.S. at 90; see also *supra* notes 100-02 and accompanying text.

151. *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1882 (1989).

152. *Id.* The Court, however, did not explain how it reached its conclusion that the regulation was expressly aimed at protecting prison security. Although the Court did not cite *Turner*, it may have relied on its reasoning in *Turner* that a logical connection exists between the correspondence regulation and prison security interests. See *Turner*, 482 U.S. at 91.

Turner, is established when the regulation operates in furtherance of a governmental interest that is “unrelated to the suppression of expression.”¹⁵³ This requirement is fulfilled when the “prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security.”¹⁵⁴

Having found the regulation to be both neutral and legitimate, the Court then considered whether a rational relationship existed between the regulation and the governmental objective it furthered. The Court found that a rational relationship did exist for two reasons. First, the Court stated that incoming publications clearly pose a security threat because, even if the articles they contain do not lead to violence, they could exacerbate tensions and lead to disorder.¹⁵⁵ Perhaps realizing the tenuousness of this line of reasoning, the Court offered a second reason: the fact that no publication may be excluded by any person but the warden, and even the warden is restricted to certain criteria for exclusion.¹⁵⁶ The purpose of these restrictions is to ensure that no publication is rejected unless the rejection is rationally related to security concerns. For example, the regulations expressly forbid the warden from taking shortcuts that might lead to needless exclusions, such as creating a list of automatically excluded publications.¹⁵⁷

The second *Turner* factor concerns the availability of alternative means for the prisoners to exercise their restricted rights. The *Thornburgh* Court noted that both *Turner* and *O’Lone v. Estate of Shabazz*¹⁵⁸ indicated that the right in question must be viewed

153. *Thornburgh*, 109 S. Ct. at 1882. The determination to reject a publication was based on content, but only to the extent that the content of the publication had potential implications for prison safety. Applied in such a manner, the regulations were considered to be neutral in the technical sense used in *Turner*. *Id.*

154. *Id.* In contrast, the censorship in *Martinez* was content-based because the regulations in that case allowed prison officials and employees to exercise personal beliefs and prejudices as a basis for censorship. Thus, in *Martinez*, correspondence was censored based on its content, *without* a clear relation between content and prison security. *Id.* at 1883 n.14; *see also* *Procunier v. Martinez*, 416 U.S. 396, 415 (1974).

155. *Thornburgh*, 109 S. Ct. at 1883. The Court gave no basis for reaching this conclusion, beyond the statement that the “District Court *properly found* that publications can present a security threat. . . .” *Id.* at 1883 (emphasis added). The Court also did not explain why it concluded that the district court reached its findings “properly.”

156. *Id.* These restrictions are set forth in 28 C.F.R. §§ 540.70(b), 540.71(b), (d), (e) (1988). The Court was comforted by the individualized nature of the determinations as to acceptability of publications required by the regulation. *Thornburgh*, 109 S. Ct. at 1883. Apparently, the Court saw the warden as being completely bound by the regulations, and unlikely to make an incorrect determination as to the acceptability of a publication.

157. *See* 28 C.F.R. § 540.71(c) (1988) (express prohibition against establishing an excluded list of publications).

158. 482 U.S. 342 (1987) (reasonableness standard used to review infringements of prisoners’ free exercise of rights).

broadly.¹⁵⁹ In *Turner*, for example, the Court did not require that prisoners be afforded other means of communicating with inmates at other institutions; the Court merely held that it was enough that other means of communication remained available to them (and not necessarily other means of communicating with prisoners at other institutions).¹⁶⁰ Similarly, in *O'Lone*, the Court refused to uphold Muslim prisoners' right to participate in one particular religious ceremony because, alternatively, they could practice their free exercise right through various other Muslim religious ceremonies.¹⁶¹ Applying this broad reading of "alternative means" to exercise the right in question, the *Thornburgh* Court found the second *Turner* factor to be fulfilled because a broad range of publications were permitted to be sent, received, and read, in addition to those that were rejected.¹⁶²

The third *Turner* factor involves the degree of impact that accommodation of the asserted right would have on others in the prison not asserting constitutional rights, both inmates and guards. The Court applied this factor in the following manner: As the publications are rejected for fear that they will be distributed to the general inmate population, creating disorder and a threat to security, the effect of actual distribution on all of the inmates and guards would be detrimental. This is a situation in which the general prison population would be impacted by the accommodation of the right asserted.¹⁶³ The weakness in this analysis, however, is the likelihood that circulation

159. *Thornburgh*, 109 S. Ct. at 1883.

