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## Prisoners' Fundamental Right to Read: Courts Should Ensure that Rational Basis is Truly Rational

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## Articles

# Prisoners' Fundamental Right to Read: Courts Should Ensure that Rational Basis is Truly Rational

Alicia Bianco\*

### INTRODUCTION

The United States contains only five percent of the world's population, but is home to twenty-five percent of the world's prisoners.<sup>1</sup> The incarceration rate is approximately one in every one hundred American adults,<sup>2</sup> and all of those incarcerated in America are victims of censorship.<sup>3</sup> American prisons prevent

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1. See *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Oct. 5, 2015); *The Cost of a Nation of Incarceration*, CBS NEWS (Apr. 23, 2012, 5:15 PM), [http://www.cbsnews.com/8301-3445\\_162-57418495/the-cost-of-a-nation-of-incarceration/](http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-of-incarceration/) (“[W]e incarcerate a greater percentage of our population than any country on Earth.” (quoting statement of Michael Jacobson, Director, Vera Institute of Justice)).

2. Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N.Y. TIMES (Feb. 28, 2008), <http://www.nytimes.com/2008/02/28/us/28cnd-prison.html>; Robert E. Rubin & Nicholas Turner, *The Steep Cost of America's High Incarceration Rate*, WALL ST. J. (Dec. 25, 2014, 4:36 PM), <http://www.wsj.com/articles/robert-rubin-and-nicholas-turner-the-steep-cost-of-americas-high-incarceration-rate-1419543410>.

3. Prisoners challenge prison conditions and regulations as violating their constitutional rights. For example, prisoners often allege violations of

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prisoners from accessing a variety of publications by refusing to order certain publications and, even more chillingly, by preventing prisoners from receiving intended publications.<sup>4</sup> Publishers rarely challenge prison censorship policies, despite having standing to do so,<sup>5</sup> because, for most publishers, prisoners do not make a “sufficiently marketable demographic” to justify challenging the prison regulations in court.<sup>6</sup> Commentator Andrea Jones acknowledges this phenomenon in her discussions on prison censorship.<sup>7</sup> In one particular instance, she notes that, although both publishers and prisoners have standing to challenge censorship policies within prisons, in practice publishers “rarely act upon notice that the material they’ve mailed has been seized or withheld.”<sup>8</sup>

Censorship in prisons poses a threat to prisoners’ First Amendment rights.<sup>9</sup> When censorship violates the First Amendment rights of the un-incarcerated, the Supreme Court vigorously protects First Amendment rights.<sup>10</sup> Yet, courts do not protect prisoners’ First Amendment rights to the same degree.

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their Eighth Amendment rights. *See, e.g.*, *Hudson v. McMillian*, 503 U.S. 1, 4 (1992); *Wilson v. Seiter*, 501 U.S. 294, 296–99 (1991); *Whitley v. Albers*, 475 U.S. 312, 314 (1986). However, the subject of this Comment is focused solely on the infringement of prisoners’ First Amendment rights by censorship of publications.

4. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 549–50 (1979).

5. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011) (“[P]ublishers and inmates have a First Amendment interest in communicating with each other.”).

6. Andrea Jones, *Battling Censorship Behind Bars: How Prisons and Jails Are Barring Inmates’ Access to Legal News, Literature and Letters*, SALON (May 7, 2013, 9:00 AM), [http://www.salon.com/2013/05/07/battling\\_censorship\\_behind\\_bars\\_partner/](http://www.salon.com/2013/05/07/battling_censorship_behind_bars_partner/).

7. *See id.*

8. *Id.*

9. *See* U.S. CONST. amend. I; *see also* Jones, *supra* note 6.

10. *See, e.g.*, *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813, 827 (2000) (holding that Playboy’s programming has First Amendment protection and stating that a content-based regulation “can stand only if it satisfies strict scrutiny”); *see also* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 128 (1991) (Kennedy, J., concurring) (“I would recognize this opportunity to confirm our past holdings and to rule that the New York statute amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. That ought to end the matter.”).

The courts, relying on *Turner v. Safley*,<sup>11</sup> have continuously deferred to the legislature and prison administrators when considering the validity of prison policies that threaten prisoners' First Amendment rights. In essence, this deference leads to courts applying an extremely lenient form of rational basis review.<sup>12</sup> However, the plain meaning of *Turner* calls for a balancing test.<sup>13</sup> This deference is inappropriate in relation to prisoners' reading rights because of the importance of the right at issue.<sup>14</sup> In addition, the current standard of review is inappropriate because prisoners face excessive anti-inmate animus and political powerlessness.<sup>15</sup> In order to adequately protect the rights of prisoners and correctly apply the *Turner* test, the courts should be more discerning and use a form of heightened review. Prisoners should be allotted a heightened version of rational basis review in order to protect their constitutional rights.

This Article examines the censorship that currently exists in prisons and the standard of review that courts apply to prisoners' First Amendment challenges to prison censorship policies. Further, this Article contends that the deference the courts have historically given, and still give, to prison administrators' policies is inappropriate—suggesting that prisoners' right to read is precisely the type of right that should be subject to a stricter version of rational basis review, often colloquially called “rational basis with a bite.”<sup>16</sup>

Part I of this Article examines the current realities prisoners

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11. 482 U.S. 78 (1987).

12. *See, e.g.*, *Beard v. Banks*, 548 U.S. 521, 522–23 (2006); *see also infra* Part II.

13. *See Turner*, 482 U.S. at 89–91; *see also infra* Part II.

14. *See infra* Section III.B.

15. *See infra* Section III.A.

16. The Court has never called “rational basis with a bite” by that name. The Court has only referred to the test by its traditional name, rational basis review. When I state that the Court used “rational basis with a bite” review, I am referring to the fact that the Court only admitted to using rational basis review, but in actuality engaged in a more in-depth analysis. When the Court does not assume that a statute is rationally connected to the government interest put forth or *sua sponte* determines a government interest that is related to the challenged statute, but instead searches to see if the challenged statute is actually rationally related to a legitimate government interest, then, in my opinion, it is applying “rational basis with a bite” review.

face if they want to simply read a book behind bars. Part II first explores the standard of review that courts apply to prisoners' rights litigation, focusing specifically on the standard of review for current First Amendment litigation. Second, Part II later examines the level of deference that is granted to prison administrators and how the standard affects the applicable standard of review. In Part III I lay out why a form of heightened review, "rational basis with a bite," is called for when it comes to prisoner reading rights. First, I present an equal protection argument, succinctly analyzing a history of prisoners' rights litigation and identifying the political powerlessness of prisoners and the animus against them. I also explain that the courts cannot assume that the executive branch, administrative agencies, or the legislature are protecting prisoners, as prisoners are a vulnerable group. Second, I present a due process argument, arguing that the right to read is a fundamental right. Part IV explains the developing "rational basis review with a bite" jurisprudence,<sup>17</sup> providing a sampling of the cases that have applied it and explaining why it was applied. Finally, Part V concludes that courts should, at minimum, use "rational basis with a bite" review in order to adequately protect prisoners' First Amendment rights. In other words, courts should look closely to ensure that there is actually a rational relationship between the legislation or policy and the asserted legitimate government interest.<sup>18</sup>

#### I. CURRENT POLICIES

Prisoners throughout the United States are forbidden from reading a variety of publications.<sup>19</sup> The list of banned

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17. See *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 460–61 (Wis. 2005) ("'Rational basis with teeth,' sometimes referred to as 'rational basis with bite,' focuses on the legislative means used to achieve the ends.").

18. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996).

19. See, e.g., CAL. CODE REGS. tit. 15, § 3134.1 (2015). See also *Thornburgh v. Abbott*, 490 U.S. 401, 404–06 (1989); *Bell v. Wolfish*, 441 U.S. 520, 548–49 (1979) (discussing the publisher-only rule, showing that there are a variety of restrictions other than censorship that threaten prisoners' First Amendment reading rights); TEX. CIV. RIGHTS PROJECT, BANNED BOOKS IN THE TEXAS PRISON SYSTEM 11 (2011) [hereinafter BANNED BOOKS], [http://www.texascivilrightsproject.org/docs/prisonbooks/TCRP\\_Prison\\_Books\\_Report.pdf](http://www.texascivilrightsproject.org/docs/prisonbooks/TCRP_Prison_Books_Report.pdf); Matt Berman, *The Banned Books and Censored Magazines of Connecticut's State Prisons*, ATLANTIC (Aug. 30, 2013), <http://www.the>

publications varies from institution to institution,<sup>20</sup> and each state and federal prison system has a unique banned publication list.<sup>21</sup> However, very few institutions make these lists accessible to the public.<sup>22</sup> By keeping these lists confidential, institutions are preventing free citizens from learning about the restrictions and policies. Thus, the public is not often in possession of the necessary information to even understand the abridgement of First Amendment rights that prisoners face. Without this information, those among us who sympathize with prisoners are without the necessary tools to fight for the rights of the incarcerated.

#### A. *The Regulations*

All federal prisoners are subject to a regulation that states:<sup>23</sup>

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atlantic.com/national/archive/2013/08/the-banned-books-and-censored-magazines-of-connecticuts-state-prisons/279207/. It is important to note that in many institutions prisoners can only receive paperback newspapers and periodicals from publishers; no hardcovers are permitted at all, and friends and family cannot send any publications into the institutions. See 06-070-05 R.I. CODE R. § III (Lexis Nexis 2015).

20. See, e.g., *TDCJ Banned Book List*, TEX. C. R. PROJECT (Feb. 24, 2011), <http://www.texascivilrightsproject.org/2803/banned-books-in-the-texas-prison-system-how-the-texas-department-of-criminal-justice-censors-books-sent-to-prisoners/> (follow "Download the banned books list to your computer: Excel format" (3.5mb)); see also Andrew Losowsky, *Prison Books Ban: The Censorship Scandal Inside America's Jails*, HUFFINGTON POST (Oct. 3, 2011, 8:24 AM), [http://www.huffingtonpost.com/2011/10/02/prison-books-ban\\_n\\_991494.html](http://www.huffingtonpost.com/2011/10/02/prison-books-ban_n_991494.html).

21. See, e.g., BANNED BOOKS, *supra* note 19, at 11. See also Pat Eaton-Robb, *Connecticut Prison Inmates Reading True Crime and Other Violent Books*, HUFFINGTON POST (Dec. 5, 2010, 5:12 AM), [http://www.huffingtonpost.com/2010/10/04/connecticut-prison-inmate\\_n\\_749592.html](http://www.huffingtonpost.com/2010/10/04/connecticut-prison-inmate_n_749592.html) (noting how at least two prisons within the state allow a particular publication concerning a group of murders within Kansas in 1959); Warren Richey, *Feds' Request: Let Us Take on Jail that Bans All Books Except the Bible*, CHRISTIAN SCI. MONITOR (Apr. 13, 2011), <http://www.csmonitor.com/USA/Justice/2011/0413/Feds-request-Let-us-take-on-jail-that-bans-all-books-except-the-Bible>.

22. See BANNED BOOKS, *supra* note 19, at 11. Texas is one of the few states that have made their banned book list publically accessible. See *TDCJ Banned Book List*, *supra* note 20.

23. As of October 2014, the federal prison population consisted of slightly less than 214,000 inmates. See *Population Statistics*, FED. BUREAU PRISONS, [http://www.bop.gov/about/statistics/population\\_statistics.jsp](http://www.bop.gov/about/statistics/population_statistics.jsp) (last visited Oct. 20, 2014). These statistics, which are made publically available by the Federal Bureau of Prisons, are updated each Thursday; the data in this Comment reflect the numbers available on October 20, 2014.

