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Turner v. Safley: The Supreme Court Further Confuses Prisoners' Constitutional Rights

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THE SUPREME COURT FURTHER CONFUSES PRISONERS' CONSTITUTIONAL RIGHTS

I. INTRODUCTION

Prisoners are individuals that many of us would simply rather not think about. They have violated the rules that hold together the fabric of our society. When we are asked to treat them fairly, and provide them their basic rights guaranteed by the Constitution, many of us become morally outraged. The real test for any truly civilized society, however, is how it treats those it views as its outcasts. As Justice Brennan has stated:

It is . . . easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity. Nothing can change the fact, however, that the society that these prisoners inhabit is our own. Prisons may exist on the margins of that society, but no act of will can sever them from the body politic. When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.¹

In Turner v. Safley,² the United States Supreme Court promulgated a new "reasonableness" standard by which prisoners' constitutional claims will be judged. The Court held that a prison regulation is constitutionally valid if it reasonably relates to a legitimate penological objective.³ The Turner test is of monumental significance as it applies to all cases where prisoners assert that a penal regulation has violated their constitutional rights, regardless of the type or degree of the deprivation.⁴

This Note explores the standard promulgated in Turner. The Author then analyzes the application of the Turner standard in several post-

³. Id. at 2261.
⁴. Id. at 2262.
Turner cases. Finally, this Note examines the future viability of the Turner reasonableness test and proposes an alternative test.

II. STATEMENT OF THE CASE

The controversy in Turner v. Safley\(^5\) arose from two prison regulations in effect at Renz Correctional Institute [Renz], a state prison located in Cedar City, Missouri.\(^6\) The first regulation prohibited inmates at one prison from writing to inmates of another.\(^7\) This rule provided an exception for "correspondence 'with immediate family members who [were] inmates in other correctional institutions,' and . . . correspondence 'concerning legal matters.'"\(^8\) Correspondence sent to inmates other than family members was allowed only if a specially assigned "classification/treatment team" determined that the communication would be "beneficial" for all parties involved.\(^9\)

The second regulation prohibited inmates from marrying other inmates or civilians, unless they had the express permission of the prison superintendent.\(^10\) The superintendent was to permit marriage only "‘when there [were] compelling reasons to do so.’"\(^11\)

A group of prisoners at Renz, in conjunction with others affected by the prison regulations, brought a class action against the state prison for both injunctive relief and damages.\(^12\) The prisoners claimed that the reg-

\(^6\) Id. at 2257. The prison was originally built as a minimum security prison, thus it has no guard towers or walls. Id. at 2257-58. It houses both males and females; most of the males are minimum security inmates and most of the females are either medium or maximum security inmates. Id. at 2257. The two rules under scrutiny in Turner were promulgated by the Missouri Division of Corrections, and were in effect at all prisons within its jurisdiction. Id. This suit focused on the application of the rules to the Renz facility. Id.
\(^7\) Id. at 2258.
\(^8\) Id.
\(^9\) Id. (citing Brief for Appellants at 34, Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985) (Nos. 84-1827, 84-2337)). "Trial testimony indicated that as a matter of practice, the determination whether to permit inmates to correspond was based on team members' familiarity with the progress reports, conduct violations, and psychological reports in the inmates' files rather than on individual review of each piece of mail." Id. At Renz, however, the district court found that all inmates were flatly denied the right to correspond with inmates who were not family members. Id. (citing Safley v. Turner, 586 F. Supp. 589, 591 (W.D. Mo. 1984)).
\(^10\) Id. (citing Brief for Appellants at 47, Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985) (Nos. 84-1827, 84-2337)).
\(^11\) Id. (citing Brief for Appellants at 47, Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985) (Nos. 84-1827, 84-2337)). Prison officials testified that normally prisoners would be allowed to marry only in the cases of a pregnancy or the birth of an illegitimate child. Id.
\(^12\) Id. at 2257. The certified class included those who were or may be confined at Renz and were interested in writing to inmates at other Missouri jails, as well as those "‘who desire[d] to . . . marry inmates of Missouri correctional institutions and whose rights of . . . marriage have been or will be violated by employees of the Missouri Divisions of Correc-
ulations violated their first and fourteenth amendment constitutional rights. A federal district court, applying a strict scrutiny standard, held that both regulations, as applied at Renz, were unconstitutional. The district court found that the regulations were "far more restrictive than [was] either reasonable or essential for the protection of any state security interest, or any other legitimate interest, such as rehabilitation of inmates." Thus, although the state may have had a legitimate purpose for enacting the regulations, it failed to use the least restrictive means to accomplish that purpose.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's holding. The court of appeals agreed with the lower court that the strict scrutiny standard rather than the reasonableness standard applied when evaluating the constitutionality of the prison regulations. The appellate court viewed both prison regulations as being far more restrictive than necessary to accomplish the state's goals of rehabilitation and security.

The United States Supreme Court granted certiorari. The Court held that the proper standard to evaluate prisoners' constitutional rights was not the strict scrutiny standard, but rather, the reasonableness test.

13. Id. at 2258 (quoting Brief for Appellants at 21-22, Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985) (Nos. 84-1827, 84-2337)).
14. Id. at 2258. The first amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
15. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. Const. amend. XIV, § 1.
16. Safley v. Turner, 586 F. Supp. 589 (W.D. Mo. 1984), aff'd, 777 F.2d 1307 (8th Cir. 1985), aff'd in part and rev'd in part, 107 S. Ct. 2254 (1987). Under the strict scrutiny test, in addition to showing that the regulation furthers an important or substantial governmental interest, it must also be shown that the limitation is no greater than necessary to protect the governmental interest involved. See Procunier v. Martinez, 416 U.S. 396, 413 (1974).
17. Safley v. Turner, 777 F.2d at 1314.
18. The Supreme Court has defined the reasonableness test as follows: "[W]hether the prohibition [in question] . . . is reasonably related to legitimate governmental objectives." Block v. Rutherford, 468 U.S. 576, 586 (1983).
19. Safley, 777 F.2d at 1314.
20. Id. at 1315.
The Court listed four factors that should be balanced when determining the reasonableness of a prison regulation. Applying the reasonableness test to the prison regulations at Renz, the Court concluded that the marriage regulation was unreasonable because it failed to promote "legitimate penological interests." The Court, however, found the mail regulation to be a reasonable attempt by prison officials to increase the effectiveness of prison security and the rehabilitation process.

III. REASONING OF THE COURT

A. The Majority Opinion

1. The development of a standard

Justice O'Connor, writing for the majority, began her analysis by recognizing that prisoners are entitled to the protection of the Constitution and the rights it bestows. The Court stated that when a prison regulation infringes on a fundamental constitutional guarantee, federal courts must use their authority to protect that right. The majority further noted, however, that courts are generally not equipped to evaluate many aspects of prison administration and reform, and thus should give extreme deference to prison authorities. The Court stated that its task in Turner was "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.'" This sentiment led the majority to develop the Turner reason-

23. Id. at 2262. In determining reasonableness the Court listed four relevant factors. First, whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Id. (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). Second, "whether there are alternative means of exercising the right that remain open to prison inmates." Id. Third, the impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources generally. Id. Finally, whether there are ready alternatives that fully accomodate the prisoner's rights at a minimal cost to valid penological interests. Id.

24. Id. at 2267.

25. Id. at 2264. The Supreme Court, however, found that the appellate court did not rule on the district court's finding "that the correspondence regulation had been applied by prison officials in an arbitrary and capricious manner." Id. at 2267. This issue was remanded to the court of appeals for consideration. Id.


27. Id. at 2259 (citing Procunier v. Martinez, 416 U.S. 396, 405-06 (1974)).

28. Id. (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)).


30. Id. at 2259 (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)).
2. Reasonableness test

The Turner Court first looked to Procunier v. Martinez in an attempt to find a standard to apply to prisoners' constitutional claims. The regulation in Martinez prohibited prisoners from sending mail to non-prisoners in which the prisoners excessively complained, magnified their complaints or expressed negative views toward religion, politics or race. The Martinez Court applied a strict scrutiny standard, and invalidated the regulation because of its impact on non-prisoners' first and fourteenth amendment rights. The Martinez Court, however, expressly reserved the question of which was the proper standard to apply to cases dealing exclusively with "prisoners' rights." Thus, the Turner majority ruled that the Martinez decision did not mandate applying the strict scrutiny standard in prisoners' rights cases.

To determine the correct standard, the Turner Court next looked to four post-Martinez cases in which the Court had applied a reasonableness test in assessing the constitutionality of various prison regulations. In the first case, Pell v. Procunier, prisoners alleged that a regulation prohibiting in-person media interviews with individual inmates violated their first amendment rights. Based on a reasonableness test, the Pell...
Court held that prisoners’ first amendment rights were not violated, and that a violation would be found only when it is shown that the prison officials’ response to the security concern was exaggerated. If the response is not found to be exaggerated, courts should ordinarily defer to the expert judgment of the prison administrators.

In Jones v. North Carolina Prisoners’ Union, the second post-Martinez case, the Court considered prisoners’ constitutional rights. In Jones, prison rules prohibited inmates from having labor union meetings, attempting to induce other inmates to join the union, and receiving bulk mailings from union-related outside sources. The Supreme Court found that the regulation regarding bulk mailings was reasonable under the circumstances and that the ban on union meetings and group solicitation was rationally related to the reasonable goal of prison administration. Therefore, the Court held the prison regulations did not violate the prisoners’ constitutional rights.

The third post-Martinez case, Bell v. Wolfish, involved a prison interviews, the Pell Court centered on available alternative means of communication. Id. at 824-25.

40. Id. at 835. The Court stated that “lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” Id. at 822 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)); cf. Cruz v. Beto, 405 U.S. 319, 321 (1972) (prison inmates retain those first amendment rights which are not inconsistent with their status as prisoners or with the legitimate penological objectives of the prison).

41. Pell, 417 U.S. at 827. The Court noted that in various contexts it has held that reasonable communication-related time, place or manner restrictions “may be necessary to further significant governmental interests. . . .” Id. at 826 (quoting Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (anti-picketing and anti-noise ordinance). Additionally, the Pell Court cited Adderly v. Florida, 385 U.S. 39, 46-48 (1966) (statute prohibiting trespass upon premises of county jail); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (law prohibiting peace disturbance, obstructing public passages, and courthouse picketing); Poulos v. New Hampshire, 345 U.S. 395, 398 (1953) (city ordinance forbidding holding of religious meeting in public park without license); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of the public highways)). Id.

42. Id. at 827.
44. Id. at 121.
45. Id. at 122. The Jones Court failed to explain how bulk mailings, union meetings, and group solicitation threatened prison security. The Court merely speculated that trouble might occur. Id. at 132-33. The Court stated: “Prison officials concluded that the presence, perhaps even the objectives, of a prisoners’ labor union would be detrimental to order and security in the prisons . . . . It is enough to say that they have not been conclusively shown to be wrong in this view.” Id. at 132.
46. Id. at 129.
47. Id. at 133.
regulation prohibiting prisoners from receiving hardback books unless the books were mailed directly from publishers, bookstores or bookclubs. The Bell Court stated that in the absence of regulations far more restrictive than these, the judgment of the prison administrators would receive great deference. The Court found no evidence that the prison officials had exaggerated their response to the security problem, and thus held the regulation constitutionally valid.

In Block v. Rutherford, the last post-Martinez case cited by the Turner Court, the Supreme Court upheld a ban on contact visits. The Court determined that the visits were detrimental to prison security and that the ordinance was reasonably related to security concerns.

In Turner, the Eighth Circuit had distinguished these four cases by noting that unlike Martinez, the four cases involved mere time, place or manner restrictions on speech or activities that were inherently dangerous. The appellate court contended that the regulations in Turner, by contrast, involved content-based restrictions on speech, an activity which in itself was harmless. Therefore, the court of appeals reasoned, the Martinez strict scrutiny standard should be applied to the Turner regulations.

49. Id. at 548-49.
50. Id. at 551. The Turner Court observed that the rule was a rational response to what was a clear security problem. Turner, 107 S. Ct. at 2260. The Court in Bell elaborated on the need for the ordinance. The Court stated:

It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. . . . They also are difficult to search effectively. There is simply no evidence in the record to indicate that . . . officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources.

Bell, 441 U.S. at 550-51 (1978) (citations omitted).

51. Id.
53. Id. at 591-92. A contact visit is one in which the prisoner and the visitor can meet without a barrier to physical contact. Id. at 578.
54. Id. at 591. The Court held that:

Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.