160. *Id.* The *Turner* Court had found that the regulation at issue did not completely abridge the prisoner's freedom of expression, but merely barred communication with a limited class of people (*i.e.*, inmates at other institutions) with whom officials had reasonable cause to be concerned. *Turner*, 482 U.S. at 92. Thus, by broadly drawing the rights of the prisoners, such as in the right to communicate, the Court enabled the regulation to withstand first amendment scrutiny.

161. *O'Lone*, 482 U.S. at 351. Again, the Court was drawing the threatened right broadly. In *O'Lone*, it was drawn as the right to practice the Muslim religion, thus enabling the challenged regulation to pass constitutional scrutiny. Were the right drawn narrowly, as simply the right to take part in the Jumu'ah service, it probably would not have passed muster. See generally *Religious Free Exercise*, *supra* note 18, at 476.

162. *Thornburgh*, 109 S. Ct. at 1884. But see *id.* at 1890 (Stevens, J., concurring and dissenting). Justice Stevens was concerned that some of the banned publications were the only avenue for conveying a particularly unconventional message, making it irrelevant that other publications circulate freely. *Id.* (Stevens, J., concurring and dissenting).

163. *Id.* at 1884. The Court feared the kind of "ripple effect" that concerned the Court in *Turner*. See *Turner*, 482 U.S. at 92 (concern that the inmate-to-inmate correspondence would cause disturbances affecting more than just corresponding inmates); cf. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 132-33 (1977).

of the rejected publications would actually cause a security threat.¹⁶⁴

The final *Turner* factor addresses the existence of obvious, less restrictive alternatives as evidence that the regulation is an exaggerated response to prison concerns.¹⁶⁵ Because no such alternative was presented, the Court held that the regulations were not an exaggerated response to prison concerns.¹⁶⁶ In sum, the Court resolved all of the factors comprising the *Turner* reasonableness standard in favor of the challenged regulations.¹⁶⁷

The Court remanded the as-applied challenge of the forty-six specifically rejected publications for a determination of the validity of the rejection.¹⁶⁸ The Court did rule, however, on the "all-or-nothing rule,"¹⁶⁹ which permits the warden to reject an entire publication because of one offensive article, rather than merely censoring the article.¹⁷⁰ Here, the Court deferred to the district court's finding¹⁷¹ that deleting portions of the publication would cause considerably more discontent than rejecting the entire publication.¹⁷² The Court stressed that when prison officials can demonstrate that they rejected a less restrictive alternative because of reasonable fears that it would lead to greater harm, they have demonstrated that their practice is not an exaggerated response under *Turner*.¹⁷³ Unfortunately, however, the prison officials in *Thornburgh* did not show any

164. The rejected publications should be only those found potentially detrimental to order and security. *Thornburgh*, 109 S. Ct. at 1884. The Court believed that the class of excluded publications should be those publications most likely to circulate. *Id.*

165. *See supra* notes 100-02 and accompanying text.

166. *Thornburgh*, 109 S. Ct. at 1884 ("[T]hese regulations, on their face, are not an 'exaggerated response' to the problem at hand: no obvious, easy alternative has been established.").

167. The original challenge brought by the inmates was both facial and as-applied. *Id.* at 1876. The greatest part of the majority's opinion was concerned with the facial challenge. *Id.* at 1878-84. The as-applied challenge was directed at 46 specifically excluded publications, about which there was a mootness question as the passage of time had changed the circumstances that led to their initial exclusion. *Id.* at 1885; *see Abbott v. Meese*, 824 F.2d 1166, 1175-76 (D.C. Cir. 1987).

168. *Thornburgh*, 109 S. Ct. at 1885. The remand actually was phrased in terms of an analysis of the challenge to the exclusion of any of the 46 originally excluded publications "as to which there remains a live controversy." *Id.*; *see supra* note 167.

169. *Thornburgh*, 109 S. Ct. at 1884.

170. *See supra* notes 123-24 and accompanying text.

