CONSTITUTIONAL LAW—Federal Bureau of Prisons Regulation Prohibiting Prisoners from Receiving Incoming Publications That Threaten the Security of a Penal Institution Does Not Violate Prisoners' First Amendment Rights—*Thornburgh v. Abbott*, 490 U.S. 401 (1989).

The respondents, a class of inmates and certain publishers, brought an action challenging a federal regulation promulgated by the Federal Bureau of Prisons.[1] The challenged regulation permits an inmate to receive a publication without prior approval, but allows the warden to reject any publication if he determines the publication is "detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity."[2] The respondents brought this action asserting the regulation violated their first amendment right to freedom of speech, challenging the regulation both facially and as it applied to forty-six publications the warden had rejected.[3]

The regulation sets forth specific guidelines for the warden to follow in determining whether a publication is "detrimental to the security, discipline, or good order of the prison institution."[4] The guidelines indicate the warden can reject any publication if: (1) it depicts procedures for the construction or use of weapons, bombs, or ammunition; (2) it describes or encourages methods of escape; (3) it describes procedures for brewing alcoholic beverages or manufacturing drugs; (4) it is written in code; (5) it describes or encourages activities that may lead to use of physical violence; (6) it encourages the commission of criminal activity; or (7) it is sexually explicit material, which by its nature poses a threat to the security of the prison, or facilitates criminal activity.[5] All rejected publications are returned to the publisher, and both the prisoner and the publisher receive a notice from the

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1. Thornburgh v. Abbott, 490 U.S. 401, 403 (1989).

2. 28 C.F.R. § 540.70(a) (1988). The challenged regulation was promulgated by the Bureau of Prisons. Thornburgh v. Abbott, 490 U.S. at 403. The Bureau of Prisons is an administrative agency that administers "a system of [forty-three] institutions including penitentiaries, camps, medical centers, and short-term detention" centers. Brief for Petitioners at 27a, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344).

3. Thornburgh v. Abbott, 490 U.S. at 403.

4. *Id.* at 404.

5. 28 C.F.R. § 540.71(b) (1988). The respondents did not challenge several of the guidelines. Brief of Respondents at 3 n.3, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344). These prison guidelines allow the warden to censor a publication if: (1) "[i]t depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices," 28 C.F.R. § 540.71(b)(1) (1982); (2) "[i]t . . . contains blueprints, drawings, or similar descriptions of Bureau of Prison institutions," 28 C.F.R. § 540.71(b)(2) (1982); (3) "[i]t depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs," 28 C.F.R. § 540.71(b)(3) (1982); and (4) "[i]t is written in code," 28 C.F.R. § 540.71(b)(4) (1988).

warden explaining the reason for the rejection.[6] The regulation also provides for an administrative appeal process by which either the prisoner or the publisher can challenge any decision made by the warden by contacting the Regional Director to the General Counsel of the Federal Bureau of Prisons.[7]

The censorship scheme outlined in the regulation begins with a screening process.[8] The initial screening of the publications begins in the prison mailroom.[9] If a publication is not flagged by mailroom personnel, it is delivered to the prisoner.[10] All flagged publications are given to a second employee for review.[11] The reviewing staff applies the guidelines set forth in the challenged regulation to determine whether the publication presents any risk to the prison.[12] If the staff decides to exclude a particular publication, a rejection notice is prepared for the warden's signature.[13]

The respondents challenged the regulation facially on the basis the regulation lacked meaningful standards.[14] The respondents argued that, given the absence of any meaningful standards in the regulation, the prison personnel were unable to accurately determine which publications should be excluded.[15] The respondents noted neither the mailroom personnel nor the reviewing staff received any formal training in applying the Bureau's censorship policy.[16] The respondent contended the staff basically relied on their own personal views in determining which publications might cause detriment to the internal order of the prison.[17]

The respondents also noted the absence of meaningful standards in the

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6. 28 C.F.R. § 540.71(e) (1988).

7. *Id.*

8. Brief of Respondents at 4, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344). Respondents contended the screening of the material was cursory and typically took only seconds or minutes. *Id.* at 5.

9. *Id.* at 4.

10. *Id.* at 4-5.

11. *Id.* at 5.

