

Prisoners Beware; You Always Have Something Left To Lose: *Beard v. Banks* and the Rise of the Deprivation Theory of Rehabilitation

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I. Introduction

In *Beard v. Banks*,¹ the United States Supreme Court upheld a Pennsylvania prison policy that prohibited certain particularly incorrigible inmates from accessing secular newspapers and magazines, as well as personal photographs.² Six Justices chose to overturn the United States Court of Appeals for the Third Circuit's reversal of a District Court's grant of summary judgment sustaining the policy. The Court did not attain a majority. Four of the six Justices, Roberts, Breyer, Kennedy, and Souter, joined in a plurality opinion written by Justice Breyer.³ Justice Thomas submitted an opinion concurring in the result only, which Justice Scalia joined.⁴ Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined,⁵ and Justice Ginsburg filed an additional dissent.⁶ Justice Alito did not participate in the case.⁷ *Beard*, unlike any of the Court's relevant precedents, required the Court to analyze a constitutionally restrictive prison regulation in the summary judgment context. The Third Circuit had held that the slim record in the case was insufficient for summary judgment.⁸ The Court disagreed and held that the prison regulation was reasonably related to the Secretary's goal of motivating better behavior on the part of particularly difficult prisoners.⁹

¹ 126 S.Ct. 2572 (2006).

² *Id.* at 2582.

³ *Id.* at 2575.

⁴ *Id.* at 2582.

⁵ *Id.* at 2585.

⁶ *Id.* at 2591.

⁷ *Id.* at 2582.

⁸ *Id.* at 2577.

⁹ *Id.* at 2578, 2580.

II. Factual Background

The State of Pennsylvania operates three special prison facilities to house difficult prisoners.¹⁰ The Long Term Segregation Unit (“LTSU”), the most restrictive of the three, is home to approximately forty of the State’s most dangerous, incorrigible, and recalcitrant inmates.¹¹ The LTSU is divided into two levels.¹² Inmates placed in the LTSU spend their first ninety days on level two (“LTSU-2”), the most restrictive level of confinement in the State.¹³ Inmates who behave appropriately during this probationary period graduate to the less restrictive level one (“LTSU-1”); inmates who continue to misbehave remain on LTSU-2.¹⁴ Most never graduate.¹⁵

While all three special prison facilities seriously limit inmates’ personal prison privileges, inmates on LTSU-2 suffer the most severe restrictions.¹⁶ LTSU-2 policy dictates that inmates are confined to cells for twenty three hours per day, are allowed one visitor per month, may not use the telephone except in emergencies, and have no access to the commissary.¹⁷ Unlike all other prisoners in the State of Pennsylvania, LTSU-2 inmates are denied any access to newspapers, magazine, or personal photographs.¹⁸ LTSU-2 inmates are, however, permitted limited access to written communications, including legal and personal correspondence, religious and legal materials, two library books, and writing paper.¹⁹ Inmates on LTSU-1 are allowed access to one newspaper and five magazines; however, they still may not possess personal photographs.²⁰

In 2001, Ronald Banks, a prisoner on LTSU-2, sued the Secretary of the Pennsylvania Department of Corrections, Jeffrey Beard (“Secretary”), in federal court.²¹ Banks alleged that the LTSU-2 policy prohibiting access to magazines, newspapers, and photographs and violated his and similarly situated inmates’ First Amendment rights.²² The District Court rapidly disposed of

¹⁰ *Id.* at 2576.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 2576-77.

²¹ *Id.* at 2577.

²² *Id.*

Banks's suit by granting the Secretary's early motion for summary judgment.²³ Instead of filing an opposition to the Secretary's motion, Banks filed his own cross-motion for summary judgment, which was denied.²⁴ When the motions were filed, the record consisted merely of a deposition from the Deputy Superintendent of the prison ("Deputy"), the Secretary's statement of material facts not in dispute, and various prison policy manuals.²⁵

On appeal, a divided panel of the United States Court of Appeals for the Third Circuit reversed, holding the evidentiary record insufficient to support, as a matter of law, the prison regulation.²⁶ The Supreme Court of the United States granted the Secretary's petition for certiorari,²⁷ and in a 6-2 split with no majority, the Court reversed and remanded the case.²⁸