171. *Thornburgh*, 109 S. Ct. at 1884. *But see id.* at 1891 n.17 (Stevens, J., concurring and dissenting) (stating that the district court had no basis for its finding). Justice Stevens presented testimony on the record and from a deposition transcript that indicated that no support existed for petitioners' position that inmate discontent with selective censoring would threaten prison security. *Id.* (Stevens, J., concurring and dissenting).

172. *Id.* at 1884. This is reminiscent of the Court's finding that publications can be a security threat. *See supra* note 155 and accompanying text (Court makes no attempt to ascertain the veracity of the district court's holding).

173. *Thornburgh*, 109 S. Ct. at 1884. The problem with this reasoning is that the prison officials did not demonstrate anything, let alone that they had rejected a less restrictive alternative than the all-or-nothing rule. *See supra* note 171 and accompanying text; *see also infra* note 208 and accompanying text.

grounds for fearing that merely censoring offensive portions of a publication would create greater harm than censoring the entire publication.¹⁷⁴ As if to bolster its decision, in light of its lack of foundation, the Court added administrative convenience as an additional factor for consideration,¹⁷⁵ leading to the unmistakable inference that the Court upheld the all-or-nothing rule merely for administrative convenience.¹⁷⁶

In sum, the Court applied the *Turner* test to the regulations at issue in *Thornburgh*. This decision was inspired by a possibly erroneous fear that *Martinez* established a standard of strict or heightened scrutiny.¹⁷⁷ The *Thornburgh* decision also was encouraged by a desire to give prison officials wide discretion in their task of protecting prison security, and the *Turner* standard of review provides more discretion to prison officials than *Martinez*.¹⁷⁸ Thus, the *Turner* standard, formulated for pure prisoners' rights issues, was applied to *Thornburgh*, despite the fact that *Thornburgh*, like *Martinez*, involved the constitutional rights of both prisoners and free citizens. By applying *Turner*, the Court held that the challenged regulations¹⁷⁹ and the warden's use of the all-or-nothing rule were facially valid.¹⁸⁰ The Court, however, remanded the as-applied challenge concerning the forty-six specifically rejected publications for a determination of the validity of the rejection.¹⁸¹

C. Justice Stevens' Concurring and Dissenting Opinion

Justice Stevens, in a strongly worded separate opinion, concurred

174. See *supra* notes 171, 173.

175. *Thornburgh*, 109 S. Ct. at 1884. The Court stated: "Furthermore, the administrative inconvenience of this proposed alternative [to censor only the offensive pages, and not the entire publication] is also a factor to be considered, and adds additional support to the District Court's conclusion that petitioners were not obligated to adopt it." *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 549 (1979)).

176. This presumption is created by the facts set forth in Justice Stevens' dissent indicating that the prison officials' creation and enforcement of the all-or-nothing rule was completely without foundation in concerns of prison security. *Thornburgh*, 109 S. Ct. at 1891 n.17 (Stevens, J., concurring and dissenting). If no security-based foundation exists for the all-or-nothing rule, then the rule must be based on the second reason mentioned by the Court—administrative convenience.

177. See *supra* notes 137-38 and accompanying text.

178. See *supra* notes 139-40 and accompanying text.

179. See *supra* note 167 and accompanying text.

180. See *supra* notes 170-73 and accompanying text.

181. See *supra* note 168 and accompanying text.

with the majority on only one point.¹⁸² He agreed that the district court's *carte blanche* deference to the findings of the prison officials was improper.¹⁸³ Thus, Justice Stevens concurred only with the majority's decision to remand for a case-by-case review of the forty-six specifically excluded publications.¹⁸⁴ This limited concurrence, however, was eclipsed by Justice Stevens' disagreement with all of the majority's other findings.¹⁸⁵

1. The Abandonment of *Martinez*

Justice Stevens strongly disapproved of the majority's use of the *Turner* standard rather than the *Martinez* standard in its resolution of *Thornburgh*. Justice Stevens viewed *Thornburgh* as being more closely related to *Martinez* because they both were concerned with the rights of free citizens.¹⁸⁶ While *Martinez* involved the screening and censorship of outgoing prisoner correspondence, both *Martinez* and *Thornburgh* recognized that the rights of free citizens are affected when regulations are imposed upon prisoner correspondence.¹⁸⁷ The standard in *Turner*, however, was formulated without consideration of the rights of free citizen correspondents because the regulations were limited to inmate-to-inmate correspondence.¹⁸⁸

Justice Stevens also noted that lower courts routinely have applied the *Martinez* standard when reviewing limitations not only on correspondence, but also on communications such as the publications at issue in *Thornburgh*.¹⁸⁹ The lower courts, validating some restrictions

182. *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1885 (Stevens, J., concurring and dissenting).

