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RENDERING *TURNER* TOOTHLESS: THE SUPREME COURT'S DECISION IN *BEARD V. BANKS*

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ABSTRACT

The Supreme Court has long recognized that prisoners' constitutional rights must be balanced against the need for deference to the decisions of prison administrators when prisoners' rights are restricted incident to their incarceration. The Court, however, has never explicitly recognized a theory of proper incarceration, yet it has implicitly adopted such a theory through its decisions regarding the constitutionally permitted level of restriction on particular prisoners' rights. This Note argues that the Court's prisoners' rights jurisprudence evinces a particular definition of proper incarceration and then reads the multiple opinions in Beard v. Banks *consistently with that theory.*

INTRODUCTION

"The United States has considerably more violent crime and vastly more punishment than any other prosperous democracy."[1] "There has been a fivefold increase in the number of incarcerated individuals over the last thirty years."[2] "In 2006, over 7.2 million people were on probation, in jail or prison, or on parole" in the

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1. CRIMINAL LAW: CASES AND MATERIALS 21 (John Kaplan et al. eds., 5th ed. 2004).

2. Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1194 (2006).

United States.[3] As of December 2006, 2,258,983 individuals were incarcerated in the United States,[4] roughly five out of every one thousand Americans.[5] For certain segments of the population, the statistics are far bleaker. At the end of 2006, 3.04 percent of black males were prison inmates, compared with 1.26 percent of Hispanic males and 0.49 percent of white males.[6]

Such incarceration has been justified primarily by two theories:

> What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.
>
> What we may call the utilitarian view holds that on the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.[7]

The American system of incarceration is based on these two theories, and the states along with prison administrators often tailor incarceration in their jurisdictions to further these goals.

"Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation

3. U.S. Dep't of Justice, Bureau of Justice Statistics, Corrections Statistics, http://www.ojp.usdoj.gov/bjs/correct.htm (last visited Jan. 14, 2007).

4. U.S. Dep't of Justice, Bureau of Justice Statistics, Prison Statistics, http://www.ojp.usdoj.gov/bjs/prisons.htm (last visited Jan. 14, 2007).

5. *See id.* ("[T]here were an estimated 501 prison inmates per 100,000 U.S. Residents . . . .").

6. *See id.* ("At yearend 2006 there were 3,042 black male sentenced prison inmates per 100,000 black males in the United States, compared to 1,261 Hispanic male inmates per 100,000 Hispanic males and 487 white male inmates per 100,000 white males.").

7. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955).

between law and the social order."[8] The "penological goals of retribution, deterrence, incapacitation, and rehabilitation"[9] can justify a variety of legitimate penological schemes, "[a]nd the responsibility for making these fundamental choices and implementing them lies with the legislature."[10] Furthermore, "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'"[11] Thus, "reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."[12]

Notwithstanding this deference to legislatures, the Court has set some limits on the types of constitutionally acceptable punishment. "[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime,"[13] and he does "not forfeit all constitutional protections by reason of [his] conviction and confinement" alone.[14] The Eighth Amendment's prohibition on cruel and unusual punishment protects prisoners,[15] but their constitutional protections do not stop there.[16] The Court explained, "[O]ur cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, . . . [and] they are protected against invidious discrimination on the basis of race under the Equal Protection Clause."[17] Finally, "they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law."[18] Although "[p]rison walls do not form a barrier separating prison

8. Harmelin v. Michigan, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring).

9. *Id.* at 999.

10. *Id.* at 998.

11. *Id.* (quoting Rummel v. Estelle, 445 U.S. 263, 275–76 (1980)).

12. Solem v. Helm, 463 U.S. 277, 290 (1983).

13. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

14. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (quoting Bell v. Wolfish, 441 U.S. 520, 545 (1979)).

15. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

16. *But see* Beard v. Banks, 126 S. Ct. 2572, 2582–83 (2006) (Thomas, J., concurring in the judgment) (arguing that legislatures and prison officials constitutionally have the ability to define punishment in any way that does not exceed the limits of the Eighth Amendment).

17. *Wolfish*, 441 U.S. at 545 (citing Pell v. Procunier, 417 U.S. 817 (1974); Cruz v. Beto, 405 U.S. 319 (1972); Lee v. Washington, 390 U.S. 333 (1968); Cooper v. Pate, 378 U.S. 546 (1964)).

18. *Id.* at 545 (citing Meachum v. Fano, 427 U.S. 215 (1976); *McDonnell*, 418 U.S. at 539).

inmates from the protections of the Constitution,"[19] "the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere."[20]

Prisoners' retention of their constitutional rights and their ability to appeal to courts for protection are of particular importance given their place in society. Incarcerated criminal offenders "constitute a despised minority without political power to influence the policies of legislative and executive officials."[21] Prisoners are "routinely and permanently disenfranchised."[22] As "'constitutional outsiders' replete with . . . 'spoiled identities,'"[23] prisoners lack the ability to affect the legislature during their imprisonment when prison regulations deprive them of life, liberty, and property and often do not regain that ability upon release from prison.[24]

In prisoners' rights cases, the Supreme Court has historically balanced this need for protection of the rights of politically powerless prisoners with the need for deference to legislatures and prison administrators.[25] In balancing these ideals, however, the Court has refused to find that the adoption of any particular penological theory is mandated by the Constitution[26] and has left the difficult task of dealing with the complex and intractable problems of prison

19. Turner v. Safley, 482 U.S. 78, 84 (1987). This language was also used by the Court in *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989), and by the concurrence in *Overton v. Bazzetta*, 539 U.S. 126, 137 (2003) (Stevens, J., concurring). The Court has similarly stated that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *McDonnell*, 418 U.S. at 555–56.

20. *Banks*, 126 S. Ct. at 2577–78 (plurality opinion).

21. CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 292 (2d ed. 1997).

22. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459 (1999). Many states permanently disenfranchise felons. *Id.* The Supreme Court accepted the constitutionality of this practice in *Richardson v. Ramirez*, 418 U.S. 24 (1974), upholding a California law permanently disenfranchising all felons. *Id.* at 56.

23. James E. Robertson, *The Jurisprudence of the PLRA: Inmates as "Outsiders" and the Countermajoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187, 198 (2001).

24. *See id.* ("[I]nmates had nary a voice in the legislative debate over the proposed legislation."). This is because they are disenfranchised. Chemerinsky, *supra* note 22, at 459; *see also* Geiger, *supra* note 2, at 1191 ("Ex-offenders are often legally disenfranchised.").

25. *See* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) ("Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. . . . [T]his attitude springs from . . . perceptions about the nature of the problems and efficacy of judicial intervention. . . . But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . .").

26. Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

administration to prison administrators themselves.[27] It has also declined to craft a theory of proper incarceration, but has nevertheless found that some rights are "inconsistent with proper incarceration."[28]

This Note argues that despite the Court's explicit claims to the contrary, it has in fact created and implemented an ascertainable theory of proper incarceration through its prisoners' rights cases. It also argues that the Court's decision in *Beard v. Banks*[29] should be read in a way that is consistent with this theory and should represent further development of this theory in the realm of deprivations for rehabilitation. Part I outlines the broader legal history of prisoners' rights cases, with a particular focus on *Turner v. Safley*,[30] which provided the balancing test used in *Banks*. Part II discusses the Supreme Court's decision in *Beard v. Banks*. Finally, Part III analyzes the test for determining the constitutionality of restrictions on prisoners' rights and the proper amount of deference to be given prison administrators. This Part interprets the theory of proper incarceration implicitly developed and implemented by the Court and locates within *Banks* a way to further develop that theory consistent with precedent.

I. BACKGROUND

The Court has sought to balance the rights retained by prisoners with the goals of effective and efficient prison administration through its prisoners' rights jurisprudence. It has tried to maintain meaningful judicial review while deferring to the legislature and prison officials to set and administer prison policy. Initially, the Court's cases lacked a coherent standard for reviewing prisoners' rights claims and balancing

27. *Martinez*, 416 U.S. at 404–05.

28. *See* Johnson v. California, 543 U.S. 499, 510–11 (2005) (applying strict scrutiny instead of the deferential *Turner* standard because the Court has "applied *Turner*'s reasonable relationship test *only* to rights that are 'inconsistent with proper incarceration'"). The majority in *Johnson* did not explicitly refuse to determine what proper incarceration should entail; instead it decided the case without crafting any theory of proper incarceration because it found equal protection was not inconsistent with proper incarceration. *Id.* at 510–11, 515. Justice Thomas, however, argued in his dissent that by inquiring whether equal protection was consistent with proper prison administration, the majority in fact impermissibly substituted its conception of proper incarceration for that of the prison officials. *Id.* at 541–43 (Thomas, J., dissenting). For a definition of the term "theory of proper incarceration" and an explanation of the Court's theory, see *infra* Part III.A.