III. Legal Background

A. Prisoners' Rights

Only a few decades ago, the American legal system treated inmates as mere slaves of the State, reasoning that such convicts forfeited all personal rights along with their liberty.²⁹ Under this view, which has been rejected,³⁰ the Eighth Amendment's proscription of cruel and unusual punishment provided the only protection for an inmate's rights.³¹ Now, however, it is well settled that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution."³² When a prison regulation or policy violates a fundamental constitutional guarantee, federal courts will uphold their duty to protect constitutional rights.³³

While prisoners do not surrender all constitutional protections, lawful incarceration clearly brings about the necessary withdrawal or limitation of many rights and privileges.³⁴ In the

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2582.

²⁹ *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting).

³⁰ *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (Stevens, J., concurring) (Citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)); *Jones*, 433 U.S. at 139 (Marshall, J., dissenting).

³¹ *Overton*, 539 U.S. at 138 (Stevens, J., concurring).

³² *Turner v. Safley*, 482 U.S. 78, 84 (1987); *accord Overton*, 539 U.S. at 137 (Stevens, J., concurring).

³³ *Turner*, 482 U.S. at 84; *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974).

³⁴ *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

context of the First Amendment, inmates retain only those rights that are not in conflict with their status as prisoners or with the legitimate penological objectives of the corrections system.³⁵

B. The *Turner* Standard: Rise of the Four Factors

The United States Supreme Court, in *Turner v. Safley*,³⁶ formulated a standard for scrutinizing prison regulations that impinge on inmates' constitutional rights. The Court held that such regulations are valid if they reasonably relate to legitimate penological interests.³⁷ *Turner* was not the first time, however, that the Court considered the appropriate level of judicial scrutiny for analyzing constitutionally restrictive prison regulations and practices.

The Court's first opportunity to address the issue came in 1974 in *Procunier v. Martinez*,³⁸ a challenge to a prison regulation that censored prisoners' mail.³⁹ The Court heard the case ostensibly to decide "the appropriate standard of review for prison regulations restricting freedom of speech."⁴⁰ But, ignoring this important issue, the Court struck the regulation on a much narrower ground through the application of strict scrutiny.⁴¹ The Court held that, regardless of prisoners' rights, free citizens enjoyed a protected First Amendment right to correspond freely with prisoners, and the State infringed that right by censoring prisoner mail.⁴² The Court analyzed the regulation by comparing valid government interests in the prison environment with the fundamental right to communicate freely with prisoners.⁴³

Martinez was not a "prisoners' rights case," but instead turned on a finding that the regulation restricted free citizens' First Amendment rights, thereby invoking application of the fatal strict scrutiny standard of review.⁴⁴ Although *Martinez* did not resolve its own issue, the Court found three relevant governmental interests in the prison context: (1) preservation of internal order and discipline, (2) maintenance of institutional security against escape or unauthorized ingress, and (3) rehabilitation of prisoners.⁴⁵

³⁵ *Jones*, 433 U.S. at 125-26; *Pell*, 417 U.S. at 822.

³⁶ 482 U.S. 78 (1987).

³⁷ *Id.* at 89.

³⁸ 416 U.S. 396 (1974).

³⁹ *Id.* at 398.

⁴⁰ *Id.* at 406.

⁴¹ *Id.* at 413.

⁴² *Id.* at 408-09.

⁴³ *Id.* at 411-413.

⁴⁴ *Id.* at 409.

⁴⁵ *Id.* at 412.