12. *Id.* at 2.

13. *Id.* at 8. The respondents contended a warden seldom reversed a rejection decision made by a reviewing staff member. *Id.* The rejection notice generally was a preprinted form that contained some boilerplate language explaining the reason for the rejection. *Id.* at 9. Although the publications were not rejected by title, some publications were routinely rejected issue after issue. *Id.* One warden was quoted, "We don't read the articles. I'm not interested in articles and the mailroom isn't. They don't have time to read the articles and I don't either." *Id.* at 8.

14. *Id.* at 5.

15. *Id.*

16. *Id.* The respondents noted that one mailroom worker stated she did not understand what the censorship standard meant. *Id.*

17. *Id.* In determining which publications should be flagged, one mailroom employee stated, "Sex is a standard, radical is a standard. I will go out on a limb and say communism and fascism is a standard I would use. It is more a political-sexual type standard I personally use. I have not been told." *Id.* One employee stated that his recommendation to censor sexual material was based on his own personal opinion. *Id.*

challenged regulation caused censorship decisions to vary widely, both among prisons and among prison officials within the same prison.[18] One example of how censorship decisions varied from one prison to another was the different reactions various prison officials had to a homosexual publication called *The David Kopay Story*.[19] Two federal prisons rejected the book because its homosexual nature was not in the best interest of maintaining security within the prison, but three other maximum security prisons allowed the publication, finding the book did not cause a threat to prison security.[20]

The district court rejected the respondents' facial challenge of the regulation and found a rational relationship between the regulation and the penological objective of maintaining security within the prison.[21] The court also upheld *en masse* the exclusion of the forty-six specific publications, finding the censored material posed a threat to security if read by the prisoners.[22]

The court of appeals reversed, finding the challenged regulation facially invalid.[23] The court held the Federal Bureau of Prisons failed to prove the challenged regulation was necessary to further some substantial governmental interest of security, order, or rehabilitation.[24] The court remanded the case and ordered the lower court to apply the standard of review outlined in *Procunier v. Martinez*[25] to each of the forty-six publications.[26]

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18. *Id.* at 6. The respondent noted censorship of sexually explicit materially was routinely treated differently from one prison institution to another. *Id.* at 7. *Hustler* was censored from maximum to minimum security prisons in the southeast region, but these same issues of *Hustler* were allowed at maximum and minimum security prisons in the north central region. *Id.*

19. *Id.* at 6-7.

20. *Id.* at 7.

21. Thornburgh v. Abbott, 490 U.S. at 414 n.12 (1989); *see also* Brief of Respondents at 31a-32a, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344).

22. Brief of Respondents at 31a, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344).

23. Abbott v. Meese, 824 F.2d 1166, 1173 (D.C. Cir. 1987), *cert. granted*, 485 U.S. 1020 (1988), *vacated sub nom.*, Thornburgh v. Abbott, 490 U.S. 401 (1989).

24. Abbott v. Meese, 824 F.2d at 1175.

25. Procunier v. Martinez, 416 U.S. 396 (1974). The court held censorship of prisoner mail is only justified when the following circumstances exist: (1) The regulation in question furthers an important or substantial governmental interest unrelated to the suppression of expression; and (2) the limitation of first amendment freedoms must be no greater than necessary to the protection of the particular governmental interest involved. *Id.* at 413-14.

26. Abbott v. Meese, 824 F.2d at 1175-76. An illustrative list of some of the censored publications includes the following:

(1) *Win Magazine*. Prison officials rejected this pacifist political magazine stating the article described activities that may lead to physical violence. *See* Brief of Respondents at 12 n.14, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344). At trial, the Regional Director admitted the article should have been allowed in the prisons. *Id.* The district court, however, upheld the rejection of the publication as part of its wholesale rejection of all forty-six publications. *See* Thornburgh v. Abbott, 490 U.S. at 403 (1989).

(2) War Resisters League, 1979 Peace Calender: While There Is a Soul In Prison.