183. *Id.* at 1886 (Stevens, J., concurring and dissenting).

I cannot agree, however, with either [the Court's] holding that another finding of "reasonableness" will justify censorship or its premature approval of the Bureau's regulations. These latter determinations upset precedent in a headlong rush to strip inmates of all but a vestige of free communication with the world beyond the prison gate.

Id. (Stevens, J., concurring and dissenting) (citing *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Procunier v. Martinez*, 416 U.S. 396, 422 (1974) (Marshall, J., concurring); *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam)).

184. *Thornburgh*, 109 S. Ct. at 1886 (Stevens, J., concurring and dissenting). The district court had found the suppression of the forty-six specifically excluded publications to be reasonable, and thus sustained their exclusion. *Id.* (Stevens, J., concurring and dissenting). The Supreme Court remanded for a case-by-case review. *Id.* at 1885.

185. *Thornburgh*, 109 S. Ct. at 1886 (Stevens, J., concurring and dissenting).

186. Justice Stevens emphasized that *Thornburgh*, like *Martinez*, was concerned with the rights of prisoners and nonprisoners. *Id.* at 1887 (Stevens, J., concurring and dissenting). *Turner*, on the other hand, was concerned solely with the rights of prisoners. *Id.* at 1888 (Stevens, J., concurring and dissenting).

187. See *supra* notes 36-37 and accompanying text; see also *Thornburgh*, 109 S. Ct. at 1886 (Stevens, J., concurring and dissenting).

188. See *supra* notes 88-91 and accompanying text; see also *Thornburgh*, 109 S. Ct. at 1888 (Stevens, J., concurring and dissenting).

189. See *Thornburgh*, 109 S. Ct. at 1887 (Stevens, J., concurring and dissenting).

and invalidating others,¹⁹⁰ have indicated that the *Martinez* standard "does not deprive prison officials of the discretion necessary to perform their . . . tasks."¹⁹¹ The *Thornburgh* majority also expressly recognized that *Martinez* does not deprive prison officials of their discretion.¹⁹² Given these facts, Justice Stevens found it inexplicable that the Court limited *Martinez* to outgoing mail and applied *Turner* in this case.¹⁹³

2. The Application of *Turner*

Justice Stevens feared that the *Turner* reasonableness standard adopted by the Court "too easily may be interpreted to authorize arbitrary rejections of literature addressed to inmates."¹⁹⁴ He also was troubled by the fact that the *Martinez* standard does not take into account the rights of nonprisoners.¹⁹⁵ Justice Stevens asserted that

"[L]ower courts routinely have applied [*Martinez's*] standard to review limitations not only on correspondence between inmates and private citizens, but also on communications—such as the newsletters, magazines, and books at issue—between inmates and publishers." *Id.* (Stevens, J., concurring and dissenting) (citing *Lawson v. Dugger*, 840 F.2d 781 (11th Cir. 1987), *reh'g denied*, 840 F.2d 779 (1988) (*per curiam*), *vacated*, 109 S. Ct. 2096 (1989); *Valiant-Bey v. Morris*, 829 F.2d 1441 (8th Cir. 1987); *Murphy v. Missouri Dep't. of Corrections*, 814 F.2d 1252 (8th Cir. 1987); *Pepperling v. Crist*, 678 F.2d 787 (9th Cir. 1982); *Trapnell v. Riggsby*, 622 F.2d 290 (7th Cir. 1980); *Brooks v. Seiter*, 779 F.2d 1177 (6th Cir. 1985); *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978); *Aikens v. Jenkins*, 534 F.2d 751 (7th Cir. 1976); *Morgan v. LaVallee*, 526 F.2d 221 (2d Cir. 1975)).