In the same Term, the Court also decided *Pell v. Procunier*,⁴⁶ which began fourteen years of prisoner rights jurisprudence that culminated in the seminal *Turner* case. As new problems arose and the law evolved, the Court identified four factors that helped resolve the tension between the strong, historical policy of judicial deference to prison officials' actions and the Court's constitutional mandate to protect fundamental rights.⁴⁷ Analysis of these four factors, which form the heart of the *Turner* standard, dictates whether a regulation reasonably relates to a legitimate penological interest.⁴⁸

1. Alternative Means of Exercising the Infringed Right

In *Pell*, prisoners and reporters challenged a regulation prohibiting reporters from conducting face-to-face interviews with specifically named, requested inmates.⁴⁹ The Court proceeded on the assumption that the right of free speech included the right to communicate a person's views to any willing listener.⁵⁰ Although the regulation restricted that right, the Court noted that the availability of alternative means of communication was relevant to the evaluation of the regulation's constitutionality.⁵¹

The prisoners in *Pell* could communicate with the press and other people outside the prison through mail or visits with family, friends, clergy, or lawyers.⁵² While mentioning in dicta that the availability of such alternatives would be unimpressive if advanced to justify a restriction on the personal communication of free citizens,⁵³ the Court upheld the restriction.⁵⁴ The governmental interest in prison security, threatened by outsiders' entry for face-to-face contact with inmates, sufficed to justify the restrictive regulation.⁵⁵ The Court also highlighted state corrections officials' judgment that the regulation aided prisoner rehabilitation.⁵⁶ Because the restriction operated in a view-point neutral fashion and furthered the legitimate government interests of security and rehabilitation, the corrections officials' judgment received a strong

⁴⁶ 417 U.S. 817 (1974).

⁴⁷ *Turner v. Safley*, 482 U.S. 78, 89 (1987).

⁴⁸ *Id.* at 89-91.

⁴⁹ *Pell*, 417 U.S. at 819.

⁵⁰ *Id.* at 822.

⁵¹ *Id.* at 824.

⁵² *Id.* at 824-25.

⁵³ *Id.* at 825.

⁵⁴ *Id.* at 827-28.

⁵⁵ *Id.* at 827.

⁵⁶ *Id.*

measure of judicial deference.⁵⁷ This was an area where their professional expertise was peculiarly well suited for resolving the problem.⁵⁸

In *Turner*, the Court relied on *Pell* for the proposition that courts owed great deference to the decisions of corrections officials when prisoners had other ways to exercise their rights.⁵⁹ *Turner* involved a challenge to two state prison regulations: one regulation effectively prohibited correspondence between non-related inmates at different institutions; the other permitted inmates to marry only with permission from the prison superintendent.⁶⁰ State correction officials promulgated the correspondence-limiting regulation primarily to address the security issue posed by inmates' at different institutions communicating escape plans or arranging assaults.⁶¹ Upholding the regulation, the Court noted that the regulation did not bar inmate expression altogether, but simply restricted communication with a limited class of people that caused concern for prison officials.⁶² While the regulation foreclosed one avenue of inmate expression, it still allowed inmates the freedom to exercise a large subset of their free speech rights by communicating with people other than inmates at other state facilities.⁶³

The alternatives available to prisoners need not be ideal, only available.⁶⁴ In *Overton v. Bazzetta*,⁶⁵ prisoners challenged a visitation policy that allowed inmates to receive visits only from approved individuals and barred prisoners who committed multiple substance abuse violations from receiving any visits whatsoever.⁶⁶ The Court found that the prisoners could still associate with people not on their approved list by relaying messages through those who were allowed to visit, by mail, and by telephone.⁶⁷ Even if absolutely no alternative means of communication existed, the Court noted, it would not be conclusive, but simply some evidence of a regulation's unreasonableness.⁶⁸

2. A Valid, Rational Connection

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Turner v. Safley*, 482 U.S. 78, 91 (1987).

⁶⁰ *Id.* at 81-82.

⁶¹ *Id.* at 91.

⁶² *Id.* at 92.

⁶³ *Id.*

⁶⁴ *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003).

⁶⁵ 539 U.S. 126 (2003).

⁶⁶ *Id.* at 129-30.

⁶⁷ *Id.* at 135.