29. Beard v. Banks, 126 S. Ct. 2572 (2006).

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

these concerns. Then, in *Turner v. Safley*, the Court developed the reasonable relationship test to clear up confusion and provide for a single standard. Over time, however, numerous standards again developed to deal with specific prisoners' rights claims. The Court's prisoners' rights jurisprudence culminated in its decision in *Beard v. Banks*, upholding a prison policy of depriving prisoners of constitutional rights to encourage better behavior and promote rehabilitation.[31]

This Part outlines the progression of the Court's prisoners' rights jurisprudence by tracing early prisoners' rights law, examining the Court's decision in *Turner* and the state of prisoners' rights post-*Turner*, and discussing the cases following *Turner* that provide the immediate context for the Court's decision in *Banks*.

*A. Identifying the Problem: The Pre-*Turner *Cases*

In the Court's early cases dealing with claims of prisoners' rights, the absence of a clear standard and test created a landscape of jurisprudence which was confusing and difficult to navigate. First, in *Procunier v. Martinez*,[32] the Court framed the analysis by requiring the federal courts to take cognizance of prisoners' constitutional claims and later explained that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[33] It examined broad prison policies requiring censorship of incoming and outgoing mail and prohibiting the use of law students and other paraprofessionals to conduct attorney-client interviews.[34] Though the question was framed as whether the First Amendment applied in prison, the Court found it unnecessary to answer that question because it found the regulations impinged unconstitutionally on the rights of those not imprisoned.[35] The Court based its decision on judicial restraint and recognized that courts are ill-equipped to deal with the complex problems posed by the modern prison system.[36] It

31. *Banks*, 126 S. Ct. at 2578–79 (plurality opinion).

32. Procunier v. Martinez, 416 U.S. 396 (1974).

33. *Turner*, 482 U.S. at 84–85 (citing *Martinez*, 416 U.S. at 404–06).

34. *Martinez*, 416 U.S. at 398–400.

35. *Id.* at 408 ("Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter . . . .").

36. *Id.* at 404–05 ("[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require

noted, however, that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[37] Thus, it left unresolved the standard of review for prisoners' constitutional claims in light of those conflicting interests.[38]

Three other cases attempted to deal with prisoners' rights issues within the *Martinez* framework but failed to create any coherent standard.[39] In *Pell v. Procunier*,[40] the Court upheld a California prison policy prohibiting face-to-face media interviews with prisoners[41] on the ground that prisoners had alternative ways of exercising their First and Fourteenth Amendment rights to communication.[42] In balancing the interests framed in *Martinez*, the Court deferred to prison officials' judgments regarding prison security and determined that unless their actions were an exaggerated response to concerns of prison security, the Court would rely on the expertise of prison officials in judgments about prison policies.[43]

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[44] the Court balanced the need for deference to prison officials when dealing with urgent problems of prison administration with the fact that prisoners retain rights not inconsistent with their status as prisoners.[45] Because allowing the "development of informal organizations [would] threaten the core functions of prison administration, maintaining safety and internal security,"[46] the Court in *North Carolina Prisoners' Labor Union* upheld the policy

expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.").

37. *Id.* at 405–06.

38. *See Turner*, 482 U.S. at 85 ("*Martinez* did not itself resolve the question that it framed.").

39. *See id.* at 85–89 (discussing the opinions after *Martinez* leading up to *Turner*).

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

41. *Id.* at 821–22.

42. *Id.* at 825–26. The availability of alternative means of exercising the restricted right was later incorporated into the *Turner* test. *See Turner*, 482 U.S. at 90 ("A second factor relevant in determining the reasonableness of a prison restriction, as *Pell* shows, is whether there are alternative means of exercising the right that remain open to prison inmates.").

43. *Turner*, 482 U.S. at 86 (citing *Pell*, 417 U.S. at 827).

44. Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

45. *Id.* at 129–32.

46. *Turner*, 482 U.S. at 92 (citing *N.C. Prisoners' Labor Union*, 433 U.S. at 125).

prohibiting prisoner labor unions and restricting associational rights as central and therefore rationally related to the objectives of prison administration.[47]

Finally, in *Bell v. Wolfish*,[48] the Court upheld a prison policy permitting inmates to receive hardcover books only when sent directly from the publisher, book club, or bookstore.[49] Prison administrators justified this "publisher-only" rule as a means of avoiding "'serious' security and administrative problems."[50] The Court noted that the restriction was neutral and that the inmates retained alternative means of exercising their First Amendment rights.[51] Ultimately the Court found this was "a rational response by prison officials to an obvious security problem," and absent prohibitions far more sweeping than those here, the considered judgment of prison officials would prevail.[52]

These four cases did not provide a consistent standard to determine the constitutionality of restrictions on the rights of prisoners. Though *Martinez* framed the analysis by requiring a balance of prisoners' rights with deference to prison administrators,[53] in *Pell*, *North Carolina Prisoners' Labor Union*, and *Wolfish*, the Court balanced those interests ad hoc. In each case the deciding factor was different. In *Pell*, the constitutionality of the provision turned on the alternative means available for prisoners to exercise their rights,[54] but in *North Carolina Prisoners' Labor Union*, the Court found the prisoners' interests were "barely implicated" because the need for institutional security was so high.[55] And finally in *Wolfish*, it

47. *N.C. Prisoners' Labor Union*, 433 U.S. at 132–33.

48. Bell v. Wolfish, 441 U.S. 520 (1979).

49. *Id.* at 550.

50. *Id.* at 549.

51. *Id.* at 551–52. As noted, the second prong of the *Turner* test incorporated the availability of alternative means of exercising the right. *See supra* note 42. Similarly, neutrality was incorporated into the first prong of the *Turner* test, which requires a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. *Turner*, 482 U.S. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). The Court further explained that to satisfy this first prong, "the governmental objective must be a legitimate and *neutral* one." *Id.* at 90 (emphasis added).

52. *Wolfish*, 441 U.S. at 551.

53. Procunier v. Martinez, 416 U.S. 396, 405–06 (1974).

54. Pell v. Procunier, 417 U.S. 817, 825–26 (1974).

55. *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 130–33 (1977) ("Responsible prison officials must be permitted to take reasonable steps to forestall such . . . threat[s].").

was the neutrality and narrowness of the provision that substantiated its constitutionality.[56] It is in this confusing context that *Turner v. Safley* was decided, and the Court provided guidance in this area of law.

B. Turner v. Safley *and the Background of Deference to Prison Administrators*

The decision in *Turner* provided what was to be the sole standard for prisoners' rights cases, and the Court has since declared that future decisions in this area should not render this powerful decision toothless.[57] In *Turner*, the Supreme Court first formulated the reasonable relationship test for prisoners' rights cases—a test that would later be applied in *Banks*—and laid the foundation for much of modern prisoners' rights jurisprudence.[58] *Turner* involved two prison policies: a regulation of correspondence between inmates in different institutions and a regulation severely restricting inmates' ability to marry.[59] The correspondence regulation permitted communication with inmates in other institutions only when it was between immediate family members or when the correspondence concerned legal matters.[60] Otherwise, the regulation prohibited correspondence unless "the classification/treatment team of each inmate deem[ed] it in the best interest of the parties involved."[61] The marriage regulation allowed marriage by an inmate only when approved by the superintendent of the prison and provided that permission should only be given when there were compelling reasons to do so.[62]

The Court's opinion in *Turner* outlined four factors to balance in determining whether a regulation restricting prisoners' rights is reasonable:

> First, is there a "'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to

56. *See Wolfish*, 441 U.S. at 551–53 (concluding the restriction is "limited," in part because of its neutral operation and the alternatives available to prisoners).

57. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Supreme Court indicated the importance of *Turner* by adopting its reasonableness standard and declaring that it is not "toothless." *Id.* at 414.

58. *See* Beard v. Banks, 126 S. Ct. 2572, 2577 (2006) (plurality opinion) (declaring *Turner* one of the cases containing "the basic substantive legal standards governing this case").

59. Turner v. Safley, 482 U.S. 78, 81–82 (1987).

60. *Id.* at 81.

61. *Id.* at 82.

62. *Id.*

> justify it"? Second, are there "alternative means of exercising the right that remain open to prison inmates"? Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? And, fourth, are "ready alternatives" for furthering the governmental interest available?[63]

Applying this test, the Court upheld the correspondence regulation, determining that the regulation reasonably related to penological interests of security and safety and thus logically advanced those institutional goals.[64] Importantly, this regulation was "not an exaggerated response to those objectives."[65] In contrast, the Court struck down the marriage regulation after applying the four-factor test because it did not reasonably relate to the prison administration's goal of rehabilitation and was too broad to serve that penological objective.[66] The Court noted that although the prison could implement restrictions on the time, place, and manner of inmates' marriages, it could not categorically ban marriage.[67]

In striking down the marriage restriction and upholding the correspondence regulation, the *Turner* Court announced a definite standard and test for determining the constitutionality of rights restrictions in prisons.[68] In announcing the four-factor balancing test, the Court established the *Turner* test as the measure of constitutionality for regulations restricting the rights of prisoners.

63. *Banks*, 126 S. Ct at 2578 (plurality opinion) (quoting *Turner*, 482 U.S. at 89–90) (internal citations omitted).

64. *Turner*, 482 U.S. at 93.