190. *See, e.g.*, *Espinoza v. Wilson*, 814 F.2d 1093 (6th Cir. 1987); *Travis v. Norris*, 805 F.2d 806 (8th Cir. 1986); *Meadows v. Hopkins*, 713 F.2d 206 (6th Cir. 1983); *Vodicka v. Phelps*, 624 F.2d 569 (5th Cir. 1980); *Carpenter v. South Dakota*, 536 F.2d 759 (8th Cir. 1976), *cert. denied*, 431 U.S. 931 (1977).

191. *Thornburgh*, 109 S. Ct. at 1887 (Stevens, J., concurring and dissenting). If the *Martinez* standard deprived prison officials of the discretion necessary to perform their tasks, every challenged regulation would be invalidated by the courts.

192. *Id.* at 1879 (Stevens, J., concurring and dissenting). The majority stated that *Martinez* did not deprive prison officials of the discretion necessary to vindicate and protect the government interests at issue. *Id.* (Stevens, J., concurring and dissenting).

193. *Id.* at 1887 (Stevens, J., concurring and dissenting). "[The majority recognizes that *Martinez* does not deprive prison officials of their discretion.] Inexplicably, it then partially overrules *Martinez* by limiting its scope to outgoing mail; letters and publications sent to prisoners now are subject only to review for 'reasonableness.'" *Id.* (Stevens, J., concurring and dissenting).

194. *Id.* at 1889 (Stevens, J., concurring and dissenting). Justice Stevens' was concerned that a reasonableness standard creates an easy means of upholding first amendment restrictions based on speculative security risks and administrative convenience, rather than on specific evidence indicating the restrictions are necessary for the furtherance of an important governmental interest. *Id.* (Stevens, J., concurring and dissenting) (citing *Turner v. Safley*, 482 U.S. 78, 101 n.1 (1987)).

195. *Thornburgh*, 109 S. Ct. at 1889 (Stevens, J., concurring and dissenting). Justice Stevens believed that the Court's acceptance of the prison officials' asserted need for "broad discretion" to prevent internal disorder" creates a presumption that the rejec-

provisions which allow publications to be rejected if their contents are “‘detrimental’ to ‘security, good order, or discipline’ or ‘might facilitate criminal activity’”¹⁹⁶ are impermissibly ambiguous,¹⁹⁷ and give free rein to prison officials to censor incoming publications.¹⁹⁸

Further, Justice Stevens argued that the majority’s acceptance of the prison officials’ assertion that they need broad discretion to prevent internal disorder created a presumption that all rejections pursuant to the regulations are reasonable.¹⁹⁹ Accordingly, he concluded that this presumption will replace the meaningful scrutiny of constitutional claims in the prison setting.²⁰⁰ To support this claim, Justice Stevens cited the testimony of a mail clerk which indicated that publications were rejected on the basis of personal prejudices or categorical assumptions, rather than individualized assessments of risk.²⁰¹ In addition, he stated that some of the rejected publications may be the

tion of publications is reasonable. This presumption, Justice Stevens noted, provides less judicial protection of publishers’ rights than is required by the first amendment. *Id.* (Stevens, J., concurring and dissenting).

196. *Id.* (Stevens, J., concurring and dissenting) (citing 28 C.F.R. § 540.71(b) (1988)); see *supra* note 115.

197. *Thornburgh*, 109 S. Ct. at 1889 (Stevens, J., concurring and dissenting). In assessing this regulation, Justice Stevens agreed with the earlier court of appeals holding in this case. The appellate court stated:

Although the introductory paragraph of [28 C.F.R. § 540.71(b) (1988)] appears at first to limit the Warden’s authority to rejecting material “determined detrimental to the security, good order, or discipline of the institution,” it goes on to provide: “or if it might facilitate criminal activity.” “[M]ight facilitate” permits a far looser causal nexus between expression and proscribed conduct than “encourages.” Moreover, the term “detrimental” is susceptible of different meanings

Abbott v. Meese, 824 F.2d 1166, 1173 (D.C. Cir. 1987), *vacated sub nom. Thornburgh v. Abbott*, 109 S. Ct. 1874 (1989) (quoting 28 C.F.R. § 540.71(b) (1988)).