⁶⁸ *Id.*

To be reasonable, a regulation must have a valid, rational connection to the legitimate governmental interest advanced as justification.⁶⁹ In *Block v. Rutherford*,⁷⁰ pre-trial detainees⁷¹ challenged a regulation denying them access to contact visits⁷² with family and friends.⁷³ The prison administrators submitted as justification their professional judgment that contact visits posed a substantial risk to prison security.⁷⁴ The Court asked whether the prohibition on contact visits reasonably related to the prison's security.⁷⁵ The Court found a valid, rational connection between a ban on contact visits and the internal security of the detention facility.⁷⁶

Contact visits risked not only the introduction of drugs, weapons, or other contraband into the facility, but also the safety of innocent individuals whom detainees could have taken hostage or jeopardized in other ways.⁷⁷ The Court upheld the regulation and reiterated that matters of prison security lie peculiarly within the expert domain of correction officials.⁷⁸ The Court instructed that, absent evidence that correction officials have exaggerated their response to considerations of prison security, courts should ordinarily defer to officials' expert judgments in such matters.⁷⁹ Similarly, in *Turner*, the ban on inmate-to-inmate correspondence logically related to legitimate security concerns.⁸⁰ The Court in *Turner* accepted prison officials' judgment that inmate communications across jails exacerbated the problem of prison gangs and endangered inmates placed in protective custody at certain facilities.⁸¹

In *Overton*, the Court held that the restriction on visitation for inmates with two substance abuse violations was rationally connected to the legitimate goal of deterring drug use

⁶⁹ *Turner v. Safley*, 482 U.S. 78, 89 (1978); *see also* *Bell v. Wolfish*, 441 U.S. 520, 550-51 (1979) (holding that ban on prisoner receipt of hardback books not mailed directly from publisher was rationally related to the obvious security problem posed by the ease with which someone could smuggle contraband into a correctional facility inside the spine or pages of a hardback book); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 129 (1977) (upholding ban on inmate solicitation for and group meetings of inmate labor union as rationally related to government interest in ensuring prison security and order).

⁷⁰ 468 U.S. 576 (1984).

⁷¹ While pre-trial detainees are analogous to convicted prisoners in some cases, distinguishing the two is important because pre-trial detainees retain more rights than prisoners. Pre-trial detainees cannot be punished before an adjudication of guilt in accordance with due process of law. *Id.* at 583.

⁷² Contact visits allow prisoners the opportunity to touch and hold their family and friends and should be distinguished from non-contact visits, which occur through a barrier, usually by telephone.

⁷³ *Id.* at 578.

⁷⁴ *See id.* at 588.

⁷⁵ *Id.* at 586.

⁷⁶ *Id.* at 586.

⁷⁷ *Id.* at 586-87.

⁷⁸ *Id.* at 584.

⁷⁹ *Id.* at 584-85.

⁸⁰ *Turner v. Safley*, 482 U.S. 78, 91 (1987).

⁸¹ *Id.* at 91-92.

in prisons.⁸² The Court also noted that the withdrawal of visitation privileges was a proper technique for inducing compliance with prison rules, and that this was especially true for high-security prisoners who had few other privileges to lose.⁸³ While the Court generally gives deference to officials' judgments, a regulation cannot withstand constitutional scrutiny under *Turner* when the connection between the regulation and its asserted goal is so remote as to render the policy arbitrary or irrational.⁸⁴

3. *Impact of Accommodation: The "Ripple Effect"*

In the closed environment of a prison, even the smallest change is likely to cause serious repercussions.⁸⁵ When a prisoner exercises an asserted right, which results in significantly less liberty and safety for everyone else, guards and prisoners alike, courts should defer to prison officials' judgments when deciding how best to balance constitutional rights and governmental interests.⁸⁶ In *Turner*, the court noted that allowing inmates to correspond with inmates at other jails would result in less safety for both guards and prisoners because of the potential for the growth of prison gangs and incitement of riots, or other such mischief.⁸⁷ The court relied heavily on prison officials' expert opinions that allowing inter-prison communication would threaten the core functions of prison administration, safety and security.⁸⁸

In *O'Lone v. Estate of Shabazz*,⁸⁹ the Court upheld prison regulations that effectively barred inmates from observing Jumu'ah, an important Islamic religious service.⁹⁰ One regulation forced certain classes of prisoners to work outside the main prison building, in which the service was held, and the other regulation prohibited prisoners from returning to the institution during

⁸² *Overton v. Bazzetta*, 539 U.S. 126, 134 (1977).