The Supreme Court granted certiorari, and *held*, vacated and remanded.[27] The Court found the challenged regulation was facially valid because the regulation was reasonably related to the legitimate penological objective of maintaining security within the prison institution.[28] The case was, however, remanded to the district court for a determination of the validity of the regulation as it applied to each of the forty-six publications.[29] *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

The Court began its analysis by discussing the challenged regulation.[30] It found the regulation contains sufficient provisions to prevent the undue censorship of publications.[31] The regulation also contains a provision prohibiting the warden from rejecting any publication " 'solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant.' "[32]

The Court noted the regulation provides the necessary procedural safeguards for both the recipient and the sender of the publication.[33] The regulation allows the warden to designate staff to screen publications and to approve incoming publications, but it allows only the warden to reject a publication.[34] The most important aspect of the screening process was that only the warden could make the final decision regarding the exclusion of a publication.[35] Thus, the Court concluded the provisions of the regulation protect the recipient and the sender from undue censorship.[36]

The respondent argued the screening process lacked meaningful standards that caused staff employees within the same prison to make inconsis-

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Prison officials in Atlanta rejected this work because they found it encouraged prison strikes. *See* Brief of Respondents at 12 n.14, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344). The district court upheld the exclusion without making a finding that the calendar posed a threat to the security. *Id.*

(3) Workers World. Prison officials censored this weekly newspaper of the Workers World Party arguing the publication supported gay rights. *Id.* at 13 n.14. The prison officials also felt that the article could cause rebellion by the inmates. *Id.* The General Counsel originally affirmed the censorship of the article during an appeal process, but he admitted at the trial the article did not pose a threat to prison security. *Id.* However, the district court upheld the rejection of the publications, and made no findings as to whether the article posed a threat to the prison institution. *Id.*

27. Thornburgh v. Abbott, 490 U.S. at 419 (1989). Justice Blackmun delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy joined. *Id.* at 402. Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justices Brennan and Marshall joined. *Id.* at 420.

28. *Id.* at 409.

29. *Id.* at 419.

30. *Id.* at 404.

31. *Id.* at 416.

32. *Id.* at 405 (quoting 28 C.F.R. § 540.71(b) (1988)).

33. *Id.* at 406.

34. *Id.*

35. *Id.* at 416.

36. *Id.* at 419.

tent decisions when reviewing the same publication.[37] Prison officials at different institutions also made inconsistent decisions regarding the exclusion of a publication.[38] The respondent also contended the warden routinely endorsed the decisions of the reviewing staff to exclude a publication.[39] Interestingly, the Court did not address the respondents' contentions, rather it reviewed the regulation based on its literal meaning and found the regulation provides the necessary procedural safeguards.[40]

Next, the Court discussed the first amendment concerns raised by the censorship scheme of the challenged regulation.[41] The Court emphasized prison walls do not create a barrier that prevents prisoners from the same constitutional protection afforded free citizens.[42] Furthermore, it stated prison walls do not prevent free citizens from exercising their first amendment right to communicate with prisoners.[43]

The Court cautioned, however, that "these rights must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration."[44] It stated prison administrators have the difficult task of finding a balance between maintaining the security of the internal prison environment and recognizing the legitimate demands of free citizens who want to communicate with prisoners within that environment.[45] The Court concluded these constitutional claims were legitimate, but prison officials must be given the authority to determine whether certain proposed interactions may be potentially detrimental to the security of the prison.[46]

Next, the Court discussed two major Supreme Court cases in which it had previously addressed the constitutionality of prison regulations that allowed inmates' mail to be censored.[47] The earlier of these two cases was *Procunier v. Martinez*.[48]

Martinez involved a prison regulation promulgated by the Director of the California Department of Corrections.[49] The regulation allowed prison officials to censor the personal correspondence between prisoners and free citizens.[50] Prison officials were authorized to censor incoming and outgoing correspondence containing complaints about the prison or letters reflecting

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37. Brief of Respondent at 5, Thornburgh v. Abbott, 490 U.S. 401 (1989) (No. 87-1344).
38. *Id.* at 7.
39. *Id.* at 8.
40. Thornburgh v. Abbott, 490 U.S. at 417 n.15.
41. *Id.* at 407.
42. *Id.*
43. *Id.*
44. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 85 (1987)).
45. *Id.*
46. *Id.* at 408.
47. *Id.* at 408-09.
48. Procunier v. Martinez, 416 U.S. 396 (1974).
49. *Id.* at 398.
50. *Id.* at 398-400.