65. *Id.*

66. *See id.* at 97–99 (explaining that though rehabilitation was a valid interest, the provisions were not reasonably related and that the provisions themselves were broader than the penological objectives stated).

67. *See id.* (explaining that prisons could certainly regulate the time and circumstances of the marriage ceremony for legitimate security interests but that the rule banning marriages was an exaggerated response to security objectives).

68. *See id.* at 89–91 (articulating the four-factor test). *But see* Trevor N. McFadden, Note, *When to Turn to* Turner*? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 136 (2006) (arguing that although *Turner* is nominally the test for prisoners' rights, it is not applied in many cases).

C. Testing the Limits of the Turner *Test: The Post-*Turner*, Pre-*Banks *Cases*

In case after case, the Court turned to *Turner*, applying its four-factor test to numerous questions of prisoners' rights.[69] Though it was for a time the exclusive test in this area,[70] eventually situations began to arise in which the *Turner* test was not entirely appropriate even though the constitutional rights of prisoners were implicated. By necessity, the test was modified or rejected in those situations.

The Court initially applied the *Turner* test to religious freedom situations in *O'Lone v. Estate of Shabazz*.[71] In *Estate of Shabazz*, Muslim inmates on work detail outside the prison were prohibited from returning to the prison during the workday to attend Jumu'ah, though certain other Muslim observances remained unrestricted.[72] The Court applied the *Turner* test to uphold the policy, finding that it was justified by institutional security and rehabilitative concerns; the stringent time requirements for Jumu'ah made it extraordinarily difficult for prison administrators to ensure that each Muslim could attend; the Muslim prisoners retained alternative means of free exercise of their religion; and the accommodation of these inmates would have adverse effects on other inmates, prison personnel, and prison resources.[73] After the passage of the Religious Land Use and Institutionalized Persons Act of 2000,[74] however, the Court rejected the *Turner* test and adopted a compelling government interest standard for Establishment Clause cases as indicated by the statute.[75]

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69. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 361–62 (1996) (citing *Turner*); Washington v. Harper, 494 U.S. 210, 223–25 (1990) (same); Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (same); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (same).

70. This point is generally accepted by both courts and academics, but an argument has been presented that in fact *Turner* is not the exclusive test for prisoners' rights claims. *See generally* McFadden, *supra* note 68, at 136 ("In addition to academics, the Supreme Court itself suggests that *Turner* created a uniform, single standard of deference to prison administrators. . . . However, a closer examination of the Court's jurisprudence shows that this generalization is simply not true—the Court does not always apply *Turner* in prison-rights cases.").

71. *Estate of Shabazz*, 482 U.S. at 348 (explaining that *Turner* guides the consideration of religious freedom claims by prisoners).

72. *Id.* at 345–46.

73. *Id.* at 350–53.

74. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc).

75. *See* Cutter v. Wilkinson, 544 U.S. 709, 723 & n.11 (2005) (rejecting the use of the deferential *Turner* test for the compelling government interest test indicated by the RLUIPA).

The Court in the procedural due process realm created a test in *Sandin v. Conner*[76] incompatible with *Turner*'s reasonable relation test.[77] *Conner* asks whether the state had created liberty interests which did not exceed the sentence sufficiently to give rise to a due process claim by their own force, but "nonetheless impose[d] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[78] The Court in *Conner* found that refusing to allow an inmate to present witnesses at his disciplinary hearing was not the type of atypical, significant deprivation in which the state might conceivably create a liberty interest[79] and upheld the policy without engaging in a balancing of the *Turner* factors or even mentioning the *Turner* test.[80]

Courts have not applied the *Turner* test to Eighth Amendment claims.[81] Instead, such claims are judged using the "evolving standards of decency" test, which asks whether the punishment is so disproportionate that it offends the "evolving standards of decency that mark the progress of a maturing society,"[82] "shocks the conscience," or is "repugnant to the conscience of mankind."[83] If so, the punishment will be deemed cruel and unusual and thus unconstitutional.

Fifth Amendment self-incrimination claims have also been judged using a different standard, one developed in *McKune v. Lile*.[84] The *Lile* test, like the *Turner* test, asks whether the policy bears a rational relation to a legitimate penological objective, but then asks whether the adverse consequences that an inmate faces for not participating relate to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.[85] Thus for Fifth Amendment self-incrimination claims,

76. Sandin v. Conner, 515 U.S. 472 (1995).

77. McFadden, *supra* note 68, at 140, 163–64.

78. *Conner*, 515 U.S. at 483–84.

79. *Id.* at 475–76.

80. *See id.* at 486 (engaging in analysis without mentioning the *Turner* test).

81. McFadden, *supra* note 68, at 168.

82. Roper v. Simmons, 543 U.S. 551, 560–61 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

83. Whitley v. Albers, 475 U.S. 312, 327 (1986) (internal quotation marks omitted).

84. McKune v. Lile, 536 U.S. 24, 41 (2002).

85. *Id.* at 37–38.

the Court balances prisoners' interests with valid penological objectives,[86] but does not do so using the *Turner* test.

Finally, the Court determined that the deferential *Turner* test would not apply to the racial segregation of prisoners in *Johnson v. California*[87] and instead applied strict scrutiny.[88] In *Johnson*, the Court found unconstitutional a California policy that segregated prisoners on the basis of race while determining their ultimate placements.[89] The Court accepted the rationale of the dissenters on the Court of Appeals, that *Turner* is inapplicable when "the right asserted is not inconsistent with legitimate penological objectives,"[90] by applying the far less deferential strict scrutiny standard and striking down the policy.[91]

Though the Court rejected the *Turner* test in *Conner*, *Lile*, and *Johnson*, and Congress mandated a compelling interest test instead of the *Turner* test in free exercise cases, *Turner* was well established as the standard for other First Amendment claims. But whether the *Turner* test would apply when a First Amendment rights deprivation was itself justified by prison administrators primarily as an encouragement of rehabilitation had not been challenged. The Court decided the proper test for deciding prisoners' constitutional claims in precisely this context in *Banks*.

II. THE FACTS AND DECISION OF *BEARD V. BANKS*

In *Beard v. Banks*, a case brought by an inmate in Pennsylvania, the Supreme Court reevaluated the limits of First Amendment rights in prison.[92] The Commonwealth of Pennsylvania houses its most difficult prisoners in the Long Term Segregation Unit (LTSU), which

86. *Id.* at 36–37.

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

88. *Id.* at 512.

89. *Id.* at 502–03.

90. *Id.* at 505 *(*"Judge Ferguson, joined by three others, dissented on grounds that '[t]he panel's decision ignore[d] the Supreme Court's repeated and unequivocal command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny, and fail[ed] to recognize that [the] *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological objectives.'"); s*ee id.* at 510–12 ("The right not to be discriminated against on one's race is not susceptible to the logic of *Turner*.").

91. *Id.* at 509–10, 512.

92. Beard v. Banks, 126 S. Ct. 2572, 2580 (2006) (plurality opinion).

is reserved for the "most incorrigible, recalcitrant inmates."[93] All inmates in the LTSU are initially assigned to the most restrictive "level 2,"[94] where they "have no access to the commissary, they may have only one visitor per month (an immediate family member), and they are not allowed phone calls except in emergencies."[95] They also have no access to newspapers, magazines, or personal photographs, though they are allowed personal and legal correspondence, religious and legal materials, two library books, and writing paper.[96]

Inmate Ronald Banks filed an action alleging that the "level 2 Policy forbidding inmates all access to newspapers, magazines, and photographs bears no reasonable relation to any legitimate penological objective and consequently violates the First Amendment."[97]

Justice Breyer wrote for the plurality to reverse the Third Circuit's judgment that the regulation could not be supported as a matter of law and uphold the Pennsylvania LTSU-2 policy prohibiting any access to newspapers, magazines, or photographs for inmates.[98] Justice Thomas wrote an opinion concurring in the judgment joined by Justice Scalia, creating the necessary majority to uphold the law.[99] Justice Ginsburg dissented and also joined in a dissent written by Justice Stevens,[100] while Justice Alito, who wrote the Third Circuit dissenting opinion,[101] did not participate.[102]

The multiple opinions in this case reflect the Justices' different positions on the appropriate level of deference to give prison officials in First Amendment cases. Though a majority of the Court decided the case solely on the basis of the first *Turner* factor, dismissing the other three factors and thereby the balancing process demanded by

93. *Id.* at 2576.

94. *Id.* Inmates in LTSU-2 have the possibility of graduating to somewhat less restrictive level 1 at the discretion of prison administrators after the first ninety days, but most of the forty inmates in LTSU remained in level 2 when *Banks* was decided. *Id.*

95. *Id.*

96. *Id.* Restrictions on prisoners in LTSU-1 are only slightly decreased; they may receive one newspaper and five magazines, though personal photographs are still prohibited. *Id.* at 2576–77.

97. *Id.* at 2577.

98. *Id.* at 2581–82.

99. *Id.* at 2582 (Thomas, J., concurring in the judgment).

100. *Id.* at 2585 (Stevens, J., dissenting); *id.* at 2591 (Ginsburg, J., dissenting).