Id. at 586. For a discussion of Bell and Block, see Jacobs, Prisoners' Rights, ANN. SURV. OF AM. LAW 325, 325-35 (1985).

56. Id.
The Supreme Court disagreed. Justice O’Connor noted that the Supreme Court did not apply a strict scrutiny standard in any of the four post-Martinez cases. Instead, in those cases the Court applied a reasonableness test asking whether the regulation was reasonably related to legitimate penological objectives, and whether the regulation was an exaggerated response to the problem.

In its analysis of the four post-Martinez cases, the Turner Court asserted that in Pell, the factor that mandated application of the reasonableness test was not the applicability of the time, place, or manner distinction, but rather that there were alternative means for an inmate to exercise the right in question. Thus, under Pell, the extent to which one is deprived of a right will be scrutinized when balancing a prisoner’s first amendment right with the government’s interest in security.

The Turner majority also disagreed with the court of appeals’ suggestion that the reasonableness test should be applied only where the prison enacts a time, place, or manner restriction or where the regulation prohibits dangerous activities. Justice O’Connor asserted that the court of appeals had failed to establish a standard by which courts could evaluate whether an activity was inherently dangerous. Instead, Justice O’Connor claimed that the court of appeals simply stated that a letter does not present the same kind of security problem as a hardback book. The Supreme Court held that there was no evidence to support this conclusion, and stated that categorizing an activity as presumptively dangerous is really a conclusion “about the reasonableness of the prison restriction in light of the articulated security concern.”

The majority contended that even if the reasoning of Pell, Jones, and Bell did not resolve the standard of review question left open in Martinez, the Turner Court would resolve it. In announcing the new standard, the Court stated: “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological objectives.”

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58. Id. at 2260.
59. Id. at 2260-61.
60. Id. at 2261 (citing Pell v. Procunier, 417 U.S. 817, 823-24 (1974)).
61. Id. (citing Pell v. Procunier, 417 U.S. 817, 824 (1974)).
62. Id. (citing Saley v. Turner, 777 F.2d 1307, 1310-12 (8th Cir. 1985)).
63. Id. (citing Saley v. Turner, 777 F.2d 1307, 1311-12 (8th Cir. 1985)).
64. Id. (citing Saley v. Turner, 777 F.2d at 1307, 1313 (8th Cir. 1985)). In Bell v. Wolfish, 441 U.S. 520 (1979), the Court found that allowing prisoners to have hardback books in the prison caused a security risk. Bell, 441 U.S. at 551. See supra text accompanying note 50.
66. Id.
PRISONERS' CONSTITUTIONAL RIGHTS

imate penological interests." The Court explained that applying a strict scrutiny standard would harm prison administrators' ability to deal effectively with security problems by requiring them to predict which remedy is the least restrictive. Furthermore, it would place the responsibility on non-expert judges to decide whether the best possible solution was being used.

The majority then extracted four factors from the Supreme Court's post-Martinez prison cases that must be balanced in deciding the validity of a prison regulation: “First, there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it;” second, there must be “alternative means of exercising the right[s] that remain open to the prison inmates;” third, a court must consider “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;” lastly, the absence of a ready alternative that fully accommodates a prisoner's rights at “de minimis” costs to valid penological interests is also evidence that the regulation is reasonable. The Court emphasized that the last factor is not the least restrictive alternative test. Under this factor, the inmate must not only show that an alternative exists but that the inmate's alternative accommodates prisoners' rights at a de minimis cost to valid prison interests.

67. Id.
68. Id. at 261-62 (citing Jones v. North Carolina Labor Prisoners' Union, 433 U.S. 119, 128 (1977)). The Supreme Court has also deferred to authority in cases involving military regulations. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986).
69. Turner, 107 S. Ct. at 2261-62. The Court reasoned that by making the judges the final arbiters, federal courts would become increasingly involved in prison administration affairs. Id. (citing Procunier v. Martinez, 416 U.S. 396, 407 (1974)).
70. Id. at 2262. The Court claimed that by analyzing Pell, Jones, and Bell, a test could be developed to determine whether a prison regulation violated a prisoners' constitutional rights. Id.
71. Id. (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). The regulation will be found invalid if the logical connection between the regulation and the goal is so remote that it makes the policy irrational or arbitrary. Id. The government's purpose must be legitimate and neutral and the regulation that impinges on prisoners' first amendment rights must operate in a neutral way, without regard to the content of expression. Id; see also Bell, 441 U.S. at 551; Pell, 417 U.S. at 828.
74. Id. (citing Block v. Rutherford, 468 U.S. 576, 587 (1984)).
75. Id. The least restrictive alternative test would require the prison to show that there is no alternative regulation that would substantially accomplish the prison goals, while at the same time being less restrictive of the prisoners' rights. Martinez, 416 U.S. at 413.
76. Id.
a. The application of the Turner test to the mail regulation

The Turner Court concluded that under its newly-minted reasonableness test, the mail regulation prohibiting inmates from writing to prisoners at other institutions, did not violate the prisoners' first amendment rights. Under the first prong of the Turner test—whether there is a valid relationship between the regulation and a legitimate governmental interest—the majority found that the ordinance was enacted for security reasons. Based on the testimony of prison officials indicating that mail can be used to communicate escape plans, arrange assaults, and plan other dangerous activities, the Court reasoned that the correspondence prohibition was logically related to these security concerns. Moreover, the Court noted that this kind of communication is sometimes forbidden even after a prisoner has been released on parole.

As to the second prong of the reasonableness test—whether there are alternative means of exercising the asserted right—the Court noted that the regulation at Renz did not deprive the prisoners of all forms of expression. Rather, "it bar[red] communication only with a limited class of other people with whom prison officials have particular cause to be concerned—inmates at other institutions within the Missouri prison system."

Next, Justice O'Connor noted that testimony by prison officials indicated that correspondence between prisoners in different facilities threatened the prison administrators' ability to maintain safety and internal security. Moreover, the Court asserted that the right to correspond in Turner was analogous to the purported right of prisoners to organize into a labor union in Jones, in that if these "rights" were recognized, less liberty and safety could result for both prisoners and guards alike. The

77. Id. at 2264.
78. Id. at 2263.
79. Id. (citing 2 Record at 76, 4 Record at 225-28). Witnesses testified before the district court that there was an increasing problem with prison gangs, and that restricting correspondence between gang members in different prisons was an important variable in solving the problem. Id. (citing 2 Record at 75-77, 3 Record at 266-67, 4 Record at 226). Officials also testified that Renz was used to provide protective custody for certain inmates and that this could be jeopardized by permitting correspondence between Renz and other facilities. Id. (citing 3 Record at 264-65).
80. Id; see, e.g., 28 C.F.R. § 2.40(a) (10) (1987), which makes federal parole conditional on not associating with known criminals unless the parolee has express permission from his or her parole officer.
82. Id.
83. Id.
Court reasoned that there was an even greater potential "ripple effect" in *Turner* than there was in *Jones*. In *Jones*, the problems associated with allowing prisoners to engage in unregulated union activity had been isolated within a single prison. In *Turner*, however, prisoners' correspondence with inmates at other facilities manifestly affected the staff and the inmates of more than one institution. Where safety and security are at stake, the Court reasoned, "the choice made by correction officials—which is, after all, a judgment 'peculiarly within [their] province and professional expertise,' should not be lightly set aside by the courts." The benefit to both prisoners and staff from the mail restriction thus outweighed the infringement on prisoners' right to correspond.

Lastly, the Court asserted that there were no obvious or easy alternatives to the regulation chosen. The only alternative suggested by the prisoners—monitoring prison correspondence—would create more than a *de minimis* cost. Not only would there be a risk of missing dangerous correspondence, but there would be a heavy burden on staff resources as well.

On the basis of this analysis, the *Turner* Court concluded that "[t]he prohibition on correspondence [at Renz was] reasonably related to valid corrections goals." Thus, the mail regulation was held to be constitutional.

**b. prohibition on marriage**

The *Turner* Court next considered the regulation prohibiting inmates from marrying without the permission of the prison superinten-
dent.\(^9\) Prison officials argued that the right to marry is not a fundamental right in the context of a prison,\(^9\) and that even if prisoners have a constitutional right to marry, any regulation affecting the right should be evaluated under a reasonableness standard rather than under strict scrutiny.\(^7\) In this light, prison officials concluded that because "the restriction [was] reasonably related to legitimate security and rehabilitation concerns,"\(^8\) it did not violate the prisoners' constitutional rights.

The Court recognized that the fundamental right to marry applies to prisoners as well as free persons.\(^9\) The Court stated: "It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'"\(^10\) According to the Court, there are many valid reasons for allowing prisoners to marry.\(^1\) First, inmate marriages, like marriages in general, are a sign of commitment and the desire for emotional support.\(^2\) Second, many religions require marriage as a showing of personal dedication and religious faith.\(^3\) Third, most prisoners look forward to their release and form the marriage with the belief that they will someday live together as man and wife.\(^4\) Lastly, many government benefits are conditioned on marital status.\(^5\) The majority held that the combination of these factors created a constitutional right for prisoners to marry.\(^6\)

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95. Id. at 2265; see supra notes 10-11 and accompanying text.
96. Turner, 107 S. Ct. at 2265. Prison officials conceded that under Zablocki v. Redhail, 434 U.S. 374 (1976), the right to marry was found to be a fundamental right. They claimed, however, that Zablocki does not apply to a prison setting. Turner, 107 S. Ct. at 2265.
98. Id.
99. Id. (citing Zablocki v. Redhail, 434 U.S. 374 (1976); Loving v. Virginia, 388 U.S. 1 (1967)).
100. Id. (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)). The Court noted, however, that the right to marry in a prison context may be restricted. Id.
101. Id.
102. Id. The Court noted that expressions of emotional support and public commitment are important and valuable aspects of marriage. Id.
103. Id. Common sense demonstrates that it is important for a prisoner working toward rehabilitation to feel good about himself and the progress that he is making. One who is religious, and is refused the right to marry, is prevented from fully exercising his or her religious beliefs. This can have a devastating effect on the rehabilitation process.
104. Id.
105. Id. The Court listed benefits such as social security, property rights and the right to have a child born out of wedlock deemed legitimate. Id.
106. Id. The Court reasoned that this conclusion is not contrary to Butler v. Wilson, 415 U.S. 953 (1974), which summarily affirmed Johnson v. Rockefeller, 365 F. Supp. 377, 380-82 (S.D.N.Y. 1973), aff'd, 415 U.S. 953 (1974). In Johnson, a marriage prohibition applied only to prisoners with life sentences; denial of the right to marry was an aspect of the punishment
After establishing that prisoners have a constitutional right to marry, the majority analyzed the Renz marriage regulation. The marriage regulation permitted a prisoner to marry "only with the permission of the superintendent of the prison, and provide[d] that such approval should be given only 'when there are compelling reasons to do so.'" The Court noted that the regulation not only governed marriages between inmates, but between prisoners and civilians as well. Because civilians were actually affected by the regulation, the Court observed that applying the Martinez strict scrutiny standard might be appropriate, because "the regulation may [have] entail[ed] a 'consequential restriction on the [constitutional] rights of those who are not prisoners.'" The Court concluded, however, that it need not consider the possible application of the strict scrutiny standard, because even under the less demanding reasonableness test, the regulation violated the prisoners' constitutional rights.

Prison authorities claimed that two governmental concerns justified the finding that the marriage restriction was "reasonably related" to the asserted security goal. First, as a matter of security, officials claimed that love triangles, which may result from inmate marriages, could provoke violent confrontations between the prisoners. Second, with regard to rehabilitation, Prison Superintendent William Turner testified that many female prisoners were either too dependent on the men in their lives, or were often abused at home, and that these factors were related to their crimes. As a result, Turner testified that many women inmates needed to become more self-reliant and that the marriage prohibition promoted this rehabilitative process.

Applying its reasonableness standard, the majority held that the marriage regulation was unconstitutional. The Court concluded that

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for their crime. *Id.* at 381-82. The *Turner* Court distinguished *Johnson* on this basis. *Turner*, 107 S. Ct. at 2265.


108. *Id.* at 2258 (quoting Brief for Appellants at 47, *Safley v. Turner*, 777 F.2d 1307 (8th Cir. 1985) (Nos. 84-1827, 84-2237)).


111. *Turner*, 107 S. Ct. at 2266. The Court reasoned that if the regulation failed under the more lenient reasonableness test, it became irrelevant whether strict scrutiny applied. *Id.*

112. *Id.*


114. *Id.* (citing 3 Record at 154-55).