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“[T]he Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.”<sup>24</sup> Conversely, “the Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant.”<sup>25</sup> Moreover, an additional federal regulation prevents inmates from obtaining publications that have any pectoral images of nudity or sex acts<sup>26</sup>—no law currently exists preventing written accounts of the same. States have adopted similar regulations; however, many of those regulations expressly allow for the banning of books due to sexually explicit content.<sup>27</sup>

Based on the above, prisons may only lawfully ban publications in order to further a legitimate penological objective.<sup>28</sup> “Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc.) of persons convicted of crimes.”<sup>29</sup> Two penological objectives frequently cited for justifying censorship of publications within prisons are rehabilitation and institutional security.<sup>30</sup> Penological interests sound like firm constructs. However, which books will interfere with rehabilitation and where the border is between publications that interfere with institutional security and those that may merely depict violence or discuss weaponry but are otherwise safe is open to interpretation. In other words, it is hard to discern where the line is drawn between publications that interfere with legitimate penological interests and those that are protected from infringement. Additionally, no recent studies exist which support the argument that certain publications hinder rehabilitation or jeopardize institutional security. Due to the deference afforded to prison administrators, the courts have not looked deeper to determine whether pornography actually inhibits

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24. 28 C.F.R. § 540.71 (2014).

25. *Id.*

26. *Id.* § 540.72.

27. *See, e.g.*, CAL. CODE REGIS. tit. 15, § 3134.1(e) (2014).

28. *See* *Turner v. Safley*, 482 U.S. 78, 87 (1987).

29. *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 996 (9th Cir. 2010) (Thomas, J., dissenting) (quoting *Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2d Cir. 2001)).

30. *See, e.g.*, *Beard v. Banks*, 548 U.S. 521, 525–26 (2006).

rehabilitation of prisoners in general.<sup>31</sup>

Prison wardens often delegate the decision-making power to prison employees, whether it is mailroom employees or glorified inspectors.<sup>32</sup> This delegation of decision-making power gives employees the power to make the initial determination of whether the publication in question, if not already banned in the institution, is either: (a) appropriate for the prison population, or (b) inappropriate for the prison population. Whether the book should be rejected or not is often based on the particular employee's subjective understanding of the applicable policy or statute.<sup>33</sup> This fact is chilling because we are allowing non-elected and largely anonymous individuals to routinely make subjective decisions that limit a large population's First Amendment rights. It is not easy to determine whether a publication will be detrimental to one of the penological interests of the institution because it is largely a subjective decision. For example, some schools of thought say reading about gang activities could dissuade gang activity; others say that it could foster gang activity.<sup>34</sup> Publications that some individuals may think threaten a penological interest may actually foster a penological interest, and vice versa. Moreover, employees are provided with a cloak of

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31. See Barry W. Lynn, "Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation, 21 HARV. C.R.-C.L. L. REV. 27, 33 (1986).

32. See, e.g., 06-070-05 R.I. CODE R. § III(C) (Lexis Nexis 2015); BANNED BOOKS, *supra* note 19, at 8.

33. See, e.g., BANNED BOOKS, *supra* note 19, at 8.

34. See *Ciempa v. Jones*, 745 F. Supp. 2d 1171, 1177 (N.D. Okla. 2010), *aff'd*, 511 F. App'x 781 (10th Cir. 2013). *Ciempa* involved several publications that were withheld from a prisoner in Oklahoma because the publications contained gang related material. See *id.* The Oklahoma Department of Corrections has a regulation that provides:

Publications are prohibited that . . . Advocate terrorism, criminal behavior, racial, religious, or national hatred, or any material that creates an unsafe environment for the inmates or staff. . . . The facility is not authorized to implement a prohibition on any materials that inmates may receive by subscription, such as a magazine, newspaper, or other similar type of periodical. Each issue of the material has to be received and reviewed to determine whether or not it violates the correspondence restrictions of this agency. . . . Correspondence containing gang related material, information, photographs, or symbols are prohibited.

*Id.* (quoting Okla. Dep't of Corr., Facility Operations, Correspondence, Publications, and Audio/Video Media Guidelines, OP-030117).

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anonymity to shield their identity from accountability if they decide, in an abundance of caution, to ban more publications than the applicable policy requires.<sup>35</sup>

Today, in Texas, if an incoming book is not already on the banned book list, the employees in the mailroom make the decision as to whether the prisoner will be allowed to read the publication sent to him or her.<sup>36</sup> If those employees determine that the publication is inappropriate, then the publication is added to Texas's statewide banned book list, and the prisoner must jump through administrative hoops to gain access to the material.<sup>37</sup> In Rhode Island, if the prison's mailroom officer determines that the publication is inappropriate or even questionable, the mailroom officer forwards the publication to the Central Office Investigator (Investigator) for review.<sup>38</sup> The Investigator determines if the publication is appropriate and whether to give it to the inmate or not.<sup>39</sup> Both the prisoner and publisher are given notice as to the Investigator's ultimate decision if the book is not allowed.<sup>40</sup>

The deference afforded to these prison officials allows the animus of society to dictate many of the regulations controlling prisoners. We are trusting mailroom prison employees to protect the First Amendment rights of America's large prison population, which is made up of the despised, outcasts of society.<sup>41</sup> By giving these employees the power to reject or permit publications based on their own subjective judgment of whether the publications would potentially threaten a legitimate government interest, we are unjustly delegating the job of determining the exact extent of prisoners' First Amendment rights.<sup>42</sup> The press has called these

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35. The identity of the mailroom employees in prison institutions are not publicized; even the identities of those in the Rhode Island prison system who investigate questionable material are not well known.

36. See BANNED BOOKS, *supra* note 19, at 12.

37. See *id.*

38. See 06-070-05 R.I. CODE R. § III(C) (Lexis Nexis 2015).

39. *Id.*

40. *Id.*

41. See *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting); James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 118 & n.207 (2006).

42. See CAL. CODE REGS. tit. 15, § 3134.1 (2014). See also *Thornburgh v. Abbott*, 490 U.S. 401, 406 (1989); BANNED BOOKS, *supra* note 19, at 12;

employees' decisions arbitrary in the few instances where such decisions have been publicized.<sup>43</sup> Allowing subjective, arbitrary decisions to dictate the extent of prisoners' First Amendment rights is hardly rational.

The administrative processes that prisoners can utilize in an attempt to gain access to "inappropriate" publications varies slightly throughout the country.<sup>44</sup> In most institutions, prisoners can file a grievance<sup>45</sup> in an attempt to gain access to the restricted material.<sup>46</sup> Members of the Department of Corrections, such as wardens, directors, or committees, consider these grievances.<sup>47</sup> In Rhode Island, prisoners can request a review by the Assistant Director of the Institution prior to beginning the formal grievance process.<sup>48</sup> Once a review of the prison employee's initial findings is conducted, many institutions afford prisoners the right to an administrative appeal in order to question the institution's decision regarding the publication.<sup>49</sup> However, it is important to

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Berman, *supra* note 19.

43. See, e.g., BANNED BOOKS, *supra* note 19, at 12; Berman, *supra* note 19. However, more often than not, when a prison employee decides to ban a publication, notice only goes to the prisoner and perhaps the publisher; the public remains in the dark. See, e.g., 06-070-05 R.I. CODE R. §§ III(A)(2)(i)(2), III(A)(2)(j)(1)(b)(2).

44. See Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 344–49 (2009).

45. For an outline of the basic grievance process and how it works in the Rhode Island Prison system, see R.I. DEP'T CORR., INMATE HANDBOOK 30–32 (2007) [hereinafter R.I. INMATE HANDBOOK], <http://www.doc.ri.gov/documents/Inmate%20Handbook%20507.pdf>.

46. See Jack Ryan, *Handling Grievances in a Jail / Detention Setting*, LEGAL & LIABILITY RISK MGMT. INST., [http://www.llrmi.com/articles/jails/jail\\_grievances.shtml](http://www.llrmi.com/articles/jails/jail_grievances.shtml) (last visited Dec. 8, 2015). One of the most important tools for any jail is the grievance process by which inmates may file complaints regarding conditions and situations where their rights may have been violated. By providing prisoners with a proper grievance process, the jail administration can resolve issues within the jail environment before the conditions or events lead to a full-blown lawsuit. See *id.*; see also BANNED BOOKS, *supra* note 19, at 8–12; R.I. INMATE HANDBOOK, *supra* note 45, at 30–32.

47. See Shay, *supra* note 44, at 344–49.

48. See R.I. DEP'T OF CORR., POL'Y AND PROC.: POLICY NO. 24.01-6, Attachment C, p. 2 (2010), [hereinafter *Inmate Mail*], <http://www.doc.ri.gov/documents/administration/policy/Inmate%20Mail%20Policy%2013.pdf>.

49. See, e.g., 14B N.C. ADMIN. CODE 12B.0103 (2013) (“[T]he inmate should be notified in writing within 24 hours of the reason for censorship. The inmate shall be afforded the opportunity to appeal the decision in

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note that during the grievance and/or appeals process, the institution returns the publication at issue to the sender.<sup>50</sup> Therefore, the prisoner is at a distinct disadvantage when requesting a review, filing a grievance, or appealing an institution's decision because the prisoner lacks access to the banned material to formulate his challenge.<sup>51</sup> Thus, the review processes discussed are often insufficient. In many systems, once the validity of a publication's ban is denied on appeal, another prisoner cannot appeal the same publication's ban at a later date.<sup>52</sup> The appeals process is essentially nonexistent if the book requested is already a banned book.<sup>53</sup>

If a prisoner loses his challenge at the administrative level, he may bring his challenge to the courts.<sup>54</sup> Only after exhausting his or her appeal at the administrative level can a prisoner challenge a prison administrator's decision by filing a claim in court, alleging that the decision violated his First Amendment rights.<sup>55</sup>

In many prisons throughout the country, prisoners yearn to read prohibited publications.<sup>56</sup> For example, in 2011, *The New York Times* and other various publishers published a story on Mark Melvin, an inmate serving a life sentence at Kilby Correctional Facility outside of Montgomery, Alabama.<sup>57</sup> Melvin was prevented from receiving and reading the Pulitzer Prize winning book, *Slavery by Another Name*, by Douglas A. Blackmon.<sup>58</sup> The book details a historical investigation on how

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writing, within seven days, directly to the Director of the Division of Prisons.”). *See also* Thornburgh v. Abbott, 490 U.S. 401, 406 (1989); BANNED BOOKS, *supra* note 19, at 12.

50. *See, e.g., Inmate Mail, supra* note 48, at Attachment C, p. 2.

51. *See* Jones, *supra* note 6.

52. *See id.*; *see also* BANNED BOOKS, *supra* note 19, at 8–12.

53. *See* BANNED BOOKS, *supra* note 19, at 8–12.

54. *See generally* Tracking Prisoner Censorship in the U.S., MAOIST INTERNATIONALIST MINISTRY PRISONS, <http://www.prisoncensorship.info/data> (last visited Dec. 8, 2015) (providing a database of prison censorship cases).

55. *See id.*

56. *See generally* Clay Calvert & Kara C. Murrhee, *Big Censorship in the Big House—A Quarter-Century After Turner v. Safley: Muting Movies, Music & Books Behind Bars*, 7 NW. J.L. & SOC. POL'Y 257 (2012).

57. Campbell Robertson, *Alabama Inmate Sues to Read Sothern History Book*, N.Y. TIMES (Sept. 26, 2011), <http://www.nytimes.com/2011/09/27/us/alabama-inmate-sues-to-read-southern-history-book.html>; *see* Losowsky, *supra* note 20.