⁸³ *Id.*

⁸⁴ *Turner*, 482 U.S. at 89-90.

⁸⁵ *Id.* at 90.

⁸⁶ *Id.* at 92-93.

⁸⁷ *Id.* at 91-92.

⁸⁸ *Id.* at 92.

⁸⁹ 482 U.S. 342 (1987).

⁹⁰ *Id.* at 347.

the day.⁹¹ The Court held, among other things,⁹² that accommodating the Muslim inmates' right to free exercise of religion would have undesirable effects on the prison.⁹³

The inmates in *O'Lone* suggested two ways that the prison could accommodate their religious practices: placing all Muslim inmates in inside work details or allowing Muslim inmates to work on the weekends.⁹⁴ In prison officials' judgment, giving the inmates inside work detail would threaten prison security by creating the impression of favoritism when other inmates observed that certain groups were escaping a rigorous work detail.⁹⁵ The weekend work detail would require extra supervision, a drain on the prison's scarce human resources.⁹⁶ In closing, the court reaffirmed its "refusal, even where claims are made under the First Amendment, to substitute [its] judgment on difficult and sensitive matters of institutional administration" for the professional opinions of prison officials.⁹⁷

4. *Obvious, Ready Alternatives*

The absence of ready alternatives to a particular regulation is evidence of the regulation's reasonableness.⁹⁸ The Court has made clear, however, that Prison officials have no duty to assure that a particular regulation is the least restrictive alternative.⁹⁹ Prisoners can undermine the reasonableness of a regulation by pointing to an obvious regulatory alternative that fully accommodates their asserted right while imposing no more than a *de minimis* burden on valid penological goals.¹⁰⁰ In *Turner*, the prisoners suggested that officials could monitor inmate correspondence instead of banning it altogether.¹⁰¹ Prison officials testified that reading every piece of prisoner-to-prisoner correspondence was an impossible task and risked missing dangerous messages.¹⁰² The Court held this testimony sufficient to prove that the alternative

⁹¹ *Id.* at 345, 347.

⁹² The court found that the regulations were logically connected to the security and rehabilitation concerns, and that the prisoners were not deprived of all forms of religious exercise because they could freely observe a number of their religious obligations. *Id.* at 350-52.

⁹³ *Id.* at 352-53.

⁹⁴ *Id.* at 352.

⁹⁵ *Id.* at 353.

⁹⁶ *Id.*

⁹⁷ *Id.* (citation and internal punctuation omitted).

⁹⁸ *Turner v. Safley*, 482 U.S. 78, 90 (1987).

⁹⁹ *Id.*; *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987) (criticizing lower court's decision to require officials to disprove availability of alternatives).

¹⁰⁰ *Overton*, 539 U.S. at 136.

¹⁰¹ *Turner*, 482 U.S. at 93.

¹⁰² *Id.*

imposed more than a *de minimis* cost on the legitimate prison goal supporting the regulation, security.¹⁰³ Under *Turner*, the standard for judging alternatives is very high, and the Court has found prisoners' suggested alternatives persuasive only in exceedingly rare situations.¹⁰⁴

IV. Court's Rationale

A. Setting the Legal Standard

1. First Principles

The Court began its analysis in *Beard* with a recitation of the basic principles underlying modern prisoner rights jurisprudence.¹⁰⁵ The Court observed that while imprisonment does not *ipso facto* deprive prisoners of all constitutional protections, the Constitution permits greater restrictions in prisons than in other contexts.¹⁰⁶ When examining prison regulations for constitutional compliance, the Court reaffirmed that the judiciary should accord substantial deference to the professional judgment of prison administrators,¹⁰⁷ a concept that echoes throughout the Court's precedents.¹⁰⁸ In framing its inquiry, the Court recognized that *Turner's* reasonable relation test and the recent decision in *Overton* provided the appropriate legal standard for scrutinizing the policy at issue.¹⁰⁹

2. Summary Judgment

The record in this case consisted merely of the Secretary's statement of undisputed facts, the Deputy's deposition, and various prison policy manuals.¹¹⁰ Because *Beard* arrived in the Court in a summary judgment posture, the Court would have to examine the record to see if the Secretary had met his burden of demonstrating the absence of a genuine issue of material fact