115. *Id.* (citing 1 Record at 80-81).

116. *Id.*

117. *Id.*
under the first factor of the reasonableness test, the prohibition on marriage was not "reasonably related" to the asserted security and rehabilitation goals. The Court reasoned that the "rule sweeps much more broadly" than necessary for legitimate penological objectives. Missouri prison officials had claimed that they did not object to male inmate-civilian marriages and the district court had found that before the rule was implemented, such marriages were not prohibited. Thus, the argument that prison officials implemented the inmate marriage rule to aid in prisoner rehabilitation appeared to the Court to be unnecessarily overbroad and a meaningless justification.

The Court noted that the prison's justification for prohibiting inmate-civilian marriages was equally puzzling. Missouri prison officials admitted that they usually had permitted inmate-civilian marriages. The majority observed that the rehabilitation concern appeared to be aimed primarily at female inmates marrying other inmates, not female inmate-male civilian marriages. The Court further stated that the rehabilitation concern itself was suspect. Justice O'Connor pointed to the district court's finding that between 1979 and 1983 prison officials had closely scrutinized all proposed female inmate-male civilian marriages and had approved only one. In contrast, male inmate-female civilian marriages were routinely approved. These factors supported the idea that the governmental interest was overbroad, and thus not legitimate under the first prong of the Court's newly formed reasonableness test.

The majority further reasoned that under factor number two of the reasonableness test, "[t]here [were] obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a

118. Id.
119. Id.
120. Id. at 2267 (citing 4 Record at 240-41).
122. Turner, 107 S. Ct. at 2266-67 (citing 2 Record at 141-42). If Superintendent Turner believed that marriage would hinder the rehabilitative progress of male prisoners, he would not have routinely approved them. Id. at 2266. Application of the rule to male prisoners therefore appears to be unjustifiable. Id. at 2267.
123. Id. at 2266-67.
124. Id. at 2267 (citing 4 Record at 240-41). Specifically, Superintendent Turner stated that he generally did not object to inmate-civilian marriages. Id. (citing 2 Record at 141-42).
125. Id. Implicitly, even if the rule applying to female inmate marriages was justified, it was nevertheless overly broad because it also applied to inmate-civilian marriages.
126. Id.
127. Id.
128. Id.
As an example, Justice O'Connor explained that marriages are usually allowed in federal prisons, but that the right to marry is denied if the warden determined that the marriage would be a threat to prison security. The majority noted that nowhere in the record was there testimony by prison officials that such an alternative would not be an adequate way to ensure security. Furthermore, there was no evidence indicating that the marriage regulation would prevent love triangles, as inmates tend to consort with members of the opposite sex regardless of whether marriage would eventually occur.

As to whether the exertion of the right to marry would have a negative impact on prisoners and prison staff, the Court determined that Turner was not a case where there would be a "ripple effect" on the prison staff and the prisoners they supervise. The Court observed that "where the inmate wishes to marry a civilian, the decision to marry is a completely private one."

Finally, the fourth Turner factor under which a court should determine whether there are alternatives to the regulation in question, led the Court to conclude that the Missouri regulation was an exaggerated response to the prison's security problem. The Court found that there were obvious, easy alternatives to the regulation that accommodated both the right to marry and placed a de minimis burden on the pursuit of legitimate security objectives. As an example, the Court noted that federal prisoners were generally permitted to marry unless the warden determined that the marriage would be a threat to security.

The majority thus concluded that "the Missouri marriage regulation, as written, [was] not reasonably related to these legitimate penological interests."

B. Justice Stevens' Concurring and Dissenting Opinion

Although Justice Stevens concurred with the majority's holding that
the marriage regulation violated the prisoners’ constitutional rights, he disagreed with the Court’s conclusion that the prison mail regulation was a valid exercise of authority.\textsuperscript{139}

Justice Stevens suggested that upholding a regulation merely because there is a logical connection between the regulation and a legitimate institutional concern is meaningless.\textsuperscript{140} Stevens reasoned that such a standard would allow wardens to curtail prisoners’ rights any time they were able to think of a plausible security concern to justify their actions.\textsuperscript{141} Justice Stevens implied that the majority’s standard was too broad, because a warden can manufacture a relationship between prison security and the prohibition of many constitutional rights.\textsuperscript{142}

1. Mail regulation

In his analysis of the majority opinion, Justice Stevens observed that the prisoners were not attacking the validity of the mail regulation in general, but rather, were attacking its application at Renz.\textsuperscript{143} The regulation, as written, allowed correspondence between unrelated prisoners if a specially formed classification/treatment team, comprised of prison staff, felt that it was best for all parties involved.\textsuperscript{144} The district court, however, found that Renz officials completely banned correspondence.\textsuperscript{145} The rule was enforced without regard to whether security or rehabilitation would be adversely affected by allowing a specific letter to be mailed.\textsuperscript{146} Moreover, the district court found that inmates were denied

\begin{itemize}
  \item \textsuperscript{139} Turner v. Safley, 107 S. Ct. 2254, 2268 (1987) (Stevens, J., concurring in part and dissenting in part).
  \item \textsuperscript{140} Id. at 2267 (Stevens, J., concurring in part and dissenting in part).
  \item \textsuperscript{141} Id. at 2267-68 (Stevens, J., concurring in part and dissenting in part).
  \item \textsuperscript{142} Id. (Stevens, J., concurring in part and dissenting in part). Illustrating how a mere logical connection between the regulation and an institutional interest can lead to an unnecessary prohibition, Justice Stevens stated:
  
  Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it.

  \textit{Id. at 2268} (Stevens, J., concurring in part and dissenting in part).
  \item \textsuperscript{143} Id. (Stevens, J., concurring in part and dissenting in part). This distinction is very important. If the Court had focused on the broader issue of the regulation in general, and the regulation was found to be reasonable and constitutionally valid, it does not mean that a narrower, more restrictive application will also be valid.
  \item \textsuperscript{144} Id. at 2269 (Stevens, J., concurring in part and dissenting in part); see \textit{supra} notes 7-9 and accompanying text.
  \item \textsuperscript{145} Id. (Stevens, J., concurring in part and dissenting in part) (citing Safley v. Turner, 586 F. Supp. 589, 591-92 (W.D. Mo. 1984)). The district court had found that Renz inmates could not write to non-family inmates or receive mail from them. \textit{Id.} This rule was set forth in the “Renz Inmate Orientation Booklet” which inmates were given when they arrived at Renz. \textit{Id.}
  \item \textsuperscript{146} Id. (Stevens, J., concurring in part and dissenting in part).
the right to correspond even when evidence indicated that their intent was merely to pursue innocent friendships. In affirming the district court decision, the court of appeals had held that:

absent a showing that prison officials would be unable to anticipate and avoid any security problems associated with inmate-to-inmate mail that would result from application of the correspondence rule as it is written and as enforced at other Missouri prisons, the total ban at Renz found by the District Court offends the First Amendment.

Justice Stevens agreed with the court of appeals that the correspondence regulation as applied at Renz was unconstitutional.

Furthermore, Justice Stevens argued that the Court's finding, that the prisoners still had alternative means of expressing their right because all communication with the outside world was not cut off, was not relevant in determining whether the rule as applied at Renz was unnecessarily broad. The issue was whether all inmate-inmate correspondence should have been banned, and not whether there were other unrelated ways a prisoner could communicate. Justice Stevens further concluded that a fair application of this reasoning would mandate the absurd result of upholding the marriage regulation because it too could have been more restrictive.

Justice Stevens noted that the Court's last reason for upholding the mail regulation was that it would be impossible for prison staff to examine the contents of all inmate mail. Justice Stevens asserted that this finding was not supported by the record in the district court.

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147. Id. (Stevens, J., concurring in part and dissenting in part) (citing Safley v. Turner, 586 F. Supp. 589, 591-92 (W.D. Mo. 1984)). These factual findings led the district court to issue an injunction holding that the prohibition was "unnecessarily sweeping." Id. (Stevens, J., concurring in part and dissenting in part) (citing Safley v. Turner, 586 F. Supp. 589, 596 (W.D. Mo. 1984)). The district court also held that "[d]efendants have failed to demonstrate that the needs of Renz are sufficiently different to justify greater censorship than is applied by other well-run institutions." Id. (Stevens, J., concurring in part and dissenting in part) (quoting Safley v. Turner, 586 F. Supp. 587, 596 (W.D. Mo. 1984)).

148. Id. at 2270 (Stevens, J., concurring in part and dissenting in part) (citing Safley v. Turner, 777 F.2d 1307, 1315-16 (8th Cir. 1985)).

149. Id. (Stevens, J., concurring in part and dissenting in part).

150. Id. at 2272 (Stevens, J., concurring in part and dissenting in part).

151. Id. (Stevens, J., concurring in part and dissenting in part). Justice Stevens referred to the idea that both regulations, despite their restrictive nature, do not completely eliminate all aspects of the privilege. Id. (Stevens, J., concurring in part and dissenting in part). Under this reasoning, the Court should reach the same result in both situations. Id. (Stevens, J., concurring in part and dissenting in part).

152. Id. (Stevens, J., concurring in part and dissenting in part).

153. Id. at 2273 (Stevens, J., concurring in part and dissenting in part).
trial record contained no statistics regarding how many letters were sent to or were received from Renz. The state itself could only say that it had 8,000 inmates throughout the state and that it assumed that inmates would write. Justice Stevens concluded that the rule enforced at Renz was an "excessive response" based on speculation and deference rather than on consideration of expert opinion.

2. Prohibition on marriage

Justice Stevens asserted that the majority’s approval of the correspondence regulation was puzzling when compared to its disapproval of the marriage regulation. Stevens noted that the majority concluded that it was mere speculation to assume that the security problems associated with love triangles stemmed from inmate-to-inmate marriage. However, the majority gave deference to the prison administrator’s speculation that inmate mail posed a threat of gang violence and transmission of secret codes. It was also puzzling how the majority correctly discredited the speculation that, after release from prison, an inmate spouse might try to help the other inmate escape, while the majority gave weight to the testimony that escape plans might be hidden in letters.

Justice Stevens observed further contradictions in the majority’s balancing of the evidence. Although the majority had struck down the marriage regulation finding it to be more restrictive than practices at other Missouri prisons, it upheld the mail regulation, despite the fact that

154. Id. at 2272 (Stevens, J., concurring in part and dissenting in part).
155. Id. (Stevens, J., concurring in part and dissenting in part) (Transcript of Oral Arg. at 14). The State called two witnesses to support its contention that reviewing inmate mail would be an impracticable task. Id. at 2272-73 (Stevens, J., concurring in part and dissenting in part). Mr. Blackwell had stated that, not only would it be impossible to read all the mail, but that he would not want to. Id. at 2272 (Stevens, J., concurring in part and dissenting in part) (citing 4 Record at 41-43). Ms. Halford, a witness from Kansas, had claimed that due to the amount of mail received, reading it would not only be boring, but would also be a poor use of time. Id. at 2273 n.12 (Stevens, J., concurring in part and dissenting in part). Justice Stevens believed that Halford’s statement was applicable to the Kansas facility, but not to Renz, which was considerably smaller in size. Id. at 2273 (Stevens, J., concurring in part and dissenting in part). The average population at Renz in 1983 was only 270 persons. Id. n.12. As the district court stated: “[t]he staff at Renz has been able to scan and control outgoing and incoming mail, including inmate to inmate correspondence.” Id. at 2273 (Stevens, J., concurring in part and dissenting in part) (quoting Safley v. Turner, 586 F. Supp. 589, 592 (W.D. Mo. 1984)).
156. Id. (Stevens, J., concurring in part and dissenting in part).
157. Id. at 2274 (Stevens, J., concurring in part and dissenting in part).
158. Id. (Stevens, J., concurring in part and dissenting in part).
159. Id. (Stevens, J., concurring in part and dissenting in part).
160. Id. (Stevens, J., concurring in part and dissenting in part).
161. Id. (Stevens, J., concurring in part and dissenting in part).
mail regulation was more restrictive than similar rules throughout the state.\footnote{162} The Court had acknowledged that marriage has many characteristics that help to enhance rehabilitation;\footnote{163} it discounted any benefits gained from writing to a friend on the basis that all communication with the outside world had not been eliminated.\footnote{164} Furthermore, the majority had rejected the district court's finding that the mail regulation was unfair due to "'excessive paternalism'" but credited this same testimony in the context of the marriage regulation.\footnote{165}