"inflammatory political, racial, religious or other views . . . when the originator's possession is used to subvert prison discipline by display or circulation."[51]

The Court in *Martinez* wanted to fashion a standard of review for prisoners' constitutional claims that would be responsive to both the "policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights."[52] It discussed two major concerns in determining the standard of review applicable for deciding the facial validity of the challenged regulation.[53]

First, the Court recognized the question of first amendment rights within the prison context has a consequential effect on the first amendment rights of free citizens who correspond with the prisoners.[54] It noted the first amendment rights of free citizens to communicate with a prisoner through personal correspondence, books, publications, or other material is inextricably intertwined with the first amendment rights of the intended recipients.[55]

Second, the Court recognized the challenged regulation allows prison officials to apply their own prejudices and opinions in censoring the mail.[56] It reasoned the regulation authorizes prison officials to censor any correspondence containing complaints or grievances about the prison or letters expressing inflammatory beliefs that prison officials believe might result in disorder.[57]

In recognition of these concerns, the Court held censorship of prisoner mail is justified only when the following circumstances exist: (1) The regulation in question furthers "an important or substantial governmental interest unrelated to the suppression of expression;" and (2) "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[58]

Later, in *Turner v. Safley*,[59] the Court lowered the standard of review it had enunciated in *Martinez*.[60] The facts in *Turner* involved a prison regulation promulgated by the Missouri Division of Corrections.[61] The regulation allows prison officials to censor incoming mail sent by prisoners from other prisons,[62] and prohibits correspondence between inmates of different pris-

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51. *Id.* at 399 n.3.
52. *Id.* at 406.
53. *Id.*
54. *Id.* at 408.
55. *Id.* at 408-09.
56. *Id.* at 415.
57. *Id.*
58. *Id.* at 413.
59. Turner v. Safley, 482 U.S. 78 (1987).
60. *Id.* at 89.
61. *Id.* at 81.
62. *Id.* at 81-82.

ons.[63] The Court held the regulation is facially valid because it is reasonably related to the penological interest of maintaining security within the prison.[64]

In *Turner* the Courtfocused on two issues, which were ultimately instrumental in its decision to establish a more deferential standard of review than enunciated in *Martinez*.[65] First, it distinguished *Turner* from *Martinez* by pointing out the challenged regulation in *Martinez* placed consequential restrictions on the first amendment rights of free citizens, but the challenged regulation in *Turner* dealt exclusively with prisoners' rights.[66] The Court stated the holding in *Martinez* turned on the fact the challenged regulation had a consequential effect on the rights of free citizens only.[67] The facts in *Turner*, however, presented an opportunity to determine the proper standard of review applicable to cases dealing exclusively with prisoners' rights.[68]

The Court emphasized a more deferential standard of review is necessary when dealing with correspondence between inmates at different institutions because communication between felons can be a conduit for a "potential spur of criminal behavior" in the prison.[69] It noted communications between felons at different institutions could facilitate the coordination of criminal activity, such as the maintenance of gang activity, while institutionalized.[70] The Court concluded a more deferential standard of review is necessary in cases dealing exclusively with prisoners' rights because correspondence between inmates at different institutions creates legitimate security concerns.[71] The appropriate standard of review is whether the regulation is reasonably related to a legitimate penological interest.[72]

In *Thornburgh* the Court applied the *Turner* reasonableness standard to the Bureau of Prisons' challenged regulation instead of the *Martinez* standard.[73] The Court attempted to explain why the *Turner* reasonableness standard was favored in situations in which prisoners receive publications from the outside world.[74] It emphasized a reasonableness standard is needed to allow prison administrators the necessary latitude to make difficult decisions concerning whether the circulation of certain publications could pose a

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63. *Id.* at 82.
64. *Id.* at 91-93.
65. *Id.* at 85-86.
66. *Id.* at 85.
67. *Id.*
68. *Id.* at 85-86.
69. *Id.* at 91-92.
70. *Id.*
71. *Id.*
72. Thornburgh v. Abbott, 490 U.S. at 413 (1989) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).
73. *Id.* at 413-14.
74. *Id.*

threat to prison order and discipline.[75] Prison administrators have the difficult task of striking a balance between the maintenance of security in the prison environment and the recognition of the "legitimate demands [of free citizens] . . . who seek to enter [the] environment, in person or through the written word."[76] The Court concluded that given the balancing task, considerable deference should be given to the prison administrators because the judiciary is "ill equipped" to handle the problems of prison management.[77]