¹⁰³ *Id.*

¹⁰⁴ See *Turner*, 482 U.S. at 98 (finding general permission to marry absent a threat to security or order an easy, obvious alternative to prison regulation barring marriage absent approval from the superintendent). *But see Overton*, 539 U.S. at 136 ("Respondents have not suggested alternatives meeting this high standard."); *O'Lone*, 482 U.S. at 353 ("There are no obvious, easy alternatives to the policy.") (punctuation omitted); *Turner*, 482 U.S. at 93 ("The only alternative proffered by the claimant prisoners. . . clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals.").

¹⁰⁵ *Id.* at 2577-78.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2578.

¹⁰⁸ See *Turner v. Safley*, 482 U.S. 78, 86-87 (1987) (discussing the Court's precedents, which defer to prison officials' expert opinions).

¹⁰⁹ *Beard*, 126 S.Ct. at 2577-78.

¹¹⁰ *Id.* at 2577.

and his entitlement to judgment as a matter of law.¹¹¹ If so, Banks, who bore the burden of proof, would have to set forth specific facts demonstrating a genuine issue for trial.¹¹² In an ordinary summary judgment analysis, a court views all facts in favor of the non-moving party.¹¹³ In *Beard*, however, the Court distinguished disputed facts from disputed matters of professional judgment, holding that the later should be viewed in light of the deference accorded to prison authorities, such as the Deputy.¹¹⁴ The Court noted that if a prisoner is unable to point to sufficient evidence to counter a prison official's judgment, the prisoner would be unable to prevail on the merits and, therefore, could not withstand a motion for summary judgment.¹¹⁵

B. Application of the *Turner* Standard: Ineffective

Although the Secretary asserted several penological rationales for the policy, the Court focused on one, providing difficult inmates an incentive for better prison behavior.¹¹⁶ The inmates subjected to the regulation were “the worst of the worst,” and had repeatedly proven the necessity of holding them in strict confinement.¹¹⁷ In the Deputy's opinion, taking away what little freedoms these inmates enjoyed would motivate better behavior,¹¹⁸ a practice known as the “deprivation theory” of rehabilitation.¹¹⁹

The Court found a valid, rational connection between the policy and this legitimate governmental interest based almost exclusively on the Deputy's deposition.¹²⁰ In his deposition, the Deputy testified that prison officials are very limited in what they can give or deny LTSU-2 inmates, who have already been deprived of practically every privilege and have little left to lose.¹²¹ The Deputy believed that denying access to newspapers, magazines, and photographs was a legitimate method of spurring inmates to behave properly.¹²² Similarly, the Deputy

¹¹¹ *Id.* at 2578.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2579.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2580.

¹²⁰ *Id.* at 2579.

¹²¹ *Id.*

¹²² *Id.*

testified that the policy discouraged inmates in LTSU-1, a less restrictive level of confinement, from acting out and returning to LTSU-2.¹²³

Because the policy completely banned any non-religious newspapers, magazines, and photographs, the Court found it clear that there was no alternative means for the inmates to exercise their infringed First Amendment rights.¹²⁴ The lack of alternatives was some evidence that the regulation was unreasonable; however, this evidence was not conclusive.¹²⁵

In analyzing the third *Turner* factor, the impact of accommodation, the Court reasoned that if officials judged that the policy produced better behavior, then the absence of the policy would produce worse behavior.¹²⁶ Similarly, with regard to the fourth *Turner* factor, there were no ready alternative methods of accommodating the prisoners' constitutional rights at *de minimis* cost to the valid penological interests.¹²⁷ The absence of alternatives was unsurprising, however, because the policy's goal was to deny inmates certain rights in the hopes that this deprivation would motivate them to behave, a type of constitutional carrot-on-a-stick.