Justice Stevens noted that by pointing out these inconsistencies, he was not indicating that the analysis of the marriage regulation was improper.\footnote{166} Rather, he concluded that if the majority consistently applied its new standard, the mail regulation as well as the marriage regulation would have been found to be unconstitutional.\footnote{167}

IV. ANALYSIS

A. The Choice of a Standard

In Turner v. Safley,\footnote{168} the United States Supreme Court was called upon to further define how courts should evaluate a claim that a prison regulation has violated a prisoner's constitutional rights. For inmates, Turner was a chance to establish a higher degree of protection by reviving the application of the strict scrutiny test;\footnote{169} for prison officials, the case presented an opportunity to enhance their control by convincing the Court to apply a far less demanding standard of reasonableness.\footnote{170}

Based on precedent, a strong argument could be made for applying either of these standards of judicial review.\footnote{171} The Turner Court, how-

\footnote{162. Id. (Stevens, J., concurring in part and dissenting in part).}
\footnote{163. Id. (Stevens, J., concurring in part and dissenting in part).}
\footnote{164. Id. (Stevens, J., concurring in part and dissenting in part).}
\footnote{165. Id. (Stevens, J., concurring in part and dissenting in part).}
\footnote{166. Id. at 2275 (Stevens, J., concurring in part and dissenting in part).}
\footnote{167. Id. (Stevens, J., concurring in part and dissenting in part).}
\footnote{169. In light of the most recent pre-Turner Supreme Court decisions, there was considerable doubt as to the future application of the strict scrutiny standard to the context of challenged prison regulations. If the prisoners could convince the Court to apply the strict scrutiny standard where a right had been completely deprived, then the greater protection would appropriately have been afforded where it was most needed.}
\footnote{170. By applying the reasonableness test to this case, the Court would be applying it to the only class of prisoner cases—cases where a right is being completely deprived—where its applicability was in dispute.}
\footnote{171. None of the pre-Turner Supreme Court cases had explicitly established a standard applicable to a case where a prisoner's right had been completely eliminated. Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974). It was
ever, rejected the prisoners' contention that a reasonableness test should be applied only where a regulation protects the prison from a dangerous condition, or involves a mere time, place or manner restriction on inmate speech.\textsuperscript{172} The majority noted that the Court in \textit{Pell v. Procunier},\textsuperscript{173} \textit{Jones v. North Carolina Prisoners' Labor Union},\textsuperscript{174} and \textit{Bell v. Wolfish}\textsuperscript{175} had addressed the question of what standard should be used to evaluate prisoners' constitutional claims.\textsuperscript{176} However, the Court asserted that even if its prior decisions did not address the question, it had the power to do so in this case.\textsuperscript{177} In utilizing that power, the Court found the reasonableness test to be the proper standard.\textsuperscript{178}

\textbf{B. The Court's Application of its New Standard}

1. \textit{Turner v. Safley}: Lack of an evenhanded application

In \textit{Turner v. Safley},\textsuperscript{179} the United States Supreme Court identified four factors that a court must balance in deciding whether a prison regulation is reasonable and thus constitutional: (1) whether there is a valid connection between the regulation and a legitimate governmental interest; (2) whether alternative means of exercising the right remain open to the prisoner; (3) the impact that exertion of the right will have on prisoners and prison staff; and (4) whether the regulation is an "exaggerated response" to an interest which could be accomplished by alternative means at a \textit{de minimis} cost.\textsuperscript{180}

The \textit{Turner} Court's application of its new reasonableness standard clearly reveals the manipulability of the test. It is this manipulability that will cause a lack of uniformity among the lower courts and will deter prisoners from asserting their constitutional rights. This fact can best be possible to argue either that: (1) since this is different from the cases where the reasonableness test had been applied, the strict scrutiny test should be applied; or (2) this is just another case where the reasonableness standard should be applied, and that by looking at past cases we can determine the relevant factors for defining reasonableness.

\textsuperscript{172} \textit{Turner}, 107 S. Ct. at 2261.
\textsuperscript{173} 417 U.S. 817 (1974).
\textsuperscript{174} 433 U.S. 119 (1977).
\textsuperscript{175} 441 U.S. 520 (1979).
\textsuperscript{176} \textit{Id.} at 2260-61.
\textsuperscript{177} \textit{Id.} at 2261. The prior cases, while dealing with prisoners' constitutional rights, had established no general rule. \textit{Block}, 468 U.S. at 576; \textit{Bell}, 441 U.S. at 520; \textit{Jones}, 443 U.S. at 119; \textit{Pell}, 417 U.S. at 817. The Court in \textit{Turner} saw the establishment of such a general rule as its task, and adopted a reasonableness test as appropriate in all prison cases where rights of non-prisoners are not involved. \textit{Id.} at 2262.
\textsuperscript{178} \textit{Turner}, 107 S. Ct. at 2262.
\textsuperscript{179} 107 S. Ct. 2254 (1987).
\textsuperscript{180} \textit{Id.} at 2262.
exemplified by comparing the Court's use of evidence in both the correspondence and marriage regulations.

a. connection between the regulation and the governmental interest

Under the first prong of the Turner test, the majority found that the marriage regulation was not logically related to legitimate security concerns.181 The prison officials claimed that the regulation was enacted to help control problems stemming from the formation of "love triangles."182 The Turner Court correctly observed that these relationships would exist regardless of a prisoner's marital status.183

However, when considering the correspondence regulation, the majority arrived at a different conclusion. The majority concluded that the correspondence regulation was logically related to a legitimate security concern.184 The finding of a legitimate security concern was based on the speculative testimony of three witnesses.185

The first witness, Superintendent Turner, speculated that the regulation would stop communication at an early stage.186 His testimony, however, failed to show that the correspondence would cause a security risk.187 The second witness, Ms. Haldor of Kansas, claimed that the mail system could be used to plan escapes and that prohibiting inmate correspondence would help halt the beginning of gang problems.188 The trial judge correctly attached little weight to Ms. Haldor's testimony as there were no gang problems in Kansas despite the allowance of inmate correspondence.189 The last witness, Mr. Blackwell, testified that one way to attempt to prevent gangs is by limiting inmate correspondence.190 Mr. Blackwell's testimony, however, merely supported the proposition

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181. Id. at 2266.
182. Id.
183. Id. at 2265.
184. Id. at 2264.
185. Id. at 2270-73 (Stevens, J., concurring in part and dissenting in part) (citing 2 Record at 76).
186. Id. at 2270 (Stevens, J., concurring in part and dissenting in part). Stevens further concluded that Turner's testimony supported the district court's holding that the mail regulation was an exaggerated response to the fear of gang problems at Renz. Id. (Stevens, J., concurring in part and dissenting in part).
188. Id. at 2271 (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 160). Ms. Haldor, "the Director of the Kansas Correctional Institution at Lansing," had reviewed the prison's policies, visited Renz for a few hours, and "discussed the case with Superintendent Turner." Id. at 2270-71 (Stevens, J., concurring in part and dissenting in part).
189. Id. (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 158).
190. Id. at 2271 (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 267). Mr. Blackwell was in charge of general management of "Missouri's adult correctional
that some restrictions may be necessary, but did not lend support to the
total ban on inmate correspondence in effect at Renz. The Turner
Court viewed this speculative evidence, however, as sufficient, and con-
cluded that the correspondence regulation was logically related to a legiti-
mate security concern. This was so, even though the average
population at Renz was 270 persons, and it took only one hour a day
to scan all incoming mail from other institutions, as well as some outgo-
ing mail.

b. alternative means of exercising the asserted right

In applying the second prong of the Turner reasonableness test to
the marriage regulation—whether there remains open to prison in-
mates an alternative means of exercising the constitutional right—the
majority surprisingly did not focus on the fact that there were no alterna-
tive means of exercising the right to marry. The Turner marriage rule
exemplifies in its most pristine form the failure of a prison regulation to
meet this prong. By forbidding a prisoner from marrying, he or she is
left with no alternative but to completely refrain from the desired
activity.

This prong of the Turner test, however, presents a problem that
arises when the test is applied to a rule like the correspondence regula-
tion. Whether a court will find that there are alternative means of exer-
cising a given right will depend on the framing of the parameters of that
right. If the right in Turner was described narrowly as the right to com-
municate with prisoners at other institutions, then there would be no
alternative means of exercising it. The Turner Court, however, defined
the right more broadly as encompassing “all means of expression.” The
Court then concluded that only one small part of a prisoner’s right
to communicate was barred: the right to communicate with “inmates at
other institutions within the Missouri prison system.” This prong of
the test offers no guidance as to how broadly or narrowly a right is to be
defined. If a court is in favor of the regulation, it can do what was done in
Turner: define the regulation in question as only barring one small
part of the total right. Thus, under the *Turner* test, when dealing with any right that has more than one dimension, the right can always be broken into components, and a prisoner can be denied any part of it.

c. impact on prisoners and staff

Under the third prong of the *Turner* reasonableness test—the extent to which accommodating an asserted right will impact on prisoners and staff—the majority concluded that accommodating the right to marry will not have a detrimental effect on the prison staff. As love triangles will develop regardless of a marriage ceremony, the ceremony in and of itself is not the critical factor in determining whether rivalries will develop.

When evaluating the correspondence regulation, however, the Court found that the third prong of the test was satisfied based on the testimony of prison officials. Prison officials had asserted that “correspondence

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198. *Id.*
199. *Id.* at 2266.
200. *Id.*
201. *Id.* at 2263. Superintendent Turner had offered no proof that the correspondence prohibition prevented escape plots. *Id.* at 2270 (Stevens, J., concurring in part and dissenting in part). Turner stated that “from the standpoint that we don’t have escapes, we don’t have the problems that are experienced in other institutions.” *Id.* (Stevens, J., concurring in part and dissenting in part) (quoting 2 Record at 75). His testimony also failed to show that the correspondence would cause a security risk; rather he could only speculate that this would stop communication at an early stage. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 2 Record at 76).

Justice Stevens concluded that Turner’s testimony supported the district court’s holding that the mail regulation was an exaggerated response to the fear of gang problems at Renz. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 2 Record at 117-18).

The possibility of inmates using the postal system to transmit secret codes was not mentioned by either of the prison’s two other witnesses. *Id.* at 2271 (Stevens, J., concurring in part and dissenting in part). Instead, Ms. Halford, a witness from Kansas who had not previously been familiar with the rules in effect at Renz, testified that she saw two problems with having an open correspondence rule. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 158-59). First, she stated that in the preceding year a male and female inmate escaped together and were free for over a week. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 158-59). She claimed that “they must have used the mails to plan their escape.” *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 158-59). The trial judge, however, presumably gave this testimony very little weight because there had been no evidence of mail communication whatsoever. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 158-59). Second, Halford claimed that a prohibition on inmate correspondence would help halt the initiation of gang problems. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 160). The trial judge attached little weight to this statement because there had been no gang problem in Kansas’ prison system despite the allowance of inmate-to-inmate correspondence. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing 3 Record at 158). Justice Stevens suggested that it was ironic that the witness could not convince her employers in Kansas to enact a prohibition on inmate correspondence, but yet her speculative testimony had managed to con-
between prison institutions facilitates the development of informal organizations that threaten the core functions of prison administration, maintaining safety and internal security." Rather than require specific evidence showing that problems would arise at Renz, the Court chose to defer to the expertise of the prison officials. This exemplifies another way in which the *Turner* standard is highly manipulable depending on the degree of proof which a court deems necessary. If a court wants to find a detrimental effect on prison security, it can accept proof based on mere speculation. If it does not wish to uphold the regulation, a court may be able to find that the connection between assertion of the right and any actual harm is unsupported by the evidence and hence illusory.

**d. alternatives to the regulation**

Under the last prong of the *Turner* test, the majority found that there were obvious alternatives to the marriage regulation. It concluded to the contrary, however, when considering the correspondence
The majority observed that monitoring inmate mail would exact more than a *de minimis* cost to the prison. The Court also placed credence in the testimony of prison officials that it would be impossible to read every piece of inmate-to-inmate correspondence. The majority found this evidence compelling, even though a guard at Renz testified that “at Renz he scanned the contents of all approved incoming mail from other institutions, and that this task and scanning some outgoing mail together took approximately one hour a day.” This testimony is not consistent with the Court’s finding that it would be “impossible to read the portion of the correspondence that is addressed to, or received from, inmates in other institutions.”