The Court noted the two-prong standard established in *Martinez* might be interpreted as enunciating a heightened scrutiny level, and such an interpretation is inappropriate "for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons."[78] Furthermore, the *Martinez* standard may result in every administrative judgment being subject to scrutiny because the second prong of the test requires the prison official to determine if there is a less restrictive way of solving the problem.[79]

In *Thornburgh*, the Court justified its decision to apply a heightened scrutiny level by distinguishing the facts in *Martinez* from *Thornburgh*.[80] It stated the regulated activity at issue in *Martinez* was outgoing correspondence from prisoners, which by its very nature, did not present a threat to prison order and security.[81] Potentially dangerous outgoing correspondence would be readily identifiable, such as escape plans, plans relating to ongoing criminal activity, or threats of blackmail.[82] Because such correspondence is readily identifiable, less deference should be given to the judgment of the prison administrator.[83] Therefore, the Court held a heightened scrutiny level was acceptable in *Martinez*.[84]

In *Thornburgh*, however, the Court stated incoming publications pose a greater threat to prison order and security; therefore, more deference should be given to "the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."[85] Incoming publications, requested by an inmate, expectedly circulate among many prisoners within the institution and, therefore, may potentially result in coordinated disruptive conduct.[86] An inmate may subscribe to a publication that causes fellow inmates to draw inferences about the sub-

75. *Id.*
76. *Id.* at 407.
77. *Id.* (citing Procunier v. Martinez, 416 U.S. 396, 404-05 (1974)).
78. *Id.* at 410.
79. *Id.* at 410-11.
80. *Id.* at 412-13.
81. *Id.* at 411.
82. *Id.* at 412.
83. *Id.*
84. *Id.*
85. *Id.* at 408.
86. *Id.* at 412.

scriber's beliefs, sexual orientation, or gang affiliation; therefore, causing fellow inmates to act in a disruptive manner.[87] The Court concluded incoming publications may pose a potential threat to the order and discipline in the institution, and prison administrators should "be given broad discretion to prevent such disorder."[88]

The Court in *Thornburgh* attempted to distinguish *Martinez* from *Thornburgh*, stating the regulated activity at issue in *Martinez* was the outgoing correspondence.[89] The Court suggested regulations affecting outgoing correspondence are subject to stricter scrutiny because they affect the first amendment rights of free citizens.[90] It then stated *Thornburgh* only involved incoming correspondence, and implied the case exclusively involved the first amendment rights of prisoners.[91]

This distinction, however, is in direct conflict with the decision in *Martinez*. The standard of review established in *Martinez* was intended to be applicable to both outgoing and incoming correspondence.[92] In the *Martinez* case, Justice Powell stated:

> Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or the intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.[93]

Despite the incorrect analysis regarding the distinction between *Martinez* and *Thornburgh*, the Court in *Thornburgh* limited the *Martinez* standard to prison regulations affecting outgoing correspondence and held all incoming mail would be subject to the *Turner* reasonableness standard.[94] The Court concluded the reasonableness standard in *Turner* should be applied to the challenged regulation because the standard in *Martinez* failed to afford prison officials with sufficient discretion to protect prison security.[95]

In applying the *Turner* reasonableness standard to the challenged regulation, the Court examined the factors it identified as being necessary to channel the reasonableness inquiry.[96] In *Turner*, the Court identified three factors that should be examined when a regulation is challenged: (1)

87. *Id.*
88. *Id.* at 413.
89. *Id.* at 411.
90. *Id.* at 411-12.
91. *Id.* at 413.
92. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974).
93. *Id.*
94. Thornburgh v. Abbott, 490 U.S. at 413 (1989).
95. *Id.* at 414.
96. *Id.*

whether the governmental objection underlying the regulations at issue is legitimate and neutral, and whether the regulations are rationally related to the objective; (2) whether the prison inmates have alternative means by which they can exercise their right to receive correspondence that is not detrimental to prison security; and (3) whether an accommodation of an asserted constitutional right will have an adverse impact on others within the prison, such as the guards and inmates.[97]