58. *See* Losowsky, *supra* note 20; *see generally* DOUGLAS A. BLACKMON,

black prisoners were treated in the South during the late 19th and early 20th century.<sup>59</sup> When the prison officials refused to give Melvin his book, Melvin appealed, but the prison officials upheld their decision to ban the book.<sup>60</sup> As support, the officials “cit[ed] a regulation banning any mail that incites ‘violence based on race, religion, sex, creed, or nationality, or disobedience toward law enforcement officials or correctional staff.’”<sup>61</sup> Following the denial of his appeal, Melvin brought a lawsuit against the prison officials.<sup>62</sup> The author of the banned publication commented on the absurdity of banning his book, noting that “[t]he idea that a book like mine is somehow incendiary or a call to violence is so absurd.”<sup>63</sup>

After a prisoner exhausts his administrative appeals, a prisoner’s only available means of gaining access to the banned publication is to file a suit in court, which Melvin did.<sup>64</sup> Information concerning the ultimate outcome of Melvin’s suit has not been publicized since 2012, at which time his lawsuit was in the discovery phase.<sup>65</sup> Numerous cases have been brought by prisoners challenging the constitutionality of various restrictions on their ability to access certain publications—some of which have made their way all the way to the United States Supreme Court, as discussed below.<sup>66</sup>

In Texas, in 2008, 11,544 of the books sent to state prisoners

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SLAVERY BY ANOTHER NAME (2008).

59. See *The Book*, SLAVERY BY ANOTHER NAME, <http://www.slaverybyanothername.com/the-book/> (last visited Dec. 8, 2015) (providing a description of *Slavery by Another Name*).

60. See Losowsky, *supra* note 20; Robertson, *supra* note 57.

61. Robertson, *supra* note 57.

62. See *id.*

63. See *id.* (quoting Telephone Interview with Douglas A. Blackmun, Author, *Slavery by Another Name* (2008)).

64. See COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER’S MANUAL ch. 22 (8th ed. 2009) (establishing that the step after administrative remedies is filing suit in federal court). For more information on Melvin’s lawsuit, see Stephanie Siek, *Prison Bars White Inmate from Reading ‘Slavery by Another Name,’ Citing Security Risk*, CNN: IN AMERICA (Feb. 29, 2012, 7:00 AM), <http://inamerica.blogs.cnn.com/2012/02/29/ala-prison-bars-white-inmate-from-reading-slavery-by-another-name-citing-security-risk/>.

65. See Siek, *supra* note 64.

66. See, e.g., *Beard v. Banks*, 548 U.S. 521 (2006); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Thompson v. Campbell*, 81 F. App’x 563 (6th Cir. 2003). See also *Tracking Prisoner Censorship in the U.S.*, *supra* note 54.

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never reached the inmates because the books were banned by either: (a) already being on the banned book list, or (b) being deemed inappropriate by a mailroom employee in one of Texas's prisons.<sup>67</sup> Prisoners appealed decisions 2472 times in 2008 alone; the Texas Department of Criminal Justice heard only 1210 of these appeals because approximately 1200 of the books were already permanently banned.<sup>68</sup> At the end of 2009, Texas prisons had banned 11,851 titles.<sup>69</sup> The Texas Department of Criminal Justice had permanently banned 8002 of the 11,851 titles.<sup>70</sup>

B. *The Arbitrariness of Prison's Decisions to Ban Books*

In addition to the shocking number of publications that institutions have banned based on the subjective opinion of designated prison employees, there are numerous examples of publication bans within prisons that make the whole process appear even more arbitrary. For example, in Connecticut,<sup>71</sup> state prisoners were prohibited from reading the first book in the *A Song of Ice and Fire* series.<sup>72</sup> However, at the same time, prisoners were permitted to read, *A Clash of Kings* or *A Storm of Swords*, later books in the same series.<sup>73</sup> When considering a prisoner's administrative appeal, the Connecticut Bureau of Corrections finally made the first book in the series accessible to

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67. See BANNED BOOKS, *supra* note 19, at 12–13 (describing the discretion given to the employees to determine if, in a case of first impression, a publication should be admitted into an institution).

68. See *id.*

69. See *id.* at 13 n.16.

70. See *id.* at 13.

71. In Connecticut:

Each facility shall establish a review process for all incoming publications in accordance with guidelines established by the Media Review Board. The Unit Administrator or designee shall review the individual publication prior to the rejection of that publication. The Media Review Board shall then review anything deemed objectionable by the facility and notify the Unit Administrator or designee of the decision.

Conn. Dep't of Corr., Administrative Directive 10.7(4)(N)(2) [hereinafter *Inmate Communications*], available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad1007.pdf>.

72. See Berman, *supra* note 19.

73. See *id.* Some prisoners did in fact read the series out of order because of a prior ban on the first book in the series, *A Game of Thrones*. See *id.*

inmates.<sup>74</sup> Other prisons have banned a variety of great literary classics. For example, some of the books that Texas permanently banned within its prisons include: *Shakespeare & Love Sonnets*, *Utopia*, *Burmese Days*, and Dante Alighieri's *Inferno*.<sup>75</sup>

The free flow of ideas, especially political ideas, is a key element of American democracy.<sup>76</sup> A federal prison in Colorado actually banned President Obama's books, *Dreams from My Father* and *The Audacity of Hope*.<sup>77</sup> This ban halted the free flow of political ideas, which is directly adverse to the spirit of the First Amendment. The decisions to ban Obama's books were later overturned through the appeals process, demonstrating that the initial ban was not related to a legitimate penological interest.<sup>78</sup>

While commenting on prison censorship, Andrea Jones discussed Prison Legal News (PLN), a national publication of which the majority of subscribers are prison-inmates.<sup>79</sup> The goal of PLN is to increase political awareness and inform prisoners of their rights.<sup>80</sup> Jones stated that PLN has "faced blanket censorship in over ten state prisons systems, and countless bans in local jails across the country."<sup>81</sup> This type of "blanket censorship" might exemplify that some prisons actually aim to keep prisoners uninformed regarding the information that is most valuable. As the free flow of ideas, especially political ideas, is a key element of American democracy, it is significant that prisons are banning a publication that informs prisoners of their rights. Informing prisoners of their rights and transforming them into more engaged citizens is a step toward their rehabilitation. Yet, prisons frequently justify bans on the basis that access to certain publications would be detrimental to rehabilitation. Banning

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74. *See id.*

75. *See* BANNED BOOKS, *supra* note 19, at 40–41.

76. *See* U.S. CONST. amend. I; N.C. Right to Life, Inc. v. Leake, 108 F. Supp. 2d 498, 511 (E.D.N.C. 2000) ("[T]he principle that core political speech, essential to the free flow of ideas in a democracy, occupies a highly protected place within First Amendment jurisprudence.").

77. *See* Sean Hannity, *Why Did One Prison Ban Obama's Books?*, FOX NEWS (July 14, 2009), <http://www.foxnews.com/story/2009/07/14/why-did-one-prison-ban-obama-books.html>.

78. *See id.*

79. *See* Jones, *supra* note 6.

80. *See id.*

81. *Id.*

informative publications such as PLN can actually threaten the same goal that institutions are seeking to accomplish.

Censorship is occurring in prisons throughout the country and threatens prisoners' First Amendment rights. Yet, many of the decisions to ban publications within prisons appear arbitrary. While Mr. Melvin's story was reported, his story is but a grain of sand on a beach full of individuals who are being denied access to publications. The vast majority of these individuals' stories go untold. Now, we face the question of what happens when prisoners, like Mr. Melvin, or the countless others whose grievances and/or administrative appeals are denied, bring their challenges to court.

## II. STANDARD OF REVIEW

In 1964, the Supreme Court in *Cooper v. Pate* implicitly recognized that prisoners keep some of their constitutional protections.<sup>82</sup> The Court also acknowledged in *Cooper* that prisoners could seek protection of their constitutional rights and guarantees through the court systems.<sup>83</sup> More pointedly, in 1974, the Supreme Court expressly expounded in *Pell v. Procunier* that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system."<sup>84</sup>

Before the Court's decision in *Turner v. Safley*, the Court was hesitant to discern a clear standard of review for courts to use in determining whether a prison regulation or policy violated a prisoner's First Amendment rights.<sup>85</sup> In *Turner*, the Court considered the legality of two regulations: the first regulation censored correspondences between inmates at different

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82. See 378 U.S. 546, 546 (1964); Stacey A. Miness, Note, *Pornography Behind Bars*, 85 CORNELL L. REV. 1702, 1707 (2000); see also Victoria Ford, Case Note, *First Amendment Rights Behind Bars: To Deny a Prisoner Pornography, the Third Circuit in Ramirez v. Pugh Requires Proof of Detriment to Rehabilitation*, 13 VILL. SPORTS & ENT. L.J. 73, 74 & n.10 (2006) (noting that prisoners retain the same constitutional protections as citizens so long as the rights at issue do not conflict with goals of incarceration).

83. Miness, *supra* note 82, at 1707.

84. 417 U.S. 817, 822 (1974). *Pell* involved members of the press who were denied access to interview prison inmates face-to-face. See *id.* The Court held that the First Amendment does not guarantee the press any special access to inmates beyond what is given to the public. *Id.*

85. See 482 U.S. 78, 85–89 (1987); Miness, *supra* note 82, at 1707.

institutions, and the second regulation affected prisoners' ability to marry.<sup>86</sup> Having yet to pronounce an appropriate standard for assessing the constitutionality of prisoners' rights, the Court used *Turner* to declare the appropriate standard.<sup>87</sup> The Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>88</sup> It is clear from both the language of *Turner* and the language of subsequent cases where the *Turner* factors have been applied that the *Turner* test is advocating for rational basis review.<sup>89</sup>

The Court ultimately established four factors to help courts determine "the reasonableness of the regulation[s] at issue."<sup>90</sup> The *Turner* test is in some ways a totality of the circumstances test; however, if the first factor is not satisfied, then the regulation is not reasonable.<sup>91</sup> In determining what factors a court should consider in order to decide whether a prison regulation or policy is reasonable, the Court reviewed prisoners' rights jurisprudence.<sup>92</sup>

The first factor the Court articulated is that "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."<sup>93</sup> The regular rational basis test provides that the means of a regulation must be rationally related to serving a legitimate governmental interest; the language of the traditional rational basis test is quite similar to the language the Court used for this factor.<sup>94</sup>

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86. *Turner*, 482 U.S. at 81–82. *Turner* held that, while the censorship of prisoner-to-prisoner correspondence was reasonably related to legitimate security concerns, the regulation restricting access to marriage was not; it was considered an exaggerated response to the institution's security and rehabilitative concerns. *Id.* at 91.

87. *Id.* at 78.

88. *Id.* at 89.

89. *See, e.g.*, *Beard v. Banks*, 548 U.S. 521 (2006).

90. *Turner*, 482 U.S. at 84–90.

91. *See id.*

92. *See id.* at 78–79.

93. *Id.* at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Further, the Court stated that it found it "important" to ensure that policies that regulated First Amendment rights were neutral and not content based. *Id.* at 90.

94. *Compare* *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486, 488–90 (1955) (applying the traditional rational basis test and holding that a state regulation of appropriate vendors of optometry equipment was not unconstitutional as the regulation was rationally related to a government

Essentially, the Court is using this factor to establish the principle that in order for a potentially restrictive prison regulation to be reasonable, it must pass the rational basis test.<sup>95</sup>

The second factor the Court used to determine if a regulation was reasonable was “whether there are alternative means of exercising the right that remain open to prison inmates.”<sup>96</sup> If one mode of expression is limited in order to advance a *legitimate government interest*, then the Court wants to assess the other options prisoners have to express themselves.<sup>97</sup> In *Turner*, the Court expressly advised deference only if there existed alternative avenues available for the exercise of the asserted right.<sup>98</sup>

Third, the Court inquired into the challenges a prison could face if the prison was forced to provide the inmate’s requested freedom.<sup>99</sup> Again, the Court expressly advised deference only “[w]hen accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff.”<sup>100</sup> Finally, the Court advised lower courts to consider the absence of sufficient alternatives to censorship.<sup>101</sup> The Court stated, “the absence of ready alternatives is evidence of the reasonableness of a prison regulation.”<sup>102</sup> However, existence of a less restrictive alternative that accomplished the same desired governmental interest would be some evidence that the regulation violated prisoners’ rights.<sup>103</sup> Lower courts continue to use the *Turner* factors to determine if prison regulations violate prisoners’ constitutional rights.<sup>104</sup>

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interest), *with Turner*, 482 U.S. at 89–90 (asserting that prison regulations must be rationally and logically connected to a legitimate government interest to be considered “reasonable” for the purposes of judicial review).