101. Banks v. Beard, 399 F.3d 134, 148–50 (3d Cir. 2005) (Alito, J., dissenting).

102. *Banks*, 126 S. Ct. at 2582.

their presence,[103] the Court's opinions evince three distinct levels of deference to prison administrators.

Writing for the plurality, Justice Breyer found the deprivation of newspapers and magazines a significant incentive to improve behavior, thus satisfying the first of the *Turner* factors.[104] The plurality found that an analysis of the other factors added little to the determination acquired from the first factor.[105] Because there was a "valid rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"[106]—the first of the *Turner* factors—the regulation was reasonable.[107] Thus, the ultimate determination of the *Turner* test was made after considering only one factor.[108] This essentially changed the test from requiring a *reasonable* relationship to requiring a *rational* relationship.[109]

103. *See id.* at 2579 (plurality opinion) (applying the first factor alone of the *Turner* test); *id.* at 2588 (Stevens, J., dissenting) (same).

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

105. *Id.* at 2580.

106. *Id.* at 2578 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987) (internal quotation marks omitted).

107. *See id.* at 2578–79 ("[W]e believe that the first rationale itself satisfies *Turner*'s requirements. . . . [T]he statement and deposition set forth a 'valid, rational connection' between the Policy and 'legitimate penological objectives.'" (quoting *Turner*, 482 U.S. at 89, 95)).

108. *Id.* The unwieldy application of the final three factors of the test in deprivation for rehabilitation situations is evident through an examination of each prong. The second factor asks whether "alternative means of exercising the right that remain open to prison inmates" exist. *Id.* at 2578 (quoting *Turner*, 482 U.S. at 90). Justice Stevens explained that, "under the deprivation theory of rehabilitation, there could never be a 'ready alternative' for furthering the government interest, because the government interest is tied directly to depriving the prisoner of the constitutional right at issue." *Id.* at 2588 (Stevens, J., dissenting). Therefore the second factor is clearly inapplicable in deprivation for rehabilitation situations. The third factor, the "impact . . . accommodation of the asserted constitutional right . . . [will] have on guards and other inmates, and on the allocation of prison resources generally," *id.* at 2578 (plurality opinion) (quoting *Turner*, 482 U.S. at 90), is not necessarily implicated in the deprivation for rehabilitation situation because the purpose of the deprivation is not affected by the ease with which the right could be provided. The fourth factor, whether there are "ready alternatives" available for furthering the governmental interest, *id.* (quoting *Turner*, 482 U.S. at 90), could be useful in determining the reasonableness of the deprivation. For instance, when prisoners have not been deprived of other privileges and when alternative deprivation remains available, deprivation of constitutional rights would be more likely to be deemed unreasonable. In fact, the Commonwealth of Pennsylvania made the argument that the previous removal of all other rights and privileges indicated the policy's necessity to encourage good behavior. *Id.* at 2579.

109. For a discussion of the modification of the *Turner* test, see *supra* Part I.C. The change from the word "reasonable" to the word "rational" is not necessarily significant here. Instead, it is the change of the test indicated by the change of language that is important. A rational relationship requires that a prison regulation be justified in a valid, rational way by a legitimate

The plurality opinion explained that the Third Circuit gave too little deference to the deputy superintendent's claim that the LTSU-2 program created significant behavioral incentives for particularly difficult inmates.[110] Thus, in applying the test, the plurality gave "substantial deference to the professional judgment of prison administrators[,]"[111] recognizing that "the Constitution sometimes permits greater restriction of [constitutional] rights in a prison than it would allow elsewhere."[112] The plurality explained that although it did not accord deference for disputed facts, the views of prison authorities in matters of professional judgment received such deference.[113] In practice, however, the plurality did not look beyond the justifications given by the secretary of the Pennsylvania Department of Corrections to determine whether those justifications were in fact adequate or were instead exaggerated responses to the state's objective, as the Court did in *Turner*.[114] The plurality found the views of the deputy superintendent to be sufficient evidence that the regulations "do, in fact, serve the function identified."[115] Based on this evidence alone, the plurality found the first factor—the only factor it considered, and thus the entire test—satisfied.[116] In sum, the deference given by the plurality counted the opinions of prison administrators as adequate evidence in favor of the policy and would have required evidence contradicting those opinions to avoid summary judgment.[117]

government interest. *See Turner*, 482 U.S. at 89–90 (explaining that a rational connection must not render the policy "arbitrary or irrational" and that the government interest must be "a legitimate and neutral one"). A reasonable relationship requires that this rational relationship be balanced with the three other *Turner* factors. *See Turner*, 482 U.S. at 89–91 (describing the four factors relevant in determining the reasonableness of a regulation). This distinction evinces the change of test that is essential to the analysis of this Note.

110. *Banks*, 126 S. Ct. at 2581 (plurality opinion).

111. *See id.* at 2578 (quoting Overton v. Bazzetta, 539 U.S. 126, 132 (2003)) (stating the standard of deference in prisoners' constitutional rights cases).

112. *Id.* at 2577–78.

113. *Id.* at 2579.

114. *See id.* at 2578–79 (explaining that the Secretary gave justifications and they were therefore adequate).

115. *Id.* at 2579.

116. *See id.* (explaining that the statements satisfy the first factor and support the policy's reasonableness).

117. *Id.* at 2580. This is true despite the fact that Justice Breyer also emphasized that the deference owed to prison officials is not so high that it is impossible for prisoners to challenge a regulation. *Id.* at 2581.

The level of deference granted by the plurality is best understood against the background of the level given by the concurrence. Instead of applying only a single factor like the plurality and dissent, Justice Thomas in his concurrence jettisoned the *Turner* factors altogether.[118] He instead analyzed the case using his own standard of deference, opining that deference to prison administrators should extend to the limits of the Eighth Amendment.[119] He argued that the Constitution grants states and prison officials the ability to define and redefine punishment and incarceration up to the limit of cruel and unusual punishment set by the Eighth Amendment.[120] His approach flatly rejects the *Turner* test in favor of absolute deference to prison administrators. Rather than assuming that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[121] the concurrence presumed that it is the state's prerogative to determine when sentences include the extinction of constitutional rights.[122] From this premise, the concurrence determined that prisoners are not entitled to any rights beyond those provided in the Eighth Amendment because states are free to define and redefine punishment to include various types of deprivations regardless of whether they extinguish constitutional rights in the process.[123] This deference exceeds the grant of deference by the

118. *See id.* at 2582 (Thomas, J., concurring in the judgment) ("Both the plurality and the dissent evaluate the regulations challenged in this case pursuant to the approach set forth in *Turner v. Safley*, which permits prison regulations that 'imping[e] on inmates' constitutional rights' if the regulations are 'reasonably related to legitimate penological interests.'" (citations omitted)).

119. *Id.* at 2582–83. Justice Thomas first articulated this standard in his concurrence in *Overton v. Bazzetta*, 539 U.S. 126 (2003), which involved the Michigan prison policy limiting the total number of visitors inmates could receive and placing restrictions on who those visitors could be. *Id.* at 129–30. He argued that the policy was constitutional because the prisoners' lawful sentence removed a right enjoyed by free persons, not because it withstood the *Turner* test, as the majority held. *Id.* at 139 (Thomas, J., concurring in the judgment). He explained that the majority's position rested on the erroneous assumption "that the Constitution contains an implicit definition of incarceration" and that the proper view was instead that "[s]tates are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—provided only that those deprivations are consistent with the Eighth Amendment." *Id.* (emphasis omitted).

120. *Banks*, 126 S. Ct. at 2582–83 (Thomas, J., concurring in the judgment) (citing *Bazzetta*, 539 U.S. at 139 (Thomas, J., concurring in the judgment)).

121. Turner v. Safley, 482 U.S. 78, 84 (1987).

122. *Banks*, 126 S. Ct. at 2583 (Thomas, J., concurring in the judgment).

123. *Id.* at 2582–83.

plurality[124] and grants absolute deference to states and prison officials to entirely eliminate constitutional rights with only the Eighth Amendment as a limit.[125]

In their dissents, both Justice Stevens and Justice Ginsburg approached the regulation, like the plurality, through the lens of *Turner*.[126] Although Justice Stevens evaluated the policy to determine whether it reasonably connected to the penological interest of rehabilitation, writing in dissent for both himself and Justice Ginsburg he also focused on an additional aspect of the *Turner* test: that an exaggerated response to a legitimate penological objective cannot withstand scrutiny.[127] This approach assumes prisoners retain some constitutional protection beyond merely that of the Eighth Amendment.[128] The dissenters granted a level of deference distinct from that of both the plurality and the concurrence. They gave less deference to prison administrators' justifications in their examination of whether the challenged deprivations were exaggerated responses to a prison's legitimate interest in rehabilitation.[129] Both Justice Stevens and Justice Ginsburg determined that a reasonable factfinder could conclude the responses were exaggerated, and thus the "prison officials [were] not entitled to judgment as a matter of law."[130] Neither dissenter found the justifications given by prison administrators to be such strong evidence that the prisoner was required to refute the justifications for the case to go to trial.[131] Instead, they agreed that the opinions of prison administrators alone were not enough to grant summary judgment and explained that under the plurality's analysis

124. As discussed *supra*, the plurality counted as evidence the opinions of prison officials about particular prison policies limiting constitutional rights beyond what would be permissible for those who are not incarcerated. *See id.* at 2578 (plurality opinion) ("[O]ur inferences must accord deference to the views of prison authorities.").