198. *Thornburgh*, 109 S. Ct. at 1889 (Stevens, J., concurring and dissenting). The terms “detrimental” and “might facilitate” are so malleable and open to interpretation that there is little relation left between the enforcement of the regulations and the feared conduct being prevented. *Id.* (Stevens, J., concurring and dissenting). This leaves the warden virtually unchecked in his censorship of incoming publications. *Id.* (Stevens, J., concurring and dissenting).

199. See *supra* note 195 and accompanying text. Further, Justice Stevens stated that no evidence supports the majority’s assumption that any of the publications will be circulated among the prison population, much less that such feared circulation would cause “ripples of disruption.” *Thornburgh*, 109 S. Ct. at 1890 (Stevens, J., concurring and dissenting).

200. “I am concerned that the Court today too readily ‘substitute[s] the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting.’” *Thornburgh*, 109 S. Ct. at 1890 (Stevens, J., concurring and dissenting) (quoting *Black v. Rutherford*, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring)). Cf. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting); *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 142-43 (1977) (Marshall, J., dissenting).

201. *Thornburgh*, 109 S. Ct. at 1890 n.14 (Stevens, J., concurring and dissenting). In addition, Justice Stevens cited some explanations given for the rejection of separate publications. They were remarkably similar, leading to suspicions that they were, essentially, form rejections. *Id.* at 1890 n.15 (Stevens, J., concurring and dissenting).

only medium for a particularly unconventional message, making it irrelevant that the regulations permit prisoner access to other publications.²⁰² Finally, Justice Stevens noted that there was *no* evidence that an incoming publication ever caused a security or even a disciplinary problem.²⁰³ In fact, some publications rejected by the warden at Marion Federal Penitentiary were delivered without incident to inmates in other prisons.²⁰⁴

3. The All-or-Nothing Rule

Justice Stevens disagreed with the majority's holding that the all-or-nothing rule is reasonable.²⁰⁵ "[A]fter 16 years of litigation petitioners have failed to develop an argument that tells us anything about the assumed security or administrative justification for this rule."²⁰⁶ The majority did not analyze the district court's finding that the rule was reasonable,²⁰⁷ deferring instead to the lower court's

202. *Thornburgh*, 109 S. Ct. at 1890 (Stevens, J., concurring and dissenting); see *supra* notes 96-97 and accompanying text. The availability of alternative means of exercising the right infringed upon is a factor in the analysis of the reasonableness of a regulation impacting correspondence under *Turner*. See *Turner v. Safley*, 482 U.S. 78, 90 (1987); see also *Thornburgh*, 109 S. Ct. at 1883 (Stevens, J., concurring and dissenting).

203. *Thornburgh*, 109 S. Ct. at 1890 (Stevens, J., concurring and dissenting).

204. *Id.* (Stevens, J., concurring and dissenting) (citing Brief for Appellant at 60, 99, 116-17). Justice Stevens was convinced that under either the *Martinez* standard or the more deferential "reasonableness" standard of *Turner*, the regulations at issue are an impermissibly exaggerated response to security concerns. *Id.* (Stevens, J., concurring and dissenting) (citing *Turner*, 482 U.S. at 89-90).

205. *Thornburgh*, 109 S. Ct. at 1891-92 (Stevens, J., concurring and dissenting). Justice Stevens again sided with the court of appeals, and against the majority, in agreeing with the finding that "rejection of the balance [of the publication] is not 'generally necessary' to protect the legitimate governmental interest involved in the portion properly rejected." *Id.* (Stevens, J., concurring and dissenting) (quoting *Abbott v. Meese*, 824 F.2d 1166, 1173-74 (D.C. Cir. 1987)).

206. *Thornburgh*, 109 S. Ct. at 1891 (Stevens, J., concurring and dissenting). Justice Stevens quoted in its entirety the discussion of the record that led to the district court's finding that the all-or-nothing rule was reasonable. *Id.* at 1891 n.17 (Stevens, J., concurring and dissenting). This discussion proffered no evidence that the inmates would be more discontent with the practice of censoring portions of a publication than with the practice of rejecting the entire publication. *Id.* (Stevens, J., concurring and dissenting).

In fact, one of the defendant prison officials in the court of appeals admitted that there was "*really no reason* for not deleting the offending material and turning over the balance to the inmate . . ." *Abbott*, 824 F.2d at 1174 (emphasis added).