Having completed the *Turner* analysis, the Court admitted that the deprivation theory of rehabilitation did not map well onto the *Turner* factors.¹²⁸ All the factors, with the exception of the valid, rational connection factor, simply related to the policy itself.¹²⁹ Because the policy's purpose was rehabilitation through the deprivation of privileges, looking for alternative ways of exercising the privileges and the impact of accommodating the privileges would not only be futile, but also contrary to the purpose of the policy. Realizing this, the Court noted that the real issue in this case was not balancing the *Turner* factors, but rather determining whether the relationship between the policy and the stated goal was reasonable, instead of simply logical.¹³⁰

The Court found that the record, which consisted primarily of the Deputy's affidavit, sufficiently demonstrated the reasonableness of the policy.¹³¹ Looking to *Overton*, the Court

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 2579-80.

¹²⁶ *Id.* at 2580. This reasoning is unpersuasive because it commits the logical fallacy known as "denying the antecedent." This fallacy occurs when an argument takes the following form: if P therefore Q; not Q, therefore not P. By way of illustration, if Justice Breyer is the President, then he is mortal. Justice Breyer is not the President; therefore, he is not mortal.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

noted many similarities:¹³² in both cases, the deprivations had important constitutional dimensions,¹³³ the deprivations were only imposed on prisoners with serious behavior problems,¹³⁴ and prison officials, relying on their professional judgment, concluded based on their experience that the regulations furthered legitimate prison objectives.¹³⁵ Here, the Court relied on *Overton* for the proposition that withholding privileges “is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.”¹³⁶

C. Banks Did Not Show a Genuine Issue for Trial

Even though the record showed that the prison officials’ professional judgments sufficiently justified the policy, Banks could have defeated the Secretary’s motion for summary judgment in the trial court by setting forth specific facts showing a genuine issue for trial.¹³⁷ Instead of responding to the Secretary’s motion, however, Banks filed his own cross-motion for summary judgment, claiming that the regulation was unreasonable as a matter of law.¹³⁸ Banks argued that the policy lacked any significant incentive effect based on the LTSU-2 inmates’ history of incorrigibility.¹³⁹ Banks pointed out that only one-quarter of LTSU-2 inmates ever graduated from the unit.¹⁴⁰ Finally, Banks cited court opinions that showed the belief of some courts that increased contact with the world generally favored rehabilitation.¹⁴¹ The Court rejected these arguments, noting that there was nothing to indicate that a twenty-five percent graduation rate was not actually quite high, given the inmates’ past behavior.¹⁴² Regarding the cited cases, the Court held them insufficient to show the unreasonableness of the policy because they did not implicate prison policies restricting the rights of especially fractious prisoners.¹⁴³

¹³² *Id.*

¹³³ In *Overton*, the regulation in controversy deprived certain inmates of all visits with close family members. *Overton v. Bazzetta*, 539 U.S. 126, 130 (2003).

¹³⁴ In *Overton*, only inmates with multiple substance abuse problems were denied visitation rights. *Id.*

¹³⁵ *Beard*, 126 S.Ct. at 2580.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2581.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

D. Deference

The Court's policy of deference to the expert judgment of prison officials pervades the law of prisoner rights.¹⁴⁴ In *Beard*, the Court criticized the Court of Appeals for giving too little deference to the prison officials.¹⁴⁵ The Court of Appeals required the Secretary to show that the ban could modify behavior, had a basis in real human psychology, and had proven effective.¹⁴⁶ This was too high a summary judgment burden to impose on the Secretary,¹⁴⁷ and it ignored the Deputy's professional judgment that the policy, depriving particularly difficult prisoners of a last remaining privilege, provided a significant incentive for behavior modification.¹⁴⁸

In closing, the Court noted that this deference to prison officials' expert judgment does not make it impossible for inmates or others to attack prison policies.¹⁴⁹ The Court, in dicta, noted that if Banks could have shown that this severe restriction was actually a *de facto* permanent ban, the Court might decided differently.¹⁵⁰ Here however, the Secretary adequately showed the reasonableness of the regulation, and Banks failed to point to specific facts that could lead a rational trier of fact to find in his favor.¹⁵¹

E. Thomas's concurrence

Justice Thomas followed a completely different approach than the plurality and dissent, choosing instead to analyze the facts under the framework he set forth in his concurrence in *Overton*.¹⁵² Thomas argued that the States were free to decide the punishment for unlawful conduct, and the restrictions imposed by prison officials, such as the policy in issue, constituted part of that punishment.¹⁵³ This view, reminiscent of pre-*Martinez* jurisprudence, would only

¹⁴⁴ See e.g. *Block v. Rutherford*, 468 U.S. 576, 591 (1984) ("We could not have been clearer in our holding . . . that [prison administration] is a matter lodged in the sound discretion of [prison officials]."); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 125 (1977) ("The District Court . . . got off on the wrong foot . . . by not giving appropriate deference to the decisions of prison administrators.").