In sum, each of the elements of the *Turner* test is so vague that the test essentially permits a court to reach whatever result it wishes. The standard will inevitably lead to inconsistencies in interpretation depending on the inclination of a particular court. Prisoners will suffer as they will not be given any certain degree of protection. The lack of predictability will not only leave prisoners unsure of their constitutional rights, but will deter many from asserting them.

**e. subsequent criticism of the Turner test**

Justice Brennan has criticized the *Turner* standard as not being the best way to guard prisoners’ constitutional rights. Justice Brennan stated that “[w]hile we must give due consideration to the needs of those in power, this Court’s role is to ensure that fundamental restraints on...
that power are enforced."

Justice Brennan's primary concern is that the *Turner* reasonableness test is lax in its evaluation of prison officials' actions because it does not differentiate between degrees of deprivation. The same test is applied regardless of whether the prisoners' right to engage in a specified activity is merely restricted or completely eliminated. It is true that the distinction between a restriction and an elimination of a right is one aspect of the *Turner* reasonableness test, but rather than being the basis for a heightened level of scrutiny, it merely becomes another factor to consider. As Justice Brennan observed, if the *Turner* standard of review is appropriate, the field of constitutional law could be reduced to one test and we could incorporate all relevant variables under the test's rubric. It is clear, however, that courts have not generally found this to be the case; a stricter standard of review has been applied where the exertion of a right has been prohibited or severely restricted.

2. The Supreme Court further defines the *Turner* standard

Eight days after deciding *Turner*, the Supreme Court had an opportunity to apply its new test in *O'Lone v. Estate of Shabazz*. In *O'Lone*, inmates alleged that two prison policies violated their first amendment right to freedom of religion.

The first policy, "Standard 853," required inmates who were being shifted from maximum to minimum security status to spend a period of time in "intermediate gang minimum status." Prisoners in this intermediate group were assigned work away from the main prison build-

212. *Id.* at 2408 (Brennan, J., dissenting).
213. *Id.* (Brennan, J., dissenting). Under the Court's test a restriction limiting the use of the prison library to certain times is given the same degree of scrutiny as a regulation prohibiting inmates from reading entirely. *Id.* (Brennan, J., dissenting). The message to prison officials is that they need only act reasonably and all such regulations will be upheld. *Id.* (Brennan, J., dissenting).
216. *Id.* (Brennan, J., dissenting).
217. *Id.* at 2408-09 (Brennan, J., dissenting); *See also* Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985) (strict scrutiny standard is applied where there is a complete deprivation of a right).
220. *Id.* at 2403. *See supra* note 13.
221. The term "Standard 853" merely refers to the specific policy mandating the implementation of intermediate gang minimum status. *Id.* at 2402.
222. *Id.* This intermediate status group was designed to combat problems that may arise when a prisoner is transferred from maximum security status, which is restrictive, to minimum security status, which has a much higher degree of freedom. *Id.*
The second policy prohibited these prisoners from returning to the main buildings during the day. Moslem prisoners objected, claiming the policies affected their ability to take part in Jumu'ah, a weekly religious ceremony.

The Court upheld the validity of both policies under the *Turner* reasonableness test. Chief Justice Rehnquist, writing for the majority, held that under the first prong of the *Turner* test the policies were rationally related to legitimate governmental interests in prison security. The Court reasoned that Standard 853 was designed to combat overcrowding, and the second policy was necessary to combat congestion and delays at the main gate, which was a high risk area.

Under the second prong of the *Turner* test, in ascertaining whether there were alternative means of exercising the asserted right, the *O'Lone* Court stated that prisoners were not deprived of all forms of religious expression since they could still engage in prayer and discussion during non-working hours. The Court observed that in *Turner*, the right was defined broadly as the right to communicate, rather than the right to communicate with prisoners in other institutions. Similarly, the majority reasoned that here it was appropriate to broadly define the right as the right to take part in "Muslim religious ceremonies," rather than in one particular ceremony.

In his dissent, Justice Brennan argued that the majority’s analysis ignored the fact that "Jumu'ah is the central religious ceremony of Muslims, 'comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects.'" Jumu'ah is not like other

223. *Id.*
224. *Id.* at 2403.
225. *Id.* Jumu'ah is a weekly religious service held in the main prison building or in another building known as “the Farm.” *Id.* at 2402. “Jumu’ah is commanded by the Koran and must be held every Friday after the sun reaches its Zenith and before the Asr, or afternoon prayer.” *Id.*; see Koran 62:9-10.
226. *O'Lone*, 107 S. Ct. at 2405.
227. *Id.*
228. *Id.* at 2405-06.
229. *Id.* at 2406. Chief Justice Rehnquist further stated that Muslim prisoners were given substitute meals whenever pork was served in the dining hall. *Id.* The prison made special arrangements during the month long period of Rhamadan by giving the prisoners breakfast at 4:00 A.M. and dinner at 8:30 P.M. each evening. *Id.* The Chief Justice concluded that because prisoners were allowed to take part in these other activities, restricting their right to Jumu'ah was reasonable. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 2410 (Brennan, J., dissenting) (quoting Shabazz v. O’Lone, 595 F. Supp. 928, 930 (D.N.J. 1984)).
Moslem prayers that can be made up if missed, for the Koran commands that Jumu‘ah be attended. Justice Brennan observed that:

If a Catholic prisoner were prevented from attending Mass on Sunday, few would regard that deprivation as anything but absolute, even if the prisoner were afforded other opportunities to pray, to discuss the Catholic faith with others, and even to avoid eating meat on Friday if that were a preference. Prison officials in this case therefore cannot show that “‘other avenues’ remain available for the exercise of the asserted right.”

The majority, however, by defining the right broadly, again indicated that if a right can be divided into several parts, only one of which is foreclosed by the government, the Court will not hesitate to find that alternative means of expressing the right exist.

In O’Lone, the Court combined the last two prongs of the Turner test. Under Turner prong number three, the O’Lone Court weighed the four alternatives suggested by the prisoners and concluded that under the fourth Turner factor, each of the alternatives would have had a negative impact on prison security “by allowing ‘affinity groups’” to form. The Court therefore rejected all four of the alternatives suggested by the prisoners.

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233. Id. at 2410 (Brennan, J., dissenting) (quoting Shabazz v. O’Lone, 595 F. Supp. 928, 930 (D.N.J. 1984)).
235. Id. at 2406. See supra notes 195-97 and accompanying text.
236. O’Lone, 107 S. Ct. at 2406. See supra notes 73-76 and accompanying text.
237. O’Lone, 107 S. Ct. at 2406. Administrator O’Lone testified that whenever the prison isolates particular groups, an organizational structure develops that threatens institutional authority. Id.
238. Id. at 2412-14 (Brennan, J., dissenting). The prisoners provided four alternative suggestions to the policies in effect. Id. (Brennan, J., dissenting). The prisoners first suggested that the prison assign gang minimum security prisoners to an inside work detail on Fridays. Id. at 2412 (Brennan, J., dissenting). Prison officials testified that this would enable minimum and maximum security prisoners to mingle. Id. (Brennan, J., dissenting). As noted by the district court, this concern is nonsensical as “[t]he defendants did not explain why inmates of different security levels are not mixed on work assignments when otherwise they are mixed.” Id. (Brennan, J., dissenting) (quoting Shabazz v. O’Lone, 595 F. Supp. 928, 932 (D.N.J. 1984)). The O’Lone majority found, nonetheless, that this alternative directly conflicted with standard 853’s directive to place gang minimum security prisoners in outside work details. Id. (Brennan, J., dissenting). As noted by Justice Brennan:

This conclusion, however, neglects the fact that the very issue is whether the prison’s policy, of which Standard 853 is a part, should be administered so as to accommodate Muslim inmates. The policy itself cannot serve as a justification for its failure to provide reasonable accommodation. The record as it now stands thus does not establish that the Friday alternative work detail would create a problem for the institution.
The O'Lone holding was consistent with the majority’s opinion in Turner. In both cases, the Court, by classifying the right broadly, found that there had been an alternative way of expressing the right.\(^{239}\) The O'Lone decision further demonstrated that the Court will not consider a prisoner’s alternative suggestions as viable if they will have any negative affect on the prison, no matter how insignificant. From O'Lone, it seems clear that the Court will uphold all prison regulations unless they have absolutely no rational relation to a legitimate penological purpose.

3. Does the Turner test call for balancing?

When analyzing the Turner test, a question arises as to whether the Turner factors were formulated to comprise a balancing test or whether failure under one prong necessitates a finding of unreasonableness. In an

\(^{239}\) Id. (Brennan, J., dissenting).

Second, the prisoners suggested that gang minimum security inmates be permanently assigned to inside work details. \(^{2}\) Id. (Brennan, J., dissenting). Prison officials, however, claimed that they reserved inside work details for the riskiest gang minimum security inmates. \(^{3}\) Id. (Brennan, J., dissenting). Prisoners claimed, in response, that there were a significant number of inside jobs, in addition to those filled by the riskiest gang minimum security inmates, that could be assigned to regular gang minimum security inmates. \(^{4}\) Id. (Brennan, J., dissenting). Justice Brennan concluded that prison officials should have been required to provide data to substantiate their claim. \(^{5}\) Id. at 2412-13 (Brennan, J., dissenting).

Third, the prisoners suggested that gang minimum security inmates be assigned to weekend work detail to allow them to make up the time missed in attending Jumu'ah on Friday. \(^{6}\) Id. at 2413 (Brennan, J., dissenting). Prison officials, however, claimed that “the creation of additional weekend details would be a drain on scarce human resources.” \(^{7}\) Id. (Brennan, J., dissenting) (quoting Shabazz v. O'Lone, 595 F. Supp. 928, 932 (D.N.J. 1984). As noted by Justice Brennan:

The record provides no indication, however, of the number of Muslims that would seek such a work detail, the current number of weekend details, or why it would be infeasible simply to reallocate current Saturday or Sunday workers to Friday, rather than create additional details. The prison is able to arrange work schedules so that Jewish inmates may attend services on Saturday and Christian inmates may attend services on Sunday.

\(^{8}\) Id. (Brennan, J., dissenting).

The last alternative proposed by the prisoners was that minimum security inmates residing at the Farm be given work detail in the Farm building or in the immediate area. \(^{9}\) Id. (Brennan, J., dissenting). Justice Brennan stated that “[s]ince Standard 853 permits such assignments for full minimum inmates, and since such inmates need not return to prison facilities through the main entrance, this would interfere neither with Standard 853 nor the concern underlying the no-return policy.” \(^{10}\) Id. (Brennan, J., dissenting).

The prison officials, however, claimed that this might create an affinity group comprised of Muslims, which could threaten prison security. \(^{11}\) Id. (Brennan, J., dissenting). Justice Brennan observed that prison authorities based this theory on pure speculation and that they produced no evidence exhibiting such a problem in the five years in which the prison allowed Muslim inmates to attend Jumu'ah. \(^{12}\) Id. (Brennan, J., dissenting). The O'Lone Court, however, deferred to the prison officials' judgment and found the proposed alternatives were not constitutionally required. \(^{13}\) Id. at 2407.

\(^{239}\) O'Lone, 107 S. Ct. at 2406; Turner, 107 S. Ct. at 2263.
effort to ascertain whether a prison regulation is constitutional, the Turner Court mandated the application of a four-part test.\(^\text{240}\) In Turner, the majority concluded that the correspondence regulation was fully supported by each element of the test.\(^\text{241}\) The Court, however, did not indicate whether a court must balance the factors when only some of the factors point toward a finding of reasonableness. While this might be a problem in theory, it is unlikely to be one in practice. This is because the four Turner factors are either so closely related or so vague that a court can virtually assume that there is no disagreement among them.

For example, if a court finds under the first prong that there is a valid connection between a regulation and a legitimate governmental purpose, then it will naturally conclude under prong three that the exerted right would have an impact on prison staff. This makes perfect sense. If there is a legitimate reason for enacting the regulation, it must be to prevent some deleterious effect within the prison. And, once a court finds that the regulation is rationally related to a penological purpose and that it furthers prison security, the court will likely define the prisoner's right broadly in order to find, under the second prong, that there are other means available for exercising the right.\(^\text{242}\) Similarly, under prong four, a court will be less inclined to find that the regulation represents an exaggerated response, or that the state has alternative means of dealing with the problem at hand.

In most situations where the court finds a regulation to be valid, its decision will thus find support in all four Turner factors. The Turner Court, however, did not explicitly bind itself to this assumption. To the contrary, the Turner majority set forth four factors for determining the reasonableness of the regulation.\(^\text{243}\) This indicates that these factors were deemed important by the Supreme Court but it does not indicate a court is precluded from considering other factors. Further, since these factors, in addition to other factors, may be used to prove that a regulation is reasonable, it follows that the factors are to be balanced, and thus, do not have to point toward the same conclusion. Yet, practically speaking,


\(^{241}\) Turner, 107 S. Ct. at 2256.