207. *Thornburgh*, 109 S. Ct. at 1891 (Stevens, J., concurring and dissenting). Because the majority did not apply the *Martinez* test, it felt relieved of the obligation to question the district court's finding that the all-or-nothing rule was reasonably founded. *Id.* at 1884 (Stevens, J., concurring and dissenting). This glib evasion on the

“‘finding’ of a security threat that even prison officials admitted to be nonexistent.”²⁰⁸ In Justice Stevens’ view, the majority’s primary justification for the all-or-nothing rule is administrative convenience,²⁰⁹ which is insufficient as a matter of law under either the *Turner* reasonableness standard or the *Martinez* standard.²¹⁰ Justice Stevens stated that the majority’s holding regarding the all-or-nothing rule “highlights the likelihood that an attitude of broad judicial deference, coupled with a ‘reasonableness’ standard, will provide inadequate protection for the rights at stake.”²¹¹

In short, Justice Stevens believed that the Court should have decided *Thornburgh* under the *Martinez* standard of review because *Thornburgh* was more closely related to *Martinez* than to *Turner*.²¹² Further, Justice Stevens viewed the application of the *Turner* standard of review as creating a broad deference to decisions made by prison officials, a deference that will replace meaningful constitutional scrutiny in the prison setting.²¹³ His view is corroborated by the majority’s validation of the all-or-nothing rule, despite the fact that prison officials could not identify a need for such a rule.²¹⁴

V. IMPACT

The most immediate impact of this decision will be felt on remand, when the as-applied challenge will be considered in regard to the forty-six specifically rejected publications.²¹⁵ The district court can be expected to uphold the regulations as applied to the rejected publications because the *Thornburgh* Court’s use of the *Turner* standard of review clearly sends a message to the lower courts that it prefers

part of the nation’s highest court is remarkable. See *infra* note 208 and accompanying text.

208. *Thornburgh*, 109 S. Ct. at 1891 (Stevens, J., concurring and dissenting); see also *id.* at 1891 n.17 (Stevens, J., concurring and dissenting).

209. *Id.* at 1891-92 (Stevens, J., concurring and dissenting) (citing Brief for Appellant at 41, 68). “[G]eneral speculation that some administrative burden might ensue should not be sufficient to justify a meat-ax abridgment of the First Amendment rights of either a free citizen or a prison inmate.” *Id.* at 1892 (Stevens, J., concurring and dissenting).

210. *Id.* (Stevens, J., concurring and dissenting). Because the prison officials are required to read an article before rejecting it, the extra few seconds required to clip an article can hardly be of constitutional significance. *Id.* (Stevens, J., concurring and dissenting).

211. *Id.* (Stevens, J., concurring and dissenting). Thus, Justice Stevens believed that the reasonableness standard was “toothless.” *Id.* at 1892 n.18 (Stevens, J., concurring and dissenting).

212. See *supra* notes 186-88 and accompanying text.

213. See *supra* note 200 and accompanying text.

214. See *supra* notes 206-11 and accompanying text.

215. *Thornburgh*, 109 S. Ct. at 1885. The Court remanded the 46 specifically rejected publications “as to which there remains a live controversy” to determine the validity of their rejections.

to defer to the decisions of prison officials whenever possible.²¹⁶ The most obvious example of the Court's deferential bias is the upholding of the all-or-nothing rule in the face of an admitted lack of evidence even hinting at its necessity.²¹⁷ With this kind of precedent from the Supreme Court, the district court has no basis upon which to invalidate the FBP regulations as applied to the forty-six specifically excluded publications.

In a broader sense, the deference in this case is likely to turn the tide of prison constitutional review back to its pre-*Martinez*, highly deferential position.²¹⁸ *Martinez* was the first prisoners' rights case to break the precedent of judicial deference to the decisions of prison officials.²¹⁹ The *Thornburgh* Court explicitly stated that it chose to apply the *Turner* standard of review because *Turner* allowed more deference to the decisions of prison officials than *Martinez*.²²⁰ The Court made this decision despite the fact that *Martinez* is the factual equivalent of *Thornburgh* with a standard of review formulated for precisely the issues presented by *Thornburgh*.²²¹ In addition, the acceptance of prison officials' unwarranted allegations, as in the all-or-nothing rule,²²² is a very strong example of the Supreme Court not only advocating deference, but applying it as well. This precedent set by *Thornburgh* will undoubtedly turn constitutional prison review back to its original highly deferential position.