125. *Id.* at 2583 (Thomas, J., concurring in the judgment).

126. *Id.* at 2585 (Stevens, J., dissenting); *id.* at 2592 (Ginsburg, J., dissenting).

127. *Id.* at 2585 (Stevens, J., dissenting).

128. *Id.*

129. *See id.* at 2585–91 (scrutinizing the justifications of prison administrators and finding the regulations to be an exaggerated response to the valid penological objective of rehabilitation).

130. *Id.* at 2588–89; *accord id.* at 2593 (Ginsburg, J., dissenting).

131. *See id.* at 2589 n.3 (Stevens, J., dissenting) (suggesting that evidence contradicting the opinions of the prison authorities is precisely the kind of evidence that might have been presented at trial); *see also id.* at 2592–93 (Ginsburg, J., dissenting) (explaining that deference should only be granted after the facts shown are viewed in the light most favorable to the nonmoving party, thus implying that this stage of litigation is not the most appropriate for granting deference).

any deprivation would be upheld as a way to improve behavior due to the level of deference given to prison officials.[132]

Additionally, Justice Ginsburg's dissent focused on the procedural stage of the case before the Court.[133] She argued that even if the deference given by the plurality was appropriate, it was inappropriate at summary judgment, the stage of litigation in question.[134] She took issue with the plurality's recognition that the summary judgment standard requires the Court to "draw 'all justifiable inferences'" in favor of Banks, but did so only after first according deference to prison authorities on "disputed matters of professional judgment."[135] Ginsburg's dissent explained that "deference should come into play, pretrial, only after the facts shown are viewed in the light most favorable to the nonmoving party and all inferences are drawn in that party's favor."[136] Ginsburg ultimately found on the basis of the record that "'the logical connection between the . . . regulation and the asserted goal' could be found by a reasonable trier to be 'so remote as to render the policy arbitrary or irrational.'"[137]

The variation in deference given by the Justices provides an important distinction in the application of the *Turner* test. The concurring argument for absolute deference stands in stark contrast to the dissenters' approach of inquiring whether the regulation is an exaggerated response to a valid penological objective before granting summary judgment. The plurality granted higher deference to prison administrators than required by precedent through its elimination of three of the *Turner* factors. Which of these approaches should lower courts adopt? And even more importantly, how does the Court's decision in *Banks* affect the theory of incarceration implicitly adopted by the Court?

132. *Id.* at 2588–89 (Stevens, J., dissenting); *id.* at 2591–92 (Ginsburg, J., dissenting).

133. *Id.* at 2592–93 (Ginsburg, J., dissenting).

134. *Id.*

135. *Id.* at 2592.

136. *Id.* at 2592–93.

137. *Id.* at 2593 (quoting Turner v. Safley, 482 U.S. 78, 89–90 (1987)).

III. RECONCILING *BANKS* WITH A THEORY OF PROPER INCARCERATION

Given the multiple levels of deference granted by the Justices, determining how lower courts should interpret the *Banks* opinion consistently with precedent becomes a difficult task. This Note argues that the best approach combines the consolidation of the *Turner* test by most of the Court with the dissenters' emphasis on ensuring that prison officials' justifications for deprivations are not exaggerated responses to real and intractable problems faced by prison administration. This Part discerns a theory of proper incarceration to facilitate a deference analysis for lower courts and finds that a theory of proper incarceration is already present in the Court's jurisprudence. Thus, though a theory may be necessary, it would not require a new creation. It then deconstructs *Banks* and chooses from among the opinions a standard that is consistent with this theory of proper incarceration to apply in future prisoners' rights cases.

A. The Court's Theory of Proper Incarceration

At least one scholar has argued that the Court in *Banks* chose to eliminate meaningful judicial review of prisoners' rights restrictions to avoid crafting a theory or definition of proper incarceration.[138] But what is a theory of proper incarceration, and what would indicate whether the Court has chosen to craft one? A theory of proper incarceration is simply "what a proper prison ought to look like and how it ought to be administered."[139]

According to Justice Thomas, for the Court to analyze which restrictions on rights in prison are constitutional it must necessarily adopt such a theory or definition.[140] He explained, "The Court's precedents on the rights of prisoners rest on the unstated (and erroneous) presumption that the Constitution contains an implicit definition of incarceration."[141] And when a right "need necessarily be compromised for the sake of proper prison administration" it is inconsistent with proper incarceration.[142] Justice Thomas explained

138. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 263–73 (2006).

139. Johnson v. California, 543 U.S. 499, 541–42 (2005) (Thomas, J., dissenting).

140. *Id.*; Overton v. Bazzetta, 539 U.S. 126, 139 (2003) (Thomas, J., concurring).

141. *Bazzetta*, 539 U.S. at 139 (Thomas, J., concurring).

142. *Johnson*, 543 U.S. at 541 (Thomas, J., dissenting).

that "[t]his inconsistency-with-proper-prison-administration test begs the question . . . . For a court to know whether any particular right is inconsistent with proper prison administration, it must have some implicit notion of what a proper prison ought to look like and how it ought to be administered."[143] Thus a theory of *proper* incarceration is simply a definition of *constitutional* incarceration. Assuming Justice Thomas is correct, the Court's extensive prisoners' rights jurisprudence and its determinations about which rights are compatible with proper incarceration indicate that it has at least implicitly adopted such a theory.[144]

The theory of proper incarceration the Court has implicitly created comes from its prisoners' rights jurisprudence. Through previous cases, the Court has determined that prison walls do not keep out the protections of the Constitution, even though constitutional rights may be restricted when necessary.[145] Further, the Court has determined that those rights which are not inconsistent with proper incarceration remain wholly intact and may not be infringed even in prison,[146] and that constitutional rights may be limited for security purposes when on balance the restrictions are reasonably related to valid penological objectives.[147]

Thus, even if a theory of proper incarceration must exist before the Court can meaningfully review prison policies, previous decisions have already established many features of that theory. The structure of the theory was set in pre-*Turner* cases such as *Martinez*, in which the Court explained that the two ultimate factors to be balanced in prisoners' rights cases were the need to protect constitutional rights retained by prisoners and the need for the courts to exercise restraint and defer to prison administrators when dealing with the complex and

143. *Id.* at 541–42.

144. *See Bazzetta*, 539 U.S. at 139 (arguing that the Court has adopted such a theory); *Johnson*, 543 U.S. at 541 (Thomas, J., dissenting) (same); *see also* Beard v. Banks, 126 S. Ct. 2572, 2575–82 (2006) (plurality opinion) (deciding the extent to which First Amendment rights are retained in prison); McKune v. Lile, 536 U.S. 24, 36–38 (2002) (deciding the extent to which Fifth Amendment rights against self-incrimination are retained in prison); Sandin v. Conner, 515 U.S. 472, 477–87 (1995) (deciding the extent to which due process rights are retained in prison); O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–53 (1987) (deciding the extent to which free exercise rights are retained in prison).

145. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989).

146. *Johnson*, 543 U.S. at 510.

147. Turner v. Safley, 482 U.S. 78, 91 (1987).

intractable problems of American prisons.[148] *Turner* built on this structure and set out the framework to evaluate rights-deprivation situations in which prison administrators could receive substantial deference while still allowing substantive judicial review for the protection of prisoners' rights.[149]

Similarly, *Johnson* set out a framework for use when the rights at issue are not inconsistent with proper incarceration.[150] Though the Court in *Johnson* did not define "proper incarceration" explicitly,[151] it illuminated some aspects of what constitutes proper incarceration through its decision. By finding equal protection not inconsistent with proper incarceration, it implied that proper incarceration includes equal protection rights.[152] The framework of Fifth and Eighth Amendment rights restrictions as well as procedural due process claims, which were decided outside the *Turner* context and thus are inapplicable to First Amendment situations, also illuminate the theory.[153] *Turner*'s analytical framework failed in *Banks* because the deprivation for rehabilitation justification did not map well within the *Turner* framework. The right in question was not a Fifth Amendment, Eighth Amendment, or due process right, nor so obviously compatible with the vision of proper incarceration alluded to by the Court in *Johnson* that the *Johnson* framework became applicable. Thus the Court was required to further develop its burgeoning theory of proper incarceration in *Banks*.

Because case law is necessarily reactive rather than proactive, all-encompassing theories and frameworks often develop in segmented ways in response to the needs posed by particular cases rather than in a comprehensive fashion. Thus, any decision evaluating the level of constitutional protection granted to prisoners would have further developed the Court's theory of proper incarceration. Even refusing

148. Procunier v. Martinez, 416 U.S. 396, 424–28 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

149. *See Turner*, 482 U.S. at 85 ("Our task, then, as we stated in *Martinez*, is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'").