95. *Turner*, 482 U.S. at 89–90.

96. *Id.* at 90.

97. See Anna C. Burns, Note, *Beard v. Banks: Restricted Reading, Rehabilitation, and Prisoners’ First Amendment Rights*, 15 J.L. & POLY 1225, 1239–40 (2007) (noting the role of deference while also recognizing the need to protect prisoners from total deprivation of their rights).

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

99. *Id.*

100. *Id.*

101. *Id.* at 90–91.

102. *Id.* at 90.

103. *Id.* at 90–91.

104. See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 131–32, 135–36 (2003); *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989); *Thompson v. Campbell*, 81 Fed. App’x. 563, 566–67 (6th Cir. 2003); *Willson v. Buss*, 370 F. Supp. 2d 782, 786–87, 790 (N.D. Ind. 2005).

A couple years after *Turner*, the Court decided *Thornburgh v. Abbot*, which focused on the censorship of publications sent to prisoners.<sup>105</sup> In *Thornburgh*, the Court harkened that the reasonableness standard, applied in *Turner*, would also apply to incoming mail (including, but not limited to, publications that are sent to prisons).<sup>106</sup> The Court “adopt[ed] the *Turner* standard . . . with confidence that . . . ‘a reasonableness standard is not toothless.’”<sup>107</sup> Thus, *Thornburgh* clarified that courts should use the *Turner* test to evaluate whether or not a prison regulation has violated a prisoner’s fundamental rights. The Court found the *Turner* test preferable for analyzing these regulations because of its “express flexibility.”<sup>108</sup>

The *Turner* factors appear to lay the foundation of a balancing test in which the court weighs the prisoner’s rights against the institution’s legitimate penological interests. However, if a court really analyzes the four *Turner* factors, it would be applying something more than the traditional rational basis review.<sup>109</sup> The Court made it clear in *Turner* that the prison regulations at issue did not prompt a heightened standard of scrutiny, which the lower courts had previously applied.<sup>110</sup> Instead, the Court inquired only whether the “prison regulation[s] that [burden] fundamental rights [are] ‘reasonably related’ to legitimate penological objectives, or whether [they represent] an ‘exaggerated response’ to those concerns.”<sup>111</sup> The Court may have rejected an intermediate or strict standard of review, but the Court left traces of a heightened standard throughout the *Turner* decision. While the first factor primarily lays out the rational basis test, the other three factors look deeper—contemplating other available means of exercising the right, considering difficulties that would result if the prison was forced to forgo the restriction at issue, and inquiring into possible regulatory alternatives that would accomplish the asserted interest.<sup>112</sup> To some extent, these factors

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105. 490 U.S. at 403, 408, 412–14.

106. *Id.* at 412–14; *see also Turner*, 482 U.S. at 89–91.

107. *Thornburgh*, 490 U.S. at 414 (quoting Petition for Writ of Certiorari at 17 n.10, *Thornburgh*, 490 U.S. 401 (No. 87-1344)).

108. *Id.*

109. *Turner*, 482 U.S. at 89–91.

110. *Id.* at 83, 86.

111. *Id.* at 87.

112. *Id.* at 89–91.

inquire into whether the statute is the least restrictive means of accomplishing the goal. Courts only consider least restrictive means when applying strict scrutiny.<sup>113</sup> Thus, to fully comply with *Turner*, courts should, at minimum, be honestly considering how the regulation at issue holds up against each of the four factors. Moreover, just because *Turner* sets forth a “rational basis” review, does not mean that the rational basis standard is what *should* be applied by the courts because the Supreme Court does not always get the questions before it correct.<sup>114</sup> Prisoners need the courts to apply a more meaningful review than traditional rational basis review. Therefore, even if the Court was setting forth a traditional rational basis test within *Turner*, which I do not believe it was, then courts should reject that test and apply a slightly more meaningful review when prisoners’ rights are at issue.

A. *The Inescapable Problem of Deference*

Even though *Turner* and its progenies, including *Bell v. Wolfish*, deal with protecting prisoners’ First Amendment rights, the Court frequently promoted deference towards prison administrators within these cases.<sup>115</sup> When the Court dealt with prisoners’ First Amendment rights in *Bell v. Wolfish*, the Court justified giving deference to prison administrators on the ground that “the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions.”<sup>116</sup> There are additional rationales for the Court to give prison administrators deference. First, “courts are ill equipped to deal

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113. See KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 602 (18th ed. 2013).

114. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216–18 (1944); *Dred Scott v. Sandford*, 60 U.S. 393, 393–94 (1857).

115. See 441 U.S. 520, 547–48 (1979); *Turner*, 482 U.S. at 85–87, 89–91; see also Clay Calvert & Justin B. Hayes, *To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13, 44 (2012) (“[T]he *Turner* test ‘emphasizes deference to prison officials and the relative technical and administrative expertise of corrections authorities.’”) (quoting Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 341 (2009)).

116. *Bell*, 441 U.S. at 547. The reasoning behind the Court’s decision to provide deference to prison administrators largely mirrors the reasoning behind the Court’s choice to endorse a rational basis review in cases of this nature. See *supra* Section II.A.

with the increasingly urgent problems of prison administration and reform.”<sup>117</sup> Second, prison administrators’ responsibilities, including “maintaining order, securing the prisons against escape, and rehabilitating prisoners, require expertise and complex planning.”<sup>118</sup> And third, the responsibility of running and organizing prisons is markedly “within the province of the legislative and executive branches of government,” not the judiciary.<sup>119</sup> While the aforementioned reasons behind allowing prison administrators a degree of regulatory deference may make sense, the degree of deference allowed remains far too great.

The Court instructed the judiciary to “accord[ ] wide-ranging deference” to prison administrators when the prison administrators maintain that they adopted and executed the policies and practices in question because, in their judgment, the policies and practices “are needed to preserve internal order and discipline and to maintain institutional security.”<sup>120</sup> While the Court claimed that it sought to balance the constitutional rights of inmates with legitimate penological government objectives, the level of deference afforded to prison administrators causes the purported balancing test in *Turner* to be heavily slanted against prisoners.<sup>121</sup> Today, the lower courts’ application of *Turner* has continued to accord prison officials a high level of deference.<sup>122</sup>

Recently, the level of deference afforded to prison administrators has bordered on the edge of absurdity. For example, in *Beard v. Banks*, the Court considered a prison administrator’s motion for summary judgment on a prisoner’s claim that the application of a prison policy violated the prisoner’s

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117. *Turner*, 482 U.S. at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974)).

118. Peter R. Shults, Note, *Calling the Supreme Court: Prisoners’ Constitutional Right to Telephone Use*, 92 B.U. L. REV. 369, 373 (2012).

119. *Turner*, 482 U.S. at 84–85.

120. *Bell*, 441 U.S. at 547 (collecting cases).

121. See Burns, *supra* note 97, at 1225–28.

122. See, e.g., *Beard v. Banks*, 548 U.S. 521, 521, 524–25 (2006); Kaufman v. Schneiter, 474 F. Supp. 2d 1014, 1023 (W.D. Wis. 2007) (noting the “highly deferential” approach courts have taken toward evaluating prison regulations when following *Turner*); *Self v. Horel*, No. C 07-5347 MMC (PR), 2008 WL 5048392, at \*1, \*3 (N.D. Cal. Nov. 24, 2008) (applying the *Turner* test and concluding that a prison regulation that banned all material with frontal nudity, including an educational book on how to draw, did not violate prisoners’ First Amendment rights).

First Amendment Rights.<sup>123</sup> The Court declared: “[A]t this stage we must draw ‘all justifiable inferences’ in [the prisoner’s] ‘favor.’ In doing so, however, we must distinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, our inferences must accord deference to the views of prison authorities.”<sup>124</sup>

The distinction above twists the summary judgment standard, which traditionally draws *all reasonable inferences* in favor of the nonmoving party rather than distinguishing “disputed matters of professional judgment” as a separate consideration.<sup>125</sup> If other courts give similar breadths of deference to prison administrators at this stage of the litigation, it will be very difficult for a prisoner’s challenge to survive a summary judgment motion. The level of deference that courts afford to the prison administrators is often outcome-determinative; as a result, a motion for summary judgment is an extremely effective pre-trial strategy for administrators.<sup>126</sup> For instance, if a prison administrator asserts that a policy, regulation, or particular ban is necessary for security, rehabilitation, or another penological interest, then, regardless of the truth or extremity of that interest, the courts defer to the administrator’s judgment. Thus, the courts are inclined to defer to the prison administrator’s judgment regardless of whether a prisoner claims that a policy is in violation of the prisoner’s rights, or that the regulated material is appropriate.

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123. 548 U.S. at 524–25.

124. *Id.* at 529–30 (citations omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

125. *See* *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 841 (1st Cir. 1993) (acknowledging that the summary judgment standard requires a court to “review the record in the light most favorable to the nonmoving party, and to draw all reasonable inferences in the nonmoving party’s favor”). In *Beard*, the prisoner was the non-moving party, but he was not given the benefit of all reasonable assumptions. *See* 548 U.S. at 521. Instead, the government was given the benefit of inferences in its favor because of the level of deference afforded to the prison administrators. *See id.* at 525, 528, 530. Summary judgment is only appropriate when there is not an issue of material fact. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting *FED. R. CIV. P.* 56(c)). Typically, the prisoners’ contentions would create an issue of material fact; however, the deference afforded to the administrators overrides the prisoner’s argument. This deprives the prisoner of his right to trial because the deference afforded prevents him from getting past the summary judgment stage.

126. *See* *Calvert & Hayes*, *supra* note 115, at 53.

*Beard* provides a more specific example of the above phenomena. There, the Pennsylvania Department of Corrections deprived all inmates initially, and certain inmates continuously, of the right to access photographs and secular magazines or newspapers.<sup>127</sup> The deputy superintendent of the prison claimed that this regulation encouraged inmates to engage in positive behavior.<sup>128</sup> The Court accepted this contention as rational while relying on only the deposition testimony of the deputy superintendent.<sup>129</sup> The Court stated “that the regulations do, in fact, serve the function identified.”<sup>130</sup> Thus, the Court held that even at the summary judgment stage, there was no dispute as to whether the regulation was rationally related to the penological goal of rehabilitation—despite the fact that statistics and the prisoner refuted the deputy superintendent’s contention.<sup>131</sup> Ordinarily, the prisoner’s contention and the statistics would have created a genuine issue of material fact and precluded summary judgment, but the deference afforded to the prison administrator’s contention ended the case at the summary judgment stage of litigation.<sup>132</sup>

The current state of jurisprudence makes it quite difficult for prisoners to successfully challenge a law or policy as violating their constitutional rights because the judiciary affords high deference to the prison administrators.<sup>133</sup> In Justice Stevens’s opinion in *Turner*, concurring in part and dissenting in part, he warned that this would happen, declaring that the majority’s standard was “virtually meaningless” and would “permit disregard for inmates’ constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection

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127. *Beard*, 548 U.S. at 525–27.

128. *Id.* at 530.

129. *Id.* at 529–30.

130. *Id.* at 531.

131. *Id.* at 530, 534–35.

132. *See id.* at 525, 532–35.

133. *See, e.g., id.* at 529–30; *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir. 1993); *Self v. Horel*, No. C 07-5347 MMC (PR), 2008 WL 5048392, at \*5 (N.D. Cal. Nov. 24, 2008); *Kaufman v. Schneiter*, 474 F. Supp. 2d 1014, 1023 (W.D. Wis. 2007); *Snow v. Woodford*, 26 Cal. Rptr. 3d 862, 869 (Cal. Ct. App. 2005).

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between that concern and the challenged regulation.”<sup>134</sup> Therefore, the level of deference afforded to prison administrators has made the rational basis review that courts afford to a prisoner’s challenges even weaker than traditional rational basis review.