Thornburgh also specifically limited *Martinez* to situations involving outgoing prisoner mail.²²³ All other regulations involving prisoner correspondence are governed by *Turner*.²²⁴ A problem created

216. The selection of the *Turner* standard of review is inescapably a selection of a standard that gives great flexibility to prison officials in performing their tasks. See *supra* note 84 and accompanying text. Arguably, the selection of the *Turner* standard of review can be seen as a return to the Court's pre-*Martinez* attitude of hands-off deference to the problems of prison administration. See *supra* notes 17-18 and accompanying text.

217. See *supra* notes 155, 164, 206 and accompanying text.

218. Prior to *Martinez*, most courts adopted a hands-off attitude towards prison administration problems. See *supra* notes 17-18 and accompanying text. Such a hands-off attitude provides the ultimate in deferential approaches.

219. See *Procunier v. Martinez*, 416 U.S. 396, 404-07 (1974).

220. See *supra* note 93 and accompanying text.

221. Both *Martinez* and *Thornburgh* involved prison regulations censoring mail between inmates and free citizens. See *Martinez*, 416 U.S. at 408-09; see also *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1876-78 (1989). These regulations create an incidental restriction on the free speech rights of free citizens. See *supra* notes 186-88 and accompanying text.

222. See *supra* notes 155, 164, 206 and accompanying text.

223. *Thornburgh*, 109 S. Ct. at 1881.

224. *Id.* at 1881-82.

by this dichotomy is that the sensitivity with which *Martinez* treated the rights of free citizens corresponding to prisoners did not exist in *Turner* or *Thornburgh*.²²⁵ Thus, in all cases except those regulating only outgoing mail, the first amendment rights of free citizens will be subject to incidental restriction by prison regulations without consideration by judicial review.²²⁶ Free citizens corresponding with or mailing subscriptions to prisoners will have their free speech rights infringed by regulations that are subject to review by a standard that was formulated only for inmate-to-inmate correspondence.²²⁷

Finally, application of the all-or-nothing rule results in a prison official's rejection of an *entire* publication because of one offensive article, or, as the case may be, one offensive page.²²⁸ A prison inmate can be denied an entire subscription publication because, in one official's opinion, one article is too sensitive to be delivered to the prisoner, who then might disseminate it to the entire prison population.²²⁹ Under the *Turner* standard of review, as applied in *Thornburgh*, the inmate has no redress in this situation. The Court has afforded so much deference to prison officials in their application of the FBP regulations that prisoners effectively are stripped of their first amendment free speech right to receive information. Thus, after *Thornburgh*, an inmate may be denied a publication on little more than an official's whim.

VI. CONCLUSION

By using the *Turner* standard of review, rather than *Martinez*, the Court applied the incorrect standard of review to *Thornburgh*. This decision is inexplicable in light of the fact that the *Martinez* standard was promulgated for precisely the situation presented in *Thornburgh*, where the rights of free citizens are affected by regulations imposed on prison inmates. The less demanding *Turner* standard provides no protection for free citizens' rights that are incidentally affected by prison regulations. This situation is exacerbated by the Court's adoption of a standard of broad deference to the decisions of prison officials. Prison officials are left with the freedom to enforce or apply FBP regulations in any manner they choose, without fear of being second-guessed by the courts. Prison inmates now are faced with the

225. The *Turner* standard of review did not consider incidental restrictions on the rights of free citizens, as did *Martinez*. *Turner* was concerned only with pure prisoners' rights. See *supra* notes 89-91 and accompanying text.

226. This is the only logical conclusion, considering that the standard for review set forth in *Thornburgh*, that of *Turner*, does not take into account the rights of free citizens. See *supra* notes 89-91 and accompanying text.

227. See *supra* notes 89-91 and accompanying text.

228. See *supra* notes 168-72 and accompanying text.

229. See *supra* notes 168-72 and accompanying text.

narrowing of one of their few remaining freedoms—that of receiving information—with little possibility of redress. The Court appears to be, as Justice Stevens feared, “in a headlong rush to strip inmates of all but a vestige of free communication with the world beyond the prison gate.”²³⁰

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230. *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1886 (1989) (Stevens, J., concurring and dissenting).