150. *Johnson*, 543 U.S. at 505.

151. *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 267–68.

152. *See Johnson*, 543 U.S. at 510 ("It is not a right that need necessarily be compromised for the sake of proper prison administration.").

153. *See generally* McFadden, *supra* note 68 (describing the different analyses that courts have used for prisoners' rights claims outside the *Turner* context).

the existence of constitutional protections beyond the Eighth Amendment—a theory much different than one that balances prisoners' rights with penological goals—further develops the theory. The Court's development of this theory in *Banks* ultimately included a modification of the *Turner* test in deprivation for rehabilitation situations, despite the fact that the Court did not make this modification expressly.[154] Not only does this modification further develop the preexisting theory of incarceration, but it also shows that accommodating deprivation for rehabilitation situations within its preexisting theory of incarceration was not problematic for the Court.

Because it had already developed many details of the theory of incarceration, the Court in *Banks* did not need to create a theory out of "whole cloth."[155] In fact, the only necessary development of the theory in *Banks* was the level of deference given to prison officials' justifications for restricting constitutional rights in the name of rehabilitation. Furthermore, any decision on the level of deference applicable in rehabilitation situations adds to the developing theory of "proper incarceration." As such, rather than the Court being forced to choose either to retain meaningful judicial review or to create a new theory from "whole cloth," only determining which deference level was most appropriate became essential to filling in the details of the theory of incarceration already accepted by the Court.

B. The Appropriate Test and Level of Deference

Because the Court in *Banks* only needed to further develop the theory of proper incarceration by deciding the appropriate level of deference to be granted when prison officials justify their actions as promoting rehabilitation, this Note turns to distilling the proper level of deference post-*Banks* from multiple opinions, precedent, and policy.

Though there was no majority opinion, a majority of the Court agreed on the proper test to determine whether regulations were valid restrictions of prisoners' rights.[156] Over half of the Justices implemented a test that eliminated three of the *Turner* factors,[157] thus

154. *See* Beard v. Banks, 126 S. Ct. 2572, 2579 (2006) (plurality opinion) (applying only the first of the *Turner* factors).

155. *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 269.

156. *See Banks*, 126 S. Ct. at 2579 (plurality opinion) (applying only the first factor of the *Turner* test); *id.* at 2588 (Stevens, J., dissenting) (same).

157. *Id.* at 2579 (plurality opinion); *id.* at 2588 (Stevens, J., dissenting).

further developing the theory of proper incarceration by altering the way the Court decided the extent to which First Amendment rights were retained in prison. To avoid rendering *Turner* toothless[158] when the Court does not rely on all four factors, it must make a new formulation to balance the interests of prisoners with deference to prison administrators. The plurality nominally kept the same level of deference—not entire deference, but definite reliance on the justifications of prison administrators—without accounting for the loss of teeth due to the absence of the other factors,[159] thus effectively increasing deference to the prison administrators. The approach of the dissenters, however, presented a way to account for that loss by replacing the eliminated factors with *Turner*'s requirement that the regulation not be an exaggerated response to the penological objective.[160] The concurrence, in contrast, rejected any balancing whatsoever and instead favored deference over judicial review, endorsing absolute deference to prison officials.[161] The level of deference granted to prison administrators will not only determine the outcome of most cases, it will also ultimately determine whether courts continue to engage in meaningful judicial review of prison policies. The next Sections further explore the issues of deference and judicial review.

1. *Absolute Deference is Not the Proper Standard.* The Court's long observance that prisoners retain constitutional rights cannot be reconciled with the position taken by Justice Thomas's concurrence—that prisoners retain no rights beyond those granted in the Eighth Amendment—or with the plurality's implicit movement toward that position.[162] Thus those approaches should be rejected. The concurrence's position should also be rejected on the ground that it eliminates meaningful judicial review in situations dealing with the fundamental rights of discrete and insular minorities, disenfranchised prisoners, and former prisoners. Finally, with the elimination of meaningful judicial review of prison policies, the accountability of

158. *See* Thornburgh v. Abbott, 490 U.S. 401, 414 (1989) ("We adopt the *Turner* standard in this case with confidence that . . . 'a reasonableness standard is not toothless.'").

159. *See Banks*, 126 S. Ct. at 2575–82 (plurality opinion) (analyzing the regulation at issue under one of the four *Turner* factors, but not adding anything additional to the test).

160. *See id.* at 2588–89 (Stevens, J., dissenting) (reviewing the regulation to determine whether it is an exaggerated response to a valid penological objective).

161. *Id.* at 2582–83 (Thomas, J., concurring in the judgment).

162. *See supra* notes 13–20 and accompanying text.

prison officials would decrease, possibly leading to greater abuses of their power, reflecting yet another reason absolute deference to prison administrators is improper.

The Court has repeatedly held that incarcerated individuals are still entitled to constitutional protections even though those protections may be limited.[163] Despite precedent to the contrary, Justice Thomas continued to argue that the Constitution, apart from the Eighth Amendment, does not apply in prison.[164] Given the long-standing precedent accepting that constitutional rights are retained in prison, for the Court to move toward the theory of constitutional rights advocated by Justice Thomas in his concurrence, it would have to overturn, abrogate, or at least undermine countless holdings to the contrary. Although by eliminating three factors of the *Turner* test the Court may have taken a tentative implicit step toward the doctrine advocated by Justice Thomas,[165] it did not, and does not seem likely to, explicitly reject years of precedent proclaiming precisely the opposite of that interpretation.

In addition to its sharp departure from precedent, the concurrence's approach is undesirable because it effectively eliminates meaningful judicial review of prison policies. There are several compelling arguments for strong judicial review of, and thus less deference to, prison policies restricting the rights of prisoners. First, meaningful judicial review is justified because prisoners lack political power and are often disenfranchised, rendering them a "discrete and insular minority."[166] Under the philosophy announced in *United States v. Carolene Products Co.*,[167] regulations that discriminate against "discrete and insular minorities" may require a "more searching judicial inquiry."[168] Discrete and insular minorities are those

163. *See, e.g.*, *Banks*, 126 S. Ct. at 2577–78 (plurality opinion) ("This Court recognized in *Turner* that imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment. But at the same time the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere." (citations omitted)); *see also supra* notes 13–20 and accompanying text.

164. *Banks*, 126 S. Ct. at 2582–83 (Thomas, J., concurring in the judgment).

165. *See The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 267 ("[T]he plurality subtly but surely took a large step toward the approach adopted by Justice Thomas . . . .").

166. Gieger, *supra* note 2, at 1208.

167. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

168. *Carolene Prods. Co.*, 304 U.S. at 153 n.4; *see* Chemerinsky, *supra* note 22, at 459 ("As the Court has noted, 'more searching judicial inquiry' is appropriate when it is a law that interferes with individual rights, or a law that restricts the ability of the political process to

that are unlikely to rely on the political process for adequate protection.[169] Incarcerated criminal offenders fit this classic definition because they "constitute a despised minority without political power to influence the policies of legislative and executive officials."[170] Scholars have deemed prisoners to be "the least sympathetic group of 'outsiders' in our constitutional jurisprudence."[171] Because according to *Carolene Products* the Equal Protection Clause is meant to protect those to whom the political process is useless and criminal offenders are viewed as second-class citizens, legislation that places further burdens on this already marginalized group should be viewed with strict scrutiny.[172]

Nevertheless, "to many people, inmates are unworthy of concern,"[173] and "[l]ower federal courts have uniformly rejected heightened protection for inmates."[174] Offenders are only protected from legislation with no conceivable rational basis.[175] This position may stem from the fact that, though prisoners are a discrete and insular minority, they are "a minority that has earned its despised status by causing harm to society."[176] Yet "[t]he words of the Bill of Rights provide a basis for judicial scrutiny of government policies that infringe on individuals' rights—even if the individuals in question have earned their despised status."[177] Therefore even if prisoners are

repeal undesirable legislation, [or] a law that discriminates against a 'discrete and insular minority.'"); Gieger, *supra* note 2, at 1208 ("Justice Stone thus suggested [in *Carolene Products*] that where groups are repeat losers in pluralist politics not because of their minority status in a majoritarian democracy but because of prejudice, the judiciary may set aside its traditional deference towards legislation and more rigorously review it.").

169. Chemerinsky, *supra* note 22, at 459. In addition to the discrete and insular minority composed of all prisoners, the incarcerated individuals making up the prison population are primarily members of larger discrete and insular minorities. *See* James E. Robertson, *Supreme Court Review: Foreword: "Separate but Equal" in Prison:* Johnson v. California *and Common Sense Racism*, 96 J. CRIM. L. & CRIMINOLOGY 795, 843 (2006) ("At the close of 2004, white inmates comprised thirty-four percent of all federal and state male prisoners serving sentences of longer than one year."). In fact, the "prison functions as a 'peculiar institution' by excluding large numbers of black offenders from the mainstream economic, political, and social life of the nation." *Id.* at 844.

170. SMITH, *supra* note 21, at 292.

171. Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. REV. 173, 176 (1995); *accord* Robertson, *supra* note 23, at 203.