III. WHY COURTS SHOULD REVIEW PRISONERS’ CLAIMS THAT REGULATIONS ARE VIOLATING THEIR RIGHT TO READ WITH HEIGHTENED SCRUTINY

There is a large variety of information that is withheld from prisoners. When prisoners challenge the regulations and policies that endorse censorship, prisoners need the courts to actually listen to their claims with an open mind. It is inappropriate to give government policies and regulations such a high level of deference. As discussed below, prisoners are politically weak and vulnerable; there is excessive anti-inmate animosity in America; they have a history of unequal treatment; and they are currently segregated from the rest of society. From a Due Process perspective, the above regulations require heightened scrutiny because prisoners’ reading rights are fundamental. When fundamental rights are threatened the court applies strict scrutiny.<sup>135</sup> It follows that prisoners should be entitled to, at the very least, a meaningful form of rational basis review when their fundamental rights are threatened.

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134. 482 U.S. 78, 100–01 (1987) (Stevens, J., concurring in part and dissenting in part). The standard of review applied here ignores facts that lead the fact finder to hold that the violation at issue did violate prisoner’s rights. As Stevens’ opinion stated:

Because the record contradicts the conclusion that the administrative burden of screening all inmate-to-inmate mail would be unbearable, an outright ban is intolerable. The blanket prohibition enforced at [the institution] is not only an “excessive security concern; it is inconsistent with a consensus of expert opinion—including Kansas correctional authorities—that is far more reliable than the speculation to which this Court accords deference.

*Id.* at 112.

135. *See, e.g.,* *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (acknowledging the need for a strict scrutiny review of regulations that might curtail the civil rights of a single group).

A. *Equal Protection*

Courts review challenged laws and policies to determine if groups or classes are being unequally treated for an impermissible reason.<sup>136</sup> A “class” is “a group of people, things, qualities, or activities that have common characteristics or attributes.”<sup>137</sup> The court reviews the challenged regulation more closely if the regulation affects certain classes than if it affects others. For instance, a regulation that makes distinctions based on race is examined more closely than a regulation that makes distinctions based on economic classifications; this is because classes based on race are suspect classes.<sup>138</sup> Courts consider certain factors in order to determine whether a class qualifies as a suspect class, a semi-suspect class, or neither:<sup>139</sup> history of purposeful unequal treatment,<sup>140</sup> political powerlessness,<sup>141</sup> immutability, origin of distinguishing characteristics,<sup>142</sup> relevance of characteristic to state objectives, and discreteness and coherence of the group.<sup>143</sup> If a law or policy infringes on a suspect class’s constitutional right, the courts uses strict scrutiny to determine if the infringement is

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136. See SULLIVAN & FELDMAN, *supra* note 113, at 601–02.

137. BLACK’S LAW DICTIONARY 119 (4th ed. Supp. 2011).

138. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 487, 494 (1954); see also SULLIVAN & FELDMAN, *supra* note 113, at 602.

139. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 429–30 (Conn. 2008) (“[C]ourts generally have applied the same criteria to determine whether a classification is suspect, quasi-suspect or neither. Just as there is no uniformly applied formula for determining whether a group is entitled to heightened protection under the constitution, there also is no clear test for determining whether a group that deserves such protection is entitled to designation as a suspect class or as a quasi-suspect class.” (citations omitted) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–42 (1985); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976))).

140. See, e.g., *Murgia*, 427 U.S. at 313.

141. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

142. See, e.g., Miriam J. Aukerman, *The Somewhat Suspect Class: Towards A Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J. L. SOC’Y 18, 59–60 (2005). Yet, “[f]aultlessness is . . . not necessary for suspect class status. For example, non-citizens, at least to the extent that they entered the United States as adults, can be understood as being accountable for their status[.] . . . Yet, legal aliens are protected under strict scrutiny, even though they chose their status.” *Id.* at 60; see also *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

143. See, e.g., Aukerman, *supra* note 142, at 51.

constitutionally permissible.<sup>144</sup> When the courts subject a regulation or policy to strict scrutiny the government must show that its policy is necessary to achieve a compelling state interest.<sup>145</sup> If this is proved, the state must then demonstrate that the legislation is narrowly tailored to achieve the intended result.<sup>146</sup> Courts use intermediate scrutiny if a law or policy infringes on the rights of a quasi-suspect class.<sup>147</sup> When the courts subject a regulation or policy to intermediate scrutiny, the government must show that the challenged law advances an important government interest by means that are “substantially related” to that interest.<sup>148</sup> For regulations that do not involve a classification, courts apply a “minimal rational review to determine whether there the regulation bears a rational relationship to a legitimate government interest.”<sup>149</sup>

Prisoners have many of the indicia of being a suspect class or quasi-suspect class.<sup>150</sup> Prisoners have a history of being intentionally treated harshly by those in control of their environment; prisoners are politically weak if not powerless; and prisoners are an insular and discrete class—I discuss each in more detail below.<sup>151</sup> Courts have held that prisoners are not a suspect class or semi-suspect class, and thus, are not entitled to intermediate or strict scrutiny if a law or policy affects their rights.<sup>152</sup> The courts are reluctant to award a heightened review

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144. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634 (1996); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Kerrigan*, 957 A.2d at 422.

145. See, e.g., *Romer*, 517 U.S. at 635; *Kerrigan*, 957 A.2d at 414, 422.

146. See, e.g., *Romer*, 517 U.S. at 625–26; *Kerrigan*, 957 A.2d at 414.

147. See, e.g., *Heller v. Doe*, 509 U.S. 312, 319–20 (1993); *Craig v. Boren*, 429 U.S. 190 (1976).

148. See, e.g., *Kerrigan*, 957 A.2d at 423 (quoting *Ramos v. Vernon*, 353 F.3d 171, 175 (2d Cir. 2003)).

149. SULLIVAN & FELDMAN, *supra* note 113, at 602.

150. See Jason E. Pepe, *Challenging Congress’s Latest Attempt to Confine Prisoners’ Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 *HAMLIN L. REV.* 58, 79 (1999).

151. See *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Steven, J., dissenting) (“Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared . . . [and] shut away from public view, prisoners are surely a ‘discrete and insular minority’” (footnote omitted) (quoting *Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984))); James E. Robertson, *The Jurisprudence of the PLRA: Inmates As “Outsiders” and the Countermajoritarian Difficulty*, 92 *J. CRIM. L. & CRIMINOLOGY* 187, 204 (2001).

152. See, e.g., *Phillips v. Monroe Cty.*, 311 F.3d 369, 376 n.2 (5th Cir.

to prisoners because they are responsible for being members of their class.<sup>153</sup> However, prisoners share many traits with groups that the Courts has classified as suspect or quasi-suspect classes. The similarities between prisoners and classes that the Court has deemed suspect or quasi-suspect classes demonstrate that prisoners are in a weak position within our society.

1. *The Early Rise of Animus Towards Inmates in Judicial Review*

Viewing the social, political, and cultural history of prisoners in the United States demonstrates that prisoners' rights warrant a stricter judicial review than the current highly deferential, rational basis review that is being afforded to prisoners' challenges.<sup>154</sup> In America, prisons were initially institutionalized in the 1800s.<sup>155</sup> The first two American prisons were Cherry Hill, which was a solitary confinement institution where the prisoners neither saw nor spoke to one another, and Auburn, which was a New York state institution where prisoners were forced to walk in lockstep, perform hard labor, and remain in constant silence.<sup>156</sup> A warden at the Auburn institution believed it was actually his duty to break the spirit of the prisoners; he "encouraged his guards to treat the inmates with contempt and flogged the insane and epileptic as well as the recalcitrant."<sup>157</sup> The traditional view was that prisoners had no rights because prisoners forfeited their

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2002); *Nicholas v. Tucker*, 114 F.3d 17, 21 (2d Cir. 1997); *Myers v. Lewis*, No. 93-16373, 1994 WL 83278, at \*1 (9th Cir. Mar. 10, 1994); *White v. Wexford Health Sources, Inc.*, No. 2:09-CV-00161-GHD-JMV, 2012 WL 3000645, at \*4 (N.D. Miss. July 23, 2012); *Hernandez v. Dretke*, No. Civ.A. 104CV186C, 2005 WL 170722, at \*4-5 (N.D. Tex. Jan. 24, 2005).

153. See Walker Newell, *An Irrational Oversight: Applying the PLRA's Fee Restrictions to Collateral Prisoner Litigation*, 15 CUNY L. REV. 53, 71 (2011).

154. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472-73 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

155. See *Miness*, *supra* note 82, at 1704 (citing Alvin J. Bronstein, *Offender Rights Litigation: Historical and Future Developments*, in 2 PRISONERS' RIGHTS SOURCEBOOK 5, 5 (Ira P. Robbins ed., 1980)).

156. See Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J.L. & PUB. POL'Y 413, 418-19 (1984).

157. *Id.* at 419 (quoting JOHN BARTLOW MARTIN, *BREAK DOWN THE WALLS* 115 (1954)).

rights as a punishment for committing and being convicted of a crime.<sup>158</sup> Nineteenth-century courts openly supported this notion because courts are a product of their contemporary society, in that judges are citizens too.<sup>159</sup> In a published decision during this time, one court stated that a convict, while imprisoned, “has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.”<sup>160</sup> At this time, the courts followed the view that the legislature, executive, and prison officials were responsible for drafting and implementing the laws that would dictate the condition in which inmates would live; the courts followed this view to such an extent that they kept their hands off prisoners’ rights.<sup>161</sup>

Eventually, courts accepted that prisoners had rights, but they followed what is called the “hands-off” doctrine towards prisoners.<sup>162</sup> Just as the name implies, the “hands-off” doctrine meant that the judiciary did not interfere with internal operations of prisons; under the “hands-off” doctrine the courts were without power to supervise prison administration or interfere with ordinary prison rules and regulations.<sup>163</sup> Essentially, the “hands-off” doctrine prevented the judiciary from protecting prisoners’ rights.<sup>164</sup> This doctrine existed because the courts “assumed they had no power to supervise prison administration or interfere with prison rules or regulations, even in the face of a possible constitutional violation.”<sup>165</sup> Inmates imprisoned during the epoch

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158. See *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871); *Miness*, *supra* note 82, at 1704.

159. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 425 (1857) (holding that a slave brought to a free state would remain a slave because, as an African American, he was not a citizen, and, thus, he did not have standing to sue); *Ruffin*, 62 Va. (21 Gratt.) at 796 (holding that the Court had thus endorsed slavery and a version of concentration camps at a time when society had deemed those things acceptable because, unfortunately, the animus of society occasionally invades the courts); see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding it constitutional to intern Japanese Americans during World War II).

160. *Ruffin*, 62 Va. (21 Gratt.) at 796.

161. See *id.*; see also *Miness*, *supra* note 82, at 1704–05.

162. See *Miness*, *supra* note 82, at 1705.

163. See, e.g., *Davis v. Finney*, 902 P.2d 498, 501 (Kan. Ct. App. 1995).

164. See, e.g., *Ramos v. Lamm*, 485 F. Supp. 122, 130 (D. Colo. 1979); *Clements v. Turner*, 364 F. Supp. 270, 276 (D. Utah 1973).