¹⁴⁵ *Beard*, 126 S.Ct. at 2581.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2581-82.

¹⁵¹ *Id.* at 2582.

¹⁵² *Id.* at 2582 (Thomas, J., concurring).

¹⁵³ *Id.*

allow prisoners to challenge prison restrictions that violated the Eight Amendment's proscription of cruel and unusual punishment.¹⁵⁴

F. Stevens's Dissent

Justice Stevens, like the plurality, chose to analyze the prison policy under *Turner*.¹⁵⁵ Stevens argued that the policy struck at the heart of prisoners' first amendment rights to receive, to read, and to think.¹⁵⁶ While the Secretary's asserted justifications, security and rehabilitation, were certainly valid, Stevens concluded that the Secretary failed to establish, as a matter of law, a reasonable relation between these interests and the challenged policy.¹⁵⁷ Regarding security, Stevens noted that prisoners were allowed to have a number of items in their cells that could be used "to start fires, catapult feces, or to create other dangers" as effectively as newspapers, magazines, and photographs.¹⁵⁸ As to the deprivation theory of rehabilitation, Stevens warned that there was no limiting principle; if this justification sufficed, it would support any regulation that deprived prisoners of constitutional rights so long as there was a theoretical possibility that the prisoner could regain the right by modifying his behavior.¹⁵⁹ In sum, Stevens found the connection between the Secretary's stated interest and the policy "exceedingly tenuous."¹⁶⁰

V. Implications

Beard v. Banks is an important addition to the constellation of prisoner rights jurisprudence for a number of reasons. By upholding a prison regulation through summary judgment, which the court has never done before, the Court reinforced and amplified the deference owed to the professional judgments of prison officials. *Beard* empowers prison officials to implement almost any regulation that does not involve physical abuse and to legitimize it through their own testimony of its efficacy.¹⁶¹

¹⁵⁴ *Id.* at 2582-83.

¹⁵⁵ *Id.* at 2585 (Stevens, J., dissenting).

¹⁵⁶ *Id.* at 2586.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2588.

¹⁶⁰ *Id.* at 2590.

¹⁶¹ *Id.* at 2592 (Ginsburg, J., dissenting).

As prison populations continue to increase,¹⁶² the number of inmate challenges to prison regulations will likely also increase. *Beard* directs trial courts that summary judgment is an acceptable mechanism for deciding the constitutionality of prison regulations.¹⁶³ Because prison officials can now summarily dispatch challenges to their policies, prisoners will struggle to find remedies for many deprivations of constitutional rights.

Beard also draws attention to the *Turner* standard's Achilles heel. When prison officials justify a policy under the deprivation theory of rehabilitation, the majority of the *Turner* factors become meaningless.¹⁶⁴ Because the deprivation theory is a valid justification,¹⁶⁵ The Court will likely use *Beard* in the future to analyze challenges to prison regulations justified on that ground.

¹⁶² See e.g. *Overton v. Bazzetta*, 539 U.S. 126, 129 (2003) (noting the rapid expansion of Michigan's prison population in the early 1990's); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987) (noting the problem of serious overcrowding in the prison facility).

¹⁶³ *Beard*, 126 S.Ct. at 2582 (upholding summary adjudication of prisoner's constitutional challenge to prison policy).

¹⁶⁴ See *id.* at 2584-85 (Thomas, J., concurring) (examining the shortcomings of the *Turner* framework as applied to prison regulations that seek to modify inmate behavior through privilege deprivation).

¹⁶⁵ *Overton*, 539 U.S. at 134 ("withdrawing . . . privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners.").