172. Gieger, *supra* note 2, at 1241–42.

173. Robertson, *supra* note 23, at 203.

174. *Id.* at 201.

175. Gieger, *supra* note 2, at 1242.

176. SMITH, *supra* note 21, at 292.

177. *Id.*

unworthy of greater protection, higher judicial scrutiny under *Carolene Products* is appropriate when the rights in question are fundamental constitutional rights.[178]

Because prisoners lack political recourse to the other branches of government and the rights in question are fundamental rights, stricter judicial review should apply in prisoners' rights situations in accordance with the Supreme Court's mandate in *Carolene Products*.[179] Moreover, eliminating meaningful judicial review creates a situation where "[t]he protections provided by the United States Constitution apply least where they are needed the most."[180]

A related argument contends that meaningful judicial review is necessary to increase accountability of prison officials.[181] Because political mechanisms tend to be inadequate tools for prisoners, strong judicial review would promote both "accountability and the efficacy of prison policies."[182] Prison officials, though they possess unique knowledge of complex prison systems, are the very individuals who have incentive to justify harsh policies and hide individual abuses.[183] Though prisons serve an enforcement function and should already be accountable to the executive, the ability of prisoners to petition the courts, and the ability of the courts to review policies without automatically deferring to the justifications of prison administrators, provides an opportunity for courts to ensure that prison officials remain accountable.[184]

178. The Court in *Carolene Products* established that restrictions of fundamental rights, as well as those that discriminate against discrete and insular minorities, may be subject to a more searching judicial inquiry. United States v. Carolene Prods. Co., 304 U.S. 144, 152–153 n.4. (1938); *see* Chemerinsky, *supra* note 22, at 459 ("As the Court has noted, 'more searching judicial inquiry' is appropriate when it is a law that interferes with individual rights . . . . The violations of basic constitutional rights by authoritarian institutions fits [*sic*] exactly within the areas where the *Carolene Products* footnote justifies heightened review.").

179. *See* Chemerinsky, *supra* note 22, at 461 ("The current presumption is against judicial review when there is a claim that an authoritarian institution has violated a person's rights. This assumption is backwards of what it should be. The judiciary should operate from the premise that it has a special role in protecting individuals in these institutions.").

180. *Id.* at 441.

181. *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 272.

182. *Id.*

183. *See* Chemerinsky, *supra* note 22, at 458 ("[W]hen people are given authority over others abuses are likely to occur.").

184. *See The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 273 ("[Federal courts] then should focus on promoting accountability for increasingly severe restrictions on constitutionally protected rights.").

Finally, the concurrence's approach should be rejected because the disproportionate power it gives prison administrators will likely lead to abuse. At least one legal scholar has argued that the very nature of authoritarian institutions leads to abuses.[185] Various social science evidence has indicated that "the greater authority some have over others, and the fewer the checks or limits on behavior, the greater the chance for abuse."[186] This greater likelihood of serious abuses in such authoritarian situations provides greater necessity for judicial review and involvement.[187] Giving extreme deference to the opinions of the very individuals with reason to justify harsh regulations—the prison administrators who adopted the policy in the first place and are inclined to value order in their prisons above the welfare of individual inmates—would merely exacerbate this problem and eliminate the already extremely limited ability of prisoners to make a case of constitutional infringement.[188] Because the potential for abuse is already present and granting additional deference to prison administrators would increase this risk of abuse, courts should continue to meaningfully review prisoner rights claims.

Thus, the concurrence's position of absolute deference should be rejected for at least four independent reasons. First, it is inconsistent with countless precedent, which established that prisoners retain constitutional rights. Second, under *Carolene Products* prisoners are a discrete and insular minority that should receive greater, not less, judicial review of policies discriminating against them. Even if prisoners are not worthy of such greater protection, when the rights in question are fundamental, their restriction should still be subject to stricter scrutiny. Third, meaningful judicial review increases the accountability of prison administrators. Finally, meaningful judicial

185. *See* Chemerinsky, *supra* note 22, at 441–42 ("[T]hese are the places where judicial review is most essential. Because of the very nature of these institutions, serious abuses of basic rights can occur. . . . Unfortunately, individuals in these institutions generally have nowhere else to turn for protection.").

186. *Id.* at 458.

187. *Id.* The Court has not accepted this argument and has been reluctant to get involved with prisons because of the perceived dangers of becoming embroiled in complex prison administration problems. *See* Beard v. Banks, 126 S. Ct. 2572, 2582 (2006) (Thomas, J., concurring in the judgment) (describing what he believes to be the "least perilous approach for resolving challenges to prison regulations").

188. *See* Chemerinsky, *supra* note 22, at 450 (describing how the Court ignored potential incentives on the part of prison administrators in a case involving the ability of prisoners to be free from forced injections of powerful antipsychotic medications).

review can lessen the abuses characteristic of authoritarian institutions.

2. *Movement toward Absolute Deference is Also Inappropriate.* By simply eliminating the other *Turner* factors instead of modifying the balancing test, the plurality has given something resembling the concurrence's absolute deference to prison administrators.[189] Because absolute deference is inappropriate, eliminating factors of the balancing test to give nearly absolute deference to prison administrators under the guise of granting the same deference previously afforded under *Turner* must also be inappropriate. Thus, a greater modification of the test is necessary.

Though the *Turner* test is ostensibly the sole test for prisoners' rights claims,[190] in *Banks* both the plurality and dissenters determined the constitutionality of the prison regulation based solely on the first of the *Turner* factors.[191] They therefore abridged the *Turner* test to consist of only one factor in deprivation for rehabilitation situations.[192] This factor asks whether there is a there a "valid rational connection" between the prison regulation and the legitimate government interest put forward to justify it.[193] When the Court only uses this first factor without any balancing of the other three factors, the test effectively changes from whether the policy reasonably relates to a legitimate penological objective to simply whether this first factor is met.

The problem with this application is that by establishing a four-factor test in *Turner* to determine what reasonably relates to a valid penological objective, the Court implicitly found that a "reasonable relation" to a valid penological objective was *not* the equivalent of a "valid rational connection."[194] Because reading the first *Turner* factor as merely restating, clarifying, or illuminating the nature of what is a reasonable relation would negate the purpose of the other three factors and thus conflate a valid rational connection with a reasonable

189. *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 268.

190. McFadden, *supra* note 68, at 136.

191. *Banks*, 126 S. Ct. at 2579 (plurality opinion) ("The second, third, and fourth factors . . . here add little, one way or another, to the first factor's basic logical rationale."); *id.* at 2588 (Stevens, J., dissenting) ("[T]his deprivation theory does not map easily onto several of the *Turner* factors . . . .").

192. *Id.* at 2580 (plurality opinion).

193. *Id.* at 2578 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

194. *See Turner*, 482 U.S. at 89–90 (establishing that four factors are relevant in determining the reasonableness of the policy in question).

relationship to a valid penological objective, this reading must be inappropriate. The other factors must add something necessary to the analysis. If the other factors are necessary to the analysis, their removal without replacement must not only change the nature of the test, but implicitly must cause the application of the test to no longer determine what is reasonably related and therefore no longer be an appropriate formula for determining what passes constitutional muster. The plurality's elimination of the balancing indicated by the other factors while continuing to grant deference to prison administrators necessarily moves the standard toward the absolute deference granted by the concurrence.

An additional aspect of the Court's incarceration jurisprudence reflects the inappropriateness of this movement. The *Turner* Court itself dealt with a deprivation for rehabilitation situation and did not merely accept the justifications of prison officials without further inquiring into the likelihood that they were in fact correct.[195] Though one of the regulations examined in *Turner* dealt with a security justification—the kind of justification courts have had no problem tracing through the *Turner* factors—the other regulation was of the same type dealt with in *Banks*: a deprivation of privileges for rehabilitative purposes.[196] In *Turner*, the Court found assertions by prison administrators that the regulation was in fact rehabilitative to be inadequate to withstand scrutiny.[197] It did not give greater deference through the application of only one factor to the prison administrators' justification that the policy was rehabilitative.[198] It also did not cite to or seem to rely on evidence presented by the prisoner to the contrary[199]—as the *Banks* plurality opinion suggested was necessary to survive summary judgment.[200] Instead, the *Turner* Court

195. *See The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 272 ("In invalidating the ban on inmate marriages, the *Turner* Court did not defer unquestioningly to the prison administration's determination of the rehabilitative benefits.").

196. *See Turner*, 482 U.S. at 81–82 (explaining the two regulations at issue).

197. *See id.* at 99 ("[W]e note that on this record the rehabilitative objective asserted to support the regulation itself is suspect.").

198. *See id.* ("[T]he almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid.").

199. *See id.* at 94–99 (disposing of the marriage regulation without mentioning or citing to any evidence presented by the prisoners).

200. Beard v. Banks, 126 S. Ct. 2572, 2581–82 (2006) (plurality opinion) (suggesting that "prisoners or others attacking a prison policy" may survive summary judgment by presenting "substantial evidence that . . . the [p]olicy is not a reasonable one").

used its own reasoning to question the relationship between the regulation and the asserted penological objective.[201] This example set in *Turner* prescribes how the Court should proceed in evaluating deprivation for rehabilitation claims and shows that anything resembling absolute deference is inappropriate.