\(^{242}\) In Turner, the majority defined the correspondence right broadly by stating that "the regulation does not deprive prisoners of all means of expression, but simply bars communication with a limited class of people—other inmates—with whom authorities have particular cause to be concerned." Id.

\(^{243}\) Id.
courts will be unlikely to find that a prison regulation is unconstitutional even when there are no alternatives that fully accommodate the expression of the right at a de minimis cost and where there are no other ways of expressing the right. These consequences are too easily avoided by merely defining the right broadly and finding that alternatives would be too costly. Thus, most likely, as in Turner, the four factors of the reasonableness test will be either united in support of a regulation, or united against it. The Turner Court has devised a standard that appears rigorous on first reading, but in reality operates as little more than a vehicle by which courts may implement their political beliefs.

4. The strict scrutiny standard after Turner

The current viability of the strict scrutiny standard in prisoners' rights cases is a question of great doubt. The Turner Court asserted that the Procunier v. Martinez\(^{244}\) strict scrutiny standard did not apply to cases that solely involve prisoners' rights.\(^{245}\) The Turner Court held that Martinez was distinguishable because Martinez involved the rights of non-prisoners.\(^{246}\)

Although at first glance the majority may appear to be affirming the Martinez strict scrutiny standard for certain circumstances, upon closer look this seems highly unlikely. The Turner test was based on the Court's interpretation of four past Supreme Court cases.\(^{247}\) Significantly, in all four cases the rights of non-prisoners were also involved.\(^{248}\) These cases\(^{249}\) seem to implicitly reject the Turner Court's holding that the Martinez strict scrutiny will apply where a regulation also involves the rights of non-prisoners.\(^{250}\)

In light of Pell, Jones, Bell, and Block, the application of the Martinez strict scrutiny standard remains questionable at best. These decisions are distinguishable, however, on the basis that the regulations involved in

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244. 416 U.S. 396 (1974).
246. Id.
247. Id. at 2262. See supra notes 31-76 and accompanying text.
249. Block, 468 U.S. at 578; Bell, 441 U.S. at 550; Jones, 433 U.S. at 122; Pell, 417 U.S. at 829.
those cases did not infringe on the rights of non-prisoners in a manner that was unduly burdensome. If courts drew this distinction, strict scrutiny will apply where the regulation causes an undue burden to the rights of non-prisoners. On the other hand, the Supreme Court may have implicitly overruled *Martinez* through its decisions in *Pell*, *Jones*, *Bell*, and *Block*. If this is true, all prisoner cases will be subject to the *Turner* reasonableness test.

Until the controversy over the future viability of *Martinez* is resolved, prisoners will likely frame their complaints to show that the rights of non-prisoners are also being affected. If this can be shown, prison officials will have to prove not only that the regulation has an important or substantial governmental interest, but also that it is not needlessly broad.251 Thus, not only does the strict scrutiny standard place the burden of proof on the prison officials, it also makes the means chosen to implement the regulation the central issue.252 This approach, however, can only be utilized in cases that also affect non-prisoners' rights. Since the vast majority of cases will not fall into this category,253 the reality is that, for the most part, the highly manipulable *Turner* standard will govern almost all cases where prisoners claim that a regulation is unconstitutional.

C. Post Turner Cases

Lower courts have already interpreted the *Turner*254 standard inconsistently. The unworkability of the *Turner* test is demonstrated by two federal courts of appeal opinions, both of which managed to avoid the path taken by the Supreme Court in *Turner* and *O'Lone*.255 This section reviews two approaches that a pro-prisoners' rights court might take when faced with possible application of the *Turner* standard. The options are: (1) finding that the regulation affects the rights of non-prisoners and applying the *Martinez* strict scrutiny standard; (2) applying *Turner* narrowly, calling for a heightened level of proof on the part of the prison administrators so as to afford greater protection for prisoners.

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251. See *Martinez*, 416 U.S. at 413.
252. *Id.*
253. Most prison regulations are aimed at regulating the conduct of prisoners and will not directly affect people outside the prison.
1. Lower court application of Martinez

In *Turner*, the Supreme Court severely narrowed the applicability of the *Martinez* strict scrutiny standard in cases where a prisoner claims that a prison regulation is unconstitutional. The *Turner* Court concluded that the *Martinez* strict scrutiny standard was the proper standard to apply only where "the challenged regulation caused a 'consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners.'" In these limited situations, where both prisoners’ and non-prisoners’ rights are affected by a regulation, the strict scrutiny standard will be applied, affording a greater degree of protection to the prisoner. The United States Court of Appeals for the District of Columbia Circuit found *Abbott v. Meese* to be just such a case.

In *Abbott*, the Federal Bureau of Prisons had enacted a regulation giving prison wardens the power to deny prisoners the right to receive certain publications. The court applied the *Martinez* strict scrutiny standard rather than the *Turner* reasonableness test. The court based its choice of the stricter standard on the fact that the regulation also affected the first amendment rights of the publishers of the prohibited material. The court reasoned that the non-inmate publishers had a constitutional right to publish.

In applying the strict scrutiny standard, the court held that the burden of proof was on prison officials to show "a rejection of a publication is at least 'generally necessary to protect one or more of the legitimate governmental interests . . . ' of security, order, or rehabilitation.

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257. *Id.* at 2260 (quoting *Procunier v. Martinez*, 416 U.S. 396, 409 (1974)).
258. *Id.*
260. The Federal Bureau of Prisons implements uniform rules with which all wardens must comply. *Id.* at 1169.
261. *Abbott*, 824 F.2d at 1169. Denied publications were of the type that were found to be "'detrimental to the security, good order, or discipline of the institution or . . . [that] might facilitate criminal activity.'" *Id.* (quoting 28 C.F.R. § 540.71(b) (1987)); see also 28 C.F.R. §§ 540.70 and 540.71 (b)-(e) (1987).
262. *Abbott*, 824 F.2d at 1169.
263. *Id.*
264. *Id.* at 1170. The court, however, failed to distinguish *Abbott* from *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), and *Bell v. Wolfish*, 441 U.S. 520 (1979), where the Supreme Court had applied a reasonableness test to a prison regulation that had affected publishers' first amendment rights.
The *Martinez* strict scrutiny standard serves as a greater protection for prisoners,\(^\text{266}\) but can only be utilized in a case such as *Abbott* where the rights of non-prisoners are also involved.\(^\text{267}\) More importantly, *Abbott* demonstrates that by classifying a regulation as one that affects the rights of non-prisoners, lower courts can avoid applying the *Turner* test by manipulating the distinction that the *Turner* Court drew between *Turner* and *Martinez*.\(^\text{268}\)

2. The manipulability of the *Turner* test

In many situations, a court can affect the finding of the constitutionality of a prison regulation by the type of proof it requires to meet the standards it deems relevant. As Justice Stevens noted in his separate opinion in *Turner*, "[h]ow a court describes its standard of review when a prison regulation infringes fundamental constitutional rights often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation."\(^\text{269}\) The point is more evident when we compare the showing the *Turner* Court required (for both the marriage and the correspondence regulations), with the showing required in *McCabe v. Arave*,\(^\text{270}\) in which the Court of Appeals for the Ninth Circuit found the prison regulation unconstitutional.\(^\text{271}\)

One of the regulations at issue in *McCabe* limited inmates to ten books and ten magazines at one time.\(^\text{272}\) Some prisoners, who were members of the Church Jesus Christ Christian (CJCC), claimed that this regulation, along with the prison’s practice of not allowing the storage of CJCC literature in the chapel library, violated their first amendment right to freedom of worship.\(^\text{273}\)

Applying the *Turner* standard, the court of appeals held that the regulation was constitutionally invalid.\(^\text{274}\) The *McCabe* court’s application of the various prongs of the *Turner* standard, while entirely logical, demonstrates that the way a court applies the standard, rather than anything inherent in the standard itself, determines whether a given regula-

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\(^{267}\) See *Abbott*, 824 F.2d at 1169.

\(^{268}\) *Id.*

\(^{269}\) *Turner*, 107 S. Ct. at 2267 (Stevens, J., concurring in part and dissenting in part).

\(^{270}\) 827 F.2d 634 (9th Cir. 1987).

\(^{271}\) *Id.* at 638.

\(^{272}\) *Id.* at 637.

\(^{273}\) *Id.*

\(^{274}\) *Id.* at 638 (citing *Turner v. Safley*, 107 S. Ct. 2254, 2262 (1987)).
tion is unconstitutional.275

Under the first prong of the Turner test, the McCabe court reasoned that the regulation, insofar as it banned all CJCC books from the chapel library, had no logical connection to a legitimate governmental interest.276 The court noted that although some content regulation is allowed in a prison,277 the Supreme Court has stated that the absence of content regulation is an important factor in upholding regulations that affect prisoners’ first amendment rights.278 The McCabe court concluded that although books espousing violence or illegal activity could be banned from the library, those preaching racism or racial purity could not.279 The regulation was thus too restrictive to have a valid and logical connection to the government’s interest in security.280

Although this interpretation of the first factor of the Turner standard is certainly reasonable, it seems contrary to the Supreme Court’s application of the same factor in Turner.281 In Turner, the correspondence regulation banned prisoners from writing any letters to each other because of the fear that they might write in code to plan escapes.282 The regulation, however, was arguably overbroad, for prison officials did not search for letters encouraging escapes, but rather, banned all prison-to-prison correspondence.283 The Supreme Court nevertheless held that the regulation had a valid and logical connection to a legitimate penological interest.284 Since the first Turner factor does not define how narrowly tailored a regulation must be to be logical, the McCabe interpretation may be valid although it appears to be contrary to that employed in Turner.

With respect to the second prong, whether there are alternative

275. Id. at 637-38.
276. Id. (citing Turner v. Safley, 107 S. Ct. 2254, 2262 (1987)).
277. Id.; see Procunier v. Martinez, 416 U.S. 396, 416 (1974) (material that might lead to violence could be banned); Murphy v. Missouri Dep’t of Corrections, 814 F.2d 1252, 1257 (8th Cir. 1987) (Aryan Nation materials which encourage violence or are reasonably likely to lead to violence because of their racial nature can be banned); Aikens v. Jenkins, 534 F.2d 751, 757 (7th Cir. 1976) (Martinez does not prohibit banning of literature if it may reasonably be thought to encourage violence).
279. Id. Courts have ruled that a prison cannot ban all religious literature merely because it is racist. Id. (citing Aikens v. Jenkins, 534 F.2d 751, 756-57 (7th Cir. 1976); Long v. Parker, 390 F.2d 816, 822 (3rd Cir. 1968)).
280. Id.
281. Id. at 2263.
283. Id. at 2272 n.8 (Stevens, J., concurring in part and dissenting in part).
284. Id. at 2264.
means of exercising a right that remains open to inmates, the right to read twenty to forty books could have been viewed as only a small part of one's religious expression. The McCabe court, however, defined the prisoner's right narrowly, viewing it as the right to read twenty to forty books dealing with CJCC doctrine. By defining the right in this way, rather than as the right to engage in religious practices, the court concluded that no viable alternatives existed. By contrast, the Turner Court upheld the correspondence regulation by defining the right broadly, as communication, and concluded that the right to communicate with other prisoners was just a small part of the right of communication. Similarly, in O'Lone v. Estate of Shabazz, the Supreme Court described the right to attend Jumu'ah, a central religious ceremony, to be just one aspect of expressing religious faith. The right in McCabe could have been defined just as broadly. The right to read twenty to forty books could have been viewed as only a small part of one's religious expression. The McCabe application, however, is perfectly consistent with the Turner test, as the second Turner prong does not define the scope of an asserted constitutional right.

Similarly, in considering whether there were ready alternatives to the regulation, the Turner Court placed credence in the statement that it would be an impossible task to sort through all the prisoner-to-prisoner mail. The McCabe court, however, concluded that there was no problem with storing the CJCC literature in the chapel library and was seemingly indifferent to the time it might take to sort books that were violent from those that were merely racist or preaching racial purity. This would certainly seem to be a more time consuming task than the one rejected in Turner. In Turner, the prison staff would have to read only letters, whereas in McCabe, the prison staff would have to read entire books. Although letters may need to be reviewed more often, new additions to the library would call for a constant reviewing process.