165. Cheryl Dunn Giles, Note, *Turner v. Safley and Its Progeny: A*

of the “hands-off doctrine experienced a host of inhumane acts, including racial segregation[,] poor medical care[,] inmate-on-inmate assault[,] staff brutality and indifference[,] and squalor.”<sup>166</sup> Coinciding with the civil rights movement of the 1960s, as well as numerous prison riots around the country protesting the terrible conditions inside prisons, courts began to reject the hands-off doctrine.<sup>167</sup> Although courts were willing to hear prisoners’ challenges that regulations and policies violated their constitutional rights, as one scholar documented, “remnants of the ‘hands-off’ doctrine [remained throughout] the area of prisoner [rights] litigation.”<sup>168</sup>

While the “hands-off” doctrine has eroded, courts remain reluctant to involve themselves in the problems that arise in prison administration.<sup>169</sup> The deference afforded to prison administrators today is a remnant of the “hands-off” doctrine.<sup>170</sup> The United States Supreme Court has repeatedly asserted that this deference is owed to the prison administrators,<sup>171</sup> and thus, has led other courts to follow its precedent and furnish prison administrators with deference as well.<sup>172</sup> Prison administrators and the legislature are primarily entrusted with the task of running prisons and setting policies.<sup>173</sup> The judiciary has not sought to step in and take an active role in the running of prisons.<sup>174</sup> Yet, in actuality, the shocking, dangerous, and

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*Gradual Retreat to the “Hands-Off” Doctrine?*, 35 ARIZ. L. REV. 219, 220 (1993).

166. Robertson, *supra* note 41, at 100 (footnotes omitted).

167. See Giles, *supra* note 165, at 222 (citing *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (“[T]he Court [has] recognized that inmates retain certain constitutional rights and privileges and may seek redress in court for their unlawful deprivation.”); Miness, *supra* note 82, at 1705–06 (citing BRANHAM & KRANTZ, SENTENCING, CORRECTIONS, AND PRISONERS’ RIGHTS IN A NUTSHELL 129–30 (4th ed. 1994)).

168. Miness, *supra* note 82, at 1707 (citing BRANHAM & KRANTZ, SENTENCING, CORRECTIONS, AND PRISONERS’ RIGHTS IN A NUTSHELL 132 (4th ed. 1994)).

169. See, e.g., *Clements v. Turner*, 364 F. Supp. 270, 277 (D. Utah 1973).

170. See *id.*

171. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989); *Turner v. Safley*, 482 U.S. 78, 85 (1987).

172. See, e.g., *Lawson v. Singletary*, 85 F.3d 502, 509–10 (11th Cir. 1996); *Corby v. Conboy*, 457 F.2d 251, 254 (2d Cir. 1972).

173. See *Rhodes v. Chapman*, 452 U.S. 337, 349, 354 (1981).

174. See *id.*

merciless conditions in prisons that frequently violate the prisoners' rights have been forced upon judicial notice by prison riots brought about by inmates fighting for their rights and the occasional public interest story, discussing the conditions prisoners live under.<sup>175</sup> By allowing too much deference—a remnant of the “hands-off” doctrine—to affect decisions on inmates' constitutional challenges, the courts are enabling any anti-inmate animus to form the basis of regulations that threaten prisoner rights.

## 2. *Animus Towards and Political Weakness of Prisoners*

In a strong dissenting opinion in *Hudson v. Palmer*, Justice Stevens expressed that “[p]risoners are truly the outcasts of society. Disenfranchised, scorned and feared[,] . . . [they are] shut away from public view, prisoners are surely a ‘discrete and insular minority.’”<sup>176</sup> The institutionalization of prisons brought with it the “practice of ‘civil death,’” which consisted of penalizing convicted offenders with a set of criminal penalties that included, among other things, the revocation of voting rights.<sup>177</sup> This practice of a “civil death” still exists today for the vast majority of prisoners. Currently, only two states allow imprisoned felons to vote.<sup>178</sup> All of the other states prevent felons who are currently serving a sentence from voting.<sup>179</sup> As of 2014, 5.85 million Americans were prohibited from voting because they had been convicted of a felony.<sup>180</sup> Some states restrict voting rights of a

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175. *See id.* at 354 (citing *Inmates of Suffolk Cty. Jail v. Eisenstadt*, 360 F. Supp. 676, 684 (Mass. 1973)).

176. *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting) (quoting *Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984)) (advocating a more thorough judicial review of prisoners claims, asserting that the presumption that all conduct by prison guards is reasonable is unsupported).

177. *See* JEAN CHUNG, SENT'G PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 2 (2013), [http://www.sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

178. *See id.* at 1 (noting that Maine and Vermont do not restrict prisoners' voting rights even if they have a felony conviction).

179. *See id.* at 1 tbl. 1 (providing a chart dictating how long felons are prevented from voting in each state).

180. *Id.* at 1 & tbl. 1 (noting that the 5.85 million disenfranchised felons include both those currently incarcerated for committing felonies and citizens that had been convicted of felonies and released but had permanently lost their right to vote).

convicted felon even after he or she has served his or her sentence and is no longer on probation or parole.<sup>181</sup> Thus, many imprisoned felons, and many free people who have experienced prison life, are currently disenfranchised. This disfranchisement greatly weakens the political power and voice of prisoners.<sup>182</sup> Prisoners get little to no protection from the political processes; they lack an organized or even a largely enfranchised constituency.<sup>183</sup> Prisoners must rely on federal courts for protection of their constitutional rights, as the judiciary is the only branch of the federal government that is not elected.<sup>184</sup>

In America, prisoners are one of the only groups that are still acceptable, perhaps even politically correct, to hate.<sup>185</sup> Politicians, who are often responsible for making and implementing the conditions in prisons, compete to be the toughest on crime. Moreover, politicians repeatedly advocate laws that restrict prisoners' rights.<sup>186</sup> Prisoners face—and have historically faced—extreme negative animus in the community as well.<sup>187</sup> For example, citizens frequently fight against allowing halfway houses or rehabilitation facilities in their neighborhoods.<sup>188</sup> Citizens claim that they do not want a *criminal element* near communities comprised of free citizens, even though these institutions can greatly help prisoners.<sup>189</sup> Clearly, the mindset that prisoners “deserve what they get” by virtue of committing the crime they were convicted of is not gone from modern society.

When a group is politically insular and/or powerless, courts should look closely at whether the government interest that the

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181. *See id.* at 1 tbl. 1.

182. *See id.* at 5.

183. *See* Robertson, *supra* note 151, at 203–04.

184. *See id.*

185. *See* Aukerman, *supra* note 142, at 18–19.

186. *See id.*

187. *See, e.g.,* Hudson v. Palmer, 468 U.S. 517, 557 (1984) (Stevens, J., concurring in part and dissenting in part); *see also* CHRISTOPHER SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 288 (1993) (“Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials.”); Robertson, *supra* note 151, at 203.

188. *See, e.g.,* Cmty. Res. for Justice, Inc. v. City of Manchester, 949 A.2d 681, 684 (N.H. 2008).

189. *See id.*

policymakers use to justify the regulation is in fact rationally related to the regulation. Heightened rational basis review is particularly important because an insular group is not in the majority and may not be integrated into society. This factor has helped lead courts to categorize a particular group as suspect and apply strict scrutiny.<sup>190</sup> Prisoners are particularly insular as they are physically separated from the rest of society by the bars on their cells. Thus, they deserve a close review into whether the government interests are, in fact, reasonable.

Prisoners have many characteristics consistent with suspect classes and quasi-suspect classes. Yet, courts do not acknowledge prisoners as a suspect or quasi-suspect class. I do not argue that prisoners' challenges should be given intermediate or strict scrutiny, as the Court has refused to grant prisoners this level of review. The fact that the Court does not consider prisoners to be a suspect or quasi-suspect class does not negate all of the characteristics that prisoners share with suspect and quasi-suspect classes. The fact that prisoners share so many characteristics with these vulnerable classes points to the need to afford prisoners the most stringent strand of rational basis review available to courts.

## B. *Fundamental Rights*

### 1. *Prisoners Retain Rights*

As the Court stated in *Turner*, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."<sup>191</sup> Further, the Court has also stated that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system."<sup>192</sup> Prisoners retain the basic civil right to read and stay informed with national events. Prisons throughout the country recognize this right.<sup>193</sup> The Federal Bureau of Prisons expressly recognizes the right to read and stay informed by ensuring via regulation that each

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190. See *Moreno*, 413 U.S. at 533–35. But see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

191. 482 U.S. 78, 84 (1986).

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

193. See *Burns*, *supra* note 97, at 1266 n.254.

prison provides a library service stocked with a wide variety of reading materials to which inmates regularly have access.<sup>194</sup>

## 2. *The Right to Read is A Fundamental Right*

The free segments of the population possess a right to read.<sup>195</sup> 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 of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>196</sup> Nevertheless, it is understood that the First Amendment grants rights that are not specifically enumerated in the words of the First Amendment.<sup>197</sup> “[T]he Supreme Court has ruled that specific guarantees in the Bill of Rights have penumbras, containing implied rights.”<sup>198</sup> While the rights implied from the penumbra of the Bill of Rights are not expressly in the Constitution, or within the First Amendment, they are necessary to give full meaning, life, and substance to the express guarantees of the Amendments.<sup>199</sup> One of these implied rights is the right to read.<sup>200</sup>

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194. See 28 C.F.R. § 544.100 (2014).

195. See Stanley Wu, Note, *Persona Non Grata in the Courts: The Disappearance of Prisoners' First Amendment Constitutional Rights in Beard v. Banks*, 28 WHITTIER L. REV. 981, 981, 989 (2007).

196. U.S. CONST. amend. I.

197. See, e.g., Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866–67 (1982); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

198. BLACK'S LAW DICTIONARY 564 (4th ed. Supp. 2011) (defining a “penumbra” as “[a] surrounding area or periphery of uncertain extent”). The clauses of the First Amendment are among the specific guarantees of the Bill of Rights that have a penumbra. See *Griswold*, 381 U.S. at 482–84.

199. See *Griswold*, 381 U.S. at 482–84.

200. See *id.* at 482 (citing *Martin*, 319 U.S. at 143). Freedom of speech and the penumbra of rights it encompasses are among the fundamental rights protected by the Fourteenth Amendment from infringement or constitutional abridgment by the states. See *id.* at 488, 499 (Goldberg, J., concurring); see also *Schneider v. New State*, 308 U.S. 147, 150–51 (1939) (“This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men.”) (footnote omitted); *Smith v. Wash. State Dep't of Corr.*, No. C13-5138 RBL-JRC, 2014 WL 813703, at \*3 (W.D. Wash. Mar. 3,

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The Supreme Court has long recognized that the First Amendment includes the right to read.<sup>201</sup> In *Martin v. City of Struthers*, the Court stated:

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom [,] which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.<sup>202</sup>

In addition, in *Griswold v. Connecticut*, the Court acknowledged that:

[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] *the right to read*.<sup>203</sup>

What would be the point of being able to talk or write freely if no one could hear what you said or read what you wrote?<sup>204</sup> In my opinion, such a restriction would turn our fundamental First Amendment freedoms into empty rights.

More directly to the issue, in *Stanley v. Georgia*, the Court held that a state could not criminalize the private possession of obscene material by a consenting adult because every person has a vested interest in being able to read and receive information and ideas freely.<sup>205</sup> The Court stated that “[i]f the First Amendment

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2014) (“Prison inmates have a First Amendment right to send and receive mail. This right applies to the states through the Fourteenth Amendment.”) (citations omitted).

201. See, e.g., *Griswold*, 381 U.S. at 482; *Martin*, 319 U.S. at 143.

202. 319 U.S. at 143 (footnote omitted) (citation omitted).

203. 381 U.S. at 482 (emphasis added) (citing *Martin*, 319 U.S. at 143).

204. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“It would be a barren marketplace of ideas that had only sellers and no buyers.”).

205. 394 U.S. 557, 568 (1969). Later cases have held that the mere possession of child pornography is an exception to this rule because “the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia Law at issue in *Stanley*.” *Osborne v. Ohio*, 495 U.S. 103, 108 (1990).

means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”<sup>206</sup> The reasoning of *Stanley* is trumpeted in Justice Marshall’s dissent to a prisoners’ rights case where he explained, the fact “[t]hat individuals have a fundamental First Amendment right to receive information and ideas is beyond dispute.”<sup>207</sup> The Court has long recognized that the right to read and receive information and ideas, regardless of their social worth, is fundamental to the free American society:<sup>208</sup> “Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved.”<sup>209</sup>

Typically, the courts review any regulation or policy that threatens a fundamental right with strict scrutiny.<sup>210</sup> As Justice Brennan said in his concurrence in *Lamont v. Postmaster General of the United States*: “In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose.”<sup>211</sup> When a prisoner claims his fundamental rights have been violated, the courts subject the claim to the *Turner* test, and refuse to review the claim with heightened scrutiny.<sup>212</sup> However, similar restrictions on a free citizen’s fundamental right to read would trigger heightened scrutiny.<sup>213</sup> While the Court acknowledges, to some

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206. *Stanley*, 394 U.S. at 565.