The plurality effectively removed the teeth from the *Turner* test by relying on and deferring to the justifications given by prison administrators for prison policy.[202] Following the plurality opinion, the scrutiny given to prison policies turns entirely on the justifications for a policy given by the prison administrators. Thus, if a policy is justified by security needs, all four *Turner* factors will apply. If instead the administrators choose to justify the policy through rehabilitation needs alone, only one factor of the *Turner* test will apply, and the policy will face less strict scrutiny.[203] Using the plurality's reasoning, any deprivation of constitutional interest could be justified as "rehabilitative" because it would encourage inmates to behave better in order to regain their constitutional rights.[204] Therefore the practical effects of the plurality's reasoning are essentially the same as if it had wholly adopted the concurrence's approach, that is, "prison officials from now on will be able to abridge constitutionally protected rights 'merely by reciting talismanic incantations' of rehabilitation."[205]

Though the approaches implemented by the concurrence and the plurality should not be adopted, justifications for stricter review must still be balanced with the need for discipline, the preservation of order, and the unique knowledge possessed by prison officials regarding prison administration.[206] These interests can be reconciled when courts give deference to prison officials by looking to their justifications and judgments for guidance, but balance those justifications with the nature and quality of the right restricted and closely examine the connection between the regulation and the stated penological objective. An increase in the burden of production placed

201. *See Turner*, 482 U.S. at 98–99 (explaining that there was not enough evidence on the record to show that the restriction was reasonably related to the stated goal).

202. *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 268.

203. *See Banks*, 126 S. Ct. at 2588 (Stevens, J., dissenting) (explaining that the justification accepted by the plurality has no limiting principle).

204. *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 268.

205. *Id.* (quoting *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 245 (1989)).

206. *See* Chemerinsky, *supra* note 22, at 460 (acknowledging the importance of discipline and order in authoritarian institutions).

upon prison administrators "would hopefully lead to better-supported policies and help eliminate hunch-based regulations."[207] The *Turner* majority's analysis of the marriage restriction—deferring to the prison administration's claim of rehabilitative benefits but not doing so unquestioningly—reflects this type of balancing and inquiry into the quality of the connection.[208] This type of inquiry is precisely the type advocated by the dissent in *Banks*.[209]

3. *Balancing While Deferring.* The dissent's application of the *Turner* test presents a possible modification that could replace the abridged *Turner* factors and thus create a new test for deprivation for rehabilitation situations. The dissent's approach, articulated by Justice Stevens, does precisely what the *Turner* Court itself did when faced with a justification that a deprivation was rehabilitative: it analyzes the deprivation using the applicable *Turner* factors and scrutinizes whether the regulation is an exaggerated response to the valid penological objective of rehabilitation.[210] This approach more accurately reflects the *Turner* Court's intent to maintain a balancing test for prisoners' rights and should be the approach adopted by the lower courts.

Justice Stevens in his dissent carefully reviewed the justifications for the restrictive policy given by the prison administrators.[211] Even absent any facts put forth by Banks, the dissent used logic and experience to find enough problems with the justifications put forth by the administrators to conclude reasonable fact finders could differ on their determinations about the constitutionality of the policy.[212] This application deals with the difficulty created by consolidating the test and replaces the other three *Turner* factors with another

207. *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 138, at 272.

208. *See id.* ("In invalidating the ban on inmate marriages, the *Turner* Court did not defer unquestioningly to the prison administration's determination of the rehabilitative benefits.").

209. *See* Beard v. Banks, 126 S. Ct. 2572, 2588–89 (2006) (Stevens, J., dissenting) (encouraging courts to be particularly cautious in evaluating prison policies justified primarily on the basis of deprivation for rehabilitation).

210. *See id.* (finding that a reasonable factfinder could conclude that the regulation was an "exaggerated response" to the prison's legitimate rehabilitation interest); *see also* Turner v. Safley, 482 U.S. 78, 97–98 (1987) (explaining that the marriage regulation is an exaggerated response to a valid objective).

211. *Banks*, 126 S. Ct. at 2586–90 (2006) (Stevens, J., dissenting).

212. *Id.* at 2588–89. Similarly, the Court in *Turner* carefully scrutinized the justifications offered by the prison administrators and found they were not enough to sustain the regulation. *Turner*, 482 U.S. at 99.

mechanism for determining the constitutionality of prison regulations restricting constitutional rights—a more searching inquiry behind the prison adminstrators' justifications. Though the dissenters also dispensed with three of the *Turner* factors, they nevertheless conceptualized the application of the first factor differently and found the connection between the policy and a valid penological objective too attenuated to be constitutional.[213] The dissent's reading of the first factor implied a scrutiny of the government's justifications that cannot act simultaneously with the high level of deference granted to the government by both the plurality and the concurrence.[214] The dissenters' evaluation of whether the policy was an exaggerated response to a valid penological objective standardizes this scrutiny.[215] The differences in the amount of deference given, including the possibility that a decrease in deference might effectively replace the eliminated *Turner* factors, present possible alternative ways to read the test for rehabilitative deprivation situations.

When the dissenters agreed with the plurality that three of the *Turner* factors were inapplicable in deprivation for rehabilitation situations, they added another mechanism whereby the prisoners' rights previously protected by balancing the factors could remain protected—decreasing the deference given to the opinions of prison administrators.[216] The dissenters looked more carefully at the justifications of the prison administrators to ensure that they were not merely an "exaggerated response" to the prison's legitimate interest in rehabilitation.[217] Though the *Turner* test always contained this "exaggerated response" language,[218] it was not necessary to separately examine regulations because balancing the four factors already ensured there was no exaggeration. When only one factor and no balancing is used, an "exaggerated response" analysis gives teeth to the test. This exaggerated response analysis would require something more than a mere assertion by prison administrators that a

213. *See Banks*, 126 S. Ct. at 2588–89 (Stevens, J., dissenting).

214. *See id.* (explaining that to ensure that *Turner* continues to impose meaningful limits on government action, courts should cautiously evaluate the justifications put forth by prison administrators).

215. *Id.*

216. *See id.* at 2589–90 (refusing to simply accept justifications given by prison administrators without additional evidence).

217. *Id.* at 2588–90.

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

deprivation of constitutional rights will improve behavior for those rights to be constitutionally restricted or removed.

Thus, the dissenters and the plurality each applied the first *Turner* factor, asking whether there was a valid rational connection between the prison regulation and the legitimate government interest put forward to justify it. Then, in addition, the dissenters asked whether the justification given was an exaggerated response to this objective. Following the example of the *Banks* dissenters and requiring prison administrators to demonstrate in some tangible way—beyond a mere assertion by the administrators—that the policy is meaningfully connected to rehabilitation before granting summary judgment would allow the Court to maintain the substantive judicial review it developed in *Turner*, *Johnson*, and other precedent without becoming embroiled in the complex problems of prison administration. In situations in which only some of the *Turner* factors are useful, giving teeth to *Turner* by examining prison officials' justifications in a meaningful way is precisely the modification needed to maintain the purpose of the *Turner* test. This proposed modification of the test better furthers the purpose of judicial review of prison administration, follows *Turner*'s analysis of a deprivation for rehabilitation situation, and better reflects the actions of the Court in other situations in which facts did not fit the *Turner* test.

CONCLUSION

In addition to furthering the theory of incarceration already established by the Court in its previous prisoners' rights cases, the mechanism used by the *Banks* dissenters fills the gap in constitutional protection created by consolidation of the *Turner* factors in deprivation for rehabilitation situations. By requiring prison administrators to demonstrate in some tangible way that a restrictive policy is meaningfully connected to rehabilitation, the Court could maintain the substantive judicial review it developed in *Turner* without becoming embroiled in the complex problems of prison administration. This approach would enable the Court to more critically examine the justifications of prison administrators to ensure those justifications are not merely an exaggerated response to a valid penological concern. It would also allow the Court to build on precedent to provide clarity to yet another aspect of this "theory of incarceration" without deciding questions not before it and without requiring it to create a new theory out of "whole cloth."

Judicial review of government actions protects and sustains the constitutional rights of all Americans. This judicial review is even more essential to the increasingly large portion of society which is, was, or will be incarcerated. As prison populations continue to grow, the complexities and difficulties of prison administration will only increase. Balancing the need for deference to those prison administrators on the front lines with the need for meaningful judicial review of prison policies has always been a challenge for the courts. If courts refuse to recognize the weight on the scales of either of these interests, the present prison system will quickly become unsustainable. Courts cannot act as prison administrators from afar, making the daily decisions of authoritarian administration, nor can they completely abrogate their role as protectors of the Constitution for those most in need. Thus the Court is compelled to strike a balance. For many years *Turner* provided that balance. Moving toward absolute deference and rendering *Turner* toothless would do more than undermine decades of jurisprudence. It would leave the system prone to abuse and eventually unsustainable, and it would leave prisoners with no way to protect the rights granted to them by the Constitution.