The Court in *Thornburgh* held the challenged regulation meets all three factors set forth in the *Turner* reasonableness standard.[98] First, the Court found the regulation is neutral and legitimate because it prohibits the rejection of a publication solely because its content is religious, sexual, political, or unpopular; rejection may occur only if the publication is detrimental to security.[99] It also found the regulation is rationally related to security interests because the admission of some publications might " 'exacerbate tensions and lead indirectly to disorder.' "[100] Furthermore, the Court emphasized the regulation allows only the warden to reject a publication once he decides it is detrimental to the security and order of the prison.[101]

The Court in *Thornburgh* addressed the second factor in *Turner*—whether the prisoners have alternative means of exercising their first amendment rights.[102] In *Turner* the Court held the second factor would be satisfied as long as other means of expression remained available to the prisoners.[103] The Court in *Thornburgh* found the second factor was satisfied because the challenged regulation "permit[s] a broad range of publications to be sent, received, and read" by the prisoners.[104]

Thirdly, the Court in *Thornburgh* addressed the impact the accommodation of the asserted constitutional right would have on guards and other prisoners.[105] It found the third factor was satisfied because the circulation of potentially dangerous publications could disrupt the security in the prison and likely cause harm to guards and inmates.[106] The Court concluded its analysis by holding the challenged regulation is facially valid because it meets the three factors outlined within the *Turner* reasonableness test.[107]

Furthermore, the Court in *Thornburgh* referred to three Supreme Court decisions involving prisoners' first amendment rights in a noncensorship

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97. Turner v. Safley, 482 U.S. 78, 89-90 (1987).
98. Thornburgh v. Abbott, 490 U.S. at 419 (1989).
99. *Id.* at 414.
100. *Id.* at 416 (quoting Application to Petition for Cert. at 23a).
101. *Id.*
102. *Id.* at 417.
103. *Id.* at 417-18.
104. *Id.* at 418.
105. *Id.*
106. *Id.*
107. *Id.* at 419.

prison context to justify its use of the *Turner* reasonableness standard.[108] These three cases were decided after *Martinez* but before *Turner*. In these interim cases the Court concluded the appropriate standard of review in assessing prisoners' first amendment rights in a noncensorship context is whether the challenged prison regulation is reasonably related to maintaining security and good order in the prison.[109]

The application of a reasonableness standard in these interim cases sets forth the foundation for the use of this standard in *Turner*.[110] The Court stated the use of the reasonableness standard in *Turner* and later in *Thornburgh*, did not reflect a radical departure from *Martinez* because the three interim cases had already set forth the framework for a more deferential standard of review.[111]

Although the majority opinion in *Thornburgh* did not discuss the three cases in detail, the dissent more thoroughly addressed them.[112] The dissent argued the application of the reasonableness standard in the three cases did not justify the Court's abandonment of the *Martinez* standard in the *Thornburgh* case.[113] The dissent argued that, although the three interim cases did involve communications between inmates and outsiders, their legal and factual backgrounds differed from those in *Martinez*.[114]

In the first case, *Pell v. Procunier*,[115] "inmates and reporters challenged regulations prohibiting face-to-face media interviews with specific prisoners."[116] The Court held the infringement on prisoners' rights was reasonable because prisoners could send letters to the media which was "less disruptive than the physical entry of [news] reporters."[117]

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[118] inmates maintained that first amendment rights "protected their efforts to form a union."[119] The Court held the prison administrators' reasons for prohibiting the union were reasonable because union organizing would occur largely among inmates without allowing for prison supervision.[120]

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108. *Id.* at 407 (citing Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974)).

109. *Id.* at 409.

110. *Id.*

111. *Id.* at 410 n.9.

112. *Id.* at 425-26 (Stevens, J., dissenting).

113. *Id.* at 425 (Stevens, J., dissenting).

114. *Id.* (Stevens, J., dissenting).