207. *Bell v. Wolfish*, 441 U.S. 520, 572–73 (1979) (Marshall, J., dissenting).

208. *See, e.g., Stanley*, 394 U.S. at 568; *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring).

209. *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943).

210. *See, e.g., Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006) (“Heightened scrutiny . . . is appropriate when government action interferes with a person’s fundamental rights, such as freedom of speech or religion.”); Ulrika Ekman Ault, Note, *The FBI’s Library Awareness Program: Is Big Brother Reading Over Your Shoulder?*, 65 N.Y.U. L. REV. 1532, 1539 (1990).

211. 381 U.S. 301, 310 (1965) (Brennan, J., concurring).

212. *Turner v. Safley*, 482 U.S. 78, 87–91 (1987); *see also* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G REP. 245, 254 (2012) (“In the prisoners’ rights context, there is an obvious tension between the *Turner* test, which if not identical to rational basis review is certainly a species of it, and the fact that in many cases, it is prisoners’ fundamental rights—ordinarily afforded heightened scrutiny—that are at issue.”).

213. *See* Pepe, *supra* note 150, at 72 (“With respect to burdens of

extent, that the Government has the duty to confine itself to the least intrusive regulations when First Amendment rights are threatened within prison walls, the Court still applies rational basis review to determine the constitutionality of the statutes, regulations, or prison policies.<sup>214</sup> As one scholar has argued, the first factor of the *Turner* test, rationality, actually acts as a “leveler of rights by drawing no distinction between [prisoners] ‘weak’ (non-fundamental) and ‘strong’ (fundamental) rights.”<sup>215</sup>

Reading habits correlate with being an active participant in one’s community and foster the free flow of ideas.<sup>216</sup> These benefits are key to democratic functioning and can aid in the penological objective of rehabilitation by keeping a prisoner’s mind engaged.<sup>217</sup> One Federal Communications Commissioner expressed the importance of the free flow of ideas to the core of our democracy: “We have to secure our legacy as Americans—the free flow of ideas and information that was at the very foundation of our country.”<sup>218</sup> Prison officials cite the penological goal of rehabilitation to justify prison censorship.<sup>219</sup> However, reading helps engage prisoners’ minds and fosters a free flow of ideas.<sup>220</sup> Furthermore, reading promotes active engagement in the community.<sup>221</sup> Thus, reading can actually serve rehabilitative ends.<sup>222</sup>

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prisoners’ fundamental rights, the Court has crafted an intermediate standard of review.”); Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 135–36 (1985) (addressing, in part, that the right to self-representation is a fundamental right). Yet, under this supposed intermediate standard, “[g]overnment action that burdens prisoners’ fundamental rights fails . . . unless it is reasonably related to a legitimate penological interest.” Pepe, *supra* note 150, at 72. This standard is eerily similar to rational basis review, especially considering the level of deference given to the government. See Dolovich, *supra* note 212, at 254.

214. See, e.g., *Beard v. Banks*, 548 U.S. 521, 531–32 (2006); *Turner*, 482 U.S. at 87.

215. Robertson, *supra* note 41, at 120.

216. See BANNED BOOKS, *supra* note 19, at 5–6.

217. See *id.*

218. Jonathan S. Adelstein, Comm’r, Fed. Commc’ns Comm’n, Remarks at the National Conference for Media Reform, Minneapolis, Minnesota 3 (June 8, 2008).

219. See Burns, *supra* note 97, at 1256–58 & n.206.

220. See BANNED BOOKS, *supra* note 19, at 5–6.

221. See *id.* at 5.

222. See *Clark v. California*, 739 F. Supp. 2d 1168, 1179 & n.2 (N.D. Cal. 2010).

Since the right to read is a fundamental right, the courts should strictly comply with the *Turner* test to ensure that prisoners' fundamental rights are not being arbitrarily violated. The *Turner* test stands for rational basis review, but there is nothing preventing the courts from looking deeper into the *Turner* factors to ensure that the regulations and decisions are actually reasonable. The courts ought to analyze each factor much more closely; it is absurd that they do not, as an enhanced rational basis review is what the test calls for on its face.

#### IV. RATIONAL BASIS WITH A BITE

The current application of the *Turner* test does not work. Prisoners' challenges are not adequately reviewed. Prisoners need extra protection because reading rights are fundamental rights, and prisoners are a class with many characteristics that define suspect and/or quasi-suspect classes. The Court refuses to review prisoners' First Amendment rights challenges with intermediate or strict scrutiny. Accordingly, I suggest that an enhanced rational basis review be applied to prisoners' First Amendment rights challenges.

Three levels of scrutiny purportedly exist, including rational basis review, intermediate scrutiny, and strict scrutiny.<sup>223</sup> In some cases, the Court seems to add teeth to its rational basis review, causing it to become a meaningful hurdle to overcome.<sup>224</sup> The Court has applied this heightened rational basis review, "rational basis with a bite," when considering laws that disadvantage certain classes of people.<sup>225</sup> While the Court has

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223. See *Calvert & Hayes*, *supra* note 115, at 13, 21–22; Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 743 (2014) (arguing that the level of scrutiny courts apply can often be outcome determinative). Under rational basis review, the courts will uphold the law at issue only if it is rationally related to a legitimate government purpose. See Pollvogt, *supra* note 223, at 743. When using intermediate scrutiny, the courts will uphold the law at issue only if it is substantially related to an important government interest. See *id.* at 744. When the court is using strict scrutiny, it will uphold the law at issue only if it was enacted for a compelling government interest, is narrowly tailored, and the least restrictive means to achieve the compelling interest. See *id.*

224. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533–34 (1973).

225. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–

never expressly acknowledged such a standard of review, “rational basis with a bite” occurs when the Court, purportedly using traditional rational basis review, searches for an actual, rational connection between a regulation, statute, or policy and a legitimate governmental interest.<sup>226</sup> Despite the fact that “rational basis with a bite” exists, prisoners’ fundamental rights claims are currently subjected to one of the least effectual and most deferential forms of rational basis review.<sup>227</sup>

#### A. *Traditional Rational Basis Review*

Courts are more deferential to the government’s purported objectives under rational basis review than under strict scrutiny review.<sup>228</sup> The traditional rational basis review utilized today is very similar to the standard set forth by the Court in 1911.<sup>229</sup> Under rational basis review, the court will uphold the law at issue only if it is rationally related to a legitimate government purpose.<sup>230</sup> “When [a] classification . . . is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.”<sup>231</sup> Clearly, the conventional wisdom is, when using this form of rational basis review, virtually any regulation will be deemed rational.<sup>232</sup>

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47 (1985) (the class of people with intellectual disabilities); *Moreno*, 413 U.S. at 533–35 (the “hippie” class). Rational basis with a bite review is unnecessary when a law threatens a class that the Court has expressly recognized as either a quasi-suspect or suspect class, because those classes are entitled to intermediate scrutiny and strict scrutiny, respectively. See Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 793 (1987) (arguing that rational basis with a bite review is merely the Court’s use of the intermediate scrutiny standard, despite declining to recognize a class as quasi-suspect).

226. See, e.g., *Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 634–35; *Moreno*, 413 U.S. at 533–34.

227. See *Beard v. Banks*, 548 U.S. 521, 531–32 (2006); *Turner v. Safley*, 482 U.S. 78, 87 (1987); see also *Calvert & Hayes*, *supra* note 115, at 44.

228. See SULLIVAN & FELDMAN, *supra* note 113, at 602.

229. See *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

230. See *Pollvogt*, *supra* note 223, at 743.

231. *Lindsley*, 220 U.S. at 78.

232. See Aukerman, *supra* note 142, at 3; Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 262 (1996) (“[W]e all teach our students, the Court never invalidates statutes unless it applies something more than ‘real’ minimal scrutiny.”) (footnote omitted).

Historically, the Court has stated, “[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>233</sup> *Williamson v. Lee Optical Co.* is an early case where the court used rational basis review.<sup>234</sup> In this case, the Court had no proof before it that the regulation at issue served a legitimate government purpose; however, the Court presented hypothetical facts that connected the regulation to a legitimate government purpose.<sup>235</sup> It is easy to see that traditional rational basis review has been construed to be a very weak level of review.<sup>236</sup>

B. *Rational Basis with a Bite Review Jurisprudence*

In *United States Department of Agriculture v. Moreno*, the Court applied “rational basis with a bite” review to invalidate a law that disadvantaged hippies.<sup>237</sup> Despite the fact that the government attempted to justify the disputed regulation by claiming an interest in: (1) “rais[ing] levels of nutrition among low-income households” and (2) “strengthen[ing] our agricultural economy,” the Court found the law irrelevant to these purposes.<sup>238</sup> Thus, the Court found the law could not withstand judicial review, stating that the law as applied was “wholly without any rational

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233. *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

234. *See id.* at 487–91. The Court upheld a regulation that favored one group (opticians) over another group (the sellers of ready to wear doctors). *See id.* While the facts are not significant to this paper, the review the Court gave in that case exemplifies traditional rational basis review.

235. *See id.* at 487, 490–91.

236. *Compare* *Beard v. Banks*, 548 U.S. 521, 522, 530–32 (2006) (stating that the courts must show “substantial deference to the professional judgment of prison administrators” and accepting the administrators’ assertion that deprivation of access to newspapers, magazines, and photographs was reasonably connected to the legitimate penological interest of incentivizing better behavior), *with* *Williamson*, 348 U.S. at 487 (noting that the regulation at issue “may exact a needless, wasteful requirement in many cases,” but then devising hypotheticals to connect the regulation to a legitimate governmental interest and determining it “is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement”).

237. 413 U.S. 528, 529, 534, 543 (1973). The law at issue technically disadvantaged groups of unrelated people who lived together by preventing them from receiving food stamps. *See id.* at 529. However, the law did so in a way that disadvantaged hippies. *See id.* at 534, 537.

238. *Id.* at 533–34.

basis.”<sup>239</sup> The court went on to note that the real reason for the law, which was evident from the legislative history, was to prevent hippies from receiving food stamps.<sup>240</sup> That purpose did not justify the restriction because laws or regulations based on negative animus without some independent, legitimate interests are invalid.<sup>241</sup> Therefore, the Court proclaimed that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>242</sup> This is significant because, inferring from Douglas’s concurrence, one could interpret the Court’s holding to be the result of looking beyond the government’s surface justification for the law and engaged in more in-depth analysis than is typical for rational basis review.<sup>243</sup>

In *Lawrence v. Texas*, the law at issue made it a crime to commit sodomy and, thus, prohibited male homosexual intercourse.<sup>244</sup> Based on Justice O’Connor’s concurrence it is clear that she looked closely at how rarely the law was being enforced.<sup>245</sup> Based on this review of the law, she discerned that the law “serve[d] more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior,” and thus, she and the majority of the Court ruled the law was invalid.<sup>246</sup> In reaching this conclusion, the Court overturned precedent and held that moral disapproval alone cannot be a legitimate government interest that allows for a constitutional infringement.<sup>247</sup> In *Romer v. Evans*, the Court used rational basis review but looked critically at the purported government objectives to see if those objectives were actually being served by

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239. *Id.* at 538.

240. *Id.* at 534, 537–38.

241. *Id.* at 534.

242. *Id.*

243. *Id.* at 543–44.

244. 539 U.S. 558, 562 (2003).

245. *See id.* at 583. (O’Connor, J., concurring).

246. *Id.* at 583.