The Turner Court found that if the prison staff was required to read all the mail, the impact on staff resources would be considerable. The

285. Id. at 2262.
286. McCabe, 827 F.2d at 638.
287. Id.
290. Id. at 2406.
292. Turner, 107 S. Ct. at 2264 (citing 3 Record at 159 and 4 Record at 42-43).
293. McCabe, 827 F.2d at 638.
295. Id. at 2263-64.
Court assumed this fact to be true without providing any statistical data.\textsuperscript{296} In fact, this assumption ran contrary to testimony that indicated scanning all incoming prisoner-to-prisoner mail, along with some outgoing mail, only took one hour a day.\textsuperscript{297} In \textit{McCabe}, the court, without explanation, found that impact on guards and other prison resources would be minimal.\textsuperscript{298} Again, the \textit{Turner} test does not define what constitutes a substantial impact on prison staff and how much information is necessary to support such a conclusion.\textsuperscript{299} Thus, the test gives considerable flexibility to the courts.

Whether one agrees or disagrees with the result in \textit{McCabe}, one must acknowledge the fact that there are many inconsistencies in the way the reasonableness standard was applied in \textit{McCabe} and in \textit{Turner}.\textsuperscript{300} \textit{McCabe} establishes that the \textit{Turner} test can be applied to provide protection for prisoners.\textsuperscript{301} \textit{McCabe} also exemplifies, however, that it may not be the strength of one's claim, but the bias of the particular court that hears it, that affects whether a prisoner's constitutional rights will be protected.\textsuperscript{302} This inconsistency constitutes the greatest single flaw of the \textit{Turner} test and has already resulted in inconsistent rulings throughout the lower courts.\textsuperscript{303} The extent to which rights are infringed, as well as the degree of impact on prisoners and staff, should affect the amount of deference a court gives to prison officials. The \textit{Turner} test fails to distinguish situations which call for different levels of scrutiny. In applying a low level of review, while using variables that are normally associated with heightened scrutiny, the Court has invited confusion. It is no wonder that the lower courts have failed to apply the standard consistently. Unless the Supreme Court is prepared to review a great number of prisoners' rights cases, the development of a new standard is mandated.

\section*{D. An Alternative Test}

1. The \textit{Abdul Wali} approach

\textit{a. reasonableness test}

In formulating its own reasonableness test, the majority in \textit{Turner v.}
Safley implicitly rejected the tripartite standard developed by the Court of Appeals for the Second Circuit in Abdul Wali v. Coughlin. The Abdul Wali standard varies the degree of scrutiny that a prison regulation receives depending on "the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation . . . on the exercise of that right." If a regulation does not completely deprive a prisoner from exercising a right, or if the activity that prisoners seek to engage in is presumptively dangerous, the Abdul Wali test provides that the prison regulation will be invalidated only if "the restriction is not supported by a reasonable justification." This gives appropriate deference to prison officials, allowing them to make rules necessary to efficiently run their institutions.

b. strict scrutiny standard

The greatest advantage of the Abdul Wali test is that it furnishes the court with an opportunity to apply different levels of scrutiny depending on the situation. The variance of scrutiny allows prison officials to run their institutions effectively while still protecting prisoners' fundamental constitutional rights. However, when a prisoner seeks to engage in an activity that is not presumptively dangerous, and where the regulation completely deprives the prisoner of that right, the strict scrutiny test applies and prison officials must then show that "a particular restriction is necessary to further an important governmental interest, and that the limitations on freedom occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved." Thus, where a prisoner is completely deprived of a right, the Abdul Wali test calls for the application of the strict scrutiny standard.

c. Turner implicitly rejects Abdul Wali

The prison officials in Turner implied that the Abdul Wali test was unworkable. They claimed that such a test would force courts to determine whether an activity was dangerous and, based upon that deter-

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305. 754 F.2d 1015 (2d Cir. 1985).
306. Id. at 1033.
307. Id.
308. Abdul Wali, 754 F.2d at 1033.
310. Abdul Wali, 754 F.2d at 1033.
mination, that one of two standards would be applied.\textsuperscript{312} Prison officials argued that this would require courts to guess whether the situation was dangerous enough to warrant a restriction.\textsuperscript{313}

There are two substantial flaws in the prison officials' reasoning. First, where the state's rationale for curtailing an inmate's right to engage in an activity is based on a theory of dangerousness, prison administrators are required to have a valid basis for believing the activity to be dangerous. By forewarning a prison official that a court may scrutinize the rationale for enacting a regulation, the official will be more likely to enact regulations that in fact relate to dangerous activity. This will give prison officials the ability to deal effectively with real problems, and at the same time, will protect prisoners' constitutional rights.

The prison officials' argument that the \textit{Abdul Wall} test is unworkable, because it would force courts to decide whether an activity is dangerous,\textsuperscript{314} also lacks merit. Under \textit{Turner}'s four-part reasonableness test, it is a court which will decide "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."\textsuperscript{315} Thus, not only does the \textit{Turner} test require a court to judge the impact of asserting a right, but it requires a court to determine whether the impact will be substantial.\textsuperscript{316} The \textit{Turner} test also instructs courts to determine whether there are other means of exercising the regulated right, whether there are alternatives to the challenged regulation and whether there is a valid connection between the regulation and a legitimate governmental interest.\textsuperscript{317} If courts can competently make all four of these complex determinations in a given case, it follows that they are qualified to determine \textit{Abdul Wali}'s threshold question of whether the assertion of a given right is dangerous.\textsuperscript{318}

A further criticism leveled at the \textit{Abdul Wali} standard was that the use of the strict scrutiny standard shifts the burden of proof from the prisoners to the prison officials.\textsuperscript{319} Prison administrators argued that they "cannot produce bleeding bodies to demonstrate the effectiveness of their regulation."\textsuperscript{320} This line of reasoning, however, is not persuasive.

\begin{itemize}
  \item \textsuperscript{312} \textit{Id.}
  \item \textsuperscript{313} \textit{Id.}
  \item \textsuperscript{314} \textit{Id.}
  \item \textsuperscript{315} \textit{Turner}, 107 S. Ct. at 2262.
  \item \textsuperscript{316} \textit{Id.}
  \item \textsuperscript{317} \textit{Id.}
  \item \textsuperscript{318} \textit{See Abdul Wali}, 754 F.2d at 1033.
  \item \textsuperscript{319} Brief for Petitioners at 25, \textit{Turner} (No. 85-1384).
  \item \textsuperscript{320} \textit{Id.} at 26.
\end{itemize}
Under the *Abdul Wali* test, prison officials would only be required to show that in the past, exertion of the right has been dangerous or, if the right has never been exerted, that the exertion of the right at other prisons has proved dangerous.\(^{321}\) This could be accomplished by either pointing to past problems at the prison or to problems in other institutions that lack a similar restriction. If there is truly a legitimate reason for enacting a rule, there should be some extrinsic information to support it. Since prison officials will often be the only persons with access to such information, it is appropriate that they should have the burden of producing it.

Under the *Abdul Wali* test, this proof would only be necessary where a regulation completely deprives a prisoner from exercising a protected right, and where it does not appear on its face that it is regulating an activity that is inherently dangerous.\(^{322}\)

Thus, in either the situation where a prisoner's actions are inherently dangerous, or where a prison needs to enact a restriction aimed at partially limiting the expression of a right, the prison regulation will be subjected to the highly deferential reasonableness test.\(^ {323}\)

d. advantages of Abdul Wali

In a prison, where efficiency is critical to the running of a safe institution, prison officials should have the ability to promulgate regulations that increase efficiency. Where enacting a regulation will allow a prison official to improve the way the prison is run, the official should have the leeway to do so. The *Abdul Wali* test takes this into account by making the degree of scrutiny a prison regulation receives dependent on the extent a prisoner's right is deprived.\(^ {324}\) Whereas under the *Turner* test, when a right is totally deprived, the test does not place any special emphasis on the total deprivation, but merely considers it in combination with the other *Turner* factors.\(^ {325}\) This is inappropriate where a prisoner is threatened with the complete loss of an exerted right. Rather, prison officials should be required to show that there are no less restrictive alternatives to achieving the desired result.\(^ {326}\)

The *Turner* Court failed to show why prison officials should be given such extreme deference when they threaten to take away a pris-

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321. *Abdul Wali*, 754 F.2d at 1033.
322. *Id*.
323. *Id*.
324. *Id*.
326. *Abdul Wali*, 754 F.2d at 1033.
oner's right. Even if it overburdens prison administrators to show that something is presumptively dangerous, this in itself, is not enough to justify the application of the reasonableness test. The Turner-type of balancing so undervalues a prisoner's right to constitutional protection that it abuses the concept of deference. The proper balance, as established in Abdul Wali, is not to exalt one approach at the expense of the other, but to recognize that each approach plays a valid role. By choosing between two tests, depending on the situation, courts strike a proper balance between aiding the prison officials and protecting the prisoners.

e. Turner or Abdul Wali: is there really a difference?

The Turner and Abdul Wali tests are quite similar in several aspects. Under both tests, a court must determine whether the prohibited activity is so dangerous that it will have a substantial effect on prisoners and prison staff. In addition, a court must decide whether the prisoner's right has been completely deprived. One might conclude that these standards are equally manipulable and hence produce equal amounts of uncertainty.

For example, even under Abdul Wali, if a court wants to apply a mere reasonableness test, it can simply classify the regulation as pertaining to a dangerous condition, or as not working a complete deprivation. The court could thus consider expression of the right to be dangerous based on speculative evidence or define the right so broadly that the right has not been totally deprived. Once the court has classified the regulation in either of these ways, the reasonableness test rather than strict scrutiny would apply and the regulation would be per se constitutional. This argument, however, is simply not persuasive.

Under the Abdul Wali test, it is true that classification of the right determines the applicability of one standard over the other. However, as the court would not yet be operating under the guise of a specific standard, during its classification analysis the evidence required would have

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327. The minimal level of proof required by the Turner Court places great credence in the views of prison administrators. Turner, 107 S. Ct. at 2270-74 (Stevens, J., concurring in part and dissenting in part). This leads to courts underevaluating the relevant evidence, and thus providing prisoners with very little protection for their constitutional rights.

328. The Abdul Wali court was not favoring either the strict scrutiny standard or the reasonableness test. Abdul Wali, 754 F.2d at 1033. The court argued for the continued viability of both standards and the selective application of a test depending on the particular circumstances of the case. Id.

329. Turner, 107 S. Ct. at 2262; Abdul Wali, 754 F.2d at 1033.

330. Turner, 107 S. Ct. at 2262; Abdul Wali, 754 F.2d at 1033.

331. Abdul Wali, 754 F.2d at 1033.

332. Id.
to be based on more than mere speculation. If the prison officials wanted
the regulation to be scrutinized under the more deferential reasonableness test, they would have to demonstrate that exercising the right would
create a dangerous condition, or that the regulation limited rather than
completely deprived a prisoner from exercising a protected right.

Thus, while Turner requires very little evidence of actual danger, under Abdul Walli, proof is the focal point for determining the choice of a
standard. In further contrast, under the Turner test, the Court in Turner and O'Lone saw no problem in defining the right so broadly as to
minimize the effect of the regulations on the asserted right. Under Abdul Walli, however, a court would be aware that the distinctions it
draws will mandate the applicability of a particular standard. An im-
portant aspect of the philosophy of the Abdul Walli test is based on the
difference between a complete deprivation of a right and merely regulat-
ing the way in which it is exerted. Therefore, the task of applying a
particular standard will be taken seriously. Given the philosophy of the
test, there will be a presumption in favor of defining the right very
broadly. This will cause courts to be more careful when assessing the
to extent to which a right is infringed.

When a prisoner is completely prevented from engaging in an act
which, if undertaken in a non-prison setting would be protected by the
Constitution, he or she should be deemed to have been completely de-
prived of that right and strict scrutiny should apply. This does not
mean that the regulation is unconstitutional; it simply mandates a higher
level of scrutiny.

Implementing the Abdul Walli standard will strike the proper bal-
ance between prison officials' need to control their institutions and a pris-
oner's right to constitutional protection. Where prison officials adopt
rules to combat dangerous situations, the regulations would be subjected
to the deferential reasonableness test. Similarly, where regulations
merely control the manner in which a prisoner may exercise a constitu-
tional right, the reasonableness approach would prevail. But where
officials promulgate regulations that completely deprive a prisoner of the

334. Abdul Walli, 754 F.2d at 1033.
335. Turner, 107 S. Ct. at 2263; O'Lone, 107 S. Ct. at 2406.
336. Abdul Walli, 754 F.2d at 1033.
337. Id.
338. Id.
339. Id.
340. Id.
ability to exert a right, the strict scrutiny standard will apply. The strict scrutiny standard requires the prison officials to show that the government has an important or substantial interest and that there is no less restrictive means of achieving the desired result. If there is no less restrictive means, the regulation will be upheld. If, however, there is a less restrictive alternative, the prison regulation will be found unconstitutional.