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

116. Thornburgh v. Abbott, 490 U.S. at 425 (Stevens, J., dissenting) (citing Pell v. Procunier, 417 U.S. 817, 819 (1974)).

117. *Id.* (Stevens, J., dissenting) (citing Pell v. Procunier, 417 U.S. at 824 (1974)).

118. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

119. Thornburgh v. Abbott, 490 U.S. at 425-26 (Stevens, J., dissenting) (citing Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. at 129 (1977)).

120. *Id.* at 426 (Stevens, J., dissenting) (citing Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. at 129 (1977)).

In *Bell v. Wolfish*,[121] "the Court upheld a regulation that allow[s] only publishers, bookstores, and book clubs to mail hardbound books to pretrial detainees."[122] Jail administrators argued hardbacks might be used to conceal contraband.[123] As it is less likely publishers will improperly use books delivered to inmates, only they are allowed to send hardbacks.[124] The Court found the regulation to be reasonable for security reasons and noted there were no restrictions on softcover books.[125]

Although the dissent in *Thornburgh* disagreed with the majority's opinion regarding the standard of review to be used in prisoners' rights cases, the dissent concurred with the majority's decision to remand the case to the district court.[126] The dissent agreed the district court had erred in sustaining the rejection of all forty-six publications without determining the validity of the regulation as it applied to each one of the publications.[127]

On remand, the district court will have to view each publication and determine whether any of the publications pose a threat to the security and order of the prison.[128] The prison administrators, acting within the scope of the regulation, have already found each of the forty-six publications posed a threat to the internal security of the prison.[129] In light of the majority's opinion "that the judiciary is 'ill equipped' to deal with the difficult . . . problems of prison management,"[130] the district court will probably afford considerable deference to the decisions of the prison administrators. Therefore, on remand the district court will likely find the majority of the publications were justifiably excluded by prison administrators.

The Court's decision in *Thornburgh* will have a significant impact on the first amendment rights of prisoners. In analyzing the Court's decision, one might conclude prisoners' first amendment rights are at the mercy of the prison administrators. By giving considerable deference to the judgment of prison administrators, the Court has made it too easy for them to infringe on prisoners' first amendment rights.

The more deferential standard established in *Thornburgh* raises an obvious question: To what extent can a prisoner's first amendment rights be infringed upon at the discretion of a prison administrator? The *Thornburgh* decision gave the prison administrator broad discretion to determine the regulations necessary to maintain order and discipline within the institution.

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

122. Thornburgh v. Abbott, 490 U.S. at 426 (Stevens, J., dissenting) (citing Bell v. Wolfish, 441 U.S. 520 (1979)).

123. *Id.* (Stevens, J., dissenting) (discussing Bell v. Wolfish, 441 U.S. 520 (1979)).

124. *Id.* (Stevens, J., dissenting) (citing Bell v. Wolfish, 441 U.S. at 549 (1979)).

125. *Id.* (Stevens, J., dissenting) (citing Bell v. Wolfish, 441 U.S. at 550 (1979)).

126. *Id.* at 422 (Stevens, J., dissenting).

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

128. *Id.* at 404.

129. *Id.* at 403.

130. *Id.* at 407-08 (citing Procunier v. Martinez, 416 U.S. 397, 404-05 (1974)).

Although a definite need exists to maintain internal security and order within prisons, the standard of review established in *Thornburgh* gives feeble protection to the constitutional rights of prisoners. The reasonableness standard makes it too easy for a prison administrator to infringe on a prisoner's first amendment rights based merely on an administrative concern or speculation about a possible security risk.

The infringement on a prisoner's first amendment right at the hand of the prison administrator will effect the first amendment rights of those free citizens who attempt to communicate with the prisoners. The Court found its decision to give considerable deference to the prison administrator affects the first amendment rights of the prisoners only. Clearly, this is not the case because the censorship of the incoming mail infringes on the sender's ability to exercise his first amendment right to communicate with the prisoner. This is not strictly a prisoners' rights case; this case involves the consequential restrictions on the first amendment right of those citizens who are not prisoners because their interests are "inextricably meshed" with the rights of prisoners who are the intended recipients of their correspondence. Alarmingly, prison administrators have been given free reign to infringe on these first amendment rights with little or no judicial restraint.

Willa E. Rucker