247. *Id.* at 577–78 (majority opinion); *see id.* at 583 (O’Connor, J., concurring) (“Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’” (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

the amendment at issue.<sup>248</sup> In considering an amendment to Colorado's State Constitution, which prevented protected status based upon homosexuality or bisexuality, the Court ultimately held that the amendment at issue violated the rights of homosexual citizens because the under-and-over-inclusive nature of the amendment revealed that the amendment was based on negative animosity towards homosexuals.<sup>249</sup>

In *City of Cleburne v. Cleburne Living Center Inc.*, the Court again purported to use ordinary rational basis review to determine whether a challenged regulation required a special use permit to operate a home for the mentally disabled.<sup>250</sup> However, the Court questioned whether the government's contention "that other people can live under such 'crowded' conditions when mentally retarded persons cannot" was legitimate.<sup>251</sup> Traditionally, however, under rational basis review, the government does not need to prove that its contentions were true to uphold a questionable statute because as long as the government's views are possible, the court would assume that the version of the facts that would support the government's regulation existed.<sup>252</sup> Yet, while using what I and many others call "rational basis with a bite," the Court closely looked at the threatened class's social, cultural, and political history.<sup>253</sup> Moreover, the Court reviewed the class's current status in society to determine if the regulation was reasonably related to a legitimate government purpose, or alternatively, based on negative animus for the group.<sup>254</sup> Once the Court determined that the mentally disabled were not an

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248. 517 U.S. 620, 626, 631–33, 635 (1996).

249. *Id.* at 621, 632–34; *see also* SULLIVAN & FELDMAN, *supra* note 113, at 751.

250. 473 U.S. 432, 432 (1985). Though the ordinance at issue was not invalid on its face, the Court ultimately held that the regulation was valid; the regulation was invalidly applied in this case because the denial of the special use permit was not rationally related to the government interests that the city presented. *See id.*

251. *Id.* at 450 (quoting *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191, 202 (1984)).

252. *See, e.g.*, *Beard v. Banks*, 548 U.S. 521, 522, 531–32 (2006) (accepting the prison officials' contentions without any supporting proof that the regulation actually served the purpose); *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

253. *Cleburne*, 473 U.S. at 432, 438, 446–48, 450, 453–55.

254. *Id.* at 442–47.

appropriate class for heightened scrutiny, the Court still looked critically at each justification the government put forth to see if the denial of the special use permit was rational.<sup>255</sup> Ultimately, the Court determined that the denial was not rational.<sup>256</sup>

The cases above demonstrate that under a certain line of case law, courts, purportedly acting under rational basis review, gave regulations at issue an enhanced review. The courts reviewed beyond the government's bare assertion of why the regulation at issue was appropriate; the courts did this rather than accepting the lawmakers' justification at face value. The Court did not accept the lawmakers' justifications at face value under "rational basis with a bite," simply because a set of facts can be reasonably conceived to sustain the law or policy at issue; the existence of those facts, at the time the law was enacted, are not presumed.<sup>257</sup> Under rational basis review a court would accept any conceivable justification for a law or statute, but under "rational basis with a bite" as demonstrated above the courts actually look into the credibility of the justification.

C. *Prisoners Reading Rights Are Entitled to "Rational Basis with a Bite"*

Prisoners' reading rights are exactly the type of rights that deserve heightened scrutiny. The courts need to apply a heightened form of rational basis review when considering the constitutionality of restrictions that infringe upon prisoners' fundamental reading rights. Further, regardless of the right at issue, prisoners as a group have many characteristics that are indicative of a suspect or a quasi-suspect class.<sup>258</sup> Therefore, the courts should look closely at restrictions that disadvantage prisoners. Also, *Turner* itself lays out something more than the pure rational basis test, as the *Turner* test sets forth that when reviewing prisoners' claims, courts should look at the rational basis test and three other factors in order to determine if a

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255. *Id.* at 446, 448–50.

256. *Id.* at 448, 450.

257. *See Beard*, 548 U.S. at 522–23 (2006); *see also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973).

258. *See Aukerman*, *supra* note 142, at 51–56 (comparing characteristics of former prisoners and groups classified as suspect).

challenged regulation or policy is reasonable.<sup>259</sup>

The standard derived from *Turner* calls for courts to consider whether “prison regulation[s] that [burden] fundamental rights [are] ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”<sup>260</sup> The current application of the *Turner* test is every bit as toothless as Justice Stevens warned that it would be in his dissent, due at least in part to the extraordinary deference afforded to prison administrators.<sup>261</sup> Though this standard seems to call for a slightly heightened form of review, in practice, the *Turner* test is clearly used as a weak strand of rational basis review.<sup>262</sup>

Prisoners are disenfranchised, politically weak, and unpopular. The policies infringing upon the fundamental reading rights of prisoners are overinclusive as they prevent individuals, without any individualized assessment, from receiving publications. It is my opinion that the publications in *most, if not all*, prisoners’ hands would not compromise institutional security or rehabilitative goals. However, because people must be convicted of a crime in order to become initiated into the class, courts have been unwilling to apply heightened scrutiny.<sup>263</sup> Prisoners have many of the qualities that traditionally encouraged courts to review other classes’ constitutional challenges using the somewhat heightened rational basis with a bite test.<sup>264</sup> Prisoners numerically make up a significant minority within the American society, and we should stand up and ensure that any infringement on prisoners’ rights is only committed when necessary to further

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259. 482 U.S. 78, 89–90 (1987) (listing the other three factors as: (1) whether there are alternative means of exercising that right; (2) the impact accommodation of the right will have on guards, other inmates, and the allocation of prison resources; and (3) absence of ready alternatives to the regulation).

260. *Id.* at 87.

261. *See id.* at 100–01 (Stevens, J., dissenting) (“Application of [this] standard would seem to permit disregard for inmates’ constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.”).

262. *See Calvert & Murrhee, supra* note 56, at 263 & n.57 (observing that *Turner* established a “very relaxed form of judicial scrutiny”).

263. *See Newell, supra* note 153, at 71.

264. *See Aukerman, supra* note 142, at 52–56.

an institution's legitimate penological interest.<sup>265</sup>

The legislature and prison administrators are primarily responsible for running prisons.<sup>266</sup> They have had this responsibility since the warden of one of the first prisons “encouraged his guards to treat the inmates with contempt and flogged the insane and epileptic as well as the recalcitrant.”<sup>267</sup> The legislature and prison administrators had this responsibility when the deplorable prison conditions around the country led to an outbreak of prison riots.<sup>268</sup> Clearly, the legislature and prison administrators have historically failed in their responsibility and duty to care for prisoners and protect the rights that prisoners retain.<sup>269</sup>

While some infringements are necessary as a result of a prisoner's status as a prisoner, other infringements violate the rights that prisoners retain despite their incarceration.<sup>270</sup>

The judiciary makes prisoners, who already suffer from an abridgement of their constitutional rights, victims by inadequately reviewing their constitutional challenges to regulations or policies. As Justice Brennan declared, “[j]udicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons.”<sup>271</sup> Without judicial intervention, prisoners will inevitably remain victims. At minimum, prisoners are entitled to the modern “rational basis with a bite” analysis to ensure that the policies and regulations employed in prisons are actually rationally related to a legitimate government interest.

The judiciary endorses many prison policies affecting

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265. See THOMAS P. BONCZAR & ALLEN J. BECK, U.S. DEP'T OF JUST., LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997), <http://bjs.gov/content/pub/pdf/Llgsfp.pdf> (“An estimated 5.1% of all persons in the United States will be confined in a State or Federal prison during their lifetime, if incarceration rates recorded in 1991 remain unchanged in the future.”); see also Brittany Bondurant, Note, *The Privatization of Prisons and Prisoner Healthcare: Addressing the Extent of Prisoners' Right to Healthcare*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT. 407, 421 (2013).

266. See *Rhodes v. Chapman*, 452 U.S. 337, 349, 354 (1981).

267. *Engel & Rothman*, *supra* note 156, at 419.

268. See *Miness*, *supra* note 82, at 1706.

269. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Cooper v. Plate*, 378 U.S. 546, 546 (1964).

270. See *Pell*, 417 U.S. at 822.

271. *Rhodes*, 452 U.S. at 354 (Brennan, J., concurring).

prisoners' reading rights by giving such a high level of deference to prison administrators. Further, if this deference and, consequently, lenient rational basis review continues, the courts will only be perpetuating the mistreatment, anti-inmate animus, and curtailment of rights that prisoners—a largely disenfranchised class—have long faced in this country.

Prisoners are a weak and vulnerable segregated group within American society. Still, in this country, prisoners retain all the rights that are not inconsistent with their role as prisoners.<sup>272</sup> Prisoners do retain some level of First Amendment rights. The courts do not grant prisoners strict or even intermediate scrutiny review even when their fundamental rights are violated. First Amendment rights are fundamental rights.<sup>273</sup> The importance of First Amendment rights within this country is just another reason why prisoners need to be afforded the most stringent form of rational basis review available when prisoners' First Amendment rights are threatened.

#### CONCLUSION

In general, the banning of certain publications within prisons makes sense. Preventing prisoners from accessing publications that provide instructions on how to make weapons out of readily accessible materials or provide blueprints of the institutions in which they are incarcerated, is clearly necessary to further legitimate penological interests. Yet, when administrators try to prevent prisoners from receiving Arabic/English dictionaries because it would be detrimental to the security of the institution if the prisoners learned English, the policy is no longer justified.<sup>274</sup> When administrators try to prevent prisoners from accessing books by Shakespeare, Orwell, Obama, or other new award-

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272. See *Pell*, 417 U.S. at 822.

273. See *supra* Section III.B (discussing why reading rights are fundamental and how First Amendment issues are typically treated in regard to free citizens).

274. Jared A. Goldstein, Distinguished Research Professor of law, was told by the administrators of the Guantanamo Bay institution that giving his clients access to Arabic/English dictionaries would be detrimental to the security of the institution, and thus, the prisoners at the institution were prohibited from receiving said dictionaries. Interview with Jared A. Goldstein, Distinguished Research Professor of Law, Roger Williams Univ. Sch. of Law, in Bristol, R.I. (May 2, 2014).

winning publications, it just is not rational. The justifications prisons use that enable them to ban books cannot justify limitless restrictions. It is important to ensure that that the penological interests of our institutions are narrowly tailored. Meaning, for example, as a society, we should not find that a publication is detrimental to the institutional security of a prison simply for providing a critical political allegory or a controversial idea.

The current deference awarded to the prison administrators and the legislature is unacceptable because it prevents one out of every hundred Americans from receiving the level of judicial review to which they are entitled.<sup>275</sup> Prisoners are a vulnerable and unpopular class. Moreover, the right argued herein is a fundamental right that is subject to the highest level of scrutiny outside of prison doors. In order to ensure that prison policies and regulations are not infringing on and inhibiting prisoners' rights, a more "biting rational basis review" is required. After all, a more "biting" approach can be found in the *Turner* decision itself!<sup>276</sup> For this review to be meaningful, courts must use a "biting" form of rational basis when reviewing prisoners' challenges to policies that allegedly violate their rights.

The right to read and have open access to information is at the foundation of the American society. If we are denying those rights to prisoners, what are we saying about our society? We must bear in mind the words that Winston Churchill is reputed to have said: "[Y]ou measure the degree of civilization of a society by how it treats its weakest members."<sup>277</sup>

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275. BONCZAR & BECK, *supra* note 265; *see* Bondurant, *supra* note 265, at 421.

276. *See* 482 U.S. 78, 89–90 (1987). If the regulations were measured under a reasonable standard, there would be no need for additional factors, yet those factors are included in the opinion.

277. *E.g.*, Nicola, *David Cameron Has Blood on His Hands*, DAVID BOLES BLOGS (Mar. 29, 2013), <http://bolesblogs.com/2013/03/29/david-cameron-has-blood-on-his-hands/> (quoting statement of Winston Churchill).