A further advantage of the Abdul Wali standard is that it is likely to provide a prisoner with a more meaningful review of a court's decision than the Turner test. Under Turner, a prisoner may obtain a reversal of the trial court's judgment only if he or she can show that the trial court's decision was clearly erroneous.

Under the Abdul Wali test, however, not only can a prisoner challenge the application of the standard as clearly erroneous, but a prisoner can also challenge the initial choice of the standard. This will provide for a more thorough review and a greater source of protection for a prisoner's constitutional rights.

The Turner Court, by mandating the use of a single highly deferential standard for all cases where prisoners claim that their constitutional rights have been violated, and by labeling that standard the reasonableness test, makes it clear that prisoners' rights need not be carefully guarded. In comparison, the Abdul Wali test symbolizes the notion that prisoners still have constitutional rights and the scrutiny that a regulation is given should vary depending on the degree a right is deprived.

f. the future of the Turner standard

Turner was not a unanimous decision. In fact, only five Justices supported the majority opinion including the recently retired Justice Powell. In O'Lone v. Estate of Shabazz, the Supreme Court split exactly along the same lines. Since Justice Powell is no longer with the Court, and his replacement, Justice Kennedy, has not yet expressed an opinion.

341. Id.
342. Id.
344. Abdul Wali, 754 F.2d at 1033. As the Abdul Wali test calls for a choice between the reasonableness test and their strict scrutiny standard, a prisoner can argue on appeal that the wrong standard was applied.
346. Abdul Wali, 754 F.2d at 1033.
347. Turner, 107 S. Ct. at 2257. Justice O'Connor delivered the opinion of the Court in which Chief Justice Rehnquist, and Justices White, Powell, and Scalia joined. Id.
348. O'Lone, 107 S. Ct. at 2400.
in this area, there is some doubt as to the future viability of the *Turner* standard.

Justice Brennan’s dissenting opinion in *O’Lone* expressed great satisfaction with the *Abdul Wali* standard. If Justice Kennedy sides with the Brennan camp, there will be a five Justice majority on the Court supporting the *Abdul Wali* standard and thus, greater predictability and protection will be provided for a prisoner threatened with the loss of a valuable constitutional right. If, however, Justice Kennedy joins the *Turner* majority, then the protection of prisoners’ constitutional rights will be in jeopardy.

In reviewing prisoners’ rights cases, the United States Supreme Court now has three options. The Court will either (1) refuse to hear cases in this area, thus tacitly affirming its belief in the *Turner* standard; (2) modify the *Turner* test by reviewing a lower court decision that uses the standard to protect a prisoner’s rights; or (3) grant review in all cases like *Abbott* and *McCabe* and reverse lower courts, holding that they misapplied *Turner*, without modifying the *Turner* test itself.

Thus, although the *Turner* test can be criticized for its deference to prison officials and its ready manipulability, its manipulative nature can allow a sympathetic court to closely guard prisoners’ constitutional rights. If the test is modified to become more like the traditional rational basis test, then the *Turner* Court’s highly restrictive interpretation of prisoners’ constitutional rights will become universal. Although the *Abdul Wali* test surely makes the most sense in terms of protecting the rights of both prison officials and prisoners, whether it will become the chosen measure of interpretation will depend on the views of Justice Kennedy, as well as the Supreme Court’s reaction to cases like *Abbott* and *McCabe*.

V. PROPOSAL

A. A Modified Abdul Wali Approach

Although the *Abdul Wali v. Coughlin* standard is more protective

349. Id. at 2407 (Brennan, J., dissenting).
350. For a discussion of *Abbott*, see supra notes 260-65 and accompanying text.
351. For a discussion of *McCabe*, see supra notes 272-99 and accompanying text.
352. Under the rational basis test, the court examines whether the legislative enactment is rationally related to achieving the stated statutory purpose. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 462-63 (1981). The court need not find that the legislative enactment will correct the asserted problem, but rather, that it might correct the problem. Id. at 464.
353. 754 F.2d 1015 (2d Cir. 1985).
of prisoners' constitutional rights than the *Turner v. Safley* test, it is not without its problems. For the *Abdul Wali* standard to function effectively, a court must respect the balancing philosophy upon which the test was based. If a court is biased in favor of finding that a regulation is valid, it may not accept the presumption that a particular right should be defined narrowly. By defining a right broadly, the court can classify the regulation as only affecting a small part of that right, thus finding only a partial deprivation. In these circumstances, a court would apply the reasonableness test and prisoners would receive no greater protection than under *Turner*.

Both the *Abdul Wali* test and the *Turner* test focus on whether a right has been completely deprived. This concept is highly manipulable. The degree of deprivation a court finds will depend on how broadly or narrowly the right is defined. If the right is framed narrowly, a court will be more likely to find a complete deprivation. Since courts define the parameters of a particular right, they can easily manipulate the concept of complete deprivation.

The *Abdul Wali* test was created to strike a proper balance between the competing goals of giving flexibility to prison administrators and protecting prisoners' constitutional rights. Nevertheless, the complete deprivation requirement runs counter to *Abdul Wali*'s intended purpose, as it is subject to manipulation. Rather than asking whether there has been a complete deprivation, the proper question should be whether there has been a substantial deprivation.

A substantial deprivation requirement will force courts to compare the degree of activity that the regulation forecloses with that which it permits. When a prisoner is deprived of a significant portion of a constitutional right, the regulation should be carefully scrutinized. Under the modified *Abdul Wali* test, the strict scrutiny standard will apply where there is a substantial deprivation of a constitutional right. This will provide a greater source of protection and predictability for inmates, because it will be much easier for a prisoner and his or her counsel to decide whether there has been a substantial deprivation, rather than a complete deprivation. If the regulation merely restricts the manner in which a

355. *Abdul Wali*, 754 F.2d at 1033.
356. Id.; *Turner*, 107 S. Ct. at 2262.
357. *Abdul Wali*, 754 F.2d at 1033.
358. The Supreme Court has held that in some circumstances where a law substantially impinges on protected conduct a heightened level of scrutiny should be applied. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (first amendment), see also *Doe v. Bolton*, 410 U.S. 179 (1973) (right to privacy).
right is expressed, however, or if the activity in which prisoners seek to engage is presumptively dangerous, the prison regulation will be invalidated only if "the restriction is not supported by a reasonable justification."359 This will provide prison officials with the flexibility to effectively run their institutions. The modified Abdul Wali standard will therefore strike the balance that Abdul Wali sought to achieve. The modified Abdul Wali approach will not only give deference to prison officials but will also protect prisoners' constitutional rights.

B. Application of the modified Abdul Wali approach

The benefits of the modified Abdul Wali approach can be best exemplified by hypothesizing how the test would have been applied to three cases previously discussed. In O'One v. Estate of Shabazz,360 Moslem prisoners objected to two prison regulations, claiming that the regulations affected their ability to take part in the prayer activities of Jumu'ah.361 The Supreme Court upheld the validity of the regulations.362 The Court reasoned that prisoners were not deprived of all forms of religious expression, for they could still engage in prayer and discussion during non-working hours.363

Under the modified Abdul Wali standard, depriving prisoners of the right to attend Jumu'ah, the central religious ceremony of their faith, would certainly have been considered a substantial deprivation.364 Since the prisoners were completely forbidden from attending Jumu'ah, the degree of deprivation caused by the regulation would have been found to outweigh that which it permitted. Thus, the prisoners would have been entitled to have a court scrutinize the regulations under the strict scrutiny standard.

In McCabe v. Arave,365 the Court of Appeals for the Ninth Circuit found a prison regulation that limited inmates to ten books and ten magazines to be unconstitutional.366 Some prisoners who were members of the Church Jesus Christ Christian (CJCC) claimed that this regulation along with the prison's practice of not allowing CJCC literature to be stored in the chapel library, violated their first amendment right to reli-

359. Abdul Wali, 754 F.2d at 1033.
361. Id. at 2402-03.
362. Id. at 2407.
363. Id. at 2406. See supra note 229 and accompanying text.
365. 827 F.2d 634 (9th Cir. 1987).
366. Id. at 637.
gious expression. Because the church strongly suggested that all members read between twenty to forty books, the court viewed the ten book limit as a complete deprivation of that right.

The Ninth Circuit used the *Turner* test to protect prisoner's rights. In light of *O'Lone*, however, where the Supreme Court found Jumu'ah to be just one aspect of religious expression, the Supreme Court undoubtedly would have held the regulation in *McCabe* to be constitutional. Thus, in *McCabe* strict scrutiny was applied only because the *McCabe* court was favorable toward prisoners' constitutional rights.

Under the modified *Abdul Wali* approach, a regulation that limits prisoners to ten books would be a substantial deprivation of the right to practice the CJCC religion. As CJCC recommends that all members read twenty to forty books, a prisoner who could only read ten CJCC books could not adequately practice the religion. Since the reading requirement is integral to the religion, the degree of activity the regulation forecloses would certainly outweigh that which it permits. Due to this substantial deprivation, the strict scrutiny standard would have been applied.

The modified *Abdul Wali* test as hypothetically applied to both *McCabe* and *O'Lone* demonstrates that in certain situations courts would find it difficult to hold that a right was not substantially deprived. In cases such as these, the deprivation is substantial because the expression of the particular right is central to the expression of the entire right. Therefore, there is little room for a court to manipulate the standard to conform to its particular views regarding prisoners' constitutional rights.

In *Turner v. Safley*, the Supreme Court found a regulation prohibiting prisoners from writing to non-family inmates in other institutions to be constitutional. The Court found that there were alternative means of exercising the right by defining the right broadly, as "all means of expression." The Court then concluded that only one small part of a prisoner's right to communicate was barred: the right to communicate with "inmates at other institutions within the Missouri prison system."

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367. Id.
368. Id. at 638.
369. Id.
370. *O'Lone*, 107 S. Ct. at 2406.
372. Id.
374. Id. at 2263.
375. Id.
Under the modified *Abdul Wali* test, the question would have been whether the regulation deprived prisoners of a substantial portion of their right to communicate. To answer this question a court would have needed more information about what percentage of an inmate's correspondence is inmate-inmate related. Under this standard, however, prisoners in *Turner* would have had a better chance to prove a sufficient deprivation.

If a court defines the right broadly, under the *Turner* test it is almost impossible for a prisoner to show complete deprivation of a right. Under the modified *Abdul Wali* test, however, a prisoner still has an opportunity to show that the deprivation is such a substantial part of the right, that without its expression, the right is almost meaningless. One must recognize, however, that when the right is not as obviously substantial, as in *O'Lone* or *McCabe*, there is still some room for manipulation by the courts. Even with this in mind, however, the modified *Abdul Wali* test serves as a greater source of protection for prisoners' constitutional rights.

**VI. CONCLUSION**

In *Turner v. Safley*,\(^3\) the United States Supreme Court adopted a single test to scrutinize all claims that a regulation has violated a prisoner's constitutional right.\(^4\) Although the idea is novel, it is misguided, as it assumes that a single standard can adequately protect all prisoners' claims. As Justice Brennan stated, "[i]f a directive that officials act 'reasonably' were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary."\(^5\)

Moreover, the *Turner* Court adds confusion to the area of prisoners' constitutional rights by adopting a four-prong approach designed to test the reasonableness of a penal regulation.\(^6\) The requirements of this test become meaningless if they can be satisfied by providing evidence based on mere speculation. The *Turner* standard is so flexible that it effectively allows a court to use it to support its own personal views. Since this will produce a lack of uniformity among the lower courts, the *Turner* test as presently structured is simply unworkable.

With the retirement of Justice Powell and the arrival of Justice Kennedy, the viability of the *Turner* standard is uncertain. One can only hope that for the benefit of prisoners, lawyers, and our society as a whole,

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377. Id. at 2261.
the Court overrules *Turner v. Safley* and adopts a more sensible standard based on the test formulated in *Abdul Wali v. Coughlin*.\(^{380}\)

*William Mark Roth*

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380. 754 F.2d 1015 (2d Cir. 1985).

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